

SUPREME COURT OF QUEENSLAND

CITATION: *SOS Community Action Group Inc & Anor v Reef Cove Resort Ltd & Anor* [2006] QCA 519

PARTIES: **SOS COMMUNITY ACTION GROUP INC**
ASSN NO IA34287
(first applicant/applicant)
CAIRNS AND FAR NORTH ENVIRONMENT CENTRE
ASSN NO IA1134
(second applicant)
v
REEF COVE RESORT LIMITED ARBN 098 880 329
(first respondent/first respondent)
CAIRNS CITY COUNCIL
(second respondent/second respondent)

FILE NO/S: Appeal No 5430 of 2006
P & E Appeal No 329 of 2005

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Integrated Planning Act*

ORIGINATING COURT: Planning and Environment Court at Cairns

DELIVERED ON: 8 December 2006

DELIVERED AT: Brisbane

HEARING DATE: 16 November 2006

JUDGES: Keane and Holmes JJA and Chesterman J
Separate reasons for judgment of each member of the Court, each concurring as to the orders made

ORDER: **1. Application for leave to appeal dismissed**
2. Applicant to pay the respondents' costs of the appeal

CATCHWORDS: ENVIRONMENT AND PLANNING - CONSENTS, APPROVALS AND PERMITS - VALIDITY - GENERALLY - local authority issued a negotiated decision notice approving the reconfiguration of land - application made to Planning and Environment Court seeking orders declaring local authority's decision invalid - first respondent succeeded in having certain grounds of this application struck out - merit of applicant's grounds of alleged invalidity - whether primary judge erred in granting strike out

Integrated Planning Act 1997 (Qld) s 3.1.5, s 4.1.21(1)(a), s 4.1.56, s 6.1.30(3)(c)
Local Government (Planning and Environment) Act 1990 (Qld) s 4.4(5A), s 5.1(6), s 5.1(6A)

Leda Holdings Pty Ltd v Caboolture Shire Council [2005] QPEC 56; DC Nos 3492 and 3950 of 2005, 26 July 2005, cited
Leda Holdings Pty Ltd v Caboolture Shire Council & Ors [2006] QCA 271; Appeal No 7501 of 2005, 1 August 2006, cited
Palyaris v Gold Coast City Council [2004] QPELR 162; Appeal No 723 of 2002, 1 August 2003, considered
Stubberfield v Redland Shire Council & Anor [1993] QPLR 214, cited
Theseus Exploration NL v Foyster (1972) 126 CLR 507, cited
Weightman v Gold Coast City Council & Anor [2002] QCA 234; Appeal No 2452 of 2002, 28 June 2002, considered
Westfield Management Ltd v Brisbane City Council & Anor [2003] QPELR 520; DC No 4951 of 2202, 17 April 2003, cited
Woolworths Ltd v Maryborough City Council (No 2) [2006] 1 Qd R 273; [2005] QCA 262, cited

COUNSEL: S J Keim SC, with T L Fantin, for the applicant
 D R Gore QC, with R S Litster, for the first respondent
 S M Ure for the second respondent

SOLICITORS: Environmental Defenders Office of Northern Queensland Inc for the applicant
 Clayton Utz for the first respondent
 MacDonnells Law for the second respondent

- [1] **KEANE JA:** On 9 September 2004, the second respondent ("the local authority") issued a negotiated decision notice approving the reconfiguration of 120.5 hectares of land at False Cape facing Sunny Bay near Cairns in far north Queensland. The applicant commenced proceedings asserting the invalidity of the local authority's decision and seeking declaratory orders to that effect under s 4.1.21(1)(a) of the *Integrated Planning Act 1997* (Qld) ("the IPA").
- [2] The first respondent ("the developer") applied to the Planning and Environment Court ("the P & E Court") to strike out four of the grounds of alleged invalidity, namely grounds 1A to 1D inclusive. The developer's application succeeded, and the applicant now seeks leave to appeal against the decision of the P & E Court pursuant to s 4.1.56 of the IPA.
- [3] The arguments which bear on the application for leave to appeal can be discussed intelligibly only after the background to the local authority's decision has been summarised.

Background

- [4] On 29 March 1990, the Governor-in-Council approved the amendment of the Town Planning Scheme then applying to the land in question. That scheme gave effect to a 1987 order of the then Local Government Court whereby the land was rezoned from the Rural C Zone to the Special Facilities (Tourist Resort Development As Per Plan of Development 1063) Zone. Plan of Development 1063 contemplated resort and associated residential development of the kind ultimately intended by the developer in this case. A new planning scheme was gazetted on 29 November 1996 ("the 1996 scheme"). The 1996 scheme is a "transitional planning scheme" within the meaning of the IPA. It was the scheme which was in force when the developer

applied to the local authority for the reconfiguration of the land. Under the strategic plan which formed part of the 1996 scheme, the land in question was designated as a "Major Future Tourist Accommodation" location. In March 2001, the local authority substituted a new Plan of Development 1063 for that which had previously been approved in relation to the Special Facilities zoning.

- [5] The developer acquired the land in 2002. On 5 June 2003, the developer made a development application to the local authority pursuant to the IPA for approval for the reconfiguration of the land into a number of lots. As contemplated by s 1.3.5 of the IPA, the reconfiguration involved the rearranging of the boundaries of the land by registering a plan of subdivision. It is common ground that this application was "code assessable" and not "impact assessable" as those terms are used in the IPA.
- [6] On 22 June 2004, the local authority resolved to issue a development approval for reconfiguration of the land into a number of lots. This approval was subject to conditions. The negotiated decision notice issued, as I have said, on 9 September 2004.
- [7] On 26 August 2005, the developer applied to the local authority for approval of operational works for preliminary road works for the first stage of the development. This application was approved. The argument proceeded in the P & E Court, and in this Court, on the basis that the approval for operational works stands or falls with the approval of the reconfiguration. It was not argued that there was a basis for challenging the approval of operational works for preliminary road works which was separate and distinct from the challenge to the approval of the reconfiguration.
- [8] The application for reconfiguration was required, by s 6.1.30(3)(c) of the IPA, to be dealt with by the local authority pursuant to s 5.1(6) and (6A) of the otherwise repealed *Local Government (Planning and Environment) Act 1990* (Qld) ("the P & E Act"). Of relevance here is s 5.1(6A) of the P & E Act, which provides as follows:
- "The local government must refuse to approve the application if -
- (a) the application conflicts with any relevant strategic plan or development control plan; and
 - (b) there are not sufficient planning grounds to justify approving the application despite the conflict."
- [9] The uses proposed for the lots to be brought into existence upon the reconfiguration were permitted as of right by the 1996 scheme. The applicant argues, however, that the effect of s 5.1(6A) of the P & E Act was to oblige the local authority to refuse an application for development which, though permitted by a transitional planning scheme, was in conflict with the strategic plan (which in this case was a component of that scheme) or the Development Control Plan ("DCP") (which in this case was adopted subsequent to that scheme).
- [10] The DCP which is relevant for the purposes of s 5.1(6A) of the P & E Act contains the following relevant provisions:
- "1.1** ... This [DCP] does not attempt to regulate existing lawful uses but does regulate those uses that require the lodgement of a development application ...

Nothing in this [DCP] shall be construed to confer any rights to use land for any purpose. Such rights remain vested in other parts of the Planning Scheme ...

1.2 GENERAL INTENT

The forested hillslopes above the coastal plain and river valleys are landscape features representative of, and uniquely characteristic of the Cairns region. They are features which make the region attractive to both residents and tourists and contribute in distinguishing the region from other tourist destinations. The hillslopes are also an important habitat and form a link between the coastal lowlands and mountain ranges. It is intended that the attractiveness and importance of the hillslopes as a habitat be maintained.

The features of the hillslopes that make them, attractive are the stark contrast between the steep, generally forested slopes and the cleared and cultivated plains below ... It is intended that this natural attractiveness be maintained by not permitting development on much of the hillsides. Where development does occur it should only be on slopes that are safe and stable and in a manner which ensures that there will be no changes to the landscape character, visual appeal or ecological values.

1.3 AIM

The aim of this [DCP] is to protect the landscape character, ecological values and the visual quality of the hillslopes so as to retain the scenic backdrop to the lowland areas and to ensure that where land can be developed without impact on the scenic quality and ecological value, it is developed in a manner that is safe and serviceable for the proposed use.

...

1.4 PREFERRED DOMINANT AREAS

The location of the preferred dominant areas as described below, is shown on the [DCP] maps.

1.4.1 Category A - Unconstrained

It is intended that these areas in the context of hillslope protection are the preferred locations for development. Land within this designation has been identified by various factors as not being constrained in terms of potential visual degradation which may arise from development.

Generally it is cleared land with slopes less than 1 vertical to 6 horizontal (1:6). However, these areas may contain isolated areas such as gullies, steep ridge faces or prominent ridge lines or sections of wetland or rainforest areas which need to be assessed in any detailed site analysis.

It should also be noted that the suitability for development needs to be assessed with reference to other parts of the Planning Scheme in terms of physical constraints such as flooding, and statutory constraints such as zoning and Strategic Plan designation.

1.4.2 Category B – Constrained

Land within this designation has been identified, by various factors, as being constrained to varying degrees for future development.

It is considered however that land designated as Category B and located adjacent to the Urban designation on the Strategic Plan Map Diagram A.I may have opportunities for certain forms of development, provided that any such development would meet particular performance standards designed to ensure that the intent of this [DCP] is maintained. For development to be approved in this category, the applicant will need to demonstrate to Council that the land can be made safe and serviceable for the proposed use without resort to, in Council's opinion:

- [i] complex engineering solutions to overcome the constraints;
- [ii] the undertaking of anything more than minor earthworks; or
- [iii] the need for controls, to ensure that there is no change to the landscape or scenic value of the area, to be placed upon the land use, in excess of those available in the Planning Scheme or Local Laws.

Land designated as Category B but not located adjacent to the Urban designation on the Strategic Plan Map Diagram 1 may comprise both land suitable for development subject to the above proviso and land not suitable for development. The process of determining the extent of land unsuitable for development will occur at the time of a development application or, where applicable, by mutual agreement between the landowner and Council as set out in Hillslopes Objective 9.

...

1.5 OBJECTIVES AND IMPLEMENTATION

...

1.5.1.1 Hillslopes Objective 1

To retain the hillslopes in a manner which reflects the City image while conserving areas of ecological value and scenic amenity.

Implementation

- [a] Council when considering development applications shall not approve applications where the proposal:
 - [i] is not able to be undertaken in a manner sympathetic and sensitive to the surrounding natural environment;
 - [ii] would be contrary to maintaining the environmental and visual integrity of the hillslopes;

...

1.5.3.2 Hillslopes Objective 8

To identify those areas which require further detail to establish its suitability for development.

Implementation

- [a] The areas identified as Category **B** may have some potential for development. To ascertain this potential, a development application lodged with Council shall be accompanied by a Concept Plan in accordance with Provision 1.6.1.

...

1.6 ASSESSMENT DETAILS

1.6.1 Concept Plan

The purpose of the concept plan is to ensure that any proposed development shall be based on a thorough site survey and site analysis that identifies all environmental constraints and opportunities in order to preserve and prevent depletion of the hillslope character. To ensure this, any development application, unless determined otherwise by Clause 1.6.1.6, shall include a Concept Plan including the elements as outlined by Clauses 1.6.1.1, 1.6.1.2, 1.6.1.3, 1.6.1.4, 1.6.1.5.

...

1.6.1.2 Site Analysis

The analysis tasks includes recording and identifying:

- areas that are too sensitive to develop by either significant vegetation or slope stability problems. With regard to slope stability the analysis is to be undertaken in accordance with Clause 1.6.1.3;
- areas that are visually exposed to other locations. This analysis to be undertaken in accordance with Clause 1.6.1.4;
- areas that may require special protection, eg sites of cultural heritage significance;
- major views within the site and vistas beyond;
- areas exposed to strong winds and areas sheltered from wind to assist in locating buildings and buffer planting;
- slopes facing northeast through north to northwest as these are the most suitable locations for orientation of buildings, terraces, and other open space to the sun;
- shady area which will be cool in summer; and
- bush fire hazard. Analysis to be undertaken in accordance with Clause 1.6.1.5.

1.6.1.3 Geotechnical Report

A geotechnical report, prepared by a qualified and experienced geotechnical engineer, detailing the suitability of the site for the proposed development shall form part of the Concept Plan. This report shall include, but not be limited to assessment of the following:

- [a] Existing site conditions, including:
 - soil type, depth and properties;
 - rock type and properties;
 - depth of weathering;
 - angles of dip of rock bedding planes and fault planes;
 - slope stability;
 - erosion stability;
 - history of any known geological problems or occurrences on the site or adjoining property.
- [b] Details of measures proposed to be incorporated in the development to ensure safe and otherwise satisfactory construction practices, including:

- measures to be adopted to control soil and rock movement from future weathering and saturated conditions; and
- design matters to be considered during the construction of building foundations, roads, driveways or any other works involving the excavation or filling of any land.

The adequacy of the geotechnical report regarding the testing procedures adopted, the scope of the report and that the tests undertaken to ensure the findings of the report are representative of the site, shall be determined by the Director Planning and Development, who may, if deemed necessary, request further information from the applicant.

1.6.1.4 Visual Assessment Report

A report, prepared by a qualified Landscape Architect or an approved professional, which deals with the likely visual effects of the proposed development. This report shall include, but not be limited to, the following:

- [a] Location plan and site identification details,
- [b] Site survey plan, in accordance with Clause 1.6.1.1.

...

1.6.1.6 Concept Plan Discretion

Council may decide that a Concept Plan in part or in whole may not be required where the proposal is of a minor nature (such as a dwelling house) and where the level of detail as set out in the above provisions is deemed unnecessary by the Director Planning and Development.

1.7 DEVELOPMENT REQUIREMENTS

Council shall not approve a development application or building approval within the Category A area referred to in Hillslopes Objective 3[b] and 7(b), Category B or Category C area referred to in Hillslopes Objective 4, 5, 7 or 8 Hillslopes Objective 5 respectively unless it conforms to the relevant provisions stated in those objectives and the following provisions:

1.7.1 Proposal and Design Layout

- [a] The design and layout of any proposal shall ensure harmony between the proposal and the natural and man-made features of the landscape.

...

1.7.2 Access and Parking

...

- [c] Practical access shall be provided for conventional vehicles.

...

1.7.3 Excavation and Fill

...

- [b] Large earth fills or cuts to accommodate building construction shall not be approved. Buildings shall be designed and sited to blend into the landscape with minimal excavation and fill.

...

1.7.4 Siting and Design of Building and Outbuildings

...

- [e] Buildings and associated roads shall not be constructed in areas with a slope greater than 1 in 3.
- [f] The design, bulk, height and form of all new buildings, outbuildings and extensions to existing buildings and outbuildings shall not dominate or detract from the scenic and environmental qualities of the site and of the local environment." (emphasis in original)

- [11] The 1996 scheme recognises the relevance of the DCP as well as the strategic plan contained in the scheme. In this regard, paragraph 4.2 of Pt C of the 1996 scheme provides:

"4.2 LIMITATION ON USE RIGHTS CONFERRED

Notwithstanding that pursuant to Sub-section 1.2, development may be carried out with or without the consent of the Council, the carrying out of any permitted development subject to conditions or permissible development shall be subject to:

- [a] those provisions contained in this Planning Scheme (including those of any relevant [DCP]) applicable to the development and the zone in which it is proposed; and all relevant Local Laws and policies;
- [b] Where permitted development is development specified in Column 2 of the Table of Development applicable to a particular zone, the carrying out of such permitted development in that zone shall also be in accordance with the conditions of development, if any, imposed by the Council in respect of that permitted development."

- [12] The land in question was within the Category B – Constrained designation referred to in cl 1.4.1 of the DCP. The applicant argues that the DCP applies to regulate the reconfiguration because reconfiguration is itself a use which "requires the lodgement of a development application". That argument was not contested by the developer. It will be seen, however, that the standards prescribed for "development" on the hillslopes on which the applicant seeks to rely are concerned with **works**, which, if approved, are apt to alter the topography, environment and visual amenity of the hillslopes in question.

- [13] In resolving to approve the developer's application, the local authority had before it, and may be taken to have acted upon, the advice and recommendations of its Town Planning Officer, Mr P M Tabulo. Mr Tabulo's report to the meeting of the local authority on 22 July 2004 identified a number of his concerns in relation to the work intended to be carried out by the developer. The applicant included this report in the material upon which it relied before the learned primary judge. Mr Tabulo recommended that the local authority issue a development permit to reconfigure the land in accordance with the developer's application subject to extensive conditions which were directed, not merely to the reconfiguration of the land, but to the subsequent alteration of the topography of the land and the actual construction of roads and buildings on it. In the body of Mr Tabulo's report, he said:

"The [DCP] aims to protect the landscape character, ecological values and visual quality of the hillslopes to retain the scenic backdrop of Cairns and to ensure that land can be developed without impact on the scenic quality and ecological value, it is developed in a

manner that is safe and serviceable for use. The applicant has not yet demonstrated that the proposed development can be undertaken with minimal impact on the scenic quality of the site as detailed engineering is yet to be undertaken. Conditions have been included in the recommendation to Council specifying maximum batter heights and requirements for the revegetation of cleared areas to reduce the visual prominence of the development ... Although the recommendation to Council is for a Development Permit, the applicant is still required to demonstrate that the proposed development complies with the relevant provisions of the Category B designation of the [DCP]. This will ensure that all relevant issues are captured and addressed without necessitating the referral coordination process. The foremost concern is that the development is to be safe and serviceable without resorting to complex engineering solutions, or the undertaking of extensive earthworks ... Section 1.7 of the [DCP] states that Council is not to approve a development application unless it complies with the provisions of the [DCP]. The pertinent provisions that are to be complied with prior to Council issuing a Development Permit for Operational Works include:

- Large earth fills or cuts to accommodate building construction shall not be approved.
- Buildings and associated roads shall not be constructed in areas with a slope greater than 1 in 3 (33%).

The proposed development does not comply with the relevant provisions of the Strategic Plan and the relevant [DCP]."

- [14] Mr Tabulo's report went on to identify further conflicts between the development ultimately intended by the developer on the one hand, and the strategic plan and DCP in relation to the city Image Objective, Tourism Strategy, and Visual Amenity on the other. The applicant emphasises the concluding passage of Mr Tabulo's report:

"The above report highlights a series of issues and concerns that this development presents. Under different circumstances and without historic approval the application would have had to been either [sic] substantially modified or refused. However as Council is dealing with an historic approval the best it can endeavour to do is to impose a series of conditions that go some way [sic] to achieving some of the current intents or outcomes."

It is to be emphasised that it is clear that, when Mr Tabulo spoke of "this development", he was referring to the construction of the facilities ultimately intended by the developer.

The applicant's arguments

- [15] It is convenient to mention at this point that, before the hearing at first instance, the applicant had sought the permission of the developer to allow Dr Fred Baynes, an engineering geologist, access to the land to provide expert geotechnical evidence in support of the applicant's challenge to the validity of the local authority's decision. This request was refused by the developer. At the hearing of the developer's application to strike out grounds 1A to 1D of the applicant's originating application, the applicant sought to argue that evidence from Dr Baynes would be admissible in

support of the grounds of validity 1B and 1C. The learned primary judge concluded that this evidence would not be admissible.¹

- [16] In the application to this Court, leave was sought to appeal against the refusal by the primary judge of an application by the applicant for a direction that the developer permit Dr Baynes to inspect, and conduct tests upon, the land in question. It appears, however, from a number of sources, including the absence of any such application on the file, the argument addressed to his Honour, and his Honour's reasons for judgement, that no such application was made to his Honour. It may be the case, as was suggested in argument, in this Court on behalf of the applicant, that the issue between the parties as to whether or not such a direction should be made was whether the evidence of Dr Baynes would be admissible; but the fact remains that no application for a direction in these terms was actually before his Honour, and his Honour made no order refusing the application. The application for leave to appeal is, therefore, in this respect, misconceived. This ground of the application for leave must be rejected on that basis.

The challenges to validity of the approval

- [17] I turn now to consider the applicant's arguments that the local authority's approval of the application was invalid. It is necessary first to set out the grounds of alleged invalidity which were propounded by the applicant. These grounds identify the respects in which it is said that the developer's application conflicts with the DCP and the strategic plan. As the particulars of ground 1A were repeated (with some deletions) in relation to the other grounds, it will be sufficient to set out the particulars only in relation to ground 1A. The grounds of alleged invalidity in question were as follows (as set out in reasons for judgment):

"1A. The second respondent erred in law in failing, in breach of s6.1.30(3)(c) IPA and s 5.1(6A) *Local Government (Planning and Environment) Act* 1990 ('the repealed Act'), to refuse the first respondent's development application notwithstanding that the application conflicted with a relevant development control plan, namely, the Hillslopes Development Control Plan ('the DCP') and with the strategic plan for the City of Cairns in circumstances where the only matter arguably identified as sufficient planning grounds to approve the application notwithstanding the conflict was not capable, as a matter of law, of constituting sufficient planning grounds.

Particulars of the Conflict with the DCP

- (a) The site is identified by the DCP as category B-constrained land;
- (b) Despite a requirement in paragraph 1.4.2 of the DCP, the first respondent had not, at the time of the reconfiguration approval, demonstrated to the second respondent that the land could be safe and serviceable for the proposed use without resort to, in the second respondent's opinion, complex engineering solutions to overcome the restraints identified in the DCP; the undertaking of anything more than minor earthworks; or the need for controls to ensure that there is no change to the landscape or scenic value of

¹ *SOS Community Action Group & Anor v Reefco Resort Limited and Cairns City Council* [2006] QPEC 069 at [27].

- the area, in excess of those available in the Planning Scheme or Local Laws;
- (c) Despite a requirement in paragraph 1.4.2 of the DCP, the process of determining the extent of land unsuitable for development did not occur at the time of the development application or at an alternative time permitted by Hillslopes Objective 9;
 - (d) In breach of paragraph 1.5.1.1 of the DCP, the proposed use was contrary to maintaining the environmental and visual integrity of the hillslopes including the site;
 - (e) In breach of paragraphs 1.5.3.2 and 1.6 of the DCP, the application was not accompanied by a concept plan which recorded and identified areas that are too sensitive to develop on account of slope stability problems (and failed to provide a geotechnical report, other than a preliminary report, that assessed existing site conditions and assessed details of measures proposed to be incorporated in the development to ensure safe and satisfactory construction practices) or areas that are visually exposed to other locations or major views within the site and vistas beyond (and failed to provide a visual assessment report which provided details of the proposal with plans, levels, elevations, sections, and perspectives and details of how the proposal accorded with the second respondent's Hillslope Visual Assessment Handbook).
 - (f) In breach of paragraph 1.7 of the DCP, the proposal failed to conform with requirements that:
 - (i) The design and layout shall ensure harmony between the proposal and the natural and man-made features of the landscape (1.7.1(a));
 - (ii) Practical access shall be provided for conventional vehicles (1.7.2(c)).
 - (iii) Large earth cuts to accommodate building construction shall not be approved (1.7.3(b)).
 - (iv) Buildings and associated roads shall not be constructed in areas with a slope greater than 1 in 3 (1.7.4(e));
 - (v) The design, bulk, height and form of all new buildings and outbuildings shall not dominate or detract from the scenic and environmental qualities of the site and of the local environment (1.7.4(f)).

Particulars of the Conflict with the Strategic Plan

- (g) In breach of City Image Objective 3, the application failed to maintain the scenic quality and minimal level of development of the beaches and headlands within the City of Cairns in that it will be highly visible from the outer reef and island boating routes and from the northern beaches of Cairns.

Particulars of the matter not capable of constituting
Sufficient Planning Grounds

- (h) The second respondent regarded itself as bound to approve the application because of the existence of the rezoning from Rural C zone to Special Facilities Zone by governor in council dated 29 March 1990. Such rezoning approval is not reasonably capable of constituting sufficient planning grounds to approve the application despite conflict with the DCP and the strategic plan.

1B. The second respondent's decision to approve the development application, was invalid on the grounds of unreasonableness in that no reasonable council properly instructed would have found sufficient planning grounds to justify approval of the development application despite the fact that the application conflicted with the DCP and the strategic plan for the City of Cairns.

Particulars of the Conflict with the DCP

...

1C. The second respondent failed to follow procedures required by law, including by s 6.1.30(3)(c) IPA and s 5.1(6A) *Local Government (Planning and Environment) Act* 1990 ('the repealed Act'), in that, in purporting to approve the development application, it failed to identify and enumerate the conflicts which existed between the proposal and the DCP and the proposal and the strategic plan for the City of Cairns prior to giving consideration to whether sufficient planning grounds existed to approve the application notwithstanding the said conflicts.

Particulars of the Conflict with the DCP which needed to be
identified and considered

...

1D. The second respondent failed to follow procedures required by law, in breach of the DCP and s 6.1.30(3)(c) IPA and s 5.1(6A) *Local Government (Planning and Environment) Act* 1990 ('the repealed Act'), in that, in purporting to approve the development application, it failed to ensure that the following procedures required by the DCP were complied with prior to the granting the said approval.

..."

- [18] In relation to grounds 1A and 1B, the applicant relied upon Mr Tabulo's report to argue that this report identified conflicts between the developer's application and the strategic plan and the DCP. In relation to grounds 1C and 1D, the applicant sought to argue that there were conflicts between the application and the DCP and strategic plan in addition to those referred to by Mr Tabulo which were not identified by the local authority.

Grounds 1A and 1B

- [19] The applicant's principal contention, both at first instance and in this Court, was that the circumstance that the 1996 scheme permitted the development of the land as of right for the purposes proposed by the developer was not capable, as a matter of law, of constituting "sufficient planning grounds" within s 5.1(6A) of the P & E Act to justify approving the application notwithstanding the conflicts between the application and the DCP.
- [20] The applicant contended, and the learned primary judge accepted, that the authoritative exposition of s 5.1(6A) of the P & E Act was contained in the decision of this Court in *Weightman v Gold Coast City Council & Anor.*² There, speaking of s 4.4(5A) of the P & E Act, a provision in identical terms to s 5.1(6A), Atkinson J said:
- "In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s. 4.4(5A)(b) of the P & E Act, the decision maker should:
1. examine the nature and extent of the conflict;
 2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;
 3. determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict."
- [21] The applicant also relied, at first instance and in this Court, on the observations of Wilson SC DCJ in *Palyaris v Gold Coast City Council*³ in support of the proposition that the 1996 scheme could not itself be the source of "sufficient planning grounds" to warrant approval of the developer's application. Wilson SC DCJ said:
- "The term 'planning grounds' in s4.4(5A) of the [P & E Act], prefaced by the word 'sufficient' connotes grounds which would establish positive betterment in terms of planning outcomes which would not otherwise be achievable through the existing Planning Scheme and justify departure from it. The difficulty for the Appellant is that each of the planning outcomes it identifies is equally available under the usage which is presently permitted, and approval would do no more than remove the requirement for a residential component, while permitting the intensification of non-residential purposes. The fact that there are no positive features arising from approval which are not otherwise achievable through development consistent with the planning strategies encapsulated in the 1994 scheme means there is, with reference to the equation described in the third stage identified by Atkinson J in *Weightman*, no substantive planning feature which justifies approval, despite the conflict."
- [22] As the learned primary judge observed, these observations by Wilson SC DCJ were made by his Honour as the decision-maker required to resolve the issue whether

² [2002] QCA 234 at [36].

³ [2004] QPELR 162 at [41].

there were sufficient planning grounds to warrant approval of an application in conflict with **the relevant town planning scheme**. Here, of course, the development in question is permitted by the 1996 scheme as of right; and so no question arises as to the need to identify sufficient planning grounds outside the scheme to justify approving an application which was in conflict with the scheme.

- [23] In any event, the question for the court below, and for this Court, is whether there was no legal possibility that the local authority, as decision-maker, could have identified and acted upon planning grounds sufficient to justify approving the application notwithstanding the conflicts with the DCP. The proposition which is essential to the applicant's case in relation to ground 1A of its originating application is that, as a matter of law, there was no "planning ground" which could provide sufficient justification to support the approval of the developer's application. In my respectful opinion, that proposition cannot be sustained.
- [24] The very existence of the 1996 scheme, and in particular the designation of the land in the strategic plan and its specific zoning, shows that there are planning grounds which might, at least arguably, supply "sufficient planning grounds" to warrant approving the application for reconfiguration of the land: those grounds are the same grounds which led to the making of the 1996 scheme. Even if the application for reconfiguration – which did not itself involve actual construction work – is considered as dependent upon approval of the ultimate development intended by the developer, the 1996 scheme provided planning grounds which might be thought to be sufficient to warrant approval of the ultimate development. In truth, of course, the application for reconfiguration was not dependent in point of law upon any further approval. This point will be discussed further in relation to grounds 1C and 1D; but for the purposes of the argument relating to grounds 1A and 1B, it is sufficient to say that the terms of the 1996 scheme were relevant to the application of s 5.1(6A) of the P & E Act. The applicant's attempt to found its argument to the contrary on the observations of Wilson SC DCJ in *Palyaris v Gold Coast City Council* referred to above cannot be upheld.
- [25] In the 1996 scheme, the strategic plan expressly contemplated that the land in question would be developed as a major tourist accommodation resort. The special facilities zoning of the land contemplated development in accordance with a plan of development which described the resort and associated facilities which were permitted at the bottom of the hillslopes facing Sunny Bay. As the learned primary judge correctly said,⁴ the zoning reflected a "specific and compelling planning intent", not only that the land in question was suitable for the proposed development, but also that the proposed development was desirable. The substitution of the new Plan of Development 1063 in March 2001 tends to confirm that the town planning considerations, which informed the zoning of the land and which was part of the 1996 scheme, have not lost their force.
- [26] The applicant sought to argue that "sufficient planning grounds" could be found in the 1996 scheme only if the DCP had made express reference in that regard to the particular provision of the 1996 scheme said to afford such grounds. No authority supports that proposition. It is not a proposition which can be teased out of the language of s 5.1(6A) of the P & E Act. The local authority, as decision-maker, was

⁴ *SOS Community Action Group & Anor v Reefco Resort Limited and Cairns City Council* [2006] QPEC 069 at [18].

entitled to take into account as "sufficient planning grounds", not only the fact that the development had been permitted under the 1996 scheme, but also the objectives, in planning terms, which informed the 1996 scheme including the strategic plan. As the learned primary judge appreciated, the zoning of the land in the 1996 scheme shows that the issue raised by ground 1A simply cannot be answered in favour of the applicant.

[27] I am, therefore, of the opinion that the contention advanced by the applicant in ground 1A must fail.

[28] As to the applicant's ground 1B, the proposition which the applicant must sustain is that no reasonable local authority could come to the view that the town planning grounds which supported the 1996 scheme were sufficient to support approval of the developer's application. Once again, the very existence of the 1996 scheme, with its strategic designation of the land, and its special facilities zoning, means that this proposition cannot be accepted.

[29] It is worth noting here that, in *Leda Holdings Pty Ltd v Caboolture Shire Council*,⁵ Wilson SC DCJ expressed a similar view, and that on the appeal to this Court in that case, Jerrard JA (with whom McMurdo P and Philippides J agreed) referred⁶ with evident approval to the "common sense proposition" stated by Quirk DCJ in *Stubberfield v Redland Shire Council & Anor*⁷ where his Honour wrote:

"It would appear fairly fundamental that the lands' zoning ... was a matter of considerable weight and more than capable of amounting to a planning ground sufficient to justify approving the application despite its apparent conflict with the Development Control Plan." (emphasis added)

[30] The applicant also argued that the learned primary judge, in striking out ground 1B of the originating application, erred in proceeding on the footing that the applicant bore the onus of adducing evidence to "prove its case" on the hearing before his Honour. It is apparent that his Honour struck out ground 1B on the basis that it was without substance as a matter of law. In my respectful opinion, his Honour was correct to do so. That being so, his Honour's reference to the want of evidence to support the applicant's contention can be seen to be merely an additional criticism of the applicant's attack on the local authority's decision. The real point is that, while evidence from Dr Baynes may have assisted the applicant to make out either ground 1B or 1C, it was irrelevant if those grounds themselves gave rise to no arguable case of invalidity.

Grounds 1C and 1D

[31] In relation to grounds 1C and 1D in the applicant's originating application, the applicant's criticism is that the local authority failed to observe the substantive criteria and the procedural steps contemplated by the DCP.

[32] In relation to these grounds, the learned primary judge said:⁸

⁵ [2005] QPEC 56 at [36] – [37].

⁶ *Leda Holdings Pty Ltd v Caboolture Shire Council & Ors* [2006] QCA 271 at [33].

⁷ [1993] QPLR 214 at 216.

⁸ *SOS Community Action Group & Anor v Reefco Resort Limited and Cairns City Council* [2006] QPEC 069 at [23].

"Put shortly, ground 1C asserts that the second respondent was required by subsection 5.1(6A) of [the P & E Act] 'to identify and enumerate the conflicts which existed between the proposal and the DCP and the Strategic Plan'. Firstly, there is nothing in subsection 5.1(6A) which expressly requires the council to 'identify and enumerate the conflicts'. For that proposition the applicants rely on the judgment of the Court of Appeal in *Weightman*. As I think I have pointed out earlier, the Court of Appeal in that case was considering the decision of a Judge of this Court on a merits appeal. In other words, it was a Judge of this Court and not the council who was the decision maker under consideration. Secondly, the single conflict involved was a quantitative one in that it related to the height and number of stories of a building. I can find nothing in the judgment of Atkinson J, or for that matter the other Justices who comprised the Court of Appeal requiring the passage in the judgment of Atkinson J to be observed as if it was some form of statutory imperative to apply in every case. In any event the first step to which Her Honour referred was as follows:- '1. Examine the nature and extent of the conflict.'"

- [33] These observations by the learned primary judge echo the comments of Fryberg J (with whom McMurdo P and Holmes J (as her Honour then was) agreed) in *Woolworths Ltd v Maryborough City Council (No 2)*⁹ that "the purely mechanical operation of the *Weightman* dictum should be avoided". It is, of course, clear that the *Weightman* dictum is not concerned with the form in which decisions of local authorities are presented. On the other hand, the dictum of Atkinson J in *Weightman* serves an important purpose. It ensures that decisions by local authorities are made rationally in the exercise of the decision-making power conferred by the legislature.¹⁰
- [34] In the present case, in my respectful opinion, the applicant's arguments in relation to grounds 1C and 1D were bound to fail for reasons quite apart from those identified by the primary judge. The applicant's argument in support of ground 1C focussed upon provisions of the DCP and strategic plan which prescribe standards of development which, in terms, relate to the alteration of topography (and associated amenity visual and environmental) and the actual construction of buildings and associated works. The applicant's focus might have been appropriate if the approval given by the local authority was apt to allow the development works ultimately proposed to be effected by the developer without the need for further approvals. In truth, however, the application did not seek approval for those works, and the approval of the application was not apt to authorise those works.
- [35] Section 5.1(6A) of the P & E Act is concerned with the existence of conflicts between the "application", the DCP and the strategic plan. In *Woolworths Ltd v Maryborough City Council (No 2)*,¹¹ in relation to a provision of the IPA somewhat analogous to s 5.1(6A) of the P & E Act, Fryberg J observed as follows: "'Conflict' in this context means to be at variance or disagree with. It describes a quality of a

⁹ [2006] 1 Qd R 273 at 296 [55] – [56].

¹⁰ Cf *Westfield Management Ltd v Brisbane City Council & Anor* [2003] QPELR 520 at 534 [71].

¹¹ [2006] 1 Qd R 273 at 286 [23].

relationship between the subject (the decision) and a part of the predicate [the strategic plan and the DCP]." (footnotes omitted)

- [36] In the present case, the relevant decision made by the local authority approved the reconfiguration and no more. The applicant's argument is not directed at the application for reconfiguration which, of itself, is not apt to be "at variance or disagree with" the standards in the DCP and strategic plan. The applicant's argument might aptly be directed at an application for approval of the construction works which the developer intends to pursue after the subdivision has been effected. The pursuit of approval for those works will be, as the developer, Mr Tabulo, and the local authority clearly understood, subject to further applications to the local authority. In this regard, as Mr Tabulo said in the executive summary of his report:

"Council is in receipt of an application for a Development Permit for land known as False Cape to create 102 residential lots, 2 super lots for future residential lots and 5 lots for townhouses, hotel/resort and 1 lot for the commercial area as per Plan of Development 1063 prepared by C&B Consulting dated 7 March 2001.

Recommended conditions of approval require the applicant to provide further detail to Council prior to the issue of a Development Permit for Operational Works. This approval does not approve the number of residential lots proposed. This aims to ensure that all relevant issues are addressed. Such issues relate to:

- Safe sight lines along the internal roads;
- Safe and practical access to each allotment;
- Plans identifying shared access driveways as per previous information supplied to Council for assessment;
- Accurate heights of cut batters;
- Details of any visual impact mitigation methods for the cut batters;
- Plans and details of the typical connectivity between on-site parking areas and building envelopes;
- Details on how the upper road can be legally traversed by the general public to obtain access to the World War II heritage relics."

- [37] In determining the application for reconfiguration, the local authority imposed conditions apt to ensure that the developer understands that the local authority will determine those applications in accordance with the DCP at the time the relevant applications are made. That circumstance cannot be relied upon by the applicant to suggest that the decision to approve the reconfiguration application itself was flawed.

- [38] In my respectful opinion, the applicant's argument, in targeting the ultimate development of the land as the point of variance with the DCP and the strategic plan, failed to address the relevant point of variance for the purposes of s 5.1(6A) as explained by Fryberg J in *Woolworths Ltd v Maryborough City Council (No 2)*. So far as the true point of variance is concerned, the approval of the reconfiguration was not itself in disagreement with the standards of development in the DCP and strategic plan. Section 5.1(6A) of the P & E Act did not oblige the Council to concern itself with the conflicts which might arguably arise between the DCP and

strategic plan and the construction works proposed to be undertaken by the developer pursuant to applications to be made in the future.

[39] To say this is not to suggest that reconfiguration or subdivision of land is not "development" or "use" for land for the purposes of the DCP. It is simply to recognise that approval of the application for reconfiguration is not, of itself, apt to "disagree with" those provisions of the DCP which prescribe standards for actual construction upon the land or the alteration of its topography. It may be said that to approach the issue in this way is to take a narrow – indeed, what might be pejoratively described as a legalistic – view of the operation of s 5.1(6A) of the P & E Act. It is to be emphasised, however, that the question raised by ground 1C for the court below and this Court was not whether the local authority's decision was the best or wisest decision which could have been made by the local authority in the light of the proposed use of the land, but whether the decision to approve the subdivision of the land was legally made by it. That question must be resolved strictly in accordance with the law.

[40] In my respectful opinion, ground 1D was doomed to fail for the same reasons.

[41] In summary in relation to the applicant's arguments regarding the invalidity of the decision of the local authority, I am of the opinion that the applicant has insufficient prospects of success on its substantive challenges to the validity of the decision of the local authority to warrant the grant of leave to appeal.

The test for striking out the grounds

[42] The applicant also seeks to argue on appeal that the learned primary judge applied an erroneous test in deciding to strike out these grounds of challenge, and urges that leave to appeal should be given to enable this question to be agitated.

[43] I would refuse the application for leave to appeal on that ground. For the reasons which I have given, I consider that the substantive issues which the applicant sought to agitate in paragraphs 1A, 1B, 1C and 1D of its originating application were correctly resolved against it. The case is, therefore, not an appropriate vehicle for the agitation of the procedural question relating to the appropriate test on an application to strike out a ground of challenge in an originating application. The Court having concluded that the substantive grounds of challenge could not succeed, it would be, to adapt what was said by Stephen J in *Theseus Exploration NL v Foyster*,¹² "contrary both to good sense and to justice now, after full argument, to permit the [application] to go to trial in the [P & E Court], followed perhaps by an appeal". These considerations are even stronger where the application is for leave to appeal, and the Court is concerned with whether a substantial injustice would remain unremedied if leave were to be refused. For the reasons set out above, no such injustice has occurred in this case.

Orders

[44] The orders which I propose are as follows:

1. Application for leave to appeal is refused.
2. The applicant must pay the respondents' costs of the appeal.

[45] **HOLMES JA:** I agree with the reasons and orders of Keane JA.

¹² (1972) 126 CLR 507 at 523.

[46] **CHESTERMAN J:** I agree with Keane JA.