SUPREME COURT OF QUEENSLAND

CITATION:	*Springfield Land Corporation Pty Limited v Cherish Enterprises Pty Ltd & Anor* [2018] QCA 266
PARTIES:	**SPRINGFIELD LAND CORPORATION PTY LIMITED** ACN 055 714 531 (applicant) **v** **CHERISH ENTERPRISES PTY LTD** ACN 052 055 811 (first respondent) **IPSWICH CITY COUNCIL** (second respondent)
FILE NO/S:	Appeal No 8535 of 2017 P & E Appeal No 2948 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane - [2017] QPEC 38 (Kefford DCJ)
DELIVERED ON:	12 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	10 May 2018
JUDGES:	Fraser and Gotterson JJA and Burns J
ORDERS:	**1. Grant the applicant leave to appeal.** **2. Grant the second respondent leave to file a cross appeal.** **3. Allow the appeal and the cross appeal.** **4. Set aside the declaration made in the Planning and Environment Court on 14 July 2017.** **5. Substitute the following:** **(i) It is declared that approval of an area development plan under the Springfield Structure Plan is a necessary pre-condition to the assessment and approval of the development application lodged on behalf of Cherish Enterprises Pty Ltd with the Ipswich City Council on or about 17 March 2016;** **(ii) The Originating Application is otherwise dismissed.** **6. The parties may make written submissions with respect to costs of the appeal, such submissions to be made in each case no later than 10 days after the**

publication of these reasons and not to exceed two pages.

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – DEVELOPMENT CONTROL PLANS – where the first respondent made a development application to the second respondent in relation to an area of land at Springfield – where pt 14 of the Ipswich Planning Scheme 2006 ("IPS 2006") contained a development control plan called the Springfield Structure Plan ("SSP"), which applied to the land – where the first respondent had not applied for, or sought approval of, a precinct plan or an area development plan under the SSP – where the primary judge made a declaration that the first respondent was entitled to have its development application assessed even though, *inter alia*, no precinct plan or area development plan had been approved by the second respondent – where s 857(5) of the *Sustainable Planning Act* 2009 (Qld) ("SPA") validates development control plans under the repealed *Local Government (Planning and Environment) Act* 1990 to the extent that they include "a process for making and approving plans, however called, with which development must comply" – whether the SSP engages s 857(5) by providing a process for making and approving area development plans with which development must comply – whether the SSP engages s 857(5) by providing a process for making and approving precinct plans with which development must comply

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – DEVELOPMENT CONTROL PLANS – where the first respondent made a development application to the second respondent in relation to an area of land at Springfield – where the application sought preliminary approval under s 242 of the SPA to vary the effect of a planning instrument, namely, the IPS 2006 – where pt 14 of the IPS 2006 contained a development control plan called the Springfield Structure Plan, which applied to the subject land – where the first respondent had not applied for, or sought approval of, a precinct plan or an area development plan under the SSP – where the primary judge made a declaration that the first respondent was entitled to have its development application assessed even though, *inter alia*, no precinct plan or area development plan had been approved by the second respondent – where s 857(5) of the SPA validates development control plans under the repealed *Local Government (Planning and Environment) Act* 1990 to the extent that they include "a process for making and approving plans, however called, with which development must comply" – whether s 857 of the SPA prevents the first respondent from making an application for preliminary

approval under s 242 of the SPA to vary the effect of the IPS 2006 so as to dispense with the requirements for a planning scheme and an area development plan

Sustainable Planning Act 2009 (Qld), s 242, s 857

COUNSEL: J M Horton QC, with D M Favell, for the applicant
R Litster QC, with S Fynes-Clinton, for the first respondent
M F Johnston, with J G Lyons, for the second respondent

SOLICITORS: MinterEllison for the applicant
Clinton Mohr Lawyers for the first respondent
Colin Biggers & Paisley for the second respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Gotterson JA and the orders proposed by his Honour.

[2] **GOTTERSON JA:** This matter concerns an area of approximately 249 hectares of land ("the Land") at Springfield which was the subject of a development application made to the Ipswich City Council ("the Council") on 17 March 2016 on behalf of Cherish Enterprises Pty Ltd ("Cherish").[1] The Land is in north-west Springfield. At the time when the development application was lodged, it was comprised of a large part of Lot 43, which Cherish owned, together with the much smaller and adjacent Lots 90 and 100 which, at the time, were being transferred to Cherish by their then owner, the Council.

[3] The current use of the Land was described in the development application as "Vacant Land & Houses".[2] The development application sought "Preliminary Approval to vary the effect of the [Ipswich Planning Scheme 2006 ("IPS 2006")] for Material Change of Use, Reconfigure a Lot, and Operational Work".[3] The purpose of the development application was stated to be to facilitate the ongoing development of the Springview Estate located at 7001 Mur Boulevard, 30 Parkside Drive and 94 Sharpless Road, Springfield.[4] Consistently with that, the proposed uses of the Land were listed as detached and attached residential dwellings; retail and commercial activities; and recreation and open space.[5]

[4] The development application was evidently submitted on the footing that it was a properly made application as defined in s 261 in Chapter 6 of the *Sustainable Planning Act* 2009 (Qld) ("SPA"). Significantly, it stated that the preliminary approval was sought under s 242, which is also in Chapter 6.[6]

[5] The ultimate issues in this litigation are whether the development application was one that might lawfully have been made under that provision and whether, as a valid application, the Council must assess and decide it under Chapter 6 of the SPA. The first issue arises in circumstances where Cherish made the development application

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1 The development application is at AB112-205. The Appeal Record contains only some of the documents submitted with the application. They are IDAS Forms 1, 5, 6, 7, 11 and 31, and a Town Planning Report with Appendices A, B, C thereto.

2 AB116.

3 AB112.

4 AB142.

5 AB122.

6 AB112.

without Council approval having been given to a precinct plan or to an area development plan, for which Part 14 of the IPS 2006 provides, applicable to the Land. Part 14 contains the Springfield Structure Plan ("SSP"), which applies to an area within which the Land is located.

[6] That Council approval has not been given to either plans has foreclosed to Cherish the route of applying for approval of the proposed development of the Land under s 2.4.1 of the SSP. In short, the Land currently has two designations under the SSP, namely, Community Residential and Open Space. Under s 2.2.3.1 of the SSP, a precinct plan, for which Springfield Land Corporation Pty Ltd ("Springfield") alone may seek approval,[7] must be approved by the Council prior to any development being approved on land with those designations. There is a comparable provision with respect to all five designations under the SSP for area development plans, for which any person may apply for Council approval.[8] Neither a precinct plan nor an area development plan has been submitted for approval, or approved, for the Land.

[7] It was in these circumstances that, on 27 July 2016, Cherish commenced proceedings in the Planning and Environment Court for declaratory relief to which the Council and Springfield were respondents.[9] The principal declaration sought was that the development application is a properly made application under s 261(1)(a)(i) of the SPA which the Council must assess and decide under Chapter 6.

[8] At first instance, Cherish submitted that it was entitled to make its development application and have it assessed notwithstanding that neither a precinct plan nor an area development plan had been approved by the Council in respect of the Land. The Council submitted that Cherish may make a development application only if it makes a concurrent application for approval of an area development plan, and that it may have the application assessed only after approval of such a plan by the Council. Springfield submitted that Council approvals of a precinct plan and an area development plan were pre-conditions to the assessment and approval of Cherish's development application.[10]

[9] The learned primary judge upheld Cherish's submission. On 14 July 2017, her Honour made a declaration that it was entitled to have its development application assessed even though, firstly, no precinct plan had been prepared by or for Springfield under s 2.2.3.3 of the SSP; secondly, no precinct plan had been approved by the Council under s 2.2.3.1 of the SSP; and thirdly, no area development plan had been approved by the Council under s 2.2.4.1 of the SSP.[11]

[10] On 22 August 2018, Springfield filed an application for leave pursuant to s 63(2) of the *Planning and Environment Court Act* 2016 (Qld) to appeal to this Court from the decision at first instance.[12] The respondents to the application are Cherish, as first respondent, and the Council, as second respondent. The Council has indicated that if leave to appeal is granted, it will file a notice of cross appeal.[13]

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7 SSP s 2.2.3.3.
8 Ibid s 2.2.4.1.
9 Originating Application: AB1082-1087.
10 Reasons at [10]-[12]: AB1223.
11 AB1217-1218.
12 AB1280-1283.
13 Affidavit of J W Nicholson filed 10 October 2017: AB1360-1361. The proposed Notice of Cross Appeal (Ex JWN-1) is at AB1362-1365.

[11] The application was heard on 10 May 2018. It is common ground that provided the appeal has merit, leave to appeal ought to be granted.[14] A hearing on the merits ensued. These reasons addressed the merits of the appeal. Before turning to the grounds of appeal, I propose to identify relevant statutory provisions and town planning instruments in their evolutionary context, and to refer to the findings at first instance.

The evolution towards the SSP and transitional provisions

[12] **The Shire of Moreton Planning Scheme:** The Land was within the area of the former Shire of Moreton for which a planning scheme was approved under the *Local Government Act* 1936 (Qld) in October 1982, and prior to the commencement of the *Local Government (Planning and Environment) Act* 1990 ("LGPEA") in April 1991. Upon the abolition of the Shire of Moreton, its area was included within a new area named City of Ipswich which was created on 22 March 1995.[15]

[13] **Springfield Development Control Plan:**[16] The Shire of Moreton Planning Scheme, which continued in effect, was amended to insert a new zone titled "Particular Development Zone" on 9 February 1996. Later, on 24 January 1997, the Springfield Development Control Plan ("1997 Springfield DCP") made under s 2.5 of the LGPEA was approved, in part, by Order in Council. It formed part of the Council's planning scheme by operation of ss 2.1(d) and 2.18(2)(c) LGPEA.

[14] On 18 June 1979, the *Local Government (Springfield Zoning) Act* 1997 (Qld) came into force. That Act rezoned land to which the 1997 Springfield DCP applied, (which included the land that became the subject of Cherish's subsequent development application) into the Particular Development Zone, effective from 24 January 1997.

[15] These events occurred prior to the coming into force on 30 March 1998 of the majority of the provisions in the *Integrated Planning Act* 1997 (Qld) ("IPA"). That Act repealed the LGPEA.

[16] The 1997 Springfield DCP provided for the making of area development plans.[17] It stipulated that development of land within any of the five designations for which it provided, could not take place unless, in the first place, there was an area development plan over the land to be developed which the Council had approved, and secondly, the development was shown on, or consistent with, the approved area development plan.

[17] **Springfield Infrastructure Agreement 1998:**[18] On 26 March 1998, the Springfield Infrastructure Agreement was entered into by the Council, Springfield, as developer, and two landowners, namely, Springfield Land Corporation (No. 2) Pty Ltd and Cherish.[19] It applies to an area which includes the Land.

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14 Appeal Transcript ("AT") 1-2 ll35-46.
15 Statement of Agreed Facts ("SAF") at first instance at [4]-[6]: AB1089.
16 Ibid at [7]-[10]: AB1089.
17 SSP s 2.2.3.1: AB967.
18 SAF at [11]: AB1089-1090.
19 AB628-903. The Springfield Infrastructure Agreement was amended by deed from time to time: AB904-942. It is unnecessary to refer to any of the amendments for present purposes.

[18] This agreement acknowledged that the developer and the landowners proposed to develop land as an integrated residential, business, retail and commercial community to be known as "Springfield" over a lengthy period estimated at 25 years, and that the Council had determined that the proposed development was in the interests of the City of Ipswich and ought to be supported.[20] The agreement also acknowledged that to facilitate the planning and control of development in a flexible manner catering for the needs of the community, the 1997 Springfield DCP had been given approval.[21]

[19] The stated purpose of the agreement was to enable certainty in the provision of infrastructure in a timely and economic manner to meet needs as development occurred in accordance with the 1997 Springfield DCP.[22] Detailed provisions to give effect to that purpose were set out within the agreement.

[20] **Ipswich Planning Scheme 1999:**[23] On 11 March 1998, the Council resolved to adopt a new planning scheme ("IPS 1999"). It was approved in part by Order in Council on 18 February 1999. This planning scheme was a transitional planning scheme under s 6.1.9(1)(a) of the IPA. It contained, as a development control plan, an amended version of the 1997 Springfield DCP which was titled "Springfield Structure Plan".

[21] This structure plan document contained the following by way of preamble:[24]

> "This Structure Plan was originally prepared under the Local Government (Planning & Environment) Act 1990. However, this Act has been repealed and replaced by the Integrated Planning Act 1997 (IPA) as from 30 March 1998.
>
> Under the IPA, this Structure Plan forms part of a 'transitional planning scheme'.
>
> To make the Structure Plan easier to use and understand, the plan has been amended to make it more consistent with the Integrated Development Assessment System (IDAS).
>
> IDAS is the system for making, assessing and deciding development applications.
>
> All 'policy' aspects of the Structure Plan, such as the aims, vision, and planning intents, remain unchanged in relation to their policy content."

[22] The IPS 1999 was approved in a statutory environment where s 6.1.45A of the IPA affirmed the validity of provisions in a development control plan under a repealed Act for the making and approval of plans and required that development must comply with such plans in the way stated in the development control plan.[25]

[23] An amendment to s 6.1.45A, effective from 30 March 1998, clarified that the validation of the provision applied notwithstanding any inconsistency with

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20 Section 1: AB639.
21 Ibid.
22 Ibid.
23 SAF at [12]-[25]: AB1090-1092.
24 AB211. Words to similar effect are contained in the Preamble in s 1.1 of the SSP: AB529.
25 IPA s 6.1.45A(2).

Chapter 3 or Schedule 1 of the IPA, and that for a transitional planning scheme which included a development control plan (as the IPS 1999 was and did), the same might be amended either under the applicable provisions in the IPA or by the amendment process mentioned in the development control plan.[26] The Council amended the structure plan for Springfield in the IPS 1999 in October 2002.

[24] **Ipswich Planning Scheme 2004:**[27] The Council resolved to adopt a new planning scheme on 10 March 2004. It commenced on 5 April 2004. The structure plan for Springfield was located in Part 14 of this planning scheme.

[25] **IPS 2006:**[28] A consolidated planning scheme for the City of Ipswich, IPS 2006, was adopted by the Council on 14 December 2005. It came into effect on 23 January 2006 and remains in force. As I have noted, Part 14 of the IPS 2006 contains the SSP.

[26] The SPA commenced on 18 December 2009. It repealed the IPA.[29] Chapter 6 of the SPA maintained and regulated the IDAS introduced by the IPA. In accordance with s 778 of the SPA, the IPS 2006 continued to have effect. It was taken to be the planning scheme for the Council's planning scheme area that was specified under the SPA.

[27] Chapter 10 of the SPA contained transitional provisions, one of which was s 857, headed "Development control plans under repealed [LGPEA]". This provision applied to a development control plan if it was included in an existing planning scheme under the repealed s 6.1.45A of the IPA and a statement in the existing planning scheme identified the area of a development control plan included in the scheme.[30] The SSP satisfied the criteria for the application of the section.

[28] Subsections 857(5) and (7) of the SPA contain the following provisions:

> "(5) To the extent the development control plan includes a process for making and approving plans, however called, with which development must comply in addition to, or instead of, the planning scheme or provides for appeals against decisions under the plan—
>
> (a) the development control plan is, and always has been, valid; and
>
> (b) development under the development control plan must comply with the plans in the way stated in the development control plan; and
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> (c) if the development control plan states that an appeal may be made, and an appeal is made, the appeal is validly made.
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> …

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26 *Local Government and Other Legislation Amendment Act* 2001 (Qld) s 15.
27 SAF at [26]-[31]: AB1092-1093.
28 Ibid at [32]-[38]: AB1093-1096.
29 SPA s 764.
30 Ibid s 857(1).

(7) Subsection (5) applies even if the process mentioned in the subsection is inconsistent with chapter 6 or a guideline made under section 117(1)."

The SSP provisions

[29] Part 14 of the IPS 2006 contains detailed provisions. The SSP is to take precedence over any inconsistent provision elsewhere in the IPS 2006.[31] It acknowledges complementary agreements, including the Springfield Infrastructure Agreement, to which reference may be made in interpreting the SSP.[32]

[30] I have already referred to the substance of provisions relating to precinct plans and area development plans insofar as they are relevant. The role of the former is to show in some detail for the area to which it relates, matters such as the stormwater management system; the type of land uses proposed; the nature and intensity of the proposed uses; the proposed phasing of development, including infrastructure; and key development parameters.[33]

[31] The role of area development plans is to be the mechanism whereby the master planning in the SSP area is put into effect. They "function as reconfiguration or land use proposals to produce an integrated plan for the development of the particular area covered by the plan".[34]

[32] The mandatory provisions in ss 2.2.3.1, 2.2.4.3 and 2.2.4.1 of the SSP to which I have referred are expressed respectively as follows:

- "Prior to development being approved on any land within the Community Residential Designation or the Open Space Designation (excluding land not included in the Springfield Infrastructure Agreement) a Precinct Plan must be approved by Council for the precinct within which the land is situated. Precinct boundaries will usually be determined by physical constraints of the land and its proposed future development.

  A Precinct Plan will show in more detail for the area to which it relates …" (s 2.2.3.1);[35]

- "Prior to any development being carried out on the land the subject of this Structure Plan, an application must be made to the Council for approval of an Area Development Plan which includes the land to be developed.

  The area included in an application for approval of an Area Development Plan may be …" (s 2.2.4.3);[36]

- "… development of any land included within the Structure Plan area cannot take place … unless—

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31 SSP s 1.6: AB531.
32 Ibid s 1.8: AB532.
33 Ibid s 2.2.3.1: AB536-537.
34 Ibid s 2.2.4.1: AB541.
35 AB536.
36 AB541.

(i) there is an Area Development Plan over the land …; and

(ii) the development is shown on or consistent with the approved Area Development Plan. (s 2.2.4.1)"[37]

[33] The SSP does not state that before an area development plan may be approved, there must be an approved precinct plan for the subject land. However, an application for an area development plan may be refused if it does not accord with an approved precinct plan.[38]

[34] Section 2.4 of the SSP is concerned with tables of development and assessing development applications. In assessing an application for the approval of assessable development, the matters that the Council must assess include the extent to which the application is consistent with any approved area development plan which includes the subject land.[39]

[35] As the preamble to the SSP states, the structure plan had been amended to make it more consistent with the IDAS in order to make it easier to use and understand.

The decision at first instance

[36] The learned primary judge acknowledged that the SSP engaged the operation of ss 857(5) and (7) of the SPA.[40] Her Honour noted the presence of the word "must" in ss 2.2.3.1 and 2.2.4.3 in Part 14. She perceived a "tension" between what she described as the "imperative language" in those two provisions and the language in s 2.4.1, s 2.4.2 and the Tables of Development in Part 14 "that invoked the Integrated Development Assessment System process". Her Honour saw a role for ss 857(5) and (7) in assisting in resolving the tension.[41]

[37] The learned primary judge considered that the tension was to be resolved by making a choice between, on the one hand, "a literal interpretation" of ss 2.2.3.1 and 2.2.4.3, and, on the other, an interpretation "that would permit Cherish Enterprises to make a development application and have it assessed on its merits, subject to the risks inherent in the impact assessment process, including the need to justify approval of the development despite conflict with the applicable local planning instrument for the land".[42]

[38] Her Honour favoured the latter choice. She did so for the following reasons:

"[165] First, if an applicant has no right to make a development application using the Integrated Development Assessment System in the *Sustainable Planning Act 2009*, and to have it assessed and decided on its merits (including assessment of any issues of conflict with Part 14 or other applicable provisions of the Ipswich Planning Scheme 2006) the detailed provisions of the Tables of Development for the Community Residential Designation and Open Space Designation that

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37 Ibid.
38 SSP s 2.2.4.10.
39 Ibid s 2.4.1: AB548.
40 Reasons at [160].
41 Ibid.
42 Reasons at [163].

draw a clear distinction between development for purposes nominated on an approved Area Development Plan and development for which there is no relevant Area Development Plan would be otiose. At the hearing, neither Counsel for Council nor Counsel for Springfield Land Corporation could provide an explanation as to how those provisions could be given effect on the interpretation contended for by their clients.

[166] Second, each of s 6.l.45A(2) of the *Integrated Planning Act 1997* and s 857(5) of the *Sustainable Planning Act 2009* have the effect that, to the extent that the Springfield Structure Plan includes a process for making and approving plans within which development must comply in addition to, or instead of, the planning scheme, the Springfield Structure Plan is declared to be valid. Although the process is declared to be valid, development under the development control plan is only required to comply with the "*plans*" in the way stated in the development control plan. Development is not required to comply with the "*process for making and approving plans*".

[167] Compliance with the "*plans*", as opposed to the "*process for making and approving plans*", is achieved by electing to carry out development as authorised on an Area Development Plan. In this respect, s 2.2.4.2 in Part 14 of the Ipswich Planning Scheme 2006 provides that upon its approval, an Area Development Plan:

(a) authorises the reconfiguration of land covered by the Plan in the manner indicated on the Plan; or

(b) authorises the use of the land (or particular reconfigured parcels of the land) covered by the Plan for the purpose or purposes shown or nominated thereon, and if applicable at the location(s) or on the site or sites shown or nominated on the Area Development Plan, provided the use of the land is in compliance with the Table of Development relating to the respective Structure Plan designations.

…

[172] Third, an interpretation that permits a developer to either apply for approval of an Area Development Plan (and, to the extent necessary, a development permit) or apply under the Integrated Development Assessment System is one that appropriately reflects the legal and historical context. It effectively preserves the options that were present under the original Springfield Development Control Plan. As is noted in paragraphs [65] to [67] above, the Springfield Development Control Plan, while identifying a relatively detailed and specific planning intent, did not, and could not, affect the ability of a landowner to seek approval for any development on its land. It merely presented a statutory hurdle to an approval on the merits, namely the identification of sufficient

grounds to justify approving the application despite conflict with the development control plan.

[173] Fourth, as was acknowledged by Counsel for Springfield Land Corporation, the literal interpretation would prohibit any development, even self-assessable development, if there was not an approved Area Development Plan (and, on Springfield Land Corporation's interpretation, an approved Precinct Plan). It would also prohibit an application for development approval. When further submissions were made on 11 July 2017, Counsel sought to change position, instead suggesting the literal interpretation simply introduced an additional hurdle. This is difficult to accept given the hurdle is one that is greater than that which existed for prohibited uses under the *Local Government (Planning and Environment) Act 1990*. Under the *Local Government (Planning and Environment) Act 1990*, a landowner was permitted to make an application to Council to achieve development for a prohibited use: it could make an application for a rezoning approval."[43]

Consistently with those reasons, including the inference she drew that in seeking development approval, a developer may elect between the SSP process and the Chapter 6 process (s 242), her Honour made the declaration to which I have referred.

The proposed grounds of appeal

[39] Springfield's proposed notice of appeal[44] lists the following grounds of appeal:[45]

"The Primary Judge erred in:

a. finding the provisions of cll 2.2.3 and 2.2.4.3 of Part 14 of the Ipswich Planning Scheme to be 'prohibitions' for the purposes of ss 2.1.23 and 6.l.9(3A) of the *Integrated Planning Act* 1997 (**IPA**);

b. finding that those provisions of IPA rendered ineffective those parts of cll 2.2.3 and 2.2.4.3 which her Honour considered constituted prohibitions, despite those clauses [having] taken effect by force of transitional provisions;

c. failing to find that Part 14 of the Ipswich Planning Scheme was the fundamental planning control on development within the area covered by that Part and prevailed to the extent of any inconsistency over other provisions of the Ipswich Planning Scheme;

d. finding that the First Respondent was at liberty to elect to pursue planning controls outside Part 14 of the Ipswich Planning Scheme;

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43 Footnotes omitted.

44 Ex AJM–3 to Affidavit of A J McDonnell filed 22 August 2017: AB1355-1359.

45 AB1356-1357.

e. failing to find that s 86 of *Sustainable Planning Act* 2009 (Qld) (**SPA**), s 316 of the *Planning Act* 2016 and s 23 of the Statutory Instruments Act 1992 had the effect of adopting Part 14 of the Ipswich Planning Scheme, and giving it effect on the terms of that Part;

f. finding that the First Respondent's development application could be assessed, approved and acted upon in the absence of:

(i) an approved precinct plan;

(ii) any application for an area development plan."

The substantive relief sought by Springfield is that the appeal be allowed; that the orders made on 14 July 2017 be set aside; and that there be a declaration that approval of a precinct plan and an area development plan by the Council are necessary preconditions to the assessment and approval of Cherish's development application.

[40] The Council's proposed notice of cross appeal relies on a different ground of appeal, namely:[46]

> "On the proper construction of s857(5) of the *Sustainable Planning Act 2009* (Qld) (**SPA**) and its proper application to the Springfield Structure Plan, the primary judge erred in law in making a declaration that:
>
> *"...Cherish Enterprises Pty Ltd is entitled to have its development application assessed and decided and it may carry out development on the land to the extent authorised by any approval even though:*
>
> ...
>
> *(c) no Area Development Plan has been approved by Ipswich City Council under s 2.2.4.1 of the Springfield Structure Plan."*
>
> (**declaration (c) made by the primary judge**), in that:
>
> (a) the Springfield Structure Plan includes a process at s2.2.4 for making and approving Area Development Plans with which development must comply; and
>
> (b) development under the Springfield Structure Plan must, under s857(5)(b) of SPA, comply with an Area Development Plan in the way stated in s2.2.4.1 of the Springfield Structure Plan."

The Council seeks as substantive relief that declaration (c) be set aside and that, in lieu, it be declared that approval of an area development plan under the SSP is a necessary pre- condition to the assessment and approval of Cherish's development application.

[41] Springfield's grounds of appeal requires a resolution of whether the learned primary judge erred with respect to three issues:[47]

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46 AB1363-1364.

47 Council's Amended Outline of Argument at [8].

1. How are ss 857(5) and (7) of the SPA to be construed and applied?

2. Does the SSP engage s 857(5) by providing a process for making and approving area development plans with which development must comply?

3. Does the SSP engage s 857(5) by providing a process for making and approving precinct plans with which development must comply?

[42] The submissions of the Council and Springfield on Issues 1 and 2 are similar. They differ as to Issue 3. Issue 1 is critical to the challenge to the judgment below.

[43] I mention at this point that in its written submissions, Cherish sought to uphold the approach of the learned primary judge to these issues. However, in oral submissions, it relied primarily on a different argument to which it alluded, but did not elaborate, below.[48] That argument is addressed after discussion of the three issues to which I now turn.

Issue 1: The construction and application of ss 857(5) and (7) of the SPA

[44] I do not propose to set out the respective arguments of the parties on this issue. It is unnecessary to do so, particularly in light of the approach taken by Cherish in oral submissions.

[45] Sections 857(5) and (7) are expressed in grammatically clear language. They are not ambiguous. Nor do they conflict with other provisions of the SPA. The meaning that these provisions have is one that accords with the grammatical meaning of the language in which they are expressed.[49]

[46] So construed, s 857(5) requires ascertainment of whether a qualifying development control plan (as the SSP is) includes a process or processes for making and approving plans, however called, with which development must comply, in addition to, or instead of, the planning scheme.[50] By operation of this provision, the development control plan is, and always has been, valid in respect of that process or those processes and, further, development under the development control plan **must** comply with a plan or plans so made and approved, in the way stated in the development control plan. Significantly, by operation of s 857(7), any such process applies even if it is inconsistent with Chapter 6 of the SPA. An obvious inconsistency here relates to area development plans for which Chapter 6 makes no provision.

[47] The validated process for making and approving an area development plan stipulates that an application must be made for such a plan before any development is carried out on land and that development of land cannot take place unless there is an area development plan over the land.[51] That being so, I am unable to agree with the observation of the learned primary judge that a developer has an option whether

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48 Submissions of Applicant: AB1113 at [15](b), [16].

49 *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 per McHugh, Gummow, Kirby and Hayne JJ at [78]; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 per Gibbs CJ at 304-305.

50 The SSP is "in addition to" the IPS 2006 because s 86 of the SPA states that it is "not incorporated into the text of the planning scheme itself" but may be adopted by it as an adopted DCP to which s 857 applies.

51 SSP ss 2.2.4.3 and 2.2.4.1 respectively.

to apply for an area development plan[52] and that it is only if that option is exercised and such a plan is made and approved, that development must comply with it.

[48] The task required of the learned primary judge was to apply those provisions according to that construction of them. Her Honour did not undertake such a task. She did, correctly, identify that ss 2.2.3.1 and 2.2.4.3 of the SSP are each a provision about a process for making and approving plans. However, she did not then proceed to apply ss 857(5) and (7) to them. The enduring validity of the SSP in respect of those processes to which s 857(5) applied was not expressly acknowledged. Nor was recognition given that s 857(5)(b) mandated that development under the SSP must comply with plans approved under such processes in the way stated in the SSP.

[49] Had the learned primary judge undertaken this task, she would have begun with identifying processes to which s 857(5) applied and then applied the provision to them. Instead, her Honour engaged in an exercise through which she reasoned to a result that deprived any process to which s 857(5) applied, and the plans for which it provided, of any application. That result defied the express terms of that provision and is untenable. Unsurprisingly, Cherish did not seek to uphold it with any vigour.

[50] I would add that the exercise was, in itself, flawed in that it proceeded upon perceived tensions between ss 2.2.3.1 and 2.2.4.3, on the one hand, and the IDAS process as it had been accommodated in amendments to the SSP, on the other. Springfield, in its submissions, has challenged the perceived tensions as exaggerated. It is unnecessary to address those submissions. It is sufficient to observe that the perception was an impermissible starting point given the express terms of s 857(7) in according primacy to s 857(5) over Chapter 6.

Issue 2: Area development plans

[51] Section 2.2.4 of the SSP contains a process for making and approving area development plans. Its sub-sections detail the process for making plans with which development must comply.[53] This process was declared to be valid and always to have been so by s 857(5)(a).

[52] Section 2.2.4.3 is part of this process. Hence, prior to any development being carried out on land subject to the SSP, an application must be made to the Council for approval of an area development plan applicable to it.

[53] Further, insofar as an area development plan states how development may be undertaken under it, then development so undertaken must comply with the plan. That, clearly, is required by s 857(5)(b).

Issue 3: Precinct plans

[54] The learned primary judge held that s 2.2.3.1 of the SSP did not include a process for the making and approval of plans with which development was required to comply.[54] It was correct for her Honour to have so held in my view.

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52 Reasons at [166], [167].

53 Note particularly SSP s 2.2.4.1, which requires that development be shown on, or consistent with, the approved area development plan.

54 Reasons at [114]–[116].

[55] Under s 2.2.3.1, a precinct plan is a prerequisite to approval for development of any land within the Community Residential Designation or the Open Space Designation. However, the SSP does not state any relevant way in which development must comply with a precinct plan. In this respect, the s 2.2.3.1 provisions differ from the SSP provisions concerning area development plans.

[56] It follows that ss 857(5) was inapplicable to the process in the SSP for making and approving precinct plans. Thus, the provisions of that subsection do not apply to that process.

Conclusions on issues 1, 2 and 3

[57] For the reasons given in the course of discussing these issues, I conclude that the declaration made by the learned primary judge cannot be sustained in respect of paragraph (c) thereof. To the contrary, if Cherish's development application is one that may only be made under the SSP, then Council approval of an area development plan for the Land is a prerequisite to any approval of the application.

Cherish's additional argument

[58] At the hearing of the appeal, Cherish sought to support the declarations under challenge with an argument that, as I have noted, was not elaborated in the court below. It submitted that there is no inconsistency between the provisions of Chapter 6 of the SPA under which the development application was made (i.e. ss 241 and 242), and the approval process under the SSP which is preserved by ss 857(5) and (7).[55] It was further argued that s 857 of the SPA did nothing to take away from Cherish's entitlement to make an application for preliminary approval under s 242 of the SPA to vary the effect of the planning instrument so as to dispense with the requirements under the SSP for a precinct plan and an area development plan. This argument is correct in part only.

[59] As I have already observed, the inconsistency between the requirement in the SSP for an area development plan to be in existence before any development can "take place" and the provisions of Chapter 6 is obvious; such a requirement is something "with which development must comply" within the meaning of s 857(5) of the SPA and Chapter 6 contains no such requirement. In this regard, it does not matter whether the SSP requirement is "in addition to, or instead of, the planning scheme"; what matters is that it is part of the "process for making and approving plans" under the SSP with which the development must comply. There is accordingly a direct inconsistency between what might otherwise be presumed to be an entitlement under ss 241 and 242 of the SPA to make application to the Council to vary the effect of the SSP so as to dispense with the requirement for an area development plan and s 857(5) which preserves that very requirement, that is to say, that "development of any land included within the Structure Plan area cannot take place … unless … there is an Area Development Plan over the land to be developed which has been approved by Council" (s 2.2.4.1 of the SSP). By s 857(7), the former is trumped by the latter.

[60] The same, however, cannot be said of the requirement under the SSP for a precinct plan to be approved before any development is "approved by Council". As, again,

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55 AT1-40 l.34 – AT1-41 l.23.

I have already observed, although that requirement is part of the "process for making and approving plans" under the SSP, it is not a requirement with which development must comply and, for that reason, s 857(5) of the SPA has no application to it.

[61] It follows that while Cherish was entitled to apply under ss 241 and 242 of the SPA to vary the effect of the SSP to dispense with the requirement for a precinct plan, it was not entitled to do the same in relation to the requirement for an area development plan.

[62] For completeness, I would add, at the risk of some repetition, the following:

(a) The learned primary judge decided that development under the SSP is required to comply only with the "plans" in the way stated in the SSP, but is not required to comply with the "process for making and approving plans". Another way of expressing the same conclusion would be to say that compliance with the "plans" will be required under s 857(5)(b) of the SPA only if and when plans are approved under the SSP. I cannot agree. Such a construction ignores the plain words of s 857(7) which give primacy to the process for making and approving plans over the provisions of, relevantly, Chapter 6 of the SPA, and otherwise overlooks that the "plans" to which reference is made in s 857(5)(b) must necessarily be the product of that process;

(b) It is correct to submit, as Cherish did,[56] that the SSP is to be read with the SPA,[57] but the mere existence of a general mechanism within that statute to vary the effect of a planning instrument (ss 241 and 242) cannot overcome specific provisions in the same statute which preserve the part of the planning instrument that is sought to be varied (s 857(5)) and, further, explicitly does so even if inconsistent with the general mechanism (s 857(7));

(c) Cherish argued that an application (like the relevant part of its own)[58] for preliminary approval to vary the effect of the SSP could not be characterised as an application for "development under the development control plan" within the meaning of s 857(5)(b) of the SPA[59] and, for that reason, that such an application was not precluded by the terms of that provision.[60] The problem with that argument is that, like the points just considered (in (a) and (b) above), s 857(5) preserves the process for making and approving plans for the development of land under the SSP; a process which prevails over anything that appears in Chapter 6. There is consequently no room for the process to be varied; and

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56 Outline of Oral Argument on behalf of Cherish at [4].

57 SSP s 2.4.

58 The application made by Cherish was not solely concerned with a proposed variation of the SSP. As the learned primary judge recorded, Cherish made application to "vary the effect of the planning scheme for a material change of use, reconfiguring a lot and operational work". As such, it was a "development application" as that expression is defined in Schedule 3 of the SPA. Also, in at least the second and third respects recorded by her Honour, it concerned "development" as defined in s 7 of the SPA (to include, relevantly, "carrying out operational work" (s 7(c)) and "reconfiguring a lot" (s 7(d)), which expressions are further defined in s 10).

59 AT1-42 l44 – AT1-43 l16. See also Further Outline of Argument on behalf of Cherish (responding to the Outline of Argument delivered on behalf of the Council) at [11] and [12].

60 AT1-43 ll10-16.

(d) Cherish made the point that, prior to the advent of the Ipswich Planning Scheme 2004, it could have made application to exclude the operation of the then development control plan with respect to the Land, either as a rezoning application under the LGPEA or, from March 1998 to 2004, an equivalent application under the IPA.[61] It was then submitted that there "was nothing in SPA s 857 that tells against" the making of an "impact assessable application for preliminary approval of the kind contemplated by SPA s 242".[62] For the reasons just discussed, that is not so. The position under previous statutory regimes is immaterial.

Disposition

[63] For these reasons, there is merit in both the appeal and the cross appeal. I would grant Springfield leave to appeal and the Council leave to file the cross appeal. Further, I would allow both the appeal and cross appeal. The declaration made at first instance should be set aside and, in lieu, it should be declared that approval of an area development plan under the Springfield Structure Plan is a necessary pre-condition to the assessment and approval of the development application lodged on behalf of Cherish with the Council on or about 17 March 2016. The Originating Application ought otherwise be dismissed.

[64] As to costs, I think it desirable that each party have the opportunity to make short written submissions, once they have had the opportunity to consider these reasons.

Orders

[65] I would propose the following orders:

1. Grant the applicant leave to appeal.
2. Grant the second respondent leave to file a cross appeal.
3. Allow the appeal and the cross appeal.
4. Set aside the declaration made in the Planning and Environment Court on 14 July 2017.
5. Substitute the following:
   (i) It is declared that approval of an area development plan under the Springfield Structure Plan is a necessary pre-condition to the assessment and approval of the development application lodged on behalf of Cherish Enterprises Pty Ltd with the Ipswich City Council on or about 17 March 2016;
   (ii) The Originating Application is otherwise dismissed.
6. The parties may make written submissions with respect to costs of the appeal, such submissions to be made in each case no later than 10 days after the publication of these reasons and not to exceed two pages.

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61 Amended Outline of Argument behalf of Cherish at [26]; Further Outline of Argument on behalf of Cherish (responding to the Outline of Argument delivered on behalf of the Council) at [10], [26].

62 Further Outline of Argument on behalf of Cherish (responding to the Outline of Argument delivered on behalf of the Council) at [12].

[66] **BURNS J:** I agree.