

# SUPREME COURT OF QUEENSLAND

CITATION: *Aria Property Group P/L v Maroochy Shire Council & Ors*  
[2008] QCA 169

PARTIES: **ARIA PROPERTY GROUP LTD** ACN 104 265 652  
(respondent/applicant)  
v  
**MAROOCHY SHIRE COUNCIL**  
(respondent/first respondent)  
**MARILYN BULLOCK, BARRY GREENSMITH, JOHN  
TITMUS AND BILL WYER**  
(appellants/second respondents)

FILE NO/S: Appeal No 11350 of 2007  
P & E Appeal No 3620 of 2006

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Integrated Planning Act*

ORIGINATING COURT: Planning and Environment Court at Brisbane

DELIVERED ON: 27 June 2008

DELIVERED AT: Brisbane

HEARING DATE: 14 May 2008

JUDGES: Muir and Fraser JJA and White J  
Separate reasons for judgment of each member of the Court,  
each concurring as to the orders made

ORDERS: **1. Application for leave to appeal allowed**  
**2. Appeal allowed with costs**  
**3. The orders of the Planning and Environment Court  
made on 30 October 2007 be set aside**  
**4. Appeal No. BD 3620 of 2006 to the Planning and  
Environment Court be dismissed**  
**5. The development application, the subject of such  
appeal, be allowed**

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL  
PLANNING – PLANNING SCHEMES AND  
INSTRUMENTS – QUEENSLAND – GENERALLY –  
where the primary judge in the Planning and Environment  
court allowed an appeal against the first respondent's decision  
to grant conditional approval for a material change of use to  
multiple dwelling units on the applicant's land – where the  
primary judge determined that the proposed development was  
not compatible with the "preferred use" under Precinct 5 of

the Planning Scheme for Maroochy Shire – where the primary judge determined that the development was in fundamental and substantial conflict with the planning provisions as it exceeded the maximum building height of 15 metres or four storeys – where the description of a height or site coverage as a "maximum" does not impose an absolute prescriptive limit by virtue of s 2.1.23 *Integrated Planning Act* 1997 (Qld) – where multiple dwelling units was a preferred use for the subject precinct – whether the failure of a proposal to meet an acceptable measure necessarily results in a conflict with the Scheme – whether the primary judge erred in law by adopting an erroneous construction of the Scheme which prevented a proper assessment of the development proposal on its merits

*Integrated Planning Act* 1997 (Qld), s 2.1.23, s 3.5.14

*Weightman v Gold Coast City Council & Anor* (2002) 121 LGERA 161; [\[2002\] QCA 234](#), cited

COUNSEL: G J Gibson QC, with M A Williamson for the applicant  
C L Hughes SC, with S C Holland for the first respondent  
M D Hinson SC for the second respondents

SOLICITORS: IPA Law Planning Lawyers for the applicant  
Sunshine Coast Regional Council for the first respondent  
Anderssen Lawyers for the second respondents

- [1] **MUIR JA:** In this application for leave to appeal from a decision of the Planning and Environment Court on 30 October 2007 the primary questions for determination are ones of construction of the Planning Scheme for the Maroochy Shire ("the Scheme" or "MP 2000") insofar as it relates to development on the subject land. The second respondents to the application appealed to the Planning and Environment Court against a decision of the first respondent Maroochy Shire Council, granting conditional approval for a material change of use to "multiple dwelling units – 16 one bedroom units and 24 two bedroom units" on land at 17 – 21 Douglas Street, Mooloolaba. The applicants are the owners of the land.
- [2] The land has an area of 1518 m<sup>2</sup> and is located on the eastern side of Douglas Street, one street removed from the Mooloolaba Esplanade. To the immediate south of the land is a four storey multiple dwelling residential building and to its north are two four storey multiple dwelling residential buildings. There is a six storey multiple dwelling residential building to the east behind the land.
- [3] Paragraph [6] of the reasons notes in respect of the proposed development:
- "The building is an attractively designed modern dwelling complex, which is articulated in both plan and elevation and will deliver an appropriate level of amenity for those residing in the complex. It takes advantage of its position and is conveniently located. The land use itself is one which is a preferred land use in the relevant planning area and precinct in terms of the type of development. In the immediate vicinity, the Council has approved buildings which are

above the height of the 15 metres in circumstances where the development is not integrated."

- [4] The land, which is south of the Mooloolaba Esplanade, is within Precinct 5 – Mooloolaba North (Multi-storey Residential) which itself is within Planning Area No. 4 – Mooloolaba.
- [5] In order to understand the arguments advanced on behalf of the parties it is desirable to set out the provisions of the Scheme referred to in or relevant to those arguments.

## **Relevant provisions of the Planning Scheme for the Maroochy Shire**

### **"2. USING THE PLANNING SCHEME**

#### **2.1 Contents of the Planning Scheme**

##### **2.1.1 Volumes 1 to 4**

- ...
- (3) Volume 3 comprises the statements of desired character and intent for each of the Planning Areas and Precincts, and Precinct Classes, into which the Shire is divided for the purposes of this Planning Scheme.
- (4) Volume 4 comprises the Planning Scheme codes.

##### **2.2 Explanation of the Performance Approach Used for this Planning Scheme**

- (1) This Planning Scheme is based on a performance approach to the regulation of development and the management of the impacts of development. This approach recognises that there are a number of ways in which land use and development can meet desired environmental, social and economic standards. In this approach, presenting what desired standards need to be met is considered more important than prescribing how such standards should be met.
- (2) For the purposes of the Planning Scheme codes, each code and each significant aspect of land use and development (referred to as an 'element') has a statement of purpose which is capable of being achieved by various means. The outcomes which best meet the purpose of each code and each of its elements are included as performance criteria.
- (3) (a) The code provisions also include acceptable measures. These measures are Council's preferred means by which the performance criteria are to be achieved.
- (b)(i) The relevant applicable **acceptable measures** are mandatory, for self-assessable development.

- (ii) For assessable development they provide an opportunity for streamlining approval processes while achieving the criteria and stated purpose. However, other ways of achieving the criteria and stated purpose of each and any element of an applicable code may be proposed by applicants.
- (c) Where other measures are proposed, the Council must be satisfied that they effectively meet the performance criteria and statement of purpose. In such cases, the applicant needs to demonstrate the acceptability of the proposed measures to Council's satisfaction.

### **2.3 Explanation of the Way the Shire is Divided for the purposes of this Planning Scheme**

- (1) This Planning Scheme is intended to recognise and be responsive to the individual character and needs of the many different localities which exist across the Shire. Accordingly, the Shire has been divided geographically into **Planning Areas**, each of which is further divided into **Precincts**.
- ...
- (4) Proposals for impact assessable development will be assessed against the statements of desired local character (made up of the Location and Role, Vision Statement and Key Character Elements) for the Planning Area and the Statement of Desired Precinct Character for the individual Precinct in which the development site is situated."

[6] Section 3 in Volume 1 defines "Integrated" as follows:

**"Integrated'** where applied to the development of premises, means premises which combine different uses and/or buildings that are planned, designed and built (either at one time or staged) to incorporate common and/or related siting, design and/or construction elements;"

[7] Section 3 also relevantly provides:

#### "3.3 Use Definitions

In this Planning Scheme, unless the context otherwise indicates or requires:

##### **(1) Residential Uses**

**'Residential use'** means use for any of the following purposes, or use of any other premises for dwelling purposes (see Figure 3.1).

...

**'Multiple dwelling units'** means premises comprising an integrated development of more than two dwelling units on the site (such as

townhouses, row houses or apartment buildings). The term does not include Accommodation buildings, Bed and breakfasts, Caravan parks, Institutional residences or Retirement villages as separately defined but may include a manager's residence; (footnote deleted)

#### **4. DEVELOPMENT AND USE WITHIN THE SHIRE**

##### **4.1 Assessment Levels**

(1) Section 2.1.3(2) of the Act allows Council's to facilitate the achievement of the desired environmental outcomes (identified in section 2.1 of Volume 2 of the planning scheme) by the identification of relevant self-assessable, assessable development requiring code assessment, and assessable development requiring impact assessment (referred to as the 'assessment level')."

- [8] Section 5 of Volume 1 of the Scheme "Assessment of Material Change of Use" relevantly provides:

#### **"5. ASSESSMENT OF MATERIAL CHANGE OF USE**

##### **5.1 Applicability of this Part**

'(1) This part identifies assessment requirements for a material change of use in each of the Precinct classes. The Table of Development Assessment describe the circumstances under which such development for particular purposes is self assessable and does not require a development application to be made (Column 1) or requires an application to be made for code assessment (Column 2). Where a proposed material change of use is for a purpose not mentioned in the relevant table for a specified purpose but not in the circumstances described, a development application for impact assessment is required.' "

- [9] The relevant part of the "Tables of Development Assessment" is now set out.

**"TABLE 5.2 TABLE OF DEVELOPMENT ASSESSMENT OF RESIDENTIAL PRECINCTS**

	Column 1	Column 2
	Circumstances under which 'material change of use" is self-assessable'	Circumstances under which 'material change of use' is code assessable
<b>Multi-storey Residential</b>		
Any of the following: <ul style="list-style-type: none"> <li>Accommodation building</li> </ul>	NA	Other than referred to in Column 1, and where:

<ul style="list-style-type: none"> <li>• Multiple dwelling units</li> <li>• Display home (where associated with an accommodation building or multiple dwelling units)</li> </ul>		<ul style="list-style-type: none"> <li>• On a site having an area of not less than 600m<sup>2</sup>; and</li> <li>• In premises having a height and Dwelling Unit Factor of not more than the maximum provided for in the particular precinct</li> <li>• On a site having a frontage of not less than 15m and having a slope of not more than 15°</li> </ul> <p>.....</p>
--	--	---

Material change of use not referred to in this table is (subject to the provisions of the Act and Part 4 of this volume of the Planning Scheme) impact assessable."

- [10] The statement of Desired Precinct Character<sup>1</sup> for "Mooloolaba North" "(Precinct Class = Multi-storey Residential)" provides:

***"Intent***

The primary purpose of the precinct is to provide for medium-high density residential and tourist accommodation, with a small mix of other (tourist and business) uses, with a high level of amenity

...

***Preferred and Acceptable Uses***

Preferred uses within this precinct are those referred to in the Table of Development Assessment (refer Vol 1) for the Multi-storey Residential Precinct Class, where on land south of the Mooloolaba Esplanade."

- [11] The following uses may also be considered consistent with the intent and desired character of this precinct where appropriately sited and designed:

- Caravan park (on land north of the Esplanade)
- Special use (on the existing school site).

- [12] The next two sub headings in the "Statement of Desired Character for Planning Areas and Precincts under the heading (5) Mooloolaba North (Precinct Class = Multi-storey Residential)" are "Landscape and Built Form" and "Preferred Maximum Density". There is a table under the latter heading which sets out "preferred maximum density" ratios for various site areas in square metres. It is then provided:

***"Maximum building height***

- 4 storeys (but not more than 15 metres)

<sup>1</sup> Section 3.4.4

Provided that Council may give favourable consideration to an application for impact assessable development in relation to an integrated development on a site south of the Esplanade as follows, where the development has regard to the Precinct intent, preferred and acceptable uses and landscape and built form of this Precinct and does not exceed the maximum building height, density and site cover in Table 4.5.

**"Table 4.5**

Maximum Acceptable Building Height	Maximum Acceptable Site Area per Dwelling for Calculating the DUF <sup>1</sup>	Maximum Acceptable Site Cover
4 storeys (but not more than 15m)	75	27.5%
6 storeys (but not more than 25m)	50	25%

<sup>1</sup> DUF = Dwelling Unit Factor (as defined in section 3.2 of Volume 1 of this Planning Scheme)"

[13] The Code for Multi-Storey Residential Premises (4.4) provides:

"The purpose of this code is to provide for multi-unit residential premises at suitable coastal and larger centres where community and commercial facilities, and utility and transport infrastructure, is available to adequately support (and be supported by) higher concentrations of local and visitor population densities.

...

(2) Site Size and Density

**PURPOSE**

To provide for higher-rise, multi-residential units to be sited on lots having areas and dimensions, which meet user requirements, allow the design of pleasant, attractive and energy efficient living and recreational environments, respects the amenity of the surrounding area, and maintain the intended role and desired character of the precinct in which they are situated.

...

(4) Building Envelope

**PURPOSE**

To facilitate the design and location of buildings in accordance with the desired precinct character such that all dwellings within the site and on adjacent sites can receive adequate daylight and ventilation, a generous amount of attractive, useable outdoor space is provided, and buildings that appropriately address the streetscape whilst avoiding any appearance of bulkiness or disproportionate length.

PERFORMANCE CRITERIA	ACCEPTABLE MEASURES
....	A1.1 Buildings have a height of not more than that stated are preferred for the relevant precinct (Volume 3 of this Planning Scheme refers); ...

[14] Volume 4 of the Scheme offers a further explanation of the interrelationship between "performance criteria" and "acceptable measures" as follows:

**"1.2 (4) Performance Criteria**

- (a) Performance Criteria are statements of the outcomes to be achieved in satisfying the stated purpose. They provide an opportunity for a variety of responses to the design of assessable development.
- (b) (i) There will be situations where not all Performance Criteria are relevant. Development is not required to meet any Performance Criteria that are not relevant.
- (ii) There will also be situations where not all relevant Performance Criteria can be met (eg. where one criterion may be in conflict with another). In such cases the development application may be approved where Council is satisfied that there are sufficient planning grounds to justify the decision having regard to the purpose of the code and code element.

**(5) Acceptable Measures**

- (a) Acceptable Measures are presented as Council's preferred means of meeting the relevant Performance Criteria. For assessable development, they are not to be interpreted as prescriptive nor do they preclude other ways of meeting the criteria. They do however offer a degree of certainty to applicants, Council and the community."

[15] The applicant alleged that five errors of law can be detected in the reasons for Judgment. It is convenient to consider each of these separately.

**Ground 1 - The primary judge erroneously construed the Statement of Desired Precinct Character for Precinct 5**

[16] After referring to the Statement of Intent for Precinct 5 and the description of "preferred and acceptable uses" the primary judge stated, in his reasons<sup>2</sup>:

<sup>2</sup> *Bullock & Ors v Maroochy Shire Council & Anor* [2007] QPEC 89

"[19] The next step is to undertake an identification of the 'preferred' uses in Precinct 5. The Table of Development assessment for Multi-storey buildings in the Residential Precinct Class in Volume One of the planning scheme promotes the notion of a 'preferred use' for the subject site by reference to a development of units having a maximum building height of fifteen metres but not more than four storeys and containing twelve two bedroom units.

[20] The Table attempts to identify and specify a range of *uses*, the commencement of which will be self assessable or code assessable development and which are 'new uses' by reference to those provisions which are identified by Precinct 5 provisions as the 'preferred uses' in the precinct. The next step to be taken is to return to Precinct 5 provisions disclosing that a 'new use' is one which occurs as a result of development for the purpose of multiple dwelling units: -

'In premises having a height and dwelling factor of not more than the maximum provided for the particular precinct.' (footnote deleted)

[21] Precinct 5 states the maximum building height as '4 storeys but not more than 15 metres'.

[22] There is no equivalent statement in terms of 'maximum dwelling unit factor'. However the preferred maximum density table by calculating site area of 1518 square metres and dividing that by the prescribed figure of 127(which represents square metres of site area per unit development) produces approximately twelve two bedroom units. This therefore sets the parameters for the development in terms of scale and density which is the 'preferred' use in Precinct 5. (footnote deleted)

[23] One emerges from the depths of the planning provisions with a tolerably clear understanding of the scheme as it relates to this development to the effect: that the parameters described in table 4.5 (above) are the parameters which relate to impact assessable development. 'Uses' described in the Table of Development assessment are 'uses' and consistent with such uses which flow from the carrying out of self-assessable development."

[17] The applicant takes issue with the conclusion in paragraph [19] that the Table of Development "promotes the notion of a 'preferred use' for the subject site by reference to a development of units having a maximum building height of fifteen metres but not more than four storeys..." It is submitted that the primary judge erroneously construed the Table and that in the Table:

- (a) The column headed "Purpose" identifies the "preferred uses" – including, relevantly, "multiple dwelling units"; and
- (b) Columns 1 and 2 fulfil an entirely different role. Column 1 expressly identifies circumstances under which a material change of use is self assessable under the Act and Column 2 identifies code assessable circumstances.

[18] The final sentence of paragraph [20] of the reasons is extracted from Column 2, the function of which is expressly stated as identifying the circumstances in which a material change of use is code assessable. That column has nothing to do with identification of preferred uses in the Precinct. This error was responsible for the conclusion in paragraph [26] that the proposed development is not a development that is a preferred or acceptable use within Precinct 5.

[19] The first respondent's counsel advanced a similar argument. It was submitted, additionally, that whilst it may have been correct if the primary judge had stated that the proposed use "is quite clearly an acceptable use in the relevant planning area but that the proposed use as intended by this development involved elements of conflict because of its height," the primary judge failed to draw such a distinction.

[20] The following arguments were advanced on behalf of the second respondent.

[21] The "preferred uses" within Precinct 5 are those "referred to in the Table of Development Assessment for the Multi-storey Residential Precinct Class". The reference is not to parts of the Table but to the Table as a whole. The Table describes particular forms of development which will be self-assessable or code assessable. Forms of development not specified in the Table will be impact assessable<sup>3</sup>. The Table specifies a range of new uses, defined by both purpose and scale. Although the primary purpose of the Table is to identify forms of development which will be self-assessable or code assessable, the Precinct 5 provisions give the Table the secondary role of identifying the forms of development which are "preferred" in Precinct 5. It is an unlikely construction that impact assessable development for "accommodation building", the impacts of which are entirely unknown until an application is made and assessed, nevertheless forms part of the "preferred uses" for that Precinct.

**Ground 2 - The primary judge erred in law in concluding that the proposed development was in conflict with an upper limit of 15 metres (but not more than four storeys) stipulated in MP 2000 and with a "maximum" acceptable site cover of 25 per cent**

[22] The applicant's arguments are summarised as follows:

The primary judge gave a literal meaning to the expression "maximum building height" and failed to recognise that Table 4.5 and the statement of "Maximum Building Height" were no more than a "statement of Desired Precinct Character" and that the actual implementation provisions are found in the Codes which form part of MP 2000.

---

<sup>3</sup> MP 2000 Vol 1, 4.1(2)

- [23] The Code applicable to Multi-storey Residential premises imposes a "performance based standard"<sup>4</sup> against which development is to be assessed. It comprises three elements:
- (a) the *purpose*, which states the Council's desired planning intent;<sup>5</sup>
  - (b) *performance criteria*, which are a statement of outcomes to be achieved in satisfying the purpose of the Code;<sup>6</sup> and
  - (c) *acceptable measures*, which are the Council's *preferred means* of meeting the performance criteria (but which do not preclude an applicant from proposing an alternative solution which meets the overarching standards, namely the performance criteria).<sup>7</sup>
- [24] As the Statement of Desired Character for Precinct 5 is implemented through the acceptable measures, the building height identified in the statement for Precinct 5 is but one means of satisfying the desired performance standard. It is not prescriptive; it is not a "stipulation", and it is not an "upper limit". A development may comply with the overarching performance standard in a way that differs or departs from that contemplated by the Statement of Desired Character.<sup>8</sup>
- [25] To the extent that the primary judge's conclusion was influenced by his interpretation that the word "preferred" in Acceptable Measure A1.1, Element 4 meant an "upper limit", it was also plainly erroneous. In a performance based planning scheme "Acceptable Measure" is but one means of satisfying applicable performance criteria. In the Code for Multi-storey Residential Houses, the performance criteria applicable to Element 4 – Building Envelope – are concerned to ensure that there "is no significant loss of amenity to residents on adjoining sites", and that the "impact of the development of the character of the area generally" is taken into account. One acceptable measure is that identified in A1.1 – that "buildings having a height of not more than that stated (in the Statement of Desired Character) are preferred" for the relevant Precinct.
- [26] The primary judge's conclusion that the actual building site cover (30 per cent) was in conflict with the 25 per cent "maximum acceptable site cover" identified in Column 3 of Table 4.5 failed to appreciate:
- (a) That Table 4.5 applies only to "an integrated development" (as is evident from the text of the paragraph preceding Table 4.5);
  - (b) It was common ground that the proposed development is not "an integrated development"; and
  - (c) The prior submissions with respect to the height issue are equally applicable to the site cover issue.

---

<sup>4</sup> MP 2000 at s 2.2(1)

<sup>5</sup> MP 2000 V 4, s 1(2)

<sup>6</sup> MP 2000 V 4, s 1(4)

<sup>7</sup> MP 2000 V 4, s 1(5)

<sup>8</sup> As is expressly recognised by MP 2000, at s 2.2(1)

- [27] In his submissions the first respondent's senior counsel submitted that the primary judge's conclusion that "four storeys (but not more than 15 metres)" was an upper limit can be seen to be incorrect as s 2.1.23(2) of the *Integrated Planning Act 1997* (Qld) ("the Act") provides that a planning scheme cannot prohibit development. Accordingly, the relevant height standard figuring in Table 4.5 including the expression "Maximum Acceptable Building Height" needs to be read subject to the requirements of the Act.
- [28] A building which exceeds a preferred height standard will not be approved necessarily. In this case, however, the findings of the primary judge as to the building's other attributes could not sustain a finding that the development is in "fundamental and substantial conflict" with the Planning Scheme. The primary judge's incorrect and prescriptive construction of MP 2000 prevented him from undertaking a balanced assessment of the merits of the proposal, taking into account the proposal's attributes, as found by him, and also the other planning grounds argued by the parties.
- [29] The respondent's submissions are as follows. Under a planning scheme, where nothing is prohibited, something described as a "maximum" does not impose an absolute prescriptive limit but the primary judge did not hold otherwise. The maximum height and maximum density provisions delineate, by reference to the Table of Assessment for the Multi-storey Residential Precinct:
- (a) Between "accommodation building" development which is code assessable and that which is impact assessable; and
  - (b) Consequently, between preferred development on the one hand (because its impacts have already been determined to be acceptable), and development of that type which may or may not be found suitable for approval, subject to assessment of its specific impact on the other.
- [30] It was in this context that the primary judge spoke in paragraph [29] of 15 metres as an "upper limit" for *preferred* development. The only use which the primary judge made of such limits was to make the determination, as a matter of construction of the scheme, that the proposed development was not a preferred or acceptable development in Precinct 5.
- [31] The Code for Multi-storey Residential Development relied on by the applicant applies as part of the (impact) assessment process. The primary judge understood that an Acceptable Measure merely represents one way of complying with the corresponding performance criterion.<sup>9</sup> The Planning Scheme itself however states that, "Acceptable Measures are presented as Council's *preferred* means of meeting the relevant performance criteria."<sup>10</sup> Thus, an accommodation building over 15 metres or at a density exceeding (on the subject site) 12 two bedroom units may be considered and approved on its merit in Precinct 5, but is not *preferred*. The Code provisions are thus in harmony with the Precinct 5 provisions.
- [32] The other essential aspect of the primary judge's reasoning process in relation to the Precinct 5 "limits", was that, whilst impact assessable development is not required to meet the acceptable solutions under the Code, it must meet the applicable

<sup>9</sup> Reasons paragraphs [4] and [13]

<sup>10</sup> MP 2000 V 4, 1.2(4)(a)

performance criteria by producing impacts which are "qualitatively similar" to the outcomes produced by complying with the acceptable solution: paragraphs [4] and [13] of the reasons.

[33] Inherent in the primary judge's ultimate determination that the proposed development was in fundamental and substantial conflict with the Scheme is a factual finding that the proposed building, with a height of 25 metres, would produce impacts which were not qualitatively similar to the impacts which would be produced by a 15 metre building. That the primary judge did not make that conclusion more explicit or deal expressly with the evidence in that regard is unsurprising, given that the applicant's visual amenity witness conceded in cross-examination that:

- (a) The proposed new building would not produce a significant enhancement in the overall streetscape on the western side of Douglas Street over the existing development;
- (b) A building of lesser height would be more complementary to the existing adjacent dwelling unit development; and
- (c) The proposal would not blend in with existing large buildings in the Precinct east of Douglas Street to be "little noticeable" by Douglas Street residents.

[34] These concessions accorded with the second respondents' evidence. The evidence thus demonstrated that the proposed development does not comply with performance criteria of the Code in relation to height. His Honour's conclusion that the conflict with the Planning Scheme was substantial was justified on this basis alone. It was a finding of fact made on the basis of a correct analysis of the legal effect and significance of the *preferred* maximum density and maximum height "limits" referred to in the Precinct 5 provisions and called up in the Code.

**Ground 3 - The primary judge erred in concluding that the proposed development is in conflict with MP 2000 because it is not "an integrated development"**

[35] It is argued on behalf of the applicant that the primary judge's conclusion that the 25 metre height of the proposed development is acceptable in accordance with the provisions of Column 1 of Table 4.5 only if it is "an integrated development" proceeded from the same erroneous construction discussed in paragraphs [17] to [21] above. The figures in Table 4.5 are not prescriptive: they are statements of Desired Precinct Character.

[36] On behalf of the respondent Council it is argued that the proposed development does not conflict with the Planning Scheme because it is not an "integrated development". The position is that in seeking approval for the desired height, the proposal receives no direct support from the Planning Scheme provisions, support which it might have obtained were it an "integrated development". Absence of support does not lead necessarily to a finding of conflict. Had the proposed development been "integrated" it would have obtained a measure of positive support from the relevant scheme provisions. In this case the absence of support for the proposed building height arguably leads to a level of conflict but that level is low.

There is no credible evidence of unacceptable impacts resulting from the proposal and had the proposal included, at ground level, for example, a hairdressing shop or an accountant's office, it would have qualified as an "integrated development". The proposal would then have benefited not only from a different height standard but also from a degree of positive support in the planning documents. Such a development may have involved adverse amenity impacts for surrounding residents.

[37] The second respondents argue as follows. The primary judge's treatment of the "proviso" started from the premise that "accommodation building" development exceeding 15 metres in height or a development density of 12 two bedroom units or equivalent is not preferred development on the subject site. The primary judge then treated the "proviso" as stating circumstances under which a proposal which is not "preferred" may nevertheless obtain "favourable consideration" under an impact assessment process if it is "an integrated development". The primary judge did not hold that the figures in Table 4.5 were "prescriptive" in any absolute sense. The primary judge held that Table 4.5 sets the outer limits of what the Scheme itself contemplates as being "favourably considered" under an impact assessment process, and that the Scheme does not contemplate those limits being reached except in relation to an appropriately designed and located "integrated development". The analysis in paragraphs [28] and [30] of the reasons is correct.

[38] Beyond those limits developments may still be applied for and must be assessed on their merits. The legal consequences of the proposed development being outside the parameters discussed above, is that the development is unsupported by anything in the planning provisions. Consequently the primary judge's conclusion that the development was neither preferred nor acceptable was clearly correct.

**Ground 4 - The primary judge erred in concluding that the proposed development is in "fundamental and substantial" conflict with the planning provisions for Precinct 5**

[39] The applicant contends that on a proper construction of the planning provisions for Precinct 5 there was no basis for concluding that:

- (a) The proposed development is not a "preferred and acceptable" use in Precinct 5;
- (b) The proposal does not satisfy the performance criteria in the Code for Multi-storey Residential Premises;
- (c) There is any, let alone any "fundament and substantial" conflict between the proposed development and the relevant provisions of MP 2000.

[40] It is argued on behalf of the respondent Council that in determining whether there are sufficient grounds to outweigh conflict with a planning document, it is necessary to:

- (a) Examine the nature and the extent of the conflict;
- (b) Determine whether there are any grounds which are relevant to the part of the application which is in conflict with the scheme and if so, whether the conflict can be justified on those grounds;

- (c) Determine whether the grounds in favour of the application overall are, on balance, sufficient to justify approving the application notwithstanding the conflict.<sup>11</sup>

- [41] The primary judge's assessment in this regard was flawed by errors of law leading him to an incorrect conclusion with respect to the extent of the subject conflict.
- [42] The second respondents argue that the arguments of the applicant and of the respondent Council are based on the false premises discussed above.
- [43] The second respondents' counsel submitted that the facts upon which those arguments rely establish no more than that, from the internal perspective of the applicant or subsequent owners, the proposal is appropriately designed and located. The same may be said of a modern and well designed abattoir located on a commercially advantageous site near residential development. Those matters are irrelevant. Paragraph (f) refers to the "purpose" aspect of preferred land use which is one of two elements, the "qualifier in terms of the type of development" flags that compliance with the other element (i.e., scale) is contentious.

**Ground 5 – the primary judge's approach to the exercise of his discretion to approve an application conflicting with the Planning Scheme was flawed**

- [44] The applicants submit that the primary judge's approach and conclusions were influenced by the errors discussed in grounds 1 to 4. It is further submitted that the primary judge erred also in rejecting the applicant's submission that the fact of the Council's earlier approval of two other multi-storey buildings in the immediate locality of the land, "Coco" and "Oxygen" was capable of being a "ground" under s 3.5.14(2)(b) of the Act. The primary judge erred in rejecting the relevance of those approvals.

**Consideration of Ground 1**

- [45] It is reasonably clear that the primary judge arrived at his finding that the proposed development "is a development which will not lead to a preferred and acceptable use as contemplated by the plan"<sup>12</sup> by a process of reasoning which determined "preferred use" by reference to the content of column 2 in the table in s 5 of Volume 1. It can be seen from paragraph [20] of the reasons that the primary judge regarded a "new use" as one which occurs "as a result of development for the purpose of multiple dwelling units ... *In premises having a height and dwelling factor of not more than the maximum preferred for the particular precinct.*" The words emphasised are from Column 2 of the Table.
- [46] The headings of the Table do not support the primary judge's construction. The Column 1 and Column 2 headings respectively are, "Circumstances under which 'material change of use' is self- assessable (or, where no codes apply, exempt)" and "Circumstances under which 'material change of use' is code assessable." On the face of it, the purpose of these columns is to describe the methods of assessment applicable to a "Multiple dwelling units use" in particular circumstances: not to define or describe a use.

<sup>11</sup> *Weightman v Gold Coast City Council & Anor* (2002) 121 LGERA 161 at 163 and 166

<sup>12</sup> Reasons paragraph 30

[47] Section 3.3 of Volume 1 contains "Use Definitions". Under the heading "(1) **Residential Uses**" are the definitions, inter alia, of "**Residential use**" and "**Multiple dwelling units**". " 'Residential use' means use for any of the following purposes, or use of any other premises for dwelling purposes (see Figure 3.1)." The following purposes include, "Accommodation building, Caravan park, detached house" and:

" '**Multiple dwelling units**' means premises comprising an integrated development of more than two dwelling units on the site (such as townhouses, row houses or apartment buildings) ..."

[48] Neither the "Multiple dwelling units" use nor any other of the defined residential uses is described by reference to height or site coverage. Figure 3.1, which appears under the "Residential Uses" heading, is a diagram depicting a "nesting" of "Residential Uses". None of the types of residential uses shown, including "Multiple dwelling units", "Retirement village", "Townhouse" and "Accommodation building" is described by reference to height or site coverage.

[49] Accordingly, where in the "Statements of Desired Character for Planning Areas and Precincts" in Volume 3 under the heading "(5) Mooloolaba North (Precinct Class = Multi-storey Residential)" it is stated that "preferred uses within this precinct are those referred to in the Table of Development Assessment (refer Vol 1) for the Multi-storey Residential precinct class, where on land south of the Mooloolaba Esplanade" the reference is to a relevant item in the Table recognisable as a use, not to such an item or use qualified by any statement in Column 1 or 2 of the Table.

[50] There is nothing in the relevant part of the Scheme which justifies the conclusion that the "Multiple dwelling units" use is to be defined or qualified by reference to form or scale as well as purpose. The descriptions of "Caravan park" and "Special use" uses without reference to form or scale under the heading "Preferred and Acceptable Uses", provide further evidence that the concept of "Use" has no such limitation. As the applicant's submissions point out, the plan draws a distinction between "Preferred and Acceptable Uses" and "Landscape and Built Form". "Maximum Building Height" and "Preferred Maximum Density" are aspects of "Landscape and Built Form".

[51] The primary judge's construction of the Statement of Desired Precinct Character for Precinct 5 was thus erroneous and the ground of appeal has been made out.

## **Consideration of Ground 2**

[52] The primary judge also erred in concluding that the Table in paragraph [9] hereof "promotes the notion of a 'preferred use' for the subject site by reference to a development of units having a maximum building height of fifteen metres but not more than four storeys and containing twelve two bedroom units."

[53] As explained earlier, the preferred uses for the subject precinct include "Multiple dwelling units". That can be ascertained from the statement of "Preferred and Acceptable Uses" for the subject precinct and from the Table of Development Assessment in Volume 1 to which the statement refers. It is noteworthy also that the "primary purpose of the precinct is to provide for medium-high density residential and tourist accommodation, with a small mix of other (tourist and business) uses, with a high level of amenity."

- [54] It is common ground that by virtue of s 2.1.23 of the Act, an Integrated Planning Scheme cannot prohibit development and that the description of a height or site coverage as a "maximum" does not impose an absolute prescriptive limit. The second respondents' written submissions state, "Clearly, under an IPA planning scheme, where nothing is prohibited, something described as a 'maximum' does not impose an absolute prescriptive limit."
- [55] A1.1 in Element 4 which incorporates as an "acceptable measure" the "4 storeys (but not more than 15 metres)" restriction in the "Statement of Desired Precinct Character" relating to Mooloolaba North, expressly provides that buildings which do not exceed the stated height are "preferred".
- [56] An "acceptable measure" is the "Council's **preferred**<sup>13</sup> means by which the performance criteria" in the Scheme Codes are to be achieved.<sup>14</sup> The "performance criteria" applicable to acceptable measure A1.1 is located in the same table. The performance criteria may be met by means other than compliance with acceptable measures.<sup>15</sup> The way the Scheme is designed to operate thus bears out the statements in s 2.2(1) of Volume 1 that the Scheme is a non prescriptive one which "recognises that there are a number of ways in which land use and development can meet desired environmental, social and economic standards." And, as discussed earlier, "Multiple dwelling units" is a "preferred use" for the Mooloolaba North precinct.
- [57] Paragraphs [29] and [30] of the reasons state:

"[29] Specifically in my view acceptable measure A2 in element 2 (site, size and density) refers to a density which equates to twelve two bedroom units and acceptable measure AI.1 in element 4 (building envelope) refers to a height of fifteen metres (but not more than four storeys). *By reference to table 4 the matters set out therein are boundaries which regulate impact assessable development.*<sup>16</sup> Furthermore in Acceptable Measure AI.1 in element 4, the phrase 'buildings have a height of not more than that stated are preferred for the relevant precinct' is used. *Although the word 'preferred' is used, reading the scheme as a whole, an upper limit of fifteen metres (but not more than four storeys) for a development which is not integrated is stipulated.*<sup>17</sup>

[30] *The development is in my view in fundamental and substantial conflict with the planning provisions for Precinct 5. It is a development which will not lead to a preferred and acceptable use as contemplated by the plan.* Furthermore the development is not an integrated one. The so-called 'bonus' provision will be rendered meaningless if emphasis is not given to the stipulation that a height of 25 metres will be possible only if the development is an integrated one. The

---

<sup>13</sup> My emphasis  
<sup>14</sup> Volume 1 s 2.2  
<sup>15</sup> Volume 1 s 2.2(3) of the Scheme  
<sup>16</sup> Emphasis added  
<sup>17</sup> Emphasis added

conflict is substantial. It is illogical to argue that the proposed development would have less impact than an integrated one in its particular situation in Douglas Street and should be approved in its non-integrated form. In fact there is evidence which I accept that there are some limited forms of integrated development which would be appropriate for the particular development in its situation for example the provision of a small 'fitness studio'." (footnote deleted; emphasis added)

- [58] His Honour referred to the matters in Table 4 as "boundaries which regulate impact assessable development." He had observed previously that "the parameters described in Table 4.5 (above) are the parameters which relate to impact assessable development."<sup>18</sup>
- [59] The primary judge's conclusion in paragraph [30] of his reasons that the bonus provision "will be rendered meaningless if emphasis is not given to the stipulation that a height of 25 metres will be possible only if the development is an integrated one", illustrates the significance which his Honour attached to the height restriction.
- [60] So too does his conclusion that the development is "in fundamental and substantial conflict with the planning provisions". That conclusion appears to have been a product of his Honour's understanding of the effect of the Table 4.5 height restriction. Even if the primary judge's reasons should not be construed as showing that he regarded the height restriction as an absolute upper limit it is apparent that he did not regard it, as he was obliged to do, as an "acceptable measure" which was one of the Council's "preferred means by which the performance criteria are to be achieved." Viewed in this light the fact that the development exceeded the height restriction could not, by virtue of that fact alone, lead to "a fundamental and substantial conflict with the planning provisions."
- [61] The applicants submitted that there was in fact no conflict between the proposal and the Scheme. The respondent Council was somewhat coy about the issue but was quite prepared to "accept (with difficulty) some minor conflict".
- [62] Because of the requirements of s 3.5.14 of the Act, it is necessary to identify and assess the extent of any "conflict" between a development application and the Planning Scheme. Section 3.5.14 relevantly provides:
- "(1) This section applies to any part of the application requiring impact assessment.
  - (2) If the application is for development in a planning scheme area, the assessment manager's decision must not—
    - (a) compromise the achievement of the desired environmental outcomes for the planning scheme area; or
    - (b) conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict."

---

<sup>18</sup> Reasons, paragraph [23]

- [63] Having regard to the way in which the Scheme is intended to operate and in particular the role of "acceptable measures" I have difficulty in accepting that the failure of a proposal to meet an acceptable measure necessarily results in a conflict with the Scheme. It would be otherwise if the "other measures . . . proposed" in the proposal failed to "meet the performance criteria and statement of purpose." For "assessable development", the role of acceptable measures is to "provide an opportunity for streamlining approval processes while achieving the criteria and stated purpose."
- [64] It follows that the contention of the applicant and the respondent Council that the primary judge's construction of the Scheme prevented him from properly assessing the merits of the proposal and that, in consequence, his Honour erred in law has been made out.

### **Consideration of Ground 3**

- [65] I doubt that this ground adds much, if anything, of substance to Grounds 1 and 2. I am doubtful also that the primary judge concluded that the proposed development was in conflict with the Scheme because it was not an "integrated development". In my view the primary judge discussed the "integrated development" provision with a view to supporting his conclusion that the height limit was in practical terms, if not legally, a maximum which could not be exceeded by development which was not an "integrated development".

### **Ground 4**

- [66] This ground has been made out, to the extent that it has been established that the primary judge's conclusions were based on erroneous considerations.

### **Ground 5**

- [67] This ground is relied on by the applicant and the respondent Council only if other grounds of appeal are not successful. Accordingly, it is unnecessary to discuss this ground in any detail. Read literally, paragraph [47] of the reasons asserts that the existence of two buildings near the proposed development, "Coco" and "Oxygen" are irrelevant to a consideration of the application on its merits. Plainly, the existence of those buildings, which exceed the subject height restrictions, are relevant to a consideration of the impact of the proposed development and I doubt that the primary judge intended to state to the contrary. The point his Honour was making in paragraphs [47] and [48], in my view, related to the relevance of "the approvals" for the buildings and not to the fact of the buildings' existence. I see no need to go into the merits of the question of whether the fact of approval, in itself, is a relevant consideration, having regard to my conclusions in respect of grounds 1 and 2. On the facts of this case the existence of the earlier approvals and what lay behind them would not appear to matter much. The buildings are there and, obviously, they are there consequent upon approvals having been given.

### **Conclusion**

- [68] The applicant and the respondent Council submitted that, in the event that leave to appeal was given and the appeal succeeded, this Court should allow the appeal, set

aside the judgment below and order that the respondents' appeal be dismissed. The respondents contended that if the appeal were to be allowed the matter should be remitted to the primary judge for re-determination in accordance with the reasons of this Court.

- [69] On behalf of the applicant and the respondent Council, it was argued that this Court was in as good a position as the primary judge to determine the respondents' appeal on its merits. In that regard, senior counsel for the applicant and senior counsel for the respondent Council pointed to the primary judge's favourable findings: in paragraph [6] of the reasons; in relation to traffic<sup>19</sup> and site cover<sup>20</sup> and a finding that there were no issues apart from the ones to which he referred in his reasons which could "be said to give rise to a conflict with the Scheme."
- [70] The applicants sought leave to file a Notice of Contention challenging the primary judge's finding that the site coverage of the proposed building was approximately 30 per cent. The primary judge referred<sup>21</sup> to an argument advanced on behalf of the applicants that, by reference to documentation in evidence, it was possible to calculate the site coverage and that the calculation revealed a site cover to the order of 50 per cent. That took into account "car parking areas that are said to be above the level of adjoining ground". His Honour referred to agreement between the parties' experts reached during pre-trial collaboration on a site cover of approximately 30 per cent and observed "such an agreement should be treated in the manner of pleadings and ... should not be departed from." The respondents argue that the primary judge erred in law in taking that approach. They submit that agreement between expert witnesses could not result in "an irrevocable admission of fact", particularly where evidence shows the factual assumptions by the experts to have been wrong.
- [71] The problem for the applicants though is of a somewhat different nature. The parties conducted their respective cases in the light of the experts' agreement. No expert called on behalf of the applicant or the respondent Council was cross-examined on the basis that the site cover was greater than 30 per cent. The evidence relied on to support the submission that the site cover is in fact 50 per cent preceded the evidence of the visual amenity experts. More importantly, no witness gave evidence to the effect that the site cover, whether it was 30 per cent or 50 per cent, gave rise to any unacceptable impact. Consequently, the respondents are seeking to depart, in a substantial respect, from the way in which the case was conducted. The primary judge was correct in refusing to allow the departure, particularly as the respondents did not seek leave to re-open their case or to have relevant experts recalled.
- [72] Senior counsel for the respondents submitted that this Court is not in a position to determine the matter on its merits, as there was conflicting expert evidence which only the primary judge was in a position to resolve. It was submitted that the primary judge did not resolve such conflicts because of his approach, which was to identify conflicts between the proposal and the Scheme and to determine whether there were sufficient planning grounds to justify approval despite the conflict. It

---

<sup>19</sup> Reasons, paragraph [38]

<sup>20</sup> Reasons, paragraph [39]

<sup>21</sup> Paragraphs [39] and [40]

was submitted that the primary judge didn't turn his mind to the question of whether, in the absence of conflict, the proposal still warranted refusal.

[73] I am unable to accept that the primary judge did not undertake an assessment of the merits of the application. I have already referred to the primary judge's discussion of traffic and site cover. After concluding that,<sup>22</sup> "There were no other issues... which can be said to give rise to conflict with the scheme", his Honour set out those matters relied on by the applicant and the Council to support approval. In paragraph [46] his Honour said, "The notion of 'sufficient grounds' must include an assessment both of any relevant planning grounds together with a consideration of matters that confer a benefit on the public generally or at least on a relevant sector of the public". His Honour remarked, "There is no doubt that the building is an attractive, well articulated proposal."

[74] The reasons then address arguments concerning the relevance of Council approvals of other buildings, whether the Scheme has been overtaken by events and whether there must be a "gradation" between precincts. The primary judge appears to have accepted the matters relied on by the applicants and the Council in support of the application, except where he indicated to the contrary.

[75] The primary judge then concludes<sup>23</sup>:

"A consideration of the arguments advanced by both co-respondent and the Council as to justification leads me to conclude because of the character and extent of the complex, that is the height of the proposed development above 15 metres, there is no basis to approve the proposed development."

[76] It is apparent from those observations that it was the height of the proposed building, having regard to the primary judge's construction of the Scheme, which caused the application to fail.

[77] For those reasons, I would order that:

- (a) the application for leave to appeal be allowed;
- (b) the appeal be allowed with costs;
- (c) the orders of the Planning and Environment Court made on 30 October 2007 be set aside; and
- (d) Appeal No. BD 3620 of 2006 to the Planning and Environment Court be dismissed;
- (e) The development application, the subject of such appeal, be allowed.

[78] **FRASER JA:** I agree with the reasons of Muir JA and the orders proposed by his Honour.

[79] **WHITE J:** I have read the reasons for judgment of Muir JA and agree with the orders he proposes for those reasons.

---

<sup>22</sup> Reasons, paragraph [41]

<sup>23</sup> Reasons, paragraph [50]

- [80] Since it was, in effect, only the height of the building proposed which caused the primary Judge to refuse planning approval for the development, which Muir JA has shown involved a flawed construction of the Scheme, it is unnecessary to remit the matter to the Planning and Environment Court. All other considerations relevant to approval were canvassed by the primary Judge and he found no other conflicts. He described the proposed building as "...an attractively designed modern dwelling..." which fitted well into its location.<sup>24</sup>
- [81] As Muir JA has concluded, there is no need in that circumstance to have the matter reheard nor even to incur the lesser cost of remitting the matter to the primary Judge.

---

<sup>24</sup>

Para [6] of the reasons.