

SUPREME COURT OF QUEENSLAND

CITATION: *Lewis v Townsville City Council & Ors* [2012] QCA 99

PARTIES: **BRADLEY SCOTT LEWIS**
(applicant)
v
TOWNSVILLE CITY COUNCIL
(first respondent)
NODNOC PTY LTD
ACN 010 112 836
(second respondent)
MICHAEL DAWSON
(third respondent)

FILE NO/S: Appeal No 6143 of 2011
P & E Appeal No 144 of 2010

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Integrated Planning Act*

ORIGINATING COURT: Planning & Environment Appeal Court at Townsville

DELIVERED ON: 17 April 2012

DELIVERED AT: Brisbane

HEARING DATE: 17 November 2011

JUDGES: Margaret McMurdo P and Muir JA and Douglas J
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **The application for leave to appeal is refused with costs.**

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL
PLANNING – PLANNING SCHEMES AND
INSTRUMENTS – QUEENSLAND – GENERALLY –
where first respondent refused the applicant's Development
Application for a material change of use to land – where the
applicant's appeal to the Planning and Environment Court
was dismissed on the basis that the use proposed by the
applicant both compromised the planning scheme and was in
conflict with it without demonstrating grounds to justify
approving the Development Application notwithstanding the
conflict – where the planning scheme designated the subject
land for Rural Use – where the applicant submitted that the
primary judge erred in finding that the proposed use
conflicted with the planning scheme in a number of respects –
whether there was an error of law sufficient to warrant the
granting of leave to appeal under *Sustainable Planning Act*

2009 (Qld), s 498 – whether the primary judge erred in the construction of *Integrated Planning Act 1997* (Qld), s 3.5.14(2) – whether the primary judge made a factual finding without evidence – whether the primary judge referred to any irrelevant considerations – whether there was a denial of procedural fairness – whether the primary judge failed to have regard to material evidence in determining the noise issue – whether the correct test was applied when deciding that the proposed use was in conflict with the planning scheme – whether the primary judge misconstrued the planning scheme – whether the primary judge failed to give proper consideration to the applicant's grounds of appeal

Integrated Planning Act 1997 (Qld), s 3.5.14
Sustainable Planning Act 2009 (Qld), s 498

ALDI Stores (A Limited Partnership) v Redland City Council [2009] QCA 346, cited

Barro Group Pty Ptd v Thuringowa City Council [1999] QPELR 312; [1999] QPEC 12, cited

Ecovale Pty Ltd v Gold Coast City Council [1999] 2 Qd R 35; [1998] QCA 67, cited

Lewis v Townsville City Council & Ors [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, related

Webster v Caboolture Shire Council [2009] QPELR 455; [2008] QPEC 82, cited

Weightman v Gold Coast City Council [2003] 2 Qd R 441; [2002] QCA 234, cited

Woolworths Ltd v Maryborough City Council (No2) [2006] 1 Qd R 273; [2005] QCA 262, cited

COUNSEL: M A Williamson for the applicant
M Hinson SC for the first respondent
No appearance for the second respondent
No appearance for the third respondent

SOLICITORS: Wilson, Ryan, Grose Lawyers for the applicant
Townsville City Council Legal Services for the first respondent
No appearance for the second respondent
No appearance for the third respondent

- [1] **MARGARET McMURDO P:** The applicant, Bradley Scott Lewis, owns land at Black River Road, near Townsville. He is sole director of Lewis NQ Haulage Pty Ltd which conducts a business carting raw materials to and from locations in the Townsville region. He applied for a Development Application for a Development Permit – Material Change of Use for Transport Depot and Landscape Supplies combined with an Environmentally Relevant Activity (motor vehicle workshop operation) in respect of the land. The first respondent, Townsville City Council, refused the application on 27 April 2010. The applicant appealed against that refusal to the Planning & Environment Court. The appeal was heard over three

days in March 2011 and was dismissed on 1 June 2011. The applicant now applies for leave to appeal under s 498 *Sustainable Planning Act 2009* (Qld). A party may appeal to this Court only on the ground of error or mistake of law or absence or excess of jurisdiction¹ and with leave of the Court or a judge.²

- [2] The second respondent, Nodnoc Pty Ltd, and the third respondent, Michael Dawson, wrote to the Deputy Registrar (Appeals) stating that they did not wish to take an active role in the application for leave to appeal but reserved their right to costs.
- [3] The applicant and the first respondent agreed at the hearing that the determination of the application for leave to appeal required this Court to consider and hear argument as to the proposed grounds of appeal, so that, if leave were granted, the appeal could also be determined without a further hearing.
- [4] The applicant's counsel submitted that leave to appeal should be granted because the primary judge erred in that his Honour:
- "(a) misconstrued s.3.5.14(2)(a) of the *Integrated Planning Act 1997* ("IPA")³;
 - (b) made a material finding of fact in circumstances where there was no evidence to support the finding⁴;
 - (c) determined the appeal by reference to an irrelevant consideration⁵;
 - (d) denied the Applicant procedural fairness in one specific aspect of the case⁶;
 - (e) failed to have regard to important evidence in the proper determination of the matter⁷;
 - (f) misconceived the proper test to be applied in determining conflict with the [Council's] planning scheme⁸;
 - (g) misconstrued the [Council's] planning scheme⁹; and
 - (h) failed to give due and proper consideration to an issue in dispute¹⁰."
- [5] Counsel also contended that this case raised an important question of law, namely, when a court ought disclose a view reached during the course of the hearing which is at odds with an agreed position between the parties. This was particularly so where the court's view, if disclosed, would have impacted on the manner in which the party bearing the onus would have run his case. He argued that this important question and its impact on the interests of justice supported the granting of leave to appeal.
- [6] The applicant's contentions require some understanding of the relevant statutory and planning scheme provisions and of the primary judge's reasons.

¹ *Sustainable Planning Act 2009* (Qld) s 498(1)(a)-(c).

² Above, s 498(2).

³ Ground 1.

⁴ Ground 2.

⁵ Grounds 3, 4 and 5.

⁶ Ground 6.

⁷ Grounds 7 and 8.

⁸ Ground 9.

⁹ Grounds 10 and 11.

¹⁰ Ground 12.

The relevant statutory and planning scheme provisions

- [7] Section 3.5.14(2) IPA is contained in the IPA's Ch 3 Integrated development assessment system (IDAS), Part 5 Decision stage. It relevantly provides:

"Decision if application requires 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."

- [8] It is common ground that the land was in the Rural 40 sub-area of the Rural Planning Area of the City of Thuringowa Planning Scheme.¹¹ The relevant provisions of the planning scheme are as follows:

"PART 1 INTERPRETATION

1.1 PURPOSE OF PLANNING SCHEME

1.1.1 This Planning Scheme has been prepared in accordance with the Integrated Planning Act 1997 as a framework for managing development in the City by identifying -

- (a) the desired outcomes for the City; and
- (b) assessable and self-assessable development.

1.1.2 In the interpretation of the provisions of the Planning Scheme, the interpretation that will best achieve the desired outcomes of the Planning Scheme contained in -

- (a) the DEOs;
- (b) the character statements of the Planning Areas and Local Areas; and
- (c) the purposes of the City Wide Codes,

is to be preferred to any other interpretation.

...

1.3 STRUCTURE OF PLANNING SCHEME

1.3.1 The Planning Scheme consists of the following parts -

- (a) Part 1 - Interpretation;
- (b) Part 2 - Desired Environmental Outcomes (DEOs) and City Strategies;
- (c) Part 3 - Planning Areas;

...

- (g) Part 7 - Definitions.

Each Part has a distinct role in the achievement of the desired outcomes for the City.

¹¹ The Planning Scheme remains in force under the transitional provisions of the *Local Government Reform Implementation (Transferring Areas) Regulation 2007* and the *Local Government Act 1993* (Qld).

1.3.2 **Desired Environmental Outcomes (DEOs) and City Strategies**

(a) The Desired Environmental Outcomes (DEOs) for the City -

- (i) are contained in Part 2 of the Planning Scheme;
- (ii) describe the desired outcomes for the City;

...

- (iv) are to be read on conjunction with each other; and
- (v) are supported by city Strategies.

(b) City Strategies for the City -

- (i) facilitate the achievement of the DEOs; and
- (ii) form part of the assessment criteria for impact assessable development.

...

PART 2

DESIRED ENVIRONMENTAL OUTCOMES (DEOS) AND CITY STRATEGIES

...

2.4 CHARACTER, CITY IMAGE, AMENITY AND LIFESTYLE

2.4.1 DEO 4

The City's valuable features, built environment and land use pattern result in a distinct sense of place and local identity, and are vibrant, safe and healthy, with access to community and cultural facilities and services.

2.4.2 City Strategies

DEO 4 is intended to be achieved by -

(a) protecting or enhancing the City's natural and built environment as an integral part of the City's Landscape Character Types.

(b) reinforcing the City's character through effective siting, design and layout of development that –

- (i) reflects community expectations;

...

- (iii) reflects local and desired character;

- (iv) enhances local identity and lifestyle;

- (v) contributes to the formation of a sense of place; and

- (vi) responds to the City's tropical climate.

(c) retaining visual and aesthetic enjoyment for the community and visitors by -

- (i) protecting the Scenic Quality of the Escarpments and Hillsides (refer to map 2 - Desired Environmental Outcomes) and coast; and

- (ii) minimising visual interruption to the escarpments, hillsides, City gateways and internal views from principal routes and future principal routes.

- (d) meeting the needs of the community including special needs groups such as youth, aged, ethnic, disabled, unemployed and indigenous people, by providing -
 - (i) accessible and affordable housing and lot size choice; and
 - (ii) equitable access to community and cultural services and facilities for all people.
- (e) ensuring equitable access for the City's community to both active and passive open space and recreation opportunities that –
 - (i) are safe, pleasant and accessible;
 - (ii) promote social interaction;
 - (iii) provide diversity of recreational settings and opportunities;
 - (iv) link the City's urban, rural, natural and coastal landscapes; and
 - (v) contribute to a regional recreational and amenity network.

...

2.6 LAND USE PATTERNS

2.6.1 DEO 6

The City's land use patterns create cohesive communities that balance economic, social and environmental considerations.¹

¹ The City's Land use Patterns is consistent with the Townsville-Thuringowa Strategy Plan.

2.6.2 City Strategies

DEO 6 is intended to be achieved by -

- (a) integrating new and existing development and providing a range of land uses that create cohesive, safe and sustainable communities.
- (b) establishing the City's Urban Growth Boundaries (refer to map 5.7) to create an efficient urban form by -
 - (i) providing for higher residential densities and a mix of uses around centres and public transport nodes;
 - (ii) ensuring orderly and sequential growth defining Urban Growth Boundaries;
 - (iii) providing linkages between residential, public spaces and facilities and workplaces; and
 - (iv) establishing a land use pattern that is consistent with the location and capacities of existing infrastructure items, plans and programs of service providers.
- (c) protecting land from encroachment by incompatible development, promoting the co-location of compatible and complementary development and allowing development where need is demonstrated.

- (d) developing and maintaining a transport network² considering frictional, functional and impact characteristics that -
 - (i) improves accessibility;
 - (ii) enhances mobility;
 - (iii) facilitates efficient and convenient access and mobility within and through the City for all transport and travel modes (maritime, vehicle-passenger and freight, bicycle, public transport and pedestrian);
 - (iv) reflects the road function and protects areas from inappropriate traffic movements;
 - (v) encourages walking and cycling through the provision of direct, safe and secure routes to local facilities such as shops and schools; and
 - (vi) minimises environmental impact.
- 2 The transport network is consistent with the Townsville - Thuringowa Integrated Transport Plan.
- (e) establishing land uses adjacent to, or in the vicinity of, existing or planned infrastructure corridors, routes or facilities (such as energy or transport) –
 - (i) that are appropriate for the location and do not impact on the safety or efficiency of the corridor or facility; and
 - (ii) that consider across-corridor connectivity so that communities are not physically divided.

PART 3

PLANNING AREAS

There are five Planning Areas in the City of Thuringowa: Rural, Industrial, Centres, Open Space and Recreation and Residential. Each Planning Area includes a Character Statement, Development Assessment Table and a Planning Area Code.

3.1 RURAL PLANNING AREA

3.1.1 CHARACTER STATEMENT

- (a) At the Commencement Date, premises within the Rural Planning Area consisted of -
 - (i) Rural Development of varying scale and intensity; and
 - (ii) other development that may be inconsistent with the future intent for the Rural Planning Area described below.
- (b) The Rural Planning Area is intended for Rural Development that contributes to the amenity and landscape of the area. In particular -
 - (i) building and structures are sited to protect the amenity of adjoining premises and contribute to maintaining the rural landscape;
 - (ii) Rural Development is located, designed and constructed to minimise potential adverse environmental impacts;

- (iii) development is compatible with the rural landscape or has a nexus with Rural Development; and
- (iv) development is adequately serviced by infrastructure.

...

(f) Development, other than Rural Development is only located in the Rural Planning Area where no viable alternative location exists, and where that development will not detrimentally affect rural amenity and the rural landscape

(g) Three sub-areas are identified for the Rural Planning Area based on land capacity and lot sizes: the Rural 10 sub-area, the Rural 40 sub-area and the Rural 400 sub-area. These sub-areas are shown on map 3.1 and -

...

(ii) the Rural 40 sub-area is intended for Agriculture, Aquaculture and Animal Husbandry on a minimum lot size of 40 hectares; ...

... "

[9] It is common ground that at the relevant time the Development Assessment Table for Material Change of Use in 3.1.2 of the planning scheme had the effect that a material change of use for Landscape Supplies in the rural 40 sub-area was Code assessable but a material change of use for Transport Depot was impact assessable.¹²

[10]

"3.1.3 RURAL PLANNING AREA CODE³

Purpose: The purpose of this code is to ensure that development within the Rural Planning Area is consistent with the character of the Rural Planning Area described in the character statement.

Applicability: This code applies to self-assessable and assessable development in the Rural Planning Area.

3 Where self-assessable development cannot comply with the acceptable solutions, a code assessable solution is required.

...

PART B	
Performance Criteria	Acceptable Solutions for Assessable Development Only
AMENITY	
P6 Development, other than rural development, is only located in the Rural Planning Area where no viable alternative location exists.	A6 No acceptable solution prescribed.

¹² See *Lewis v Townsville City Council & Ors* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, Appendix B (AB 993) ("*Lewis*").

<p>P7 Development will not detrimentally affect the existing and future rural amenity and landscape of the Rural Planning Area, taking into account -</p> <ul style="list-style-type: none"> (a) the manner in which the proposed development will affect the desired future character of the area; and (b) the degree of impact on the area. 	<p>A7 No acceptable solution prescribed.</p>
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...

3.2 INDUSTRIAL PLANNING AREA

3.2.1 CHARACTER STATEMENT

- (a) At the Commencement Date, premises within the Industrial Planning Area consisted of -
 - (i) Industrial Development of varying scale and intensity; and
 - (ii) other development that may be inconsistent with the future intent for the Industrial Planning Area described below.
- (b) The Industrial Planning Area is intended for Industrial Development that contributes to the amenity and landscape of the area. In particular -
 - (i) buildings and structures are sited to protect the amenity of adjoining premises and contribute to maintaining the industrial landscape;
 - (ii) Industrial Development is located on premises of a lot size that meets the needs of proposed users, customers and employees;
 - (iii) the layout of premises is secure, safe and legible, providing movement systems (roads, footpaths, public transport and bikeways), accessible on-site parking and manoeuvring to meet the needs of proposed users, customers and employees;
 - (iv) Industrial Development is located, designed and constructed to minimise potential adverse environmental impacts;
 - (v) landscaping of premises on which development is located contributes to maintaining or establishing an attractive Streetscape;
 - (vi) development is compatible with the industrial landscape or has a nexus with Industrial Development; and
 - (vii) development is adequately serviced by infrastructure.
- (c) Development, other than Industrial Development, is only located in the Industrial Planning Area where that development will not compromise the future use of the Industrial Planning Area for Industrial Development.
- (d) Three sub-areas have been identified for the Industrial Planning Area based on the potential impacts, needs,

scale and intensity of industry: the Light and Service Industry sub-area, the General Industry sub-area and the Noxious or Hazardous Industry sub-area. These sub-areas are shown on map 3.2; and -

- (i) the Light and Service Industry sub-area is for Industrial Development that -
 - A. causes minimal environmental impact beyond the premises' boundaries;
 - B. has a strong service and commercial orientation; and
 - C. involves high levels of interface with, and accessibility by, the public.

Shopping Centres or high impact Industrial Development are not consistent with the desired development outcomes for this sub-area;

- (ii) the General Industry sub-area is intended for a wide range of Industrial Development that may cause environmental impacts which affect premises beyond the premises' boundaries. Development, other than Industrial Development, is located where there is a direct nexus with surrounding Industrial Development and is of a scale that serves only the workforce of the sub-area and does not attract trade from outside the sub-area. Noxious or Hazardous Industry is inconsistent with the outcomes intended for this sub-area; and
- (iii) the Noxious or Hazardous Industry sub-area is intended for Noxious or Hazardous Industry. Industrial Development that has a direct nexus with Noxious or Hazardous Industry, is consistent with the desired development outcomes for this sub-area.

...

PART 7

DEFINITIONS – THE DICTIONARY

There are five Planning Areas in the City of Thuringowa: Rural, Industrial, Centres, Open Space and Recreation and Residential. Each Planning Area includes a Character Statement, Development Assessment Table and a Planning Area Code.

...

7.3 DEVELOPMENT DEFINITIONS

DEVELOPMENT TERM	DEFINITION	INCLUDES	EXCLUDES	INCLUDED IN
...				
Extractive Industry	The extraction or removal of sand, gravel, rock, stone and similar substances that materially affects the premises or its use. It includes the treatment of any substance extracted or removed from the premises.		Landscape Supplies Mining Activity	
...				

Industrial Development		General Industry Industry Light and Service Industry Noxious or Hazardous Industry		
...				
Industry	<p>Premises used for any of the following purposes -</p> <ul style="list-style-type: none"> (a) any process of manufacture; (b) dismantling or breaking up of any article; (c) treating waste materials; (d) winning clay, gravel, rock, sand, soil, stone or other materials; (e) laundering, repairing, servicing machinery or vehicle; or (f) any process of testing or analysis. <p>It includes the use of the premises for -</p> <ul style="list-style-type: none"> (a) storing goods used in the operation or activity or resulting from it; (b) providing amenities for people engaged in the operation or activity; (c) selling by wholesale good resulting from the operation or activity; and (d) accounting or administration in connection with the operation or activity. 			Industrial Development
...				
Landscape Supplies	<p>Premises used for the storage or sale of sand, soil and other landscaping materials. The term includes the wholesale or retail sale of -</p> <ul style="list-style-type: none"> (a) plants; (b) goods associated with the cultivation of plants; or (c) garden ornamentation, furniture or structures. 		Agriculture Extractive Industry Garden Centre	
...				
Rural Development		Agriculture Animal Husbandry Aquaculture Host Farm Intensive Animal Husbandry Rural Accommodation Units Rural Dwelling		

		Rural Home Occupation		
		Rural Industry		
...				
Rural Industry	Premises used for the - (a) handling, processing or packing of agricultural products whether produced on site or off; or (b) servicing of or repair of plant and equipment used in Agriculture.		Abattoir Agriculture Animal Husbandry	Rural Development
...				
Transport Depot	Premises used for the storage, maintenance, service or garaging of more than one truck, bus, taxi or other commercial vehicle. It may include the use of premises as an operational base for fleet vehicles.		Service Station Transit Centre Vehicle Repair Premises	

... "

The primary judge's reasons

- [11] The judge noted that the applicant's land was in the rural 40 sub-area of the Rural Planning Area Code in the planning scheme. The application for material change of use concerned a proposed activity which would occupy only about two of the 43.37 hectares. The relevant statute was the IPA under the transitional provisions of the *Sustainable Planning Act*.¹³
- [12] The Council's reasons for refusing the application were fourfold.¹⁴ The first was that it would compromise the achievement of the Desired Environmental Outcomes (DEOs) of the planning scheme contrary to s 3.5.14(2) IPA.¹⁵ The second was that it would result in an incompatible and inconsistent use in the location, contrary to the Character Statement of the Rural Planning Area within the planning scheme.¹⁶ The third was that it was in conflict with Performance Criteria P6 of the Rural Planning Area Code of the planning scheme.¹⁷ The fourth was that it was in conflict with Performance Criteria P7 of the Rural Planning Area Code.¹⁸
- [13] His Honour summarised the issues in dispute between the parties;¹⁹ referred to the relevant legislative²⁰ and planning scheme²¹ provisions; identified relevant planning principles as applicable. Planning schemes should be construed broadly with a sensible practical approach; as a whole; in a way which best achieves their apparent purpose and objectives; and in light of any prescription against prohibiting development contained in the IPA. Statements of intents or aims or objectives are intended to provide guidance in the task of balancing the relevant facts,

¹³ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [1]-[3].

¹⁴ Above, [4].

¹⁵ Set out at [7] of these reasons.

¹⁶ See planning scheme 2.4 set out at [8] of these reasons.

¹⁷ Set out at [10] of these reasons.

¹⁸ Above.

¹⁹ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [5]-[11].

²⁰ Above, [12]; these were attached to his Honour's reasons as Appendix A.

²¹ Above, [13]; these were attached to his Honour's reasons as Appendix B.

circumstances and competing interests when deciding whether a particular use should be rejected as inappropriate. A strategic plan sets out broad design objectives; not every objective needs to be met before approving a proposal; it should be read broadly and not pedantically. Although planning documents have the force of law they are not drawn with the precision of a statute. Conflict does not necessarily rule out a particular proposal. Implementation objectives must be read sensibly and in context and are but a function of the principal objective which is better understood by reading all implementation objectives and understanding the inherent strategy.²² The court is not a planning authority; it is not the court's function to substitute planning strategies for those that a planning authority has carefully and properly adopted.²³

- [14] His Honour summarised the applicant's evidence. His business has contracts with quarries and other extractive industries, carting raw material to and from various locations, primarily to the north and west.²⁴ He currently has 26 B-double trucks, 16 of which would be initially on the land. He wanted ready access to a quarry three kilometres away operated by the Barro Group Pty Ltd (the principal supplier to his business for transporting material to Greenvale, northwest of Townsville) and to an identified freight haulage route.²⁵ The granting of the application would avoid his business using heavily trafficked urban roads as it would if it was located in an existing industrial area.²⁶ Black River Road on which the land is situated is an identified freight haulage route.²⁷ Other businesses near the land included Zinaback Mining (a crushing plant and materials supplier); Black River Stadium (a rodeo business operated infrequently by Nodnoc Pty Ltd); an outdoor paintball game range; and the Barro quarry.²⁸ The applicant would accept conditions on the approval of his application. He had 10 trucks in other localities. If he were to use them in the business after the change of use were approved, he would have to apply for 26 trucks (an increase of 10) to park on the land.²⁹ He agreed that the Bruce Highway and Shaw Road were high mass limit approved roads.³⁰ His application would involve potentially 100 truck movements in the two daily peak hours (morning and late afternoon) on the basis of 25 trucks leaving from and returning to the business twice a day. The proposed landscaping business was the screening and supply of sand, utilising landscaping bins 3 metres x 3 metres containing various grades of material.³¹
- [15] His Honour then discussed the concept of need under the planning scheme which was raised when the applicant's town planner, Mr Stephen Motti, was cross-examined by the Council's barrister. Mr Motti rejected the suggestion that planning or community need was not advanced in the applicant's case and referred to the balancing of expectations inherent in the DEOs.³²

²² Above, [16] citing *Westfield Management Ltd v Pine Rivers Shire Council & Anor* [2004] QPELR 337, [18].

²³ Above, [17] citing *Webster v Caboolture Shire Council* [2009] QPELR 455, [7] and *Grosser v Council of the City of Gold Coast* (2001) 117 LGERA 153.

²⁴ Above, [18].

²⁵ Above, [19].

²⁶ Above, [20].

²⁷ Above, [21].

²⁸ Above, [22].

²⁹ Above, [23]-[24].

³⁰ Above, [25].

³¹ Above, [26].

³² Above, [27].

- [16] The judge stated that there is a need if its provision, taking all things into account, improves the physical wellbeing of the community.³³ A need may be weak or strong, depending on the facts. Need is a relative concept and dependent on the circumstances which the planning authority has to take into account. It is to be considered objectively from the perspective of a community, not from the perspective of the applicants for development, their competitors or objectors.³⁴
- [17] In determining whether there were other available sites, it is necessary to consider whether the overriding need for development can be otherwise accommodated on suitable and available land.³⁵
- [18] The judge was not "satisfied that any 'need' in the planning sense [had] been established on the evidence, if indeed it was ... an issue for determination ... in the proceeding. There is some doubt that was intended or done in the [applicant's] case."³⁶ Whilst the land was no doubt a convenient place on which to operate the proposed use, it was in a rural planning area and the proposed use was an urban industrial use.³⁷ His Honour was not satisfied that the appellant had adequately considered alternative sites.³⁸
- [19] As to planning issues, his Honour noted that the town planners, Mr Motti for the applicant and Ms Tricarico for the Council, had prepared a joint report. They agreed the two primary planning issues were compliance with the DEOs; and compatibility and compliance of the proposed use with the Rural Area Planning Code and Performance Criteria P6 and P7.³⁹ They disagreed as to whether the proposed use was a compatible and consistent use in the location; whether there was conflict with the planning scheme; and, if so, whether there were grounds to justify an approval despite the conflict.⁴⁰
- [20] As to compliance with the DEOs, Ms Tricarico opined that the proposed use was industrial not rural and inconsistent with the City Strategies of DEO 4(a) and (b) and DEO 6(a), (c) and (e).⁴¹ The development was incompatible with those DEOs in a rural locality and no need for the proposed use at this location was demonstrated.⁴²
- [21] Mr Motti, on the other hand, opined that the proposed use met the balanced expectations established by the DEOs in the context of strong economic development in Townsville, achieving the City Strategy DEOs 4(b), (c), (d) and (e) and 6(b), (c), (d) and (e). The proposal included vegetative buffer zones; proximity to an existing quarry; and Black River Road was a Primary Freight Network Road. The land was adjacent to other established non-rural uses and was a small footprint on the total area of the land allowing for the retention of a significant area of vegetation.⁴³

³³ Above, [28] citing *Cut Price Stores Retailers Ltd & Ors v Caboolture Shire Council* [1983] QPELR 126, 131.

³⁴ Above, [29] citing *Webster v Caboolture Shire Council* [2009] QPELR 455, [153]-[154].

³⁵ Above, [31] citing *Rich & Anor v Central Highlands Regional Council* [2010] QPEC 36, p 7.

³⁶ Above, [32].

³⁷ Above, [33].

³⁸ Above, [34].

³⁹ Above, [36].

⁴⁰ Above, [37].

⁴¹ Set out in [8] of these reasons.

⁴² *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [38].

⁴³ Above, [39].

- [22] His Honour considered the question of compatibility and consistency of the proposed use and compliance with P6 and P7.⁴⁴ Ms Tricarico contended that the proposed use was not rural development under the planning scheme and had adverse impacts on amenity, environment and maintenance of rural landscape; it was for urban industrial development and conflicted with P6 and P7. The Character Statement⁴⁵ of the landscape was rural-type uses. The proposed stockpiling of material would give rise to environmental and amenity impacts, altering the rural amenity by introducing an urban industrial use without any broad investigation into alternative sites.⁴⁶
- [23] By contrast, Mr Motti opined that the expected uses were not exhaustively defined and were land consumptive. The proposed use was consistent with adjacent extractive industry and recreational uses. It exhibited characteristics of land intensive rural use. The nearest rural residential development was five kilometres north. Traffic and noise were manageable issues.⁴⁷ Alternative sites were not compatible; were removed from principal haulage routes and quarries; and were costly in the context of the land area required. Vegetation retention, and buffers and locating the work site on the roadway side of the watercourse through the land with proximity to the Primary Freight Network Road would protect rural amenity. Black River Road was expected to accommodate intra-regional freight movements, augmenting principal freight routes.⁴⁸
- [24] His Honour then turned to Mr Motti's individual report. He argued that a Transport Depot could be recognised as a Rural Use and had characteristics consistent and compatible with uses within the term "Rural Development". P6 was complied with because there were no "viable alternative locations". P7 was complied with because the land was in the rural 40 sub-area and the proposed use was of no greater impact than already established uses in the locality.⁴⁹ An Industrial use was not incompatible with the Rural Area. The impacts arising from the proposed use were manageable.⁵⁰
- [25] In cross-examination, Mr Motti agreed that the designation of planning areas was to indicate where certain types of development were considered suitable now and in the future, so as to provide confidence to residents. The Development Assessment Table⁵¹ gives an idea of incompatibility. The proposed use was compatible in the Self-Assessable column but incompatible in the Code and Impact Assessable columns. Change could be expected over time as to future character. The nearby rodeo stadium was not a rural use but was not necessarily incompatible with rural use; as that use had been approved under a previous scheme it had to be accepted.⁵² The term "Rural Industry" included plant such as tractors and harvesters.⁵³ The Townsville-Thuringowa Road Freight Network "in context" concerned "land use".⁵⁴

44 Set out at [8] of these reasons.

45 Set out at [8] of these reasons.

46 *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [41].

47 Above, [42].

48 Above, [43].

49 Above, [45].

50 Above, [46].

51 Set out at [11] of these reasons.

52 *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [47].

53 Above, [48].

54 Above, [49].

Whilst screening of material was not within the terms of the definition of Landscape Supplies, it was implied.⁵⁵

- [26] Ms Tricarico opined that the proposed use did not fit well within the rural landscape which contained detached dwellings on generally large, vegetated lots; it adversely affected the amenity and landscape of the area. It was inconsistent with the intentions for the rural 40 sub-area and the overall Rural Planning Area. She emphasised the Character Statement in s 3.1.1(f) of the planning scheme: non-rural development is "*only located* in the Rural Planning Area when *no viable alternative* location exists and where that development will not detrimentally affect *rural amenity* and the *rural landscape*" (judge's emphasis).⁵⁶ Ms Tricarico concluded that the proposed use was an industrial one within the Rural Planning Area; there had been no thorough investigation of viable alternative locations; it was totally out of character with the surrounding landscape; it did not reinforce the city's character; community confidence in the continued integrity of planning area designations must be maintained; and an industrial use would not integrate into the rural area and would be disruptive to the surrounding community.⁵⁷ Neither the applicant's evidence nor any proposed amendment by way of minor change altered her view.⁵⁸
- [27] In cross-examination, she agreed that suggested alternative sites would require amalgamation; and Black River Road connected with two major roads. Whilst she had earlier stated that Black River Road was infrequently trafficked, in re-examination she explained she said this was when comparing it to the Bruce Highway and Hervey Range Road.⁵⁹ She agreed that transport was an important aspect of farming; transport depots have previously been placed in rural areas; and Landscaping Supplies was Code assessable and could be compatible with a rural area. She emphasised, however, that here the connection of both transport and landscaping supplies to a transport depot placed the focus in the planning sense on "Industry". She agreed that "alternative sites" was a less important concept where the proposed use was assessable in two columns of the Planning Development Assessment Table. The planned road works and safety issues were insufficient to justify approval on the traffic ground.⁶⁰
- [28] His Honour next discussed the evidence of the expert witness, Mr King, as to three aspects of air quality: engine exhaust emissions; workshop engine fumes and other odours; and dust generated by movement, loading and unloading of trucks, screening and grading of sand and emissions of dust by the wind from storage areas.⁶¹ His Honour set out s 7 of the planning scheme's *Environment Protection (Air) Policy* 2008.⁶² Mr King opined that the proposed development would not generate any significant pollutants to cause adverse amenity impacts on adjoining properties.⁶³ There was water storage and sprinklers on the land and a water truck were available. There was a minimum 20 metre wide vegetative buffer on the road frontage which would limit dust emission.⁶⁴ Mr King recommended a dust

⁵⁵ Above, [50].

⁵⁶ Above, [51].

⁵⁷ Above, [52].

⁵⁸ Above, [53].

⁵⁹ Above, [54].

⁶⁰ Above, [55].

⁶¹ Above, [59].

⁶² Above, [60].

⁶³ Above, [61].

⁶⁴ Above, [62].

management plan: damping with water and maintaining the vegetation buffers to control dust to an "appropriate degree". Air quality impacts could be controlled to meet regulatory criteria and avoid any adverse amenity impact on neighbouring locations.⁶⁵ The residence on Nodnoc Pty Ltd's land was 200 metres from the boundary and 250 metres from the proposed activity on the applicant's land.⁶⁶

- [29] The judge determined that dust was a very real concern. It would be affected by weather, including lack of rainfall and wind strength and direction. Despite Mr King's evidence, the judge considered that the air quality issue was potentially an adverse impact on the rural amenity. It was an issue which may be amenable to conditions but weather elements meant that, even with the imposition of conditions, air quality would be inherently difficult to manage.⁶⁷
- [30] The judge next considered the noise issue. The Council and Mr Dawson agreed that appropriate development conditions would adequately deal with noise. The applicant's expert, Mr Rumble, opined that conditions would result in no unacceptable impact.⁶⁸ Nodnoc Pty Ltd, however, was concerned about noise. It maintained that Mr Rumble's opinion was not reliable because he did not measure noise levels at the front of the land; the noise baseline studies were taken at the rear of the land; no noise measurements were taken at adjacent residences; noise associated with truck movements between midnight and 7.00 am was not assessed; and noise from the screening plant had not been assessed.⁶⁹
- [31] Mr Rumble responded that Nodnoc Pty Ltd had not understood his methodology and that he did measure through generic data-base information and modelling of noise impact. He selected the site on which he measured ambient noise levels because it was located as far away as practicable.⁷⁰
- [32] His Honour accepted that response.⁷¹ But the judge observed that the agreement by the Council and others, that noise levels could be controlled by imposing conditions, very much depended on the terms of these conditions. Noise remained a real concern. The screening plant operation had the potential to impact upon rural amenity in an unacceptable way and the noise level it would generate was unknown. Nodnoc Pty Ltd was the most vulnerable to any unacceptable impact from noise which may not be amenable to appropriate conditions.⁷²
- [33] The judge next discussed the traffic issue. The applicant's traffic expert, Mr Horman, based his opinion on up to 25 B-double trucks working from the land around the clock over two 12 hour shifts, changing at 6.00 am and 6.00 pm. Many trucks would often not be in use and would simply be parked at the site.⁷³ There would be up to 100 movements of drivers arriving or leaving in private vehicles for work over the two peak periods each day between 6.00 and 7.00 am and 6.00 and 7.00 pm. There would also be up to 100 truck movements each day in those peak periods, with 25 trucks leaving and returning morning and evening. This would

⁶⁵ Above, [63].

⁶⁶ Above, [65].

⁶⁷ Above, [67]-[69].

⁶⁸ Above, [71].

⁶⁹ Above, [72].

⁷⁰ Above, [75]-[76].

⁷¹ Above, [77]-[78].

⁷² Above, [79]-[80].

⁷³ Above, [82].

reduce to 64 truck movements if only 16 trucks were used in the business.⁷⁴ Traffic counts at peak times on Black River Road were very low and varied as between the Bruce Highway intersection and the Hervey Range Road intersection. These assessments were conservative and represented a "worse case scenario".⁷⁵ As traffic built up over time, right hand turns from Black River Road into the Bruce Highway would be impractical and left hand turns into Hervey Range Road would become preferable. The intersection of Black River Road and Hervey Range Road should be upgraded by widening the road shoulders.⁷⁶

- [34] The judge then referred to para 9 of the schedule of conditions attached to Barro Group's approval⁷⁷ (ex 12) which related to the neighbouring quarry business. It stated "[t]he number of truck movements on Gieseman Road shall not be permitted to exceed 600 in any one day or 60 in any one hour" The judge noted that this was "an extraordinary number and on any reasonable view logistically unachievable even with the most earnest intent!"⁷⁸
- [35] The judge returned to Mr Horman's evidence⁷⁹ and noted his conclusion that the proposed development would have only moderate traffic impacts having regard to the existing low traffic volumes on Black River Road; these impacts would easily be handled by relevant conditions.⁸⁰ His Honour noted Nodnoc Pty Ltd's concern about lights from vehicles leaving the land shining into its residence at night.
- [36] His Honour determined that vehicle numbers outside peak times appeared fairly minimal. The imposition of the accepted conditions, particularly turning lanes at both access points to the land, would alleviate the most critical issue for traffic movement and safety. Much of the vehicle movement to be generated by the proposed operation would be either turning into Black River Road from the north on the Bruce Highway or exiting into the Hervey Range Road from Black River Road to move east to the Port or west to Greenvale.⁸¹ From a planning perspective, the road work required by the proposed conditions would potentially alleviate traffic safety concerns and were clearly necessary. The benefit to the public was incidental. But the increase in vehicle movements over the two short peak periods six days a week would have a significant impact on the rural amenity.⁸²
- [37] The judge referred to Mr Condon's evidence on behalf of Nodnoc Pty Ltd. He conducted rodeos on his property which adjoined the applicant's. He expressed concern about noise, dust, traffic, suitability of site, and non-rural use, and feared that conditions may be an ineffective solution.⁸³
- [38] As to community expectation, his Honour noted that this was not in itself critical.⁸⁴ The concept of amenity raised expectations of residents and other users of the locality. It related to the preservation of those neighbourhood characteristics which

⁷⁴ Above, [83].

⁷⁵ Above, [83]-[84].

⁷⁶ Above, [85].

⁷⁷ *Barro Group Pty Ptd v Thuringowa City Council* [1999] QPELR 312; AB 946.

⁷⁸ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [86].

⁷⁹ Above, [87]-[90].

⁸⁰ Above, [91].

⁸¹ Above, [92].

⁸² Above, [93].

⁸³ Above, [94].

⁸⁴ Above, [95] citing *Acland Pastoral Co Pty Ltd v Rosalie Shire Council* [2007] QPEC 112, [40].

make it pleasing in appearance both to those living in and using the neighbourhood and those passing by.⁸⁵ The concept of amenity is subjective; knowing the use to which a particular site is or may be put may affect the perception of amenity.⁸⁶ The expression "character" has a wide meaning and must be considered in the context in which it is used in the planning scheme; its dictionary definition is "the aggregate of politics that distinguish it ... from others".⁸⁷

- [39] The judge found that Mr Condon's evidence and Nodnoc Pty Ltd's submissions, together with the evidence of Mr Dawson and Ms Tricarico, reflected community concern, in the limited sense that those choosing a rural lifestyle have an expectation of certainty from a planning scheme.⁸⁸ The proposed development would have adverse impacts on the rural amenity of the locality which would not be ameliorated by the potential conditions or by the vegetative buffer. Truck movements and the landscaping supplies operation were not capable of definitive and full appreciation because the type, size, operation and amenity aspects of the screening plant were unknown.⁸⁹
- [40] His Honour set out the competing submissions. The Council referred to the Character Statement for the Rural Planning Area; the terms of s 3.1.1(b)(f) were more "forceful" than in Character Statements for other Areas. The proposed use was in fundamental conflict with the planning scheme because the Transport Depot was an industrial use proposed for a rural area. The term "viable alternative locations" had to be considered in a community and planning sense and not from a personal sense. Mr Motti's "grounds", the Council submitted, were not "grounds" under the IPA.⁹⁰ The applicant had business operations in other locations in the city.⁹¹ The best descriptor for a transport depot was "industrial development."⁹²
- [41] Mr Dawson's lawyer referred to his reasonable expectations in the context of certainty for the future of the locality as a residential area and his fear that the proposed use would change the rural nature of the locality. The judge again referred to Mr Condon's evidence and submissions on behalf of Nodnoc Pty Ltd.⁹³
- [42] The applicant's counsel emphasised the court's self-limiting approach in planning cases. The land was a good site with no hard amenity impact. Its proximity to Barro Group's quarry for which the applicant did work constituted a public benefit. The proposed use was similar to rural industry. Under the planning scheme a transport depot was not "industrial". The applicant's expert witness, Mr Rumble, addressed noise, air quality and traffic concerns and demonstrated compatibility in respect of amenity impacts. Mr Motti's evidence as to character should be preferred to that of Ms Tricarico.⁹⁴ Only a small portion of the land was to be used in the business and this was consistent with the definition and character of rural industry. The locality on Black River Road was not a quiet rural area as future traffic

⁸⁵ Above, [96] citing *Vacuum Oil Company Pty Ltd v Ashfield Municipal Council* [1956] LGERA 8, 11.

⁸⁶ Above, [97] citing *Broad v Brisbane City Council* [1986] 2 Qd R 317, 326.

⁸⁷ Above, [98] citing *Rosswallmore Property Pty Ltd v Maroochy Shire Council* [2009] QPELR 73, [40].

⁸⁸ Above, [99]-[100].

⁸⁹ Above, [101].

⁹⁰ Above, [106].

⁹¹ Above, [107].

⁹² Above, [113].

⁹³ Above, [108]-[109].

⁹⁴ Above, [110].

projections indicated. As to viable alternative locations, the planning scheme was not as rigid as Council submitted.⁹⁵ Whilst the proposed use was contrary to s 3.1.1(f) in the Development Assessment Table, that provision was not engaged when the use straddled rural development and industrial development. Landscape Supplies was not an industrial use. Any conflict with the planning scheme was minor and all properly advanced issues could be dealt with by conditions which would be easy to enforce.⁹⁶

- [43] The judge then set out the competing contentions of Mr Motti and Ms Tricarico as to whether there was conflict with the planning scheme and, if so, whether there were sufficient grounds to justify the approval of the development application.
- [44] Mr Motti emphasised the following. There was a connection between Rural Development and the Primary Freight Network Road on a scale no greater than permitted Code uses. The land was proximate to quarries and a haulage route. The proposed use would have no greater impact than other adjoining existing activities. The land's size was consistent with adjoining holdings. Any unacceptable impacts and amenity considerations could be addressed by conditions and vegetation buffers.⁹⁷
- [45] By contrast, Ms Tricarico submitted that there were major conflicts which made the proposed use incompatible with the planning scheme. It was an industrial use within a rural area. It was not integrated with the existing rural character of the area. It was inconsistent with the intent of the rural 40 sub-area and the overall Rural Planning Area. It would result in increased noise and activity which was out of character with the area. The development could be appropriately located within an alternative viable industrial location. It did not reflect community expectations or the desired character for the quiet rural nature of the area.⁹⁸
- [46] His Honour observed that whether the proposed use was in conflict with the planning scheme under s 3.5.14(2)(b) of the IPA was a matter of law for his determination, not a matter for the town planners or other witnesses. His Honour discussed⁹⁹ the principles stated in *Weightman v Gold Coast City Council*¹⁰⁰ as explained in *Woolworths Ltd v Maryborough City Council (No2)*¹⁰¹ where Fryberg J noted the difference between "compromise" and "conflict" in s 3.5.14(2). As to conflict, the court must identify its nature and extent and assess, in the context of the planning scheme as a whole, whether there are sufficiently weighty grounds to justify approval despite the conflict, and bearing in mind the proscription in the IPA against prohibiting development.¹⁰² This required identifying the grounds which may justify approval; assessment of the role and importance to the planning scheme of the provisions which would be infringed should the approval be given; the adverse consequences, if any, which might flow from such infringement; and the

⁹⁵ Above, [111].

⁹⁶ Above, [112].

⁹⁷ Above, [114]-[115].

⁹⁸ Above, [116].

⁹⁹ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [119]-[120].
¹⁰⁰ [2003] 2 Qd R 441, [36].

¹⁰¹ [2006] 1 Qd R 273, 286 [23]-[24] and 296.

¹⁰² *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [121] citing *Australian Capital Holdings Pty Ltd & Ors v Mackay City Council*; *Australian Capital Holdings Pty Ltd v Mackay City Council & Ors* [2008] QCA 157; *Gelling v Cairns City Council* [2008] QPEC 38, [83].

competing merits and weight of the grounds relied on to justify approval.¹⁰³ The term "sufficient grounds" was not limited to planning issues but included in a broader sense the purpose and objects of the IPA. The expression "grounds" was relevantly defined in the IPA as "matters of public interest" and "not includ[ing] the personal circumstances of an applicant, owner or interested party".¹⁰⁴

[47] The court must weigh the nature and extent of the conflict against other factors. Conflict means the appeal must be dismissed unless there are sufficient relevant matters of public interest to justify the approval despite the conflict.¹⁰⁵

[48] The term "conflict" means "to be at variance or disagree with".¹⁰⁶ The conflicts in this case are:

- "(a) Character, amenity and lifestyle are impacted (DEO 4 and PC P7);
- (b) City Strategies in DEO 4 (a) and (b) are not achieved;
- (c) Land use patterns are impacted (DEO 6);
- (d) City Strategies in DEO 6 (a), (b), (c) and (e) are not achieved – there is nothing that creates a cohesive community, the rural 40 area is not industrial and the proposal is not rural development or use (3.1.1(b)), it is incompatible development, no need is demonstrated and it is not an appropriate use for the location;
- (e) There are alternative sites in the vicinity of infrastructure routes (3.1.1 (f) and PC P7);
- (f) It is a small footprint on the land but has a large adverse impact on the locality;
- (g) It is not in the character of land intensive 'rural use' (3.1.1 (g)); and
- (h) The Townsville Thuringowa Road Freight Network is not about land use."¹⁰⁷

[49] His Honour also adopted the six matters, summarised by Ms Tricarico and referred to earlier in his reasons, as identified conflicts with the planning scheme.¹⁰⁸

[50] The judge concluded:

"Conclusion

[126] In my view there is conflict with the planning scheme.

[127] The grounds advanced for the appellant to justify approval despite conflict are largely focused on his personal circumstances and interests rather than on matters of public interest. In the circumstance of this proposal, the role and the purpose of the planning scheme would be adversely affected by an approval despite the conflict, which outweighs any competing merit advanced by the appellant.

¹⁰³ Above.

¹⁰⁴ Above, [122] citing *Bullock & Ors v Maroochy Shire Council & Anor* [2008] QPELR 115.

¹⁰⁵ Above, [123] citing *Retirement Properties of Australia Pty Ltd v Maroochy Shire Council* [2008] QPEC 61, [45].

¹⁰⁶ Above, [124] citing *Webster v Caboolture Shire Council* [2009] QPELR 455.

¹⁰⁷ Above, [124].

¹⁰⁸ Above, [125], referring to [52] and [116] as discussed in [26] and [45] of these reasons.

- [128] Mr Motti opined that the proposed use exhibited characteristics of land intensive rural use. I do not agree. There may be machinery used in rural activity and movement of resources and materials by vehicles and machine – but not in the intensity of the proposed use. The focus of rural use of land lies not in the compactness of the activity on the land but in the broader purpose of the activity in the rural context.
- [129] The focus of the proposed use is an industrial one. That type of use is incompatible with the planning scheme: the Rural Planning Area Character Statement 3.1.1 (b) (i), (ii) and (iii), (f), (g)(ii); the Rural Planning Area Code and Performance Criteria P6 and P7, particularly in respect of need/alternative locations; and DEO's 4 and 6, including City Strategy 2.6.2(c).
- [130] In my view the DEO's are compromised by the proposed development; character, amenity and lifestyle are adversely impacted; the proposed use is industrial, not rural; it is not rural use or rural development; and there are viable alternative sites in industrial areas.
- [131] I do not consider that the development application can be justified on any grounds, in the broad understanding of that expression. I do not consider that there are grounds sufficient to justify approval notwithstanding that conflict."

Did the judge err in the construction of s 3.5.14(2) the IPA?

- [51] The applicant contended that his Honour misconstrued s 3.5.14(2) of the IPA¹⁰⁹ by misunderstanding the difference between s 3.5.14(2)(a) (compromising the achievement of the desired DEOs) and s 3.5.14(2)(b) (conflict with the planning scheme). His Honour erred in not appreciating the distinction between a DEO and the strategies used to achieve it under the planning scheme. The judge made no express finding that any DEO was threatened. The Council did not submit that any DEOs were compromised by the proposed development.
- [52] I consider the terms of s 3.5.14(2) make clear the legislature intended that decisions on development applications distinguish between, on the one hand, applications which compromise the achievement of relevant DEOs and must be refused;¹¹⁰ and on the other, development applications which conflict with the planning scheme, but sufficient planning grounds exist to justify the approval despite the conflict.¹¹¹ His Honour referred to s 3.5.14(2) and set it out in full in Appendix A to his reasons. The judge also discussed the relevant principles and authorities as to its construction and that of its predecessor, s 4.4(5A) *Local Government (Planning and Environment) Act 1990 (Qld) (repealed)*,¹¹² and pertinent authorities including *Weightman and Woolworths v Maryborough City Council*.¹¹³ The judge quoted

¹⁰⁹ Set out at [7] of these reasons.

¹¹⁰ IPA, s 3.5.14(2)(a).

¹¹¹ IPA, s 3.5.14(2)(b). See *Woolworths Ltd v Maryborough City Council (No 2)* [2006] 1 Qd R 273, 286.

¹¹² See also *Local Government (Planning and Environment) Act 1990 (Qld) (repealed)*, s 4.4(5).

¹¹³ Set out at [48]-[50] of these reasons.

a passage from the latter case which identifies the distinction between conflict and compromise. These matters suggest his Honour was cognisant of the distinction between s 3.5.14(2)(a) (compromise) and s 3.5.14(2)(b) (conflict).

- [53] The present planning scheme¹¹⁴ was prepared in accordance with the IPA as a framework for managing development in Thuringowa by identifying both desired outcomes for Thuringowa and assessable and self-assessable development.¹¹⁵ The planning scheme is to be interpreted in a way that best achieves the outcomes contained in its DEOs.¹¹⁶ Part 2 of the planning scheme sets out its DEOs (the broadest of planning statements) and the strategies by which each DEO is to be achieved. It is common ground that the DEOs relevant to this contention are Character, City Image, Amenity and Lifestyle (DEO 4);¹¹⁷ and Land Use Patterns (DEO 6).¹¹⁸
- [54] The judge summarised the conflicts he found with the planning scheme including his acceptance of Ms Tricarico's view that the proposed use was incompatible with the planning scheme.¹¹⁹ In [127] and [128]¹²⁰ his Honour summarised the applicant's contentions as to why the approval was justified despite the conflict. His Honour then determined at [129]¹²¹ that the proposed use of the land had an industrial focus and was "incompatible" with the planning scheme's Rural Planning Area Character Statement;¹²² the Rural Planning Area Code and Performance Criteria P6 and P7, particularly in respect of needs/alternative locations;¹²³ and DEOs 4 and 6¹²⁴ including City Strategy 2.6.2(c).¹²⁵ In [130] the judge determined that the DEOs were "compromised" by the proposed development. In [131] his Honour found that there were insufficient grounds to justify granting the development application despite its conflict.¹²⁶
- [55] The terms "compromise" and "conflict" are not defined in the IPA. They should be given their ordinary meanings in the context of s 3.5.14(2) which clearly contemplates that an application which compromises the achievement of DEOs is more serious than one which conflicts with the planning scheme. That is because the former requires the refusal of the application whereas the latter leaves open the opportunity to provide planning grounds to justify the approval. The Macquarie Dictionary¹²⁷ relevantly defines the verb "compromise" as "**7.** to make liable to danger, suspicion, scandal etc; endanger the reputation. **8.** to make concessions at the expense of one's integrity or original plans." In the context of s 3.5.14(2), compromise means to endanger the integrity of the DEOs. This construction is consistent with that taken by Brabazon QC DCJ in *Webster v Caboolture Shire*

¹¹⁴ The relevant provisions are set out in [8]-[10] of these reasons.

¹¹⁵ City of Thuringowa Planning Scheme 1.1.1.

¹¹⁶ Above, 1.1.2.

¹¹⁷ Above, 2.4.

¹¹⁸ Above, 2.6.

¹¹⁹ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [124] discussed at [48] and [49] of these reasons.

¹²⁰ Set out at [50] of these reasons.

¹²¹ Above.

¹²² Planning scheme, 3.1.1(b)(i), (ii) and (iii), (f), (g)(ii).

¹²³ Above, 3.1.3 set out at [10] of these reasons.

¹²⁴ Above.

¹²⁵ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [129].

¹²⁶ Above.

¹²⁷ Federation edition, 2001.

*Council*¹²⁸ approved by this Court in *ALDI Stores (A Limited Partnership) v Redland City Council*¹²⁹ where compromise was used synonymously with threaten.

- [56] In [129] of his reasons, his Honour concluded that the proposed use was incompatible with aspects of the planning scheme including DEOs 4 and 6 and City Strategy 2.6.2(c).¹³⁰ The adjective "incompatible" is defined in the Macquarie Dictionary as "1. not compatible; incapable of existing together in harmony. 2. contrary or opposed in character; discordant. 3. that cannot coexist or be conjoined" The term incompatible could certainly be used to describe the concept of a development which conflicts with the planning scheme, but it could also be used to describe the more extreme concept of a development which compromises the achievement of DEOs which are at the essence of the planning scheme. A development application which cannot exist together with the achievement of a DEO must compromise the DEO.
- [57] While his Honour could have more clearly separated his reasoning in respect of s 3.5.14(2)(a) on the one hand and s 3.5.14(2)(b) on the other, I consider it clear enough that his Honour found the proposed development both compromised the achievement of DEOs 4 and 6 (s 3.5.14(2)(a)); and conflicted with the planning scheme with insufficient grounds to justify granting the development application despite the conflict (s 3.5.14(2)(b)).
- [58] It is true that the Council did not submit that the proposed development compromised the achievement of DEOs (even though that was the Council's findings at first instance). It was content to satisfy the less onerous test under s 3.5.14(2)(b). Mr Dawson, however, clearly contended that the proposed development compromised DEOs,¹³¹ as, in effect, did the Council's town planner, Ms Tricarico, who considered the development was incompatible and in major conflict with the planning scheme.¹³² The judge did not have to specifically state that DEOs 4 and 6 were threatened to conclude that they were compromised. He made clear that he understood the meaning of "compromise" in s 3.5.14(2)(a). His Honour's finding that the development was incompatible with DEOs 4 and 6 was a finding that those DEOs were more than threatened; the development could not coexist with the achievement of DEOs 4 and 6; that is, the development and those DEOs were incompatible and the development compromised those DEOs. It is trite to state that compromise of significant strategies by which a DEO is to be achieved may amount to compromise of the achievement of that DEO. The judge made factual findings which supported his conclusion that the achievement of DEOs 4 and 6 were compromised because the proposed development was in essence an industrial use in a rural neighbourhood and that such use was incompatible and could not exist together with the achievement of DEOs 4 and 6. See, for example, planning scheme 2.4.2(a) and (b) and 2.6.2(a) and (c). There is no reason to conclude the judge considered only whether some strategies to achieve those DEOs were compromised rather than whether the achievement of those DEOs themselves were compromised.
- [59] I remain unpersuaded that his Honour erred in the construction of s 3.5.14(2) of the IPA. But even if I am wrong, I cannot see that this error affected his Honour's

¹²⁸ [2009] QPELR 455, [102]-[107].

¹²⁹ [2009] QCA 346, [19].

¹³⁰ Set out at [50] of these reasons.

¹³¹ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [9].

¹³² Above, [116], discussed at [45] of these reasons.

reasoning and conclusion as to conflict under s 3.5.14(2)(b) which was in itself reason to refuse the development application. This contention does not provide reason to give leave to appeal.

Did the judge make a factual finding without evidence?

- [60] The applicant contends that the judge was required to take into account para 9 of ex 12, the development approval relating to Barro Group's nearby premises which authorised it to generate up to 600 truck movements in any one day or 60 in any one hour.¹³³ It was uncontroversial that some of Barro Group's heavy vehicles would travel along Black River Road on a path identical to those to be taken by the applicant's trucks if the proposed development was approved. The judge's statement, that the conditions to Barro Group's development were for "an extraordinary number [of vehicle movements] and on any reasonable view logistically unachievable even with the most earnest intent!",¹³⁴ was made without supporting evidence and constituted an error of law which affected the balance of his Honour's reasoning as to the question of impact on character and amenity.
- [61] Elsewhere in his reasons his Honour made clear that he understood that a part of the applicant's case was that there were local non-rural businesses in this rural area, including Barro Group's quarry.¹³⁵ The judge's impugned observations appear to correctly state the obvious; the evidence did not support a conclusion that there were anything like 600 per day or 60 per hour vehicle movements generated by Barro Group's quarry or that this was a realistic future prediction. In any case, the impugned statement¹³⁶ in context was a mere aside which seems to have had no or very limited effect on his Honour's reasons.
- [62] This contention is without substance and does not provide reason to grant leave to appeal.

Did the judge refer to any irrelevant consideration?

- [63] The applicant contends that the judge erred in considering the question of community need in determining the development application.¹³⁷ In finding conflict with the planning scheme's DEO 6 in 2.6.2(a), (b), (c) and (e), the judge stated that need was not demonstrated.¹³⁸ In finding the proposed use was an industrial one, incompatible with the planning scheme's 3.1.1(b)(i), (ii) and (iii), (f), (g)(ii) and Rural Planning Area Code and Performance Criteria P6 and P7, his Honour again referred to need.¹³⁹ The absence or existence of a planning need was not identified by any party as an issue to be determined. The planning scheme does not require need to be demonstrated before an approval can issue. The Rural Planning Area Code's P6 and P7 do not require need to be considered. The judge in referring to need dealt with a matter which was irrelevant, both at law and in the way the case was conducted.

¹³³ See *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [86] discussed at [34] of these reasons.

¹³⁴ Above, [86].

¹³⁵ See, for example, Above, [19]-[22], [33] and [115].

¹³⁶ Above, [86].

¹³⁷ Above, [27]-[30] and [32].

¹³⁸ Above, [124].

¹³⁹ Above, [129].

- [64] The grounds of appeal were widely drawn and did not exclude the issue of need.¹⁴⁰ Nodnoc Pty Ltd identified need as an issue.¹⁴¹ Mr Dawson also argued that development application should be refused because of matters including "availability of viable alternative rural 40 sub-area, no community need".¹⁴² In the joint expert report, Ms Tricarico for the Council noted: "The need for this development to be located on the subject site has not been demonstrated"¹⁴³ while Mr Motti for the applicant opined that the proposed development could "effectively service the needs of the community".¹⁴⁴ As the primary judge noted,¹⁴⁵ in cross-examination Mr Motti argued that need was an issue in this case.¹⁴⁶ The planning scheme 2.4.2(d) refers to "the needs of the community". The concept of need is also relevant to DEO 5 Economy.¹⁴⁷ The question of community need was an issue below and was relevant under the planning scheme.
- [65] In any case, what was unquestionably clearly in issue at the hearing and relevant under the planning scheme, was whether a viable alternative location existed for the proposed development: see planning scheme s 3.1.1(f)¹⁴⁸ and P6 in the Rural Planning Area Code.¹⁴⁹ That issue was capable of indirectly raising an aspect of need in the sense of economic supply and demand: see *Ecovale Pty Ltd v Gold Coast City Council*.¹⁵⁰
- [66] The applicant's contention that the judge erred in considering the question of need in determining the development application is not made out.

Was there a denial of procedural fairness?

- [67] The applicant contends that it was common ground the proposed development would not unacceptably impact on the question of amenity because of noise and dust emissions as this could be controlled by appropriate conditions.¹⁵¹ The exception was Nodnoc Pty Ltd and the judge rejected its contentions as to noise. The only expert noise evidence came from the applicant's Mr Rumble. His report contained the conditions which he considered should be attached to the development approval and included specific controls for the screening plant relating to the Landscape Supplies aspect. It was not open to the judge in those circumstances to find that noise was a real concern which was unamenable to appropriate conditions,¹⁵² before first giving the applicant an opportunity to deal with that concern. Had the judge done so, the applicant may have been able to call evidence through Mr Rumble to address that concern.
- [68] As the judge explained, there is a difficulty with that contention. Nodnoc Pty Ltd was very concerned about the noise issue and was not satisfied that conditions

¹⁴⁰ AB 952-954.

¹⁴¹ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [8].

¹⁴² Above, [9] and letter on behalf of Mr Dawson to the applicant's lawyers AB 298-300.

¹⁴³ AB 381.

¹⁴⁴ AB 384.

¹⁴⁵ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [27].

¹⁴⁶ T1-90 (AB 135).

¹⁴⁷ See planning scheme 2.5.2(iii).

¹⁴⁸ Set out at [8] of these reasons.

¹⁴⁹ Set out at [10] of these reasons.

¹⁵⁰ [1999] 2 Qd R 35, 46.

¹⁵¹ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [78], discussed at [32] of these reasons.

¹⁵² Above, [80], discussed at [32] of these reasons.

would alleviate the problem.¹⁵³ The noise question was a live issue between the applicant and Nodnoc Pty Ltd and the judge was not bound by the view of the Council and Mr Dawson. Although the judge found Nodnoc Pty Ltd's noise concerns were answered by Mr Rumble, his Honour also concluded, as he was entitled on the evidence, that the noise issue remained a real concern and may not be amenable to appropriate conditions.¹⁵⁴ The judge was entitled to expect that Mr Rumble gave all his relevant evidence about the noise issue dealing with the contentions of Nodnoc Pty Ltd. His Honour did not deny the applicant an opportunity to adduce evidence about the noise issue.

- [69] The applicant's contention that the judge denied him procedural fairness is not made out.

Did the judge fail to have regard to material evidence in determining the noise issue?

- [70] The applicant's next contention is closely related to the last. It is that the judge did not have regard to material evidence relevant to his findings on the noise issue.¹⁵⁵ The complaint is that the judge did not refer to Mr Rumble's evidence concerning the screening plant and the treatments which he recommended as conditions to the planning approval to avoid unacceptable noise impacts. The preferred construction of his Honour's reasons is, not that the judge impliedly rejected this aspect of Mr Rumble's evidence, but that his Honour did not have regard to it at all.
- [71] The onus was on the applicant to persuade his Honour that the Council should have approved his development application. The judge made clear in his reasons that he remained doubtful as to whether the conditions proposed by the applicant, which were acceptable to the Council and Mr Dawson and to which his Honour referred in his reasons,¹⁵⁶ would be sufficient to eliminate potential impact from noise upon the rural amenity of the neighbours, especially Mr Condon (Nodnoc Pty Ltd). His Honour did not fail to have regard to this aspect of Mr Rumble's evidence; he simply found it unpersuasive.
- [72] The applicant's contention that the judge failed to have regard to a material aspect of Mr Rumble's evidence is not made out.

The relevant test to determine conflict with the planning scheme

- [73] The applicant emphasises that the principal issue for the judge in determining whether the proposed development conflicted with the planning scheme was the degree to which it would impact on rural amenity, character and landscape: see the planning scheme 2.4.2(b)(iii), 3.1.1(b)(iii), 3.1.1(f), 3.1.3(P7).¹⁵⁷ He contends that this required a consideration of three independent but cumulative factors: existing character, planned character and the impact of development approvals on that character in circumstances where the approvals are current but the rights granted under them have not yet been taken up either in whole or part. Each of those three components must be considered in assessing character and amenity for the purpose of the planning scheme. The judge assessed only the first without considering the second and third.

¹⁵³ Above, [7], [11], [71], [78] and [94]; discussed at [30]-[32] of these reasons.

¹⁵⁴ Above, [80]; discussed at [32] of these reasons.

¹⁵⁵ Above, [78]-[80]; discussed at [32] of these reasons.

¹⁵⁶ Above; discussed at [27]-[29] of these reasons at.

¹⁵⁷ Set out at [7] and [10] of these reasons.

- [74] The applicant contends that his Honour gave insufficient weight to the conditions of Barro Group's development approval (ex 12) which was directly relevant to the character of the area in terms of vehicle activity. The judge ignored existing non-rural development in surrounding properties, including a paint ball range, rodeo stadium and crushing plant. His Honour did not take into account that the Rural Planning Area for the purpose of the planning scheme contemplated that rural land could be used for non-rural purposes including Landscape Supplies which was part of the applicant's proposed development. The judge also ignored that the planning scheme had earmarked Black River Road as a strategic freight road, a matter which was relevant to the issue of "planned character".
- [75] The applicant points out that the judge accepted Ms Tricarico's report.¹⁵⁸ She described the existing character of the area as a landscape which "contains detached dwellings on generally large vegetated lots".¹⁵⁹ This ignored the other existing development nearby (a paint ball shooting range, rodeo stadium, crushing plant). Mr Tricarico also ignored that one of the uses of the proposed development was a use anticipated in the area under the planning scheme, namely, Landscape Supplies. She also ignored that the applicant's land had frontage to a road earmarked as a strategic freight route. Ms Tricarico did not have regard to ex 12 (the conditions imposed on Barro Group's planning approval for extractive industries) in assessing the impact of the proposal on character and amenity. The judge, in accepting Ms Tricarico's evidence and in not dealing with these issues, misapplied the relevant test in determining impacts on character and amenity. This amounted to an error of law which materially impacted upon his Honour's decision.
- [76] These contentions do not seem to me to raise an error of law. Rather, they appear to be an attempt to turn the applicant's dissatisfaction with the experienced Townsville Planning and Environment Court judge's factual findings into an error of law. The judge's reasons, which I have fully summarised earlier, do not suggest his Honour failed to consider both existing and planned character, and also the impact of existing development approvals on that character. His Honour referred to many of the non-rural uses already existing in the neighbourhood.¹⁶⁰ The judge was also cognisant that the applicant's land abutted Black River Road, a Primary Freight Network Road.¹⁶¹ There was no evidence that future traffic movements from Barro Group would approach those allowed by its development approval conditions set out in ex 12.
- [77] The applicant's contention that the judge failed to consider planned character and the impact of existing development approvals on that character is not made out.

Did the judge misconstrue the planning scheme?

- [78] The applicant next contends that the judge's reasons revealed two legal errors in his construction of the planning scheme. The first occurred when the judge stated that one of the conflicts with the planning scheme was "the Townsville-Thuringowa Road Freight Network is not about land use".¹⁶² This appears to be a reference to

¹⁵⁸ Summarised in *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [52]; see also [116] and [125] as discussed at [26], [54] and [63] of these reasons.

¹⁵⁹ *Lewis* [2011] QPEC, [51].

¹⁶⁰ See, for example, Above, [22], [33], [47] and [94]; discussed at [14], [18], [25] and [37] of these reasons.

¹⁶¹ Above, [39], [43], [49], [111], [115] and [124]; discussed at [21], [23], [25], [42], [44] and [47] of these reasons.

¹⁶² Above, [124(h)].

planning scheme 2.6.2(d)¹⁶³ and the footnote to it. When 2.6.2(d) is read in context with the whole planning scheme¹⁶⁴ and particularly with 2.6.2(e), it is clear that the identification of Black River Road (which abuts the front of the applicant's property) as a Freight Network Road in the Transport Plan is relevant to land use. Its relevance is in determining Character issues (DEO 4) and whether Land Use Patterns (DEO 6) will be achieved through the co-location of transport uses with recognised transport routes.

- [79] The impugned quotation from his Honour's reasons upon which the applicant relies does seem to be inconsistent with the planning scheme 2.6.2(d) and the footnote to it. I am not satisfied, however, that this error affected his Honour's factual findings which led to his ultimate conclusions that the proposed development compromised DEOs 4 and 6; and conflicted with the planning scheme and with insufficient grounds to justify approval notwithstanding that conflict. His Honour clearly appreciated that aspects of the road network arguably favoured the applicant's case. But he did not think it was a matter, alone or with other matters favouring the applicant, which justified approval despite the conflict. This contention is not made out.
- [80] The applicant's contention as to the second legal error is that the judge further erred in construing the planning scheme by holding that the development was industrial.¹⁶⁵ The planning scheme read as a whole shows that the proposed material change of use is not industrial development as defined in the planning scheme. The applicant again emphasises that, under planning scheme 3.1.2, that part of the development application which was for a proposed material change of use for Landscape Supplies is assessable development in the Rural Planning Area. He contends this error affected his Honour's reasoning.
- [81] The judge plainly appreciated that Landscape Supplies was a Code assessable use in the Development Assessment Table in the rural 40 sub-area. His Honour also appreciated that Transport Depot was an impact assessable use. This can be ascertained from the summary of the Development Assessment Table in Appendix B to his Honour's reasons.¹⁶⁶ The development application was not, however, for Landscape Supplies alone, but for "Landscape Supplies and Transport Depot".¹⁶⁷ The planning scheme was divided into five Planning Areas: Rural; Industrial; Centres; Open Space and Recreation; and Residential. Each Planning Area contained a character statement identifying desired development outcomes for that area. The character statement for the Rural Planning Area referred to "rural development";¹⁶⁸ and "development other than rural development" which is only to be "located in the Rural Planning Area where no viable alternative location exists, and where that development will not detrimentally affect rural amenity and the rural landscape".¹⁶⁹ It is common ground and self-evident that the applicant's proposed use, Landscape Supplies and Transport Depot, was not "rural development".¹⁷⁰ The

¹⁶³ See [8] of these reasons.

¹⁶⁴ See [8]-[10] of these reasons.

¹⁶⁵ *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [116] and [124]; discussed at [54], [61] and [67] of these reasons.

¹⁶⁶ AB 993, referred to at [9] of these reasons.

¹⁶⁷ Both defined terms in Part 7: see [10] of these reasons.

¹⁶⁸ Planning scheme 3.1.1(b).

¹⁶⁹ Above, 3.1.1(f).

¹⁷⁰ A defined term in Part 7 planning scheme: see [10] of these reasons.

fact that it was not within the definition of "industrial development"¹⁷¹ did not mean the judge was wrong in characterising the rural 40 area in which the applicant's land is situated as "not industrial". Whilst it may be argued that the proposed use does not neatly fall into the definition of "industry" and "industrial development" in the planning scheme, the judge was entitled to conclude that the proposed use was an industrial one in the broad sense. In terms of the five Planning Areas, the industrial planning area was plainly the most apposite, as the reports of both town planners accepted.

- [82] The applicant has not persuaded me that this aspect of the judge's reasons amounts to an error of law which affected his Honour's ultimate conclusions.

Did the judge fail to give proper consideration to the applicant's grounds of appeal?

- [83] The applicant's final contention is that the judge failed to give proper consideration to the grounds which the applicant submitted justified approval of his development, despite conflict with the planning scheme. His Honour did not specifically refer to all of Mr Motti's evidence. His Honour found that the applicant's grounds largely focussed on his personal circumstances and interests rather than on matters of public interest. In determining the appeal, the judge must have regard to all matters relevant to the assessment process, in the same way as the assessment manager (the Council) must in deciding the original application. The judge should have, but did not, accurately record all of the applicant's grounds advanced to justify approval and address those grounds *seriatim*. His failure to do so constitutes an error of law which may well have impacted upon the reasons for his Honour's ultimate conclusions.
- [84] I cannot accept the contention that, as a matter of law, the judge was required to deal with every point raised by Mr Motti *seriatim*. The applicant has not taken us to any provision in the IPA which mandates such an approach. His Honour referred to relevant aspects of the law and identified a critical issue as being whether there were sufficient grounds to approve the proposed development despite the conflict with the planning scheme.¹⁷² His Honour adequately summarised the relevant evidence of the applicant's Mr Motti as to why he considered there were grounds justifying the approval despite the conflict.¹⁷³ The judge then gave his reasons for finding the proposed development conflicted with the planning scheme; for remaining unpersuaded that there were sufficient grounds to justify approval notwithstanding that conflict; and for finding that DEOs 4 and 6 were compromised by the proposed development.¹⁷⁴ The applicant has not identified any critical piece of Mr Motti's evidence relevant to the grounds of appeal which the judge did not consider.
- [85] The applicant has not shown that the judge, in reaching his factual findings and ultimate conclusions failed to give proper consideration to Mr Motti's evidence or the applicant's grounds of appeal.

Conclusion

- [86] Not every decision-maker need have concluded that the development application compromised the achievement of DEOs 4 and 6. The applicant's town planner,

¹⁷¹ Above.

¹⁷² *Lewis* [2011] QPEC, unreported, Durward SC DCJ, P & E 144 of 2010, 1 June 2011, [123]; discussed at [61] of these reasons.

¹⁷³ Above, [39], [42] and [44]-[50]; as discussed in these reasons at [21], [23], and [25].

¹⁷⁴ Above, [124]-[131]; discussed or set out in these reasons at [48]-[50].

Mr Motti, raised solid arguments which a decision-maker could have accepted as demonstrating why the development should be approved despite its conflict with the planning scheme. But the primary judge, an experienced Planning and Environment Court judge who has lived in the Townsville region for many decades, took a different view. The conclusions, that the development application was in conflict with the planning scheme; that the applicant did not demonstrate sufficient grounds to justify approval notwithstanding that conflict; and that the planning scheme DEOs 4 and 6 were compromised by the proposed development, flowed rationally from the view of the evidence taken by his Honour. These conclusions were unsurprising in the context of the terms of the relevant planning scheme provisions and his Honour's factual findings. The applicant has not demonstrated any error of law. The application does not raise an important question of law. The application for leave to appeal should be refused with costs.

ORDER: The application for leave to appeal is refused with costs.

- [87] **MUIR JA:** I agree that the application for leave to appeal should be refused for the reasons given by the President. I also agree with Douglas J's reasons.
- [88] **DOUGLAS J:** I agree with the reasons of the President and the order proposed by her.
- [89] I wish to say something further in respect of the issue whether the learned primary judge erred in law in concluding at [80] that the screening plant operation had "the potential to impact upon rural amenity in an unacceptable way and the unknown factor is the noise that may be generated by and in association with the screening plant ... It may not be amenable to appropriate conditions at all and that is a very real matter of concern".
- [90] While it is true that the applicant and the first respondent were content to proceed at the hearing on the assumption that conditions could be framed to cope with any issue related to noise, Mr Condon clearly and without objection raised an issue about noise and the screening plant in his cross-examination.¹⁷⁵ There was then some brief re-examination about modelling of potential acoustic impacts on Mr Condon's residence.¹⁷⁶
- [91] Counsel for the applicant was aware during the hearing of the evidence that, from Mr Condon's point of view, noise associated with the screening plant remained an issue in the case.¹⁷⁷ Mr Condon also argued, in his evidence, that the proposed use could not be "conditioned to eliminate nuisance ...".¹⁷⁸ In his very brief submissions he again referred to "noise pollution".¹⁷⁹
- [92] Mr Rumble had prepared an analysis of the disputed noise issues, including the issues about the screening plant where he concluded that Mr Condon's concerns had no factual foundation.¹⁸⁰ Nonetheless, Mr Condon's concern as to the adequacy of possible conditions remained in issue and it was legitimate for his Honour to express some scepticism as to whether the evidence allowed the conclusion that the

¹⁷⁵ AB 37 1 40 – 39 1 30.

¹⁷⁶ AB 39 1 45 – 40 1 2.

¹⁷⁷ AB 146 11 10-20.

¹⁷⁸ AB 183 11 29-31.

¹⁷⁹ AB 203 11 5-6.

¹⁸⁰ AB 817-824.

screening plant operation was amenable to appropriate conditions. It remained a matter in issue for him to decide. Consequently, in my view, his Honour did not err in law in making the comment complained of. Nor should his statement be seen as anything more than a comment. It is clear that his Honour's reasons for his decision were based principally on other issues.