SUPREME COURT OF QUEENSLAND

CITATION:	*Bell v Brisbane City Council & Ors* [2018] QCA 84
PARTIES:	**KATE PETA BELL** (applicant) **v** **BRISBANE CITY COUNCIL** (first respondent) **SUNLAND DEVELOPMENTS NO 8 PTY LTD** ACN 128 607 714 (second respondent) **CHIEF EXECUTIVE ADMINISTERING THE *SUSTAINABLE PLANNING ACT* 2009** (third respondent)
FILE NO/S:	Appeal No 6214 of 2017 P & E Appeal No 2868 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2017] QPEC 26 (Rackemann DCJ)
DELIVERED ON:	4 May 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 November 2017
JUDGES:	Sofronoff P and Philippides and McMurdo JJA
ORDERS:	**1. Leave to appeal is granted.** **2. The appeal is allowed.** **3. Remit the matter to the Planning and Environment Court, to be further considered according to law.** **4. The first and second respondents are to pay the applicant's costs of and incidental to the application for leave to appeal and the appeal in this court.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – MATTERS FOR CONSIDERATION OF CONSENT AUTHORITY – CONSIDERATION OF PARTICULAR MATTERS – AMENITY AND COMPATIBILITY – PARTICULAR CASES – where the second respondent sought and obtained approval from the first respondent for a material change of use to develop the former Australian Broadcasting Commission site at Toowong for

residential use – where the proposed development is three towers that each significantly exceed the relevant height restrictions in the applicable planning scheme – where the applicant lives on adjoining land and made a submission about the development application to the first respondent – where the applicant's case is that the proposed development does not comply with the planning scheme – where the Planning and Environment Court concluded that there were sufficient grounds, in the public interest, to justify the decision to approve the proposed development despite the conflict with the planning scheme – whether the Planning and Environment Court's conclusion resulted from errors of law by the judge

Integrated Planning Act 1997 (Qld), s 3.5.14
Local Government (Planning and Environment) Act 1990 (Qld), s 4.4(5A)
Planning Act 2016 (Qld), s 311
Planning and Environment Court Act 2016 (Qld), s 63, s 65, s 76
Sustainable Planning Act 2009 (Qld), s 313, s 326, s 498

Bruce v Caloundra City Council [2007] QPELR 571; [2007] QPEC 46, cited
Clark v Cook Shire Council [2008] 1 Qd R 327; [2007] QCA 139, cited
Elan Capital Corporation Pty Ltd v Brisbane City Council [1990] QPLR 209, considered
Grosser v City of Gold Coast (2001) 117 LGERA 153; [2001] QCA 423, cited
Lockyer Valley Regional Council v Westlink Pty Ltd [2013] 2 Qd R 302; [2012] QCA 370, cited
Nevtan Investments Pty Ltd v Belyando Shire Council [2008] QPELR 326, cited
Palyaris v Gold Coast City Council [2004] QPELR 162; [2003] QPEC 56, cited
Prettlejohn v Cairns Regional Council [2012] QPELR 485; [2012] QPEC 23, cited
Titanium Enterprises Pty Ltd v Caloundra City Council [2007] QPELR 154; [2006] QPEC 106, cited
Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335, cited
Weightman v Gold Coast City Council [2003] 2 Qd R 441; [2002] QCA 234, cited
Woolworths Ltd v Caboolture Shire Council [2004] QPELR 550; [2004] QPEC 15, cited
Woolworths Ltd v Warehouse Group (Aust) Pty Ltd (2003) 123 LGERA 341; [2003] NSWLEC 31, cited
Zappala Family Co Pty Ltd v Brisbane City Council (2014) 201 LGERA 82; [2014] QCA 147, cited

COUNSEL: D R Gore QC, with M Batty, for the applicant
G J Gibson QC, with N Loos, for the first respondent

C L Hughes QC, with M Williamson and J Lyons, for the second respondent
J Brien for the third respondent

SOLICITORS: Connor O'Meara Solicitors for the applicant
Brisbane City Legal Practice for the first respondent
McCullough Robertson for the second respondent
Norton Rose Fullbright for the third respondent

[1] **SOFRONOFF P:** I agree with the reasons of McMurdo JA and with the orders that he proposes.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by McMurdo JA for the reasons stated by his Honour.

[3] **McMURDO JA:** This is an application for leave to appeal against the decision of the Planning and Environment Court,[1] in which the applicant unsuccessfully challenged the approval of a proposed development on the former Australian Broadcasting Commission site, on the riverside at Toowong. The second respondent sought and obtained approval from the Council for a material change of use, under which it would develop the land, mainly for residential use, by the construction of three towers, two of 24 storeys and one of 27 storeys containing a total of 555 units.

[4] The applicant lives on adjoining land. She made a submission about the application to the Council and was thereby entitled to appeal against its decision. On her case, the development proposal, in many respects, did not comply with the Council's planning scheme. The Planning and Environment Court concluded that although the non-compliance was not as extensive as the applicant had alleged, there was a "level of conflict with a number of provisions, or parts of provisions of relevance to the assessment of the subject application" and that the level of conflict was "significant."[2]

[5] The assessment of the development application, both by the Council and by the Court, was made under the now repealed *Sustainable Planning Act* 2009 (Qld) ("the SPA"). Section 326(1) of the SPA provided that a decision to approve the development was not to conflict with a "relevant instrument", which was defined to include a planning scheme,[3] unless there were "sufficient grounds to justify the decision, despite the conflict". The term "grounds" was defined to mean "matters of public interest".[4]

[6] The Court concluded that there were sufficient grounds, in the public interest, to approve the proposed development notwithstanding its conflicts with the planning scheme.[5] By her proposed appeal, the applicant would challenge that conclusion, arguing that upon a

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1 *Bell v Brisbane City Council & Ors* [2017] QPEC 26 ("Judgment").

2 Judgment at [381].

3 SPA, s 313(2)(e)(iii), s 326(2).

4 SPA, Schedule 3.

5 Judgment at [393].

number of bases, it resulted from errors of law by the judge.[6] One of those errors is said to be that the judge was mistaken about the extent of the non-compliance, because he erred in interpreting provisions of the planning scheme which limited the height for any building on this site.

The planning scheme

[7] The application for approval required an "impact assessment" under the SPA,[7] so that it had to be assessed against the planning scheme.[8] The relevant scheme is the Brisbane City Plan 2014 ("the Scheme"), under which the site is within the Major Centre zone and in the locality which is subject to that part of the Scheme, which is called the Towong-Auchenflower Neighbourhood Plan ("TANP").

[8] The Scheme contains many such neighbourhood plans. They contain a hierarchy of provisions which are categorised as overall outcomes, performance outcomes and acceptable outcomes. The categorisation is explained in Part 7, s 7.1(6) of the Scheme as follows:

> "(6) Each neighbourhood plan code identifies the following:
>
> (a) the application of the neighbourhood plan code;
>
> (b) the purpose of the neighbourhood plan code;
>
> (c) the overall outcomes that achieve the purpose of the neighbourhood plan code;
>
> (d) the purpose and overall outcomes for each precinct;
>
> (e) the performance outcomes that achieve the overall outcomes of the neighbourhood plan code;
>
> (f) the acceptable outcomes that achieve the performance outcomes of the neighbourhood plan code;
>
> (g) the performance and acceptable outcomes of a precinct that achieve the overall outcomes of the precinct."

[9] The purpose of the TANP is expressed in s 7.2.20.3.2 of the Scheme as follows:

> "(1) The purpose of the Toowong-Auchenflower neighbourhood plan code is to provide finer grained planning at a local level for the Toowong-Auchenflower neighbourhood plan area.
>
> (2) The purpose of the Toowong-Auchenflower neighbourhood plan code will be achieved through overall outcomes including overall outcomes for each precinct of the neighbourhood plan area."

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6 Despite its repeal, the SPA continues to apply in this case: *Planning Act* 2016 (Qld), s 311.

7 Judgment at [8].

8 SPA, s 314(2)(g).

[10] The overall outcomes for the TANP are prescribed by s 7.2.20.3.2, to include the following:

> "(3)…
>
> (h) Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development."

I will refer to this as overall outcome (3)(h).

[11] The overall outcomes for the sub-precincts including that within which this site is found, are prescribed by s 7.2.20.3.2 to include the following:

> "(4) …
>
> (h) Development on sites adjoining the Brisbane River ensures the public access to the river, and buildings adjoining riverfront public spaces include a lively blend of retail, commercial, residential and community uses."

I will refer to this as overall outcome (4)(h).

[12] Overall outcome (3)(h) is central to the applicant's case. The judge found that the height of the proposed buildings was not consistent with community expectations. The corresponding performance outcome is expressed within s 7.2.20.3.3.A as follows:

> "Development is of a height, scale and form that achieves the intended outcome for the precinct, improves the amenity of the neighbourhood plan area, contributes to a cohesive streetscape and built form character and:
>
> (a) …
>
> (b) is aligned to community expectations about the number of storeys to be built[.]"

I will refer to this as PO1(b).

In turn, the corresponding acceptable outcome is expressed within the same provision as follows:

> "Development complies with the number of storeys, building height and the minimum site frontage in Table 7.2.20.3.3.B",

with the notation that:

> "Neighbourhood plans will mostly specify maximum number of storeys where zone outcomes have been varied in relation to building height. Some neighbourhood plans may also specify height in metres. Development must comply with both parameters where maximum number of storeys and height in metres are specified."

I will refer to this as AO1.1.

[13] As the judge found, Table 7.2.20.3.3.B does not specify a maximum height, but it does specify a maximum number of storeys, namely in this case, being one for the development of a site of 1500 square metres or more with a frontage of at least 36 metres in this sub-precinct, a limit of 15 storeys.[9]

[14] The Scheme[10] provides that the purpose of the Major Centre zone is to provide "a mix of uses and activities" including "concentrations of higher order retail, commercial offices, residential, administrative and health services, community, cultural and entertainment facilities and other uses capable of servicing a subregion in the planning scheme area." As already noted, the TANP, by overall outcome (4)(h), requires a diversity of uses for development on sites adjoining the Brisbane River. The judge found that the development did not comply with those provisions.[11]

[15] Another relevant performance outcome is that designated as PO2,[12] which provides that a development site should, amongst other things, provide "a highly active [street] frontage". The judge rejected an argument by the present second respondent that PO2 was relevant only where what was proposed were buildings on the street front, rather than set back as with the three towers under this proposal. The judge found that this proposal involved "some level of conflict with PO2", although he said it exhibited "significant merit in the way that it addresses the streetscape."[13]

[16] There were further provisions of the Scheme with which, on the judge's findings, the proposed development was inconsistent, but they need not be discussed.

[17] Maps within the TANP designated the site as a "catalyst site" and a "landmark site". As the judge said,[14] the term "catalyst site" is explained in s 7.2.20.3.2(3)(s), where one of the overall outcomes is expressed to be that "[s]tructure planning of catalyst sites … addresses the unique characteristics of these sites ensuring that development integrates with surrounding land, creates an attractive public realm and urban environment, provides public space and retains and re-uses on-site heritage structures." The term "landmark site" is defined in the Scheme[15] as a site:

> "identified in the neighbourhood plan to accommodate buildings or developments that attain citywide prominence through a combination of notable architectural excellence, siting and location."

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9 Judgment at [64].

10 s 6.2.2.2.

11 Judgment at [382].

12 s 7.2.20.3.3.

13 Judgment at [348] – [350].

14 Ibid at [45].

15 SC1.2.3.B.

[18] The site is the subject of its own performance outcome in the TANP. PO11 provides the development on this site should be such that it:

> "(a) enhances the pedestrian experience with high-quality building design, streetscape and waterfront amenities providing a direct and tangible linkage between Toowong and the river;
>
> (b) provides a new public space with supportive uses to encourage activity on and occupation of the river's edge;
>
> (c) maintains the natural quality of the waterfront experience for access by the general public;
>
> (d) reflects the local culture and heritage of Middenbury House;
>
> (e) provides an arcade between Coronation Drive and Archer Street."

It also is the subject of specific acceptable outcomes, described in the TANP as AO11. The judge found no inconsistency between the development and PO11 or AO11.

The Reasons for Judgment

[19] There were many issues which were the subject of evidence and argument in the Planning and Environment Court, during a hearing occupying 13 days in June, July and August 2016. From his Honour's extensive Reasons for Judgment, it is necessary to consider only the findings which were made about the provisions of the TANP which I have identified and the reasons for his Honour's conclusion that there were sufficient grounds to justify an approval of the project, notwithstanding its conflict with the Scheme. For the most part, the applicant's arguments focus upon the development's inconsistency with the TANP's provisions about the appropriate height of buildings by limiting the number of storeys.

[20] The starting point is that according to the TANP, a maximum number of storeys was prescribed as 15, whereas two of the proposed towers would be 24 storeys and the third would be 27 storeys. Consequently, the judge found, the proposal departed from the relevant acceptable outcome, AO1.1.[16] However, the judge said it did not follow that the proposal was inconsistent with the TANP, "because acceptable outcomes are not mandatory".[17] The basis for that observation, in the case of AO1.1, is open to question. As I have set it out above, it contains the statement that a development *must* comply with a limit which is expressed as a *maximum* number of storeys.

[21] By s 7.1(6)(f) of the Scheme,[18] the performance outcomes of a neighbourhood plan code are achieved by the acceptable outcomes. Only one of the acceptable outcomes is relevant to the height and number of storeys of a structure, and it is AO1.1. It quantifies what would meet "community expectations about the number of storeys to be built." Although the judge accepted that community expectations would be at least in part

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16 Judgment at [66].

17 Ibid at [64].

18 Set out above at [8].

informed by that prescribed maximum of 15 storeys, he said that the community might expect a development could exceed that maximum.[19] Again, that is open to question.

[22] Nevertheless, the judge found that:[20]

> "Even if reasonable expectations are not limited to 15 storeys … the height of this particular proposal [was not] aligned to community expectations about the number of storeys to be built [and] therefore does not meet PO1 in relation to height."

[23] His Honour then said that the non-compliance with PO1 was not the end of the matter because the development might still comply with the relevant overall outcome (3)(h). It is convenient to again set out that provision:

> "Development is of a height, scale and form which is consistent with the amenity and character, community expectations and infrastructure assumptions intended for the relevant precinct, sub-precinct or site and is only developed at a greater height, scale and form where there is both a community need and an economic need for the development."

That provision raised two questions in the present case. The first was whether the heights of the proposed towers exceeded "community expectations". The judge found that they did. At one point he found that the proposed towers were of a height which exceeded "reasonable expectations",[21] but at another point in the judgment, he found that the height did not accord with community expectations.[22]

[24] The second question, under overall outcome 3(h), was whether there was both a community need and an economic need for the development. His Honour found that there was a need of each kind. That finding is strongly challenged by an argument that it involved a legal error in the interpretation of the provision.

[25] In describing the question of community and economic need as follows, the judge said that:[23]

> "(b) the community need and economic need do not have to be specifically demonstrated for the amount which is not "consistent" with the amenity and character, community expectations and infrastructure assumptions for the relevant precinct, sub-precinct or site;
>
> (c) nor does the community need and economic need have to be specifically demonstrated for the amount which, for example in the case of building height, the proposed development exceeds the building height specified in an acceptable outcome;

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19 Judgment at [70].

20 Ibid at [76].

21 Ibid at [382].

22 Ibid at [76].

23 Ibid at [79].

(d) community need and economic need must be for "the development" – meaning the totality of what is proposed[.]"

[26] The judge discussed the evidence from three economists, Mr Brown (who was engaged by the applicant), Ms Shimmin (who was engaged by the Council) and Mr Dimasi (who was engaged by the second respondent). The judge began by accepting Mr Dimasi's evidence that:[24]

> "… there is a considerable economic and community need *for the subject site to be developed* and a significant economic and community disbenefit from the past, and any significant future, delay in realising the site's development potential [which is] an opportunity cost." (Emphasis added.)

[27] The judge noted that the site had been vacant for a decade and that it had "stayed effectively derelict", notwithstanding that it had become designated as a landmark site and a catalyst site under the Scheme. He said that there was "a substantial economic and community disbenefit in the site remaining in its current state,"[25] and continued:

> "[273] Further, I accept Mr Dimasi's point that it would be economically inefficient and would impose an economic and community disbenefit if efficient development were to be refused with the consequence of the site remaining vacant until what some might regard as a "perfect" development can be achieved, whatever that might be. That, however, cannot be taken too far. It would be the antithesis of proper planning to allow the "opportunity cost" argument to justify permitting any form of development whatsoever, no matter how unacceptable otherwise, simply in order to get something developed promptly on the site. In this case however, the proposal would not only facilitate the meaningful development of the site, but would do so in a way which *addresses* economic and community need." (Emphasis added.)

[28] His Honour noted that the development would result in more than a thousand residents on the site, with flow-on benefits for the locality by increasing its "activity and vibrancy".[26] The development would also provide a significant area of public open space and public access to the river bank, through land between the towers. The judge said that the development proposed "a high quality public realm, bike paths and walkways, the retained, rejuvenated and repurposed Middenbury [a heritage building on the site], a café/restaurant associated with that and a café nearer the riverfront."[27] The judge endorsed a statement in the joint report of Mr Shimmin and Mr Dimasi that:[28]

> "…a need exists if the wellbeing of the community is enhanced, including subsectors of the community at large."

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24 Ibid at [271].

25 Ibid at [272].

26 Ibid at [275].

27 Ibid at [276].

28 Ibid.

[29] His Honour found that the development would achieve a "city-wide prominence" (a reference to its status as a landmark site), that it would act as a "catalyst" and that it would meet community expectations "that a high-quality development with a high level of amenity, particularly public realm, would be established on the site", as well as being a "development [which] should achieve architectural excellence".[29]

[30] The judge accepted evidence from Mr Shimmin that the development would "represent modern, new and regenerative [development]" and would "lift the bar" by "creating a new development benchmark in the Towong major centre, and indeed in inner Brisbane as well[.]"[30]

[31] His Honour was unpersuaded by Mr Brown's concern that there was no demonstrated need for the extent of residential development which was proposed. The judge said that Mr Brown's analysis had overlooked "the relative scarcity of truly comparable residential developments to the subject".[31] The judge concluded that the apartments to be offered under this development would have "very wide appeal to many segments and will draw from a broad spectrum, including all parts of the Brisbane metropolitan area generally as well as from interstate."[32] He found that the development had a "combination of attributes" which would offer "something which is not truly comparable".[33]

[32] Still on the subject of community and economic needs, the judge discussed a further question, for which there had been evidence from Mr Brown, of whether the approval of this development would "prejudice the need for the subject site to be used for retail and commercial office space purposes."[34] He found that the "level of need for the subject site to be given over to significant commercial office space development is relatively weak".[35] Similarly, he found that there was "a relatively modest demand for additional retail floor space within the Toowong major centre."[36] He accepted that there will be a need for further retail development in the Toowong centre and "that the subject site would be suitable for some retail uses". But he found that it was "unlikely that a large retail focused catalyst/landmark development would be achieved on the subject site, at least in the short to medium term." Therefore, he concluded, "[t]here would be public disbenefit in quarantining the subject site in the meantime in the hope that there might be a build-up of demand, over the longer term, to excite such a proposal."[37]

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29 Ibid at [278].

30 Ibid at [279] – [280].

31 Ibid at [288].

32 Ibid at [290].

33 Ibid at [291].

34 Ibid at [294].

35 Ibid at [295].

36 Ibid at [303].

37 Ibid at [310].

[33] In concluding that there was both an economic and a community need for the development as a whole, the judge said:[38]

> "I am satisfied that refusing the subject development in the hope that a different proposal, with a much more substantial retail and/or commercial focus being put forward, is likely to be to the community disbenefit."

[34] At the end of the judgment, his Honour considered whether there were sufficient grounds under s 326(1)(b) of the SPA, and the summary which follows refers to his reasons on that question. He there observed that there had been many suggested inconsistencies with the Scheme, which he had not accepted, and that there were "many provisions of [the Scheme] with which the proposal is either consistent or positively supports or achieves."[39] The judge said that there were inconsistencies, "although the conflict is not as great as was alleged by the appellant". He said that "there is a level of conflict with a number of provisions, or parts of provisions of relevance" and that the level of conflict was "significant".[40] In particular he identified these matters:

> "[382] I have found that the proposed towers are of a height which exceeds reasonable expectations, that the built form does not have an active built form edge to the streetscape or at ground level (in the case of the towers) and the development does not contain a balanced mix of uses or include a significant component of non-residential centre activities. It has insufficient non-residential uses in order to avoid a finding of some conflict on that account." (Footnotes omitted.)

[35] The judge then observed that some of those inconsistencies had resulted from the adoption of a tower-in-plaza design, rather than a tower-over-podium design and that he had found that the development would serve "useful purposes, in the public interest",[41] and that the use of higher towers would result in "much greater space at ground level than would otherwise be expected."[42] He found that the development proposal "achieved a highly open site at ground level", with much of that space being "to the public benefit, by designating it as public open space".[43] He said there was a larger area than could be expected, according to the TANP, for public open space.

[36] His Honour referred to the site's status as a landmark site, saying that "[t]he adoption of a more vertical built form, in conjunction with the site location, building siting and adoption of a bold, interesting, architectural design of the highest quality by a world renowned architect also capitalises on the potential to achieve city-wide prominence as a visual

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38 Ibid at [311].

39 Ibid at [380].

40 Ibid at [381].

41 Ibid at [383].

42 Ibid at [384].

43 Ibid at [385].

reference."[44] He said that on the other hand, it was "difficult to see how the community would be substantially advantaged by the provision of substantially more non-residential uses".[45]

[37] The judge concluded as follows:

> "[389] The respects in which the proposal is otherwise in conflict with the planning scheme have been discussed. Any conflict is not accompanied by an undue effect. The amenity impacts of the co-respondent's proposal have been assessed and found to be acceptable.
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> [390] Senior counsel for the appellant accepted that the quality of the architecture is relevant, although he submitted that it should not carry the day.
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> [391] Economic and community need have been discussed earlier. For the reasons given, there is a need for the development potential of the site to be realised and a need for the development proposed. The development would also be the instigator of further activity within the centre.
>
> [392] The merits of the proposal generally have been discussed earlier and are substantial.
>
> [393] On balance, I am satisfied that there are sufficient grounds, in the public interest, to approve the proposed development notwithstanding conflict with the planning scheme." (Footnotes omitted.)

The application for leave to appeal

[38] The judgment was delivered on 10 May 2017. The application for leave to appeal was filed on 21 June 2017. According to the applicant's submissions, leave to appeal is sought pursuant to s 63 of the *Planning and Environment Court Act* 2016 (Qld). Section 76(2) of that Act provides that it applies to any appeal in relation to a proceeding mentioned in s 76(1)(a), which is a proceeding which had started under the SPA, but had not ended before the commencement of the 2016 Act on 3 July 2017. Final orders have not been made in this proceeding, so that it is s 63 of the *Planning and Environment Court Act* 2016 (Qld) which governs this application for leave to appeal. In any case, if the present application is governed by s 498 of the SPA, again the appeal to this Court may be made only by leave and is limited to an error of law or an error as to the jurisdiction of the Planning and Environment Court.[46]

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44 Ibid at [387].

45 Ibid at [388].

46 SPA, s 498(1).

[39] In the usual way, this Court has heard full argument on the merits of the proposed appeal. The third respondent to this application is the Chief Executive administering the SPA, who was not an active participant in this Court.

Grounds of the proposed appeal

Community and economic needs

[40] I have referred to the two questions under overall outcome (3)(a). The applicant's argument is that notwithstanding the judge's extensive discussion of the evidence of the three economists, his Honour did not consider the second of these questions, which is whether there was a community need and an economic need for *the development*. In essence, the argument is that it was necessary to consider whether there was a need, of each kind, for this development, rather than a need which could be satisfied by a development of the same kind, but of a height and scale which was consistent with community expectations and, in particular, which complied with the prescribed maximum of 15 storeys.

[41] The same argument was advanced in the Planning and Environment Court and was rejected by the judge in the passage which I have set out above at [25].[47] The submissions in this Court for the respondents, in substance, adopt the judge's reasoning. For the following reasons, the applicant's argument should be accepted.

[42] The question here was whether there was both a community need and an economic need "for the development", an expression which unambiguously refers to the particular development which is being assessed. The question arises in the context of the height of the development being inconsistent with community expectations for the relevant precinct, sub-precinct or site. Consequently, the question must be answered by reference to a development of this height.

[43] For the purposes of discussion, let it be assumed that there is a community need, and an economic need, for a high quality residential development which provides public spaces of the kind and to the extent which the judge described; but let it also be assumed that these needs could be satisfied by the provision of, say, 300 units within three towers, none of which would exceed 15 storeys. In that case, the second respondent's proposed development might be described as satisfying a need. But this development would more than do so. The question is not whether the development would satisfy community and economic needs; it is whether there is a need for this development, or put another way, whether it is necessary to develop their site by buildings of this height.

[44] To vary the facts of that example, take a case where there are community and economic needs for, say, 300 units and for the other benefits as I have described, but where for reasons of commercial practicality, no development providing only that number of units within 15 storeys or fewer, would be undertaken. In that case, it would be necessary to construct buildings which were inconsistent with community expectations, because a smaller and compliant development, being commercially impracticable, would not be built and therefore could not satisfy the need.

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47 Judgment at [79].

[45] The judge observed that this site had been unused for a decade. He referred to the "disbenefit" to the community in that respect. Perhaps he had the impression, given the length of that period, that this could be a case of a kind which I have described in the preceding paragraph. But if so, there was nothing said of it in the judgment. His Honour did not consider whether a development had to be of this height to satisfy community and economic needs.

[46] His Honour said that there would be "an economic and community disbenefit if efficient development were to be refused with the consequence of the site remaining vacant until what might be regarded as a "perfect" development can be achieved, whatever that might be."[48] But the question was not whether there was a need for some development of the site. Nor was the question whether, as the judge put it, the proposal "*addresses*" economic and community need. It was whether *this* development was *necessary*, which did not require a consideration of whether there was a "perfect" development which could be achieved.

[47] By endorsing the proposition that "a need exists if the well-being of the community is enhanced [by the development]",[49] again his Honour addressed the wrong question. The well-being of the community could be enhanced by something which provided *more than* the community needed.

[48] In his reasoning on this question, the judge also referred to the status of the site as a landmark site and as a catalyst site. He found that there was "an expectation that development should achieve architectural excellence and obtain citywide prominence." He was satisfied that the development would achieve those things.[50] Accepting that to be so, those attributes could be relevant to this question under overall outcome (3)(h), only if there was a community need and an economic need for a development with those attributes. But the judge did not find that there was both a community and an economic need for those attributes. And nor did he find that only this development could provide them.

[49] Accepting, as this Court must, the judge's analysis of the evidence in his discussion of this question, his findings provided no basis for a conclusion that upon the proper interpretation of this provision, there was a demonstrated community need and economic need for this development. In the absence of a demonstrated need of each kind, the development was inconsistent with overall outcome (3)(h). The extent of that inconsistency was considerable: two of the towers exceeded the maximum number of storeys by more than 50 per cent and the third tower was even higher.

Section 5.3.3 of the Scheme

[50] Something should be said of another submission for the applicant, which is that there was an error in the assessment of whether the proposal complied with the Scheme, under s 5.3.3 which prescribes rules for the assessment of different types of development. The rules are expressed differently for code assessable development than for impact assessable development, the latter being relevant in this case. It is said that at times, the judge applied criteria that applied to code assessable development rather than impact

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48 Ibid at [273].

49 Ibid at [276].

50 Ibid at [278].

assessable development. It is said that the judge was thereby diverted from the requirement in s 5.3.3 for impact assessable development that the "development … be assessed against the planning scheme, to the extent relevant". I am unpersuaded that the criticism is justified. In any case, it is not shown to have been material to the outcome.

Section 326 of the SPA

[51] The remaining arguments for the applicant are relevant to the question of whether there were sufficient grounds to justify the decision, according to s 326 of the SPA which is as follows:

> "**326 Other decision rules**
>
> (1) The assessment manager's decision must not conflict with a relevant instrument unless—
>
> (a) the conflict is necessary to ensure the decision complies with a State planning regulatory provision; or
>
> (b) there are sufficient grounds to justify the decision, despite the conflict; or
>
> (c) the conflict arises because of a conflict between—
>
> (i) 2 or more relevant instruments of the same type, and the decision best achieves the purposes of the instruments; or
>
> *Example of a conflict between relevant instruments—*
>
> a conflict between 2 State planning policies
>
> (ii) 2 or more aspects of any 1 relevant instrument, and the decision best achieves the purposes of the instrument.
>
> *Example of a conflict between aspects of a relevant instrument—*
>
> a conflict between 2 codes in a planning scheme
>
> (2) In this section—
>
> ***relevant instrument*** means a matter or thing mentioned in section 313(2) or 314(2), other than a State planning regulatory provision, against which code assessment or impact assessment is carried out."

[52] Before going to those arguments, it is necessary to refer to the authorities in this Court on the provision. Many of the cases which were cited in argument were decided under the statutory predecessor of s 326 of the SPA, namely s 4.4(5A) of the *Local Government (Planning and Environment) Act* 1990 (Qld) ("the 1990 Act"). It provided that a local government must refuse to approve an application if it conflicted with any relevant strategic plan or development control plan and there were not "sufficient planning grounds to justify

approving the application despite the conflict". In *Grosser v City of Gold Coast*,[51] White J (with whom Thomas and Williams JJA agreed) said that s 4.4(5A) provided "a simple two-stage process which first requires the identification of conflict with the Strategic Plan, then, if conflict is present, the application must be refused if there are not sufficient planning grounds to justify approving the application despite the conflict."[52] In that case, the primary judge was found to have erred, by reasoning that s 4.4(5A) was not engaged, because the inconsistencies with the Strategic Plan were not "so fundamental" as to do so.[53]

[53] The same provision of the 1990 Act was considered in *Weightman v Gold Coast City Council*,[54] where the primary judge had found that a development would exceed a prescribed maximum height under the planning scheme, but that there were sufficient planning grounds to justify approving the application despite the conflict. The principal judgment was given by Atkinson J, with whom McMurdo P agreed. The Chief Justice dissented in the result, but stated his agreement with the principles expressed by Atkinson J.[55] Her Honour noted that under s 4.4(5A), it was a "mandatory requirement" that the approval be refused if there were not sufficient grounds to justify it. Her Honour considered that the primary judge had wrongly held that the provision was directory only.[56] She said that the provision required the decision maker to: (1) examine the nature and extent of the conflict with the planning scheme; (2) determine whether there were any planning grounds which were relevant to the part of the application which was in conflict with the planning scheme and if the conflict could be justified on those planning grounds; and (3) determine whether the planning grounds in favour of the application as a whole were, on balance, sufficient to justify approving the application notwithstanding the conflict.[57] In her concurring judgment, the President said that only when the extent of the conflict with the planning scheme was appreciated, could the discretion under s 4.4(5A) be properly exercised.[58]

[54] Section 4.4(5A) of the 1990 Act was re-enacted in s 3.5.14 of the *Integrated Planning Act* 1997 (Qld), which was later amended (in 2006) in terms which were subsequently replicated in s 326 of the SPA. The question became, as it is under s 326 for this case, whether there were "sufficient grounds", rather than "sufficient planning grounds", to justify the decision and the term "grounds" was defined to mean matters of public interest, and not including the personal circumstances of an applicant, owner or interested party. In *Lockyer Valley Regional Council v Westlink Pty Ltd*,[59] Holmes JA (as the Chief Justice

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51 (2001) 117 LGERA 153; [2001] QCA 423.

52 Ibid at 166 [49].

53 Ibid.

54 [2003] 2 Qd R 441; [2002] QCA 234.

55 Ibid at 446 [8].

56 Ibid at 453 [35].

57 Ibid at 453 [36].

58 Ibid at 448 [15].

59 [2013] 2 Qd R 302 at 323 – 324 [25]; [2012] QCA 370.

then was) said that the expression "planning grounds" required a narrower inquiry than that entailed in assessment of the unqualified and broadly defined "grounds" which had become relevant under the amended s 3.5.14.

[55] Section 326 of the SPA was considered in *Zappala Family Co Pty Ltd v Brisbane City Council*.[60] Morrison JA there said that in applying s 326(1), the Court must examine the nature and extent of the conflict with the planning scheme, for which he cited *Weightman v Gold Coast City Council* and *Lockyer Valley Regional Council v Westlink Pty Ltd*. He held that this had not occurred in that case because the judge had wrongly considered that a certain provision of the planning scheme, dealing with car parking, was inapplicable.[61]

The so-called "Elan Capital" error

[56] In *Elan Capital Corporation Pty Ltd v Brisbane City Council*,[62] Quirk DCJ described a proposed development, which was the subject of a re-zoning application, as a "serious intrusion upon the integrity of [part of the planning instrument]", such that to permit the development would unacceptably "cut across" the Council's "planning strategy". He said that it was not the court's function to substitute planning strategies (which on evidence given in a particular appeal might seem more appealing) for those which a planning authority in a careful and proper manner had chosen to adopt.[63] That judgment has been cited in many cases, including in this Court's judgment in *Grosser v Gold Coast City Council*.[64]

[57] It is argued that in the present case, the judge reasoned inconsistently with the principle from *Elan Capital*, by effectively substituting his own planning opinions in place of those which are expressed in the Scheme.

Irrelevant considerations

[58] It is submitted that in determining the question under s 326, the judge erroneously took into account irrelevant considerations, of which two are identified.

[59] The first is the judge's finding that although there were conflicts with the Scheme, the development proposal *was* consistent with the Scheme in many other respects.[65] The other is said to have been the judge's incorrect interpretation of overall outcome (3)(h) and s 5.3.3 of the Scheme.

[60] As to the former, the judge's consideration of the s 326 question was affected by his incorrect interpretation of that provision, as I will discuss. However, the characterisation of that legal error as a consideration of an irrelevant matter, adds nothing to the applicant's case.

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60 (2014) 201 LGERA 82; [2014] QCA 147.

61 Ibid at 107 [118].

62 [1990] QPLR 209 ("*Elan Capital*").

63 Ibid at 211.

64 (2001) 117 LGERA 153 at 155 [6] (Williams JA) and 163 [38] (White J).

65 Judgment at [380].

And as to s 5.3.3, it is not demonstrated that if there was an error in that respect, it mattered for the s 326 question or otherwise.

Failure to consider relevant matters

[61] It is submitted that the judge erred in failing to take into account necessary considerations, two of which are said to be the correct interpretation of overall outcome (3)(h) and the correct interpretation of s 5.3.3. What I have just said under the last heading applies equally to this submission.

[62] It is submitted that the judge failed to consider whether another development, one which did not conflict with relevant provisions of the Scheme, could achieve the same (or similar) positive outcomes as the judge relied upon to find sufficient grounds under s 326. Counsel for the applicant described this as the "alternative development point". The argument cites a number of judgments in the Planning and Environment Court which are said to support the proposition, that to qualify as a sufficient ground under s 326, the ground must be one "which would establish positive betterment in terms of planning outcomes which would not otherwise be achievable through the existing Planning Scheme."[66]

The "public detriment" argument

[63] It is submitted that the judge overlooked a principle that there is a real public interest in upholding obedience to the planning laws by all members of the community, and by all local governments, even in circumstances where there is no associated harm. But the cases which are cited for this submission were not concerned with s 326(1)(b) or any analogous provision. They were cases where development had occurred, in non-compliance with a development permit, and in that context, the court emphasised the importance of obeying the law.[67]

Section 326 - consideration

[64] By s 314(2) of the SPA, an application must be assessed against each of the matters or things there listed, to the extent that it is relevant. The list includes "a planning scheme". By s 324(2), the decision on the application for approval must be based upon such an assessment.

[65] Section 326(1) requires that the decision not be in conflict with a relevant instrument, including a planning scheme, unless the circumstances engage one of the four exceptions which are there stated. In the present case, only the exception within s 326(1)(b) was thought to be relevant. The judge did not identify a conflict between two or more relevant instruments of the same type, or between two or more aspects of any one

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66 *Palyaris v Gold Coast City Council* [2004] QPELR 162, 169 [41]; [2003] QPEC 56; *Titanium Enterprises Pty Ltd v Caloundra City Council* [2007] QPELR 154, 164 [59]; [2006] QPEC 106; *Bruce v Caloundra City Council* [2007] QPELR 571, 575 - 576 [38]; [2007] QPEC 46; *Nevtan Investments Pty Ltd v Belyando Shire Council* [2008] QPELR 326, 335 [52]; *Prettlejohn v Cairns Regional Council* [2012] QPELR 485, 492 [53]; [2012] QPEC 23.

67 *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335, 339 – 340; *Woolworths Ltd v Warehouse Group (Aust) Pty Ltd* (2003) 123 LGERA 341, 348; [2003] NSWLEC 31; *Woolworths Ltd v Caboolture Shire Council* [2004] QPELR 550, 560; [2004] QPEC 15.

relevant instrument.[68] In particular, his Honour did not identify a conflict between the Scheme's designation of the site as a catalyst site and a landmark site and, on the other hand, the Scheme's prescription of a maximum number of storeys.

[66] Section 326(1)(b) will be engaged only where there is a tension between the application of the relevant instrument, here a planning scheme, and the public interest. If that tension exists, it will be for the decision maker to consider whether there are *sufficient* grounds, in the public interest, to depart from the instrument. Necessarily, cases where that tension exists will be exceptional, because a planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land. In *Clark v Cook Shire Council*,[69] Keane JA, with the agreement of the other members of this Court said:

> "The terms of a planning scheme inevitably reflect the striking of an overall balance, *in the public interest*, between the many interests potentially affected by the planning scheme." (Emphasis added.)

[67] It is not for the decision maker (including in this context a Court), to gainsay the expression of what constitutes the public interest that is in a planning scheme. A decision maker might think that a limit of 15 storeys is too restrictive, and the public would be better served by a higher limit. But this decision maker must accept that it is in the public interest that the limit be 15 storeys, because that is what the planning scheme effectively provides.

[68] Cases could arise where relevant circumstances have changed since the planning scheme was made, or where it can be seen that there is a factual error in the scheme itself. Cases of that kind were identified in the explanatory notes for s 3.5.14 of the *Integrated Planning Act* 1997 (Qld). There might also be cases where it is evident that the planning scheme has not anticipated the existence of circumstances which have created a need for a certain development in the public interest. In exceptional cases of all of these kinds, the decision maker might be able to conclude that the planning scheme is not, in the particular case, an embodiment of what is in the public interest.

[69] The submissions for the respondents emphasise that in *Elan Capital*, Quirk DCJ used the expression "planning strategies", which they distinguish from the relevant provisions of the Scheme in this case. However, what must be applied here are the terms of s 326(1)(b) of the SPA, for which there was no legislative equivalent when *Elan Capital* was decided.[70]

[70] Consequently, any consideration of the application of s 326(1)(b) of the SPA must proceed upon the premise that it is in the public interest that the planning scheme, in each relevant respect, be applied, unless the contrary is demonstrated. Thus in the present case, it had to be assumed that the public interest would be served by confining the

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68 SPA, s 326(1)(c).

69 [2008] 1 Qd R 327 at 338; [2007] QCA 139.

70 The case was apparently decided under the *Local Government Act* 1936 (Qld), s 33(6A). By s 33(6A)(e)(iii) of that Act, the local authority was obliged to consider whether the proposed re-zoning accorded or conflicted with any strategic plan or development control plan, but that was not a provision in the mandatory terms of s 326(1)(b) of the SPA. Section 4.4(5A) of the 1990 Act was inserted in 1992.

development of this land to buildings of a height that accorded with community expectations that buildings would not extend, or at least significantly extend, beyond 15 storeys. That was not an arbitrary limit; it was an expression of a means by which, in the public interest, the scale of any development would be kept in alignment with community expectations. The Scheme was unambiguous in providing, within AO1.1, that "[d]evelopment must comply with both parameters where maximum number of storeys and height in metres are specified."

[71] His Honour did not discern any ambiguity or error in the Scheme in this respect. Nor did he find that the relevant provisions of the Scheme could not be assumed to represent what was in the public interest, because the relevant circumstances had changed since the Scheme came into force. Notably, the TANP made particular provision for this site, but without qualifying overall outcome (3)(h) and AO1.1.

[72] The judge considered that there were certain benefits from the heights of these proposed buildings. He concluded that the heights would enhance the enjoyment of the site, by providing less of a building footprint and consequently more land which could be used for public open space. He also concluded that the greater heights of the buildings would give them a prominence, both in terms of visibility and architectural merit, which would enhance the contribution of the development as a landmark site. They were factual conclusions which had an evidentiary basis. But whether they provided sufficient grounds to justify a conflict with the Scheme was another matter.

[73] After discussing the height of the proposed buildings, the judge set out and adopted a number of submissions which had been made for the Council. Amongst them was the proposition that if community need and economic need were established, that would call for something of a "balancing exercise", under which there would be "a balancing consideration of all positive and negative attributes of the proposed development (for example, particular community benefits might weigh in favour of approval even where a proposal is not consistent with the community expectations)."[71]

[74] In that passage, the judge did not identify the legal source for that balancing exercise. The judge did not proceed to a factual analysis of that kind, except in his consideration, at the end of the judgment, of s 326.[72] It would appear that the judge undertook that broad balancing exercise in the belief that this was what s 326(1)(b) required. In my respectful opinion, the judge misconstrued the provision. This would explain his Honour's observation, in considering s 326, that there were many provisions of the Scheme with which the proposal was either consistent or which it "positively supports or achieves".[73]

[75] His Honour repeated his finding that there was a community need and an economic need under overall outcome (3)(h),[74] in his conclusion about the operation of s 326. With respect, that reasoning is difficult to accept. If, in truth, there was a community need and an economic need for this development, it would follow that overall outcome (3)(h) would

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71 Judgment at [79] (e), (f).

72 Ibid at [378] – [393].

73 Ibid at [380].

74 Ibid at [391].

be satisfied, the decision would not conflict with it and it would not matter for s 326. On the other hand, if there was no demonstrated community need and economic need for this development, there would have been a conflict, in which case there had to be some reason for concluding that the Scheme did not accurately represent what was in the public interest.

[76] At an earlier point in the judgment, his Honour said that "[e]ven if there were a conflict with OO(3)(h), this is, in my view, an exceptional case in which the proposal warrants approval notwithstanding."[75] However the judge did not reveal why this was an exceptional case, so as to satisfy s 326(1)(b), other than by the broader balancing exercise to which I have referred.

[77] At no point did the judge refer to the Scheme as an embodiment of what represented the public interest. The judge did not identify any way in which the Scheme's specification of an acceptable height was to be disregarded as the result of an error in drafting, a change in relevant circumstances from those which existed when the Scheme was prepared or a failure of the Scheme to anticipate a need, in the public interest, for a development on this site with buildings of this height. In essence his Honour formed his own judgment of what was in the public interest without recognising the relevance of the Scheme to that question. The same may be said of his conclusion that the public interest justified the conflict between the decision and overall outcome (4)(h).

[78] Ultimately, by the judge substituting his own view of the public interest for that which was expressed in the Scheme, there was a legal error which affected his conclusion under s 326. Further, that was also affected by the legal error in the interpretation of overall outcome (3)(h).

Conclusion and orders

[79] In my conclusion, the judgment was affected by errors of law, which warrant a grant of leave to appeal and the appeal being allowed.

[80] It was submitted for the applicant that if she succeeded upon this basis, this Court should consider whether the development should be approved. I would accept that the respondents should not be able to adduce further evidence, having failed to establish, upon a proper interpretation of overall outcome (3)(h) that there was a community need and an economic need for this development. But I am not persuaded that this Court would be well placed to consider what is ultimately a factual question, under s 326, once that question is considered according to law. The case should be remitted to the Planning and Environment Court, under s 65 of the *Planning and Environment Court Act* 2016 (Qld). Counsel for the applicant disavowed a suggestion that the case should be remitted to another judge. Clearly this judge should have a better understanding of the evidence.

[81] I would order as follows:

1. grant leave to appeal.

2. allow the appeal.

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75 Ibid at [81].

3. remit the matter to the Planning and Environment Court, to be further considered according to law.

4. the first and second respondents to pay the applicant's costs of and incidental to the application for leave to appeal and the appeal in this Court.