SUPREME COURT OF QUEENSLAND

CITATION:	*Lockyer Valley Regional Council v Westlink Pty Ltd as Trustee for Westlink Industrial Trust & Ors; Keep Lockyer Rural Inc v Westlink Pty Ltd as Trustee for Westlink Industrial Trust & Ors* [2012] QCA 370
PARTIES:	**In Appeal No 5165 of 2012:** **LOCKYER VALLEY REGIONAL COUNCIL** (applicant) **v** **WESTLINK PTY LTD AS TRUSTEE FOR WESTLINK INDUSTRIAL TRUST** (first respondent) **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT** (second respondent) **MICHAEL WILLIAM ASHLEY** (third respondent) **GERALD SCOTT** (fourth respondent) **KEEP LOCKYER RURAL INC** (fifth respondent) **LYNNE HALL** (sixth respondent) **GEOFFREY KING** (seventh respondent) **In Appeal No 5163 of 2012:** **KEEP LOCKYER RURAL INC** (applicant) **v** **WESTLINK PTY LTD AS TRUSTEE FOR WESTLINK INDUSTRIAL TRUST** (first respondent) **LOCKYER VALLEY REGIONAL COUNCIL** (second respondent) **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT** (third respondent) **MICHAEL WILLIAM ASHLEY** (fourth respondent) **GERALD SCOTT** (fifth respondent) **LYNNE HALL** (sixth respondent) **GEOFFREY KING** (seventh respondent)

FILE NO/S:	Appeal No 5165 of 2012 Appeal No 5163 of 2012 DC No 2606 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	21 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	16 October 2012
JUDGES:	Holmes and White JJA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The order made by the Planning and Environment Court on 27 April 2012 is set aside.** **4. The appeal to that Court from the decision of the applicant made on 11 August 2010 to refuse the first respondent's application for a development permit is remitted to that Court for determination according to law, with the direction that it be heard by a judge of that Court other than the primary judge.** **5. The first respondent is to pay the applicant's costs of and incidental to the application, the leave to appeal and the appeal in this Court, with the exception of those costs incurred in connection with the filing of the applicant's supplementary outline of argument and the addition of ground 3(d).** **6. The applicant is to pay the first respondent's costs of responding to the applicant's supplementary outline of argument and the addition of ground 3(d).**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL IMPACT ASSESSMENT AND APPROVAL GENERALLY – OTHER STATES AND TERRITORIES – where the applicant seeks leave to appeal against a decision of the Planning and Environment Court allowing the first respondent's appeal and approving its application to develop a natural gas fired electricity peaking station – where the proposed appeal turns on the application of s 3.5.14(2)(b) of the *Integrated Planning Act* – where the primary judge was required to determine whether sufficient grounds existed to justify a decision to grant the development permit where the use was not consistent with the purpose of the relevant planning scheme zone – where the applicant contends that the primary judge misconstrued the relevant planning scheme

and wrongly considered the conflict to be of a minor rather than major nature – where the applicant contends that the primary judge mistook the notion of 'sufficient grounds' in s 3.5.14(2)(b), took into account irrelevant considerations and failed to recognise relevant considerations – where the applicant contends that the primary judge failed to give adequate reasons as to why public benefits relating to the proposal could not be met through compliance with the regional plan or why it had to be met on the subject land – whether the primary judge erred in construing the planning scheme – whether the conflict with the planning scheme was correctly characterised – whether the primary judge erred in his application of the test in *Weightman v Gold Coast City Council* for determining sufficiency of grounds where conflict existed – whether the absence of negative impacts could amount to a ground – whether it was a relevant consideration that the same project would have been permissible undertaken by a public entity – whether the trial judge dealt with the applicant's argument that the development could be accommodated on a site designated for industry in the regional plan – whether there were material errors of law in the making of the decision

Integrated Planning Act 1997 (Qld), s 2.1.23, s 2.5A.20, s 2.5A.21, s 3.5.14
Local Government (Planning and Environment Act) 1990 (Qld)
Sustainable Planning Act 2009 (Qld), s 498

Australian Capital Holdings Pty Ltd v Mackay City Council [2008] QCA 157, considered
Grosser v City of Gold Coast (2001) 117 LGERA 153; [2001] QCA 423, considered
Kentbrock Pty Ltd v Gold Coast City Council [2003] QPELR 587; [2003] QPEC 20, considered
Lockyer Valley Regional Council v Westlink Pty Ltd & Ors (2011) 185 LGERA 63; [2011] QCA 358, related
Palyaris v Gold Coast City Council [2004] QPELR 162; [2003] QPEC 56, cited
Weightman v Gold Coast City Council [2003] 2 Qd R 441; [2002] QCA 234, considered
Westlink P/L v Lockyer Valley Regional Council & Ors [2012] QPEC 31, related
Westlink P/L v Lockyer Valley Regional Council [2011] QPEC 96, related

COUNSEL:

In Appeal No 5165 of 2012:
D R Gore with M A Williamson for the applicant
C L Hughes SC with B D Job for the first respondent
No appearance for the second, third, fourth, sixth or seventh respondents
V Odgaard with C Hall on behalf of the fifth respondent

In Appeal No 5163 of 2012:
V Odgaard with C Hall on behalf of the applicant
C L Hughes SC with B D Job for the first respondent
D R Gore with M A Williamson for the second respondent
No appearance for the third, fourth, fifth, sixth or seventh respondents

SOLICITORS: In Appeal No 5165 of 2012:
Connor O'Meara Solicitors for the applicant
McInnes Wilson Lawyers for the first respondent
No appearance for the second, third, fourth, fifth, sixth or seventh respondents

In Appeal No 5163 of 2012:
McInnes Wilson Lawyers for the first respondent
Connor O'Meara Solicitors for the second respondent
No appearance for the applicant, third, fourth, fifth, sixth or seventh respondents

[1] **HOLMES JA**: The Lockyer Valley Regional Council seeks leave to appeal under s 498 of the *Sustainable Planning Act* 2009 against an order of the Planning and Environment Court which allowed the appeal of the first respondent, Westlink Pty Ltd. Of the other parties named as respondents, Ms Hall, Messrs Ashley, Scott and King and the successor departments to the Department of Environment and Resource Management[1] took no active part in the appeal. Representatives of Keep Lockyer Rural Inc made oral submissions (on matters of fact rather than law) but largely relied on the Council's argument. As is commonly the practice, the matter proceeded on the basis that if leave to appeal were granted, the Court should also resolve the appeal.

The proposed appeal

[2] The proposed appeal turns on the application of s 3.5.14(2)(b) of the *Integrated Planning Act* 1997, which provides:

> "If the application is for development in a planning scheme area, the assessment manager's decision must not –
>
> ...
>
> (b) conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict."

The meaning of "grounds" in s 3.5.14 is defined in schedule 10 of the *Integrated Planning Act*:

> "1. *Grounds* means matters of public interest.
>
> 2. *Grounds* does not include the personal circumstances of an applicant, owner or interested party."

The question for the primary judge was whether sufficient grounds existed to justify a decision to grant a development permit for a natural gas fired electricity peaking

[1] The Department of Natural Resources and Mines and the Department of Environment and Heritage Protection.

station in circumstances where that use was not consistent with the purpose of the relevant planning scheme zone.

[3] The grounds of the proposed appeal were: that the primary judge had misconstrued the relevant planning scheme and, in consequence, erroneously considered the conflict to be of a minor rather than major nature; that he had misunderstood the notion of "sufficient grounds" in s 3.5.14(2)(b) and in that regard had taken into account irrelevant considerations, while failing to take into account relevant considerations; and that he had not given adequate reasons as to why public benefits asserted in relation to the proposal could not be met through compliance with the planning documents or why the need for the proposal, if there was one, had to be met on the subject land. Shortly before the hearing of the appeal, a further proposed ground was added, to the effect that the primary judge had erred in his application of the test posited in *Weightman v Gold Coast City Council*[2] for determining the sufficiency of grounds where a conflict existed.

Previous litigation

[4] The litigation had some history. Westlink's application was for a development permit for a material change of use for electricity generation infrastructure, an environmentally relevant activity (electricity generation) and operational works in the form of vegetation clearing. The Council refused that application, but Westlink's appeal to the Planning and Environment Court was successful, the primary judge holding that permitting the proposed use would not conflict with the Planning Scheme.[3] The Council successfully appealed to this Court, which held that such a conflict necessarily resulted from the unqualified terms of section 4.12(k) of the planning scheme. In consequence, it was necessary to remit the matter to the primary judge for determination of whether, notwithstanding the conflict, there were sufficient grounds to justify approval of the proposal in accordance with s 3.5.14(2)(b).[4] After a further hearing, the primary judge concluded that the nature of the conflict "tend[ed] towards the minor rather than the major"[5] and that there were sufficient grounds to justify the decision to grant the development permit.

The Planning Scheme provisions

[5] The relevant planning scheme, the Gatton Shire Council Planning Scheme, provided for 12 zones, one of which was the Rural General Zone. Division 4 of the Scheme dealt with the assessment criteria for the Rural General Zone. Those criteria, where they are of relevance here, are set out below. Only those "specific outcomes" which reflect a particular use (as opposed to a more general statement of aim) are reproduced:

> "**4.10 Compliance with Rural General Zone code**
>
> Development that is consistent with the specific outcomes in sections 4.12 complies with the Rural General Zone code.
>
> **4.11 Overall outcomes for Rural General zone**
>
> (l) The overall outcomes are the purpose of the Rural General Zone code.

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2 [2003] 2 Qd R 441.

3 *Westlink Pty Ltd v Lockyer Valley Regional Council* [2011] QPEC 96.

4 *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2011] QCA 358.

5 *Westlink P/L v Lockyer Valley Regional Council & Ors* [2012] QPEC 31 at [34].

(2) The overall outcome sought for the Rural General zone are the following:-

(a) The zone is to provide for agricultural production, other rural activities and the maintenance of the Shire's landscape quality that is important to the overall character of the Shire.

(b) Closer settlement, particularly urban and rural residential development, is not consistent with the zone, in accordance with the SEQ Regional Plan.

4.12 Specific outcomes for Rural General zone

The specific outcomes sought for the Rural General zone are the following:-

(a) ...
(b) ...
(c) ...
(d) ...
(e) Rural service industries may be appropriate where complying with the purpose of the code.

(f) A range of other recreational, educational or tourism related uses is supported in the zone, where:

(i) the intensity and scale of the use does not reduce the amenity or operational effectiveness of neighbouring properties;

(ii) there are no adverse impacts on the natural environment, including

(A) vegetation or other features identified as having significant ecological values; and

(B) downstream water quality;

(iii) there are no impacts on the quality of the visual landscape as uses involve only limited buildings or structures that are designed, sited and of a scale consistent with the natural environmental and landscape features;

(iv) the site is connected to the Shire road network and urban centres by roads capable of accommodating the type and volume of traffic likely to be generated; and

(v) the site has access to an appropriate water supply, liquid and solid waste disposal systems and electricity supply adequate for all on-site purposes.

(g) Extractive industry uses occur within this zone where it is demonstrated that:

(i) the resource is of sufficient size and of an acceptable quality to provide a sustainable and economically viable operation;
(ii) there is a community need for the product;
(iii) environmental impacts are within sustainable levels; and
(iv) the likely transportation routes are constructed to a standard sufficient to accommodate haulage vehicles, having regard to the safety of other road users and the physical impact on the roads.

(h) Intensive animal industries may be appropriate in this zone. Such uses will be sufficiently separated and buffered from the Shire's towns, villages and rural residential communities so that there will be no adverse impact on the amenity of these areas. Any expansion or intensification of any existing intensive animal industry use which has existing adverse impacts from odour, noise, traffic other impacts on a settlement within the Shire is inconsistent with this zone.

(i) ...
(j) ...

(k) All other defined uses and other not defined uses, not specifically identified in Table 1 are not consistent with the purpose of the zone."

(The dictionary in Part 7 Schedule 1 of the Planning Scheme both identifies and explains a variety of uses which are "defined uses".)

[6] Table 1, referred to in item 4.12(k), is in this form:

Column 1 Defined Use	**Column 2** Assessment Category	**Column 3** Relevant Assessment Criteria or Applicable Codes
Animal Product Processing Industry	**Impact Assessable**	Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Extractive Industry	**Code Assessable** *where involving removal of 5,000m^3 or less per annum*	**If Code Assessable:** Extractive Industry Code Rural General Zone Code Advertising Device Code Building Work Code Earthworks Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code
	Impact Assessable *where exceeding 5,000m^3 per annum*	**If Impact Assessable**: Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA

Local Utility	**Exempt**	
Service Station	**Impact Assessable**	**If Impact Assessable**: Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Special Purpose	**Self Assessable** *(a) if for a local, state or federal government purpose; and* *(b) where not conflicting with Schedule 8 of the IPA; and* *(c) where complying with Probable Solutions for Self Assessable development* **Code Assessable** *in all other circumstances*	**If Self Assessable**: Advertising Device Code Building Work Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code **If Code Assessable**: Rural General Zone Code Advertising Device Code Building Work Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code
Telecommunications Facility	**Exempt** *if a low impact facility (as defined under the Telecommunications Act)* **Code Assessable** *if not a low impact facility (as defined under the Telecommunications Act)*	**If Code Assessable**: Telecommunications Facility Code Rural General Zone Code Advertising Device Code Building Work Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code
Transport Depot	**Code Assessable** *where no building work or only minor building work* **Impact Assessable** *in all other circumstances*	**If Code Assessable**: Rural Development Code Rural Service Industry Code Rural General Zone Code Advertising Device Code Building Work Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code **If Impact Assessable**: Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Warehouse	**Impact Assessable**	Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Other defined uses and Other (not defined uses) except use for a road	**Impact Assessable**	Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA

Westlink's proposed use did not, it may be seen, fall within table 1.

[7] One of the defined uses which appears in column 1, "Special Purpose", received some attention during this appeal. The term is defined in the dictionary to schedule 1:

> "'Special Purpose' means any premises or use of land by a local, state or commonwealth government or its corporation or agency or a community service organization. The term includes:
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> | | |
> |---|---|
> | Ambulance station | Fire brigade |
> | Cemetery | Government purposes |
> | Crematorium [where provided by an organization listed above] | Hospital |
> | | Public utility |
> | Community hall and centre | Statutory authority purposes |
>
> The term does not include parks or local utilities as defined herein..."

[8] In his first judgment, the primary judge had noted that a number of uses contemplated in the specific outcomes – Special Purpose, Animal Product Processing Industry and Extractive Industry – were at odds with overall outcome s 4.11(2)(a); those contemplated activities "shattered" any notion that s 4.11(2)(a) meant that a pristine rural environment had to be preserved.[6] On appeal, the Council argued that this amounted to his Honour's regarding s 4.11(2)(a) as intended to exhaust the consistent uses for the zone, and was an error. This Court, rejecting that appeal ground, observed that his Honour had done no more than interpret s 4.11(2)(a) in the wider context of the Planning Scheme. The specific outcomes his Honour mentioned indicated, as he had suggested, that a liberal construction was to be given to overall outcome s 4.11(2)(a).

The extent of the conflict

[9] In reaching his conclusion as to conflict on the remitted appeal, the primary judge's reasoning process was as follows:

> "It is to be noted that there is an identical equivalent of s 4.12(k) in each one of the twelve zone codes in the Planning Scheme. That militates against the argument that s 4.12(k) is a specific provision designed to reflect the Council's policy decision that any proposed use falling within that provision is, intended by the scheme to attract, in the words of Mr Gore QC, the greeting that 'if you end up in that inconsistent column you're out. We don't want you. You are inconsistent. You are a prohibition under the old language and you don't provide for the outcomes of this Rural General zone that we contemplate.'
>
> Looking at the scheme as a whole I prefer the interpretation that s 4.12(k), as with its equivalent in the other zone codes, is aptly categorised as a default provision the product of a decision of the authors of the scheme that any qualifying non-consistent use are not prohibited, as of course they cannot be, but would need to satisfy the Council on good town planning grounds of any proposal of that type. That is a sensible alternative to an approach which sought to anticipate and identify every possible future use and to deal with it in detail in the scheme. It cannot be said, consistent with IPA s 2.1.23(2) that the Council intended anything beyond a proper consideration of any such proposal.

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6 [2011] QPEC 96 at [77].

> It is not insignificant either that had this proposal been put forward by a public utility, it would have qualified as a Special Purpose and would not have been confronted by s 4.l2(k). As to the scale of the proposal this Court has accepted the evidence of Mr Vann in preference to that of Mr Craven on the issue of the impact on visual character.
>
> On the spectrum of a minor to major conflict I consider the conflict tends towards the minor rather than the major."[7]

[10] Section 2.1.23(2) of the *Integrated Planning Act* (to which his Honour refers in the second of the paragraphs set out above) precludes a local planning instrument from prohibiting "development on, or the use of premises". The conclusion at the end of the penultimate paragraph reflects his Honour's finding in his previous judgment that the proposal would not have a significant impact on visual amenity with, at the worst, only the tips of the stacks being visible.[8]

[11] The Council argued that the trial judge had erred in diminishing the significance of s 4.12(k) by categorising it as a default provision and emphasising its repetition through the Planning Scheme. The fact that there was a counterpart of s 4.12(k) in the other zones in the Planning Scheme indicated, rather, a deliberate decision by the Scheme's drafters to take a uniform approach to the identification of consistent and inconsistent approaches throughout the zones. Westlink's proposed use was one which was not regarded as consistent for any zone, notwithstanding the recognition in the "Special Purposes" category of the type of use where operated by a public utility. The primary judge erred in regarding the fact that a similar use by a public utility would have been permissible as supporting his conclusion that the conflict was minor; instead he should have regarded that fact as indicative of a deliberate planning decision to preclude such a use where it was carried out by private enterprise.

[12] Westlink submitted that the only conflict identified by this Court on the earlier appeal was that with s 4.12(k). As to the significance of that conflict, the "not defined" uses in s 4.12(k) were to be distinguished from the situation where a Council deliberately identified uses which were not desired. So, for example, if Council had defined the use of a privately operated electricity station and excluded it from table 1, that would have established conflict with the Scheme in more than a minor way. Instead, as the trial judge had correctly identified, s 4.12(k) was a default provision, indicating a decision of the authors of the Planning Scheme that non-consistent uses were not prohibited, but had instead to satisfy Council on good town planning grounds that they should be approved.

[13] In my view, "default provision" is not inapt as a description of s 4.12(k) – it is, after all, the category which applies when no others do – but it has little to say about the nature or the extent of the conflict between permitting a use which falls within it and the Planning Scheme. It is plain that the conflict cannot be characterised as minor purely by reason of the fact that the use falls within the s 4.12(k) description; otherwise no use not specifically identified in table 1 or as a specific outcome could present a significant conflict. Nor does the fact that the section's equivalent is to be found in each zone code add to or detract from the significance of the fact that the

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7 *Westlink P/L v Lockyer Valley Regional Council & Ors* [2012] QPEC 31 at [31]-[34].

8 [2011] QPEC 96 at [78].

uses within it were regarded by the Council as inconsistent with the Planning Scheme.

[14] Westlink's submission, that the only relevant conflict was with s 4.12(k), is an oversimplification of what this Court said in the previous appeal: that overall outcome s 4.11(2)(a) was to be given a liberal reading, not one which was absolute and exclusive in its reference to uses which were rural and maintained landscape quality. That construction has implications for the nature and extent of any conflict between that outcome and a proposed use, but it does not follow that any such conflict is non-existent or irrelevant. The discordance between the proposed use here and the purpose of the zone which outcome s 4.11(2)(a) identified was, at the least, part of the context in which the more directly expressed conflict presented by s 4.12(k) had to be considered. This Court has emphasised the importance of paying due regard to the planning strategies adopted by local authorities: see *Australian Capital Holdings Pty Ltd v Mackay City Council*[9] and the authorities referred to therein.

[15] Importantly, the Council had identified in some detail, in s 4.12 and table 1, the uses it regarded as acceptable in the Rural General Zone, setting out the qualifications regarded as necessary to those uses. Westlink's proposed use was not among them. To the contrary, the starting position was that it was not consistent with the purpose of the Zone. It is, no doubt, correct to say that Council intended "a proper consideration of any such proposal", but that is true of any proposal involving an impact assessable use. It was an error to say that the fact that the proposed use fell within s 4.12(k) meant no more than that.

The sufficiency of the grounds

[16] The primary judge set out the grounds which he considered justified approval of the application notwithstanding the conflict. They were as follows:

> "(a) Were this proposal to be developed by a public utility it would qualify as a Special Purpose within the scheme in which case s 4.l2(k) would have no application.
>
> (b) The proposal will be of benefit to the community in assisting in meeting its increased demand for electricity providing fast start peak power generation capable of being brought on line quickly to meet daily short term peak demand and to avoid power outages. This can be done, Mr Welchman has said, with nitrogen dioxide, particulate matter, sulphate dioxide and carbon monoxide emissions 'well below both short-term and long-term air quality objectives' for protecting human health, amenity, agriculture and vegetation.
>
> (c) The proposed location of the development is ideally located to meet the public demand for electricity at peak times given its co-location with the Roma to Brisbane Gas Pipeline along with the Gatton Gas Compressor Station joining the site to the east and the Gatton Electricity Bulk Supply Sub-Station directly opposite the site to the south. I do not agree with the Council that the scheme provides a better

[9] [2008] QCA 157 at [55]-[59].

> location than the Gatton North Enterprise Opportunity Area or any other area. That addresses the qualification placed on the Council's acceptance of the community need for a peak power station.
>
> (d) It is located amongst what I see as not incompatible land uses including the Gatton Waste Disposal Landfill fronting Forge Road and the Warrego Highway, the Gatton Sewerage Treatment Plant, the Gatton Electricity Bulk Supply Sub-Station.
>
> (e) The topography of the area is such that the proposal is physically disconnected, well screened and separated from rural residential localities. I accept that the absence of a negative impact is not, of itself, a proper ground for consideration but the screening I speak of is part of the issue of any impact on the amenity of the area;
>
> (f) Apart from contributing towards the minimisation of electricity costs to the community it will also provide an economic stimulus to the community resulting from the inflow of capital and the creation of employment both short-term and long-term therefrom;
>
> (g) The proposal is consistent with the outcomes sought to be achieved by SEQRP and purposes of both IPA and SPA on the issue of ecological sustainability."

[17] His Honour found that there were sufficient grounds to justify a decision to approve the development application despite the conflict, and allowed the appeal, approving the application subject to the resolution of conditions. His conclusions on grounds (a), (c) and (e) were the subjects of individual grounds of the proposed appeal here; but a more general argument was raised as to his Honour's approach to the assessment of grounds.

The Weightman point

[18] In *Weightman*, Atkinson J proposed (with the agreement of the other members of the Court) this approach to weighing the sufficiency of planning grounds against conflict with the planning scheme:[10]

> "In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s 4.4(5A)(b) of the P & E Act, the decision maker should:
>
> 1. examine the nature and extent of the conflict;
>
> 2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;

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[10] Her Honour was concerned with the then s 4.4(5A) of the *Local Government (Planning and Environment Act)* 1990 which was in similar, though not in identical terms, to s 3.5.14(2)(b) in the *Integrated Planning Act*.

> 3. determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict."[11]

[19] In his reasons, the primary judge set out passages from *Weightman* and embarked on some analysis of what he described as the "*Weightman* three-step test". He concluded this part of his judgment by saying:

> "Importantly, nowhere in her judgment did Her Honour suggest that the planning grounds under consideration relevant to the conflict carried more weight than those grounds under consideration relevant to the non-conflictual aspects of the development, or vice versa."[12]

Accordingly, his Honour rejected the Council's submission that grounds falling within the third limb, being of a more general nature, were of less weight than grounds coming within the second limb. The grounds advanced by Westlink, he observed, were in the third limb of the test

> "because of the lack of any specificity in the scheme of the proposed use and the general default nature of s 4.12(k)".[13]

That was different from the *Weightman* situation, where the use concerned was identified, with detailed provisions, in the planning scheme.

[20] The Council here reiterated its argument that that was wrong: grounds relating directly to the conflict (those with which the second step described by Atkinson J were concerned) must carry greater weight than the more general grounds described in the third step. In the present case, it was submitted, the grounds in favour of development all fell within the third step. The primary judge had erred in failing to recognise the distinction between the weight to be attributed to grounds in the different steps and in regarding Westlink's grounds, which fell within step three, as sufficient.

[21] The Council's attempt at construing *Weightman* so as to add another layer of explication to Atkinson J's explanation of the section (in its earlier form) should be rejected. There is no warrant in s 3.5.14(2)(b) itself for applying different weight to different grounds. To do so would be to impose an entirely artificial set of fetters on the decision-making required. The importance of the ground must depend on what it is, not where it falls in the three-step approach in *Weightman*.

Absence of a negative impact as a ground

[22] The Council complained of ground (e) of his Honour's grounds, relating to the screening and isolation of the site, that it amounted to no more than the absence of a negative: that the proposed development would not have unacceptable impacts on visual amenity. It was submitted that, as his Honour had accepted in the same paragraph of his reasons, absence of a negative impact could not amount to a ground for the purpose of s 3.5.14(2)(b), and he had, therefore, taken into account an irrelevant consideration. For that proposition, the Council cited *Grosser v City of Gold Coast*[14] and *Palyaris v Gold Coast City Council*.[15]

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11 At page 453.
12 *Westlink P/L v Lockyer Valley Regional Council & Ors* [2012] QPEC 31 at [15].
13 At [37].
14 (2001) 117 LGERA 153 at [50].
15 [2004] QPELR 162 at 169.

[23] I do not, with respect, consider that either case stands for the proposition identified. The passage in *Grosser* relied on by the Council appears in the judgment of White J (as her Honour then was), delivering the leading judgment. The appellants' contention in that case was that nothing before the Planning and Environment Court had indicated that there were any positive planning grounds to support approval of the proposal; to which the respondents pointed out that the section at issue there had not referred to "positive" planning grounds. White J said this:

> "However it does require that the planning grounds to be 'sufficient'. The discretion is couched in negative terms, that is, that the application must be refused if there are not sufficient planning grounds. This might suggest that something more is required than negative impact on the surrounding amenity and want of relevant objection."[16]

[24] In *Palyaris v Gold Coast City Council*, Wilson SC DCJ (as his Honour was at that time) noted that the applicant had advanced a number of planning grounds similar to those in *Grosser* which the Court of Appeal had not considered sufficient to justify approval of the application despite the conflict. He noted that "analogous" grounds had been put forward in another Planning and Environment Court case, *Kentbrock Pty Ltd v Gold Coast City Council*,[17]

> "Nor was the Court persuaded that the absence of negative amenity effects was, in itself, a positive planning ground supporting approval."[18]

His Honour went on to say that "sufficient planning grounds" connoted "grounds which would establish positive betterment in terms of planning outcomes."

[25] It may be accepted, as *Grosser* says and *Palyaris* implies, that the mere absence of adverse effects will not amount to sufficient grounds to outweigh a conflict with the planning scheme; but it does not follow that the absence of a negative impact or detrimental effect is not a relevant consideration. In any case, *Grosser* and *Palyaris*, it should be remembered, were concerned with a different expression, "planning grounds", and hence a narrower inquiry than that entailed in assessment of the unqualified and broadly defined "grounds" which are now relevant. It must be a matter of public interest, for example, that the project under consideration will not destroy local amenity. The isolation and screening of the project were properly considered as a ground, to be weighed with other grounds in considering their sufficiency.

The "special purpose" ground

[26] The applicant said of ground (a) identified by the primary judge that the fact that the same project would have been permissible undertaken by a public entity did not amount to a public interest, and it was an irrelevant consideration. Westlink's response was that it had not submitted, at first instance, that the "special purpose point" constituted a ground, although the question of whether it did was "moot". In any case, it was submitted, it was relevant to the overall statutory task of considering the nature and extent of the conflict and whether there were grounds to overcome it, so it was not an irrelevant consideration.

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16 At 166.
17 [2003] QPELR 587.
18 At 169.

[27] I doubt that the fact that a public enterprise's undertaking will generally be self-assessable as a "special purpose" has any bearing on the desirability of the same undertaking when conducted by private enterprise. Considerations for public as opposed to private undertakings are so dissimilar, for both historical and contemporary reasons, that it can be of no assistance that one is contemplated by the scheme and the other not. And the logic that if the activity undertaken by a public utility does not conflict with the planning scheme, that fact must render it a "matter of public interest" (as a ground within the meaning of s 3.5.14(2)(b) must be) for the same activity to be conducted by private enterprise, does not withstand closer scrutiny. I agree with the Council's submission: this was an irrelevant consideration in considering the sufficiency of grounds.

The "better location" issue

[28] In ground (c), his Honour included the sentence:

> "I do not agree with the Council that the scheme provides a better location than the Gatton North Enterprise Opportunity Area or any other area."

It seems probable that the word "than" is a typographical error, and that the preposition "at" should have appeared at that point in the sentence.

[29] The Council had submitted, at first instance, that it was relevant to consider whether any benefits to be achieved by the proposal could be met through compliance with the planning documents; in this case, the Southeast Queensland Regional Plan, which identified the Gatton North Enterprise Opportunity Area as a site for future industrial development. It was located on the south side of the Warrego Highway, opposite Westlink's site, to the north of the highway.

[30] The Council relied on this passage from *Palyaris v Gold Coast City Council* which it described as the "*Palyaris* principle":

> "The term 'planning grounds' in s 4.4(5A) of the *PEA*, prefaced by the word 'sufficient' connotes grounds which would establish positive betterment in terms of planning outcomes which would not otherwise be achievable through the existing Planning Scheme and justify departure from it. The difficulty for the appellant is that each of the planning outcomes it identifies is equally available under the usage which is presently permitted, and approval would do no more than remove the requirement for a residential component, while permitting the intensification of non-residential purposes. The fact that there are no positive features arising from approval which are not otherwise achievable through development consistent with the planning strategies encapsulated in the 1994 scheme means there is, with reference to the equation described in the third stage identified by Atkinson J in *Weightman*, no substantive planning feature which justifies approval, despite the conflict."[19]

The first sentence of the passage relied on plainly depends on the expression "planning grounds" used in the relevant section, which, as already mentioned, does not appear in s 3.5.14(2)(b). I am dubious that the balance of the passage reflects

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19 At 169.

a principle, as opposed to an evaluation of the planning grounds, including need, advanced in the particular case.

[31] But for present purposes, the content of the Regional Plan was plainly relevant: to the extent that the Planning Scheme varied from it, the Planning Scheme required amendment,[20] and the Regional Plan prevailed in respect of any inconsistency with the Planning Scheme.[21] In weighing those grounds which concerned the location of the development, the existence of the Gatton North Enterprise Opportunity Area in the Regional Plan as a possible site for the proposal was a relevant consideration. The Council's point was that the learned judge mistook its argument: it was not that the Gatton North Enterprise Opportunity Area provided a better location but that the development could have been carried out with the same advantages, consistently with the Regional Plan. The primary judge's reasons did not explain why the Council's submission had been rejected.

[32] Westlink relied on the fact that the primary judge had, in his reasons, recorded Council's submission that the need could adequately be met in the Gatton North Enterprise Opportunity Area. His Honour had also set out Westlink's submission which was that the visual impacts of a location in the area south of the Warrego Highway would be worse, suggesting that, by inference, he had accepted that argument. Unfortunately, his Honour did not say so, or make any findings on the issues raised by the respective submissions. The Council is correct in saying that he does not appear to have addressed its argument when he identified the grounds in favour of approval. His Honour failed to have regard to what was a relevant consideration raised by the Council, the availability of the alternative site in an area designated by the Regional Plan.

Conclusions and orders

[33] The errors identified were errors of law of a material kind which necessitate setting aside the judgment below. The application should be allowed and the appeal upheld. The Council did not maintain its written submission that this Court make the determination required by s 3.5.14(2)(b); unsurprisingly given that not all of the evidence before the primary judge was before it. But the Council submitted that if the appeal were to succeed, it should be remitted to a judge other than the primary judge who had heard the appeal initially and when it was previously remitted by this Court. Westlink opposed that course.

[34] However, given the history of the matter, the Council is entitled to be concerned as to whether the learned primary judge could apply his mind to the matter unaffected by all that has gone before. It is unfortunate, because it means that, subject to what accommodation the parties can reach, evidence may have to be given again; but there is a proper basis, in my view, for directing that the matter be heard by a different judge of the Planning and Environment Court.

[35] The Council's argument on the *Weightman* point was raised late, required an amendment to the draft notice of appeal and was the subject of a supplementary outline of argument requiring the filing of a further set of submissions by Westlink. The point had no merit. Westlink should have its costs of responding to the additional appeal ground.

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[20] Section 2.5A.20 *Integrated Planning Act* 1997.

[21] Section 2.5A.21(3).

[36] I would make the following orders:

1. The application for leave to appeal is granted.

2. The appeal is allowed.

3. The order made by the Planning and Environment Court on 27 April 2012 is set aside.

4. The appeal to that Court from the decision of the applicant made on 11 August 2010 to refuse the first respondent's application for a development permit is remitted to that Court for determination according to law, with the direction that it be heard by a judge of that Court other than the primary judge.

5. The first respondent is to pay the applicant's costs of and incidental to the application, the leave to appeal and the appeal in this Court, with the exception of those costs incurred in connection with the filing of the applicant's supplementary outline of argument and the addition of ground 3(d).

6. The applicant is to pay the first respondent's costs of responding to the applicant's supplementary outline of argument and the addition of ground 3(d).

[37] **WHITE JA:** I have read the reasons for judgment of Holmes JA. I agree with her Honour's reasons and the orders which she proposes.

[38] **ATKINSON J:** I have had the advantage of reading the reasons of Holmes JA. I agree that, for those reasons, the orders proposed by her Honour should be made.