SUPREME COURT OF QUEENSLAND

CITATION:	*Gold Coast City Council v K & K (GC) Pty Ltd* [2019] QCA 132
PARTIES:	**GOLD COAST CITY COUNCIL** **(applicant)** **v** **K & K (GC) PTY LTD ACN 154 560 648 AS TRUSTEE FOR K & K FAMILY TRUST** (respondent)
FILE NO/S:	Appeal No 4089 of 2018 P & E Appeal No 20 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2018] QPEC 9 (Kefford DCJ)
DELIVERED ON:	28 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	20 August 2018
JUDGES:	Sofronoff P and Fraser JA and Flanagan J
ORDERS:	**1. Leave to appeal is granted.** **2. Appeal allowed.** **3. The orders made on 29 June 2018 are set aside.** **4. The matter is remitted to the Planning and Environment Court to be determined according to law.** **5. The respondent pay the appellant's costs of this appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENT PLANNING – DEVELOPMENT CONTROL – MATTERS FOR CONSIDERATION OF CONSENT AUTHORITY – CONSIDERATION OF PARTICULAR MATTERS – PUBLIC INTEREST – where the respondent applied to the applicant for a material change of use permit to develop land within the Detached Dwelling Domain of the 2003 Planning Scheme to build a service station, convenience store, take-away food premises and a fast food drive through premises – where the proposed uses of a cafe and fast food premises conflict with the Planning Scheme and "should be considered as undesirable or inappropriate" – where, under s 326(1)(b) of the *Sustainable Planning Act* 2009 (Qld), the applicant may approve uses that conflict with the Planning Scheme provided

there are sufficient matters of public interest to justify the approval – where the applicant refused the respondent's application – where the respondent appealed that decision to the Planning and Environment Court on the basis that, *inter alia*, there was a 'need' for the proposed development – where the learned judge allowed the appeal having been satisfied that the extent of the need for the proposed development was sufficient to justify approval despite its conflict with the Planning Scheme – whether it is in the public interest to maintain the terms of the Planning Scheme unless the contrary is demonstrated – whether the respondent identified how the asserted 'need', or satisfaction of such a need, constituted a matter of public interest – whether the Planning and Environment Court applied the statutory requirements under s 326(1)(b) of the *Sustainable Planning Act* 2009 (Qld)

Local Government (Planning and Environment) Act 1990 (Qld), s 4.3(2)(c), s 4.4(3), s 4.4(5A)(b) (repealed)
Sustainable Planning Act 2009 (Qld), s 326(1)(b), s 759 (repealed)

Australian Capital Holdings Pty Ltd v Mackay City Council [2008] QPELR 608; [2008] QCA 157, distinguished
Bell v Brisbane City Council [2018] QCA 84, applied
Grosser v Council of the City of Gold Coast (2001) 117 LGERA 153; [2001] QCA 423, distinguished
Lockyer Valley Regional Council v Westlink Pty Ltd [2013] 2 Qd R 302; [2012] QCA 370, cited
Luke v Maroochy Shire Council [2003] QPELR 447; [2003] QPEC 5, explained
Noosa Gateway Pty Ltd v Noosa Shire Council [2005] QPELR 44; [2004] QPEC 34, distinguished
O'Sullivan v Farrer (1989) 168 CLR 210; [1989] HCA 61, cited
Rintoul v Brisbane City Council [2013] QPELR 900; [2013] QPEC 47, explained
Weightman v Gold Coast City Council & Anor [2003] 2 Qd R 441; [2002] QCA 234, distinguished
William McEwans Pty Ltd v Brisbane City Council [1981] QPLR 33, distinguished
Woodman McDonald Hardware Pty Ltd v Mackay Regional Council (2013) 198 LGERA 252; [2013] QPEC 21, explained

COUNSEL: G Gibson QC, with J Ware, for the applicant
D R Gore QC, with J G Lyons, for the respondent

SOLICITORS: HopgoodGanim for the applicant
Connor O'Meara for the respondent

[1] **SOFRONOFF P:** The Gold Coast City Council applies for leave to appeal a decision of the Planning and Environment Court. For the reasons which follow leave to appeal should be granted and the appeal should be allowed.

[2] The respondent, K & K (GC) Pty Ltd ("K&K") applied for a development permit for a material change of use. K&K is the owner of land at Southport that is bounded by Skiff Street on its northern boundary, Ferry Road on its western boundary and by York Street on its southern boundary and contains an area of 3038m^2. Ferry Road is a six lane divided highway. To the west of the land the area is residential for almost a kilometre until it reaches the banks of the Nerang River. Similarly, along Skiff Street and York Street there are detached dwellings and a two-storey multiple dwelling complex. This area, although predominantly residential, does contain some non-residential uses. These include a sleep therapist, a business broker, a hypnotherapist, a real estate agency and an orthodontist. There is a strip containing commercial uses on the western side of Ferry Road. Directly opposite the land with which this appeal is concerned there is a shopping centre that contains cafes, retail tenancies and other services: a BP Service Station, the Ferry Road Tavern, a Toyota car dealership, bottle shops and coffee shops.

[3] K&K wants to build a service station on its land. It wants to include within that development a convenience store, take-away food premises and a fast food drive through premises. The service station would have three bowser positions to serve six cars at a time. The convenience store would have a gross floor area of about 200m^2. The fast food premises would have an area of about 80m^2 and an additional external area of 20m^2 for outdoor dining. The take-away food premises would have 100m^2. There would be 21 car park spaces and nine bicycle spaces. The building heights would range between 5.5m and 6m, and signage associated with these businesses would rise to 7.25m. It is intended that the service station and convenience store would operate 24 hours a day and seven days a week. The drive through and take-away food premises would operate between 6.00 am and 10.00 pm on week days and during lesser periods on Sundays and Public Holidays. Vehicular access would be from Skiff Street and Ferry Road. Acoustic fences would be erected parallel with the Skiff Street frontage and with the York Street frontage.

[4] The Council refused the application and K&K appealed to the Planning and Environment Court. Its appeal was allowed. The Council now seeks leave to appeal that decision.

[5] It is common ground that the now-repealed *Sustainable Planning Act* 2009 (Qld) ("the SPA") applies to this appeal. K&K's application was impact assessable and had to be assessed against the *Gold Coast City Planning Scheme 2003* ("2003 Planning Scheme").

[6] Section 326(1)(b) of the SPA is at the centre of the dispute. It provides as follows:

> "**326 Other Decision Rules**
>
> (1) The assessment manager's decision must not conflict with a relevant instrument unless –
>
> (a) …
>
> (b) There are sufficient grounds to justify the decision, despite the conflict …"

[7] The term "grounds" is defined in the SPA to mean "matters of public interest".

[8] The Council asserted, and K&K accepted, that the proposed development conflicts with the 2003 Planning Scheme. The conflict arises as follows. The 2003 Planning Scheme establishes "Domains". Each Domain established under the Scheme contains "an intent statement" which sets out the "primary objectives" for the land within a particular Domain. The Scheme contains a Table of Development that lists land uses that are to be "considered as appropriate for the Domain to which the Table of Development applies".[1]

[9] Any use that is not listed in Section A of the Table of Development "should be considered as undesirable or inappropriate" in that Domain.[2] The "Detached Dwelling Domain" provides for low density residential areas that consist predominantly of low rise, detached dwellings "in a garden landscape". Part 5 Division 2 Chapter 4 Clause 1, states that:

> "It is intended to preserve and enhance the suburban character and residential amenity of these low density residential neighbourhoods."

[10] K&K's land lies within the Detached Dwelling Domain. A service station and a convenience store appear in Section A of the Table of Development as impact assessable developments. However, K&K also wishes to include within its development a cafe and fast food premises which would include take-away food services. These are defined terms. Part 4 of the 2003 Planning Scheme contains definitions of these terms as follows:

> "**Cafe**
>
> Premises in which refreshments or meals are served to the public for gain, but where alcohol is not consumed, dancing is not performed, and only one person may provide live entertainment. This term does not include a Restaurant or Tavern."
>
> "**Fast Food Premises**
>
> Any premises used, or intended to be used, for the sale to the public of prepared food, which is ready for immediate consumption, and which is packaged so that it can be taken and consumed away from the site; where the premises include a drive through take-away facility. This term includes the provision of ancillary facilities for the consumption of the food on the premises. This term does not include a Restaurant, Café, Take-Away Food Premises, Convenience Shop, or Shop."

[11] These uses are not included in the Table of Development pertaining to the Detached Dwelling Domain, and as a consequence, such uses "should be considered as undesirable or inappropriate" in that Domain.[3] As a result, a decision to approve the proposed development which includes these uses conflicts with the 2003 Planning Scheme. It follows that, pursuant to s 326(1)(b) of the SPA a decision to approve K&K's application must not be made unless there are sufficient matters of public interest to justify that approval despite the conflict.

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1 2003 Planning Scheme pt 5 div 1 ch 2 cl 4.0 sub-cl 4.6.1.
2 *ibid*.
3 *ibid*.

[12] The Council based its original refusal dated 12 December 2016 upon eight asserted conflicts between the proposed development and various parts of the 2003 Planning Scheme. The Council claimed that there were conflicts with "various Desired Environmental Outcomes", "Performance Outcomes", "Purposes", "Intents", and with the "Reasonable Expectations of the Community". The Council alleged that K&K had not demonstrated sufficient grounds or matters of public interest to justify a decision to approve the development despite these conflicts.

[13] By a document entitled "Respondent's Further or Amended Issues", dated 12 May 2017, the Council expanded its response to add further conflicts that it claimed existed. These included conflicts with the new *Gold Coast City Plan 2016* ("2016 City Plan") which had supplanted the 2003 Planning Scheme.

[14] K&K delivered a document entitled "Appellant's Sufficient Grounds" and it is desirable to set it out in full:

> "1. There is a need for the proposed development.
>
> 2. The proposed development can meet the need in circumstances where:
>
> 2.1 it will be conveniently located to serve the public;
>
> 2.2 it will be readily accessible in the road network;
>
> 2.3 there will be no unacceptable impacts on amenity; and
>
> 2.4 it is consistent with community expectations.
>
> 3. The proposed development will enhance the physical well being of the community in that it will provide additional choice for the convenience of residents and travellers.
>
> 4. The proposed development will not jeopardise the economic viability of existing or planned centres or service stations.
>
> 5. The proposed development will ensure appropriate utilisation of the land, in circumstances where it is currently vacant.
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> 6. Approval of the proposed development will not compromise the achievement of the Desired Environmental Outcomes of the *Gold Coast City Planning Scheme 2003* or the Strategic Framework of the *Gold Coast City Plan 2016* and otherwise complies with a substantial number of provisions in the planning schemes.
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> 7. The proposed development exhibits a high quality of design, including appropriate setbacks, in a way which adds to the amenity and character of the locality in a positive way.
>
> 8. The proposed development will not result in any discernible impacts, including adverse character and amenity impacts, on surrounding land uses or otherwise.
>
> 9. The proposed development is consistent with building height and bulk of other development in the locality."

[15] On 7 December 2017, the Council expanded its grounds of resistance to the application by adding to its document further references to the 2016 Planning Scheme in the form to which it had recently been amended on 3 July 2017. These new allegations raised further conflicts with "Purposes", "Overall Outcomes" and "Performance Outcomes".

[16] The trial began on 6 November 2017 and continued until 10 November 2017. The Council made yet another amendment to its position on 7 November 2017. Its new document headed "Respondent's Points of Refusal", reduced the grounds of conflict to 15 paragraphs (not including subparagraphs) from the previous 32 paragraphs. For the first time, the Council alleged:

> "1. For the reasons pleaded below, the proposal should be refused because:
>
> (a) the proposal is in direct and significant conflict with the Gold Coast Planning Scheme 2003 (**2003 Planning Scheme**);
>
> (b) there are not sufficient grounds to justify the proposal despite the conflict;
>
> (c) further, and in any event, significant and overwhelming weight ought be given to the Gold Coast City Plan (**2016 City Plan**) pursuant to s495(1) of SPA ~~and the proposal fundamentally cuts across and undermines the planning intention in that document.~~
>
> **Conflicts with the 2003 Scheme**
>
> 2. **Conflict 1: Expressly stated undesirable uses:**
>
> The proposal includes a drive through Fast Food Premises (to operate 6am to 8pm Monday to Saturday, and 7am to 8pm on Sundays and public holidays) and a Take-Away Food Premises (to operate 6am to 10pm every day) in circumstances where:
>
> (a) such uses are not listed in Section A of the Table of Development for the Detached Dwelling Domain and the Residential Choice Domain (which apply to the subject land);
>
> (b) by reason of s4.6.1 of Part 5, Division 1, Chapter 2 of the 2003 Scheme, the uses are to be "*considered as undesirable or inappropriate*" (Exhibit 11, page 97);
>
> (c) accordingly, there is conflict with s4.6.1 of Part 5, Division 1, Chapter 2 of the 2003 Scheme."

[17] In addition, it raised the following further matters:

> "7. **Conflict 6: No demonstrated need**.
>
> The proposal conflicts with PC12 of the 2003 Service Station Code because there is not a demonstrated need for the service station at the subject location.

Insufficient grounds despite the conflict

8. The proposal is contrary to the reasonable expectations of the community having regard to the significant number of objections lodged against the proposal.

9. The proposal cannot be conditioned to satisfactorily mitigate the conflicts against the 2003 Scheme.

10. The Appellant has not demonstrated that there are sufficient grounds to justify a decision to approve the proposal despite the conflicts.

11. There are no matters of public interest that would justify a decision to approve the proposal despite despite [*sic*] the conflicts."

[18] As I have said, K&K accepted that its proposed development would conflict with the 2003 Planning Scheme because of the inclusion of the fast food premises and take-away premises. Accordingly, Kefford DCJ found that a conflict existed. Her Honour said that pt 5 div 1 ch 2 cl 4.0 sub-cl 4.6.1 of the 2003 Planning Scheme, which declares uses that do not appear in the Table of Development to be undesirable or inappropriate "indicates a clear policy that take-away food premises and fast food premises not be located" in the relevant Domain.[4] Her Honour correctly observed that this exclusion was a "deliberate" strategy on the part of the Council.[5] Her Honour held that the resulting conflicts were not "simply technical or trivial, but, by reason of their being the result of an 'evident policy intention', were at the more serious end of the spectrum".[6]

[19] Her Honour then said:

> "[233] Here, the serious conflict occasioned by the proposal for take-away food premises and fast food premises uses, being categories of uses generally regarded as inappropriate, is significantly reduced because the proposed development:
>
> (a) would not result in material adverse amenity impacts;
>
> (b) does not conflict with the Detached Dwelling Domain Code, the Residential Choice Domain Code or the Retail and Related Establishments Code (being the specific development code applicable to take-away food premises and fast food premises);
>
> (c) in accordance with the Service Station Code:
>
> (i) will provide a service station at a suitable location;
>
> (ii) will ensure that a service station is established to meet the needs of local residents, visitors and travellers through convenient points of service;
>
> (iii) is on a site of sufficient area; and

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4 Reasons, at [205].
5 Reasons, at [206].
6 Reasons, at [231].

(iv) will be a modern, attractive service station in its appearance and design."

[20] By paragraph [7] of its final "Respondent's Point of Refusal" document the Council put in issue whether there was a "demonstrated need for the service station at the subject location". The expression "demonstrated need" is taken from Performance Criterion 12 contained in pt 7 div 2 ch 31 cl 3 of the 2003 Planning Scheme. That criterion concerns service stations and requires that a service station "must be in a location where there is a demonstrable need for the Service Station use".

[21] K&K's brief document stating "sufficient grounds" asserted four categories of issues:

(a) Need – paragraphs [1]-[4];

(b) An allegation that the land would be used appropriately – paragraph [5];

(c) An allegation that the development complies with a "substantial number of provisions in the Planning Scheme" and would "not compromise" certain identified parts of the 2003 Planning Scheme and 2016 City Plan – paragraph [6];

(d) An assertion that, by reason of its design and building character, the development would not have any specific negative effects upon amenities – paragraphs [7]-[9].

[22] There was no allegation to explain how any of these matters constituted "matters of public interest".

[23] For its part, in its lengthy Statements of Issues the Council detailed the many ways in which it alleged that the proposed development would conflict with the various instruments and then alleged simply that K&K "has not demonstrated that there are sufficient grounds to justify a decision" and that "[t]here are no matters of public interest that would justify a decision to approve".[7]

[24] Having joined issue on the question of "need", each side led evidence from an expert witness on this subject. K&K's expert, Mr Gavin Duane, was of the opinion that there was a "clear and strong level of economic need for the proposed facility".[8] The Council's expert, Mr Peter Lyshon, thought that there was "a low level of need for the proposed service station and no significant need for the proposed convenience retail facility and fast food outlets".[9]

[25] Kefford DCJ found that the "extent of the need [for a service station] is greater than the extent assessed by [the Council's expert] Mr Leyshon …" but found that the need was not "a strong need, as opined by [K&K's expert] Mr Duane".[10] Her Honour found that there was a need for take-away food premises and fast food premises[11] and for a convenience store.[12]

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7 Respondent's Second Amended and Further Issues document dated 7 September 2017, at [31] and [32].
8 Appeal Record Book ("ARB"), at 675.
9 *ibid*.
10 Reasons, at [327].
11 Reasons, at [328].
12 Reasons, at [329].

[26] Her Honour concluded:

> "[330] I am satisfied that the extent of need for the proposed development is sufficient to demonstrate compliance with performance criterion PC12 of the Service Station Code and to justify approval of the proposed development given the nature and extent of the conflict identified."

[27] Her Honour dealt with the many other issues raised by the Council, as well as the other grounds raised by K&K. It is not necessary to deal with those aspects of her Honour's decision for the purposes of this appeal.

[28] Grounds 1 and 2 in the Council's appeal raise a question about the correctness of her Honour's approach in determining the scope of the conflict that invoked the application of s 326(1)(b) of the SPA. Having found that the admitted conflict between the proposal and the 2003 Planning Scheme was "at the more serious end of the spectrum", her Honour concluded that the degree of conflict was "significantly reduced" because of certain factors that she identified. These matters included the effect of the development upon noise, air and lighting, its effect upon the character and visual amenity of the immediate locality, its effect upon traffic and the general amenity of the area, as well as other matters. The Council submits that, as a matter of principle, the "level of conflict with such a binary provision cannot be reduced by other considerations".

[29] Ground 3 of the appeal contends that her Honour erred in holding that the need for the proposed development was sufficient, together with the other grounds, to justify approval of the development application despite the conflict.

[30] Grounds 4 and 5 raise the contention that her Honour misconstrued the definition of "Neighbourhood Centre" and that her error infected the exercise of discretion.

[31] Grounds 6 to 10 contend that her Honour failed to appreciate the weight that should have been given to 2016 City Plan, which has supplanted the 2003 Planning Scheme.

[32] This appeal depends upon the issue for decision that the statute raises.

[33] Section 326(1)(b) of the SPA has a predecessor in s 4.4(5A)(b) of the *Local Government (Planning and Environment) Act* 1990 (Qld) ("LGPEA") but the LGPEA used the expression "planning grounds" instead of the defined expression "grounds". This Court in *Weightman v Gold Coast City Council & Anor* considered the meaning of the earlier provision.[13] Atkinson J, who wrote the leading judgment, said that the process under the provision was as follows:

> "[36] In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s 4.4(5A)(b) of the P & E Act, the decision maker should:
>
> 1. examine the nature and extent of the conflict;

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13 [2003] 2 Qd R 441.

2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict can be justified on those planning grounds;

3. determine whether the planning grounds in favour of the application as a whole, are, on balance, sufficient to justify approving the application notwithstanding the conflict."

[34] McMurdo P agreed with the reasons of Atkinson J. De Jersey CJ agreed with the content of paragraph [36] of Atkinson J's reasons but dissented in the result.

[35] The expression "planning grounds" has been held to mean "grounds which would establish positive betterment in terms of planning outcomes".[14] The SPA required there to be "sufficient matters of public interest" to justify a decision. There must be, therefore, matters of public interest and those matters must be "sufficient" to justify the decision.

[36] It has been said that the expression "matters of public interest" has a wider scope than "planning grounds".[15] That is undoubtedly true. Although planning grounds would always serve the public interest, matters of public interest might be constituted by matters that are not planning grounds.

[37] The expression "in the public interest", when used in a statute, imports a discretionary value judgment to be made by reference to factual matters confined only by the subject matter, the scope and the purpose of the statutory enactment.[16] The range of matters that can, potentially, be included within the scope of "matters of public interest" is very wide[17] although the particular legislation in which the expression appears will enable some matters to be regarded as definitely extraneous to any objects the legislature could have had in view.[18]

[38] Section 759 of the SPA empowers the Minister to make guidelines about the matters to be considered when deciding whether there are sufficient grounds to justify a decision under s 326. A set of such guidelines was made and the guidelines were published on 11 December 2009. Five matters were listed as "matters that may be considered when determining whether there are sufficient grounds to justify a decision that conflicts with a relevant instrument". They are:

"(a) The relevant instrument is out of date because, for example, the construction of a new railway station has enabled land previously intended for low density residential development to sustain a higher density or because a Planning Scheme is now inconsistent with current design principles, methods for addressing climate change or demographic shifts;

(b) The relevant instrument is incorrect because, for example, a Scheme was based upon an assumption of low growth but that assumption has been falsified or "constraint mapping in the Planning Scheme does not reflect the physical site circumstances";

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14 *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 302, at [24].

15 *Ibid*., at [25].

16 *O'Sullivan v Farrer* (1989) 168 CLR 210, at 216 per Mason CJ, Brennan, Dawson and Gaudron JJ.

17 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, at [42] per French CJ, Gummow, Hayne, Heydon, Crennan and Bell JJ.

18 *O'Sullivan v Farrer*, *supra*, at 216.

(c) The relevant instrument inadequately addressed development, for example, because a proposal involves alternative technologies and ideas that are still in the research and development stage or that are not yet established in common practice;

(d) The relevant instrument does not anticipate specific or particular development because the proposed development may be of international, national, state or regional significance and may not have been anticipated, such as a large infrastructure development proposed for an area envisaged to be residential;

(e) There is an urgent need for the proposal, such as an undersupply of residential care accommodation such that there is likely to be a significant shortfall in the next five years and, although changes to the Scheme are being studied, finalisation of any changes would unduly delay the delivery of the need for accommodation."

[39] It can be seen that the kinds of factors identified in the guidelines are matters that are, by their nature, capable of overriding the intent of a Planning Scheme, or capable of overriding a conflict with particular provisions contained within it, because they are matters that are *now* said to justify an exception to the Scheme but which were unavailable for consideration when the Scheme was formulated. The matters stated in the guidelines are matters that may be taken into account by a decision maker. They are not mandatory. Nor are they exhaustive.

[40] Having acknowledged that its proposal conflicted with the 2003 Planning Scheme,[19] K&K pointed to nine factors that, it submitted, warranted approval notwithstanding that conflict.[20]

[41] These matters, it was submitted, were "matters of public interest" that overcame the conflict. This was particularly so, it was said, in respect of "need". However, neither in any pleading document nor in written submissions did K&K explain how the asserted need, or the satisfaction of such a need, constituted a matter of public interest, or how, if the need did constitute a matter of public interest, it was "sufficient", on its own or in combination with other "matters", to justify the decision that K&K sought.

[42] On this appeal the Council submitted that her Honour should have assumed that it was in the public interest to maintain the terms of the Planning Scheme unless the contrary was demonstrated.[21] It made no such submission below. Nevertheless, that submission of law must be accepted. However, need as a factor in town planning decision-making has been held, under various statutes, to constitute a matter of public interest that can override the opposing public interest in seeing the enforcement of a Planning Scheme.

[43] In *Westlink Pty Ltd v Lockyer Valley Regional Council*[22] the appellant sought to justify a decision for the development of an electricity generating station by relying upon

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19 Appellant's Outline below, at [160].
20 Appellant's Outline below, at [172].
21 Relying on *Bell v Brisbane City Council* [2018] QCA 84, at [70] per McMurdo JA with whom Sofronoff P and Philippides JA agreed.
22 [2013] QPEC 35.

a demonstrated need for electricity generation. Robin DCJ found that there was such a need. His Honour had regard to the fact that it was "imperative" that public demand for electricity must be met, even though such demand fluctuates. His Honour found that he should accept the existence of an "imperative conducive to a community need for sufficient electric power at peak demand times."[23] This was "strengthened" by the proximity of the proposed electricity generator to a gas pipeline, from which it would draw fuel, and from its proximity to the market, which would reduce costs. His Honour accepted evidence that there would be a "one-off national economic benefit" of $138,000,000 and a one-off local benefit of $11,000,000. These factors, as well as others, were matters of public interest that, in his Honour's view, outweighed the public interest in maintaining the planning document with which the development would conflict.

[44] In *Rintoul v Brisbane City Council*[24] Robertson DCJ found that the proposed development of an aged care facility in Woolloongabba would result in a conflict with a planning instrument but that the conflict would only be a minor one. However, in his Honour's view there was a "clear and overwhelming need for facilities such as these, particularly close to the CBD".[25] The facility would also be close to public transport and major hospitals. In those circumstances, the "need established for the proposal is a sufficient ground in itself to overcome" the minor conflict.[26]

[45] In *Woodman McDonald Hardware Pty Ltd v Mackay Regional Council*[27] Andrews DCJ was concerned with a proposed Bunnings Warehouse that would conflict with a Planning Scheme. However, his Honour found that there was an economic need for the development. That need justified the decision because, among a large number of other considerations:[28]

(a) The conflicting Scheme was due for a full review within a year;

(b) The population growth assumptions in the Scheme had been falsified by later events;

(c) The failure of the Scheme to cater for the unforeseen growth in population had been demonstrated by decisions of the Council itself in approving certain large developments;

(d) The proposal would deliver "significant employment".

[46] In *Luke v Maroochy Shire Council*[29] Wilson DCJ found that a proposed supermarket development would create employment directly and indirectly during construction and during subsequent operation. It would save local residents the need to travel more than 15kms to access the nearest other supermarkets. His Honour found that Coolum Beach, where the supermarket was to be developed, was under-supplied by supermarkets. All the economic and town planning evidence that was called was

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23 *ibid*., at [11].
24 [2013] QPEC 47.
25 *ibid*., at [66].
26 *ibid.,*at [67].
27 [2013] QPEC 21.
28 *ibid*., at [132].
29 [2003] QPELR 447.

unanimous in the view that there was an "overwhelming need in both the economic and planning sense" for the development that was not being served.[30]

[47] At the heart of decisions like these is the acknowledgement that conformity with the Planning Scheme is, *prima facie*, in the public interest. That approach is consistent with decisions of this Court from the time of the earliest planning legislation. For example, in *Dillon v Council of the City of Townsville*[31] Carter DCJ said that the very *raison d'être* of a Planning Scheme is to *best* serve the needs of a community in a particular area. Most recently, McMurdo JA emphatically restated the principle in *Bell v Brisbane City Council*.[32]

[48] That means that it can never be enough to satisfy a provision like s 326(1)(b) of the SPA for a party merely to prove that "there is a need" for a proposed development. The existence of a need for a particular kind of development is the starting point. If the placement of a development in a particular location would conflict with a Planning Scheme, then it must be accepted that it is the intent of the Scheme that, subject to there being a matter of public interest that overrides the public interest in maintaining a Scheme, the need should met by a development on a site that does not give rise to a conflict. An applicant must identify reasons why the terms of the Planning Scheme should not prevail. Otherwise, there is a risk that, rather than applying s 326(1)(b), the decision maker will be doing no more than performing a general weighing of factors in order to determine whether, in the decision maker's own view, it would or it would not be better to permit a development on the site to go ahead.

[49] In this case, K&K's submissions below did nothing more than to state that there was a need for a development of the kind that it wished to build. It then submitted that this need "is sufficient to overcome the conflict".[33] Its submissions did not explain why that was so.

[50] For its part, the Council made the following submission below:[34]

> "317. The exercise of considering whether there are sufficient grounds to justify approval, despite the conflict, requires:
>
> (a) identification of the grounds;
>
> (b) an assessment of the role and importance to the planning scheme of the provisions which would be infringed should the proposal be approved;
>
> (c) the adverse consequences which might flow from the infringement;
>
> (d) the competing merits and weight of the grounds relied upon to justify the approval."

[51] First, I make two observations about that submission. Subparagraphs 317(c) and (d) make no sense unless the words "a consideration of" are added to each of them.

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30 *ibid*., at [110].
31 (1981) 2 APA 134.
32 *supra*., at [70].
33 Respondent's Outline below, at [173].
34 Appellant's Outline below, at [317].

I proceed upon the assumption that those words should have been there. Second, I observe that the criteria to be applied to the evaluation of "merits and weight" were not revealed.

[52] Five authorities were cited in a footnote to support that submission. The first of these was paragraph [60] of *Australian Capital Holdings Pty Ltd v Mackay City Council*[35] in which Muir JA said:

> "The primary judge, having concluded that there were conflicts with the "relevant strategic plan(s)" was required to decide if there were "sufficient planning grounds to justify approving the application despite the conflict."

[53] The statute with which that case was concerned required the identification of "Planning Grounds", an assessment of the role and importance to the Planning Scheme of the provisions which would be infringed should the application be approved and the adverse consequences, if any, which might flow from such infringement as well as the competing merits and weight of the planning grounds relied on to justify approval. Also relevant were matters in s 4.4(3) of the *Integrated Planning Act* 1997 (Qld).[36]

[54] *Australian Capital Holdings* was concerned with an application for an amendment of a use under s 4.3(2)(c) of the LGPEA. Section 4.4(3) required the Council, when considering such an application, to "assess" certain relevant matters. These included such matters as whether the intended use would create a traffic problem, would detrimentally affect the amenity of the neighbourhood and would create a need for increased facilities. In cases in which a proposal would conflict with the Planning Scheme, s 4.4(5A) required a refusal of the application if there were not "sufficient planning grounds" to justify approval. As I have already said that is an expression that is both narrower than "matters of public interest" and different in kind.

[55] The SPA, with which this appeal is concerned, is substantially different in its terms and effect from the legislation that was applicable in *Australian Capital Holdings*. This case does not concern a competition between provisions in a Planning Scheme and "planning grounds relied upon to justify approval". The case is therefore of no assistance and reliance upon it was apt to mislead.

[56] The second case relied upon by the Council, *Grosser v Council of the City of Gold Coast*[37] was also concerned with ss 4.3 and 4.4 of the LGPEA.[38] The question was whether the judge at first instance had made two particular errors of law, neither of which is relevant here. That case is also irrelevant.

[57] The third case relied upon by the Council was *Weightman v Gold Coast City Council*.[39] I have already referred to the relevant parts of that case. The case supports subparagraphs 317(a) and (b) of the Council's submissions, which were uncontroversial, but is not authority for subparagraphs 317(c) and (d).

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35 [2008] QCA 157.

36 The reference to s 4.4(3) of the *Integrated Planning Act* (Qld) in that dictum is manifestly an error and should have been a reference to s 4.4(3) of the LGPEA.

37 (2001) 117 LGERA 153.

38 See reasons of White JA at [27] and [28].

39 *supra.*

[58] The fourth case relied upon is *Noosa Gateway Pty Ltd v Noosa Shire Council*,[40] a decision of the Planning and Environment Court. The two paragraphs upon which the Council relied[41] contain quotations from the reasons of White JA in *Grosser*, quotations from the reasons of Atkinson J in *Weightman* and some dicta that emphasise the need to construe planning instruments broadly rather than pedantically. Paragraph [37] of the case, which is expressly referred to by the Council, contains a dictum from *DeGee & Anor v Brisbane City Council & Anor*[42] about the difficulty in balancing the relevant facts, circumstances and competing interests in order to decide whether a particular proposal should be approved or rejected. That is an uncontroversial proposition in its application to the legislation with which that case was concerned. It is wrong if it is to be suggested that such an approach is correct under s 326(1)(b) of the SPA.

[59] Finally, the Council relied upon a paragraph in *Blue Sky Ltd v Brisbane City Council*[43] which contains nothing more than a quotation from an earlier decision of the Planning and Environment Court which itself contains a reference to the relevant passage from *Weightman* and a repetition of the statement of Muir JA that I have already quoted in *Australian Holdings*. It does not support the submission.

[60] The Council did not identify any authority for the propositions contained in subparagraphs 317(c) and (d) of its written outline. That is not surprising because, for the reasons that I have set out above, those two propositions are wrong. The process under s 326(1)(b) does not involve a consideration of the "competing merit and weight of the grounds relied upon to justify approval". That was the process required by former legislation, namely the *Local Government Act* 1936 (Qld). Section 17 of the *Local Government Amendment Act* 1975 (Qld) established criteria (for the first time) for a decision to allow a rezoning application. In *William McEwans Pty Ltd v Brisbane City Council*,[44] Carter DCJ said that the decision making process under the *Local Government Act* 1936 (Qld) was a flexible one and that applicable statutory criteria would vary from case to case. That is not what s 326 of the SPA requires.

[61] The parties' failure to address the real legal issues demanded by the statute had consequences. For example, the economic need experts called by the parties both agreed that the proposed convenience store would sell "a very limited range of goods" and that the vast majority of visits to the service station would be by people buying fuel.[45] The relevant public interest and the relationship to that public interest of a convenience store of that kind was not identified as a matter of law or as a matter of fact, although it bore upon the severity of the conflict. The experts agreed that the take-away food premises and the drive through fast food premises would "mostly service south-bound traffic".[46] They also agreed that those retail outlets would "add to the cluster" of similar retail outlets in the immediate area. How those matters served the public interest was not identified.

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40 [2005] QPELR 44.
41 *ibid*., at [36] and [37].
42 [1998] QPELR 287.
43 [2011] QPELR 182, at [269] per Durward SC DCJ.
44 [1981] QPLR 33, at [35].
45 Economic Need Joint Expert Report, at [108]; ARB 672.
46 *ibid*., at [114].

[62] The parties framed their respective cases, and invited the learned judge to consider the matter, upon the basis that there were two essential issues that had to be addressed. The first was whether there was a "need" of some kind. The second was whether the proposed development would satisfy that need. The case was conducted as though s 326 of the SPA required the decision maker to undertake a general balancing exercise of the merits and demerits of the proposal as a whole. This is, after all, what the Council submitted the learned judge should do in subparagraphs 317(c) and (d) of its written argument. Consistently, the Council submitted that the need for the service station, if established, was insufficient to "outweigh the negative impacts it will cause". The negative impacts addressed by the Council in it submissions did not include the public interest represented by terms of the Planning Scheme.

[63] Consistently with how the parties invited the learned judge to decide the case, Kefford DCJ said:[47]

> "[234] The grounds relied upon by the appellant to justify approval of the proposed development can be broadly described as need and other matters of merit."

[64] Her Honour considered the expert evidence about the need for a service station and, to some extent peripherally, the need for a convenience store and the other food premises. After a careful and detailed examination of this evidence and the parties' submissions, her Honour found that there was a greater than "low" need for a service station and a lower than "strong" need for it.[48] Her Honour also found that there was a need for the take-away food and fast food premises, and for the convenience store. Her Honour accepted that the proposed development would not adversely affect the amenity and character of the locality, nor would it compromise the Council's strategic planning.

[65] Having made these findings, her Honour concluded:[49]

> "[330] I am satisfied that the extent of need for the proposed development is sufficient to demonstrate compliance with performance criterion PC12 of the Service Station Code and to justify approval of the proposed development given the nature and extent of the conflict identified."

[66] Accordingly, on 29 June 2018 Kefford DCJ allowed the appeal and ordered that the application be approved subject to certain conditions in an attached draft approval.

[67] There has been a failure by the parties in this case to apprehend and apply the applicable statutory requirements. It has been established beyond argument that a decision maker must take a Planning Scheme to be an expression of the public interest in terms of land use. The proposition can be put the other way around. It is, in general, against the public interest to approve a development that conflicts with the Planning Scheme. To justify such a development it must be demonstrated that the desired deviation from the Planning Scheme serves the public interest to an extent greater than the maintenance of the status quo. The public interest that is to be satisfied by the proposed development must be greater than the public interest in

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47 Reasons, at [234].
48 Reasons, at [327].
49 Reasons, at [330].

certainty that the terms of a Planning Scheme will be faithfully applied. Some such examples appear in the Ministerial Guidelines to which I have referred.

[68] A decision might be justified because the expression of public interest constituted by the Planning Scheme did not take into account, because it was unable to do so, later social developments. That was the case established before Andrews DCJ in *Woodman McDonald Hardware Pty Ltd v Mackay Regional Council*.[50] Nevertheless, it cannot be said that unforeseen circumstances must be shown in every case. It may be accepted that the need for a particular development in a particular place may constitute a matter of public interest because an identified section of the public has an interest in seeing that need satisfied by a development in the particular location. Whether that is so is a question for the decision maker to consider in the circumstances of the case. If, in the circumstances of a particular case, it is in the public interest that an identified need be satisfied by a development in a place that results in a conflict, it is necessary for the decision maker to go on to consider whether the identified public interest in satisfying the need overrides the conflict with the Planning Scheme, which it is generally in the public interest to avoid. It may be that the public interest in having a need satisfied by a non-conflicting development, such as a service station, may override the conflict created by the inclusion of conflicting uses within that development. That may depend upon the extent of the need that will be satisfied and the ramifications of the conflict in the circumstances of the case. It may depend upon whether the needed development could viably proceed without the incorporation within it of the conflicting uses. It may depend upon whether the conflicting uses add any prejudicial effects to the existing amenity beyond the effect caused by the non-conflicting uses.

[69] That process was not undertaken in this case. Although the words "matters of public interest" appear in various places in the record, the case actually proceeded upon the basis of assumptions that considerations that were once relevant under repealed legislation were those that still applied under this legislation. Ground 3 in the draft notice of appeal is established.

[70] By grounds 1 and 2 of its draft notice of appeal the Council contends that Kefford DCJ was wrong in her conclusion that certain factors, identified by her, had the effect of reducing the seriousness of the identified conflict. The Council submits that the existence of a conflict between the Planning Scheme and the proposal meant that, as a matter of principle, the degree of conflict thus identified could not be reduced. The "level of conflict" was said to be "binary". The use was either inappropriate or undesirable or it was not and, it seems, no question of degree can arise.

[71] This proposition should be rejected. If, as her Honour found, the development of a service station did not result in a conflict with the 2003 Planning Scheme, then it was not irrelevant that the uses that would create a conflict were uses that would be only a smaller part of a larger unobjectionable use. The conflict created by the proposed erection of, say, a substantial conflictive coffee shop on its own and the conflict created by the erection of a non-conflictive service station incorporating a coffee shop are, as her Honour concluded, two different things.

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50 *supra*.

[72] The examination of the nature and extent of an asserted conflict is a step that three members of the Court of Appeal unanimously said was required by a provision like s 326(1)(b) of the SPA.[51] It is the process that, for example, Robertson DCJ followed in *Rintoul v Brisbane City Council*.[52]

[73] Indeed, in this very case, both parties concentrated their evidence and submissions upon the need for a service station rather than its associated uses because the reality was that the conflicting uses were mere adjuncts to the dominant aim of K&K to develop a profitable service station. Her Honour's approach to this issue was, therefore, consistent with how the parties chose to run their respective cases, with how the experts, on instructions, regarded the main issue, and with established authority.

[74] In my respectful opinion her Honour was correct to proceed as she did. I would therefore reject grounds 1 and 2 of the appeal.

[75] The Council also puts forward as a ground of appeal that her Honour erred in thinking that the proposed service station, including the food outlets and convenience shop, would constitute a "neighbourhood centre" within the meaning of the 2016 City Plan.

[76] The 2016 City Plan was in issue because s 495(2)(a) of the SPA provides that, although an appeal must be based upon the laws and policies that were in force when the application was made, the Court may give such weight it considers appropriate to any new policy. The Council pointed to the provisions of the 2016 City Plan as a new policy and invited her Honour to give them due weight. Several of these provisions[53] use the expression "neighbourhood centre". The expression is defined, relevantly, as comprising "a minimum of five separate commercial or retail tenancies located within a single centre or comprising a consolidation of separate but interconnected users".[54] Her Honour held that the proposed development was a "neighbourhood centre".[55]

[77] The Council submits that the proposed development would not comprise "a minimum of five separate commercial or retail tenancies" and that, as a result, her Honour was wrong in her conclusion. The respondent submits that this argument overlooks the second part of the definition "comprising a consolidation of separate but interconnected users".

[78] In my view, the proposed development does not satisfy the definition. The first part of the definition is manifestly inapplicable. K&K interprets the second part of the definition as though it stood alone. However, the definition should be read so that a neighbourhood centre "must comprise a minimum of five separate commercial or retail tenancies" that are either "located within a single centre" or "comprising a consolidation of separate but interconnected users." The proposed development involves fewer than five tenancies, and fewer than five separate but interconnected users.

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51 *Weightman*, *supra*, at [36].
52 *supra*, at [53]-[57].
53 2016 City Plan ss 3.2.2, 3.3.3.1(9), 3.4.1(3), 3.4.1(7), 3.4.5, 3.4.5.1(1), 3.4.5.1(2), 3.4.5.1(14), 6.2.1.2(2)(vi), 6.2.2.2(2)(a)(v).
54 2016 City Plan version 4, Table 6C1.2.1; ARB, at1543.
55 Reasons, at [342(c)].

[79] Section 3.4.1(3) of the 2016 City Plan refers to such developments comprising a "mix of small scale uses and services in response to specific needs of their immediate neighbourhood". Section 3.4.1(7) reinforces the character of a "neighbourhood centre" by stating that such centres "respond to specific needs" as does s 3.4.1(3)(c) which states that "neighbourhood centres comprise a mix of small scale uses and services in response to specific needs of their immediate neighbourhood".

[80] The proposed development is a service station including ancillary businesses. It is not, in any sense of the expression where it appears in the 2016 City Plan, a neighbourhood centre.

[81] This error in construction affected the exercise of discretion because her Honour concluded that her consideration of provisions in the 2016 City Plan concerning neighbourhood centres showed that neighbourhood centres may be located in medium density residential zones and low density residential zones in certain circumstances, and they may be located in urban and suburban neighbourhoods within walking distance of residences. As a consequence, this was an error of law that vitiated the exercise of discretion.

[82] On this appeal the Council argues that Kefford DCJ also erred in not giving "significant and overwhelming weight" to certain conflicts between 2016 City Plan and the proposed development. One of these conflicts arises because Performance Outcome 4, contained in the 2016 City Plan, provides that service stations should not abut residential land use. This service station would do so.

[83] The weight to be given to discretionary factors, such as the content of 2016 City Plan, is a matter for the decision maker. A court that reviews an exercise of discretion that involves assessing the weight to be given to relevant factors should not substitute its own view unless it has been shown that the decision, based upon such considerations, was unreasonable in the *Wednesbury* sense.[56]

[84] Since this is a dispute that must be remitted to the Planning and Environment Court it is undesirable to express any views about the weight to be given to City Plan 2016.

[85] The relevant statutory question was never identified by the parties and, as a consequence, has not yet been the subject of decision. For this reason, leave to appeal should be granted and the appeal should be allowed.

[86] The Council has submitted that the matter be remitted if its appeal is allowed, but that the remitter should be to a different judge. No justification for such an order was advanced in argument. Kefford DCJ has an understanding of the evidence in the case and neither party has said that it will seek leave to lead further evidence, if the case is remitted, although that is a matter for the parties and the Planning and Environment Court to decide in due course. However, in these circumstances I see no benefit to either party or to the Planning and Environment Court in requiring a different judge to rehear the case and I can see no good reason to make such an order.

[87] I would order that leave to appeal be granted, that the appeal be allowed, that the orders made on 29 June 2018 be set aside and that the matter be remitted to the

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56 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1985-86) 162 CLR 24 at 41 per Mason J.

Planning and Environment Court to be determined according to law. The respondent should pay the appellant's costs of this appeal.

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

[89] **FLANAGAN J:** I agree with the orders proposed by Sofronoff P and with his Honour's reasons.