SUPREME COURT OF QUEENSLAND

CITATION:	*Redland City Council v King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd & Anor* [2020] QCA 41
PARTIES:	**REDLAND CITY COUNCIL** (applicant) **v** **KING OF GIFTS (QLD) PTY LTD** **HTC CONSULTING PTY LTD** (first respondents) **DEPARTMENT OF TRANSPORT AND MAIN ROADS** (second respondent)
FILE NO/S:	Appeal No 8114 of 2018 P & E Appeal No 3641 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2017] QPEC 64 (Kefford DCJ)
DELIVERED ON:	13 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	12 March 2019
JUDGES:	Fraser and Philippides and McMurdo JJA
ORDERS:	**1. The application for leave to appeal be granted.** **2. The appeal be allowed.** **3. The orders made on 18 June 2018 be set aside.** **4. The matter be remitted to the Planning and Environment Court to be determined according to law.** **5. The first respondents pay the appellant's costs of the appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITHIN ENVIRONMENT JURISDICTION – QUEENSLAND – PLANNING AND ENVIRONMENT COURT AND ITS PREDECESSORS – RIGHT AND AVAILABILITY OF APPEAL – where the applicant seeks leave to appeal from a decision of the Planning and Environment Court pursuant to s 63 of the *Planning and Environment Court Act* 2016 (Qld) – where the primary judge ordered that the appeal be adjourned in November 2017, giving reasons that she intended to allow the appeal and that the purpose of the adjournment was to allow for the "formulation of reasonable and relevant conditions" for

approval of the development – where final orders on the appeal were made in June 2018 – where the applicant seeks leave to appeal from the final orders made on June 2018 – whether the appeal to the Court of Appeal was made out of time – whether leave to appeal should be granted

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – where the primary judge granted an appeal pursuant to s 461(1) of the *Sustainable Planning Act* 2009 (Qld) (SPA) against the local government's refusal of a development application for a material change of use to develop land for a service station, drive through restaurant and an on-site effluent disposal irrigation area – where the development application was impact assessable such that it was required to be assessed against all relevant provisions of the applicable planning scheme – where the planning scheme is divided into various zones, including the Open Space Zone and the Environmental Protection Zone (EP Zone) – where the planning scheme also has a number of overlays – where the entirety of the site is contained within the Kinross Road Structure Plan (KRSP) Overlay Code – where the built form of the proposed development is located within the EP Zone and Bushland Living Precinct 6 of the KRSP Overlay Code – where the effluent treatment area of the proposed development is located within the Open Space Zone and Greenspace Precinct 7 of the KRSP Overlay Code – where the primary judge found that the proposed development complied with relevant ecological provisions of the EP Zone Code and the KRSP Code – whether the primary judge misconstrued specific outcome S1.1 of the EP Zone Code – whether the primary judge erred in concluding that the proposed development complied with overall outcomes 4.6.7(2)(a)(i)c. and e. of the EP Zone Code – whether the primary judge erred in concluding that the proposed development complied with overall outcome 5.15.8(f) and specific outcome 1.7(2)(b) of the KRSP Overlay Code – whether the primary judge erroneously took into account an irrelevant consideration by having regard to the maintenance and protection of ecological values of Hilliards Creek, which was located in the Northern Portion of the site

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – where the first respondents' economic expert gave evidence before the primary judge that any economic need for the proposed development could be met by a "service station with a smaller convenience store, fewer fuel spots, without the car wash and possibly without the drive through restaurant" – where the primary judge rejected that evidence as irrelevant because it was a "hypothetical alternative" – where the primary judge then made a factual

finding that there was a need for the proposed development – whether the primary judge took an erroneous approach in assessing the need for the development as a question of fact, thereby amounting to an error of law

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – where the primary judge held that while the proposed development conflicted with the planning scheme in some respects, there was otherwise a need for the proposed development that was a sufficient ground to justify approval of the development pursuant to s 326(1)(b) of the SPA – whether the primary judge erred in assessing the need for the proposed developments that would otherwise justify the approval of the development – whether the primary judge correctly applied s 326(1)(b) of the SPA to assess whether the need for the development was a sufficient ground to approve the development in the public interest, despite its conflicts with the planning scheme

Acts Interpretation Act 1954 (Qld)
Commonwealth Constitution, s 73, s 74
Fair Work Act 2009 (Cth), s 565
Integrated Planning Act 1997 (Qld)
Planning Act 2016 (Qld)
Planning and Environment Court Act 2016 (Qld), s 63, s 64
Sustainable Planning Act 2009 (Qld), s 314, s 326, s 461(1), s 759
Uniform Civil Procedure Rules 1999 (Qld), r 744

Australian Capital Holdings P/L v Mackay City Council & Ors [2008] QCA 101, cited
Australian Competition and Consumer Commission v Valve Corporation (No 4) [2016] FCA 382, followed
Bell v Brisbane City Council [2018] QCA 84, followed
Clark v Cook Shire Council [2008] 1 Qd R 327; [2007] QCA 139, cited
Clisdell v Commissioner of Police (1993) 31 NSWLR 555, cited
Commonwealth v Bank of New South Wales (1949) 79 CLR 497; [1949] HCA 47, cited
Driclad Pty Ltd v Federal Commissioner of Taxation (1968) 121 CLR 45; [1968] HCA 91, cited
Gold Coast City Council v K & K (GC) Pty Ltd [2019] QCA 132, followed
Isgro v Gold Coast City Council [2003] QPELR 414; [2003] QPEC 2, cited
Landsal Pty Ltd (In liq) v REI Building Society (1993) 41 FCR 421; [1993] FCA 121, cited
Lockyer Valley Regional Council v Westlink Pty Ltd [2013] 2 Qd R 302; [2012] QCA 370, cited
Maroochy Shire Council v Barns [2001] QCA 273, cited
Maughan Thiem Auto Sales Pty Ltd v Cooper (2013)

216 FCR 197; [2013] FCAFC 145, cited
Qantas Airways Ltd v Ardlie (2018) 265 FCR 426; [2018] FCAFC 154, cited
St Clair v Timtalla Pty Ltd [2010] QCA 304, cited
Weightman v Gold Coast City Council [2003] 2 Qd R 441; [2002] QCA 234, cited
Zappala Family Co Pty Ltd v Brisbane City Council (2014) 201 LGERA 82; [2014] QCA 147, cited

COUNSEL: G J Gibson QC, with K W Wylie, for the applicant
C O Hughes QC, with P Beehre, for the respondents

SOLICITORS: Corrs Chambers Westgarth for the applicant
J Torbey & Associates for the respondents

[1] **FRASER JA:** I agree with McMurdo JA's reasons and propose merely to add some brief reasons concerning the respondents' argument that the applicant's application for leave to appeal against the final orders made by the primary judge in June 2018 should be refused because of the applicant's omission to apply within time for leave to appeal from the primary judge's order made in November 2017.

[2] The first step in the respondents' argument is that the applicant could have applied for leave to appeal against the primary judge's order in November 2017 adjourning the appeal in the Planning and Environment Court. The primary judge's reasons published at that time explained why she intended to allow the appeal and that the purpose of the adjournment was to allow time for the formulation of the conditions upon which a development approval would be granted.

[3] It has been held that, subject to a grant of leave to appeal, an appeal to the Court of Appeal may be brought against orders made in the Planning and Environment Court allowing an appeal against the refusal of a development application and adjourning that appeal so that conditions of a proposed development permit can be formulated.[1] An order allowing such an appeal has substantive effects. For example, in *Australian Capital Holdings P/L v Mackay City Council & Ors*,[2] Holmes JA, with whose reasons I and Chesterman J (as he then was) agreed, held that a result of such an order was that the decision of the local authority to refuse approval of a development application must be regarded in the Planning and Environment Court as wrong unless and until that order was set aside on appeal to the Court of Appeal.

[4] Notwithstanding the absence in this case of an order in November 2017 allowing the appeal in the Planning and Environment Court, I accept the first step in the respondents' argument. Applying the authorities cited at [24] – [27] of Philippides JA's reasons, the order adjourning the appeal was a "decision" within the meaning of that word in s 63 of the *Planning and Environment Court Act* 2016 (Qld). That decision was adverse to the rights claimed by the applicant as a party who had sought instead an order dismissing the appeal. The decision, being made in a proceeding described in s 63, was one from which an appeal might be pursued under s 63(1) upon leave to appeal being granted under s 63(2). It follows that the applicant had a statutory right to apply within the time limited for leave to appeal

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1 See, for example, *Sunshine Coast Regional Council v Parklands Blue Metal Pty Ltd & Ors* [2015] QCA 91 at [1].

2 [2008] QCA 101.

from the order for an adjournment made in November 2017 upon the same grounds as are contained in the applicant's notice of appeal against the final orders made in June 2018.

[5] That conclusion is consistent with Thomas JA's reference in *Maroochy Shire Council v Barns*,[3] in the passage quoted in [28] of Philippides JA's reasons, to an adjournment being granted by an "order". His conclusion that the proposed appeal was "premature" is explicable by his immediately following remark that there "may well be … further dispute about the form of the relief that is to be granted", a consideration that presumably was considered to be significant for the decision whether to grant leave to appeal in that case. No doubt there was some potential for disputes about the conditions in this case, but that appears to have had no significance for the applicant's challenges to the primary judge's reasons for concluding that the appeal should be allowed and a development approval granted upon conditions to be formulated. It does not seem to me that the absence of final orders should have militated against a grant of leave to appeal against the adjournment order in this case if that were otherwise found to be appropriate, but of course the decision is a discretionary one.

[6] It is at the next step that the respondents' argument breaks down. As appears from the reasons given by my colleagues, the respondents' argument includes no explanation of how the applicant's omission to exercise its statutory right within the time limited to apply for leave to appeal against the order for an adjournment made in November 2017 could affect the efficacy of the applicant's exercise within time of its statutory right to seek leave to appeal from the final orders made in June 2018.

[7] I agree with the orders proposed by Philippides JA.

[8] **PHILIPPIDES JA: Background** This is an application by the Redland City Council (the Council) for leave to appeal pursuant to s 63 of the *Planning and Environment Court Act* 2016 (Qld) (the P&E Court Act) against a decision of the Planning and Environment Court (the P&E Court). The P&E Court decision concerned a development application by King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd (the first respondents) for a material change to use to develop land comprising 3.522 hectares (Ha) at Alexandra Hills for a service station (including an associated shop and car wash facility) and a drive through restaurant[4] as well as an onsite effluent disposal irrigation area of just over 0.5 Ha (the proposed development). The proposed site is a degraded and disused farm at the confluence of two major roads.[5]

[9] Upon the Council refusing the development application, the first respondents brought an appeal, pursuant to s 461(1) of the *Sustainable Planning Act* 2009 (Qld) (the SPA) to the P&E Court, which was allowed and the development was approved.

[10] The development application being impact assessable, s 314 of the SPA required that it be assessed against all relevant provisions of version 4 of the Redlands Planning Scheme (the Redlands Planning Scheme) which was in force when the

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3 [2001] QCA 273 at 2.
4 *King of Gifts (Qld) Pty Ltd v Redland City Council* [2017] QPEC 64 **(**Reasons**)** at [7].
5 Reasons at [1].

application was made and decided in accordance with s 324 and s 326 of the SPA.[6] By s 326(1)(b) of the SPA a decision must not conflict with the Redlands Planning Scheme unless, relevantly, there are sufficient grounds[7] to justify the decision despite the conflict, grounds being defined to mean "matters of public interest".

[11] The issues for determination before the primary judge concerned:[8]

(a) whether approval of the proposed development conflicted with the Redlands Planning Scheme by reason of:

(i) visual amenity impacts;

(ii) ecological impacts;

(iii) the nature and location of the use and character of the built form of the proposed development;

(b) whether provisions of the draft Redland City Plan 2015 ought to be given weight and warranted the refusal of the development application; and

(c) the nature and extent of the conflict and whether there were sufficient grounds under s 326 of the SPA to justify approval of the proposed development notwithstanding conflict with the Redlands Planning Scheme.

[12] On the issue of whether the proposed development conflicted with the Redlands Planning Scheme, the primary judge found that:

(a) it conflicted with some visual amenities,[9] but they were not serious[10] and there were no unacceptable impacts on visual amenities;[11]

(b) there were also no unacceptable ecological impacts,[12] either in the southern or northern portion of the proposed development; and

(c) there were conflicts concerning the nature and location of the use and character of the built form in the southern portion of the proposed development.[13]

[13] Her Honour considered the nature and extent of the conflicts and found there was clear conflict, which effectively arose as a consequence of the proposal to locate uses that were nominated as inconsistent uses.[14] However, despite the identified conflicts, her Honour considered there were sufficient grounds to justify approval, in the exercise of the discretion under s 326(1)(b) of the SPA, on the basis of need alone, but also taking other matters into account.[15]

The application for leave to appeal

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6 Reasons at [14]-[15] and [25].
7 Sch 3 of the SPA.
8 Reasons at [22].
9 Reasons at [32].
10 Reasons at [34].
11 Reasons at [112].
12 Reasons at [112].
13 Reasons at [85] and [86].
14 Reasons at [94].
15 Reasons at [108] and [114].

[14] Leave to appeal is sought before this Court, pursuant to s 63 of the P&E Court Act, which provides that an appeal may be brought only with the leave of this Court and on the ground of error or mistake in law or jurisdictional error.

[15] The draft notice of appeal raises three errors of law identified as:

(a) error arising from misconstruing and misapplying certain provisions relating to ecology included in the Redlands Planning Scheme and applicable to the southern portion of the proposed development (draft ground 1);

(b) erring in principle in undertaking an assessment of need for the proposed development (draft ground 3); and

(c) erring in principle in the application of s 326 of the SPA requiring sufficient grounds for approval (draft grounds 4 and 5).

[16] The Council submitted that leave should be granted in this case because her Honour's decision was materially affected by the alleged errors of law. The questions raised by the appeal are of specific importance to the Council as the entity responsible for administering the Redlands Planning Scheme and raised generally important questions as to the construction and application of the Scheme. Further, the proposed development would defeat the town planning intentions for the locality in which the site is situated. In addition, the proposed appeal raised important issues as to the application of s 326 of the SPA.

[17] The first respondents submitted that leave should be refused because:

(a) the primary judge made no error of law and the appeal did not involve any important or special question about the decision at first instance;

(b) the Council's grounds depended on a challenge to findings of fact (or at best mixed fact and law) which were not reviewable;

(c) the SPA has now been repealed; and

(d) the application for leave was not brought within time.

Delay – was the application for leave out of time?

[18] It is convenient to address the first respondents' contention as to delay. Section 63 of the P&E Court Act limits the grounds on which a party to a P&E Court proceeding may appeal "a decision in the proceeding" to error or mistake in law or jurisdictional error and only with the leave of the Court of Appeal. The first respondents submitted that the application for leave was not brought "within 30 business days after receiving the decision" as required by s 64(1) of the P&E Court Act.

[19] The relevant chronology is:

(a) On 6 November 2017, her Honour provided written reasons for concluding that she was satisfied that the first respondents had discharged their onus in respect of the appeal to the P&E Court and ordered that "The appeal will, in due course, be allowed. I will adjourn the further hearing to allow for the formulation of reasonable and relevant conditions".[16]

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16 Reasons at [116].

(b) On 18 June 2018, her Honour made final orders in the appeal by a document entitled "FINAL ORDER" and dated 18 June 2018[17] that:

> "1. The appeal be allowed.
>
> 2. The Development Application be approved subject to the conditions in pages 1 to 402 of the development approval package attached hereto and marked 'A'."

[20] The application for leave to appeal was filed on 30 July 2018.

[21] In contending that the application was made out of time, the first respondents argued that the relevant "decision" was that handed down on 6 November 2017. Relying on *St Clair v Timtalla Pty Ltd*,[18] it was submitted that the decision referred to in s 64 of the P&E Court Act included a "judgment" of the type delivered on 6 November 2017 determining the fate of the development application (subject only to the resolution of appropriate conditions). While her Honour made the final order allowing the appeal and approving the development subject to conditions on 18 June 2018, that was not the "operative" decision. Further, it was argued that the Council's decision to postpone filing a Notice of Appeal gave rise to a very significant hurdle[19] and the first respondents had suffered prejudice arising from the delay in proceeding with the approved development which could not be compensated by costs.

[22] The Council referred to the absence of a definition of the word "decision" in the P&E Court Act. The Explanatory Note to the P&E Court Act provided no assistance as to the term's meaning, nor was it defined in the *Acts Interpretation Act* 1954 (Qld) (the AIA). For the purpose of the appeal provisions of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR), "decision" is defined to mean "an order, judgment, verdict or an assessment of damages".[20] The word "proceeding" is also not defined in the P&E Court Act, although it is defined in the AIA to mean "legal or other action or proceeding".

[23] The Council submitted that, although it may be accepted that the expression "a decision in the proceeding" was apt to include an interlocutory decision, it did not follow that her Honour's findings, reasons and conclusions handed down on 6 November 2017 were a "decision" for the purposes of s 63 and s 64 of the P&E Court Act. Further, the order made on that date to adjourn the further hearing to allow conditions to be formulated was not one of consequence; the Council did not seek leave to appeal in respect of the adjournment. The balance of the order of that date was no more than an intimation of the primary judge's intention to order that the appeal be allowed "in due course". It was submitted that the failure to include an order allowing the appeal was deliberate. At a directions hearing on 8 December 2017, her Honour refused a request by Council to so order (to enable it to commence an appeal) until finalisation of the conditions to be imposed which did not occur until 18 June 2018. This was also said to support the conclusion that there was no "decision" to allow the appeal on 6 November 2017. The first respondents' submission to the contrary ignores the words of the order upon which they rely.

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17 Affidavit, Samuel Mark Volling, filed 30 July 2018, Ex SMV-2, p 45; AB1 at 54.
18 [2010] QCA 304.
19 *Baguley v Lifestyle Homes Mackay Pty Ltd* [2015] QCA 75 at [15] and [16].
20 *Uniform Civil Procedure Rules* 1999 (Qld) r 744.

[24] The Council contended that the primary judge's findings, reasons and conclusions delivered on 6 November 2017 were not an appellable "decision" for present purposes. The Council's contention is correct and consistent with authority.

[25] In *Commonwealth v Bank of New South Wales*,[21] the word "decision", as it appears in s 74 of the Commonwealth Constitution, was described as "an apt compendious word to cover 'judgments, decrees, orders and sentences'", reflecting wording in s 73. In *Driclad Pty Ltd v Federal Commissioner of Taxation*,[22] Barwick CJ and Kitto J said that, in connection with that expression, "judgments" refers only to "operative judicial acts" and is not used as a "convenient abbreviation" for "reasons for judgment". Further, it is fundamental that parties appeal from orders, not from reasons. As stated, in *Australian Competition and Consumer Commission v Valve Corporation (No 4)*:[23]

> "A judgment is the formal order which disposes of, or deals with, the proceeding. Reasons do not require parties to do anything, nor do they directly affect a party's rights."

[26] That statement represents well settled law. It has been adopted in *Maughan Thiem Auto Sales Pty Ltd v Cooper*,[24] where it was held that, in respect of the term "decision" for the purposes of an appeal under s 565 of the *Fair Work Act* 2009 (Cth) (the FW Act), meant the formal order made by a court which disposes of, or deals with, the proceeding then before it.[25] It was observed that "a broad test of what constituted a decision that the Court could be faced with arguments about the construction of reasons in the context of whether a party has a right of appeal or has lost a right of appeal".[26] That decision was adopted in *Qantas Airways Ltd v Ardlie*,[27] in holding that an appeal was not competent because "reasons are not a 'decision' to which s 565(1) [of the FW Act] refers".[28]

[27] Also pertinent and relied on by the Council is *Landsal Pty Ltd (In liq) v REI Building Society*,[29] where published reasons and findings by a trial judge were held not to be appellable in the absence of an order or judgment giving effect to those findings and reasons. As stated in *Clisdell v Commissioner of Police*:[30]

> "An appeal from a decision of a court is from an order or other judicial act which affects adversely the rights claimed by the appellant party. It is not an appeal from a pronouncement by the court of an opinion upon a question of law ... It is directed to modifying or reversing the action of the court appealed from."

[28] Of the same effect is this Court's decision in *Maroochy Shire Council v Barns*,[31] which concerned whether published reasons amounted to a decision for the purpose

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21 (1949) 79 CLR 497 at 625.
22 (1968) 121 CLR 45 at 64.
23 [2016] FCA 382 at [16].
24 (2013) 216 FCR 197.
25 *Maughan* at 205 [44] and 206 [46].
26 *Maughan* at 198-199 [4].
27 (2018) 265 FCR 426.
28 *Qantas* at [18].
29 (1993) 41 FCR 421, applied in *Gibson Motorsport Merchandise Pty Ltd v Forbes* (2006) 149 FCR 569 at 571 and 599-600.
30 (1993) 31 NSWLR 555 at 558, applied in *Daley v Hughes* (2014) 86 NSWLR 729.
31 [2001] QCA 273.

of the *Integrated Planning Act* 1997 (Qld). Although the ex tempore reasons for judgment dismissed the application for leave to "avoid further unnecessary expense to the party", Thomas JA adopted *Clisdell* stating:[32]

> "That remains the position. No order has been settled or made. Strictly speaking the only order that has been made is an order for adjournment. The point is taken by the respondent that the appeal is premature and I am of the opinion that it is."

[29] For the purposes of s 63 and s 64 of the P&E Court Act, the findings, reasons and conclusions delivered on 6 November 2017 were not a "decision" other than to the extent that they supported an order for an adjournment. The relevant decision for present purposes was the order made an 18 June 2018 with the consequence that the application was within time. The complaint is against the orders then made, not the order for adjournment. That an appeal may have been brought in relation to the earlier order is not to the point.

Leave should be granted

[30] I do not consider the repeal of the SPA on 3 July 2017 (when the *Planning Act* 2016 (Qld) (the PA) and the P&E Court Act commenced) provides a reason for refusing leave to appeal in this case. I accept the Council's submissions that proposed ground 1 of the proposed notice of appeal raises issues of general importance as to the proper interpretation and application of the Redlands Planning Scheme, and planning schemes more generally, and of specific importance to the Council as the entity responsible for administering the planning scheme and assessing development applications in its local government area. Nor does proposed ground 3, which alleges that her Honour erred in principle in her assessment of need for the development, affected by the change to the legislation. Proposed grounds 4 and 5, although raising errors in relation to s 326 of the SPA, concern the proper approach in relation to considering the issue of public interest where conflict arises with a planning scheme.

[31] Accordingly, there is a sufficient basis to warrant the granting of leave, notwithstanding the repeal of the SPA. The matters raised by the proposed grounds are of significance to the Council as administering authority but also of broader importance.

Uncontested findings of the primary judge

Site and locality

[32] The primary judge made the following factual findings as to the site and locality:

(a) The site is located on the north eastern corner of a roundabout intersection of Redland Bay, Boundary, Duncan and Taylor Roads, Alexandra Hills with frontage to Redland Bay Road and Boundary Road, both State controlled roads that form a major transport corridor from Capalaba to Victoria Point. The site slopes downwards away from the roundabout towards the northern, rear portion.[33]

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32 *Maroochy SC* at 2.

33 Reasons at [4].

(b) In terms of vegetation, more than 95 per cent of the site is cleared and grassed although:[34]

(i) in the north west part of the site there is a patch of natural vegetation associated with Hilliards Creek, which flows beneath Redland Bay Road and passes the north west corner of the site before flowing in a north easterly direction;[35]

(ii) to the eastern side of the site, there are scattered native trees; and

(iii) the remaining vegetation is comprised of ornamental and orchard species.

(c) The southern corner of the site is presently improved by two houses and two sheds.[36]

(d) The surrounding area has a mix of uses, most of which are rural or non-urban in nature, including large rural and semi-rural housing lots and agricultural activities. Sheldon College is located some 450 metres to the south of the site and the Victoria Point Shopping Centre and Capalaba Park Shopping Centre are each located approximately five to six kilometres east and north respectively from the site.[37]

(e) The land to the east, around Kinross Road and Panorama Drive, is in a state of transition to urban development, generally reflecting the uses encouraged by the Kinross Road Structure Plan. It does not, however, contemplate urbanisation of the site.[38]

The proposed development

[33] The proposed development includes:[39]

(a) a service station and convenience retail facility in a single storey building with a gross floor area of approximately 316 square metres (sqm);

(b) eight fuel pump stations, with 14 fuelling positions, a car wash facility with four bays;

(c) a fast food restaurant with drive through facility, with a gross floor area of 251 sqm;

(d) 69 car parking spaces;

(e) two noise barriers and a landscape buffer to the adjoining property to the east;

(f) a vegetated environmental buffer (in the northern part of the site in the vicinity of existing vegetation and proximate to Hilliards Creek) and a buffer area that is to be revegetated (towards the northern end of the site);

(g) onsite effluent disposal with a surface irrigation area of 2,100 sqm, bounded by a chain wire fence on its southern side;

(h) a 10 metre high pylon sign on each road frontage (subject to future approval); and

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34 Reasons at [2].
35 Reasons at [2]-[3].
36 Reasons at [2].
37 Reasons at [5].
38 Reasons at [6].
39 Reasons at [7].

(i) substantial road widening to Redland Bay and Boundary Roads.

[34] The proposed combined service station, store and drive through restaurant is located on the southern portion of the site, closest to the Boundary Road frontage, and the proposed hours of operation are 24 hours a day, seven days a week.[40]

The Redlands Planning Scheme

[35] The Redlands Planning Scheme is divided into various zones. Those, of particular relevance for the proposed development are the Open Space Zone (in respect of the northern part) and the Environmental Protection Zone (the EP Zone) (in respect of the southern part).[41] The Redlands Planning Scheme also has a number of overlays. The entirety of the site is within the Kinross Road Structure Plan Overlay Code (the KRSP Overlay Code) area,[42] which prevails in circumstances of inconsistency between its provisions, and any other provisions in the Redlands Planning Scheme.[43] Of particular relevance in respect of the proposed development is Greenspace Precinct 7 of the KRSP Overlay Code (in respect of the northern part) and Bushland Living Precinct 6 (in respect of the southern part).

[36] The built form of the proposed development is to be in the southern part of the site and within:

(a) the EP Zone of the Redlands Planning Scheme; and

(b) Bushland Living Precinct 6 of the KRSP Overlay Code, in particular Sub-Precinct 6a, being the Bushland Living precinct and particularly, Bushland Living (Multiple Locations) of the KRSP Overlay Code.[44]

[37] The effluent treatment area of the proposed development is to be located in the northern portion of the site and within:

(a) the Open Space Zone of the Redlands Planning Scheme; and

(b) Greenspace Precinct 7 of the KRSP Overlay Code, in particular Sub-Precinct 7a, being the Hilliards Creek Core Habitat and Corridor sub-precinct of the KRSP Overlay Code.[45]

Findings of the primary judge as to conflicts

[38] The primary judge's approach to the issue of "conflict" was that it meant "at variance or disagree with",[46] an approach supported by authority and not the subject of dispute.

The visual amenities impact

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40 Reasons at [7] and [8].

41 Reasons at [23]-[24].

42 The KRSP Overlay Code is the consequence of a declared master planned area: s 5.15.2(1) of the Redlands Planning Scheme and s 133 of the SPA.

43 Reasons at [28(c)] referring to s 5.15.2(4) of the Redlands Planning Scheme.

44 Reasons at [23].

45 Reasons at [24].

46 Reasons at [16], referring in particular to *Woolworths Ltd v Maryborough City Council (No 2)* [2006] 1 Qd R 273 at 286 [23] and *Lockyer Valley Regional Council v Westlink Pty Ltd* (2011) 185 LGERA 63 at 72 [16].

[39] As already indicated, the findings as to lack of visual impact are not challenged. It is, however, necessary to set them out in order to understand the judgment as a whole and the matters that are challenged.

The southern portion of the site

[40] As to visual amenity conflicts, the primary judge found the built form of the proposed development was not in conflict with overall outcomes 4.6.7(2)(c)(i)d. or 4.6.7(2)(d)(i)b. or specific outcome 3.2(1) of the EP Zone Code.[47] The proposed development was found to conflict with:

(a) overall outcome 5.15.8(2)f.[48] and specific outcome S1.7(1)(c) of the KRSP Overlay Code, with respect to the Bushland Living Precinct,[49] in that the proposed development was "an intensively developed complex of built form with a distinctly urban character" and "the use was [not] 'low key', nor one that 'cover(s) only a small portion of the land'";[50]

(b) overall outcome 4.6.7(2)(c)(i)d. of the EP Zone Code in that the footprint was not limited or contained, even though confined to that part of the site already cleared;[51] and

(c) overall outcome 4.6.7(2)(d)(i)c. of the EP Zone Code as, to the extent that it will be visible, the use is not one that complemented the current landscape setting, being of a very different built form character to what currently exists or is encouraged in the Redlands Planning Scheme, particularly given the night time glow that will be associated with the 24 hour a day use.[52]

[41] As to the conflicts identified in (a) and (b), the primary judge held they were not "serious" since the proposed development was "designed such that it will minimise adverse impacts on the landscape setting and will have minimal visual impact overall".[53] In that regard, her Honour listed a number of material matters, including that the buildings were low rise in appearance, it would be difficult to appreciate the extent of the development footprint from locations external to the site and the proposed development appeared to sit down below the road and was not visually prominent. Those factors also mitigated the seriousness of the conflict identified in (c).[54]

The northern portion of the site

[42] The primary judge rejected[55] the Council's submission that the maintenance of a cropped grassed area in the northern portion of the site would conflict with area's visual appearance as intended by sub-precinct 7a – Hilliards Creek Core Habitat and Corridor of the KRSP Overlay Code, which was to provide a sub-regional habitat and movement corridor for native fauna. From a visual perspective, that part of the

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47 Reasons at [29] and [34].
48 As to the third square bullet point; Reasons at [32].
49 They each state "ensure uses are low key, cover only a small portion of the land and have a very low impact on environmental values".
50 Reasons at [32].
51 Reasons at [32].
52 Reasons at [33]-[34].
53 Reasons at [34].
54 Reasons at [35].
55 Reasons at [36].

site would include some trees and native grasses and her Honour did not accept that "the whole of an area so designated must necessarily present as such".[56]

The ecological impact

[43] Although ground 1 only challenges the findings concerning the southern part of the proposed development, it is relevant to set out the findings in relation to both portions of the site.

The southern portion of the site

[44] Her Honour identified[57] the provisions which the Council contended were in conflict with the proposed development, which included:

(a) Desired Environmental outcome No 1 – Natural Environment – s 3.1.2(1)(a)(i)c. and f. which seeks an outcome whereby environmental values are managed so as to maintain biodiversity, ecological processes and community wellbeing by ensuring development protects and enhances a wide range of natural ecosystems.

(b) The EP Zone Code:

Specific outcome Sl.1(a) and (b) which provides:

"S1.l(1) Uses and other development maintain, enhance and protect *environmental values* by–

(a) re-vegetating degraded and cleared areas;

(b) retaining and increasing native animal movement through the premises;

…"

Overall outcomes 4.6.7(2)(a)(i)c. and e. which provide:[58]

"(i) Ensure uses and other development identify, protect and provide for the long-term management and enhancement of *the environmental values associated with this zone*, being – ...

(c) corridors, networks, patches and mosaics of native plants, and all areas where native animals have relatively unimpeded movement when compared to urban areas; ...

(e) native animals, native plants and ecosystems, any of which are common (least concern), vulnerable, rare or endangered as defined in the *Nature Conservation Act 1992*; ..." (emphasis added)

(c) Overall outcome 5.15.8(2)f.[59] and specific outcome Sl.7(2)(b) of the KRSP Overlay Code[60] which require, respectively, in the Bushland Living Precinct 6 and the Bushland Living – Multiple Locations Sub-Precinct 6a, that

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56 Reasons at [36].
57 Reasons at [40].
58 Reproduced at Reasons at [40(b)].
59 With respect to the second triangle bullet point under the fourth square only.
60 Both extracted at Reasons at [40(d)].

development "*protects, enhances and maintains* waterways, habitat and movement corridors for koalas and other fauna" (emphasis added).

[45] The Council's submission concerning the southern portion of the proposed development associated with the built form was that:

(a) it was in conflict with the EP Zone because it removed areas currently used by red-necked wallabies as a movement corridor and failed to provide the corridor enhancement and revegetation of the degraded and cleared areas as required by the Redlands Planning Scheme;[61] and

(b) the development of 75 per cent of that part of the site area with a service station centre conflicted, in particular, with specific outcome S1.1(1), which made clear it should be revegetated and that the existing movement corridor should be maintained and enhanced.[62]

[46] Applying *Zappala Family Co Pty Ltd v Brisbane City Council*,[63] the primary judge had regard[64] to the context of the provisions of the Redlands Planning Scheme and also considered other contextual matters. These matters assisted in appreciating the extent to which there was an obligation to enhance the ecological values of the part of the site located in the EP Zone. In that regard, her Honour referred to the Desired Environmental Outcomes No 1 – Natural Environment, which sought the "maintenance" of biodiversity, ecological processes and community wellbeing by ensuring "development" protects and enhances a wide range of natural ecosystems. Further, s 3.1.1(2) indicated that each environmental outcome is sought to be achieved or "not to be compromised to the extent practicable" having regard to each other desired environmental outcome.[65] In addition, Desired Environmental Outcome No 3 – Community Health and Wellbeing sought to ensure community facilities and amenities.[66] In that respect, the Council accepted that there was a need for a service station, albeit a modest one.[67]

[47] Her Honour also had regard[68] to the Strategic Framework, which although not having a role in development assessment, described the context of the strategies and planning measures. Given the absence of a cadastral map, her Honour stated it was not clear whether the part of the site within the EP Zone was included for ecological or visual considerations or both.[69] Her Honour referred to the Strategic Framework's vision for the Kinross Road Structure Plan Area in particular that:[70]

> "… The Kinross Road Structure Plan Area has a distinct sense of place and community built upon a strong respect for the natural environment including Hilliards Creek, flood affected areas, bushland habitats and fauna movement corridors.
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> …

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61 Reasons at [41(a)].
62 Reasons at [43].
63 [2014] QCA 147. See Reasons at [44].
64 Reasons at [45].
65 Reasons at [46(d)].
66 Reasons at [46(e)].
67 Reasons at [46(f)].
68 Reasons at [47].
69 Reasons at [49].
70 Reasons at [50].

> The Kinross Road Structure Plan Area is characterised by an extensive network of public open space. *Land along Hilliards Creek is core habitat for koala populations and other native fauna and is protected from development. Other greenspace corridors supplement this core habitat, providing a connected network of open space that divides the Kinross Road Structure Plan Area into urban and natural areas*." (emphasis added)

[48] Her Honour found that the statement suggested that the southern part of the site was of value in dividing the urban area from the natural areas, which would be achieved on the site.[71]

[49] Her Honour found[72] that the strategy with respect to Bushland Living Precinct 6 (set out in materially similar terms to the KRSP Overlay Code) admitted of the possibility of development, provided it be of very low impact on environmental values and encouraged enhancement of the environmental values associated with the Zone, while leaving open the prospect that such enhancement would be coupled with development, as did the corresponding EP Zone Code (the third matter of contextual relevance).[73] That was to be contrasted with the Hilliards Creek Core Habitat and Corridor (in the Open Space Zone) which placed far greater emphasis on the need to enhance and protect environmental values and did not contain any encouragement for substantive development.[74]

[50] In considering the Council's submission as to conflict, the primary judge referred to the joint ecology expert report and found[75] that the built form was proposed in an area cleared of native vegetation and containing buildings, gardens and groups of planted trees, cleared areas and orchards and would remove large areas of grassland habitat, adversely impacting red-necked wallaby habitat. However, her Honour noted that the ecology experts agreed that it was on a part of the site currently (and for many years) used for residential and rural purposes and that the areas of native vegetation and corridor value would be "retained, protected and enhanced". Her Honour also made two further findings at [55] as to the proposed development in this portion of the site, first that it did not involve any substantial revegetation of the environmentally degraded area in the south of the site and second, that it did not retain or increase the ability of the red-necked wallaby to move through the premises. As to those findings, her Honour stated:

> "[55] …However, that does not evidence conflict with specific outcome S1.1(1) of the Environmental Protection Zone Code. The material outcome sought is to '*maintain, enhance and protect environmental values*'. Sub-paragraphs (a) and (b) of specific outcome S1.1(1) provide two mechanisms by which that outcome may be achieved. Specific outcome S1.1(1) contains many other mechanisms…
>
> [56] There is no suggestion that the proposed development does not employ those mechanisms.

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71 Reasons at [51].
72 Reasons at [52].
73 Reasons at [53].
74 Reasons at [52].
75 Reasons at [54].

> [57] Although a less extensive development, as encouraged by the Redlands Planning Scheme, may permit greater opportunity for *enhancement of environmental values*, I am, nevertheless, satisfied that the development maintains and protects those environmental values that exist on the subject site. Those values of particular ecological significance, identified in the State and Council mapping, are the vegetated areas associated with Hilliards Creek,[76] rather than that part of the site in the Environmental Protection Zone.
>
> [58] The values are also enhanced, to a limited degree, by:
>
> (a) the proposed landscape planting, which could be conditioned to include trees and shrubs that have a benefit to the movement of birds and other animals;[77] and
>
> (b) the introduction of fencing to direct fauna towards safe road crossing points.[78] As was noted by Dr Watson, that part of the subject site that is in the Environmental Protection Zone is the most south-westerly part of a mapped environmental area and is bounded by two major roads, with a roundabout uphill. Wallaby road fatalities are common in the area.[79]"

[51] In those circumstances, her Honour concluded, contrary to the Council's submissions, that the proposed development of the southern portion relevantly complied with Desired Environmental Outcome No 1, the EP Zone Code overall outcomes 4.6.7(2)(a)(i)c. and e., and specific outcome Sl.1 and the KRSP Overlay Code overall outcome 5.15.8(2)f. and g. and specific outcome Sl.7(2)(b).[80]

Northern portion

[52] In considering the ecological impact in the northern portion of the proposed development, the primary judge noted that area included:[81]

(a) an onsite effluent disposal with a surface irrigation area of 2,100 sqm, bounded by a chain wire fence on its southern side; and

(b) a vegetated environmental buffer (in the vicinity of existing vegetation and proximate to Hilliards Creek) and a buffer area to be revegetated (towards the northern end of the site).

[53] Her Honour stated[82] that for this part of the site, the KRSP Overlay Code provisions associated with the Greenspace Precinct 7 and Hilliards Creek Core Habitat and Corridor Sub-precinct 7a required development to:

(a) enhance, protect and maintain environmental values;

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76 Supplementary Joint Report Ecology Ex 9, p 3 [9]; AB2 at 307 [9].
77 AB2 at 890.19-24.
78 Alan Chenoweth – Report on Ecology: Ex 21, p 3 [2.3.2]; AB2 at 732-733 [2.3.2].
79 T2-90/L14-30 (Mr Watson); AB2 at 901.14-30.
80 Reasons at [59] and [75].
81 Reasons at [60].
82 Reasons at [66].

(b) rehabilitate degraded habitats to increase native vegetation cover, buffer core habitats and re-establish fauna corridors;

(c) preserve and enhance native fauna habitat and movement areas and corridors along Hilliards Creek and throughout the Structure Plan Area; and

(d) protect and enhance publicly owned land that incorporates a sub-regional habitat and movement corridor for koalas and other native fauna.

[54] The Council submitted[83] that the development of the effluent discharge area in this portion of the site conflicted with the Open Space Zone Code in that it did not comprise a "rehabilitation of degraded habitats to increase native vegetation cover"[84] and did not provide a "sub-regional habitat and movement corridor".[85] As to that submission, her Honour noted that the ecological experts agreed that the proposed development in this area would:[86]

(a) protect the creek and associated riparian vegetation and would create additional habitat, including grassland for several fauna (including wallabies);

(b) retain remnant vegetation, essential habitats (in their entirety) and provide a buffer to the "*core habitat*" values associated with Hilliards Creek;

(c) retain and enhance the movement corridor for common and threatened fauna;

(d) protect and provide wildlife corridors and maintain connections to habitat areas to provide for the movement and migration of native fauna throughout Redlands; and

(e) particularly the environmental buffer and protection area, would incorporate and enhance aquatic (waterway) and terrestrial (riparian, bushland, grassland) environments, maintain and enhance ecological values and functions within the Kinross Road – Hilliards Creek open space network.

[55] Her Honour noted that the experts' only relevant dispute was as to whether the ground cover proposed for the area (an irrigated cropped grassland) achieved the native habitat intended by the Redlands Planning Scheme.[87] The Council accepted that the area may be grassed with native grasses and that fencing would allow wallabies to move on and eat the irrigated grasslands but argued that the open field like development would not resemble the native habitat and movement corridor prescribed for the northern part of the site.[88] The primary judge rejected that submission. There is no challenge to that finding.

The nature and location of the use and character of the built form

[56] In relation to the issue of conflict arising from the built form concerning the southern portion of the site, her Honour found that both a service station and a drive through restaurant were listed as "inconsistent uses" for the purposes of the EP

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83 Reasons at [41(b)].
84 Referring to specific outcome S1.9(1)(f) of the KRSP Overlay Code – Greenspace Precinct 7.
85 Referring to specific outcome S1.9(2)(a) of the KRSP Overlay Code – Hilliards Creek Core Habitat and Corridor Sub-precinct 7a.
86 Reasons at [64].
87 Reasons at [65].
88 Reasons at [68]-[70].

Zone Code.[89] In that respect, her Honour observed[90] that the Redlands Planning Scheme:

(a) encouraged uses for agricultural, educational, scientific or community activities that support environmental values, single dwelling houses on existing privately owned lots (including working from home), home businesses, low-key tourism and recreational pursuits in an environmental setting;

(b) the uses are intended to be low-key; and

(c) sought a built form that is low-rise in appearance.

[57] The primary judge found that the proposed development was not a low-key use[91] and "is fundamentally different in nature and size (in terms of its footprint) to the types of uses and development that the Redlands Planning Scheme envisages on the subject site".[92] The character of the proposed development is also not consistent with the locality.[93] The "public would not have expected a service station to be located on the subject site".[94]

[58] Her Honour concluded[95] that the proposed development was in conflict with provisions relating to impacts arising from the nature of the use and character of the *built form*, as follows:

(a) overall outcomes 4.6.7(2)(b)(i)e. and specific outcomes S2.l and S2.2(1) of the EP Zone Code;

(b) specific outcomes S1.1 and Sl.2(1) of the Open Space Zone Code;[96]

(c) overall outcomes 5.15.8(2)(f).[97] and specific outcomes S1.1 and Sl.7(2)(a) and (c) of the KRSP Overlay Code;[98]

(d) overall outcome 6.9.3(2)(a) and specific outcomes Sl(l)(a) and (b) of the Drive Through Restaurant Code;[99] and

(e) in terms of the effluent treatment area on the Open Space Zone, it conflicted with S1.1 and S1.2, given that it was part of the service station and drive through restaurant uses.[100]

[59] However, her Honour found[101] that the seriousness of the conflict between the proposed development and the Redlands Planning Scheme was tempered by:

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89 Reasons at [77].
90 Reasons at [78]-[79].
91 Reasons at [81].
92 Reasons at [82].
93 Reasons at [83].
94 Reasons at [84].
95 Reasons at [85]-[86] and [88].
96 Reasons at [88].
97 With respect to the first and third triangle bullet point under the fourth square only: Reasons at [85(c)].
98 Reasons at [85(c)].
99 Reasons at [86].
100 Reasons at [88].
101 Reasons at [89].

(a) the low visual amenity impact and absence of unacceptable ecological impacts;

(b) the low-key appearance of the proposed buildings;

(c) the park-like appearance of the effluent treatment area;

(d) the absence of impacts from the 24 hour operation (given the distance from residential development and measures proposed such as barriers and landscaping to keep potential amenity impact to acceptable levels); and

(e) the proposed co-location of the drive through restaurant with a service station, which added to the convenience of its use.

[60] There is no challenge to these findings.

Draft Redland City Plan 2015

[61] The primary judge referred[102] to the Council's Draft Redland City Plan 2015 that had been publicly notified and which Council had resolved to proceed with. Given that it maintains the current planning for the site and the town planning experts' opinions, her Honour concluded[103] that the conflict with it was not of determinative significance; that it did not herald a new planning policy or a shift in planning policy that warranted refusal of the proposed development for fear that an approval would cut across, or compromise, the ability to implement the draft scheme.

The nature and extent of the conflict with the Redlands Planning Scheme

[62] At trial, the Council submitted that there was "such clear and cogent conflict" with the Redlands Planning Scheme that "almost overwhelming grounds" for approval would be required to justify the approval of the development.[104]

[63] In accordance with her findings of fact, her Honour accepted[105] that there was a clear conflict. However, it "effectively arises as a consequence of the proposal to locate uses that are nominated as inconsistent uses and that are not low-key in nature in a zone that does not encourage that style of use". Her Honour found that its seriousness was reduced for the reasons already outlined and which were summarised as follows:[106]

> "In short, when one reads the Environmental Protection Zone Code, Open Space Zone Code and the Kinross Road Structure Plan Area Code as a whole, together with the desired environmental outcomes and strategic framework, it seems apparent that the planning rationale for limiting the uses to low-key uses with minimal footprint is, in large part, to ensure achievement of the *environmental and visual amenity goals*. These goals are *not materially compromised* by the proposed development. As such, the seriousness of the conflict is reduced." (emphasis added)

Sufficient grounds

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102 Reasons at [91].
103 Reasons at [92].
104 Reasons at [93].
105 Reasons at [94].
106 Reasons at [95].

The issue of need

[64] Given the finding of conflict, her Honour turned to consider the grounds relied upon by the first respondents pursuant to s 326(1)(b) of the SPA, being need and merit.

[65] In relation to the matter of need, her Honour referred to *Isgro v Gold Coast City Council*,[107] where, on an analysis of the authorities, it was said, need "in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community".

[66] The Council's submissions were, as noted by her Honour,[108] that the Council accepted that there was a level of need for an additional service station within the primary trade area (which included the site) as identified by the economists, Mr Duane (retained by the first respondents) and Mr Norling (retained by Council).[109] But, reflecting Mr Norling's view, the Council submitted that the level of need was of a minor to modest level, based on the number of residents in the trade area and the limited number of service stations located within that same area. Further, the Council contended that there was no evidence of a need for a drive through restaurant on the site.[110] Her Honour noted that the Council accepted that if there was a need for a drive through restaurant that could not be reasonably met by existing or anticipated drive through restaurants in existing centres, then there was no identified centre in the Kinross Road area that would meet this purpose, such that out of centre development for this use should be permitted.[111]

[67] Her Honour at [102] rejected the Council's contention that the need for the proposed development was only modest and that there was no need for a drive through restaurant, finding there was "a clear and strong level of need". That finding was based on an acceptance of Mr Duane's opinion:[112]

(a) that the current and projected population in the primary trade area, which had no service station, could support two to three service stations and increased provision of commercial facilities (and on Mr Norling's acknowledgement that its growing population would support an increased provision of facilities such as a service station, car wash and fast food outlet);

(b) as to projected population increases for Redland City;

(c) as to the growth in the fuel market in the primary trade area which demonstrated a need for two service stations;

(d) that the drive through restaurant was a normal co-location of uses on a site that provided a sustainable viable location;

(e) that the increased convenience, choice and competition in a growing market of the proposed development (and on his evidence as to the lack of co-location and Mr Norling's acceptance of convenience from co-location); and

(f) of the unlikelihood of impact on the viability of existing or proposed service stations.

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107 [2003] QPELR 414 at 418.

108 Reasons at [98].

109 The Council accepted the proposed service station would provide greater convenience and choice to passing motorists and residents of the trade area: Reasons at [99].

110 Reasons at [101].

111 Reasons at [90].

112 Reasons at [102(a)-(f)].

[68] Her Honour also rejected the Council's submission that the proposed development was inappropriate to meet the need due to its location in terms of vehicular convenience.[113]

[69] Her Honour then set out an additional submission made by the Council:[114]

> "… that, in any event, the size and scale of the proposed development, with the commensurate impacts upon the site and receiving environment described above, are much greater than what would be required to satisfy any need identified by the experts."

[70] Her Honour noted[115] that, in advancing that submission, the Council relied on the evidence of Mr Duane during cross examination that the need that he identified could be satisfied by a service station with a smaller convenience store, fewer fuel spots, without the car wash and possibly without the drive through restaurant. Her Honour held, in respect of that evidence, that it was not relevant to consider a "hypothetical alternative" as it was the proposed development that the Court must assess.[116]

[71] Her Honour found at [108] that there was "a need for the proposed development that is sufficient to justify approval despite the identified conflicts with Redlands Planning Scheme".

Other matters

[72] Her Honour also considered additional matters put forward by the first respondents to justify approval.[117] For reasons including her earlier findings, her Honour rejected the following matters as supporting approval: [118]

- the proposed development could be designed such that it was contained within the Bushland Living Precinct (6a), thereby not encroaching into the Greenspace Network Precinct (7a);[119]
- the proposed use could be designed to be "low-key" as required by the Kinross Road Structure Plan Area Code for development in the Bushland Living precinct;[120]
- degraded areas of the site are to be revegetated in accordance with the overall outcomes of the Environmental Protection Zone;[121] and
- the proposal provided much needed dedication of additional land for main roads widening, at no cost to Council or the community.[122]

[73] As to the balance of the matters that are listed below, her Honour accepted they were supportive of approval:[123]

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113 Reasons at [103]-[105].
114 Reasons at [106].
115 Reasons at [106].
116 Reasons at [107].
117 Reasons at [109] and [115].
118 Reasons at [113].
119 Reasons at [109(a)].
120 Reasons at [109(b)].
121 Reasons at [109(e)].
122 Reasons at [109(f)].
123 Reasons at [114].

- the proposed use was designed such that it was not visually prominent and the site can be landscaped such that it does not dominate the landscape setting when viewed from adjacent roads;[124]
- the proposed use would occupy only a small part of the site that was currently degraded. Parts of the site with significant environmental values will be retained and enhanced;[125]
- the actual or on ground values of any ecological significance had been identified and excluded from the development, in that the values (such as individual trees, corridors, habitats and waterways) were protected or buffered;[126]
- the proposed development and proposed environmental buffer area in the northern part of the subject site would provide an opportunity to enhance the ecological values and would result in a net environmental benefit;[127]
- the net environmental benefit would be in relation to the waterway and associated bushland. The bushland would be enhanced through rehabilitation, planting with suitable native species, removing weeds, stabilising the landscape, reducing erosion and pollution and creating habitat;[128]
- the buffer areas would also be enhanced and preserved indefinitely through either a registered covenant or a transfer of the relevant area to Council;[129]
- the proposed development and buffer (as a whole) would support and reflect the relevant environment objectives of the planning scheme (and the Kinross Road Structure Plan in particular);[130] and
- the effluent disposal system did not discharge directly into any watercourse and was confined to land based disposal. It could be confined in area and location so it did not have a detrimental effect on the ecological values of the site.[131]

[74] Her Honour also referred to *Lockyer Valley Regional Council v Westlink Pty Ltd*,[132] where it was observed that while the absence of adverse impacts will not amount to sufficient grounds to outweigh a conflicting planning scheme, it did not follow that the absence of a negative impact or detrimental effect was not a relevant consideration. In that regard, in considering whether there were grounds that were sufficient to overcome the identified conflict, her Honour considered it as material that there was an *absence of unacceptable ecological and amenity impacts*.[133]

Ground 1 – misconstruction and misapplication of ecological provisions applying to the southern part of the Site

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124 Reasons at [109(c)].
125 Reasons at [109(d)].
126 Reasons at [109(g)].
127 Reasons at [109(h)].
128 Reasons at [109(i)].
129 Reasons at [109(j)].
130 Reasons at [109(k)].
131 Reasons at [109(l)].
132 [2013] 2 Qd R 302 at 323-324; Reasons at [111].
133 Reasons at [112].

[75] By ground 1, the Council contends that the primary judge erred in law in holding with respect to the southern portion of the site that the proposed development complied with relevant ecological provisions of the EP Zone Code and the KRSP Code intended to maintain, enhance and protect the environmental values of the southern part of the Site. The error is said to arise from misconstruction of the relevant planning scheme, being an error of law.[134]

[76] The Council argued that absent that error, the correct conclusion was that the proposed development was in conflict with those provisions and that the error could have materially affected the judgment concerning the exercise of the discretion under s 326 of the SPA[135] and as such is liable to be set aside on appeal.[136] It is apparent that her Honour's finding of fact as to the absence of unacceptable ecological impacts in the southern portion of the site was material to her Honour's consideration of the nature and extent of the inconsistencies which in turn was relevant to the finding that there were sufficient grounds for the purposes of s 326 of the SPA. It is therefore necessary to consider the Council's contentions on this ground. The arguments concerning this ground were set out in the Council's written outline[137] as being that the primary judge erred in law in four respects:

(a) misconstruing specific outcome Sl.1 of the EP Zone Code;

(b) failing to consider compliance with overall outcomes 4.6.7(2)(a)(i) c. and e. of the EP Zone;

(c) misconstruing of the provisions of the KRSP Code; and

(d) taking irrelevant considerations into account.

Misconstruction of specific outcome S1.1 of the EP Zone Code?

[77] The Council contended that the primary judge erred in construing specific outcome S1.1(1) of the EP Zone Code in a disjunctive manner, rather than conjunctively, contrary to the interpretation provision in s 2.1.5(1)(a) of the Redlands Planning Scheme which specifies that, for the purposes of the scheme, "a list of items separated by a semi-colon (;) means the items on the list are joined by 'and' and must all be addressed". It was submitted that her Honour's conclusion, that the proposed development in the southern portion of the site did not conflict with Sl.1,[138] was a direct consequence of her misconstruction of S1.1[139] by taking a disjunctive approach. The Council's submission was based on:

(a) the primary judge's findings at [55] relevant to sub-paras (a) and (b) of S1.1(1) of the EP Zone Code that the proposed development did not involve any substantial revegetation of the environmentally degraded area and not retain or increase the ability of red-neck wallabies to move through the premises; and

(b) the observation that sub-paragraphs (a) and (b) of specific outcome S1.1(1) provide two mechanisms by which the specific outcome SI.1(1) may be

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134 *Weightman v Gold Coast City Council* [2003] 2 Qd R 441 at 455.

135 See Reasons at [59], [89(a)] and [112].

136 *HA Bachrach Ply Ltd v Caboolture Shire Council* (1992) 80 LGERA 230 at 237.8-238.1.

137 Council's Amended Outline [14]-[27].

138 Reasons at [59].

139 A further, similar, error was said to be demonstrated in respect of the opening words of specific outcome S1.1 by the first sentence of Reasons at [57].

achieved others, being in (c) to (h) which it was not suggested the proposed development did not employ.

[78] Given the findings made at [55], her Honour did not approach S1.1(1) on the basis that each item was "addressed" in a disjunctive sense. Her Honour's approach was to consider whether, given the findings at [55], there was conflict with S1.1(1) by emphasising that "the material outcome" sought by S1.1(1) is to "maintain, enhance and protect environmental values". Her Honour gave separate consideration to the issues of "maintenance", "enhancement" and "protection", having particular regard to what in fact were the environmental values of the southern portion of the site. Her Honour concluded at [57] that the development in the southern portion of the site "maintains and protects" those environmental values "that existed" on the site at [58] and that the values were "enhanced", albeit "to a limited degree", accepting a less extensive development might permit greater opportunity for enhancement.[140] (Her Honour's identification of the environmental values was the subject of a separate complaint as to "irrelevant" consideration to which I will refer shortly.)

[79] Her Honour's approach in relation to the matter of noncompliance with S1.1 is of no consequence, given the concession made quite properly by the Council at trial. That concession was that, where impact assessment requires assessment against "all relevant provisions" of the scheme and a code's overall outcomes are defined as being the purpose of the code, upon the development demonstrating compliance with the relevant overall outcomes in the EP Zone Code, it was open to conclude that there was compliance with the EP Zone Code overall, notwithstanding non-conformance with an EP Zone Code specific outcome as alleged.[141] The Council's submission at trial was that the concession did not affect this case since, in the circumstances of this case, the evidence indicated non-compliance with **both** overall and specific outcomes of the EP Zone Code and other codes. For the reasons stated below, irrespective of the finding as to non-compliance with specific outcome S1.1(1), her Honour correctly found there was no non-compliance with the relevant overall outcome of the EP Zone Code. There was no operative error concerning the construction of S1.1(1).

Failure to consider overall outcomes 4.6.7(2)(a)(i) c and e of the EP Zone Code?

[80] The Council contended that the primary judge erred in concluding that the proposed development complied with overall outcomes 4.6.7(2)(a)(i) c. and e. of the EP Zone Code on the basis that her Honour did not directly consider whether there was such compliance[142] and the conclusion was contrary to the findings at [55]. The first respondents submitted that the overall outcomes in question sought to ensure uses and other development that identify, protect and provide for the long term management and enhancement of environmental values being "corridors, networks, patches and mosaics of native plants and all areas where native animals have relatively unimpeded movement when compared to urban areas" and "native animals, native plants and ecosystems". The conclusions of the primary judge were conclusions of fact, based on an evaluative consideration of the provisions and context, and were open on the evidence. It was submitted that the Council's submissions on appeal overlooked that the primary judge:

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140 Reasons at [58].
141 Council's submissions at [28]-[29]; AB2 at 9-10.
142 Reasons at [59].

(a) concluded that the proposed development maintains and protects environmental values that exist[143] and that those values would be enhanced (if only to a limited degree) by landscape planting and the introduction of fencing to direct fauna towards safe crossing points that would occur if the proposed development is approved;[144]

(b) found (consistently with the opinion of both the ecology experts) that the proposed development would be located within that part of the site that is currently used for residential and rural purposes (and has been for many years) and that areas of native vegetation and corridor value will be retained, protected and enhanced; and[145]

(c) that the south-westerly corner is near the roundabout where there is no place for fauna to go except to try and cross the road near the roundabout, as Dr Watson noted in his report.[146] This is inconsistent with the position of the fauna crossing points.[147]

[81] Overall outcome 4.6.7(2)(a)(i) of the EP Zone Code refers to ensuring "uses and other development identify, protect and provide for the long term management and enhancement of *the environmental values associated with this zone*". I agree for the reasons put forward by the first respondent that there was no error in her Honour's conclusion that the proposed development complied with overall outcomes 4.6.7(2)(a)(i) c. and e. of the EP Zone Code. Further, the considerations pertinent to her Honour's conclusion were sufficiently stated at [57] and [58].

Misconstruction of 5.15.8(2)f. and specific outcome S1.7(2)(b) the KRSP Overlay Code?

[82] The Council contended that, in the same way that there had been misconstruction of specific outcome S1.1, given the findings at [55], the primary judge erred in law in finding at [59] that there was compliance with overall outcome 5.15.8(f)[148] and specific outcome s 1.7(2)(b)[149] of the KRSP Overlay Code (which both required that development in the Bushland Living (Multiple Locations) Sub Precinct 6a "protect enhances and maintains waterways, habitat and movement corridors for koalas and other fauna") by failing to construe the relevant words of those provisions conjunctively.

[83] Further, the conclusion of the primary judge as to compliance with the KRSP Overlay Code was made in the context of having expressed findings already mentioned that areas of native vegetation and corridor value would be retained, protected and enhanced,[150] environmental values would be enhanced by proposed landscape planting and fencing to direct fauna towards safe crossing points[151] and that the proposed development maintained and protected existing environmental values.[152] As explained below, the challenge to the latter finding is misconceived.

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143 Reasons at [57].
144 Reasons at [58].
145 Reasons at [54] fn 79; and the agreed evidence in the JER - Ecology: Ex 7, p 4 [13]; AB2 at 241.
146 Dr Watson Report on Ecology Matters: Ex 11, p 9 [37]; AB2 at 337.
147 See the Dr Watson Report on Ecology: Ex 11, p 9 [37]; AB2 at 337.
147 See the Town Planning Joint Expert Report: Ex 8, p 41; AB2 at 292.
148 See AB2 at 519-520.
149 See AB2 at 533.
150 Reasons at [54].
151 Reasons at [58].
152 Reasons at [57].

Consideration of irrelevant matter?

[84] The Council submitted that in concluding that the proposed development complied with the ecological provisions of Redland Planning Scheme (being the EP Zone Code and the KRSP Overlay Code which apply to the southern part of the site), her Honour had regard to an irrelevant consideration, which was said to be "those values of particular ecological significance … associated with Hilliards Creek".[153] It was submitted that the maintenance and protection of those ecological values were irrelevant to a consideration of the southern portion of the site, because Hilliards Creek is located in the "northern portion" of the site[154] (to which, as mentioned, different provisions of the Redlands Planning Scheme apply). It was argued that the error was in "inadvertently confusing or overlooking" of the fact that Hilliards Creek was in the Open Space Zone and not the EP Zone (not precinct 7a of the KRSP Overlay Code).[155]

[85] I do not consider this submission has any merit. In finding that the proposed development in southern part of the site maintains and protects "those environmental values that exist on the subject site", her Honour did not mistakenly take into account the Hilliards Creek and associated area as being in the southern part. To the contrary, at [57] her Honour expressly contrasted the environmental values of the relevant precincts, the environmental values "associated with Hilliards Creek" identified as being of particular ecological significance by State and Council mapping (referring to the Supplementary Joint Expert Report (Ecology))[156] with those in the relevant part of the Redland Planning Scheme, being the EP Zone. The particular paragraphs of that Supplementary Report, to which her Honour referred, stated:[157]

> "**Protection of Ecological Values**
>
> 9. It is agreed that the *northwest portion* of the subject land supports *values of some ecological significance* as identified in the State and Council mapping. *This is the vegetated area associated with Hilliards Creek. We agree this area needs to be protected.*
>
> 10. The balance of the subject land has been described in the [Joint Experts Report (Ecological)] and individual Statements. The area is a modified landscape with various disturbances." (emphasis added)

[86] That report also stated that "ecological areas to be protected (i.e. communities associated with Hilliards Creek to the north) will be not be adversely impacted upon by the proposal".[158] It was also clarified:[159]

> "With reference to the JER (areas of disagreement and conclusion), we accept that following further consideration and clarification of the proposed development, the following issues are resolved:

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153 Reasons at [57].
154 Reasons at [57].
155 Appeal Transcript at 1-18.
156 Supplementary Joint Report – Ecology: Ex 9, p 3 [9]; AB2 at 307.
157 Supplementary Joint Report – Ecology: Ex 9, p 3 [9]; AB2 at 307.
158 Supplementary Joint Report – Ecology: Ex 9, p 4 [20]; AB2 at 308.
159 Supplementary Joint Report – Ecology: Ex 9, p 7 [51]; AB2 at 311.

i. Ecological values associated with Hilliard's Creek will be protected and enhanced, particularly in the revegetation area

ii. Riparian open space adjacent to Hilliard's Creek will be maintained and enhanced.

iii. Grazing and wildlife corridors for wallabies will not be lost but rather reinforced and enhanced (assuming the effluent disposal area is not fenced off from the creek)."

[87] The Joint Experts Report (Ecological) had previously identified[160] that the majority of the land was cleared and that the "only area of ecological value was associated with the land in the northwest and the subject land did not represent core habitat, particularly for highly mobile fauna".

[88] Her Honour was clearly cognisant of the distinct environmental values associated with the Hilliards Creek Core Habitat and Corridor Sub-Precinct 7a in the northern part of the site and her reference to it at [57] did not indicate an irrelevant consideration of it but, to the contrary, relevantly contrasted with "that part" of the site in the EP Zone. Her Honour was comparing the values "that exist" on the land in the southern part (the EP Zone) under consideration with those of "particular ecological significance". A fair reading of her Honour's statement that those values of particular significance were "the vegetated areas associated with Hilliards Creek" makes it clear that her Honour was not erroneously taking into account environmental values that were outside the southern part of the site but emphasising that they did not exist in the southern part of the site. That conclusion involved no error of law and was factually open on the evidence.

Conclusion

[89] There was no error in her Honour's construction of the relevant provisions. Her Honour correctly had particular regard to the material outcome sought by S1.1(1) to "*maintain, enhance and protect environmental values.*" There was no error in her Honour's approach in finding, contrary to the Council's submissions, that the proposed development of the southern portion relevantly complied with overall outcomes 4.6.7(2)(a)(i)c. and e, and specific outcome Sl.1 of the EP Zone Code; and overall outcome 5.15.8(2)f. and specific outcome Sl.7(2)(b) of the KRSP Overlay Code.[161] As the first respondents submitted, that conclusion was open given that her Honour found that:[162]

(a) the built form of the proposed development was to be located in an area currently cleared of native vegetation and contains buildings, gardens and groups of planted trees, cleared areas and orchards;

(b) the ecology experts agreed it is within a part of the land that is currently used for residential and rural purposes (and has been for many years) and that the relevant areas of native vegetation and corridor value will be retained, protected and enhanced;

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160 Ecology Joint Expert Report: Ex 7, p 3 [8]; AB2 at 232.
161 Reasons at [59] and [75(c)].
162 First Respondents' Amended Outline at [11].

(c) the development maintains and protects those environmental values that exist on the site, those values of particular ecological significance, identified in the State and Council mapping, being the vegetated areas associated with Hilliards Creek, rather than that part of the site in the Environmental Protection Zone; and

(d) environmental values would be enhanced by proposed landscape planting and the introduction of fencing to direct fauna towards safe crossing points.

Ground 3 - Erroneous approach to the assessment of need

[90] This ground of appeal was expressed as being that her Honour "erred in law in holding that there was a need for the proposed development because, in doing so, her Honour rejected, as irrelevant, the evidence of the first respondents' economic analyst that the need he identified could be satisfied by a service station with a smaller convenience store, fewer fuel spots, without the car wash and possibly without the drive through restaurant". In challenging the primary judge's finding that there was a need for the proposed development, ground 3 is only concerned with error of law in making the factual finding that there was a need for the proposed development (as opposed to error in law in finding that need was a sufficient ground for approval).

[91] It was contended that her Honour misdirected herself in failing to consider the evidence of the expert, Mr Duane, in assessing the issue of need on the basis that it was "not relevant to consider a hypothetical alternative".[163] It was said that his evidence was relevant not as an alternative, hypothetical development but as going to whether the evidence demonstrated a need for the proposed development the subject of the application. It was submitted that Mr Duane's cross examination evidence permitted one answer only, that there was no such need. Her Honour erred in law in not having regard to that evidence in holding that the evidence demonstrated a need for the proposed development.[164]

[92] Further, her Honour's findings as to the need for a drive through restaurant[165] based on the "normal" experience of co-locating drive through restaurants with service stations,[166] and the convenience of that co-location,[167] do not address or overcome the error. It was submitted that the error in the finding of need led to further error in considering s 326 of the SPA as, contrary to her Honour's conclusion, "need" was not a sufficient or even an available ground for approving the proposed development despite its conflict with the Redlands Planning Scheme.

[93] In support of its contentions, the Council relied on the decision in *Bell v Brisbane City Council*[168] and the Court's finding in that case that the relevant need that was required to be demonstrated was a need for "the development" rather than a need that could be satisfied by a development of the same kind.[169] The planning

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163 Reasons at [107].

164 A finding of fact made without evidence is an error of law: *Kostas v HIA Insurance Service Pty Ltd* (2010) 241 CLR 390 per French CJ at 402 [33] and Hayne, Heydon, Crennan and Kiefel JJ at 418 [90]; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355, 368 and 387.

165 The Joint Report – Economic Need was silent on this issue: Ex 3, p 34 [75]-[77]; AB2 at 222.

166 Reasons at [102(d)].

167 Reasons at [102(e)].

168 [2018] QCA 84.

169 [2018] QCA 84 at [48]-[49].

provision in question there, Overall Outcome 3(h) of the Toowong Neighbourhood Plan, stated:

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

[94] It was held:[170]

> "The question here was whether there was both a community need and an economic need 'for the development', an expression which unambiguously refers to the particular development which is being assessed. The question arises in the context of the height of the development being inconsistent with community expectations for the relevant precinct, sub-precinct or site. Consequently, the question must be answered by reference to a development of this height.
>
> For the purposes of discussion, let it be assumed that there is a community need, and an economic need, for a high quality residential development which provides public spaces of the kind and to the extent which the judge described; but let it also be assumed that these needs could be satisfied by the provision of, say, 300 units within three towers, none of which would exceed 15 storeys. In that case, the second respondent's proposed development might be described as satisfying a need. But this development would more than do so. The question is not whether the development would satisfy community and economic needs; it is whether there is a need for this development, or put another way, whether it is necessary to develop their site by buildings of this height."

[95] It is important to note that the planning provision in *Bell*, in prescribing parameters for "development", incorporated a proviso that expressly permitted a nonconforming development on the basis of a community and economic need for the development, without resort to s 326 of the SPA. However, the need required to be demonstrated was a community and economic need for "the development" the subject of the application, relevantly being one that exceeded the intended height for the site (of 15 storeys) as the subject development did. In the particular case of *Bell*, the relevant need required to be demonstrated was for a development of the height proposed at the particular site in question. The planning provision, in permitting an otherwise conflicting development where there was a community and economic need for it, required more than demonstration of a need. It required demonstration of a type and level of public interest that s 326(1) of the SPA is directed to.

[96] In the present case, it was not in dispute between the parties that there existed an economic need for the development. The dispute at trial concerned the level of the need. The Council's submissions at trial acknowledged "a level of need for an additional service station with the Primary Trade Area based upon the number of residents in the trade area and the limited number of service stations located within

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170 [2018] QCA 84 at [42]-[43] per McMurdo JA, the other members of the Court agreeing.

that same area". It was also accepted "that the proposed service station will provide greater convenience and choice to both passing motorists who otherwise reside outside of the primary trade areas, as well as residents of the primary trade area".[171]

[97] The primary judge's rejection of the Council's submissions as to the degree of need and her finding that there was "a clear and strong level of economic need" were based on the findings set out at [102](a) to (f)] which are not disputed before this Court.[172] The need which the primary judge was considering at [102] was the level of need for the proposed development, not a less extensive one. Mr Duane did not resile from his view that there was a strong and clear need for the proposed development.

[98] The Council relied on Mr Duane cross-examination evidence in the context of a submission that there was no need for a development "of the nature and size proposed" and that:[173]

> "In such a need case with such gross conflict with [the Redland Planning Scheme]…only the minimum development necessary to satisfy that level of need ought be permitted…"

[99] The submission referred to the opinion of Mr Ovenden (the Council's planning expert) [174] that the proposed development with the land use mix and at the scale proposed was not appropriate for the site, but that:[175]

> "If the Court were to find there is a strong level of need for a service station to meet the convenience needs of the travelling public in this part of Redland City, then subject to careful design considerations, [he] could support a small scale stand-alone service station on the site".

[100] The Council's complaint was the conclusion that there was a need for the development erroneously failed to consider Mr Duane's evidence. Contrary to her Honour's view, it was argued the evidence did not concern an irrelevant hypothetical alternative, but the contention by the Council that a less extensive development could meet the need for a service station so that there was *no need* for the proposed development.

[101] The Council's complaint conflates two distinct matters; on the one hand the issue of whether there was a need that the proposed development met and the level of that need (here found to be strong), and on the other hand whether the need identified was a "sufficient" ground (that is, demonstrated a sufficient matter of public interest) to warrant approval of the proposed development to meet that need, despite the conflicts as they were found to be. The latter issue required consideration of need in the context of the proposed development that conflicted with a planning scheme, albeit that there was strong level of need that the proposed development met.

[102] In my view, her Honour did not err in not having regard to Mr Duane's evidence in relation to a different less extensive development when considering the degree of

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171 Council's written submissions, 10 August 2017 at [88]; AB2 at 26-27.
172 Appeal transcript 1-27.
173 Council's written submissions, 10 August 2017 at [94]; AB2 at 29.
174 Town Planning Joint Expert Report: Ex 8, p 33 [133]; AB2 at 284.
175 The design considerations included considerations which went to environmental impacts.

need for the proposed development. The factual question before her Honour was not whether there was a need for only a less extensive development.

[103] The Council's complaint, however, does raise important issues as to the manner in which her Honour proceeded from a finding of economic need to a finding that that need was a "sufficient ground" for approval. I therefore turn to whether the "need" demonstrated could be a sufficient ground, alone or with other matters, to warrant approval, notwithstanding the nature and extent of the conflict found to exist between the proposed development and the Redlands Planning Scheme.

Ground 4 and 5– misapplication of s 326 of the SPA as to "sufficient ground"

[104] By s 326(1)(b) of the SPA, in circumstances of any conflict with the Redland Planning Scheme, her Honour was required to refuse the development application unless there were sufficient "grounds" to justify the decision. "Grounds" is defined to mean "matters of public interest".[176]

Ground 5

[105] Ground 5 alleged that the discretion under s 326(1) of the SPA miscarried in failing to have regard to the additional conflicts between the proposed development and the Redland Planning Scheme. This was premised on the allegation in ground 1 of error in failing to find ecological conflict in respect of the southern portion of the site which was not made out. It follows that ground 5 also fails.

Ground 4

The Council's submissions

[106] Ground 4 alleged that given the conflicts as her Honour found them to be, her Honour erred in law in finding that the need for the proposed development was, nevertheless, a sufficient ground to approve the development application. Ground 4 was summarised as alleging the following errors of law:[177]

(a) failing to give proper regard to the Redland Planning Scheme and the KRSP Overlay Code as comprehensive expressions of what constitutes, in the public interest, the appropriate development of land;

(b) failing to determine that the requirement to allow the development despite conflict could not be described as "exceptional", as that term is considered in *Bell*;[178] and

(c) erroneously reducing the seriousness of conflict with parts of the Redland Planning Scheme;

[107] As to the first error, the Council submitted that the provisions of the Redland Planning Scheme (concerning visual amenity and the nature of the use and the character of the built form with which the proposed development was found to conflict) evinced an intention that the proposed development not be permitted on the site. Service stations and drive through restaurants were stated to be "inconsistent uses"[179] and approval of such uses necessarily conflicted with the Redland Planning Scheme.[180]

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176 SPA, Sch 3.
177 Council's Amended Outline at [42].
178 *Bell* at [68].
179 Reasons at [76(b)], [76(c)] and [77]; EP Zone Code specific outcome S2.1 and Table 1 & OS Zone Code specific outcome S1.1 and Table 1.

[108] In alleging the second error, Council placed specific reliance on the following passage in *Bell* concerning the construction of s 326(1)(b) of the SPA:[181]

> "Section 326(1)(b) will be engaged only where there is a tension between the application of the relevant instrument, here a planning scheme, and the public interest. If that tension exists, it will be for the decision maker to consider whether there are *sufficient* grounds (emphasis in original), in the public interest, to depart from the instrument. *Necessarily, cases where that tension exists will be exceptional, because a planning scheme must be accepted as a comprehensive expression of' what will constitute, in the public interest, the appropriate development of land* (emphasis added)."

[109] The third error was that, having noted that the clear conflict arose (as a consequence of the nature of the use and character of the built form), her Honour erred in concluding that the seriousness of that conflict was reduced by the considerations referred to at [89] and [95]. The seriousness of the conflict was to be determined by reference to matters as to the nature of the use and character of the built form and could not be "reduced" by reference to "extraneous considerations". An allied contention was that her Honour erred by holding that the fact that the environment and visual amenity goals of the Redland Planning Scheme were not materially compromised by the proposed development was relevant to the determination of the nature and extent of the conflict. In addition, her Honour erred in principle by conflating the "three-step" process stated in *Weightman v Gold Coast City Council*.[182]

The first respondents' submissions

[110] In relation to the issue of whether there was error by the primary judge in relation to s 326(1) of the SPA regarding her approach in considering the nature and extent of conflict, the first respondents argued first, that the primary judge did not erroneously reduce the *nature and extent of the conflict* found by reference to "extraneous considerations". Rather, in the orthodox way, her Honour weighed grounds against the conflict and that approach disclosed no error of law.[183] The primary judge undertook an evaluative exercise[184] to reach such a conclusion which was open and cannot be challenged in this Court. Her Honour's conclusions about the nature and extent of conflict with the planning scheme were essentially factual conclusions beyond challenge in this appeal.[185] Further, in assessing the nature and

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180 *Lockyer Valley Regional Council v Westlink Pty Ltd* (2011) 185 LGERA 63 at [33] per Fraser JA (with whom White JA and Douglas J agreed); *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 302 at 320 [13] per Holmes JA (with whom White JA and Atkinson J agreed).

181 *Bell* at [66] per McMurdo JA (with whom Sofronoff P and Philippides JA agreed).

182 [2003] 2 Qd R 441 at [36] per Atkinson J.

183 *Weightman* at [36]; *Lockyer Valley Regional Council v Westlink Pty Ltd* (2013) 2 Qd R 302 at [18]-[21]; and *Bell v Brisbane City Council* [2018] QCA 84 at [53]-[54].

184 Referring to *Aldi Stores v Redland Shire Council* [2009] QCA 346 at [13]-[14]; *CPT Manager Ltd v Central Highlands Regional Council* (2010) 174 LGERA 412 at [28]-[29]; and *Stockland Development Pty Ltd v Townsville City Council* (2013) 195 LGERA 317 at [30]-[31].

185 Referring to *Regional Land Development Corporation No 1 Ply Ltd v Banana Shire Council* (2009) 175 LGERA 115 at [23]; *Gracemere Surveying and Planning Consultants Pty Ltd v Peak Downs Shire Council* (2009) 175 LGERA 126 at [21]; and *CPT Manager Ltd v Central Highlands Regional Council* (2010) 174 LGERA 412 at [23]-[31].

extent of conflict and grounds for the proposed development, there was no error in not considering the "additional conflicts" relating to "the alleged ecology errors".[186]

[111] Second, the first respondents submitted that *Bell*[187] was not authority for the proposition that some type of limitation ought to be read into the clear words of s 326 of the SPA. Such an approach would be contrary to High Court authority[188] and this Court in the context of planning litigation.[189] *Bell* turned on the particular provisions of the planning scheme that applied which by its terms prevented the approval of the proposed development unless there was a demonstration of a specified type of need. Further, unlike in *Bell*, this case involved a second planning scheme that was relevant to the Court's assessment of the proposed development (namely, the draft Redland City Plan 2015).[190] Importantly, in the context of this case, the Council does not dispute in this appeal the finding of the primary judge that the conflict with the draft Redland City Plan 2015 "is not of determinative significance".[191]

[112] On the matter of sufficient grounds, the first respondents submitted that there are a large number of examples *where need has been regarded as sufficient to justify* approval of a proposed development which is in conflict with the planning scheme.[192] The conclusion of the primary judge as to the sufficiency of grounds to warrant approval was a determination about a factual matter, following an evaluative exercise that is beyond challenge in this Court.

Gold Coast City Council v K & K (GC) Pty Ltd

[113] In oral submissions in reply, Senior Counsel for the Council referred to a case raising s 326(1) of the SPA then reserved and in which judgment was delivered after the hearing of the appeal, being *Gold Coast City Council v K & K (GC) Pty Ltd.*[193] That decision is of importance to this appeal.

[114] The case concerned an application for a material change of use permit to develop land to build a service station, convenience store, take-away food premises and a fast food drive through premises. The proposed uses of a cafe and fast food premises conflicted with the Gold Coast City Planning Scheme 2003 which provided such uses "should be considered as undesirable or inappropriate". On refusal of the application by the Gold Coast City Council, the applicant appealed to the P&E Court which allowed the appeal, being satisfied that, despite its conflict with the planning scheme, the extent of the need for the proposed development was sufficient to justify approval under s 326(1)(b) of the SPA. On the appeal to this Court, the construction of s 326(1) of the SPA and meaning of "sufficient grounds" was considered at length by Sofronoff P (with whom Fraser JA and Flanagan J agreed).

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186 Council's Amended Outline of Argument at [42(d)].

187 [2018] QCA 84.

188 *Knight v FP Special Assets Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J.

189 See for example *Arksmead Pty Ltd v Gold Coast City Council* [2000] 1 Qd R 347 at [18].

190 Reasons at [18] (AB1 at 30).

191 Reasons at [92] (AB1 at 45).

192 *Luke v Maroochy Shire Council* [2003] QPELR 447; *Moncrieff v Townsville City Council (No 2)* [2012] QPELR 185; *Woodman McDonald Hardware Pty Ltd v Mackay Regional Council* [2013] QPELR 496; *Rintoul v Brisbane City Council*]2013] QPELR 900; *Westlink Pty Ltd v Lockyer Valley Regional Council* [2014] 198 LGERA 1; and *Neilsen Quality Gravels Pty Ltd v Brisbane City Council* [2016] QPELR 709.

193 [2019] QCA 132.

[115] The essential basis put forward by the applicant as a sufficient ground was that there was a "need" which would be satisfied by the proposed development, and that s 326 required the decision maker to undertake a general balancing exercise of the merits and demerits of the proposal as a whole.[194] It was held in consequence of that approach adopted by the parties, the real legal issues arising under s 326(1) of the SPA were not addressed because the parties failed to apprehend and apply the applicable statutory requirements.[195]

Consideration

The Planning Scheme as the embodiment of the public interest

[116] There can be no doubt that as a proposition of law, a planning scheme represents the public interest in the development of the land in question and a decision maker must take it to be an expression of the public interest in terms of land use.[196] It is taken as a *comprehensive* expression of the public interest (*Bell* at [66]) but in a *prima facie* sense, in that pursuant to s 326(1)(b) of the SPA, a sufficient matter of public interest may be demonstrated to override conformity with it.[197] A proposed development that conflicts with that expression of the public interest can only be approved where a public interest in the conflicting development is demonstrated to be sufficient to exceed the public interest otherwise represented by adhering to the provisions of the planning scheme.

[117] As stated in *K&K*:[198]

> "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 certainty that the terms of a Planning Scheme will be faithfully applied."

[118] An applicant must identify reasons why the terms of a Planning Scheme should not prevail, otherwise, as explained in *K&K*:[199]

> "… 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."

[119] The process under s 326(1) of the SPA does not involve a consideration of the "competing merit and weight of the grounds relied upon to justify approval".[200]

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194 [2019] QCA 132 at [62].
195 [2019] QCA 132 at [61] and [67].
196 Bell at *K&K* [2019] QCA 132 at [47] and [67].
197 *Bell* at [70].
198 [2019] QCA 132 at [67].
199 [2019] QCA 132 at [48].
200 [2019] QCA 132 at [60], unlike previous the predecessor legislation: the *Local Government Act* 1936 (Qld); see also at [58].

Examples of matters that may constitute sufficient grounds

[120] In *Bell*, McMurdo JA observed:[201]

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

[121] Such examples are the exception to the general proposition that planning schemes reflect the public interest and are to be enforced as such. In *K&K*, Sofronoff P similarly referred to non-mandatory and non-exhaustive examples of matters that, by their nature, are capable of overriding the intent of a planning scheme or a conflict with a particular provision of it. These are set out in the ministerial guidelines in s 759 of the SPA, being matters that were unavailable for consideration when the scheme was formulated but may be taken into account by a decision maker.[202] Further, while 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, it cannot be said that unforeseen circumstances must be shown in every case.[203]

Need as a sufficient ground

[122] The first respondent submitted, as was also submitted in *K&K*, that need has been held under various statutes to constitute a matter of overriding public interest. In that regard, reference was made to decisions, including *Westlink*, *Rintoul*, *Woodman* and *Luke* which were considered in *K&K*. After considering those decisions, Sofronoff P observed that at "the heart of decisions such as these is the acknowledgement that conformity with the Planning Scheme is, *prima facie*, in the public interest. His Honour continued:[204]

> "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."

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201 *Bell* at [68], the other members of the Court agreeing.
202 [2019] QCA 132 at [38]-[39].
203 *K&K* at [68].
204 [2019] QCA 132 at [48].

[123] In considering whether need constitutes a sufficient ground, Sofronoff observed in *K&K* at [68] that:

> "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 prejudicial effects to the existing amenity beyond the effect caused by non-conflicting uses."

Relevant considerations in assessing conflict

[124] The Council's contention that the primary judge erred in reducing the seriousness of the conflicts is misconceived. As stated in *K&K*, the examination of "the nature and extent of an asserted conflict is a step required by provision such as s 326 of the SPA.[205]

[125] In the present case, the clear conflict was found to arise as a consequence of the proposal "to locate uses that are nominated as inconsistent uses and that are not low-key in nature in a zone that does not encourage that style of use".[206] That finding is not challenged. Nor was her Honour's finding that the planning rationale for limiting the uses to low-key uses with minimal footprint was, in large part, to ensure achievement of "the environmental and visual amenity goals", that being evident from the Environmental Protection Zone Code, Open Space Zone Code and the Kinross Road Structure Plan Area Code as a whole, together with the desired environmental outcomes and strategic framework.

[126] There was no challenge to her Honour's finding that the visual amenity goals were not materially compromised by the proposed development. Nor was there error in her Honour's finding that the environmental goals (including in the southern portion) were not materially compromised. Furthermore, given the statements in *K&K*, I do not accept that the primary judge erred in considering the seriousness of the conflict. Contrary to the Council's submission, there was no error in reasoning that the seriousness of the conflict was reduced by the findings that those goals were

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205 [2019] QCA 132 at [72].

206 Reasons at [94].

not materially compromised. Nor did her Honour err in principle by conflating the "three-step" process stated in *Weightman*.[207]

The approach taken by the primary judge in applying s 326(1)(b) of the SPA

[127] Clearly, the need for a particular development may in the circumstances of a case constitute a "sufficient ground" for the exercise of the discretion to approve the development.

[128] Cases where need has been held to satisfy the criterion for demonstrating a sufficient ground for approval of a particular development are, as stated in *K&K*, premised on the principle that the relevant planning scheme is *prima facie* an expression of the public interest in the use of land. As stated in *Bell* at [68], in a particular case it may be evident that the planning scheme has not anticipated the existence of circumstances which have created a need for a certain development in the public interest such that a decision maker may conclude that the planning scheme is not in the particular case an embodiment of what is in the public interest.

[129] In the present case, her Honour correctly had regard to the nature and extent of the conflict and the planning rationale for the provisions of the Redland Planning Scheme that gave rise to a conflict. However, the issue of need which was the primary basis relied on as constituting a "sufficient ground", was not considered from the perspective of whether the need for the development was a matter of such public interest that it overrode the public interest embodied in the Redland Planning Scheme. I therefore agree with the Council's argument that the primary judge's approach to the issue of whether sufficient grounds existed to approve the development application failed to consider that the *prima facie* position that the planning scheme represented an expression of the public interest as to the appropriate development of the land in question. The exercise of the discretion under s 326 of the SPA accordingly miscarried.

[130] The matter was argued below without a consideration of the real issues arising under s 326.

[131] The Council submits in the event that the appeal be upheld, the development application should be refused, or alternatively, remitted to a different judge of the P&E Court for determination according to law. In my view, it is appropriate to remit the matter and there is no reason it ought not be remitted to be heard by the primary judge.

Orders

[132] The orders I would propose are:

1. the application for leave to appeal be granted;
2. the appeal be allowed;
3. the orders made on 18 June 2018 be set aside;
4. the matter be remitted to the P&E Court to be determined according to law; and
5. the first respondents pay the appellant's costs of the appeal.

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207 *Weightman* at [36] per Atkinson J.

[133] **McMURDO JA:** I have read a draft of the judgment of Philippides JA, in which the reasons of the primary judge and the arguments in this Court are set out in detail. This makes it unnecessary for me to do so. For the reasons that follow, I agree with the orders proposed by her Honour.

Is the application out of time?

[134] By s 63 of the *Planning and Environment Court Act* 2016 (Qld), a party to a proceeding in the Planning and Environment Court may appeal "a decision in the proceeding", but only on the ground of error or mistake in law or jurisdictional error. The appeal may be made only with the leave of this Court: s 63(2).

[135] On 6 November 2017, the primary judge published extensive reasons for judgment and ordered that the proceeding be adjourned to a further hearing to allow for the formulation of conditions of the development permit which, she had decided, should be granted.[208] That was "a decision in the proceeding" in the terms of s 63(1), and at that point, the Council could have applied for leave to appeal on each of the grounds which it argued in this Court. It is not uncommon for cases to come to this Court from a decision at that stage of a proceeding in the Planning and Environment Court.

[136] On 18 June 2018, the primary judge made orders which disposed of the proceeding. It was ordered that the appeal to that Court be allowed and that the development application be approved subject to certain stated conditions. That was also "a decision in the proceeding", in the terms of s 63(1). It is that decision which is the subject of this application for leave to appeal. The application was made within the prescribed period from the date of that decision. Yet the respondents contend that the applicant is applying for leave out of time.

[137] The respondents' argument is that the errors of law, upon which the application for leave is based, infected the 2017 decision, but not the 2018 decision. That contention cannot be accepted. The reasons for the 2018 decision, by which the appeal was allowed and a permit was granted, were those published in 2017.

[138] Consequently, this application for leave to appeal, upon the basis of alleged errors of law in the Reasons, was brought within the time prescribed for such an application.

Ground 1 of the appeal

[139] The first ground of the proposed appeal is that the primary judge made legal errors in considering whether the proposed development complied with certain provisions of the planning scheme. It is said that there are four such errors, any one of which affected the exercise of the judge's discretion to allow the appeal.

[140] The first of these errors is said to have been a misconstruction of cl S1.1 of the Environmental Protection Zone Code ('the Code'). That provision set out certain "Specific Outcomes". To understand its effect within the planning scheme, it is necessary to go first to cl 1.2.1, by which the scheme was expressed by reference to "Outcomes". There was a hierarchy of outcomes, comprising six "Desired Environmental Outcomes", "Overall Outcomes that are the purpose of a Code", and

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208 *King of Gifts (Qld) Pty Ltd v Redland City Council* [2017] QPEC 64 ("Reasons").

"Specific Outcomes that contribute to achieving the Overall Outcomes and are the outcomes by which code or impact assessable development are assessed."[209]

[141] Clause S1.1 set out Specific Outcomes on the subject of "Environment" as follows:

> "(1) Uses and other development maintain, enhance and protect environmental values by –
>
> (a) re-vegetating degraded and cleared areas;
>
> (b) retaining and increasing native animal movement through the premises;
>
> (c) retaining as many native plants as possible;
>
> (d) preventing the introduction of non-native plants or animals into the premises;
>
> (e) controlling stormwater run-off and water quality;
>
> (f) maintaining overland drainage systems and waterways in their natural state;
>
> (g) minimising the need for excavation and fill;
>
> (h) reducing erosion and sediment run-off."

[142] The primary judge found that the outcomes within paragraphs (a) and (b) would not be achieved by the proposed development, but that those within the remaining sub-paragraphs would be achieved. The Council contends that compliance with the planning scheme required the achievement of each of those outcomes. Its argument relies on cl 2.1.5 of the planning scheme, which was headed "How to read the Tables of Assessment and Assessment Criteria". Clause 2.1.5 provides that where there is a list of items separated by a semi-colon, the list is to be read as if the items are joined by the word "and", and that the items "must all be addressed". On the basis of that provision, it is said that nothing less than all of the measures within subparagraphs (a) through (h) would suffice.

[143] The view of the primary judge was that there was only one "Specific Outcome" within cl S.1.1(1), namely the maintenance, enhancement and protection of environmental values.[210] In her view, the matters in paragraphs (a) through (h) were "mechanisms by which that outcome may be achieved".[211] I respectfully disagree with that interpretation. One reason for that is that the interpretation appears to be inconsistent with the interpretation provision of cl 2.1.5. Another reason is that cl S1.1 was to "contribute to achieving" an Overall Outcome, more specifically that in cl 4.6.7(2)(a)(i), namely that a proposed development is to:

> "Ensure uses and other development identify, protect and provide for the long-term management and enhancement of the environmental values associated with this zone …"[212].

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209 AR 375.
210 Reasons [55].
211 Ibid.
212 AR 449.

If the only outcome prescribed by cl S1.1 is the maintenance, enhancement and protection of environmental values, it would be no more "specific" than the relevant Overall Outcome, so that it could not be said that its achievement would "contribute to" the achievement of the Overall Outcome. I therefore disagree with the judge's finding that the proposed development satisfied cl S1.1.[213]

[144] But it does not follow that, for this reason, the proposed development did not comply with the planning scheme. The purpose of the prescribed Specific Outcomes was to contribute to the achievement of the Overall Outcomes. It is true, as the Council submits, that there is no express provision in this planning scheme that development that complies with the relevant Overall Outcomes is one which is deemed to comply with the Code. Nevertheless, that is the effect of this hierarchy of outcomes. The achievement of the matters listed in cl S1.1 are a means to an end, which is the achievement of the relevant Overall Outcome. There is no provision to the effect that the achievement of everything within cl S1.1 is necessary for the Overall Outcome to be achieved. The Specific Outcomes *contribute* to the achievement of the Overall Outcomes, but they are not essential conditions of that result.

[145] On the findings of the primary judge, this development would maintain and protect the environmental values that exist on the subject site, although a less extensive development might permit a greater opportunity for enhancement of environmental values,[214] and the Overall Outcome would result.

[146] Consequently, the point of interpretation of cl S1.1, upon which I have disagreed with the primary judge, does not matter, because the planning scheme was satisfied in this respect by the achievement of the Overall Outcome described in cl 4.6.7.

[147] I turn to the second suggested error in the interpretation of the environmental provisions of the scheme. The Council argues that without directly considering compliance with cl 4.6.7(2)(a)(i) c and e, her Honour concluded, wrongly, that the development complied with those provisions.

[148] Overall Outcome cl 4.6.7(2)(a)(i) c and e is relevantly as follows:

> "(i) Ensure uses and other development identify, protect and provide for the *long-term management and enhancement of the environmental values* associated with this zone, *being* - …
>
> c. corridors, networks, patches and mosaics of native plants, and all areas where native animals have relatively unimpeded movement when compared to urban areas; …
>
> …
>
> e. native animals, native plants and ecosystems, any of which are common (least concern), vulnerable, rare or endangered as defined in the *Nature Conservation Act 1992* …" (Emphasis added.)

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213 Reasons [59].

214 Reasons [57].

[149] This argument misunderstands the reasoning of the primary judge. Her Honour's findings in this respect, although not discussed at length, reveal that she was satisfied that the development would maintain and protect such environmental values as existed on the site.[215] There is no demonstrated legal error in that finding of fact. Her Honour further found that those values would be enhanced, although "to a limited degree", by the proposed landscape planting and the introduction of fencing to direct fauna towards safe road crossing points.[216] There was no inconsistency between these findings and her Honour's findings, in respect of cl S1.1, that degraded and cleared areas would not be re-vegetated and animal movement through the premises would not be retained and increased.[217] In essence, her Honour found that Overall Outcome 4.6.7 would be achieved, in that the relatively insignificant environmental values on this site would be maintained, protected and, to an extent, enhanced. This second argument, under the proposed ground 1, cannot be accepted.

[150] The third argument under ground 1 is that her Honour's findings as to cl S1.1(1)(a) and (b) were inconsistent with her conclusion that the relevant provisions of the Kinross Road Structure Plan, more specifically its Overall Outcome 5.15.8(2)(f) and Specific Outcome 1.7(2)(b), were satisfied.[218] Each of those provisions was in relevantly identical terms, in requiring that a development should achieve an outcome which "protects, enhances and maintains waterways, habitat and movement corridors for koalas and other fauna."

[151] This argument should be rejected for the same reasons which reject the second argument. Her Honour's findings were that these requirements were met, because such environmental values that did exist on the subject site would be maintained and protected, and, to a limited degree, enhanced, by the development. Whether that was factually correct is not the question. There is no demonstrated legal error in this finding.

[152] The remaining argument under ground 1 focusses upon this passage from the Reasons at [57] where her Honour said:

> "…I am, nevertheless, satisfied that the development maintains and protects those environmental values that exist on the subject site. *Those values of particular ecological significance*, identified in the State and Council mapping, are the vegetated areas associated with Hilliards Creek, rather than that part of the site in the Environmental Protection Zone."
>
> (Emphasis added.)

[153] The Council argues that Hilliards Creek was irrelevant because it is located in the "northern portion" of the site, to which different provisions of the planning scheme applied. The argument follows that it should not have been considered when assessing whether the scheme, in its provisions which applied to the southern part of the site, had been satisfied.

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215 Reasons [57].
216 Reasons [58].
217 Reasons [55].
218 Reasons [59].

[154] This argument should be rejected. Her Honour was under no mistake, at this point in her judgment, that she was considering the provisions of the scheme affecting the southern part of the site. She was considering provisions of the scheme which were directed to the maintenance, management, protection and enhancement of environmental values. She was using a comparison with the areas associated with Hilliards Creek to describe the relative unimportance of the environmental values that existed on the southern part of the site. There was no legal error in assessing the proposal's compliance with the relevant outcomes prescribed by the scheme, by reference to a qualitative assessment of the relative importance of the existing environment on this part of the site.

[155] For these reasons, none of the arguments advanced in support of ground 1 of the proposed appeal can be accepted.

Proposed ground 2 of the appeal

[156] The application for leave to appeal advanced a proposed second ground of appeal, to the effect that her Honour erred in law in construing provisions of the scheme with respect to the northern part of the site. At the hearing, this ground was abandoned.

Ground 3 of the appeal

[157] The Council argues that the primary judge erred in law in holding that there was a "need" for this development, in the face of evidence indicating that the need could be satisfied by a similar development, but on a smaller scale. The argument focusses upon this part of the Reasons:

> "[106] Council submits that, in any event, the size and scale of the proposed development, with the commensurate impacts upon the site and receiving environment described above, are much greater than what would be required to satisfy any need identified by the experts. In that respect, it relies on the evidence of Mr Duane during cross-examination that the need that he identified could be satisfied by a service station with a smaller convenience store, fewer fuel spots, without the car wash and possibly without the drive through restaurant.
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> [107] It is not relevant to consider a hypothetical alternative. This court must assess the proposed development."

[158] Grounds 4 and 5 of the appeal argue that the primary judge erred in considering the operation of s 326(1) of the *Sustainable Planning Act* 2009 (Qld). The question of "need" was discussed in the course of her consideration of the operation of s 326(1) (including paragraphs [106] and [107] of the Reasons). The question was discussed under the broader heading of "Grounds", a reference to the question of whether, in the terms of s 326(1), "there are sufficient grounds to justify the decision [to approve the development], despite the conflict [with the planning scheme]". As I am about to discuss, the primary judge's consideration of the "need" for this development is central to the correctness, or otherwise, of her Honour's application of s 326(1). Ground 3 should not be separately considered.

Ground 4 of the appeal

[159] In essence, the argument under ground 4 is that her Honour's consideration of the application of s 326(1) was inconsistent with this Court's decision in *Bell v Brisbane City Council* ("*Bell*"),[219] which was given after the present case was decided.

[160] Section 326 of the *Sustainable Planning Act* relevantly provides as follows:

> "(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 …"

A planning scheme is a "relevant instrument". And the term "grounds" is defined to mean "matters of public interest".

[161] In my judgment in *Bell*, with which Sofronoff P and Philippides JA agreed, I said:[220]

> "Section 326(1)(b) will be engaged only where there is a tension between the application of the relevant instrument, here a planning scheme, and the public interest. If that tension exists, it will be for the decision maker to consider whether there are *sufficient* grounds, in the public interest, to depart from the instrument. Necessarily, cases where that tension exists will be exceptional, because a planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land."

I quoted what was said by Keane JA, with the agreement of the members of this Court, in *Clark v Cook Shire Council*:[221]

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

[162] I gave examples of cases where it might be concluded that by the time of the relevant decision, the planning scheme was not an embodiment of what, in the public interest, was the appropriate use or uses of land. One example was when the planning scheme had not anticipated the existence of circumstances which created a need, in the public interest, for a certain development.[222]

[163] In *Bell*, there was a substantial issue about a "need" for the proposed development. It was an issue which arose in a different way from this case, in that there, the issue was critical to a question of whether the proposed development conflicted with relevant provisions of the planning scheme. In that case, the planning scheme prescribed a maximum number of storeys for a development of that kind and in that "neighbourhood". However, that provision was qualified by another term of the scheme, which was that the development could be permitted "at a greater height,

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219 [2018] QCA 84.
220 At [66].
221 [2008] 1 Qd R 327 at 338; [2007] QCA 139 at [32].
222 *Bell* at [68].

scale and form where there is both a community need and an economic need for the development." In the Planning and Environment Court, it was held that there was both a community need and an economic need for the proposed development, which involved the construction of three buildings with a number of storeys considerably in excess of the prescribed maximum. Consequently, the primary judge in that case held, there was no conflict with the planning scheme in that respect.

[164] This Court held that the judge erred in law, in his interpretation of the term which permitted development on the basis of a community need and an economic need for the development. What this Court said on the question of need was in that context.

[165] In the present case, a question of "need" was considered for a different purpose, namely to assess whether, in the terms of s 326(1), sufficient grounds were demonstrated to permit the development, notwithstanding its conflict with the planning scheme.

[166] In essence, her Honour's reasoning was that there was such a need for the proposed development, by its provision of a new service station, to justify the approval of the development. This was justified, on her Honour's reasoning, notwithstanding that the development was "fundamentally different in nature and size (in terms of its footprint) to the types of uses and development that the Redlands Planning Scheme envisages on the subject site."[223]

[167] The primary judge accepted that there was a clear conflict with the planning scheme, which effectively arose "as a consequence of the proposal to locate uses that are nominated as inconsistent uses and that are not low-key in nature in a zone that does not encourage that style of use."[224] And at an earlier point of her judgment, her Honour said that there was a conflict (amongst others) in that the proposed development was "of a very different built form character to what currently exists or is encouraged in the Redlands Planning Scheme …".[225]

[168] Her Honour's findings that there was a "need" for this development are not shown, in any respect, to be the result of an error of law. Indeed, in the Planning and Environment Court, the Council accepted that there was "a level of need for an additional service station" in the relevant area, and the debate concerned the "level of need".[226] The primary judge resolved that debate by concluding that there was "a clear and strong level of economic need".

[169] But it did not follow from those findings that there was a ground for approving the development inconsistently with the planning scheme. Unless it was demonstrated that, in the relevant respects, the planning scheme, as it applied to this site, no longer represented what was required in the public interest, it could not be said that there were "grounds" (meaning matters of public interest) for permitting the development. What had to be established was not just that there was a need for such a development in the area, but that there was a need for the development in a location where the planning scheme provided that it should not occur. It had to be shown that, in the public interest, it was necessary to override the scheme as it applied to this land.

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223 Reasons [82].
224 Reasons [94].
225 Reasons [33].
226 Reasons [98], [100].

[170] Whilst judgment in the present case was reserved, this Court delivered its judgment in *Gold Coast City Council v K & K (GC) Pty Ltd*[227], which endorsed what was said in *Bell* and explained the relevance (or otherwise) of a "need" for a proposed development, in the operation of s 326(1)(b). Sofronoff P, with whose judgment Fraser JA and Flanagan J agreed, said:[228]

> "[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."
>
> (Emphasis added.)

A little later in his judgment, Sofronoff P continued:

> "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."
>
> (Emphasis added.)

[171] Although that judgment had not been given when the present case was argued in this Court, the reasoning in those passages was suggested by the Court in the course of the oral submissions for the respondents, who thereby had an opportunity to address it.[229] Counsel for the respondents were unable to demonstrate that the primary judge did consider whether there was a need for the development in a location where the planning scheme provided that it should not occur, as distinct from more generally in the area, or a part of the area, governed by the planning scheme.

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227 [2019] QCA 132.

228 At [68].

229 See especially Transcript at 1-59 to 1-61.

[172] The primary judge accepted that there were other matters, advanced by the present respondents, which were "supportive of approval of the proposed development."[230] Her Honour did not say that these grounds, absent a "need" for the development, would be sufficient. None of them seems to be a consideration which, on its face, demonstrated that it was against the public interest that the development of this land be permitted only in conformity with the planning scheme.

[173] For these reasons, the Council's case in respect of ground 4 of its proposed appeal must be accepted. The primary judge did not consider whether there was a need for this development on this location, such that the public interest would not be served by requiring that the land be developed according to the planning scheme. In fairness to the primary judge, it should be noted that not only was her judgment given before the two judgments of this Court which I have discussed, but also that it was a consequence of the way in which the parties presented their cases in her Court.

[174] Ground 5 was a contention that the consideration of s 326(1) miscarried because of the suggested errors argued under ground 1. Since none of the alleged errors in ground 1 have been made out, ground 5 could not succeed.

Conclusion

[175] For these reasons, I agree with the orders proposed by Philippides JA. And I agree with her Honour that the case should be reconsidered by the primary judge rather than another judge.

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230 Reasons [114].