# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Woolworths Ltd v Maryborough City Council & Anor* [2005] QCA 262 |
| PARTIES: | **WOOLWORTHS LTD** ACN 000 014 675<br>(appellant/first respondent)<br>**v**<br>**MARYBOROUGH CITY COUNCIL**<br>(first respondent/second respondent)<br>**ROKAY PTY LTD** ACN 098 337 690<br>(second respondent/applicant) |
| FILE NOS: | Appeal No 11375 of 2004<br>P & E Appeal No 1480 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave *Integrated Planning Act* |
| ORIGINATING COURT: | Planning and Environment Court at Maroochydore |
| DELIVERED ON: | 29 July 2005 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 1 April 2005 |
| JUDGES: | McMurdo P, Fryberg and Holmes JJ<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Application dismissed**<br>**2. Applicant to pay the first respondent's costs** |
| CATCHWORDS: | ENVIRONMENT AND PLANNING – Development control – Matters for consideration of consent authority – General – Consideration of planning schemes – Whether decision of consent authority conflicted with planning scheme – Consideration of particular planning matters – Whether there were sufficient planning grounds to justify decision – Need – Planning terminology – "Planning unit"<br><br>*Integrated Planning Act* 1997 (Qld), s 3.5.14, s 4.1.56<br>*Local Government (Planning and Environment) Act* 1990 (Qld), s 4.4(5A), s 4.13(5A)<br><br>*Weightman v Gold Coast City Council* [2002] QCA 234; (2002) 121 LGERA 161, considered |
| COUNSEL: | C L Hughes SC, with M A Williamson for the applicant<br>G J Gibson QC with J D Houston for the first respondent<br>R S Litster for the second respondent |
| SOLICITORS: | Deacons for the applicant<br>Mallesons Stephen Jaques for the first respondent |

Corser Sheldon & Gordon for the second respondent

[1] **McMURDO P:** The relevant facts and issues are set out in the reasons for judgment of Fryberg J. As it is not suggested there is any jurisdictional issue, the applicant can only appeal from the primary judge's decision under s 4.1.56 *Integrated Planning Act* 1997 (Qld) with leave and if there has been an error or mistake in law on the part of the court. I agree generally with Fryberg J's reasons for concluding that the applicant has not demonstrated any such error or mistake in law. The application for leave to appeal should be dismissed, with the applicant paying the costs of the first respondent, Woolworths Ltd.

[2] **FRYBERG J:** In this application Rokay Pty Ltd seeks leave to appeal against a decision of the Planning and Environment Court made on 17 December 2004.[1] The respondents to the application are Woolworths Ltd and the Maryborough City Council. Rokay asserts a number of errors of law on the part of that Court as its proposed grounds of appeal.[2] Those grounds were fully argued. If leave be granted no further hearing is required to determine the appeal.

**The procedural history**

[3] Rokay owns approximately 1.3 ha of land at 107 Ferry St, Maryborough. The land once formed part of the Maryborough railyards, but that use of it ceased a number of years ago and the land passed into private hands. In November 1999 a company named Kuba Enterprises Pty Ltd applied to the Council for a development permit to make a material change of use of the then vacant land. It proposed to erect two single-storey buildings and construct car parking and use each of them for the purpose of "showroom", a term defined in the city's 1990 planning scheme, which was in force until March 2000. On 23 May 2000 the Council resolved to approve the application under that scheme[3] and a decision notice was issued the following day.

[4] It is unclear when Rokay acquired the land, but it seems that it had done so by May 2003 at the latest, and probably by December 2002. In late 2002 Ryan Group Queensland Pty Ltd, a property development and leasing company of which Rokay is a part, entered into discussions and correspondence with the Council regarding whether the land could be used "to enable the establishment of a 'Warehouse' Group Variety Store". The Council expressed the view that the definition of showroom in the former planning scheme did not allow for the sale of food or groceries, but that otherwise the proposal might be generally consistent with the existing development permit. It further expressed the view that should the operation depend upon the sale of food or groceries a further application would be required. Rokay did not dissent from that view, but went ahead with construction of one building, presumably in reliance on the original approval. On or about 10 March 2003 it lodged a request for minor changes to that approval pursuant to s 3.5.24 of the *Integrated Planning Act* 1997. These changes involved a reduction in the number of tenancies, a reduction of the total floor area and an increase in the provision of parking spaces.

[5] On 6 May 2003 Rokay executed a development application seeking to use the building as "retail warehouse". In a letter accompanying the application, its

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1 The order of the Court was amended in a manner not presently relevant on 18 March 2005.

2 *Integrated Planning Act* 1997, s 4.1.56.

3 *Ibid*, s 6.1.30.

architects stated that the purpose of the application was "to permit The Warehouse to operate a *'shop'* component within the overall *'showroom'*". The extent of the proposed shop was shown on an attached plan, where the designated area for the shop component was 56.4 m², or less than 2% of the total floor area. The reason for the application was said to be "purely in order that The Warehouse's *standard/regular operations may comply with Maryborough City Council's definitions of "showroom" and "shop"* under its City Plan." The reference to the City Plan was apparently to the previous planning scheme, for the current City Plan contained no such definitions. It is now accepted that the application had to be made under the current Plan. By the time it was lodged construction of the building was complete or nearly so.

[6] A Council officer responded to the application by letter dated 27 May 2003. He noted that the application did not provide satisfactory detailed plans of the floor area, including a schedule of goods incorporated into the total site layout, and that the proposed change of use had the ability to affect traffic generation and parking allocation on the site. He required the submission of detailed scaled plans showing the proposed use areas including a schedule of goods for retail and a traffic generation and car parking analysis. He also referred the application to the Department of Main Roads, which provided a referral agency's response dated 6 June 2003. That response required the imposition of three conditions on any approval.

[7] In due course Rokay submitted a detailed drawing dated 31 July 2003 to the Council. That drawing, numbered A1.03A, subsequently became part of the development permit. Apparently it incorporated the changes sought in the application lodged on 10 March. The Council seems to have dealt with it as a variation to the May application. Its senior planning officer later summarised that application as one which

> "sought to amend the use rights from that [*sic*] existing over the premises as follows:
>
> - Reduction from six to four tenancies;
> - Reduction in total floor area from 6135 m² to 4719 m²;
> - Increase in customer parking spaces from 101 spaces to 186 spaces; and
> - The dedication of approximately 60 m² for the purpose of retailing groceries and food products."

If one took the view either that the first three changes were more than minor changes or that it was not possible to assess the May application in isolation from the other changes[4], the officer's approach would have been correct. However neither point seems to have been taken before the Planning and Environment Court. That Court determined the case on the basis that the Council dealt with the two separate applications. However improbable that seems, we must do the same.

[8] The Warehouse Group commenced trading on 12 June 2003, including in its operations the unlawful sale of food and groceries from, as his Honour found, at least 150 m² of its area. The Council quickly issued Rokay with a show-cause notice pursuant to the *Integrated Planning Act* 1997 but subsequently resolved to do nothing about the breach. Its letter of notification dated 3 September implied that it had formed a view about the development application:

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4 Compare *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485.

> "I wish to advise that the Council resolved that your response to the Show Cause Notice did not provide satisfactory town planning grounds for non-compliance as required. However, given the status of the development, no further action will be taken at this time.
>
> However, failure to comply with conditions of approval and/or use rights issues associated with future stages of the development shall be dealt with swiftly and efficiently to ensure that a repeat of the present situation does not occur."

[9] The application was impact assessable and therefore had to be advertised.[5] When that was done it attracted a submission from Woolworths dated 5 September 2003 in opposition to it. Nonetheless the Council in due course approved the application. Its decision notice to Rokay dated 10 December 2003 recorded that it had

> "approved the use of the abovedescribed land for the purpose of Commercial Activities B – Showrooms and Commercial Activities B/Shop (The Warehouse Retail Business) generally as detailed on Drawing No. B02009 A1.03A dated 31/07/2003, subject to the following conditions:-
>
> Assessment Manager Conditions – Maryborough City Council
>
> (a) That the use of the existing building for 'The Warehouse' shall be carried out generally as detailed on the submitted plan and as described in the supporting information. Future use rights of this building are limited to 'The Warehouse' or Showroom as defined in the Maryborough City Plan."

A further condition required the preparation of a plan of development for the subject land which would (among other things)

> "include the existing building occupied by 'The Warehouse' including floor layout depicting a maximum area of 60 m² dedicated to the display and sale of grocery-foods."

There were a number of other conditions, including several relating to car parking and traffic. The application before this Court has proceeded on the basis that the notice disposed of both applications which Rokay had made to the Council.

[10] Wishing to negotiate about the conditions, Rokay suspended its appeal period[6]. It lodged a detailed submission regarding car parking by letter dated 9 February 2004. On 25 March 2004 the Council issued a negotiated decision notice in the same terms as the original decision notice save for a reduction in the parking requirement. Woolworths appealed to the Planning and Environment Court against the giving of the development approval in that notice.

**The issues in the Planning and Environment Court**

[11] At the commencement of the hearing below, Rokay applied to amend its application to increase the area to be used for the sale of food and groceries from the 60 m² originally sought and approved to 150 m². In his reserved decision Robertson DCJ approved that amendment. Woolworths has not challenged that decision in the present application. However I should observe in passing that the scheme of the

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5 *Integrated Planning Act* 1997, s 3.4.2.

6 *Ibid*, ss 3.5.17-18.

*Integrated Planning Act 1997* does not include any requirement for an applicant to obtain the leave or approval of the Planning and Environment Court to amend its application. The appeal to that Court is "by way of hearing anew"[7] and there is no reason to doubt the legitimacy of the long-established practice by which applicants may without leave submit a changed application to the Court. Such a change may be considered by the Court, even on an appeal by a submitter, but only if the change is a minor one.[8] There is no reason why an applicant should not make a change conditional upon the Court's holding it to be a minor change or propose several changes in the alternative on similar conditions.[9] In such cases the onus is upon the applicant to demonstrate that the change is only a minor change. Unless it does so the appeal will proceed on the original application.

[12] The notice of appeal to the Planning and Environment Court purported to state the grounds of appeal in 11 numbered paragraphs. Of those paragraphs only one, the last, could sensibly be regarded as stating grounds of appeal. The others read like a pleading. The notice therefore did not conform with the form of notice of appeal[10] prescribed under r 29 of the *Planning and Environment Court Rules 1999*.[11] However the disconformity is understandable. A respondent to an appeal needs to know not only the grounds of the appeal but also the facts, matters and circumstances relied upon by the appellant to establish those grounds. Despite its name the notice of appeal initiates a process designed to culminate in what is in reality a trial. Unfortunately that fact is not recognised by the rules, with which the form is consistent. In the absence of a system of pleadings, consideration should be given to amending the rules to include a requirement that a notice of appeal set out not only the grounds of appeal but also the facts, matters (including matters of law) and circumstances relied upon in support of it.

[13] It is unnecessary to set out that notice of appeal. The issues in the Planning and Environment Court were summarised by his Honour as follows:

> "(a) Does the proposal "compromise the achievement" of DEO1? If the answer is yes, the appeal must succeed.
>
> (b) If no, does the proposal conflict with the Planning Scheme? If, as Rokay and Council submit, there is no conflict the appeal must fail.
>
> (c) If there is conflict, are there sufficient planning grounds to justify the approval of the proposal."

Those issues arose because Woolworths invoked s 3.5.14 of the Act. Before considering his Honour's findings under that section it is necessary to have regard to a number of provisions in the City Plan.

**The City Plan**

[14] The planning scheme for Maryborough is contained in the City Plan. That Plan has six parts. Part 1 is introductory. Part 2 describes the strategies for the city, including Desired Environmental Outcomes (DEOs). Part 3 describes the division of the city into eight Local Areas and their division into precincts. Part 4 sets out codes to explain the requirements for development. Part 5 provides explanatory

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7 *Ibid*, s 4.1.52(1).

8 *Ibid*, s 4.1.52(2)(b).

9 Compare *Ecovale Pty Ltd v Gold Coast City Council* [1999] 2 Qd R 35; *Arksmead Pty Ltd v Gold Coast City Council* [2001] 1 Qd R 347; (2000) 107 LGERA 60.

10 Form PEC-2, notified in the *Queensland Government Gazette*, no 17, 19 May 2000, p 214.

11 See *Planning and Environment Court Rules 1999*, rr 8-10, particularly r 8(4).

information to help in the interpretation of the Plan. Part 6 contains planning scheme policies.

[15] One of the 10 strategies in Part 2 is relevant. That is the Commercial Strategy set out in s 2.2. The strategy sets out three DEOs and in respect of each defines a number of primary measures to achieve the DEO. It provides:

> "***DEO 1*** ***The City Centre is the dominant location in the Maryborough Region for major shopping and commercial activity.***
>
> ***Reason*** ***This will assist in ensuring that the City Centre remains a vital, vibrant, viable centre for the City's population and its regional catchment.***
>
> **Primary Measures to Achieve DEO 1**
>
> …
>
> 3. A site on the Lennox/Alice/Ferry Street frontages of the Maryborough Rail yards land, has been approved for the purpose of a major shopping complex. No further major shopping complex development is appropriate in the City during the life of this Plan."

"Major Shopping Complex" is not a defined term. The life of the Plan is not defined, but it must be reviewed within eight years from its adoption[12]. The Plan itself specifies an intention of the Council to review it every five to seven years.[13] "City Centre" is defined in Part 3 of the Plan: it is the name of Local Area 2. DEO 1 is identified as being of "key" relevance (first in a scale of four levels of relevance) in the City Centre Local Area.[14]

[16] The City Centre Local Area is defined in s 3.3. The planning "Vision" for the Area begins:

> "The City Centre will be a compact regional centre with administrative, retail, commercial, tourism and entertainment facilities accessible to the local community. The former Railway yards redevelopment will form an integral extension of the City Centre, with heritage elements of the City Centre reflected in the new shopping development."

The Area is divided into five precincts, of which the "Railyards Redevelopment Area Precinct" is the relevant one. It in turn is divided into eight sub-precincts.[15] The Plan provides:

> "The Railyards Redevelopment Area is divided into eight (8) sub-precincts … in order to enable the expression of a detailed planning intent. Primarily, the [sub-][16] precincts are intended for the purpose of controlling land use, to ensure the development of the entire Area is undertaken in an appropriately integrated manner. Each [sub-] precinct has been defined based on existing land uses, potential land uses and physical features e.g. railway line."

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12 *Integrated Planning Act 1997*, s 2.2.1.

13 Paragraph 1.6.6.

14 Paragraph 2.12, table 2.1.

15 See the map Annexure A below.

16 The prefix "sub" is missing in the Plan, but that is an obvious mistake.

Two of those sub-precincts are relevant in the present application. They are sub-precinct 7 ("Major Shopping Complex") and sub-precinct 2 ("Special Opportunities Precinct").

[17] As the map shows, the Major Shopping Complex sub-precinct is by far the largest of the sub-precincts in the Railyards Redevelopment Area precinct. Its intent, according to the Plan, is

> "to provide for the establishment of a major shopping complex and a range of complementary commercial, retail, entertainment and service uses, which is linked to the Central Business District (CBD) and provides a focus point for the City."

That intent is to be implemented by a number of steps, including development of an internal road system and adequate pedestrian linkages, both giving access to adjoining sub-precincts. The Plan specifies that any proposal for development "is to demonstrate that an area of land adequate to ultimately accommodate a discount department store (DDS) based shopping centre will remain available as a result of the proposal's approval." That intent has been achieved. Woolworths has established a discount department store in the sub-precinct. Its lease commenced in April 2000 and runs for 15 years, with four further options of five years each. Notwithstanding the terms of Primary Measure 3[17], no site in the sub-precinct has a frontage to Ferry St.

[18] The Rokay land is located in the Special Opportunities sub-precinct. Apart from a buffer area adjoining the remaining railway line, it constitutes the whole of the sub-precinct. The Plan provides:

> "This sub-precinct is intended to provide for one or more of the following land use scenarios:
> - a residential or aged care home development located near the Central Business District of Maryborough and close to a variety of facilities;
> - medium density housing;
> - bulky goods retailing;
> - take away food premises/restaurant; and
> - carparking to service development in adjacent sub-precincts."

[19] Part 5 of the Plan contains a number of definitions. They are divided into two classes, Explanatory Definitions and Use Definitions. Under the heading "Definitions", s 5.1 provides:

> "The following section provides explanatory and use definitions to assist in the interpretation of the City Plan. The Council shall determine the applicable material change of use definition if there is any doubt as to which definition a proposal falls within or if there is a combination of uses."

[20] Section 5.1.2 contains the Use Definitions. It provides that they are used "for the purposes of the Development Assessment Tables contained in Part 3 of the City Plan".[18] Three of them are presently relevant:

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17 See paragraph [15].

18 An extract from the relevant table is set out below at paragraph [42].

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| "Commercial Activities B | Means any premises used for the sale of meals or refreshments and goods which do not heavily rely on the passing trade. |
| Shopping District | Means the retailing of goods on premises where it is part of an integrated unit and services the City's population. |
| Shopping Local | Means the retailing of goods on premises which primarily only services a local area." |

**The decision of the Planning and Environment Court**

[21] Robertson DCJ made the following findings:

a. the use approved by the Council's decision
   i. was that of a small discount department store;
   ii. was not "bulky goods retailing";
   iii. was not within the definition "Commercial B" in the City Plan;
   iv. was within the definition "Shopping District" in the City Plan;
b. the decision did not compromise the achievement of DEO 1;
c. the decision did conflict with the planning scheme in that:
   i. at least as far as the area encompassed by sub-precincts 2 and 7 was concerned, the intent of the City Plan was that any discount department store be located in sub-precinct 7 and not sub-precinct 2; consequently development of a DDS in the latter conflicted with that intent; and
   ii. under the Plan the only form of retailing intended to be developed in sub-precinct 2 was bulky goods retailing; the use approved by the decision was retailing but not bulky goods retailing, so it conflicted with that intent;
d. Rokay did not demonstrate sufficient planning grounds to justify the decision to permit trade in food and groceries in that:
   i. there was no demonstrated community need for a small portion of the premises to be devoted to such trade;
   ii. the need for competition among food and grocery outlets would not be advanced because the small scale of the food and grocery operation was unlikely to have any competitive impact; and
   iii. while there were no (adverse) external or amenity impacts caused by the operation, the same was true of the operation absent the sale of food and groceries.

Woolworths does not now challenge finding b.

**Section 3.5.14(2)(b)**

[22] Those findings were made because Woolworths invoked the provisions of s 3.5.14 of the *Integrated Planning Act 1997*. That section provides (as far as is relevant):

> "(2) If the application is for development in a planning scheme area, the assessment manager's decision must not—
>
> (a) compromise the achievement of the desired environmental outcomes for the planning scheme area; or
>
> (b) conflict with the planning scheme, unless there are sufficient planning grounds to justify the decision."

Given Woolworths' acceptance of finding b, it is unnecessary to say anything about para (a), beyond observing in passing the contrast between "compromise" in that paragraph and "conflict" in para (b).

[23] "Conflict" in this context means to be at variance or disagree with.[19] It describes a quality of a relationship between the subject (the decision) and a part of the predicate (the scheme). Unlike "compromise" in para (a), it implies no particular impact by a subject upon an object. A determination that there has been a breach of the requirement that "the assessment manager's decision must not … conflict with the planning scheme" requires the identification of the decision, the identification of some part or parts of the scheme with which the decision might be said to conflict and a decision whether the former conflicts with the latter. Only if such a determination has been made is it necessary to consider whether there are sufficient planning grounds to justify the decision.

[24] Section 3.5.14(2)(b) differs in several respects from s 4.4(5A) and s 4.13(5A) of the *Local Government (Planning and Environment) Act 1990*, provisions which may be regarded as its predecessors. Under those sections the subject of the putative conflict was the application; here it is the assessment manager's decision. Under those sections the object of the conflict was any relevant strategic plan or development control plan; under the present section it is the whole planning scheme[20]. Under those sections (if they applied) the result was a refusal of the application in the absence of sufficient planning grounds; here the result in the same circumstances is simply a non-conflicting decision. Under those sections what required justification was approval of the application; under the present section what requires justification is the decision. Moreover, the grammatical structure of the two sections is significantly different. These differences mean that care must be used in applying the cases decided under those provisions to the present section.

[25] If s 3.5.14(2)(b) is dealt with in the sequence suggested by its form[21] the identity of any conflicts between the decision and the scheme will have been established by the time the question of justification comes to be considered. That question will require the identification of planning grounds which might justify the decision and the determination of their sufficiency to do so. In making that determination regard will doubtless be had to the nature and extent of the conflict. That is substantially the process approved by this Court in *Weightman v Gold Coast City Council*[22] in relation to a previous section. It would, however, be a mistake to treat the relevant passage in that judgment as if it were a code for the determination of justification. Some of the submissions in the present case smacked of that error.

**Conflict between the decision and the scheme**

*The decision - general*

[26] The material parts of the decision are set out above.[23] Essentially the approval was "to use the abovedescribed land for the purpose of Commercial Activities B – Showrooms and Commercial Activities B/Shop (The Warehouse Retail Business) generally as detailed on Drawing No. B0200981.03 A1.03A dated 31/07/2003."

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19 The Macquarie Dictionary, 2nd ed.

20 But query whether this would include the codes within the scheme, having regard to s 3.5.13 of the Act.

21 Paragraph [23].

22 [2003] 2 Qd R 441.

23 Paragraph [9].

The land description referred to was Lot 7 SP107050, that is, the whole of Rokay's land. A condition specified, "Future use rights of this building are limited to 'The Warehouse' or Showroom as defined in Maryborough City Plan".

[27] There are possible technical problems inherent in that decision. First, it appears to have been given in respect of an excessive area. That is because it is given in respect of the whole of Rokay's land, not simply the building occupied by The Warehouse and the car park. The drawing referred to showed a second building with three tenancies. That part of the land probably should not have been included in the approval.[24] However nothing now turns on that. Second, the approval seems to have been given for a particular person, the company known as The Warehouse. No point was taken about this and I would reserve the question whether the *Integrated Planning Act 1997* permits approvals to be given *in personam*.[25] Third, the approval was given to use the premises for two purposes, each described as Commercial Activities B with a suffix.

[28] The Council's use of the defined term Commercial Activities B to specify what has been approved when the defined term is expressly defined only for the purposes of the Development Assessment Tables is curious. Presumably the Council intended the definition to apply to its expression of the purpose of the use. More importantly, Robertson DCJ found that the use of the subject premises did not fit within the definition of "Commercial B" (*sic! semble* "Commercial Activities B") and all parties now accept the correctness of that finding. That raises the question whether the approval granted by the Council covers operations of the type conducted by The Warehouse. If it does not, the whole point of the litigation might be defeated. In its draft notice of appeal the only substantive orders sought by Rokay are that the orders of the Planning and Environment Court be set aside and the appeal to that Court be dismissed. Such an outcome might or might not please Rokay; but it would seem to leave The Warehouse without an approval necessary to carry on its operations in the manner in which it desires. Presumably Woolworths would not mind losing an appeal to this Court on such a basis!

[29] It would of course be possible for a change to be made to the draft notice of appeal and for Rokay to seek an order that there be substituted for the order of the Planning and Environment Court one by which the type of operation carried on by The Warehouse was approved.[26] However that would involve this Court examining the course of proceedings in relation to this point in the Planning and Environment Court. The judge recorded in his judgment, "Council and Rokay contend that the use either falls within the Commercial B definition or may fall within the uses not defined in the Development Assessment Table 3.4 in the City Plan." Mr Hughes SC, for Rokay, made no submissions to us on this point. Mr Litster for the Council informed us that in the Court below:

> "I said quite plainly and quite firmly that his Honour would have to revisit the negotiated decision notice so as to give one which was capable of being lawfully given. It was a hearing de novo below. He didn't have to just uphold the negotiated decision notice. He could give an appropriate approval and the appropriate approval was one

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24 See the discussion below regarding the choice of the planning unit. No party suggested that the correct unit included the second building or the land upon which it was to be built.

25 Compare *Integrated Planning Act 1997*, s 3.5.28.

26 That Court seems to have power to take such a course under s 4.1.54 of the *Integrated Planning Act 1997*.

> for the inclusion of, as he found on the amendment application, 150 square metres of food and groceries within these premises."

In these circumstances, if Rokay's arguments be accepted, it may be necessary to consider whether the matter should be remitted to the Planning and Environment Court for further consideration.

[30] What is clear is that, having found that the operation did not fall within the definition of Commercial Activities B, Robertson DCJ considered the issues arising under s 3.5.14 on the basis that the decision was one to approve the operation as it actually was. I am prepared to resolve the application to this Court on the same basis. This approach necessarily requires that attention be given not to the decision actually made by the Council but to a hypothetical decision to grant an approval covering operations of the type conducted by The Warehouse, including the sale of food and groceries.

[31] Even on this basis it was necessary, as his Honour recognised, to identify the ambit of the operation (both functionally and geographically) which constituted assessable development as declared by table 3.4 of the City Plan. His Honour described this as the "planning unit". That is a useful term. The judge recorded that in the Court below the parties "proceeded on the basis that the use the subject of the appeal should be considered as an integrated part of the overall TWG[27] operation for the purposes of deciding if there is conflict or not." In this Court, Mr Litster on behalf of the Council challenged the correctness of that statement. He submitted that the Council had always taken the position that what was required was an application to authorise the display of food and groceries for sale; and that this position was correct.

*The decision – the correct planning unit*

[32] It is tolerably plain from the history of the application that Council officers had not always adopted the position that the correct planning unit for the application was the 150 m² of the building from which Rokay sought approval to sell food and groceries. The references to traffic generation and parking allocation in the Council's letter of 27 May 2003[28] demonstrate that, as does their conduct in referring the application to the Department of Main Roads. It is however correct that in its oral submissions to the Planning and Environment Court the Council abandoned its officers' approach and submitted that the Court had power to set aside the decision appealed against and make a new decision; that it should characterise the application as one for "150 m² of food and groceries"; and that "the Council's decision notice needs to be tinkered with for that reason". Mr Litster's description[29] of his submissions to the Planning and Environment Court was correct.

[33] In this Court the Council maintained the position that the correct planning unit to adopt as the subject of the decision was the area of 150 m² involved in the display of food and groceries for sale. In its outline it submitted that the judge's failure to adopt that approach permeated his decision and was likely to have affected the outcome because relevant conflict (if any) with the scheme had not been identified and characterised.

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27 The Warehouse Group.

28 Paragraph [6].

29 Paragraph [29].

[34] On behalf of Woolworths Mr Gibson QC objected to these submissions being received and to any oral submissions in support of them being made. He submitted that the position adopted by the Council was embarrassing in that it was inconsistent with that adopted by Rokay and was not covered by Rokay's proposed grounds of appeal. He submitted that if the Council wished to support this argument, it should apply for an extension of time in which to seek leave to appeal, and thereby expose itself to an order for costs. However he conceded that he was in a position to meet the point. The Court ruled that it would receive the Council's submissions insofar as they related to a question of law.

[35] One possible issue of law is identified in a footnote in the Council's outline of argument. It relates to the approach which the Planning and Environment Court (and perhaps this Court) should take to a decision of the Council about the classification of a use:

> "The matter of whether a particular use falls within a definition is a matter for determination by the Council – see clause 3 of the Transitional Scheme (A1012) and section 5.1 at page 5-1 and the note on page 5-5 of the IPA Scheme (A1429). It involves a decision that should not be interfered with unless it was unreasonable cf. *Kewlands Pty Ltd v. Logan City Council* (1998) QPELR 44 at 47F; *Lyons v. Misty Morn Developments Pty Ltd and Anor* (1998) QPELR 268 at 272H and cases there referred to."

That submission sits somewhat uncomfortably with the Council's apparent readiness in the Planning and Environment Court to abandon the terms of its decision notice and support a redefinition of the purpose for which approval was granted. That incongruity may be put to one side.

[36] It is unclear whether that submission proceeds upon an assumption that the question whether a particular use falls within a definition is one of fact, law or mixed fact and law, or whether it implies that such distinctions do not matter. If the latter, the submission is wrong: the distinctions do matter. Insofar as the question is one of fact, it may be accepted that the Planning and Environment Court will give some weight to an opinion of a planning authority that a particular undefined use has qualities which tend to align it with a particular definition. That is consistent with the long-standing view of the Court that it should give such weight as is appropriate in the circumstances of the case to an opinion of a local authority on questions of fact involving town planning expertise. That approach has particular application in appeals from decisions on planning applications (in other words, merits appeals). However insofar as the question is one of law (there being no privative clause in the legislation), the position is otherwise. Then, the question is one for the Court. Australian law recognises no doctrine of deference to a statutory interpretation favoured by a regulatory agency, such as has been recognised in the United States in *Chevron USA, Incorporated v Natural Resources Defense Council, Incorporated*[30]. Authoritative interpretation of the law is a core function of the courts as the judicial arm of the state.[31] In the Planning and Environment Court that applies whether the case is one of merits review or not. Nothing in the two cases cited in the Council's submission (which cases involved questions about the validity of earlier approvals, not merits review) suggests otherwise.

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30 (1984) 467 US 837.

31 See generally *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135; *Truth About Motorways Pty Ltd Limited v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

[37] Section 5.1 of the City Plan[32] does not affect the position, nor could it do so. Indeed I doubt whether the section does more than recite what would be the position even in its absence. It does not purport to confer authority upon any interpretation made by the Council, nor to exclude the jurisdiction of the Court. I doubt if it could validly do so, notwithstanding that the Plan has the force of law[33]; that would seem inconsistent with the provisions in the Act conferring jurisdiction on the Court. It is however unnecessary to discuss these questions further. In the circumstances of this case as determined by Robertson DCJ, nothing in the decision of the Council assists in identifying the correct planning unit.

[38] The problem of identifying the correct planning unit in the context of town planning law is one of long-standing and has arisen in many jurisdictions. Failure to identify it correctly can be fatal to an application.[34] Some of the circumstances in which the problem can arise were identified over 30 years ago:

> "First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from *G. Percy Trentham Ltd. v Gloucestershire County Council* [1966] 1 W.L.R. 506, where Diplock L.J. said, at p. 513:
>
> > 'What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a "material change in the use of any buildings or other land"? As I suggested in the course of the argument, I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'
>
> But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
>
> Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit."[35]

That decision of the English Court of Appeal has been applied in Scotland[36] and Ireland[37] and frequently in England.

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32 Paragraph [19].

33 *Integrated Planning Act 1997*, s 2.1.23.

34 *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485; contrast *Brisbane City Council v Cunningham* [2001] QCA 294; (2001) 115 LGERA 326.

35 *Burdle v Secretary of State* [1972] 1 WLR 1207 at p 1213; [1972] 3 All ER 240 at p 244.

36 *Bass Taverns Limited v Secretary of State* [1999] ScotCS 197 (20th August, 1999).

37 *Esat Digiphone Ltd v South Dublin County Council* [2002] IEHC 13 (25th January, 2002).

[39] The principles to be derived from the cases have most recently been stated (albeit in a slightly different context from the present) in the following terms:

> "i) The orthodox approach is for the decision maker to identify the appropriate 'planning unit' to be considered for the purpose of deciding whether or not there has been a material change in the use of land;
>
> ii) The appropriate planning unit may embrace an area of occupation within which a variety of activities are carried on and comprise a composite or mixed use, where the individual components may fluctuate in their intensity from time to time, but are not confined within separate and physically distinct areas of land;
>
> iii) Whether or not there has been a material change in the use of land is to be considered by reference to the character of the use or uses to which the land is put. A material change in the character of the use of land is capable of resulting, wholly or in part, from changes in the intensity of the use or uses of or activities carried out on land. Such changes may be material for planning purposes even though the generic use or uses of the land in question have not changed;
>
> iv) Whether the use of land has changed in any manner that is material for planning purposes is a question of fact and degree for the decision maker to determine in the light of all the circumstances of the case."[38]

[40] As that case shows, the identification and delimitation of a use involves considerations of fact and degree.[39] The same may be true of the process of determining whether a use fits within a particular definition in a planning scheme. It is so in this case. The submissions on behalf of the Council did not identify any error of principle in his Honour's approach to the question of the appropriate planning unit. Reference was made to *Liquorland (Australia) Pty Ltd v Gold Coast City Council*, but no relevant proposition of law was extracted from those decisions[40]. In the present case, there was evidence to support his Honour's decision: there was no physical separation of food and grocery items from others on sale at the premises, nor was any such separation proposed. The Council's planning officer had identified the capacity of the proposed change to affect traffic generation and parking allocation on the site.[41] From the car parking to the operation inside the building, The Warehouse apparently functioned as an integrated unit. That is essentially what his Honour held. His finding is one of fact. It is not open to challenge in this Court.

[41] That being so, the Council's submissions cannot assist our consideration of the arguments before us. Their content is not within the ambit of the ruling made with respect to their reception at the hearing. It is unnecessary to resolve the question whether the Council was entitled to be heard in support of the application for leave

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38 *Fidler v First Secretary of State Reigate & Anor* [2004] EWCA Civ 1295 (12 October 2004), para 14.

39 See also *Lizzio v Ryde Municipal Council* (1983) 155 CLR 211 at p 217 per Gibbs CJ.

40 [2002] QPEC 26; [2002] QPELR 295 (P & E Court); [2002] QCA 248; (2002) 121 LGERA 197 (Court of Appeal).

41 Paragraph [6].

to appeal on questions not raised by the applicant without lodging an application for leave to appeal.

*The planning scheme*

[42] I have set out or summarised above[42] a number of the provisions of the City Plan to which Robertson DCJ referred in his reasons for judgment. Also relevant (although not set out in full by his Honour) are some extracts relating to the Special Opportunities sub-precinct and the Major Shopping Complex sub-precinct from the relevant Development Assessment Table (Table 3.4):

| **Development Activity** | **Special Opportunities** | **Major Shopping Complex** |
|---|---|---|
| Commercial Activities A | C if Take Away Food otherwise I | C |
| Commercial Activities B | C if Restaurant otherwise I | C |
| Shopping District | I | C |
| Shopping Local<br><br>All other material changes of use (unless otherwise specified in Schedule 8 of the *Integrated Planning Act*) | I | C |

In that table, C indicates "code assessable" and I indicates "impact assessable".

[43] His Honour made a finding as to the intent of sub-precinct 7. He did so on the basis of the evidence of a number of town planners, some of which he accepted and some of which he rejected. He held:

> "… [the intent] is that any DDS should be located in that precinct. That intent has been achieved with Big W located within the Station Square Shopping Complex. It is quite clearly intended that high order retailing such as a DDS be located in sub-precinct 7 and not sub-precinct 2. As to another DDS, the scheme is silent and one could possibly be located elsewhere in the City Centre but that is not an issue that I need to determine."

[44] It has long been the practice of those initiated into the arcane world of town planning and town planning law to refer to the intent of a plan or a part of a plan or a zone included in a plan. That practice developed at a time when, in many parts of the world and certainly in Queensland, a basic structural feature of planning schemes was the division of the scheme area into zones by reference to which permitted, permissible and prohibited uses were defined. The intent referred to was derived by a process of construction of and inference from the words of the planning scheme (including the table of zones) and one or more of:

- the nature of existing development within and around the relevant zone when the scheme was written;

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42 Paragraphs [14] - [19].

- the history of approvals and refusals to approve decided by the local authority under the scheme; and
- evidence as to the appropriate application of sound town planning principles to the words of the scheme.[43]

Originally zones did not include any statement as to the intent of the zone. Important factors in deriving the intent were the name of the zone and the ease with which particular uses could be established in it. As schemes became more sophisticated and came to include a strategic plan and development control plans[44], statements of intent became more common. In the Maryborough City Plan (and I suspect in other planning schemes formulated under the *Integrated Planning Act* 1997) they abound. They have lost much of their formality and find many forms of expression. In s 3.3 of the Maryborough City Plan (relating to Local Area 2) they seem to involve the word intent or one of its derivatives in relation to precincts and sub-precincts and the word vision in relation to Local Areas. It is unnecessary to elaborate further.

[45] It must be borne in mind that the determination of the intent of the scheme in this sense may give rise to questions of fact or questions of mixed fact and law. It may require the assessment of evidence and the exercise of judgment. The process is not necessarily limited to the construction of the words of the scheme.

[46] It is clear that the finding which Robertson DCJ made in relation to sub-precinct 7 referred to intent in the older sense. I see no error in that approach. The words "planning scheme" in s 3.5.14(2)(b) are wide enough to encompass the intent of the planning scheme derived in this manner.

[47] The explicit statement of intent in the City Plan regarding the intent of sub-precinct 7[45] was an important consideration; but it was not suggested, nor could it have been suggested, that his Honour had overlooked that statement. Indeed, with one exception, Rokay expressly accepted that what his Honour held was correct. The exception was the finding that any discount department store should be located in sub-precinct 7. Looked at in isolation there is a degree of ambiguity in that finding. However the finding was not made in isolation. His Honour also found, "As to another DDS, the scheme is silent and one could possibly be located elsewhere in the City Centre but that is not an issue that I need to determine." That finding makes his Honour's meaning clear: any discount department store *located in the Railyards Redevelopment Area precinct* is to be located in sub-precinct 7. His Honour made no finding about the development of a store in other precincts contained in the City Centre Local Area, nor in the other Local Areas defined by the City Plan.

[48] At this point it is convenient to turn to the first argument advanced on behalf of Rokay. Mr Hughes summarised it in his outline in the following terms:

> "**Firstly**, the primary judge erred in his construction of City Plan and, therefore, he erred in finding that the use, in its entirety, was in conflict with the scheme by reason of its location within sub-precinct

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43 The list is not necessarily exclusive.

44 Apart from the City of Brisbane this development received legislative recognition in s 16 of the *Local Government Act and Another Act Amendment Act 1980*, inserting (among other things) a new sub-s 33(2A) into the *Local Government Act 1936*. As to Brisbane, see *City of Brisbane Town Planning Act Amendment Act 1971*, s 3 (inserting, among other things, a new s 4(3) into the *City of Brisbane Town Planning Act 1964*.

45 Paragraph [17].

> 2 of the Railyard Re-development Area Precinct ('*the construction point*')."

That argument had two aspects, although contrary to the submission, I do not think they were discrete. Mr Hughes elaborated the first aspect:

> "Against these findings it was wrong in law (and logic) for the primary judge to then find that there was conflict with City Plan by reason that the '*second*' DDS was not in **sub-precinct 7**. His Honour failed to ask himself the right question. He only asked whether the scheme promoted the location of a DDS in **sub-precinct 7**, and he did not ask:
>
> (a) whether a second DDS was actively (or even tacitly) discouraged outside of **sub-precinct 7** (particularly, where the intent had been achieved); or
>
> (b) where a second DDS should be located.
>
> A consideration of these questions was necessary for the primary judge before he could identify clear conflict with City Plan. It is an error of law to suggest that conflict arises when a scheme is completely silent with respect to a proposal (in this case what his Honour found to be a proposal for a '*second*' DDS). It is an error of law for a Court to ask itself a wrong question."

[49] In my judgment, that argument is not correct. It was not necessary for his Honour to discuss point (a) as a separate topic. It was implicit in his finding that a second DDS was discouraged everywhere in the Railyards Redevelopment Area precinct except in sub-precinct 7. His Honour did not find that the scheme was "completely silent" on the question of a second store in that precinct. He found it was silent as to another store "elsewhere in the City Centre". He had no need to consider the impact of a store elsewhere in the City Centre Local Area but it was necessary for him to consider the position with respect to the Railyards Redevelopment Area precinct as a whole. That was because, in the words of the City Plan, the purpose was "to ensure the development of the entire Area is undertaken in an appropriately integrated manner".

[50] His Honour's finding was one of mixed fact and law. I assume without deciding that such a point may be raised in this Court. Insofar as the finding was one of law, it was in my judgment inevitable once it is understood in the sense discussed above[46]. Insofar as it was one of fact, there was evidence to support the finding. At the time the Plan was written, Maryborough did not have a department store of any sort. Mr Hughes eloquently summarised the evidence for us:

> "Yes, the evidence before the Court and I think I put this to one of the planning witnesses, was that the Council was very keen to attract a discount department store. When I was a boy in Maryborough, there was department store called Stupards in Kent Street in the main street and since it closed, I don't think the people of Maryborough for a long time had a department store of any description.
>
> So, obviously and this was obviously part of the driving - of including the railways precinct in - in the city centre, was to try and develop a centre which was - had the benefit of a DDS for the people of Maryborough and that was, of course, achieved in sub-precinct 7."

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[46] Paragraph [47].

In such circumstances it is hardly surprising that the City Plan should have explicitly defined the intent of the surrounding sub-precincts in a way calculated to discourage competition within the precinct during the life of the Plan. It must be remembered that the whole precinct was not very big: the equivalent of about 10 city blocks. The City Plan could not lawfully forbid the establishment of a discount department store in sub-precinct 2[47]; but it was not suggested that it could not discourage such development.[48] That brings me to the second aspect of Rokay's first submission.

[51] In the case of sub-precinct 2 (the Rokay land), the intent is stated to be "to provide for one or more of the following land use scenarios".[49] None of the five uses remotely resembled a discount department store. As his Honour observed, only one of the five, bulky goods retailing, contemplated the retail sale of goods (take-away food premises may be ignored for these purposes). On Rokay's submission the construction of that phrase to mean "only bulky goods retailing" was too narrow, because it ignored the name of the sub-precinct and also the diversity of the alternative scenarios listed as its intended uses. In my judgment neither of those matters detracts from the natural meaning of the expression, involving as it does the words "one or more of the following". The intent includes bulky goods retailing and, so far as the sale of retail goods is concerned, only bulky goods retailing. It discourages the development of a discount department store.

[52] In reaching his conclusion, his Honour relied on his findings (a) that The Warehouse was not a bulky goods retailer and (b) that established town planning principles provided that higher order retailing such as a discount department store should be in or adjacent to the commercial centre, while lower order retailing should be on the periphery of commercial development. Rokay sought to challenge the finding that The Warehouse was not a bulky goods retailer and criticised the application of the stated planning principles to the circumstances of the case. Those submissions contained no matter capable of constituting an error of law; they do not demonstrate any ground for the grant of leave to appeal.

*Conflict*

[53] His Honour held that there was a "clear conflict" between the intent of sub-precinct 7 and the operation conducted by The Warehouse as a small discount department store (involving the sale of food and groceries). That was a finding of fact. Rokay submitted that the process by which the finding was reached was flawed in that it did not comply with the process described by this Court in *Weightman v Gold Coast City Council*:

> "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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47 *Integrated Planning Act 1997*, 2.1.23(2).

48 It was not argued that the Plan could not lawfully be structured to encourage a monopoly, either in a particular area or for the life of the Plan.

49 See paragraph [18].

> (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."[50]

[54] Rokay identified three respects in which it submitted the exercise of the discretion miscarried:

> "It is submitted that, even if the primary judge was correct in concluding that there was conflict with City Plan, the exercise of the discretion under **s.3.5.14(2)** of IPA miscarried by reason that:
>
> (a) he did not ascertain the true extent of the conflict with the planning scheme – **it is only when the extent of conflict is appreciated that the discretion can be properly exercised**. The primary judge was unable to determine the true nature and extent of the conflict as he failed to ask the right question: Whether a second DDS was discouraged outside of **sub-precinct 7** (particularly, where the intent for sub-precinct 7 had been achieved);
>
> (b) he did not determine whether there were planning grounds relevant to that part of the application in conflict with the planning scheme. The primary judge concluded that the use constituted a DDS which was in conflict with the scheme, but he did not examine whether planning grounds (including public or community need) warranted approval of an application to legitimise a DDS in the premises. Again, he failed to ask the right question: Whether the existence of need for retail facilities provided to the public by the Warehouse was, as a planning ground, relevant to the identified conflict;
>
> (c) he did not determine whether the demonstrated need for the Warehouse was a planning ground in favour of the application as a whole, despite finding that the conflict was said to arise by virtue of the integration of the sale of food and groceries within the whole of the Warehouse operation."

[55] I reject that submission. As I have already said, it was implicit in his Honour's reasons that he found that a second discount department store is discouraged everywhere in the Railyards Redevelopment Area precinct except in sub-precinct 7. The nature and extent of the conflict between this aspect of the City Plan and the decision for which Rokay contended are self-evident. It would have amounted to unnecessary formalism for his Honour to have postulated a separate question on the point. The purely mechanical application of the *Weightman* dictum should be avoided, particularly when dealing with the current statute rather than the one under consideration in that case. The foundation for point (a) has not been established.

[56] Point (b) also suggests an unduly formalistic approach. All of the relevant planning grounds were considered by his Honour when he dealt with the question of justification. That included the issue of need. There was no occasion for his Honour to list them separately as an answer to the question set out in the paragraph numbered (2) in the passage quoted from *Weightman* above. It is not suggested that he overlooked any relevant planning ground.

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[50] [2003] 2 Qd R 441 at 453; [2002] QCA 234 at [36]; (2002) 121 LGERA 161 at p 173.

[57] As to point (c), the evidence did not demonstrate a need for The Warehouse as a whole, as opposed to The Warehouse without food and groceries. No one suggested that the operation could not lawfully (or economically) continue if the food and groceries were not offered for sale. It was conceded by Woolworths that such an operation would be authorised by the original development permit. His Honour proceeded on that basis. It is unnecessary to consider whether that concession was rightly made[51]; Woolworths is now bound by it.

**Justification**

[58] Rokay submitted that Robertson DCJ made two errors in considering the question of justification: first, he examined the question of need on the basis of a need to sell food and groceries only, when he had clearly identified conflict on the basis of the entire use as a discount department store; and second he failed to take into account three material considerations. The first error involved an inconsistency of approach whereby:

> "(i) when examining conflict with planning documents, he considered the use as a whole, but
> (ii) when examined the applicant's primary planning ground (namely the existence of town planning need), he considered the sale of food and groceries only notwithstanding that the application was clearly pursued to legitimise the entire use … "

[59] I accept the proposition implicit in that submission that under s 3.5.14 of the *Integrated Planning Act 1997*, the decision which must be justified is the same as the decision in respect of which conflict must exist. In the present case I have identified that as the hypothetical decision to grant an approval covering operations of the type conducted by The Warehouse, including the sale of food and groceries[52]. The relevant planning unit covered the integrated operation, including the building and the car park.

[60] As to that alleged error, his Honour found:

> "It is obvious, in my view, that the "decision" referred to in s. 3.5.14(2)(b) is the decision to permit TWG to trade in food and groceries, and is not in any way referable to the original decision to approve the use on the premises as a showroom. It follows that where there is conflict with the Planning Scheme, the second respondent must point to sufficient planning grounds to justify that decision, if it is to succeed. In my view, the evidence simply does not establish any community need for a small portion of the premises to be devoted to the sale of food and groceries."

[61] In my judgment the criticism involves a misunderstanding of the judge's reasons. His Honour did not consider the question of need on the basis that the relevant decision was simply one to establish an outlet for food and groceries. There was never any suggestion of The Warehouse Group operating such an establishment. The reference to "the decision to permit TWG to trade in food and groceries" relates to the total operation, including food and groceries. That is confirmed by the last sentence in the passage quoted. It must be remembered that Woolworths had not

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51 See *Integrated Planning Act 1997*, s 3.5.21.

52 Paragraph [30].

challenged the evidence of a need for an operation of this type without food and groceries. There was no suggestion that absent the sale of food and groceries, the whole operation would have to close. What was in issue in relation to need was whether the extended operation should have been permitted. That in my judgment was what his Honour considered. He did not change the planning unit for this purpose.

[62] The second error which Rokay identified in his Honour's consideration of the question of justification was that he "failed to take into account three overwhelming and unarguable material considerations, namely:

> "(a) the uncontradicted evidence of an anti-competitive lease agreement entered into between Woolworths and the owner of sub-precinct 7 which effectively precluded a second DDS from ever establishing in sub-precinct 7;
>
> (b) the evidence that sub-precinct 7 was, in any event, fully developed so there was, physically, no room for The Warehouse (or any other '*second*' DDS) to locate within that precinct; and
>
> (c) the absence of any credible evidence that the premises required by The Warehouse's operations could be suitably accommodated in the any other location within Maryborough City, a provincial town where even Woolworths conceded there existed a town planning need for a Warehouse outlet to be located."

Those matters were material because on Rokay's submission, "the … finding that the use was in conflict with the City Plan by reason of its location meant that the Warehouse (as a DDS) should be located in sub-precinct 7." In my judgment the finding that the use was in conflict with the City Plan by reason of its location meant no such thing. All that followed from the finding was that no further discount department store should be established in the Railyards Redevelopment Area precinct during the life of the Plan. His Honour made no finding regarding the establishment of such stores in other precincts or other Local Areas. Considerations (a) and (b) therefore did not tend to demonstrate the existence of sufficient planning grounds to justify the decision within the meaning of the Act. If anything, the existence of the Woolworths store in sub-precinct 7 tended to demonstrate the opposite.

[63] His Honour made no finding to the effect that there were no premises anywhere else in Maryborough in which the operations of The Warehouse could be accommodated; his failure to do so was not criticised in the submissions in this Court; and the proposition is inherently improbable. Consideration (c) cannot amount to a fact the omission to consider which could cause a miscarriage of the judgment which the section requires.

**Summary**

[64] Rokay has not demonstrated that Robertson DCJ made any error of law in finding that the decision for which it contended conflicted with the planning scheme, and that there were not sufficient planning grounds to justify that decision. It has no basis to challenge his Honour's order setting aside the relevant part of the Council's decision notice.

**Order**

[65] The application should be dismissed. Rokay should pay Woolworths' costs. There should be no order with respect to the Council's costs.

[66] **HOLMES J:** I agree with Fryberg J, for the reasons he gives, that no error of law has been shown in Robertson DCJ's conclusions as to conflict and planning need; and I agree also with the orders he proposes.

**ANNEXURE A**

**Local Area 2 – Map 3.2** (see para [16])