SUPREME COURT OF QUEENSLAND

CITATION:	*CPT Manager Ltd v Central Highlands Regional Council & Ors* [2010] QCA 183
PARTIES:	**CPT MANAGER LIMITED** ACN 054 494 307 (appellant/applicant) **v** **CENTRAL HIGHLANDS REGIONAL COUNCIL** (respondent/not a party to the application) **LASCORP DEVELOPMENT GROUP AUSTRALIA PTY LTD** (co-respondent/respondent) **CHIEF EXECUTIVE, DEPARTMENT OF MAIN ROADS** (co-respondent by election/not a party to the application)
FILE NO/S:	Appeal No 13584 of 2009 P & E Appeal No 2840 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning & Environment Court at Brisbane
DELIVERED ON:	23 July 2010
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2010
JUDGES:	Holmes, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – DISTINCTION BETWEEN QUESTION OF LAW AND QUESTION OF FACT – where Council approved respondent's application for a development permit – where applicant was a business competitor of respondent and unsuccessfully appealed to the Planning & Environment Court – where the Emerald Shire Planning Scheme 2007 applied to the development application – where trial judge held the conflict between the development and the Scheme was minor and there was a strong need for the development – whether the trial judge's assessment of the degree of conflict between the Scheme and

the proposed development was a question of law subject to appeal – whether the trial judge erred in failing to appreciate the existence or extent of the conflict – whether the trial judge erred in failing to properly assess the sufficiency of grounds to overcome the conflict

Integrated Planning Act 1997 (Qld), s 4.1.56
Sustainable Planning Act 2009 (Qld), s 822

ALDI Stores (A Limited Partnership) v Redland City Council [2009] QCA 346, cited
Gracemere Surveying and Planning Consultants P/L v Peak Downs Shire Council & Anor [2009] QCA 237, followed
Harrow Trust v Adelaide Hebrew Congregation Inc & City of Burnside [2002] SASC 308, cited
Regional Land Development Corp No 1 P/L v Banana SC & Ors [2009] QCA 140, followed
SLS Property Group P/L v Townsville CC & Anor [2009] QCA 380, applied
Weightman v Gold Coast City Council & Anor [2003] 2 Qd R 441; (2002) 121 LGERA 161; [2002] QCA 234, followed

COUNSEL: S Doyle SC, with M Johnston, for the applicant
D R Gore QC, with J D Houston, for the respondent

SOLICITORS: Minter Ellison for the applicant
Flower & Hart for the respondent

[1] **HOLMES JA**: I agree with the reasons of Chesterman JA and with the order he proposes.

[2] **FRASER JA**: I respectfully agree with Chesterman JA's reasons for concluding that no error of law has been identified in this application for leave to appeal. I would refuse the application for that reason.

[3] **CHESTERMAN JA**: The respondent applied to the Central Highlands Regional Council ("Council") for a development permit for a material change of use for land fronting the Capricorn Highway and Codenwarra Road in Emerald. The permitted use sought was a retail/commercial complex and food premises. The development proposal was for a subregional shopping centre intended to be about 18,300m^2 and consisting of four distinct components: a discount department store of some 8,200m^2, a supermarket about 3,950m^2 in extent, showrooms 3,150m^2 in extent and speciality stores extending over 3,000m^2.

[4] The Council approved the application. It had earlier approved "a large Bunnings homemaker centre on an adjoining site", so that the two new developments together would "become a powerful rival to (Emerald's) CBD … ".

[5] The applicant was a submitter which objected to the respondent's development application and appealed the Council's decision to the Planning and Environment Court ("P & E Court"). On 21 October 2009 the P & E Court dismissed the appeal. The applicant now seeks leave to appeal to this Court pursuant to s 4.1.56 of the (repealed) *Integrated Planning Act* 1997 (Qld) ("*IP Act*"). An appeal is limited to errors of law. The right of appeal is preserved, despite the repeal of the *IP Act*, pursuant to s 822 of the *Sustainable Planning Act* 2009 (Qld).

[6] There is not, presently, in Emerald a discount department store, i.e. "a retail outlet of the likes of Target, Big W and Kmart". It does, however, have two supermarkets located within the town's CBD. The premises in which both existing supermarkets are located are owned by the applicant which leases them to large national retailers. The applicant is therefore a business competitor of the respondent's development.

[7] The P & E Court found that there was a particular, indeed strong, need for a discount department store in Emerald. The court found:

> "[13] The absence of facilities like a DDS means, … that a significant proportion (in the order of 50 per cent) of their potential household expenditure escapes the town. Those conclusions, based upon research and established data were, again, reinforced by a number of lay witnesses who spoke of restricted retail opportunities in Emerald, what they saw as high prices, and their propensity to travel to the coast (e.g. Rockhampton) to purchase household items at DDSs and other stores there.
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> [14] Underlying pressure for, and momentum towards, establishment of a DDS in Emerald was confirmed by evidence that the appellant, through one of its other entities (Centro) had been pursuing a proposal to expand Emerald Village to include a DDS since March 2007 and had achieved a measure of Council support; and, that since mid-2006 Centro has been considering expanding the small Target store to something over double its present size. The evidence also established that before Centro encountered some well publicised financial difficulties in recent times there were open discussions between it and Lascorp with respect to Centro's possible involvement in Lascorp's proposed development.
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> …
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> [19] Other residents spoke in terms that were, at times, almost plaintive about the limited shopping opportunities in Emerald and the need for them to travel long distances to obtain items and products they wanted at prices they thought were reasonable. Evidence from representatives of Woolworths and Big W was persuasive that, unsurprisingly, those very large retail corporations have access to information, and expertise, which founds profitable decisions about development, and that they believed this development would meet an obvious, present need.
>
> [20] That evidence, combined with the conclusions of the retail experts, was strongly persuasive that there is a high degree of need for this proposal – and, importantly, the level of need is such that its satisfaction will not create any unacceptable impact on existing retail facilities in the town but, rather, contribute to its economy and bring significant advantages to the community. It will also, of course, further entrench the regional role of Emerald as the major town in

> the district – something which, as will be seen, is enshrined in the Council's planning scheme.
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> …
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> [22] It is also a matter of simple but irrefutable logic that, … a development like this proposal will increase the range of economic and social benefits through additional competition and the convenience of a wider range of retail outlets.
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> [23] In the result, it is inescapable that Lascorp has met the burden of showing that there is a need for a DDS in Emerald, and the level of need can be fairly described as strong; and, that there is also sufficient need for an additional supermarket which, at this location, will also provide more convenient shopping for residents in the developing, and expanding south-east portion of the town along the Gregory Highway (who are at risk of being cut off from the existing supermarkets to the west of the Nogoa River, as occurred earlier this year for some days)."

[8] This finding, which is one of fact, could not be challenged in this Court and I did not understand the applicant attempted the task.

[9] The development application, and the appeal to the P & E Court, both fell to be decided by reference to the terms of the Emerald Shire Planning Scheme 2007 ("the Scheme"). It divided the shire into six zones one, relevant to the application, being the "Town Zone". The zones in turn "incorporate sub-areas referred to as Precincts …". In the Town Zone there were 11 precincts:

Town-Commercial Precinct;
Town-Residential Precinct;
Town-Residential Accommodation Precinct;
Town-Light Industrial Precinct;
Town-Industrial Precinct;
Town-Community Precinct;
Town-Utilities Precinct;
Town-Recreation Precinct;
Town-Rural Residential Precinct;
Airport Precinct;
Investigation Precincts A-D.

[10] The land chosen for the site of the development application is within the Town-Light Industrial Precinct. The applicant's competing supermarkets are in the Town-Commercial Precinct which comprises, in effect, the CBD of Emerald. The applicant's case, before the Council, on appeal to the P & E Court and in the application for leave to appeal to this Court, is that the Scheme intends large scale retail development to be located within the Town-Commercial Precinct and that its location in the Town-Light Industrial Precinct would give rise to a substantial conflict with the Scheme. The applicant's particular complaint is that the P & E Court did not appreciate the existence or extent of the conflict between the development and the Scheme, and failed to address whether, notwithstanding the conflict, there were sufficient planning grounds to justify the development in the Light Industrial Precinct.

[11] The Scheme, by s 1.2.1, explains that it:

> "… seeks to achieve outcomes … identified according to the following levels –
>
> (a) Desired Environmental Outcomes;
> (b) Overall Outcomes for Zones … ;
> (c) Specific outcomes for Zones … ;
> (d) Probable Solutions or Acceptable Solutions for a Specific Outcome."

[12] The Scheme says that desired environmental outcomes are:

> "… sought to be achieved to the extent practicable having regard to each of the other desired environmental outcomes, noting that in many instances there is an overlap between each of the social, environmental and economic elements."

The "desired environmental outcomes" for Emerald Shire include social element (b):

> "The town of Emerald is the main business and economic centre, providing higher order services and a range of community and civic functions. It is the main centre of the Central Highlands, Queensland."

[13] The Scheme by s 4.3.2(2) reveals that "The purpose of the Town Zone Code is to achieve the following overall outcomes:

> "1. The town of Emerald is identified as the key service town which serves the Shire;
>
> 2. Commercial, community and public uses are consolidated within the town of Emerald, ensuring that the town is easily identifiable and an accessible community centre;
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> 3. The Precincts each perform a different function within the Town Zone and represent distinct areas or groupings of compatible land uses;
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> 4. The availability of land, the amenity, and the operational needs of different uses in each Precinct are not compromised by the inclusion or encroachment of inappropriate development;
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> 5. …
>
> 6. The overall outcomes specific to each of the Precincts within the Town Zone listed below, are achieved;
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> (a) The overall outcomes sought for the **Town–Commercial Precinct** are:
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> (i) Land within the Precinct is predominantly used for commercial and business uses including shops, commercial premises, motels and hotels;
> (ii) The uses within the Precinct afford the Shire a wide range of shopping, banking, office, medical and professional services;
> (iii) … ;

(iv) The inclusion of industrial and land consumptive uses such as vehicle showrooms and low impact industries is minimised;
(v) … ;
(vi) … .

…

(d) The overall outcomes sought for the **Town–Light Industrial Precinct** are:

(i) Land within the Precinct is predominantly used for low impact industrial uses including manufacturing, processing, repairing, packing and storage, landscape supplies, vehicle depots, and warehouses;
(ii) …;
(iii) …;
(iv) …;
(v) Other uses not in the Industrial Use Class such as service industries and uses which directly serve employees of industrial uses eg food premises, are also located within the Precinct where such uses do not have significant impacts upon the operation or amenity of surrounding uses;
(vi) …;
(vii) Showrooms and vehicle showroom uses are only located on sites which have frontage to principal roads …"

[14] The applicant's particular complaints are that the P & E Court "did not refer at all to the overall outcome at s 4.3.2(2)(3) of the … Scheme ("the Precincts each perform a different function … and represent distinct areas or groupings of compatible land uses")"; nor did his Honour refer to the overall outcome expressed in s 4.3.2(2)(6)(a)(ii) that uses in the Commercial Precinct "afford the Shire a wide range of shopping". From this it is said that his Honour overlooked these elements of the Scheme and failed to appreciate that locating a large retail complex other than in the Town-Commercial Precinct was a substantial conflict with the Scheme, also exemplified by the fact that the Town-Light Industrial Precinct was designed for uses properly described as "light industrial" which excluded commercial and retail uses.

[15] The applicant submitted that the P & E Court:

> "… erred in … the construction of the … Scheme principally by failing to construe (it) as identifying and providing for distinct areas in which it is intended to locate like uses and which distinct areas are to fulfill different functions from each other. Rather the primary judge construed the … Scheme as substantially devoid of relevant planning guidance in terms of the location … of a very substantial shopping and commercial complex."

[16] The submissions continued that the court:

> "… misapplied section 3.5.14 of (*IP Act*), which requires the refusal of an application which conflicts with the … Scheme unless sufficient grounds exists (sic) to justify doing so despite the conflict. Given the primary judge's failure to properly identify the nature and extent of that conflict, his assessment of the sufficiency of grounds to justify an approval when weighed against minor conflict (as he found there to be) is itself erroneous."

Section 3.5.14 of the *IP Act* provides that if an application is for development in a planning scheme area the assessment manger's decision must not:

> "(2)(b) conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict."

[17] The argument developed the point that the approach taken by the P & E Court, to allow the retail/commercial complex in the Town-Light Industrial Precinct, had the result that the various precincts did not fulfil different functions as the Scheme required. To allow the development would convert the Light Industrial Precinct into a Commercial Precinct thereby robbing it of its distinctive function which the Scheme sought to preserve. It was said that as a matter of law the Scheme required the precincts to fulfil different functions and that the P & E Court did not address the question whether the proposal would permit the precincts to fulfil different functions. As a consequence his Honour did not address the question of conflict in the terms which the Scheme itself required. His Honour should, it was submitted, have posed the question: would the development blur the distinction between the expressed functions of the two precincts or did it allow them to fulfil their different functions? The applicant seeks an order that the application be remitted to the P & E Court for reconsideration in accordance with the proper understanding of the manner in which the existence and extent of conflict between the development and the Scheme was to be assessed.

[18] The P & E Court gave reasons for concluding that the level of conflict between the respondent's development proposal and the Scheme was minor, and that the need for the facility overwhelmed what conflict there was. His Honour said:

> "[30] At the core of the appellant's case is the proposition that the planning scheme looks to place developments like Lascorp's in the CBD, and turns its face against permitting it in the Light Industrial precinct, as proposed. A 'retail/commercial complex' is defined to include the hire and retail sale of goods in premises having a total use area greater than 2,000 square metres in a single complex, or separate buildings. That term already applies to the existing Emerald Village and Emerald Market Plaza centres, as it will to the Bunnings development and, if allowed, the proposed development.
>
> [31] The scheme provides, however, that a retail/commercial complex is impact assessable in every precinct in the Town Zone. That can be seen when the definition of these complexes is considered in the context of the definitions of 'shop'' (sic) and 'showroom'. Within the definitions is wording which shows that a single shop or showroom with a total use area greater than 2,000 square metres is properly

characterised as a retail/commercial complex. It follows that any proposal within the town of Emerald which includes something like a supermarket or DDS greater than 2,000 square metres is impact assessable in every precinct. The particular, relevant result is that proposals for a DDS on the scale under consideration would be impact assessable within the CBD. It cannot be said, then, that the scheme manifests an obvious design, intent or preference to posit retail/commercial complexes only within the CBD.

[32] In the Light Industrial Precinct there is also, relevantly, no apparent discouragement of what the Planning Scheme describes as the 'commercial use class' which collectively refers to caravan parks, commercial premises, food premises, hotels, indoor entertainment, motor sport facilities, off street carparks, outdoor entertainment, plant nurseries, **retail/commercial complex,** service stations, shops, showrooms and vehicle showroom uses.

[33] Within the scheme, too, four of the 10 precincts specifically provide overall outcomes which look to minimise the inclusion of uses within the Commercial Use class, but no such provision is contained in the overall outcomes for the Light Industrial Precinct. Moreover, there is express recognition in three of the seven overall outcomes that in certain circumstances a range of uses in the Commercial Use class may be located in that precinct including service industries and uses, servicing employees of industrial uses, indoor and outdoor entertainment, and showrooms and vehicle showrooms.

…

[35] In summary, while the planning scheme accommodates retail/commercial complexes within the CBD, it does not contain anything signifying a plain intention that a complex of that kind can only be located within that precinct; but, additionally and relevantly, these aspects of the scheme also indicate that the Light Industrial Precinct is identified as an appropriate alternative to the Town-Commercial Precinct for the location of a retail/commercial complex.

…

[38] That conclusion is supported, too, by evidence that previous attempts to expand the existing centres have incorporated proposals which involved taking part of some public parkland near the centre of town, or redeveloping an apparently abandoned RSL Club. As the evidence also indicated, and observation confirmed, no ready site for a large scale DDS presently exists in the CBD and attempts to accumulate a parcel of sufficient size would involve the acquisition and agglomeration of parcels containing other existing retail or commercial uses (or, the resumption of

quite a large part of a park which, to the visitor, represents an important and attractive spine running through the town – a proposal which, it might reasonably be thought, would meet with considerable public opposition).

…

[40] The conflict between this proposal and the planning scheme asserted by the appellant focuses, firstly on DEO(b) which speaks of Emerald as the main business and economic centre, and Overall Outcome 2 of the Town Zone Code which refers to the consolidation, within the town, of commercial, community and public uses. As already observed, to construe these provisions as necessarily implying a reference not to the town itself but, more precisely, to the CBD alone is incorrect.

[41] It is also alleged that there is conflict with the scheme insofar as it may be said to indicate a preference for developments of this kind within the Commercial Precinct. While it is true that one of the overall outcomes for that precinct refers to uses predominantly of a commercial and business type (including shops, commercial premises, motels and hotels) that is, in context, not a sign that a development outside the preferred area necessarily attracts conflict. Nor will conflict arise, as a matter of necessity, when a proposed development is not strongly specified or plainly promoted in a particular area, but not elsewhere. 'Overall Outcomes' are not, either, mandatory or prescriptive and they will ordinarily do no more than signify the need to exercise a discretion – a conclusion reinforced here by the parts of the scheme already discussed.

…

[45] In fact, the only conflict which might be described as capable of ready discernment is that pertaining to the Overall Outcome for land in the Light Industrial Precinct with its reference to 'predominant use' for low impact industrial uses. The word cannot, however, be described as indicating a strong preference for uses of that kind, or a strong aversion to other uses. When that is acknowledged, and placed in the context of the balance of the planning scheme and the benefits attached to the site in terms of location and size (and the advantages the development will bring to residents of both the town, and the region), the conflict cannot be described as other than relatively low level.

[46] That minor conflict is effectively extinguished, here, by the evidence of significant need for the proposal; the desirable effect it will have of further entrenching Emerald's important regional role, consummate with the desires expressed in the planning scheme; the economic benefits it

> will bring in reducing escape expenditure; and, its obvious feasibility (i.e., that it is supported by and has commitment from experienced national retail operators). Other factors constituting supportive planning grounds include location (a conclusion supported by inspection) and the apparent absence of, presently, a suitable and available alternative site within the CBD." (footnotes omitted)

[19] The applicant argued with respect to these reasons that the primary judge:

- Failed to construe the Scheme as a whole;
- Construed its detailed provisions without regard to the stated objective or outcome to be served by those provisions;
- Adopted a construction which does not refer to or best serve the provisions of the Scheme expressed in the principal statement of purpose.

The thrust of the complaint is that the learned judge did not refer to, and therefore must be taken to have failed to understand, the Scheme's emphasis on the different precincts each performing a different function and the express preference for retail uses to be located within the Commercial Precinct.

[20] Despite the apparent seriousness with which the submissions were advanced it is, in my opinion, impossible to conclude that the very experienced judge who constituted the P & E Court overlooked such obvious points which were the subject of submissions and which underlay the whole case the court was called upon to decide. The point which the appellant asserts the judge forgot is so obvious that it truly goes without saying. Should an officious bystander have suggested that the point had been overlooked in the reasons for judgment he would have been brusquely corrected. It is self evident that the purpose of dividing the Town Zone into precincts, each given a separate designation and individual description of purpose, indicates a planning preference for similar uses to be congregated within each precinct, and that the natures of the uses differ from one precinct to another. This is all that is meant by precincts fulfilling different functions.

[21] When the applicant complains that the primary judge overlooked overall outcome 4.3.2(2)(3) it is saying that his Honour failed to address the Scheme's requirement that the precincts function differently so that light industrial uses should be located within the Light Industrial Precinct and that commercial uses should be located within the Commercial Precinct. The submission makes the assumption that the Scheme did express that intention, and that those respective uses were to be restricted to those particular precincts so that they could "each perform a different function". There is, however, a prevenient question: what does the Scheme intend the function of the Light Industrial Precinct to be? Does it allow, or intend to prevent, commercial uses in that precinct? The first question which the P & E Court had to address was the strength of the Scheme's expressed preference for commercial uses to be located in the Commercial Precinct and light industrial uses in the Light Industrial Precinct. The assumption implicit in the applicant's submission begs that question. The primary judge addressed it directly. In answering the first question the P & E Court also necessarily addressed the question of what the Scheme meant by the functionality of those precincts.

[22] The reasons of the P & E Court indicate that the point was very much in contemplation. The court noted (para [2]) that the principal issues were:

> "whether a development which would be located on land that the … scheme designates for light industrial uses, and which would become the largest single retail centre in the district, is too remote from (the CBD) and, therefore, in substantial conflict with the … scheme … ; and, whether Emerald and the Central Highlands need it."

His Honour noted (para [26]) the applicant's submission that the proposal was:

> "in conflict with the … overall outcomes sought for precincts called Commercial, and Light Industrial …".

His Honour further explained (para [30]) that:

> "At the core of the (applicant's) case is the proposition that the … scheme looks to place developments like (the respondent's) in the CBD, and turns its face against permitting it in the Light Industrial precinct …".

[23] His Honour then explained, in the paragraphs I have set out, his reasons for concluding that despite the express preference for locating commercial retail development within the CBD, the conflict with the Scheme was minor because that preference was not strongly expressed and there was particular need for the development which could not be fitted within the Town-Commercial Precinct. The applicant takes issue with his Honour's particular reasons for that conclusion but those points raised by the applicant are not, on the authorities, points of law. They cannot be assailed in this Court.

[24] In *Gracemere Surveying and Planning Consultants P/L v Peak Downs Shire Council* [2009] QCA 237 the Court was concerned with a planning scheme distinctly similar to the Scheme here in question. By its planning scheme the township of Capella was designated a "Town Zone" divided into precincts whose function and purposes were described in terms remarkably similar to the Scheme. The local authority approved what would become Capella's largest motel/hotel development in the Town-Highway Precinct rather than the Town-Commercial Precinct. The P & E Court dismissed an appeal by a business competitor which complained that the new hotel conflicted with the planning scheme.

[25] I said, with the concurrence of the Chief Justice and Margaret Wilson J:

> "[23] … When the section says the predominant use of the Highway precinct is to be large retail showrooms and the like, and a minimised use of the precinct for motels and hotels, it is expressing a preference for development in very general terms. The section gives great flexibility to the Council when approving developments. It eschews rigidity of category of use and the prohibition of particular uses.
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> …
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> [30] The reality is that the section is worded in such vague and flexible terms that there are no clear or definitive criteria by which a judge can determine whether there is conflict between the scheme and any proposed development. The section does not describe any legal criteria by which conflict

> may be gauged. It prescribes a very general test for determining whether a hotel or motel … is a minimal use in or of the precinct. It confers on the tribunal of fact, Council or P & E Court, great width in the decision-making process. Whether such a use is minimal or not is a question of fact and degree depending upon the circumstances. It is not a question of law, given the terms in which s 4.3.2(2)(6)(f)(v) is cast."

[26] I also cited with approval the judgment of Bleby J in *Harrow Trust v Adelaide Hebrew Congregation Inc & City of Burnside* [2002] SASC 308:

> "[15] It may be doubted that the provisions of the Development Plan are to be interpreted as if they were a statute. They do no more than they purport to do, namely express objectives and general principles, rather than words of prescription or proscription generally found in a statute. However, for present purposes I am content to assume that they should be so treated. The words used in the extracts I have quoted are ordinary English words with no particular legal or technical meaning. Whether a given set of facts comes within the terms of those words will be a question of fact."

That passage was also approved by this Court in *Regional Land Development Corp No 1 P/L v Banana SC & Ors* [2009] QCA 140 at [20].

[27] Those remarks are equally applicable to the present application. Given the generality in which the different functions of the various precincts are expressed and the flexibility the Scheme gives to a planning authority, Council or P & E Court, one cannot be dogmatic about the existence or degree of any conflict that might arise between a development proposal and the Scheme.

[28] The P & E Court found conflict between the proposal and the Scheme, describing it, as already noted, as minor. The burden of the applicant's submission is that the conflict is not minor, but rather serious and substantial and therefore necessitated a more careful evaluation of the planning grounds which were relied upon to justify disregarding the conflict. The respondent submits, correctly in my opinion, that the assessment of the degree of conflict between a proposed development and a Planning Scheme is itself a question of fact, not of law, so that an error in the assessment will not provide a ground of appeal.

[29] There is ample recent authority for the submission. In *Aldi Stores (A Limited Partnership) v Redland City Council* [2009] QCA 346 the Chief Justice regarded the process as "evaluative" and not giving rise to a question of law. In *Regional Land*, Keane JA, with whom Holmes and Fraser JJA agreed, said:

> "[22] Regional's argument on the "conflict issue" is that the learned primary judge erred in not concluding that the nature and extent of the conflict was "significant" for the determination of the application. How this is said to involve a question of construction of s 3.5.14(2) of the IPA is not apparent either from Regional's notice of appeal or its submissions.

> [23] Questions as to whether evidence satisfies an indeterminate test such as "significance" or "substantiality" are generally questions of fact. While it may be accepted that whether there is a conflict between the decision of the assessment manager and the planning scheme within the meaning of s 3.5.14(2)(b) of the IPA can be a question of law, the question of the "significance" of that conflict appears to be a question of fact. This will usually be so where the determination of the question is informed by reliance by both parties on competing bodies of expert evidence as was the case here. One should be wary of laying down hard and fast rules because much may turn on the terms of the relevant legislation and the circumstances of the case, but in this case I have difficulty seeing how the conclusion of the P & E Court in this regard, even if it is erroneous, can be characterised as an error of law rather than an error of fact.
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> …
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> [28] In summary then on the "conflict" issue, Regional's challenge to the learned primary judge's conclusion as to the significance of the conflict which he acknowledged, appears to me to involve no more than an assertion of an error of fact." (footnotes omitted)

[30] In *SLS Property Group P/L v Townsville City Council* [2009] QCA 380 Keane JA said (para [22]):

> "Questions of 'significance' so far as town planning considerations are concerned are generally questions of fact in respect of which no appeal lies to this Court."

Holmes JA and Daubney J agreed.

[31] The P & E Court's designation of the planning conflict as minor is the foundation stone of the applicant's case. The cases establish that any such error was not one of law and no appeal lies from it. The remarks in *Gracemere* are equally applicable here. Because the Scheme is expressed in terms which gave the Council flexibility in the location of uses in the precincts, the location of the proposed discount department store in the Light Industrial Precinct does not give rise to an inevitable conflict which must be designated serious as a matter of the legal construction of the Scheme. The applicant's basic premise cannot be accepted.

[32] Its second point depends upon the first. It was that the P & E Court's approach to the construction of the Scheme:

> "… necessarily prevented (it) from properly identifying the nature and extent of the conflict and therefore from properly assessing the sufficiency of the grounds to approval the Proposal despite that conflict."

[33] The rejection of the existence of appealable error with respect to the "nature and extent of the conflict" between proposal and Scheme means that the complaint that the P & E Court did not properly assess the sufficiency of grounds to overcome the conflict falls away. It would, however, in any event, be relevant to the grant of

leave to appeal that the P & E Court found a particular need for the proposed retail development and that it cannot be within the Town-Commercial Precinct. If the need is to be met the development must go into another precinct and none more appropriate than the Light Industrial Precinct was suggested.

[34] It would not be appropriate to grant leave to appeal if a consideration of the case revealed, as it does in my opinion, that however one construes the Scheme and the designated desired outcomes of the various precincts, the development should have been approved, as the Council itself thought. The application of the test formulated in *Weightman v Gold Coast City Council* (2002) 121 LGERA 161 to the facts results in the conclusion that planning grounds in favour of the development outweighed the conflict between it and the Scheme.

[35] The reasons I have given indicate, I hope, that the application for leave to appeal should be refused. No error of law has been identified. However, such pointed criticisms were made of the judgment of the P & E Court that it is appropriate to point briefly to aspects of the Scheme which support the finding that the development is permitted in the Town-Light Industrial Precinct.

[36] The first indication is that the overall outcome for eight of the 10 Town Precincts is described by reference to the "predominant" use to which land in the precinct is to be put. By referring to predominant use the outcome expresses a preference, but does not exclude other uses.

[37] The second indication is that when particular uses are discouraged in a particular precinct the outcomes for that precinct say so clearly. By way of example the overall outcome for the Town-Community Precinct includes:

> "(vii) … uses in the Commercial and Industrial Use Classes is minimised; as they are generally not compatible with the uses in (this) precinct."

There is a similar expression, "minimised", in the outcomes expressed in for the Town-Utilities Precinct and the Town-Recreation Precinct. With respect to the Town-Rural Residential Precinct outcome (ix) is that:

> "Uses in the Commercial and Industrial Use Classes are generally not located on land within the Precinct."

[38] There is no such admonition in the overall outcomes expressed for either the Town-Commercial Precinct or the Town-Light Industrial Precinct. In particular the Scheme by its expression of overall outcomes does not discourage light industrial uses in the Commercial Precinct, nor commercial uses in the Light-Industrial Precinct. The level of preference for the individual uses is limited to the intention that there be identified predominant uses in each precinct.

[39] The expression of preference and discouragement are, as in *Gracemere*, very generally expressed giving rise to a Planning Scheme of great flexibility.

[40] The third indication is that the expressed overall outcomes for the Town-Light Industrial Precinct expressly contemplate the possibility of five uses in the commercial use class as defined in the Scheme. They are: food premises; indoor entertainment; outdoor entertainment; showrooms and vehicle showrooms. Some commercial uses in the Light-Industrial Precinct is therefore expressly recognised to be in accordance with the Scheme.

[41] The next indication is that the Scheme identifies Emerald, the town not just the CBD, thus including land in the Commercial Precinct and the Light Industrial Precinct, as "the key service town which serves the Shire". It is a purpose of the Town Zone Code to achieve that outcome. Commercial uses are intended to be "consolidated within … Emerald". As well, a desired environmental outcome of the Scheme is that Emerald be "the main business and economic centre, providing higher order services to … the Central Highlands …".

[42] The applicant objects that these statements are not an indication supporting the inclusion of a large retail complex in the Light Industrial Precinct because the objectives identified by the outcomes are to be achieved within the framework of the precincts and their separate functionality. The objection has the consequence that the framework of precincts would operate, or at least could operate, to prevent the outcomes which the Scheme intends to achieve. Emerald is to be the key service town for the shire within which commercial uses are consolidated allowing it to become the main business and economic centre for the Central Highlands. The division of the town into precincts is to achieve the described purposes. If by regarding the precincts as more or less rigid categories within which only obvious uses might be located the declared purposes would be frustrated. These overall purposes should be given priority over the categorisation of use by precinct. The precincts are to be used to achieve the declared objectives, not frustrate them.

[43] Another indication is that the Scheme identifies, though rather obliquely, a retail hierarchy of:

- Retail/commercial complex defined as the "hire, retail sale of goods and/or provision of … services … in premises … greater than 2000m² … in a single complex or separate buildings";
- Shop defined as the display, hire and/or retail sale of goods on premises not exceeding 2,000 square metres;
- Showroom defines any premises more than 20 square metres but not more than 2,000 square metres used for the display and sale of bulky goods;
- Commercial premises defined as professional, business or commercial services in premises no greater than 2,000 square metres in extent.

[44] The retail/commercial complex is inferentially the "top" of the hierarchy because of its size. It must be larger than 2,000 square metres whereas each of the other retail uses cannot exceed that area. Notwithstanding its rank in the hierarchy there is no specific reference to such a complex in the overall outcomes of any of the precincts. There is, however, reference to the other levels of retailing activity. It is therefore a fair inference the Scheme left open the precinct or precincts in which such a complex might be located.

[45] The penultimate, perhaps slender, indication is that a retail commercial complex is impact assessable in all 10 precincts of the Town Zone so that no precinct might be thought more appropriate than another for such a complex though, of course, some precincts by the very nature of their uses would not be suitable.

[46] The last indication is that the Council's code for reconfiguring lots provides that newly created lots in both the Light Industrial Precinct and Commercial Precinct

must be at least 800m^2, and have a road frontage of at least 18 metres and a frontage to depth ration of 1:4. The point is the identical characteristics of lots in both precincts suggest a similarity of use, in both precincts.

[47] It is not necessary to take these matters any further. They together provide substantial support for the P & E Court's opinion that the proposed development could, without any substantial conflict with the Scheme, go where it is proposed. Given that it cannot fit in the CBD and it is needed, the decision by the Council and the P & E Court is unexceptionable. Certainly it gives rise to no error of law.

[48] The application for leave to appeal should be refused with costs.