SUPREME COURT OF QUEENSLAND

CITATION:	*Goodsell Earthmoving Pty Ltd v Coordinator-General* [2019] QSC 243
PARTIES:	**GOODSELL EARTHMOVING PTY LTD** **ACN 091 632 227** (applicant) **v** **BARRY EDWARD BROE, as the COORDINATOR-GENERAL appointed under the *State Development and Public Works Organisation Act* 1971 (Qld)** (respondent)
FILE NO/S:	13710 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application for Judicial Review
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	30 September 2019
DELIVERED AT:	Toowoomba
HEARING DATE:	12 September 2019
JUDGE:	Applegarth J
ORDER:	**1. The application for a statutory order of review filed 12 December 2018 is dismissed pursuant to s 48 of the *Judicial Review Act* 1991 (Qld).** **2. The applicant pay the respondent's costs of and incidental to the proceeding on the standard basis.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – POWERS OF COURTS UNDER JUDICIAL REVIEW LEGISLATION – STAY OF PROCEEDINGS AND INTERLOCUTORY RELIEF – where the applicant seeks judicial review of a decision to impose two conditions on an approval for a material change of use – where the applicant operates a high impact industry in a low impact precinct in the Townsville State Development area and applied to the respondent for approval of its activities – where the respondent granted an approval for two years subject to conditions – where the applicant challenges only the condition limiting the approval to a two year period and a condition limiting vehicle movements to 80 heavy vehicle movements per day - where the respondent cross-applies for a stay or dismissal of the application on the grounds that such relief is inappropriate because the impugned conditions are

integral and not severable from the approval as a whole – whether the proceeding should be stayed or dismissed

Acts Interpretation Act 1901 (Cth), s 15A
Acts Interpretation Act 1954 (Qld), s 9
Judicial Review Act 1991 (Qld), ss 5, 20(2), 23(g), 30(1), 48
State Development and Public Works Organisation Act 1971, s 84E(3)

Alberton Investments Pty Ltd v Pine Rivers Shire Council [1994] QPLR 60, cited
Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (2013) 215 FCR 301; [2013] FCAFC 111, cited
Coco v The Queen (1994) 179 CLR 427, cited
Gantley Pty Ltd v Phoenix International Group Pty Ltd [2010] VSC 106, cited
Hall & Co Ltd v Shoreham-by-Sea Urban District Council [1964] 1 WLR 240, considered
Kent County Council v Kingsway Investments (Kent) Ltd [1971] AC 72, considered
Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, [2013] HCA 18, cited
Morgan v Toowoomba Regional Council (No 2) (2011) QPELR 620; [2011] QPEC 61, cited
Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) (2008) 251 ALR 80; [2008] FCA 1521, cited
Pyx Granite Co Ltd v Ministry of Housing and Local Government [1958] 554 QB 554, cited
Re Dingjan; Ex parte Wagner (1995) 183 CLR 323, cited
Spurling v Development Underwriting (Vic) Pty Ltd [1973] VR 1, cited
United Airlines v Secretary, Department of Transport and Communications (1990) 26 FCR 598, cited

COUNSEL: C L Hughes QC and M O Plunkett for the applicant
J M Horton QC and J S Brien for the respondent

SOLICITORS: Emanate Legal for the applicant
Clayton Utz for the respondent

[1] The applicant (Goodsell) conducts a high impact industry in a low impact precinct in the Townsville State Development Area (TSDA). It applied to the Coordinator-General to approve such a use. An independent review report recommended the application be refused. However, the Coordinator-General approved the application for a two year period and subject to numerous other conditions, including maintaining a limit of 80 heavy vehicle movements per day. Goodsell applies to judicially review the two year duration condition and the condition which limits heavy vehicle movements.

[2] If successful in setting them aside, Goodsell would be allowed to conduct its high impact industry in the low impact precinct for an indefinite period and without a limit on heavy vehicle movements on local roads. The Coordinator-General cross-applies to stay or dismiss the proceeding on the ground that the two challenged conditions are integral to the approval as a whole. They were to mitigate adverse impacts on roads, the environment and a nearby residential development and to give Goodsell time, if it desired, to transition to a more suitable location for the proposed use.

[3] The cross-application raises this issue: are the two challenged conditions integral to the approval as a whole, so that it would be inappropriate simply to set them aside, leaving Goodsell with an approval which was unlimited in its duration and had no limit on heavy vehicle movements?

Background

[4] The Goodsell family has operated a crushing, screening and stockpiling business on land at Racecourse Road in the Townsville suburb of Cluden since December 1993. The business receives concrete, soil, bitumen and asphalt from demolition and excavation contractors. It processes the material and sells the recycled product to building, landscaping and construction industries.

[5] The TSDA was established in October 2003 and the first Development Scheme was approved in 2005.

[6] A Development Strategy was approved by the Coordinator-General in early 2013 and a further TSDA Development Scheme was promulgated on 5 July 2013. A person must not carry out SDA assessable development in a State Development Area without an approval granted by the Coordinator-General.

[7] Goodsell undertook its activities without approval. In December 2012 it applied to "regularise" the existing use on the site.

[8] On 8 August 2013 the Coordinator-General granted an approval with conditions for general industry (materials storage and processing) on Goodsell's land. The conditions included:

- a limit on material throughput which was to not exceed 20,000 tonnes per annum;
- restricted hours of operation; and
- a restriction on vehicle movements to 40 heavy motor vehicle journeys to and from the site per day (i.e. a total of up to 80 heavy motor vehicle movements per day).

[9] Goodsell says that the limit of 20,000 tonnes per annum was an error. This is contested. Goodsell exceeded this figure by several times. On 16 October 2013 Goodsell sought amendments to the conditions, seeking approval for a limit of 20,000 tonnes per month instead of 20,000 tonnes per annum. This request was rejected by the Coordinator-General. In June 2016 the Coordinator-General issued a show cause notice, and then in September 2016 an Enforcement Notice. Goodsell applied to the Planning and Environment Court to appeal against the notice, but on 22 November 2018 discontinued that proceeding.

[10] Goodsell applied to the Coordinator-General on 9 June 2016 for a material change of use for high impact industry. Its application stated that it sought the approval to permit "an increase in the intensity of existing screening and processing operations on the site from 20,000 tonnes per annum to 320,000 tonnes per annum 'processed' on the site." This application was the subject of a lengthy process of consultation with, among others, State and local government authorities and a public notification process. Twelve of the public submissions were supportive and 30 objected to the application.

[11] The Coordinator-General appointed a consultant to undertake an independent planning and technical review of the 2016 application. For a number of reasons, including the avoidance of adverse impact on surrounding uses and to implement what was described as a "coherent policy that applies to the locality around that part of the Cluden residential area which TSDA surrounds", the independent reviewer recommended that the application be refused.

[12] The Independent Review Report was provided to Goodsell. It was given an opportunity to respond to it and did so. On 10 August 2018 draft conditions of approval were provided to Goodsell for comment and revised further draft conditions were provided to it for comment on 7 September 2018. There were a number of exchanges of information between the parties. Ultimately, Goodsell responded to the draft conditions on 8 October 2018.

[13] Rather than refuse the application, as had been recommended by the Independent Review, the Coordinator-General approved it subject to conditions. There are 28 conditions and they include:

- "The Permitted Uses must cease to be carried out within two years from the decision date" (Condition 4.1); and
- "Vehicle movements for the Permitted Uses via Racecourse Road Site Access must not exceed 80 Heavy Vehicle movements per day (as a combination of ingress and egress vehicle movements per day)" (Condition 6.2).

[14] Substantial reasons have been given for the decision to approve the application with conditions. The reasons address many issues raised in connection with the application and through the consultation process. Relevantly, and in very short summary:

- The main source of impact from the proposed development was considered to be an increase in heavy vehicle traffic along Racecourse Road. As a result, Condition 6.2 limits the number of heavy vehicle movements to 80 per day, "consistent with the peak provided for in the current approval";
- In addition, Condition 4 provides that the use may continue for a period of two years, with the Coordinator-General considering conditions with respect to traffic impacts on Racecourse Road to be "proportionate to the predicted impacts and having regard to the limit on the duration of the use";
- In addition, the issues of vehicle and pedestrian safety along Racecourse Road, and the fact that the proposed development was not consistent with the Development Scheme, were thought to justify limiting "the nature and impacts and likely future increase in those impacts" to a period of two years and for heavy vehicle movements to be limited to 80 heavy vehicle movements per day, consistent with the limit of the existing approval.

[15] More generally, the proposed development, being located within the Low Impact Industry Precinct, was said to be incompatible with surrounding uses and the Development Scheme including the Cluden residential estate adjacent to the site. The conditions, including conditions restricting the permitted use to a period of two years (Condition 4), restricting heavy vehicle movements (Condition 6), dust monitoring (Condition 20), noise management plans (Condition 18), buffers (Condition 15) and dust and odour management plans (Condition 21), were said to have been imposed to further the "well-being and safety of residents, and to ensure that an incompatible use does not become entrenched in the TSDA".

[16] The Independent Reviewer had recommended that the application be refused because the proposed use of high impact industry (material storage and processing) in the Low Impact Industry Precinct was inconsistent with the Development Scheme. Instead, the Coordinator-General sought to balance the competing interests of Goodsell as the proponent and affected stakeholders and to achieve this by "a temporally limited, conditional approval". The Coordinator-General considered that any form of unconditional, unconfined or long-term approval of the application would entrench an inconsistent use in the TSDA Development Scheme, which would undermine the fundamental high level of State planning policy set out in the Development Scheme and the future intent of the TSDA. The decision-maker concluded that an unconditional approval in the circumstances would be such as to largely disregard and undermine that planning policy and the future intent of the TSDA, and also that it was relevant that it "necessarily would have been within the reasonable contemplation of the Proponent that there would likely be future limitations upon the Site". Goodsell did not take steps or pursue formal objection at the time the TSDA and Development Scheme were imposed.

[17] In summary, the Coordinator-General considered the need to balance matters, including the predicted impacts of the proposed development and the need that the proposed development would serve. These matters were found to justify a time limit on the use of two years so as to:

> "ensure impacts can be appropriately mitigated and/or managed through the TSDA approval in the short term, and will provide a suitable amount of time for the Proponent to have the opportunity, if it so desires, to transition into a more suitable location for the proposed use which will not adversely impact on residential development and enable future expansion of the business".

[18] The 28 conditions were said to be "reasonable and relevant conditions" designed to manage the nature and length of the approval, traffic impact on State and local road networks, site-based environmental management, the supply of services and utilities, stormwater and drainage, rehabilitation plans and impacts to the environment.

The application for judicial review and the cross-application to stay or dismiss it

[19] Goodsell's application for a statutory order of review seeks to challenge:

(a) the condition that the permitted uses must cease to be carried out within two years from the decision date (Condition 4.1) and

(b) the condition that limits heavy vehicle movements to 80 per day (Condition 6.2).

It does so on a variety of grounds.

[20] If successful in its application to have those two conditions set aside, the approval would be:

- unlimited as to duration; and
- unlimited in heavy vehicle movements per day.

[21] The Coordinator-General opposes Goodsell's application, and cross-applies pursuant to s 48 of the *Judicial Review Act* 1991 (Qld) ("*JRA*") to stay or dismiss it on the grounds that:

- the duration of two years is integral to the approval; and
- the vehicle movement condition is also integral to the approval, being aligned with the condition attached to the preceding 2013 approval, with the proposed use and associated heavy vehicle traffic generation being "inconsistent with the function of the local road network".

[22] The contention that the challenged conditions as to duration of the approval and heavy vehicle movements are integral to the approval is supported by the proposition that the decision-maker would not have granted the approval, including a material processing onsite limit of 320,000 tonnes per annum, if the approval had been unlimited as to its duration and had not imposed a limit on heavy vehicle movements each day along Racecourse Road so as to minimise impacts on road infrastructure, the environment and vehicle and pedestrian safety.

[23] The Coordinator-General's contention that the two challenged conditions are each integral to the approval is restated in the contention that the conditions are "not severable from the approval as a whole".

[24] In reply, Goodsell submits that:

- the JRA permits a court to review a condition and make orders about such a condition whether it is severable or not;
- Conditions 4.1 and 6.2 are severable; and
- even if they are not severable, if the impugned conditions are held to be ultra vires, the whole approval must fail, thereby resuscitating the approval granted on 8 August 2013.

The threshold issues

[25] The limited nature of the relief sought by Goodsell, by which it seeks an order for the conditions to be set aside and does not seek, in the alternative, an order that the approval decision as a whole be set aside, gives rise to a threshold question of whether the two challenged conditions are integral to the approval. If they are, then certain legal consequences may flow. The first is that the Court would be disinclined to exercise its power to grant discretionary relief to simply set aside conditions. To do so would be an inappropriate exercise of its judicial review power so as to produce an approval which the decision-maker would not have contemplated making, namely one unlimited as to time and unlimited in heavy vehicle movements. The legal consequence would be to refuse Goodsell the relief sought by it, even if it established grounds to judicially review the decisions to impose the two challenged conditions.

[26] The second legal consequence that would flow from a finding that the two challenged conditions were integral to the approval (or "not severable" from it) would arise in connection with s 48 of the *JRA*. For essentially the same reasons, the conclusion would be reached that it would be inappropriate to grant an application which only sought to set aside the two conditions, and the discretion in s 48 to dismiss the proceeding would be exercised.

[27] As noted, Goodsell does not seek, as an alternative form of relief, an order to set aside the approval as a whole in the event the two conditions are found to be beyond power or otherwise liable to be set aside on administrative law grounds. Also, Goodsell does not seek an order which, upon the setting aside of the two challenged conditions, would remit the matter to the decision-maker to impose new conditions as to duration and heavy vehicle movements.

[28] Apart from not seeking an order, in the alternative, that the whole of the approval be set aside, so as to reinstate the 8 August 2013 approval, Goodsell does not seek in such an event a consequential order of some kind declaring that the 8 August 2013 approval contained a mistake in relation to the material throughput limit of 20,000 tonnes per annum.

[29] Finally, I should note that the application for a statutory order of review seeks in paragraph 2 an order (presumably pursuant to s 30(1)(c) of the *JRA*) declaring the rights of the parties. The declaratory orders sought are that the Coordinator-General failed to exercise the power to impose a condition that must be:

- relevant to, but not an unreasonable imposition on, the development or use of the land as a consequence of the development; or
- reasonably required in relation to the development or use of the land as a consequence of the development.[1]

It seeks a declaration that Condition 4.1 and Condition 6.2 are not relevant to, but are an unreasonable imposition on, the development or use of the land as a consequence of the development, and are "not reasonably required in relation to the development or use of the land as a consequence of the development". It also seeks an order that they are "unlawful, null and void and of no effect".

The substantive grounds of judicial review

[30] If I conclude that the form of relief by which Goodsell seeks to set aside only the two conditions (with or without a declaration that they are invalid) is not inappropriate then it will be necessary to consider the substantive grounds for judicial review. Numerous grounds of judicial review are pressed.

Judicial review of an impugned condition

[31] A reference in the *JRA* to the "making of decision" includes a reference to imposing a condition.[2]

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1 *State Development and Public Works Organisation Act* 1971 (Qld), s 84E(3).
2 *JRA*, s 5(d).

[32] The fact that a judicial review application may be brought in respect of a decision to impose a condition does not necessarily make it appropriate to grant discretionary relief under s 30 of the *JRA* to simply quash or set aside the condition. The nature of the condition and its relationship to the decision of which it forms a part may make it inappropriate to grant such relief.

[33] In such a case, the applicant may seek, either as its primary form of relief or as an alternative form of relief, an order that the decision of which the condition forms part be judicially reviewed. If the decision is set aside, the Court may make an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the court determines.[3] In that event, and depending upon the circumstances, the new decision may include no similar conditions to the ones about which complaint was made, or different conditions.

[34] In summary, an application for judicial review:

(a) may seek to have the whole of a decision which includes the imposition of a condition set aside;

(b) may be in respect of a decision which includes the imposition of a condition and seek a limited form of relief so that only the impugned condition is set aside, leaving the balance of the decision, such as an approval, intact;[4] or

(c) may be, as here, in respect of only the decision to impose the challenged condition or conditions.

If the third kind of application is brought, the applicant must show why it is appropriate to seek and obtain relief only in respect of the condition. It also may be required to meet a cross-application to the effect that it is inappropriate to grant such relief, leaving a decision, such as an approval, to stand but without conditions which were integral to it.

Are the two challenged conditions integral to the approval as a whole?

[35] I approach this question by an objective consideration of the decision, rather than by reference to the subjective reasons of the decision-maker. Doing so, I have regard to the material before the decision-maker, which included the independent review recommending that the application be refused and material which addressed the various conditions which might limit adverse impacts of the proposed use and best advance the planning policy contained in the Development Scheme.

[36] The condition limiting heavy vehicle movements is important in limiting the impact of the proposed use on the local road network and along Racecourse Road in particular, limiting the impact of heavy vehicle movement near a residential area and in limiting the risks associated with allowing an unlimited number of heavy vehicle movements on Racecourse Road. In my view, the heavy vehicle movement condition is integral to the approval as a whole. It controls the scale of the permitted use and its impact.

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3 *JRA*, s 30(1)(b).

4 This arises from the power to make an order quashing or setting aside *part* of the decision: *JRA*, s 30(1)(a).

[37] The condition as to the duration of the use also is integral to the approval. It limits the duration of the adverse impacts which arise from the proposed use in a low impact precinct, in proximity to a residential development. Impacts which might be acceptable for a limited period of say two years on local roads, on other road users and on residents may not be acceptable over a much longer, or indefinite, period. In addition, permitting an inconsistent use for a few years is more likely to uphold the policy of the Development Scheme than an approval which authorises such an inconsistent use indefinitely.

[38] In my view, it is difficult to deny that the two challenged conditions are integral to the approval as a whole. One approach to testing that proposition is to consider whether the removal of Conditions 4.1 and 6.2 would result in a substantially different approval, being a use unlimited in its duration and unlimited in the number of heavy vehicle movements along Racecourse Road. Whilst it might be said that the maximum permitted throughput would place a practical limit upon the number of heavy vehicle movements which would occur each day, the removal of Condition 6.2 would facilitate a substantial increase in the number of heavy vehicle movements above the number which historically has been permitted under the prior approval. Simply stated, maintenance of the existing limit of 80 heavy vehicle movements per day is an important condition in limiting the adverse effects of a high impact industry in a low impact precinct in proximity to a residential development. It is integral to the approval. So too is Condition 4.1: the difference between permitting the use for two years and for an indefinite period is substantial. The condition is fundamental to what was approved.

Are Conditions 4.1 and 6.2 severable?

[39] My conclusion that each condition is integral to the approval may seem to answer this question. The specific question raised by the Coordinator-General's cross-application to strike out or dismiss is whether Conditions 4.1 and 6.2 are "not severable from the approval as a whole". This frames the issue already addressed in terms of a legal concept that arises in different public law and private law fields. The notion of severance arises in public law, including the constitutional validity of legislation and the validity of delegated legislation. It also arises in the context of the judicial review of administrative decisions, such as adjudicative decisions and the granting of approvals, including approvals which are granted subject to conditions.

[40] Most administrative decisions which are successfully impugned are nullified completely. However, on occasions parts of a decision which are not infected by administrative law error may be saved if severance is available.[5] This may apply where, for example, one of more than 100 conditions on the grant of an approval is found to be defective and, in the result, that single condition is severed from the approval.[6] Expressed differently, if the part of a decision which is successfully challenged is severable from the decision as a whole then that part may be severed, with the approval left to stand. If, however, the part of the decision which is challenged is not severable from the decision as a whole, then the decision as a whole will be set aside.

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5 Aronson, Groves and Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) [10.430] ("Aronson, Groves and Weeks").

6 *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities* (2013) 215 FCR 301 at 354 [269].

[41] In some public law contexts concerning challenges to legislation, a concern for the separation between legislative and judicial powers arises. Severance may occur if the legislature intended this in the event that parts of an enactment are found to be in excess of power.[7] However, severance must not depart from the legislative intent so as to become, in effect, a legislative act. The provisions that remain after severance must have the same effect upon those still within its scope, and (to that extent) produce the same results, as would have been obtained without severance; otherwise the Court would be legislating.[8] A similar concern about the separation of powers should apply to judicial review of administrative action. As the learned authors Aronson, Groves and Weeks state: "There must in principle be the same refusal to use severance to achieve substantial alteration".[9]

[42] The parties cite authorities about severance in respect of conditions on town planning approvals. Some of these cases pre-date the development of modern administrative law in Australia. Still, they illustrate the issue of severance in an analogous situation to a modern administrative law challenge to a decision to grant an approval with conditions. The decision of the House of Lords in *Kent County Council v Kingsway Investments (Kent) Ltd*[10] is influential. It considered earlier decisions in relation to severance, including *Pyx Granite Co Ltd v Ministry of Housing and Local Government*[11] and *Hall & Co Ltd v Shoreham-by-Sea Urban District Council*.[12] In *Hall & Co Ltd*, the defendants argued that the conditions sought to be imposed could be saved by severing such parts as were thought to be objectionable. This course was rejected as an invitation to re-write the Council's conditions. By contrast, the plaintiffs invited the Court to say that the planning permission could now be regarded as free of those conditions, so that the plaintiffs would be at liberty to proceed with the proposed development as if those conditions had never been imposed. Willmer LJ observed that earlier authorities had considered the case of a permission having been granted subject to a large number of conditions in which one or two "quite trivial conditions" were held to be beyond power. In such a case it "could well be difficult to justify saying that the whole permission must fail".[13] Such a problem did not arise in *Hall & Co Ltd* because the conditions objected to by the plaintiffs were fundamental to the permission and, in such circumstances, the whole of the planning permission would fail.

[43] *Kent County Council* concerned a planning permission to develop land which included a condition which required details relating to layout, sighting, height, design and external appearances of the proposed buildings to be submitted to and approved by the local planning authority before any work began. Condition (ii) provided:

> "The permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) …"

The landowners sought declarations that this second condition was unreasonable and void and that the permissions which had been granted still subsisted. The House of

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7 Interpretation statutes may signal such an intent: see Aronson, Groves and Weeks [10.450]; *Acts Interpretation Act* 1901 (Cth) s 15A, *Acts Interpretation Act* 1954 (Qld) s 9.

8 Aronson, Groves and Weeks at [10.430] citing *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323.

9 At [10.460].

10 [1971] AC 72.

11 [1958] 1 QB 554 at 579.

12 [1964] 1 WLR 240 at 251.

13 [1964] 1 WLR 240 at 251-252.

Lords, by majority, concluded that the condition was within power. Lord Morris (with whom Lord Donovan agreed) and Lord Guest went on to consider whether, had Condition (ii) been beyond power, it should have been severed so as to allow the permission to stand.

[44] Lord Morris stated:

> "There might be cases where permission is granted and where some conditions, perhaps unimportant or perhaps incidental, are merely superimposed. In such cases if the conditions are held to be void the permission might be held to endure just as a tree might survive with one or two of its branches pruned or lopped off. It will be otherwise if some condition is seen to be a part, so to speak, of the structure of the permission so that if the condition is hewn away the permission falls away with it."[14]

His Lordship referred to the observations of Willmer LJ in *Hall & Co Ltd* earlier quoted, and to the observations of Pearson LJ (as he then was) in the same case which differentiated between conditions which are "essential, or at least important" and those which are "trivial or at least unimportant".[15] Lord Morris went on to observe that if, when the planning permissions had been granted in 1952 and 1953 the points had occurred to the developer and if the developer or anyone else had persuaded the Council that Condition (ii) was invalid, all the indications were, not that the Council would have abandoned a time condition, but that it would have insisted on one while so phrasing or redrafting its wording as to meet the technical points which had been raised in the court. Lord Morris concluded that the Council considered that a time condition was of "fundamental importance" and agreed with the primary judge and Lord Denning MR that if Condition (ii) was void "it cannot be deleted so as to leave the permission (subject to the other conditions) still subsisting".[16]

[45] Lord Guest reached the same conclusion, observing that it was "quite impossible to say that time conditions do not relate to the implementation of planning policy".[17] After concluding that the condition was valid, Lord Guest went on to consider the question of whether it was "separable". He concluded that the planning permission was entire and if a condition was found to be invalid "the whole planning permission must go". It was impossible to separate the permission without the time limit from the grant. Lord Guest observed: "The good part is so inextricably mixed up with the bad that the whole must go". His Lordship concluded by agreeing with Lord Morris that "if the condition is invalid the invalid part cannot be separated from the permission and the whole permission must go."[18]

[46] Lord Reid dissented on the question of whether Condition (ii) was within power. Having done so, he considered the question of severance, turning first to a case where a planning authority "purports to impose a condition which has nothing whatever to do with planning considerations but is only calculated to achieve some ulterior object thought to be in the public interest". In such a case the condition "should be severed

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14 *Kent County Council* at 102.
15 At 103 citing *Hall & Co Ltd* at 261.
16 *Kent County Council* at 103.
17 At 105.
18 At 107.

and the permission should stand".[19] By contrast, where a condition, though invalid, limits the manner in which the land can be developed, then the condition would not be severable because:

> "… if it were simply struck out the result would be that the owner could do things on his land for which he never in fact obtained permission and that would be contrary to the intention of the statute".[20]

[47] After referring with approval to the decisions in *Hall & Co Ltd* and *Pyx Granite Co Ltd*, Lord Reid observed that the subject case did not fall within either of the classes mentioned by him since, unlike the first case, the conditions related to planning considerations. They did not fall within the second category of case because severing the time conditions would not enable the owners to do anything on their land of a kind which the planning authority did not intend them to do. It would only extend the time during which the owner could act.

[48] Lord Upjohn referred to the question of severability and to earlier cases in which invalid conditions "went to the root of the planning permission itself and severely restricted the permission applied for".[21] According to Lord Upjohn, Condition (ii) did not go to the root of the permission itself.

[49] Before returning to the tests formulated in *Kent City Council* for severance, it is appropriate to note in passing the factual distinction between Condition (ii) in that case and the two conditions under consideration in this matter. Condition (ii) in *Kent County Council* conditioned a permission (which was otherwise unlimited as to time) by a requirement to notify matters referred to in Condition (i), being details of proposals, by a certain date. In this case, Condition 4.1 defines the period during which the use may be undertaken, after which the permission ends.

[50] To adopt some of the language in the *Kent County Council* case, the condition as to the duration of the approval in this case is part of the structure of the approval. It is an important part. Severing such a condition would enable the owners of the land to undertake high impact activities beyond a date after which the authority granting approval intended that such activities not be undertaken on the land. The condition cannot be described as incidental, collateral or unimportant.

[51] As to Condition 6.1 in relation to vehicle movements, this condition goes to a matter of substance affecting the scale of the approved use and the impact of the approved activities in the precinct and upon neighbouring roads and residential areas.

[52] No single formulation or test emerges from *Kent County Council* as to when a condition upon a town planning approval will be treated as severable. A condition which is beyond power will be severable if it is trivial, unimportant or incidental. A condition will not be severable if it is important or "part… of the structure of the permission".[22] One approach is to contrast a condition which is incidental to the permission with one which is integral to it. These different formulations point to an inquiry into the significance of the condition and whether its deletion would alter the substance of what

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19 At 90.
20 Ibid.
21 At 113.
22 At 103.

remains. An alteration to the substance of what remains after the deletion of the invalid condition should be fatal to severability.[23]

[53] The issue of whether a condition may be severed without altering the substance of what remains or an inquiry into whether the condition is fundamental or integral to the permission differs from an inquiry as to whether a condition can be excised with a blue pencil or a surgical instrument. It is not sufficient that the invalid condition can be excised so that the remaining portion can operate independently of it.[24] If that was the sole test for severance, many fundamental conditions which might simply be excised would be severable.

[54] In a case such as this, one is not concerned with a challenge to a piece of legislation and the presumption that the legislature intends a legislative instrument's provisions to be interdependent and read as a whole. Instead, one is concerned with the interpretation of an approval, read as a whole, and an assessment of whether the impugned condition constitutes a substantial, integral or important part of the approval such that its severance would alter the substance of the approval. It may be possible to approach the interpretative task by reference to the supposed intent of the decision-maker and to inquire whether severance would alter, in a substantial way, the intended effect of the decision to grant approval subject to conditions. The authorities are to the effect that severance is only possible where it would not effect a change to the substantial purpose and effect of the instrument.[25]

[55] Some dicta of Lord Morris in *Kent County Council* suggest that it is possible to inquire into whether the decision-maker would have granted approval without the impugned conditions. This may entail a hypothetical question in the town planning context of whether the Council, if it had been told that it was beyond power to impose certain conditions, would not have granted approval at all or only granted approval on different conditions. I find it unnecessary to inquire into the subjective state of the decision-maker's mind, as reflected in the statement of reasons, as to whether, if the impugned conditions had not been included, approval would not have been granted or granted on substantially different conditions. Instead, I approach the matter as an exercise in the interpretation of the decision to approve subject to conditions, and to assess the importance or otherwise of particular conditions, including whether severance would remove a condition which is integral to the approval and alter the substance of the approval which remained.

[56] In a different legislative context, namely whether a warrant was defective insofar as it purported to authorise entry onto private property, the High Court in *Coco v The Queen*[26] stated that it was not possible to sever the defective portion because it was an "integral and essential element" of the warrant as a whole.

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23 Aronson, Groves and Weeks [10.490] citing *DPP v Hutchinson* [1990] 2 AC 783 at 798-800, 811; *Re Dingjan; Ex parte Wagner* (1995) 183 CLR 323 at 347-348; *Harrington v Lowe* (1996) 190 CLR 311 at 328; *City of Adelaide v City of Salisbury* (1998) 100 LGERA 160 at 170-171; *Ruhani v Director of Police (No 2)* (2005) 222 CLR 580 at 586 [20].

24 Ibid and see the discussion of severance in public law in *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [101]-[112].

25 Ibid.

26 (1994) 179 CLR 427 at 443-444.

[57] In this matter, whether one applies one or other of the formulations in *Kent County Council*, or simply asks whether the relevant condition is an integral and important condition, the same conclusion is reached.

[58] The condition as to the duration of the approval could hardly be described as collateral, unimportant or incidental. Instead, it is fundamental to the approval granted and a significant part of the structure of the approval with conditions. It did not simply define the time at which an approved use could commence. By placing an end date on the approval, it defined in an important way the subject matter of the approval. It was an important component part of the approval. If the condition as to duration of the approval was removed, then the applicant could do things on the land after the expiry of two years in circumstances in which it had not obtained permission to do such things after that time. The condition as to the duration of the approval was integral to it. It could not be deleted without altering the substance of the approval. Condition 4.1 is not severable.

[59] I turn to the condition in relation to heavy vehicle movements for the permitted use. It is unnecessary to repeat the basis of my earlier finding that this condition is integral to the approval as a whole. It places an indirect, but important, limit on the scale of the approved use. It places a limit on the impact of the proposed use on the local road network and the environment and limits risks associated with allowing an unlimited number of heavy vehicle movements on nearby roads. The inclusion of this condition ensures that the impact of heavy vehicle movements each day does not exceed the number of heavy vehicle movements allowed under the previous approval. The condition limiting heavy vehicle movements was an important part of the approval as a whole in accommodating a high impact industry in a low impact precinct and in reducing adverse impacts. The removal of the condition on the number of heavy vehicle movements would remove an important condition and would alter in a substantial way the approval which was granted.

[60] I conclude that Conditions 4.1 and 6.2 are not severable from the approval as a whole.

Severability in the context of the *JRA*

[61] In the preceding section I have drawn upon legal principles identified in the parties' submissions concerning the severability of conditions from a decision as a whole. Their reliance upon authorities about town planning approvals is appropriate. I should add that *Kent County Council* has been applied in numerous town planning decisions in Australia.[27] Those principles permit a local authority to contend that some conditions are so important that if they were to be removed, there ought to be no approval at all.[28] An analogous situation arises in this case in which the Coordinator-General submits that the two impugned conditions are sufficiently important that it would be inappropriate, in the event they were found to be in excess of power, to set them aside, leaving an approval which was unlimited in its duration and unlimited as to heavy vehicle movements.

[62] The present issue does not arise in the context of a statutory town planning appeal in which the decision-maker contends that impugned conditions are so important that, if

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27 See, for example, *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1; *Alberton Investments Pty Ltd v Pine Rivers Shire Council* [1994] QPLR 60.

28 *Morgan v Toowoomba Regional Council (No 2)* (2011) QPELR 620 at 622 [5].

they were to be removed, the result should be that the approval itself be set aside. It arises in the context of a proceeding for judicial review.

[63] A party which seeks to judicially review a decision to approve an application with conditions on the basis that certain conditions are invalid may argue that the conditions are severable and that the appropriate form of order is to set aside the part of the decision which includes those conditions. Such a remedial response where conditions are severable is contemplated by s 30(1)(a) of the *JRA* by which the Court may make an order quashing or setting aside "a part of the decision". It has been observed that a power to quash or set aside part of a decision should only be exercised in a case where the remaining part of the decision "could stand alone if the part set aside were to be severed".[29] Otherwise, the consequence of invalidating part of a decision is that "the remaining part of the decision must likewise fall" and the only proper order is that the entire decision be set aside.[30] Section 30(1)(a) might be said to provide a statutory basis for severance of part of a decision.

[64] As noted, Goodsell does not challenge the decision to grant approval with conditions on the basis that the inclusion of invalid conditions leads to the invalidation of the decision to grant approval with conditions. It does not challenge the decision to grant approval with conditions on the basis that the two conditions are beyond power, and seek to invoke a severance argument that the appropriate form of relief is for the invalid conditions to be severed. Goodsell seeks judicial review of the decision to impose the two conditions, not the decision to approve the application with conditions.

[65] This proceeding does not seek to engage s 30(1)(a) in a judicial review of the decision to approve with conditions by seeking an order that only part of the decision, namely Conditions 4.1 and 6.2, be set aside. Instead, it seeks judicial review of the conditions and an order that the decision to impose them be set aside. In doing so it encounters the cross-application that it would be inappropriate to grant such relief because the conditions that Goodsell seeks to impugn are not severable from the approval as a whole.

Conclusion on the threshold issue

[66] I have found each of the two challenged conditions to be integral to the approval as a whole. In the circumstances, I consider that it would be inappropriate to simply set them aside, leaving Goodsell with an approval which was unlimited in its duration and unlimited in heavy vehicle movements. In addition, and for similar reasons, I have concluded that the conditions are not severable from the approval as a whole.

Goodsell's final argument in response to the cross-application

[67] Goodsell's final argument in response to the Coordinator-General's application to stay or dismiss the application pursuant to s 48 of the *JRA* is that even if the impugned conditions are not severable, if they are held to be *ultra vires*, the whole approval must fail, thereby resuscitating the approval granted on 8 August 2013.

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29 *United Airlines v Secretary, Department of Transport and Communications* (1990) 26 FCR 598 at 605; followed in *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2)* (2008) 251 ALR 80 at 132 [196].

30 Ibid.

[68] The short answer to this submission is that Goodsell does not challenge the approval decision, even as an alternative to its challenge to the decision to impose conditions. It does not seek, as an alternative to an order that the conditions be set aside, an order that the approval be set aside, thereby resuscitating the 8 August 2013 approval.

[69] Neither party contends that an appropriate outcome of the proceeding, in the event that Conditions 4.1 and 6.2 were found to be beyond power or otherwise liable to be set aside, would be for the 12 October 2018 approval simply to be set aside. Goodsell does not seek an order that the 12 October 2018 approval be set aside, let alone that such an order be made without a consequential order requiring the Coordinator-General to determine the 2016 application according to law. In the absence of an application for such an alternative form of relief, I am disposed to exercise my discretion to dismiss the application for a statutory order of review pursuant to s 48 of the *JRA*.

[70] The Coordinator-General has established that the two impugned conditions are integral to the whole approval and that, to use the language of the cross-application, they are not "severable from the approval as a whole". In the circumstances, it would be inappropriate to set aside those conditions, leaving the 12 October 2018 approval to operate without those conditions, being an approval which would be unlimited in its duration and have no limit on heavy vehicle movements for that indefinite period.

[71] For similar reasons it is inappropriate to grant the declaratory orders sought in paragraph 2 of the claim for relief. The first declaratory order sought is a declaration that the Coordinator-General "failed to exercise the power and to perform the duty reposed in him under s 84E(3) of the *State Development and Public Works Organisation Act* 1971" to impose a condition of the kind stated in that provision. Such a declaration is inappropriate in circumstances in which Goodsell does not seek any order consequential upon such a declaration to cure the alleged failure to exercise the power and to perform the duty, for example, by imposing new conditions in place of Conditions 4.1 and 6.2. It also would be inappropriate to make a declaration to the effect that Conditions 4.1 and 6.2 do not comply with s 84E(3). Whilst the Court has power to make only a declaratory order, in this case it would be inappropriate to simply make a declaratory order to the effect that Conditions 4.1 and 6.2 are beyond power or unauthorised in circumstances in which Goodsell does not seek consequential orders which are said to flow from such a declaration. Goodsell does not seek consequential orders that the approval of its application on those and other conditions be set aside or declared to be of no effect.

[72] Finally, insofar as Goodsell seeks a declaratory order that Conditions 4.1 and 6.2 are "null and void and of no effect", I consider that it would be inappropriate to grant such a bare declaration in circumstances in which the conditions are integral to the approval and not severable from it. This is essentially for the same reasons that would be inappropriate, even if Goodsell established that Conditions 4.1 and 6.2 were unauthorised or otherwise liable to be set aside on administrative law grounds, to simply order conditions that are not severable from the approval as a whole to be set aside.

[73] Therefore, I grant the Coordinator-General's application filed 12 April 2019 that the application for a statutory order of review filed 12 December 2018 be dismissed pursuant to s 48 of the *JRA*.

The substantive grounds of judicial review

[74] Because I have granted the cross-application to dismiss the proceeding, it is unnecessary to determine the substantive grounds for judicial review. For completeness, I will address them in a relatively summary form.

Natural justice

[75] Goodsell contends that a breach of the rules of natural justice happened in relation to the making of the decision. In particular, it alleges that there was a breach of procedural fairness in imposing a two year limit in circumstances in which the Coordinator-General is alleged to have not provided:

(a) the substance of the information relied on to arrive at a two year limitation;

(b) an explanation of the basis to impose a time limitation on the approval; and

(c) an opportunity to respond to those matters.

[76] In response, the Coordinator-General submits that Goodsell knew of the proposal for a two year limit on the use and the essence of why the Coordinator-General thought such a time limit to be appropriate, and had more than one opportunity to comment on the issue, which it took up. The Coordinator-General also submits that the obligation to afford natural justice did not extend to the Coordinator-General generating "evidence" for the view that he formed about the time limit and that, for reasons best known to it, Goodsell did not avail itself of the opportunity to provide evidence or information when given the opportunity to comment on the proposal for a two year limit on use.

[77] The relevant history may be summarised as follows.

[78] On 30 May 2018 the independent reviewer advised the Coordinator-General that, while the application should be refused, Goodsell's operations fulfilled a legitimate need within the Townsville development and construction industry and, consistent with the Coordinator-General's wider development industry support objectives, the opportunity existed to approve the use in whole or in part and limit the approval to a fixed period. This was said to provide a way for Goodsell to "investigate options to develop elsewhere and manage a relocation over time". The independent reviewer thought that a period of five years would be a reasonable period. The report of the independent reviewer was provided to Goodsell on 5 June 2018.

[79] On 10 August 2018 the Coordinator-General advised Goodsell of proposed draft conditions which included a condition that the permitted uses must cease to be carried out within four years from the approved date. On 17 August 2018 Goodsell requested from the Coordinator-General the supporting material and factual foundation for the independent reviewer's conclusions about approval for a fixed period and the basis for a proposed four year time limit condition. On 7 September 2018 the Coordinator-General responded to the correspondence dated 17 August 2018 and contested that it was obliged to provide the material which had been requested by Goodsell's solicitors. It also provided revised proposed draft conditions which included a draft condition that the permitted uses must cease to be carried out within two years from the commencement of the use. It sought Goodsell's comments on those conditions by 21 September 2018.

[80] On 17 September 2018 Goodsell commented on the draft amended conditions and, among other things, contended that there was no "rational evidence, or any cogent or probative grounds" to justify the proposed time limitation. It addressed arguments as to why a two year duration should not be imposed and requested "evidence" or other material in support of a two year limitation condition.

[81] On 19 September 2018 the Coordinator-General responded and addressed a number of matters. He noted that the business had operated without any development approval from 1993 until the approval of 8 August 2013 (which was limited to a maximum throughput of 20,000 tonnes per annum), that the application (which sought a limit of 640,000 tonnes per annum) could not be described as an application to regularise the original development approval, that the relevant land was in a low impact precinct and that the independent reviewer had concluded that the application should be refused. The Coordinator-General stated that matters in favour of the application, including the employment of approximately 20 people by Goodsell, needed to be balanced against the requirements of the Development Scheme. As to the specific issue of a time limit, the Coordinator-General advised:

> "...the time-limited approval is an attempt to provide your client with an outcome that could allow the transition of the business to a more suitable location, without compromising the intent of the Townsville SDA development scheme, and negatively impact surrounding residences."

[82] On 21 September 2018 Goodsell's solicitors posed a series of questions to the Coordinator-General. The Coordinator-General's submissions characterise these questions as an attempt to interrogate him. The questions included the following:

> "• What are the 'requirements of the Townsville SDA Development Scheme' in the balance?
>
> • In what way is 'the intent of the Townsville Development Scheme' that would otherwise be compromised?
>
> • What is the alleged negative impact of [sic] surrounding residences?
>
> • What factors were taken into account for a transfer of the business?
>
> • What more suitable locations are referred to?
>
> • Why was five (5) years considered reasonable?
>
> • Upon what evidence and other material was the five (5) year time made?
>
> • Why was the five (5) year limit truncated to four (4) years?
>
> • Upon what evidence and other material was the four (4) year time made?
>
> • Why is four (4) years reasonable?
>
> • Why is the initial condition of a four (4) year limit truncated to two (2) years?
>
> • Upon what evidence and other material was the two (2) year time made?

- Why is two (2) years reasonable?"

[83] The Coordinator-General did not respond to these questions and on 2 October 2018 advised that he was currently finalising his assessment of the application and invited any further comments by 8 October 2018. On 8 October 2018 the Coordinator-General advised Goodsell that his assessment of the application would be based upon the information provided by Goodsell, the independent reviewer's report and Goodsell's response to that report. On 8 October 2018 Goodsell submitted, among other things, that there was no evidence or factual foundation which had been provided by the Coordinator-General in support of setting the limit and that Goodsell had been denied the opportunity to be heard on why there should be any time limit at all, let alone one of two years.

[84] It is unnecessary to essay the law in relation to procedural fairness. I proceed on the basis that the obligation to accord procedural fairness required the Coordinator-General to inform Goodsell of the substance of the information he relied upon so that Goodsell could respond to any factual allegation or proposed conclusion on which the decision was likely to be based. The present issue does not involve a proposed adverse finding of fact based on evidence or material in the Coordinator-General's possession which should have been disclosed to Goodsell but which was withheld from it. Instead, Goodsell was informed of the material, particularly the independent review report, which provided a basis to conclude that the application should be refused, or, granted for a limited duration so as to balance competing interests and to allow Goodsell to investigate options to develop elsewhere and manage a relocation over time. Goodsell was informed of the rationale for a time-limited approval. It was given the opportunity to comment on that proposal.

[85] Goodsell complains that it was denied an opportunity to be heard on the matter and, in particular, to be heard on what a suitable amount of time was to move its business and the practicality, cost and impact of a transition to an alternative location. I am not persuaded of this. Goodsell was given an opportunity to address these matters and to provide information and arguments as to why a two year period was inadequate, including the cost of relocating and the presence or absence of suitable locations.

[86] The Coordinator-General is criticised by Goodsell for not providing to it, prior to the decision, the evidence or other factual support for the view that he formed about the appropriateness of a two year limit. However, the adoption of a time period was an evaluative judgment arrived at in providing (to adopt the Coordinator-General's reasons) "a reasonable balance between impacts on the residential area of Cluden, whilst providing for continuation of the business with time to allow the Proponent to investigate alternative Sites consistent with TSDA zoning and the Development Scheme".

[87] It may be said that the Coordinator-General had little or no information about the amount of time which would be required for Goodsell to move its business operation and the costs of doing so. However, any deficiency in that regard was largely a function of Goodsell's failure or refusal to disclose information about these matters to the Coordinator-General when it was given opportunities to do so. Instead, it insisted upon the Coordinator-General providing this kind of information to it. I accept the Coordinator-General's submission that his obligation to afford natural justice did not extend to generating evidence to support the view that he had formed about the

appropriateness of a two year limit. The Coordinator-General informed Goodsell of the decision he proposed to make and explained the reason for a time-limited approval, rather than an outright refusal of the application, as had been recommended. Goodsell was given the substance of the information relied upon by the Coordinator-General and an opportunity to present evidence and make proper submissions in response. I am not persuaded that the Coordinator-General did not accord procedural fairness to the applicant. The ground of review under s 20(2)(a) of the *JRA* is not made out. To the extent Goodsell relies upon an alleged breach of the rules of natural justice as a ground of review under s 20(2)(b), (c) and (d), those grounds are not made out.

Irrelevant considerations

[88] Goodsell advances in paragraph 4 of its application and paragraphs 107 to 121 of its submissions the contention that the Coordinator-General took into account a number of irrelevant considerations in the exercise of a power.

Relocation

[89] The first contention is that the Coordinator-General considered that a two year approval was appropriate because it gave Goodsell the opportunity to investigate options to develop elsewhere (if that is what it desired) and manage a relocation over that time. This is said to be an irrelevant consideration when relocation was not desired by Goodsell. In my view, this argument is misplaced. The Coordinator-General did not find that relocation was desired by Goodsell. It was apparent from Goodsell's submissions that it did not wish to relocate and that it regarded a time limit on the approval as a threat to a family business which had operated on the land for 26 years, providing employment and an essential service to North Queensland. Against that background, rather than refuse the application, the Coordinator-General granted it for a limited duration so as to allow for a continuation of the business and time to allow Goodsell the opportunity to investigate alternative sites "if desired". This was not an irrelevant consideration in deciding to not refuse the application, but to approve it for a limited duration.

High impact industry in a low impact industry precinct

[90] Goodsell complains that the Coordinator-General took into account that approval of the application would entrench an inconsistent use when the application was for an existing approved use and environmental conditions for long-term approval adequately ensured consistency with the Development Scheme. It contends that the Coordinator-General treated the application as one requiring an exemption from the Development Scheme when this was not the case and, instead, the development was an approved development, subject to conditions.

[91] As to the last matter, the Coordinator-General did not conclude that the application required "an exemption". Instead he took account of the fact that the use being applied for (even if it be for an existing use on different conditions including much greater throughput than previously authorised) was a high impact industry in a low impact industry precinct and that the site was close to residential communities in Cluden. This

was not an irrelevant consideration because it required consideration of the conditions which would reduce or eliminate adverse impact in the area.

High level State planning policy

[92] Goodsell contends that the Coordinator-General took into account the irrelevant consideration that an "unconditioned approval would be such as to largely disregard and undermine the fundamental high level State planning policy represented in the Development Scheme and the future intent of the TSDA" when the application was not for an unconditional approval and the intent of the scheme is to regulate the use of land in the TSDA and to permit a range of ongoing uses, where appropriate.

[93] In my view, it was not irrelevant to take into account the consequences of an unconditional approval on planning policy or the intent of the scheme. It was a relevant consideration in deciding to either refuse the application or, as was decided, to approve it with conditions, and then to decide what those conditions should be. The present issue, and this proceeding, does not concern the appropriateness of the 28 conditions and whether, overall, they struck an appropriate balance between planning policy and other interests.

[94] Next, Goodsell contends that the Coordinator-General considered that it was "seeking to subvert the zoning of the TSDA and thereby high level State planning policy". However, there was no finding of any such intent. Instead, the Coordinator-General was concerned with the implications of granting the application on policy and the inconsistency between the proposed use and the land being in a low impact industry precinct.

[95] On a related point raised by Goodsell, it was open to the decision-maker to take into consideration that high level State planning policy should not be diverted without extremely solid reasons.

Goodsell's knowledge and actions when the TSDA and the Development Scheme were established

[96] Goodsell notes that the decision-maker took into account that Goodsell did not take formal steps to object at the time the TSDA and the Development Scheme were imposed. The decision-maker observed that at the time when the TSDA and Development Scheme were imposed "it necessarily would have been within the reasonable contemplation of the Proponent that there would likely be future limitations upon the Site", and that Goodsell did not take steps or pursue formal objection at the time. Goodsell submits that this is entirely irrelevant and that what it did, or failed to do at the time, is entirely beside the point. I would not regard this matter as an important consideration. However, I am disinclined to find that it was an irrelevant consideration. If it be the case that Goodsell knew at the relevant time that its future development of the site was likely to be constrained then it was open to it to contest the restrictions that the TSDA or the Development Scheme would impose upon it. Having not done so and having continued to operate its business on the site, its objection was to the implementation of the scheme, rather than to its adoption. The observation made at paragraph 135(l) of the reasons was not irrelevant.

Relevant considerations

[97] Goodsell contends that the decision failed to take a "relevant consideration" into account in the exercise of the power.

[98] The evidence does not establish that the decision-maker failed to take into account the many matters nominated by Goodsell in paragraph 5 of its application and in paragraphs 122 to 126 of its submissions. The Coordinator-General took account of matters such as the fact that the current approval dated 8 August 2013 did not have an end date and the consequence of imposing a restriction on heavy vehicle movements to 80 vehicles. The various matters raised by Goodsell in its submissions were the subject of detailed consideration in the Coordinator-General's reasons. Rather than failing to take into account relevant considerations, Goodsell's real complaint appears to be that inadequate weight was placed upon its submissions.

Extraneous purpose and exercise of power in accordance with a rule or policy

[99] Goodsell contends that the Coordinator-General imposed Conditions 4.1 and 6.2 in order to satisfy the residents of Cluden, when those concerns were met by the other conditions. This is essentially an argument about the merits and the extent to which adverse impacts, including the effects on neighbouring residents, required, in addition to the many conditions which are not challenged, a limit on heavy vehicle movements and an approval of limited duration. The decision-maker reached the conclusion that these conditions were not an unreasonable imposition and were reasonably required. This was an evaluation which was open to it. To the extent that the decision-maker was influenced by a desire to advance State planning policy, Goodsell has not established that the Coordinator-General exercised the power without regard to the merits of the particular case. This is shown by the fact that the application was granted with conditions, rather than refused because of its inconsistency with the policy. It is also shown in the detailed reasons relating to the circumstances of Goodsell's application.

Unreasonableness

[100] Goodsell contends that the decision was an improper exercise of the power conferred by the enactment in that it was so unreasonable that no reasonable person could so exercise the power. It also relies upon the principle that where a statute is silent on the topic of reasonableness, it should be construed so that there is a condition that the power will be exercised reasonably. These principles still confer upon a decision-maker in the position of the Coordinator-General a considerable scope for decision. Unreasonableness in the sense contended for is not established by showing that many other decision-makers would have made a different decision, for example, by extending the duration of the approval beyond two years. In conferring a power, such as the power conferred by s 84E(1), the legislature is taken to intend that it be exercised reasonably, according to the "rules of reason and justice".[31]

[101] Goodsell argues that there is an irreconcilable and unreasonable tension between Condition 6.2 and Condition 5.1. Condition 5.1 provided that the processing onsite "shall not exceed 320,000 tonnes per annum." Goodsell argues that this limit could not be achieved if heavy vehicle movements were not to exceed 80 movements per day as a combination of ingress and egress.

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[31] *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at 362-363 [63] – [65].

[102] I do not regard Condition 6.2 as unreasonable. It was the existing condition. The extent to which changed transportation arrangements to and from the site within that limit might enable Goodsell to increase its processing and approach the maximum limit of 320,000 tonnes per annum was a matter for it. For example, it might increase its processing with the same number of heavy vehicle movements by ensuring that fewer heavy vehicles approached or left the site empty. The figure of 320,000 tonnes per annum was a maximum limit, not a guarantee. The imposition of such a limit is not challenged. I assume that such a limit itself has a justification in terms of placing an upper limit on processing and thereby limiting the impact of the use. It was half the amount Goodsell applied for.

[103] I am not persuaded by Goodsell's argument that no reasonable decision-maker reasonably exercising the power could have imposed Condition 6.2. A decision-maker might reasonably conclude that, taking all relevant matters into account, heavy vehicle movements should not be increased above current limits under the existing approval.

[104] As to the unreasonableness of the two year period, understandably Goodsell places reliance upon the fact that its family business has operated for 26 years, provides the region with an essential service, provides employment for 24 people and that the two year time period places an existential threat upon its business. The adoption of that two year period is said to be unexplained, and is less than the five year period that the reviewer suggested or the four year period that was initially proposed. The two year period is submitted to be devoid of plausible justification and a figure that was "arbitrarily plucked out of the air". This is said to be reinforced by the failure of the Coordinator-General to respond to Goodsell's questions about the selection of that period.

[105] Goodsell may have had arguments to overturn a two year period if this was a statutory appeal in which there was a review on the merits. Instead, it is an application for judicial review in which the Court does not sit as a merit review tribunal. Unreasonableness is not necessarily established because the decision-maker gave inadequate weight to the potential consequences to which Goodsell pointed if an approval was granted for a limited period of years. The fact that the decision was less than that recommended by the reviewer does not make it unreasonable.

[106] The fact that other conditions, including Condition 6.1, limited adverse impacts on the nearby residential area of Cluden did not make it unreasonable to grant the approval for a limited duration. The reasons of the decision-maker are logical and plausible. They involved an evaluation of competing considerations and ultimately a decision which allowed the business to continue for a few years when it would have been open to another decision-maker to refuse the application. The decision to grant the application with conditions, including a condition as to the duration of the approval, was one within the exercise of a discretionary judgment, exercised reasonably. The selection of a two year period involved an evaluation of competing interests. The fact that another decision-maker (or a merit review tribunal) may have reasonably concluded that, on balance, the application should be granted for a period of four or five years does not make the selection of a two year period illogical, unjustified or unreasonable.

[107] I am not persuaded that Goodsell has established that the decision to impose Conditions 4.1 and 6.2 were unreasonable in the sense that term is used in s 23(g) of the *JRA* or in the leading authority of *Li*.

Alleged error of law

[108] The statute creates a test for reasonableness of the conditions which differs from *Wednesbury* unreasonableness and the implication of reasonableness. Section 84E(3) provides:

> "(3) A condition imposed under subsection (1)(a)(i) must –
>
> (a) be relevant to, but not an unreasonable imposition on, the development or use of the land as a consequence of the development; or
>
> (b) be reasonably required in relation to the development or use of the land as a consequence of the development."

[109] Goodsell advances similar arguments in this context concerning the imposition of a two year time limit and a limit of 80 heavy vehicle movements per day.

[110] Although the test for reasonableness derives from an express statutory requirement, the arguments are similar. The condition limiting ingress and egress to 80 heavy vehicle movements per day was reasonable in maintaining the existing limit and limiting the impact of heavy vehicles. The figure of 320,000 tonnes per annum was a processing limit provided by Condition 5.1, not a guarantee. The extent to which Goodsell was able to increase its processing towards that limit, while still observing the requirement of ingress and egress was a matter for it. Incidentally, the new conditions allow it to operate on a Saturday, unlike the 2013 approval.

[111] As to the reasonableness of the condition as to duration, Goodsell notes that prior to the application it had "an unlimited duration right to conduct its business on the existing development under the first approval". However, that right was limited, according to the terms of the approval, to 20,000 tonnes per annum, a figure which it vastly exceeded, leading to a show cause notice and an enforcement notice. Goodsell discontinued an appeal against that enforcement notice, preferring instead to make the application which is the subject of this proceeding. The fact that its previous approval was of "unlimited duration" does not make the imposition of a time period on a much increased annual throughput unreasonable.

[112] I am not persuaded that the two conditions which are challenged failed to comply with s 84E(3).

No evidence or other material to justify the making of the decision

[113] There was material to justify the making of the decision. It included the independent reviewer's report, the terms of the existing approval and the material advanced by Goodsell in support of the application. The material which justified the making of the decision to approve the application on conditions, including Conditions 4.1 and 6.2, is apparent from the Coordinator-General's reasons. The condition concerning heavy vehicle movements was supported by the impact which such an existing limit had and the undesirability of increasing those impacts by increasing the limit. The adoption of a condition which granted approval for two years involved an evaluation of the adverse impact of the proposed use and competing matters, including the community need that the proposed development would serve. The imposition of Condition 4.1 was intended to ensure that adverse impacts could be managed in the short term while providing what was thought to be a suitable amount of time for Goodsell to have the opportunity "if it

so desires" to transition to a more suitable location at which its operations would not adversely affect residential development.

[114] The decision to include such a condition was one within the discretionary exercise of power in balancing competing considerations. As significant as its consequences may be for Goodsell, its employees and the industries which its well-established business serves, the evaluative decision to impose a two year time period cannot said to be one which was made without any evidence or other material to justify it.

Conclusion

[115] For these reasons, had I not granted the Coordinator-General's cross-application to dismiss the proceeding under s 48, I would have been disinclined to find that the grounds for judicial review argued by Goodwell were established. Subject to any submissions on costs, costs should follow the event.

[116] I order:

1. The application for a statutory order of review filed 12 December 2018 is dismissed pursuant to s 48 of the *Judicial Review Act* 1991 (Qld).

2. The applicant pay the respondent's costs of and incidental to the proceeding on the standard basis.