

# SUPREME COURT OF QUEENSLAND

CITATION: *Stradbroke Island Management Organisation Inc & Ors v Redland Shire Council & Ors* [2002] QCA 277

PARTIES: **STRADBROKE ISLAND MANAGEMENT ORGANISATION  
INC 1A6856  
FRIENDS OF STRADBROKE ISLAND ASSOCIATION  
INC 1A9583  
HAIG BECK  
JACKIE COOPER  
JANI HAENKE  
BRUCE JOHNMAN  
JAN JOHNMAN  
(appellants/applicants)  
PATRICIA LAKE  
BEN HAWKE  
P JOE LAKE  
ROBERT WHITE  
J D WHITEHEAD  
V R WHITEHEAD  
BRONWYN ZUTTON  
(appellants)**  
v  
**REDLAND SHIRE COUNCIL**  
(respondent/first respondent)  
**S MUNDAY and BELT COLLINS AUSTRALIA LTD**  
ABN 71 002 843 594  
(co-respondents/second respondent)

FILE NO/S: Appeal No 1060 of 2002  
P & E Appeal No 4859 of 2000

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Integrated Planning Act*

ORIGINATING COURT: Planning and Environment Court at Brisbane

DELIVERED ON: 2 August 2002

DELIVERED AT: Brisbane

HEARING DATE: 9 April 2002

JUDGES: McMurdo P, Davies JA and Mullins J  
Joint reasons for judgment of Davies JA and Mullins J;  
separate reasons of McMurdo P, concurring as to the orders  
made

## ORDERS:

- 1. Application for leave to appeal granted.**
- 2. Appeal allowed.**
- 3. Set aside the orders of the Planning and Environment Court made on 21 November 2001.**
- 4. In lieu thereof, allow the appeal to the Planning and Environment Court and refuse the application of the second respondent the subject of that appeal.**
- 5. The second respondent to pay the applicants' costs of this appeal.**

## CATCHWORDS:

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – MATTERS FOR CONSIDERATION OF CONSENT AUTHORITY – CONSIDERATION OF DEVELOPMENT STANDARDS – APPLICATIONS TO RELAX COMPLIANCE - where proposed re-development of hotel – where proposed development fails to comply with development standards in development control plan (“DCP”) – where s 14 DCP provides development may be approved despite conflicts with development standards where proposed development achieves objectives of DCP – where applicants must submit site development plans, site analysis plan and written statement of compliance demonstrating how proposed development achieves compliance with objectives of the DCP before approval can be given – where no evidence plans or written statement of compliance submitted

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – MATTERS FOR CONSIDERATION OF CONSENT AUTHORITY – CONSIDERATION OF DEVELOPMENT STANDARDS – APPLICATIONS TO RELAX COMPLIANCE - where discretion under s 4.13(5A)(b) *Local Government (Planning and Environment) Act 1990* to approve proposed development where there are sufficient planning grounds to justify – where primary judge did not consider whether s 14 DCP had been complied with before exercising discretion – where primary judge did not consider whether the substance of the requirements under s 14 DCP had been established before exercising discretion – where primary judge erred in exercising discretion under s 4.13(5A)(b)

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED - whether matter should be remitted to the Planning and Environment Court for determination – where all the relevant evidence before the Court of Appeal – where Court of Appeal has benefit of primary judge’s reasons – where matter of considerable public interest and importance – where decision of Court of Appeal would avoid further re-hearing and appeal – where Court of Appeal should determine application –

where application should be refused

*Integrated Planning Act* 1997 (Qld), s 4.1.27, s 4.1.56, s 6.1.30(3)(b)

*Local Government (Planning and Environment) Act* 1990 (Qld), s 4.13(5), s 4.13(5A)

*Ballymont Pty Ltd & Anor v Ipswich City Council & Ors* [2002] QCA 233; Appeal No 6697 of 2001, 28 June 2002, considered

*Vynotas Pty Ltd v Brisbane City Council* [2002] 1 QdR 108, considered

*Weightman v Gold Coast City Council & Anor* [2002] QCA 234; Appeal No 2452 of 2002, 28 June 2002, considered

COUNSEL: T W Quinn for the applicants  
P Smith (*sol*) for the first respondent  
D R Gore QC, with M E Rackemann, for the second respondent

SOLICITORS: Carew McKimmie for the applicants  
Deacons for the first respondent  
Phillips Fox for the second respondent

- [1] **McMURDO P:** This application concerns the proposed redevelopment of the Stradbroke Island Hotel, Point Lookout. The Redland Shire Council, the first respondent ("the Council"), approved an application for a material change of use of land for the redevelopment by the second respondent ("the developer") of the site of the current Stradbroke Island Beach Hotel, Point Lookout, North Stradbroke Island. The applicants, incorporated associations and individuals opposed to the proposed redevelopment, unsuccessfully appealed from that approval to the Planning and Environment Court under s 4.1.27 *Integrated Planning Act* 1997 (Qld) ("IPA"). They now seek leave to appeal from the decision of the Planning and Environment Court under s 4.1.56 IPA which allows a party to appeal on the ground of error or mistake in law only with leave of this Court. The parties agree that this is an appropriate case in which, if leave is given, to also deal with the appeal, the merits of which were canvassed before us.
- [2] The site of the proposed redevelopment is on a scenic and visually prominent headland on the only road through Point Lookout and is just over 8,000 sq metres in area. The redevelopment of the present licensed hotel and 66 serviced accommodation units is for an integrated tourist resort comprising a new hotel with a bistro, bar, terraces, decks, drive-through bottle shop and manager's residence; 16 serviced hotel rooms; reception area, lobby and function room and, to the west, 27 accommodation units in two buildings of three storeys with rooftop gardens and terraces. Basement level parking for 63 vehicles and service facilities are provided beneath the hotel and the units.
- [3] The applicants submit that the learned primary judge in dismissing their appeal failed to give adequate reasons and to decide issues raised; erred in taking into account irrelevant considerations; misconstrued and failed to apply the provisions of the Council's Development Control Plan 3 Point Lookout ("DCP3") s 14 and s

4.13(5A) *Local Government (Planning and Environment) Act 1990* (Qld) ("LGA") and erred in concluding there were proper town planning grounds to approve the development application.

**The relevant town planning scheme**

- [4] The site is included in the Council's DCP3, a "transitional planning scheme" under Ch 6 IPA. Applications as to land subject to DCP3 must be decided under s 4.13(5) and (5A) LGA.<sup>1</sup>
- [5] Section 4.13(5A) LGA provides:
- "The local government must refuse to approve the application if -
- (a) the application conflicts with any relevant strategic plan or development control plan; and
  - (b) there are not sufficient planning grounds to justify approving the application despite the conflict."

DCP 3 does not have binding force but is of persuasive relevance only: *Vynotas Pty Ltd v Brisbane City Council*.<sup>2</sup> Considerable weight must, however, be given to planning schemes<sup>3</sup> especially a plan such as DCP3 which is clearly intended to place strict controls on development in a unique and prominent seaside location within a fragile coastal environment close to Brisbane.

**DCP3**

- [6] The introduction to DCP3 provides that:
- "Point Lookout is a rare example of a township, located in close proximity to a State capital city, which has retained its coastal village character. ...

The extensive planning investigations and community consultation processes undertaken in the preparation of this DCP resulted in the formulation of an approach to development management in the township directed towards:-

- retaining and enhancing the area's natural environment;
- conserving the township character;
- allowing for growth in the less constrained areas of the town;
- expanding residential and tourism use opportunities within a controlled environment; and
- providing for continued use as a coastal holiday destination.

It is intended to reinforce the clustering of development and to separate development clusters using landscape and natural bushland elements. It is further intended to retain the scale of development by limiting the height and bulk of buildings and structures; and to reinforce pedestrian movement as the dominant mode of travel within the township.

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<sup>1</sup> IPA, s 6.1.30(3)(b) and note the observations of Fryberg J in *Ballymont Pty Ltd & Anor v Ipswich City Council & Ors* [2002] QCA 233, [18]-[20].

<sup>2</sup> [2002] 1 QdR 108, 113.

<sup>3</sup> *Vynotas*, para [22].

Previous planning instruments applying to Point Lookout did not adequately provide for the conservation of the existing natural environment, or the retention of the locality's inherent character. Past township development strategies promoted forms of development which had the potential to significantly alter the character of the township, with the consequential loss of the charm of the existing settlement.

This Development Control Plan establishes a more appropriate approach to the management of development within the township. It provides clearer and more specific development guidelines for private lands, puts forward development guidelines for the upgrading of public spaces, identifies future development directions for township expansion, and promotes revised subdivisional and environmental design guidelines as implementation vehicles for the Plan."<sup>4</sup>

- [7] The Plan then sets out seven key development principles:
- i. To consolidate development in order to prevent township sprawl.
  - ii. To improve pedestrian accessibility within the township by de-emphasising vehicular reliance.
  - iii. To ensure that future development is in character with the existing township.
  - iv. To cater for the needs of increased tourism and visitor demand through a range of accommodation types and standards.
  - v. To ensure that the natural environment and visual character of Point Lookout are not compromised by the built environment.
  - vi. To identify management approaches which will maintain the quality of the natural and built environment into the future.
  - vii. To diversify the local economy and to provide for economic activity."<sup>5</sup>

- [8] Its purpose and aim:
- "... is to regulate and guide development in the Point Lookout locality. It designates land uses for the DCP Area, outlines a preferred strategy for pedestrian and vehicular movement and specifies controls for development.

Its aim is to provide for the appropriate and orderly development of the township and to ensure that the natural environment and character of Point Lookout is maintained."<sup>6</sup>

- [9] DCP3

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<sup>4</sup> DCP3, s 1.1.

<sup>5</sup> DCP3, s 1.2.

<sup>6</sup> DCP3, s 1.3.

"... applies to all forms of development requiring town planning approval in the Development Control Plan area. It is also a requirement that the planning and design principles detailed within the Development Control Plan will apply to the erection of buildings and structures.

... Where there is an inconsistency or conflict between the Town Planning Scheme and the Point Lookout DCP, the provisions of the Point Lookout DCP shall prevail to the extent of the inconsistency."<sup>7</sup>

- [10] The intent of DCP3's development strategy "is to manage growth in a manner which first and foremost promotes the village character of Point Lookout, and generally conserves the fragile coastal environment and other areas of particular environmental quality."<sup>8</sup>
- [11] The land covered by DCP3 is divided into precincts and the proposed redevelopment site is within Precinct 3, Tourist Accommodation and Facilities.<sup>9</sup> The provisions governing that Precinct are set out in DCP3 s 6. The intent of the Precinct is to identify:
- "areas which are to cater primarily for short stay tourist accommodation and related support facilities. Locations identified for future tourist accommodation are accessible to the natural and outdoor attractions of Point Lookout. Where tourist accommodation sites are located in visually sensitive areas, a lower density of development will be permitted in comparison to less sensitive sites. A greater building height is intended on land south of East Coast Road<sup>10</sup> where tourist accommodation is to be concentrated."<sup>11</sup>
- [12] Tourist accommodation sites are:
- "intended to be developed as integrated tourist facilities consisting of predominantly accommodation units with attendant facilities to cater for the needs of short stay guests.
- The built form is to be low to medium rise, and is to respect the topographical features of each individual site. Where an established native vegetative cover exists, development should be designed to integrate with this cover."<sup>12</sup>
- [13] The Preferred Development Form includes low to medium rise buildings respecting the topographical features of each individual site; development should integrate with any established native vegetative cover.<sup>13</sup>
- [14] Section 6 DCP3 then provides for a number of development standards: Vegetation Retention;<sup>14</sup> Site Works;<sup>15</sup> Height Limit;<sup>16</sup> Site Coverage;<sup>17</sup> Boundary Clearance

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<sup>7</sup> DCP3, s 1.5.

<sup>8</sup> DCP3, s 3.1; see also the General Development Criteria set out in DCP3, s 3.2.

<sup>9</sup> DCP3, s 3.3.1, area no 3.

<sup>10</sup> The site of the proposed redevelopment is north of East Coast Road.

<sup>11</sup> DCP3, s 6.1.

<sup>12</sup> DCP3, s 6.3.

<sup>13</sup> DCP3, s 6.3.

<sup>14</sup> DCP3, s 6.4.1.

<sup>15</sup> DCP3, s 6.4.2.

and Building Form;<sup>18</sup> Materials;<sup>19</sup> Colours;<sup>20</sup> Carparking Requirements;<sup>21</sup> Signage;<sup>22</sup> Point Lookout Headland Streetscape Master Plan.<sup>23</sup> Each of these development standards sets out a control and a purpose of control.

- [15] Section 14 DCP3, **Discretionary Provisions for the Consideration of Innovative and Sensitive Designs**, provides:

"Where applicants believe they have a desirable solution to a specific site which achieves compliance with the objectives of the Development Control Plan but fails to comply with the development standards, the following additional information shall be submitted:-<sup>24</sup>

**14.1.1 A Site Analysis Plan ...**

**14.1.2 Site Development Plans ...**

**14.1.3 Written Statement of Compliance**

A Written Statement of Compliance – any such application shall be accompanied by a written statement demonstrating how the proposed design achieves compliance with the objectives of the Development Control Plan and the purpose of each of the Development Standards applicable within the relevant Precinct. The detailed written explanation shall also illustrate how the proposed development achieves a more sensitive and desirable design solution than if it were to comply with each of the relevant development standards."

- [16] Although DCP3 does not specifically set out objectives, it is common ground that the objectives referred to in s 14.1.3 here include the matters extracted above from ss 1 and 3 DCP3 and the intent in s 6.1 DCP3. Section 14 DCP3 provides that where a proposed development design does not comply with a development standard but complies with those objectives, the developer must submit a written statement showing how the proposed development is a more sensitive and desirable design solution than if it complied with each of the relevant development standards.<sup>25</sup>

- [17] Here it is common ground that the proposed development does not meet a number of development standards. The onus is on the developer to establish that the appeal to the Planning and Environment Court should be dismissed.<sup>26</sup> In order to comply with DCP3, the developer had to satisfy the judge that, despite non-compliance with one or more development standards, the proposed development meets the objectives of DCP3 and is a more sensitive and desirable solution than if it in fact met each relevant development standard. If the developer does not meet that onerous test, then the proposed redevelopment does not comply with DCP3. That test is not met by showing that another complying development would be a less sensitive and desirable solution but must address the compliance of the development the subject of the application. But the application for the proposed development

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<sup>16</sup> DCP3, s 6.4.3.

<sup>17</sup> DCP3, s 6.4.4.

<sup>18</sup> DCP3, s 6.4.5.

<sup>19</sup> DCP3, s 6.4.6.

<sup>20</sup> DCP3, s 6.4.7.

<sup>21</sup> DCP3, s 6.4.8.

<sup>22</sup> DCP3, s 6.4.9.

<sup>23</sup> DCP3, s 6.4.10.

<sup>24</sup> DCP3, s 14.1.

<sup>25</sup> DCP3, s 14.1.3.

<sup>26</sup> IPA, s 4.1.50(2).

will not be refused<sup>27</sup> if the developer demonstrates there are sufficient planning grounds to justify its approval despite the conflict.<sup>28</sup>

### **The primary judge's reasons**

- [18] The learned primary judge identified the applicants' main case against the proposed development as the alleged unacceptable conflict with DCP3.<sup>29</sup> His Honour recognised that demonstrated non-compliance with development standards will not necessarily lead to the rejection of the application for redevelopment because, first, s 14 DCP3 gives a discretion to allow departure from the development standards where it can be shown that a proposal is "a desirable solution to a specific site which achieves compliance with the objectives of the DCP but fails to comply with the development standards". Second, his Honour identified that s 4.13(5A) LGA accepts the possibility of departure from the DCP when there are sufficient planning grounds. Third, his Honour noted this Court's decision in *Vynotas*.
- [19] His Honour then considered the provisions of DCP3 relating to the Tourist Accommodation and Facilities Precinct, particularly observing DCP3 s 6.3, and the uniqueness of the site location and its visual prominence.<sup>30</sup> His Honour also observed that this was not a new development but a redevelopment of a facility which has served the community well for a considerable time and "it is important that it be able to continue to do so and, as a consequence, functionality is an issue along with visual impact."<sup>31</sup>
- [20] His Honour next considered the evidence of the developer's architect, Mr Millis, who was concerned with balancing the appearance of the project with functionality, so as to be an effective commercial entity. His Honour concluded:  
 "I am satisfied that [Mr Millis] has succeeded in achieving an appropriate balance in that sense. I am satisfied that the proposal will not compromise the character of Point Lookout and that the built form will be of a scale and character which will comfortably take its place on this unique site while continuing to provide what the community expects from such a facility."<sup>32</sup>
- [21] His Honour expressed concern that the proposal by the applicants' expert, Professor Beck, who preferred a building form broken into a number of smaller structures (as required by DCP3), did not sufficiently take into account functionality.
- [22] His Honour then considered whether the proposed development complied with the development standards under DCP3 including those which the applicants now contend are not met by the proposed redevelopment.
- [23] His Honour observed that Vegetation Retention was less than the 35 per cent required by the control<sup>33</sup> but, bearing in mind the purposes of that control,<sup>34</sup> the

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<sup>27</sup> *Vynotas*.

<sup>28</sup> LGA, s 4.13(5A)(b).

<sup>29</sup> Reasons for Judgment, paras [16], [21].

<sup>30</sup> Reasons for Judgment, para [22].

<sup>31</sup> Reasons for Judgment, para [23].

<sup>32</sup> Reasons for Judgment, para [24].

<sup>33</sup> DCP 3, s 6.4.1; Reasons for Judgment, para [26].

<sup>34</sup> DCP 3, s 6.4.1.

onsite landscaping, combined with the vegetation surrounding the site which is intended to be augmented, sufficiently achieves the essential objects of the DCP.<sup>35</sup>

- [24] His Honour noted the purpose of the control for the development standard, Height Limit<sup>36</sup> and accepted that the proposed development exceeded that control and this was "potentially of consequence".<sup>37</sup> He found that the excess height on the hotel building was "minor" and on the apartment building "not great, (and) has largely resulted from the attention given to the on-roof terraces".<sup>38</sup> This is not a development in "an otherwise pristine area but rather of a site which has been developed for some considerable time". The visual appearance of the proposed development will not "involve a worsening in appearance from what can now be seen and could not seriously be suggested to be unduly offensive."<sup>39</sup> Whilst the visible impact of the development is not minimal, vegetative screening will be substantial and the overall result is that "the relatively minor exceedences in respect of building height should not ... be held to be contrary to the objectives of the DCP".<sup>40</sup> Later his Honour observed that, as to view impediments, only a very small proportion of the intended buildings exceed the height limits contemplated by the DCP and not to any great extent. The surrounding vegetation will soften the appearance of the development and will not be very intrusive.<sup>41</sup>
- [25] His Honour then considered the development standard, Site Coverage,<sup>42</sup> and the purpose of that control which does not contemplate buildings of more than two storeys in height; but the height limits permitted by that control<sup>43</sup> would allow for buildings of at least three storeys and the preferred development form in this precinct<sup>44</sup> contemplates low to medium rise buildings, which would include a three storey building. The fact that this development was three storeys did not preclude its approval. His Honour observed:
- "Any dispute in relation to site coverage appears largely to be resolved, as it would seem that the achieved site coverage is fairly close to the 35 per cent mentioned in s 6.4.4."<sup>45</sup>
- [26] The learned primary judge next considered the development standard, Boundary Clearance and Building Form.<sup>46</sup> His Honour rejected the applicants' contention that the now unused road reserve which passes around the site to the west, north and east should be regarded as a street when considering the control of this development standard. The proposed development in the area where setbacks are in issue is substantially above the level of the pathway and pedestrians using the pathway would be more likely to focus their attention towards the ocean. His Honour concluded the applicants' complaints are "ill-founded and are not such as to warrant the proposal's rejection".

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<sup>35</sup> Reasons for Judgment, para [27].

<sup>36</sup> DCP 3, s 6.4.3.

<sup>37</sup> Reasons for Judgment, para [29].

<sup>38</sup> Reasons for Judgment, para [29].

<sup>39</sup> Reasons for Judgment, para [30].

<sup>40</sup> Reasons for Judgment, para [31].

<sup>41</sup> Reasons for Judgment, para [49].

<sup>42</sup> DCP3, s 6.4.4.

<sup>43</sup> DCP 3, s 6.4.3.

<sup>44</sup> DCP 3, s 6.3.

<sup>45</sup> Reasons for Judgment, para [33].

<sup>46</sup> DCP3, s 6.4.5.

[27] As to Maximum Building Length, his Honour referred to the purpose of the control.<sup>47</sup> The existing structure is approximately 100 metres; the length of the proposed accommodation building is a little over 50 metres.

"As previously indicated and explained in the evidence the design represents a compromise between functionality and appearance. Physical site constraints also come into play. I accept the evidence that the result achieved though possibly not the optimum visual outcome to an overly critical eye is by no means an unattractive development and is not unacceptable in the circumstances."<sup>48</sup>

The purposes of the control are not offended by the proposal.<sup>49</sup>

[28] His Honour formed the view that the development standards in DCP3 "must be examined against the background of the opportunities for departure from the standards".<sup>50</sup> He accepted the view of the Technical Assessment Group of Council officers that:

"... there is considered to be considerable merit in what is intended. The proposal seeks to update the existing hotel and accommodation built form to the high standard of presentation using material and colours that are aesthetically pleasing and enable the development to become a landmark feature of the Shire. The proposal has been scaled back from what was initially intended in response to the concerns of submitters and Council ... .

In terms of the nature of the development as an integrated tourist resort hotel and accommodation units, it is not considered practical to meet all of the DCP controls. The proposal as revised is an acceptable solution to the constraints of the land and enables the opportunity for a high standard development that is consistent with Council's planning intent."<sup>51</sup>

as "a fair appraisal and if any conflict with the DCP could be said to exist, which is not my view, then more than adequate planning grounds exist to justify approval nevertheless."<sup>52</sup>

[29] In rejecting the applicants' appeal, his Honour expressed sympathy with their position and their "strong and conservative idea as to how this part of North Stradbroke Island should develop", a position which has contributed to the form of DCP3.<sup>53</sup>

[30] But his Honour decided the views of the applicants are not the views of the entire community; the Council in drafting its planning instruments has the difficulty of achieving the best possible compromise between the various competing attitudes. DCP3 has achieved this objective well, controlling the form of development to

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<sup>47</sup> Reasons for Judgment, para [37].

<sup>48</sup> Reasons for Judgment, para [38].

<sup>49</sup> Reasons for Judgment, para [37].

<sup>50</sup> Reasons for Judgment, para [44].

<sup>51</sup> Reasons for Judgment, para [44].

<sup>52</sup> Reasons for Judgment, para [44].

<sup>53</sup> Reasons for Judgment, para [56].

maintain the area's character whilst embodying a level of flexibility to deal with special cases such as this.<sup>54</sup>

- [31] On the whole of the evidence his Honour noted that he was "satisfied that the onus of showing that the application is one that should be approved has been discharged."<sup>55</sup>

**Was there a misconstruction of or failure to apply the provisions of the DCP?**  
*Section 14 DCP3*

- [32] A major issue for determination was whether the proposed development complied with DCP3. It did not meet a number of development standards. His Honour did not, as he was required under s 14 DCP3, enquire whether the proposed development is a more sensitive and desirable solution than if it met each relevant development standard. Before his Honour was entitled to exercise the limited discretion conferred by s 4.13(5A)(b) LGA to approve the application, his Honour had to first decide whether the proposed development conflicted with DCP3 and, if so, to what extent; only then could he make an informed decision whether there were sufficient town planning grounds to justify approving the application despite the conflicts.<sup>56</sup> Instead, his Honour merely decided, for very broadly stated reasons, (functionality and the visual and other advantages of the proposed development over the current development), that the application should be approved.
- [33] Although some attempts were made by the developer's town planner, Mr Munday, to address the s 14.1.3 DCP3 question, this went no further than establishing that a development which complied with DCP3 could be less sensitive and desirable than this proposed development. This did not address the question posed in s 14.1.3 DCP 3. On the evidence the developer did not call evidence capable of satisfactorily answering this question and the non-compliance with the various development standards has the result that the development application conflicts with DCP3. His Honour erred in concluding otherwise.<sup>57</sup> His Honour's failure to apply the appropriate test under s 14 DCP3 and his wrong approach to the proper exercise of discretion under s 4.13(5A) constituted errors of law.
- [34] I turn now to his Honour's consideration of those development standards which the applicants contend constituted further errors of law.

*Vegetation Retention*

The first of these standards is Vegetation Retention.<sup>58</sup> The applicants contend that his Honour's reasons are inadequate in that they do not resolve the dispute as to the percentage of the site to be landscaped and the percentage of the proposed development which actually satisfied the control. Although his Honour's reasons on this issue were brief,<sup>59</sup> his Honour recognised that vegetation retention was less than that required by the control, but, inferentially, accepted the evidence of the developer's experts that the on-site landscaping, combined with the vegetation

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<sup>54</sup> Reasons for Judgment, para [57].

<sup>55</sup> Reasons for Judgment, para [58].

<sup>56</sup> Compare *Weightman v Gold Coast City Council & Anor* [2002] QCA 234, [8], [14] and [36] as to the correct approach to the exercise of discretion under the similarly worded s 4.4(5A) LGA.

<sup>57</sup> Reasons for Judgment, para [44].

<sup>58</sup> DCP3, s 6.4.1.

<sup>59</sup> Reasons for Judgment, para [26]; see these Reasons at para [23].

surrounding the site which was to be augmented, sufficiently achieved the essential objects of the DCP.<sup>60</sup> This factual finding was not an error of law.

*Site coverage*

- [35] The purpose of the control imposed on the development standard Site Coverage is to allow for landscaping and control building massing; to maintain natural seepage of water to water table; to encourage development of a character sympathetic to the existing township; to maintain solar access and privacy; and to prevent buildings dominating the natural landscape.<sup>61</sup>
- [36] The control allows for 30 per cent site coverage for two storey buildings which may be increased to 35 per cent through the use of permanently open verandahs or balconies attached to or linking buildings.<sup>62</sup> The redevelopment application included three storey buildings with an additional basement car park and partially covered roof terraces on the apartment buildings.
- [37] "Site coverage" is relevantly defined as:  
 "the proportion expressed as a percentage which the area of a site covered by buildings bears to the total area of the site, where the area covered by buildings is measured to include the area within the projection of the outer limits of the buildings on to a horizontal plane, provided that such measurement shall not include:-  
 a. any building or structure or part thereof included in a landscaped open space area (eg gazebo, small garden shed, shade structure);  
 ...  
 c. private balconies which are not covered by or do not cover private habitable rooms and which are accessible only from one dwelling unit. Where any part of such balcony is more than two point five (2.5) metres out from the wall of the balcony, that part shall be included in the site coverage measurement;  
 d. verandahs, covered patios, building linkages and other covered areas which in total have a combined area of less than 5% of the allotment area."<sup>63</sup>
- [38] As set out above,<sup>64</sup> his Honour noted:  
 "Any dispute in relation to site coverage appears largely to be resolved, as it would seem that the achieved site coverage is fairly close to the 35 per cent mentioned in s 6.4.4 [DCP]."<sup>65</sup>
- [39] His Honour here misunderstood a concession by the applicants' counsel that the mathematical calculation as to the various areas relevant to site coverage was not in issue and wrongly interpreted it as a concession that site coverage itself was largely resolved.<sup>66</sup> As a result, his Honour failed to consider a significant aspect of the appeal before him and an issue essential to determining whether and to what extent

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<sup>60</sup> Reasons for Judgment, para [27].

<sup>61</sup> DCP3, s 6.4.4.

<sup>62</sup> DCP3, s 6.4.4.

<sup>63</sup> DCP3, s 2.

<sup>64</sup> See these Reasons, para [25].

<sup>65</sup> Reasons for Judgment, para [33].

<sup>66</sup> See transcript 17, 25, 56-58, 362, 367-369, 396-398, 543-546.

the proposed development complied with DCP3. In the circumstances, this constituted an error of law.

- [40] I turn now to the applicants' contentions below not dealt with by the primary judge. The applicants first contend that the hotel terrace above the car park should have been included in the site coverage and, second, that all the area of the private balconies should have been included because they were more than 2.5 metres deep. As to the first contention, it seems that this area may be exempt because of the definition of "site coverage" in paragraph a. But the car park is not completely underground and much of it is three metres above the road reserve; even if it is exempt from the definition of site coverage because of its roof treatment, its bulk (5.09 per cent of site coverage) is relevant to the purpose of the control and objectives of DCP3. The second contention is without merit because paragraph c. of that definition includes only that part of a private balcony (as provided for in the definition) more than 2.5 metres out from the balcony wall.
- [41] It is common ground that the combined building site cover, the site cover of private balconies more than 2.5 metres deep<sup>67</sup> and the site coverage of other unexempted structures<sup>68</sup> was 33.98 per cent, just within the maximum allowance.<sup>69</sup> Whilst the percentage of allowable site coverage is increased to 35 per cent where there are permanently open verandahs or balconies attached to buildings and/or linking buildings, that concession can only mean that, despite paragraph d. of the definition of site coverage, those permanently open areas must then be included in the calculated site cover. The developer did not include them. Planning instruments are often poorly drafted but courts must make some sense of them; it offends common sense to increase the allowable site coverage to 35 per cent if the areas which trigger the increase are already excluded from the definition of site coverage. DCP3 cannot intend to give a double advantage for such areas, not only excluding them from the definition of site coverage but also allowing the site coverage to be increased by 5 per cent where they are present. Here, an additional 4.99 per cent of site cover is taken up by covered areas linking the buildings. This area should be included in the site coverage and raises the percentage of site coverage to 38.97 per cent, exceeding the maximum 35 per cent provided.
- [42] Although not infringing any specific provision of DCP3, the following matters are relevant to the purpose of the control and the objectives of DCP3 which envisage a lower density of development. First, a further 3.11 per cent of site coverage includes balconies of less than 2.5 metres deep which are excluded from the definition of site coverage.<sup>70</sup> If this area were to be included it would bring the overall site coverage to 42.08 per cent of the site. Second, no provision is made in the control for buildings of more than two storeys, whereas the proposed development has buildings of three storeys<sup>71</sup> with additional basement car parks and some with partially roofed terraces.
- [43] It should also be noted that the expert opinions expressed in the town planning and architect reports, relied upon by the respondent and generally accepted by the

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<sup>67</sup> A combined site coverage of 33.98 per cent.

<sup>68</sup> DCP3, s 2 definition "site coverage"; an additional site coverage of 1.04 per cent.

<sup>69</sup> DCP3, s 6.4.4.

<sup>70</sup> DCP3, s 6.4.4 "Site coverage", c.

<sup>71</sup> See, however, Reasons for Judgment, para [32]; these Reasons, para [25].

learned primary judge, were based on the false premise that the maximum site coverage was not exceeded.

*Building height*

[44] Another development standard is Height Limit.<sup>72</sup> The purpose of the Height Limit control is to prevent the domination of the natural landscape by the built form of a development and to protect views of neighbouring properties. The Height Limit control provides that roofs or pergolas covering decks are permitted to extend 10.5 metres above natural ground level when not exceeding 15 sq metres in area for each detached building. Any structure above the 9.5 metre height limit must be permanently unenclosed on all sides.<sup>73</sup> It was common ground before the learned primary judge that all three buildings substantially exceeded the control. The Council and developer contended that nevertheless the building height excesses were not continuous and were of a lightweight nature, namely skylights, lifts, stairwells and structures covering on-roof terraces.

[45] His Honour recognised that the height limits were a matter "potentially of consequence".<sup>74</sup> As to the hotel building, he regarded the excess as "minor"; the excess for the apartment buildings was "not great" and largely resulted from attention to the on-roof terraces. Those findings of fact do not constitute an error of law.

*Boundary clearance and building form*

[46] The purpose of the control for the development standard, Boundary Clearance and Building Form,<sup>75</sup> is to allow for landscaping and to control building bulk; to encourage development of a character sympathetic to that existing; to maintain solar access; to control relationships between detached buildings on a site; and to maintain privacy. The control relevantly provides that building setbacks are to be a minimum of six metres to any street boundary and two metres to any side boundary; the rear boundary building setback is to be six metres and no building length is to exceed 20 metres.

[47] It was common ground that the lengths of each building substantially exceeded the control. His Honour noted the hotel building length is shorter than the current building and the development was attractive and acceptable.

[48] It was also common ground that the proposed development provided no setback to part of the western boundary; along the northern boundary there is an encroachment into the six metre setback zone towards the western end; there is a more substantial encroachment towards the eastern end of the northern boundary where the terrace structure abuts the northern boundary for more than 40 metres and there is a substantial encroachment at ground level.

[49] In concluding that the applicants' complaints on this development standard are "ill founded and are not such as warrant the proposal's rejection",<sup>76</sup> his Honour observed that the boundary of the property is on an unused road reserve<sup>77</sup> which is unlikely to

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<sup>72</sup> DCP 3, s 6.4.3.

<sup>73</sup> DCP 3, s 6.4.3 control i.

<sup>74</sup> Reasons for Judgment, para [29].

<sup>75</sup> DCP 3, s 6.4.5.

<sup>76</sup> Reasons for Judgment, para [36].

<sup>77</sup> Reasons for Judgment, para [35].

function as a vehicular thoroughfare again; if in the future it is used as a public pedestrian pathway the development in the area where setbacks are in issue is substantially above the level of the pathway and the attention of pedestrians is more likely to be turned towards the ocean.<sup>78</sup> His Honour did not address the lack of compliance with the setback control on the northern boundary but this seems to have been a relatively minor issue in the appeal below which it was not essential to address.<sup>79</sup> Nevertheless, even on the facts accepted by his Honour, this control was infringed, in part by the location of the sail-covered terrace over the substantial car park structure and certainly by the length of the buildings.

- [50] As I have noted, his Honour erred in law in failing to correctly apply the s 14 DCP3 test to determine whether, despite the non-compliance with the proposed development application, these development standards complied with DCP3 and in failing to consider the applicant's contentions as to site coverage.

#### **Section 4.13(5A) LGA**

- [51] His Honour also erred in applying s 4.13(5A) LGA for the reasons I have given earlier.<sup>80</sup> His Honour's discretion under this subsection necessarily miscarried as he failed to determine whether the proposed development application conflicted with DCP3 and, if so, the extent of that conflict, before considering s 4.13(5A)(b) LGA. This also constituted an error of law. Whilst ordinarily the judicial exercise of the discretion under s 4.13(5A) LGA is a question of fact,<sup>81</sup> here there are identified errors of law which require the re-exercise of that discretion.
- [52] The next question is whether this matter should be remitted to the Planning and Environment Court for decision in accordance with this Court's decision<sup>82</sup> or whether this Court will determine whether the development application, on the material before the primary judge, should have been approved under ss 4.13(5) and 4.13(5A)(b) LGA,<sup>83</sup> despite the conflicts with DCP3.
- [53] It seems the appeal to this Court is not by way of rehearing: *Logan v Woongarra Shire Council*<sup>84</sup> and *Osterley Pty Ltd v Caboolture Shire Council*.<sup>85</sup> That has the effect that this Court must decide the case on the law applicable at the time of the hearing, something which raises no difficulty here.
- [54] Whilst ordinarily this matter would be sent back to the Planning and Environment Court for determination, there are factors which make it proper for this Court to finally dispose of it. First, the parties have had the opportunity to canvass before this Court all the relevant evidence which was before the primary judge so that we are in as good a position as the primary judge to determine the issue; we additionally have the benefit of his Honour's reasons. Second, the case is of considerable public interest and importance; a decision from this Court will avoid the expensive and time-consuming prospect of a further hearing and appeal.

<sup>78</sup> Reasons for Judgment, para [36].

<sup>79</sup> *Holts Hill Quarries Pty Ltd v Gold Coast City Council & ors* [2000] QCA 268, Appeal No 7006 of 1999, 14 July 2000, paras [25]-[31]

<sup>80</sup> These Reasons, paras [32]-[33].

<sup>81</sup> *Ridgewood Development Pty Ltd v Brisbane City Council* [1985] 2 QdR 48, 52; *Gold Coast Carlton Pty Ltd v Beaudesert Shire Council* [1986] 1 QdR 414, 415.

<sup>82</sup> IPA, s 4.1.58(a).

<sup>83</sup> IPA, s 4.1.58(b) or (c).

<sup>84</sup> [1983] 2 QdR 689, G N Williams J (as he then was) with whom Matthews and Kelly JJ agreed.

<sup>85</sup> [1996] 2 QdR 34, 39-40.

- [55] The proposed development application fails to comply with four of the ten development standards required by DCP3. As to Vegetation Retention, his Honour found the proposed development achieved the essential objects of DCP3. His Honour found that the Height Limit excesses were relatively minor, softened by surrounding vegetation and not very intrusive. Non-compliance with the Boundary Clearance development standard was also found by his Honour to not be particularly significant although each of the buildings was much longer than allowed by the control. Of even greater concern is the issue of Site Coverage of these three storey buildings which cover almost 39 per cent of the site, five per cent beyond the maximum allowable in the development standard. The three storey apartment buildings have an additional basement and a partially roofed terrace. Whilst the first three infringements of the development standards are not individually of great significance, the combination of the four areas of non-compliance is more serious, particularly in the light of the objectives of DCP3 which place strict controls on development to enhance the natural environment and visual character of this unique and prominent seaside location close to Brisbane. The DCP envisages these qualities will not be compromised by the built environment and that a lower density of development will be permitted in visually sensitive areas like this site. The bulk of the sail-covered terrace on top of the car park, which is up to three metres above the road reserve and runs along the boundary for 40 metres, cannot be excluded when considering the objectives of DCP3. The buildings are higher, longer and cover more of the site with less vegetation retention than allowed by DCP3. There was no evidence that a development which complied with DCP3 would necessarily be less attractive than the proposed development.
- [56] On the other hand, his Honour was moderately impressed by visual aspects of this development and, as he rightly observed, it was undoubtedly a considerable improvement on the existing development; the hotel building will be shorter than the current building; the landscaping will be more sympathetic with the objectives of DCP3 and the proposed development will be largely obscured by trees.
- [57] The other matter which persuaded his Honour to refuse the applicants' appeal was functionality. The evidence as to functionality was limited. It did not go so far as to establish that a redevelopment of the site complying with DCP3 would not be economically viable. Mr Lally, whose family have owned the present site for about 15 years and who currently runs the hotel with his wife, said that the smaller 20 metre square buildings required for compliance with DCP3 would not assist functionality because staffing economies could not be achieved in quiet times. He provided no details. In cross-examination he conceded it may be possible to operate a commercially viable hotel comprising of one or more 20 metre by 20 metre buildings.<sup>86</sup> The applicants produced evidence that a number of operating hotels are of such dimensions.
- [58] I am far from persuaded that the evidence on these or other planning grounds justified approving the application despite its significant conflict with DCP3. The developer has failed to discharge its onus to show why approval should be given to the proposed development.

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<sup>86</sup> Transcript, 305.

### Orders

- [59] I would grant the application for leave to appeal, allow the appeal, set aside the order of the Planning and Environment Court and instead order that the development application be refused. The second respondent should pay the applicants' costs of the application and the appeal to be assessed.

### DAVIES JA and MULLINS J:

#### The proceedings

- [60] This is an application for leave to appeal from a decision of a judge of the Planning and Environment Court effectively approving an application by the second respondent to develop a tourist resort on the site of the Point Lookout Hotel on North Stradbroke Island. Leave is sought pursuant to s 4.1.56 of the *Integrated Planning Act* 1997 (Qld), and therefore the appeal, if leave is granted, is relevantly limited to one upon the ground of error or mistake of law on the part of the Planning and Environment Court. With the consent of all parties this Court agreed to hear full argument on the basis that if leave were granted it would proceed to determine the merits of the appeal.
- [61] On 11 October 2000 the first respondent approved an application by the second respondent for a material change of use of land at Point Lookout to allow it to be redeveloped for a tourist resort. The land is included in the Special Development Zone in the first respondent's planning scheme. In its Strategic Plan it is designated as Tourist Business and Accommodation and in its Development Control Plan No 3 it is included in the Tourist Accommodation and Facilities Precinct (No 3). The land is currently the site of the Stradbroke Island Beach Hotel.
- [62] The *Integrated Planning Act* 1997<sup>87</sup> required the application to be decided pursuant to s 4.13(5) and s 4.13(5A) of the *Local Government (Planning and Environment) Act* 1990 (Qld).<sup>88</sup> Those subsections provided:
- "(5) In deciding an application made to it pursuant to section 4.12 a local government is to—
- (a) approve the application; or
- (b) approve the application, subject to conditions; or
- (c) refuse to approve the application.
- (5A) The local government must refuse to approve the application if—
- (a) the application conflicts with any relevant strategic plan or development control plan; and
- (b) there are insufficient planning grounds to justify approving the application despite the conflict."
- [63] The applicant appealed to the Planning and Environment Court against the decision of the first respondent and on 21 November 2001 the learned Planning and Environment Court judge rejected the applicant's contention that the proposed development should not have been approved because it conflicted with Development Control Plan No 3 (DCP). The DCP is a planning instrument specifically for the control of development at Point Lookout.

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<sup>87</sup> Section 6.1.30(3)(b).

<sup>88</sup> That is because, in the Tourist Accommodation and Facilities Precinct, a tourist resort was a permissible use. See s 4.12(1) of the *Local Government (Planning and Environment) Act*.

**The scheme of the DCP as it applied to this development**

- [64] Section 1.3 of the DCP sets out its purpose and aim as follows:
- " The purpose of this Development Control Plan is to regulate and guide development in the Point Lookout locality. It designates land uses for the DCP Area, outlines a preferred strategy for pedestrian and vehicular movement and specifies controls for development.
- Its aim is to provide for the appropriate and orderly development of the township and to ensure that the natural environment and character of Point Lookout is maintained."
- [65] Section 1.1 of the DCP had earlier stated, by way of background, that:
- "Point Lookout is a rare example of a township, located in close proximity to a State capital city, which has retained its coastal village character. Considering its location near surf beaches and an attractive headland, it is remarkable that this character has been largely retained given that such areas are usually subject to substantial development pressures.
- ...
- It is further intended to retain the scale of development by limiting the height and bulk of buildings and structures; ..."
- And it had stated as four of its seven key development principles:
- iii. To ensure that future development is in character with the existing township.
  - iv. To cater for the needs of increased tourism and visitor demand through a range of accommodation types and standards.
  - v. To ensure that the nature environment and visual character of Point Lookout are not compromised by the built environment.
  - vi. To identify management approaches which will maintain the quality of the natural and built environment into the future."
- [66] Section 3.1 of the DCP then states the development strategy, the intent of which is described as follows:
- "The intent of the strategy is to manage growth in a manner which first and foremost promotes the village character of Point Lookout, and generally conserves the fragile coastal environment and other areas of particular environmental quality."
- [67] Section 3.3.1 of the DCP divides the Special Development (Point Lookout) Zone into precincts. Precinct 1 is described as "Island Residential", precinct 2 as "Shopping Business and Mixed Use", precinct 3, the subject precinct, as "Tourist Accommodation and Facilities", precinct 4 as "Eco-Tourism Accommodation", precinct 5 as "Service Uses", precinct 6 as "Community Facilities/Special Uses", precinct 7 as "Public Open Space" and precinct 8 as "Landscape Preservation". Separate sections then deal with each of the precincts, each providing for development standards in a number of respects.
- [68] It is s 6 of the DCP which provides for the tourist accommodation and facilities precinct. Section 6.1 states the intent of that section as follows:
- "This precinct identifies areas which are to cater primarily for short stay tourist accommodation and related support facilities. Locations

identified for future tourist accommodation are accessible to the natural and outdoor attractions of Point Lookout. Where tourist sites are located in visually sensitive areas a lower density of development will be permitted in comparison to less sensitive areas. A greater building height is intended on land south of East Coast Road where tourist accommodation is to be concentrated."

It is important to note that the subject land is north of East Coast Road.

- [69] Section 6.4 of the DCP contains the development standards for this precinct. The form of each subsection of that section dealing with each development standard is that the purpose of control is first stated and then the control is stated. The purposes are, on the whole, self-evident. However, for completeness, we shall state those which are relevant here.
- [70] The purpose of the vegetation retention control is said to be to protect land from erosion, to maintain native flora and fauna, to screen buildings and to maintain scale and character of streetscape. The purpose of the height limit control is said to be to prevent the domination of the natural landscape by the built form of a development and to protect views of neighbouring properties. The purpose of the site coverage control is to allow for landscaping and control building massing, to maintain natural seepage of water to water table, to encourage development of a character sympathetic to the existing township, to maintain solar access and privacy and to prevent buildings dominating the natural landscape. And the purpose of the control of building clearance and building form, including length of buildings, is to allow for landscaping and to control building bulk, to encourage development of a character sympathetic to that existing, to maintain solar access, to control relationships between detached buildings on a site and to maintain privacy.

**Contravention of development standards in s 6.4 of the DCP**

- [71] It was conceded by Mr Gore QC, for the second respondent, that the proposed development failed to comply with three of the development standards set out in s 6.4 of the DCP. These concessions were made in respect of the development standards for vegetation retention,<sup>89</sup> building height,<sup>90</sup> building length and boundary clearances.<sup>91</sup> Moreover Mr Gore QC submitted, and this was not disputed by the applicant, that the respondents conceded these below.
- [72] As to each of the first two of these, vegetation retention and building height, the learned Planning and Environment Court judge made specific findings of non-compliance with the standard but in neither case as to the extent of that non-compliance. As to building length and boundary clearances his Honour made no specific finding of non-compliance although such a finding may be implicit from the fact that he appeared to be purporting to exercise a discretion to permit the development notwithstanding non-compliance in each case. It need hardly be added, therefore, that his Honour made no finding as to the extent of non-compliance in each of those respects. As will appear from what we say below, it is our opinion that the extent of non-compliance with the standards contained in the

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<sup>89</sup> Section 6.4.1 of the DCP.

<sup>90</sup> Section 6.4.3 of the DCP.

<sup>91</sup> Section 6.4.5 of the DCP.

DCP is relevant to the exercise of discretion to approve an application notwithstanding non-compliance. It will therefore be necessary to say something about the extent of non-compliance in each of those respects.

- [73] The applicant also submitted that the proposal failed to comply with the development standard for site coverage in s 6.4.4 of the DCP. This was contested by the respondents. The dispute was resolved by his Honour by the rather curious conclusion that:

"Any dispute in relation to site coverage appears largely to be resolved, as it would seem that the achieved site coverage is fairly close to the 35 per cent mentioned in s. 6.4.4."

- [74] It will be necessary also, for the purpose of deciding this appeal, to resolve this contest between the parties as to whether this development control standard was complied with and if not the extent of that non-compliance. It will also be necessary to say something about his Honour's quoted conclusion in this respect.

- [75] Before turning to the extent of non-compliance with the development standards with respect to vegetation control, building height, building length and boundary clearances, and the question whether and, if so to what extent, there was non-compliance with the standard for site coverage, we should complete our discussion of the scheme of the DCP by referring to s 14. The respondents contend that, whatever may have been the extent of those non-compliances, the learned Planning and Environment judge could and did exercise a discretion under that section to allow the development notwithstanding that non-compliance.

#### **Section 14 of the DCP**

- [76] Section 14 is the last section in the DCP. It is headed "DISCRETIONARY PROVISIONS FOR THE CONSIDERATION OF INNOVATIVE AND SENSITIVE DESIGNS" and s 14.1 provides:

"Where applicants believe they have a desirable solution to a specific site which achieves compliance with the objectives of the Development Control Plan but fails to comply with the development standards the following additional information shall be submitted:-  
..."

The information required includes a site analysis plan (s 14.1.1), site development plans (s 14.1.2) and a written statement of compliance (s 14.1.3). Section 14.1.1 sets out in detail what is required in a site analysis plan. We do not find it necessary to set this out. Section 14.1.2 then requires:

"Site Development Plans incorporating both a site layout plan and elevation plans at a scale of not less than 1:100. In addition to submitting site development plans for the proposed development, the applicant shall also be required to submit site development plans for a hypothetical design which complies with all development standards applicable within the relevant Precinct."

Section 14.1.3 then requires:

"A Written Statement of Compliance - any such application shall be accompanied by a written statement demonstrating how the proposed design achieves compliance with the objectives of the Development Control Plan and the purpose of each of the Development Standards applicable within the relevant precinct. The detailed written explanation shall also illustrate how the proposed development

achieves a more sensitive and desirable design solution than if it were to comply with each of the relevant development standards. The person making the statement shall be nominated."

[77] Thus the written statement of compliance must show:

1. how the proposed design achieves compliance with the objectives of the DCP;
2. how the proposed design achieves compliance with the purpose of each of the development standards; and
3. how the proposed development achieves a more sensitive and desirable design standard than if it were to comply with each of the relevant development standards.

In the last of these requirements "more sensitive" appears to mean more visually sensitive<sup>92</sup> and "desirable" appears to mean more desirable as a design solution giving effect to the objectives of the DCP and the purpose of each of the relevant standards. The objectives of the DCP appear to be the purpose and aim set out in s 1.3 and the intent set out in s 6.1; and the purpose of each of the development standards are those which we have stated in [70].

[78] There is no evidence that any of the subsections of s 14 of the DCP were complied with. In particular there was plainly no submission of a site development plan for a hypothetical design which complied with all development standards<sup>93</sup> and there was no written statement of compliance within the meaning of s 14.1.3. The learned Planning and Environment Court judge made no attempt to compare the proposal with one which did comply with each of the relevant standards.

#### **Non-compliance with the relevant standards**

[79] The learned Planning and Environment Court judge commenced his discussion of the question of non-compliance with the standards set in s 6.4 of the DCP in the following way:

"There was a series of complaints made about the proposal and it was submitted that the matters raised involved a level of non-compliance with the DCP (and the development standards set out in s.6) which was unacceptable. Before embarking upon any detailed consideration of these matters it has to be said, at once, that any demonstrated non-compliance with these development standards is not necessarily fatal to the proposal and there are a number of important reasons for this.

1. Section 14 of the DCP, by necessary implication, provides to the assessing authority a discretion to allow departure from the development standards where it can be shown that a proposal represents:-

'A desirable solution to a specific site which achieves compliance with the objectives of the DCP but fails to comply with the development standards.'

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<sup>92</sup> See s 6.1 of the DCP quoted in [68].

<sup>93</sup> Arguably such a plan was tendered during the course of evidence in the Planning and Environment Court.

2. Section 4.13(5A) of the *Local Government Planning and Environment Act* accepts the possibility of departure from the DCP when sufficient planning grounds exist to justify that departure.

3. As was recently explained by the Court of Appeal in *Vynotas Pty Ltd v. Brisbane City Council* (2001), 112 LGERA 206, a transitional planning scheme may not, as a matter of law, prohibit any particular form of development."

[80] His Honour then proceeded to consider each of the relevant standards and their application in this case. It is convenient to state, in each case, what the standard required, what appears, in each case, to have been provided in the proposal, and his Honour's conclusion so far as it is relevant.

**(a) vegetation retention**

[81] Section 6.4.1 of the DCP required that vegetation be retained within 35 per cent of the site. Mr Pate, a landscape architect called by the second respondent, was of the view that the area made available for landscaping was 28 per cent. However, Professor Beck, a professor of architecture and one of the applicants, calculated that the landscaped areas in Mr Pate's plan totalled only 25.4 per cent. More importantly, he concluded that only 15.3 per cent of this actually satisfied the control in s 6.4.1 because only that part of it contained indigenous species listed in Schedule 1. That seems to be correct. On that view, what was proposed was not even one-half of the required vegetation retention standard. His Honour did not advert to this. He referred, in this respect, only to the "work" of Mr Pate with which he was "impressed". His conclusion was no more than that it had "to be accepted that it is less than the 35% mentioned in the relevant standard". Had his Honour understood the effect of Professor Beck's evidence he would have appreciated how far the provision for vegetation retention fell short of this requirement.

[82] His Honour then went on to say "I am of the opinion that the essential objectives of the DCP in this respect will be achieved". He expressed this opinion, it seems, because, as he put it, "when one bears in mind the purposes of the landscaping standards (which are identified in s. 6.4.1) the ability of on-site landscaping to fulfil those purposes is reinforced to a substantial extent by the vegetation surrounding the site (which is intended to be augmented)". By this, his Honour seems to be saying that the extent of vegetation surrounding this site may permit reducing the need to comply with the vegetation standard required on the site. There is nothing in the stated purposes of this control which supports that conclusion and, in view of the fact that the DCP seems to envisage this to be a visually sensitive site (see s 6.1), we think that that conclusion is wrong. The proposal for vegetation retention was less than half of that required and it did not, for the reason given by his Honour, otherwise achieve the objectives of the DCP.

**(b) building height**

[83] The height limit for the site as provided in s 6.4.3 of the DCP is 9.5 metres. This was exceeded in each of those buildings proposed for the site. The elevation plans approved by the Planning and Environment Court show the 9.5 metre line intersecting the roof of the hotel building and the roof terraces of each of the accommodation buildings, in the latter case about half-way between the floor and roof of each of those terraces. His Honour did no more than describe the extent to which the hotel building exceeded the height limit as "minor" and that to which the

apartment buildings did so as "not great". Although the plans before us are not to scale, this seems a very generous conclusion.

- [84] His Honour, in purporting to exercise a discretion in this respect notwithstanding non-compliance with this standard, looked at the visual impact of the proposal, comparing it with the existing hotel on the site, and concluding that "it will certainly not ... involve a worsening in appearance from what can now be seen". Whether that was so or not, a comparison of the proposal with the existing structure was irrelevant to any exercise of discretion under s 14 of the DCP.

**(c) building length**

- [85] The maximum length of any building, allowed under s 6.4.5 of the DCP is 20 metres. Each of the proposed buildings contravenes this standard. The proposed hotel building, according to Professor Beck's measurements was 51 metres long and 47 metres wide. According to Mr Mills the dimensions were 45 metres by 37 metres. On either view it grossly exceeded the standard. The apartment blocks, according to Professor Beck's measurements, which appear to have been uncontradicted, were 45.8 and 35 metres long respectively, again grossly exceeding the standard. His Honour said of these only that "the length of the accommodation building has been reduced to a little over fifty metres". It is unclear where his Honour got this measurement from or whether he was referring to only one accommodation building. His Honour did not mention the dimensions of the hotel building.

- [86] It is surprising, in view of the extent of those non-compliances with the standard, that his Honour was able to conclude, as he did, that the purpose of avoiding excessive building bulk was achieved. Moreover, again his Honour sought to compare the proposed length of one of the buildings with the existing length of the hotel building, a comparison which was irrelevant for the purpose of s 14 of the DCP.

**(d) boundary clearances**

- [87] These are required by s 6.4.5 of the DCP to be a minimum of six metres from any street boundary and two metres from any side boundary and, for the rear boundary, to be six metres. In fact the land is bound on all four sides by dedicated roads although the road on the western and part of the northern side is unmade. On the north-western corner of the land the proposal allows for no boundary clearance between one of the accommodation buildings and the western frontage for nearly 40 per cent thereof. Along the northern boundary, the hotel basement car park, which is between three and four metres above existing ground level, encroaches to within one metre of the boundary. On the eastern boundary 50 per cent of its length is covered by car park as is all of the southern boundary.

- [88] His Honour took the view, as to the north-western corner, that as the road reserve there was not used and was, he thought, unlikely to be used as a road, those boundaries were not "street boundaries". Even if one accepts the correctness of this last conclusion, there were substantial non-compliances on almost every boundary. His Honour's conclusion, that the applicant's complaints were "ill-founded", was therefore not justified on the evidence.

**(e) site coverage**

[89] Section 6.4.4 of the DCP limits the site coverage to 30 per cent for two storey buildings, although site coverage may be increased to 35 per cent for two storey buildings by permanently open verandahs or balconies attached to or linking buildings. However, there does not seem to be any doubt that the proposal did not comply with the requirement whether viewed as two or three stories. If one does not take into account the beer garden area covered with a sail, balconies less than 2.5 metres deep and the covered walkways, the site coverage was 33.98 per cent.

[90] The area covered with the sail was an additional 5.09 per cent, which would make a total of 39.07. Mr Gore QC submitted that the area of the beer garden covered with the sail should not be included because it was a building or structure or part thereof included in a landscaped open area within the meaning of exception a. in the definition of "Site coverage". That excludes from buildings included in the measurement of site coverage:

"a. any building or structure or part thereof included in a landscaped open area (e.g. gazebo, small garden shed, shade structure);  
... "

Here the beer garden was situated on the roof of the car park which was part of the total structure. As the car park was only partly underground, its roof, the floor of the beer garden, was partly above ground, in some places about half a storey above ground. Notwithstanding that there was intended to be some landscaping on the concrete floor of the beer garden and that the beer garden would be beside a landscaped open area it did not, in our opinion, come within the above exception. That exception, in our opinion was intended to exclude from the definition only those small structures, of kinds similar to the examples given, which are situated *in* a landscaped open area, that is, upon the ground in such an area.

[91] The inclusion of this area brought the site coverage up to 39.07 per cent.

[92] There remained an argument with respect to balconies less than 2.5 metres deep, covered walkways and covered patios which were exceptions c. and d. They excepted:

"c. private balconies, which are not covered by or do not cover private habitable rooms, and which are accessible only from one dwelling unit. Where any part of any such balcony is more than two point five (2.5) metres out from the wall of the balcony, that part shall be included in the site coverage measurement;  
d. verandahs, covered patios, building linkages and other covered areas which in total have a combined area of less than 5% of the allotment area."

[93] This argument was not resolved by the learned Planning and Environment Court judge, although his Honour did appear to conclude that the site coverage was more than 35 percent by his statement quoted in [73]. It is not clear what if anything can be inferred from this as to the inclusion of the 5.09 per cent for the sail area or the inclusion of the other disputed areas. They were 3.11 per cent for private balconies and 4.99 per cent for other common areas. The result of inclusion of all of these is a site coverage of 47.18 per cent.

- [94] Because all of the private balconies in the accommodation buildings were covered, they did not come within the exception in c. There were some uncovered private balconies in the hotel building which were not covered but these were fewer in number and substantially smaller in total area than those in the accommodation buildings. Together with the other covered areas, the balconies in the accommodation buildings exceeded the five per cent stated in d. Accordingly the standard for site coverage was grossly exceeded.
- [95] Therefore, it is apparent that the proposed development failed to comply with the development standards with respect to vegetation retention, building height, building length, boundary clearances and site coverage. It is also apparent that, in all cases the failures are substantial. There are, however two provisions which arguably permit departure from these standards. The first of these is s 14 of the DCP, the relevant parts of which and the effect of which we have already stated. The second is s 4.13(5A) of the *Local Government (Planning and Environment) Act*.

#### **The application of s 14 of the DCP**

- [96] As we have already pointed out that there was no evidence that s 14 of the DCP had been complied with or that his Honour adverted to its requirements.<sup>94</sup> It could not therefore have had any application in this case. It is perhaps unnecessary to add that it seems unlikely, in view of the gross overdevelopment, in terms of the DCP, that was involved in this proposal, that the second respondent could have complied with that section.

#### **How his Honour resolved this case**

- [97] The way in which his Honour sought to resolve the matter was as follows:
- "I have spent considerable time in working through the Development Standards found in s. 6 of the DCP. I must repeat that these matters must be examined against the background of the opportunities for departure from the standards that exist. In summing up on these topics I can do no better than adopt what was said in the report of the Technical Assessment Group of Council officers who recommended approval of the proposal:
- 'The particular architectural presentation of the development has been assessed by Council's technical officers and there is considered to be considerable merit in what is intended. The proposal seeks to update the existing hotel and accommodation built form to the high standard of presentation using material and colours that are aesthetically pleasing and enable the development to become a landmark feature of the Shire. The proposal has been scaled back from what was initially intended in response to the concerns of submitters and Council ...
- In terms of the nature of the development as an integrated tourist resort hotel and accommodation units, it is not considered practical to meet all of the DCP controls. The proposal as revised is an acceptable solution to the constraints of the land and enables the opportunity for a high

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<sup>94</sup> Though he did refer to it: see the passage from his Honour's reasons quoted in [79].

standard development that is consistent with Council's planning intent.'

On my view of the evidence, this represents a fair appraisal and if any conflict with the DCP could be said to exist, which is not my view, then more than adequate planning grounds exist to justify approval nevertheless."

[98] There are three comments which should be made about that passage. The first is that the report of the technical assessment group of council officers, which his Honour adopted, does not advert to the comparison which must be made under s 14 of the DCP. The second concerns his Honour's statement that there was no conflict between the proposal and the DCP. This is not only inconsistent with the concessions made both before his Honour and in this Court and also with his Honour's earlier findings of non-compliance with some of the standards. It is also plainly inconsistent with the findings which, in our opinion, his Honour should have made with respect to the failure of the proposal to comply with each of the standards discussed. And the third comment is that the phrase that more than adequate planning grounds exist to justify approval, if there were non-compliance, appears to be a reference to s 4.13(5A)(b) of the *Local Government (Planning and Environment) Act*, which permits the local government to refuse an approval of an application if "there are insufficient planning grounds to justify approving the application despite the conflict", rather than to the requirements of s 14 of the DCP.

[99] His Honour referred, later in his judgment, to the DCP embodying "a level of flexibility that will enable it to deal with special cases of which this is one" but that did not appear to bring him any closer to a consideration of the specific matters required by s 14.

[100] Some indication of why his Honour concluded that there was not any conflict with the DCP may be gathered from the way in which his Honour dealt with the question whether, in each case, a development standard was complied with. For example after accepting that the vegetation retention was less than the 35 per cent mentioned in the relevant standard his Honour said:

"As it was pointed out however, when one bears in mind the purposes of the landscaping standards (which are identified in s. 6.4.1) the ability of on site landscaping to fulfil those purposes is reinforced to a substantial extent by the vegetation surrounding the site, (which is intended to be augmented). I am of the opinion that the essential objectives of the DCP in this respect will be achieved. I find the suggestion that in dealing with this aspect of the case one should ignore off-site vegetation and screening as unrealistic."

[101] So his Honour appears to have construed s 6.4.1 of the DCP not as providing a minimum standard, with an explanation of the purpose of doing so, but as enabling him to look generally, including at off-site vegetation and screening as well as to the standard in order to determine whether the purpose of the standard has been broadly satisfied.

#### **His Honour's errors**

[102] In our opinion that is a misconstruction of the DCP. The controls are, in each case, minimum standards which must be complied with unless the developer satisfies the Council or the Planning and Environment Court, by means of the plans submitted

pursuant to s 14.1.1 and s 14.1.2 and the written statement submitted pursuant to s 14.1.3, that the proposed development achieves a more sensitive and desirable design solution than if it were to comply with each of the relevant development standards. His Honour's error in this respect appears in his discussion of each of the other relevant development standards, in some cases implicitly and in others, such as in his discussion of maximum building lengths, explicitly.

[103] Moreover had his Honour made specific findings as to the extent of departure from the development standard in each of the cases we have mentioned his Honour would not have failed to appreciate, as he apparently did, that the departure in each case appears to be substantial and, consequently perhaps, that it was unlikely that the proposal would be one which was either more sensitive or more desirable than one which complied with the standards.

[104] There is another error which appears to affect his Honour's judgment. He appeared to think that an appropriate comparison to make, for the purpose of deciding the appeal was between the existing development on the land and what is proposed. However, as we have pointed out, that what was proposed would be better than what was already there was not a relevant consideration.

***Local Government (Planning and Environment) Act s 4.13(5) and s 4.13(5A)***

[105] We are prepared to accept that, implicitly, s 4.13(5)<sup>95</sup> would have permitted the Council to approve the application notwithstanding conflict with the DCP if there were sufficient planning grounds to justify approving the application despite the conflict. Mr Gore QC for the second respondent, rightly conceded that, where there have been failures to comply with the development standards, as there were here, and there was a failure by the second respondent to comply with s 14, as there plainly was here, it would need to be an exceptional case to justify approving the application despite the conflict. No such exceptional case was identified. For that reason, subject to one matter to which we refer below, it is therefore unnecessary to consider this section further.

**Conclusion**

[106] The proposal failed to comply with development standards in five respects; vegetation retention (s 6.4.1 of the DCP), height limit (s 6.4.3), site coverage (s 6.4.4), and boundary clearance and linear dimensions of buildings (s 6.4.5). Moreover the failures appear to be, in each case, substantial.

[107] Having failed to comply with the development standards in each of these respects the second respondent, in order to obtain approval, was obliged to but failed to comply with s 14 of the DCP. In particular it did not submit a site development plan for a hypothetical design which complied with all the development standards and it did not submit a written statement of compliance demonstrating how the proposed design achieved compliance with the objectives of the DCP and the purpose of each of the development standards; and illustrating how the proposed development achieved a more sensitive and desirable design solution than if it were to comply with each of the relevant development standards. Whether it could have done the latter, given the extent of the departure from those standards and the

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<sup>95</sup> Set out in full in [62]. Cf *Ballymont Pty Ltd & Anor v Ipswich City Council & Ors* [2002] QCA 233; Appeal No 6697 of 2001, 28 June 2002 at [18] and [19], *Weightman v Gold Coast City Council & Anor* [2002] QCA 234; Appeal No 2452 of 2002, 28 June 2002 at [8] and [36].

consequent apparently gross overdevelopment of the site by the proposal compared to one which complied with the development standards, may be doubted.

- [108] But it is unnecessary to reach a conclusion on that question. It is sufficient, for the purpose of deciding this appeal, that the second respondent failed to discharge the onus which was upon it of showing that it complied with the requirements of s 14 of the DCP. It did not even attempt to do so and his Honour did not consider whether it did or not.
- [109] It may have been possible for the Council or the Planning and Environment Court, notwithstanding failure to comply with s 14 of the DCP, to conclude that the substance of the matters required to be established, in order to give rise to the exercise of a discretion under that section, had been established; and consequently to have been satisfied, in those exceptional circumstances, that there were sufficient planning grounds to justify granting the application pursuant to s 4.13(5) and s 4.13(5A) despite that failure. But neither the Council nor the Court purported to do that and it may be seriously doubted whether the evidence as a whole could have justified that course.
- [110] Because, subject to that possibility, s 14 of the DCP had to be complied with, in the circumstances of this case, before the Council could grant approval of this application, and it was not so complied with, the application should have failed. For the same reason, the appeal to the Planning and Environment Court by the present applicant should have succeeded.

### **Orders**

1. Application for leave to appeal granted;
2. appeal allowed;
3. set aside the orders of the Planning and Environment Court made on 21 November 2001;
4. in lieu thereof allow the appeal to the Planning and Environment Court and refuse the application of the second respondent the subject of that appeal;
5. the second respondent pay the applicants' costs of this appeal.