# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Yu Feng P/L v Brisbane CC & Ors* [2007] QCA 382 |
| PARTIES: | **YU FENG PTY LTD**<br>(appellant/applicant)<br>**v**<br>**BRISBANE CITY COUNCIL**<br>(respondent/first respondent)<br>**ROSS NIELSON PROPERTIES PTY LTD**<br>ACN 010 754 873<br>(first co-respondent/second respondent)<br>**STATE OF QUEENSLAND**<br>(second co-respondent/third respondent) |
| FILE NO/S: | Appeal No 2223 of 2007<br>P & E Appeal No 187 of 2006 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave *Integrated Planning Act* |
| ORIGINATING COURT: | Planning and Environment Court at Brisbane |
| DELIVERED ON: | 9 November 2007 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 7 August 2007 |
| JUDGES: | Williams and Holmes JJA and Atkinson J<br>Separate reasons for each member of the Court, each concurring as to the order made |
| ORDER: | **Leave to appeal refused** |
| CATCHWORDS: | ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – APPLICATIONS – GENERALLY – OTHER MATTERS – where council granted approval of a development application by the second respondent – where land in question was zoned Light Industry at the time the application was made to Council – where proposed development was therefore in conflict with the planning scheme as it stood at the time the application was made – where application for preliminary approval sought to vary the effect of the applicable local planning instrument – where "overwhelming need" for the development was relied upon as a ground for approving the proposed development despite conflict – where applicant's appealed to the PEC – where City Plan and Everton Park Local Plan had been amended since the giving of Council approval – where changes largely consistent with the |

proposed development – where some of the proposed development fell outside the MP3 designation – where PEC was permitted and did have regard to these amended instruments although not bound by them – whether "overwhelming need" demonstrated – whether approval should have been given for the proposed development – whether there was error below in construing the principle derived from *Grosser* – whether the decision below contained appellable error – whether leave to appeal should be granted

*Integrated Planning Act 1997* (Qld), s 3.1.6, s 3.5.5A, s 3.5.5, s 3.5.14A, s 3.1.14, s 4.1.52(2)(a), s 4.1.56, s 4.1.58

*Grosser v Council of the City of Gold Coast* (2001) 117 LGERA 153; [2001] QCA 423, considered

COUNSEL: S J Keim SC, with C J Clease, for the applicant
T N Trotter for the first respondent
C L Hughes SC, with M A Williamson, for the second respondent

SOLICITORS: Barry Nilsson Lawyers for the applicant
Brisbane City Legal Practice for the first respondent
Connor O'Meara for the second respondent

[1] **WILLIAMS JA:** This is an application for leave to appeal from a decision of the Planning and Environment Court ("PEC") dismissing an appeal by a submitter, Yu Feng Pty Ltd ("the appellant"), against the decision of the Brisbane City Council ("the Council") to grant approval to a development application lodged with the Council by Ross Neilson Properties Pty Ltd ("RNP") on 13 October 2004. The decision of the Council was communicated to the relevant parties undercover of a letter dated 22 December 2005. The actual decision is comprised of a large number of pages, but it is sufficient for present purposes to say that the approval was in relation to the following:

"1. Material Change of Use (Preliminary Approval) – Centre Activity (preliminary approval for Everton Park Urban Village Plan of Development)
2. Reconfiguration of a Lot (Development Permit) – Reconfiguration (8 into 5)
3. Material Change of Use (Development Permit and Preliminary Approval) – Centre Activity (Stage 1 shop, park, road, medical centre, office and restaurant)
4. Material Change of Use (Development Permit) – Centre Activity (Stage 2 multi-unit dwelling, shop, park, office, restaurant, medical centre)
5. Reconfiguration of a Lot (Development Permit) – Reconfiguration of a Lot (Community Management Scheme – Standard Plan with Common Property)."

[2] The appellant lodged an appeal with the PEC on 2 February 2006 and the hearing of the appeal commenced on 18 September 2006. Judgment dismissing the appeal was delivered on 1 February 2007. The appellant now seeks leave to appeal to this Court. Section 4.1.56 of the *Integrated Planning Act 1997* (Qld) ("the Act")

provides for an appeal to this Court on the ground of error or mistake in law with the leave of this Court. This Court has the powers conferred by s 4.1.58 of the Act.

[3] There are some unusual features of this case which could be said to make it unique; it is highly unlikely that any court in the future would be confronted with the questions raised by this application in a similar factual context.

[4] The application relates to proposed development on a large site (7.7 hectares) in an otherwise well developed suburban area of Brisbane. Much of the site had previously been taken up by a Woolworths distribution centre, but for some years it has not been used for that purpose. A large empty building is still on the land and the judge at first instance recorded that the site "presented on inspection as rundown and forlorn." Later in his judgment he said that there was "a plain, strong town planning and community need for the redevelopment of an unattractive and derelict light industrial site."

[5] Under the Brisbane City Plan 2000 as at October 2004 the land in question was zoned Light Industry; as the judge noted that was "a reflection of its historical use". There could be no argument with the proposition that, given the current surrounding development, sound town planning principles would demand a use other than Light Industry. The development proposal lodged by RNP and approved by the Council was broadly summarised by the trial judge as follows:

> "… an entire, large-scale development to be called 'Everton Park Urban Village' and associated permits for reconfigurations of lots and material changes of use. It incorporates a shopping centre (including a Woolworths supermarket) containing over 5700m$^2$, a retail showroom precinct of 6800m$^2$, a tavern and liquor barn, and almost 500 apartments in a number of buildings (which would also contain some small retail outlets). The proposal also includes a proposed new road, Everton Avenue, which will cut through the site between Stafford and South Pine Roads."

[6] When pressed to specify the points of law alleged to be involved in the appeal, and such as would warrant the granting of leave to appeal, senior counsel for the applicant provided the following particulars:

1. The proper construction of s 3.1.6, s 3.5.5A read with s 3.5.5, and s 3.5.14A read with s 3.5.14 of the Act with regard to applications for preliminary approval, where part of the approval seeks to change the planning scheme.
2. The proper construction of cl 4.4.2.6 of the City Plan.
3. The proper construction of the local plan and those provisions of the City Plan, apart from the local plan, which assist with regard to the way in which the construction of a local plan is to be approached.
4. The learned trial judge erred in that he misconstrued and misapplied the decision of this Court in *Grosser v Council of the City of Gold Coast* (2001) 117 LGERA 153; [2001] QCA 423.

[7] When considering the first alleged error of law it is necessary to appreciate the unusual circumstances which provide the backdrop to the decision in the PEC. As already noted the development application in question was lodged with the Council on 13 October 2004. The Council then, in its capacity as assessment manager, had to carry out an "impact assessment" pursuant to s 3.5.5(2) of the Act having regard to the "planning scheme and any other relevant local planning instruments"

(s 3.5.5(2)(b)). In other words the Council, as assessment manager, in assessing the application lodged 13 October 2004 had to have regard to the Brisbane City Plan, and the zoning thereunder for the subject land of Light Industry. There was no other planning instrument to which the Council, as assessment manager, could have regard. That position prevailed when the decision was approved on 21 December 2005, and communicated to the relevant parties the following day.

[8] But while the Council was considering the application in accordance with the requirements of the Act other events were happening which ultimately were to have some relevance when the matter came on for hearing on appeal in the PEC. On 30 November 2004 the Council resolved to prepare some amendments to the City Plan including an Everton Park Local Plan. Ministerial approval to give public notification of that resolution was granted on 21 March 2005. In response to that public notification RNP made submissions with respect to the draft Local Plan on 16 May 2005 and town planners on the behalf of the appellant has made submissions on 20 May 2005. It was on that day, 20 May 2005, that the period for making submissions with respect to the Local Plan expired. But it was not until 9 May 2006 that the Council resolved to amend the City Plan to include the Everton Park Local Plan. That Local Plan commenced to have legal effect as and from 1 July 2006.

[9] It will be recalled that the decision of the Council as assessment manager on the application lodged by RNP was made on 21 December 2005, and the notice of appeal to the PEC was filed on 2 February 2006. When the matter came on for hearing in that court on 18 September 2006 the Everton Park Local Plan was in force. The appeal to the Planning and Environment Court is "by way of hearing anew" (s 4.1.52(1)).

[10] Despite the fact that the Local Plan was in force, the PEC had as a matter of law to assess the question of material change of use against the planning scheme in effect when the application was made – that is the City Plan zoning the land as Light Industry. That is because s 4.1.52(2)(a) of the Act provided that the PEC "must decide the appeal based on the laws and policies applying when the application was made." But, importantly for present purposes, that section goes on to provide that the Court "may give weight to any new laws and policies the court considers appropriate". In other words, on the facts of this case, the PEC was not bound as a matter of law to apply the provisions of the Everton Park Local Plan which had become law as and from 1 July 2006, but could, in the exercise of its discretion, give such weight to the contents of that Local Plan as it considered appropriate.

[11] Against that background the learned judge at first instance said in his reasons for judgment:

> "While it is true that the provisions of the Local Plan were not in existence in any form at the date RNP lodged its original application it is inescapable that, from a time shortly thereafter, the Local Plan arose for discussion and those discussions (which actively involved RNP's representatives) were continuing throughout the ensuing twelve months while the Council was considering the proposal and, in effect, negotiating with RNP. In other words the Local Plan was being discussed, and developed and polished, as a process which was almost concurrent with Council's consideration of the various elements of RNP's large scale homogenous proposal.

> To ignore the Local Plan and the zoning changes it makes would, in those circumstances, be illogical. While the weight to be given to a new planning instrument like the Local Plan might, in some cases, be tempered by the fact it did not achieve its final form until six months after RNP's proposal was granted approval, the issues raised in these appeals cannot be allowed to slip through the cracks created by this unusual conjunction of events. The clear aims of IPA and the planning schemes promulgated under it mean the court must do its best to determine an appeal by reference to the statutory yardstick which can be located by those with a relevant interest. Here, logic and the prevailing circumstances compel the conclusion that it is the Local Plan which should be the primary, determinative planning instrument."

[12] But there was a further complication confronting the PEC. The application by RNP, inter alia, sought preliminary approval pursuant to s 3.1.6 of the Act. That section applies where part of the application seeks approval to vary the effect of any local planning instrument for the land in question. If the preliminary approval approves a material change of use then, pursuant to that section, the approval prevails insofar as it is different to the local planning instrument. There was acceptance on the hearing of the appeal to this Court of the following propositions. If under the City Plan land was zoned Light Industry and an application for preliminary approval for a material change of use was made pursuant to s 3.1.6 to enable the land to be used for commercial and residential purposes and if the preliminary approval was granted, that approval would in effect become the permitted use or zoning of the land. In other words the Light Industry classification would no longer be relevant and one would look to the terms of the approval to determine the permitted use of the land. A similar situation would apply where there was in existence a Local Plan. An approval pursuant to s 3.1.6 would overrule the permitted use of the land pursuant to that Local Plan and substitute as the permitted use that specified in the approval.

[13] The judge at first instance recorded that the senior and experienced town planner who gave evidence on behalf of the appellant "abandoned any contention that conflict with the City Plan (in its form before 1 July 2006) was a basis for refusal." In other words, insofar as the PEC was bound by s 4.1.52(2)(a) of the Act to decide the appeal applying the planning provisions in force as at 13 October 2004, there was no basis for allowing the appeal. To that extent it was not an error of law for the judge to say that RNP had "the benefit of a preliminary approval". But insofar as s 4.1.52(2)(a) of the Act gave the court a discretion to give weight to new laws and policies the judge noted that the appellants submissions "unsurprisingly emphasise that an approval of that kind should not be allowed to make RNP's path in this appeal easier". It was in that context that the judge concluded that it was the "Local Plan which should be the primary, determinative planning instrument" in deciding the appeal.

[14] That led the judge at first instance to record that the substantive issues in dispute raised by the appellant were: "alleged conflict with City Plan or the new Local Plan; whether a need had been established for the proposed development, or, whether it would create unacceptable economic impact; traffic; noise; and, to the extent there are any conflicts with elements of the planning schemes, whether there are sufficient planning grounds to warrant approval despite those conflicts." The judgment then

proceeded to consider those issues, particularly in the light of the Local Plan. Eventually the judge summarised the appellant's position by saying:

> "Ultimately, Yu Feng's criticism took on a flavour of an argument that RNP's proposal is not the best form of development in the context of that to which the Local Plan might be said to aspire, but that is not the test a developer must meet."

[15] It appears to me that the judge at first instance was correct in so describing the approach taken by the appellant, and he was also correct to say that it was not a relevant consideration that someone might be able to devise a plan which some would say was a better form of development.

[16] The matter would have had to have been approached somewhat differently in the PEC if, rather than giving such weight to the Local Plan as the judge considered appropriate in the circumstances, the Local Plan had the full force of law as a planning instrument. In the instant case the Local Plan provided for a mix of commercial and residential use of the subject land and that was also what was proposed by RNP in its application. In those circumstances it was much easier to reach the conclusion that there was not such inconsistency between the proposal and the Local Plan as would justify the PEC in overruling the decision of the Council.

[17] What in effect the PEC had to do was to assess the proposal of RNP under s 3.5.5A of the Act against the Local Plan bearing in mind it was for the court to determine what weight should be given to the latter in the circumstances of this case. As paragraphs later in the reasons show, that is exactly what the judge did.

[18] When the reasons are read in the light of what I have said it becomes clear that the judge did not err as the appellant alleges in construing s 3.1.6, s 3.5.5A read with s 3.5.5 and s 3.5.14A read with s 3.5.14 of the Act. Given the unusual combination of fact his Honour's approach was not wrong. Even if the task was to decide the appeal based on the fact that the binding planning consideration in law was the Local Plan the result would have been the same.

[19] The next contention by counsel for the appellant is that the judge at first instance wrongly construed and applied cl 4.4.2.6 of the City Plan. Relevantly that clause provides:

> "The Plan strongly encourages Centre activities to locate in-Centre and strongly discourages their location out-of-Centre.
>
> Out-of-Centre development of Centre activities is inconsistent with the intent of the Plan unless an overwhelming community need is demonstrated. Overwhelming community need will have to be demonstrated through preparation of a Commercial Impact Assessment report as detailed in the Commercial Impact Assessment Planning Scheme Policy.
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> …
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> Where an assessment of overwhelming community need demonstrates that it is not possible to accommodate a Centre activity within a Centre within the life of the Plan, preference will be given to

> that development occurring at the edge of an existing Centre, rather than in a stand alone or more isolated location."

[20] The City Plan provides for Multi-Purpose Centres and Special Purpose Centres. The concern here is with Multi-Purpose Centres. Clause 4.4.2.2 states that Multi-Purpose Centres "are to be provide for a wide range of uses to develop at convenient and assessable locations in the City. They are, or can be, well serviced by pedestrian, bike and public transport modes. They incorporate most of the traditional strip shopping centres. … The Centres will increasingly act as the focal points for: service delivery and employment opportunities … higher density residential locations." Then one finds in the definitions in cl 10.2 a list of what are described as "Centre Activities" for such a centre.

[21] In the present case, as is demonstrated by a consideration of the plan exhibit 35, the proposal by RNP does not limit centre activities to the MP3 area designated on the Local Plan. There is an obvious change in the percentage of area to be used for residential and commercial purposes. Specifically showrooms designated in the proposal by RNP are located outside the precinct designated MP3 in the Local Plan. There was also a significant area for car parking located outside of the precinct designated MP3 in the Local Plan.

[22] The contention of the appellant is that it was not established before the PEC that there was an "overwhelming need" for redevelopment of the site in the way proposed by RNP.

[23] The judge in his reasons dealt with "overwhelming need" as follows:

> "The issue of need arises in two contexts: first, it is relied upon by RNP as one of the planning grounds to warrant approval of the proposed development (despite the conflict with the planning scheme in its form at the time the applications were made); and, secondly, Yu Feng asserts that because some parts of the proposal involve retail development outside that part of the side which is now designated MP3 under the Local Plan, the applicant must demonstrate an overwhelming community need; City Plan, Chapter 3 and s 4.4.2.6.
>
> As to the first, it is clear there is a general need (in the town planning sense) for redevelopment of this site and the economic need experts Mr Leyshon and Mr Brown generally agreed that there is at least a moderate and in some instances a significant need for a variety of the facilities to be provided (save the supermarket). The conclusion is uncontentious: the traditional approach to town planning need involves as focus upon the well being of the community and the provision of appropriate services and facilities, including greater competition and choice. It is the community's perspective which is paramount.
>
> …
>
> As to the question of overwhelming community need (touching those parts of this proposal which are appropriate in MP3 areas but fall outside the MP3 section designated within the site under the local

> plan) the phrase has a particular meaning identified by Skoien SJDC in *Wincam Developments No. 3 Pty Ltd v Brisbane City Council* [2004] QPELR 474 at 477. …
>
> The proviso falls to be considered in a context where neither Mr Buckley or any other witness could identify any real impact, let alone unacceptable ones, arising as a consequence of inconsistencies with the planning scheme. Mr Humphries, the Town Planner called in RNP's case, Mr Robinson (a very senior and experienced architect, and Mr Leyshon) were all persuaded that there is a significant town planning and community need for the proposed development.
>
> This is an obsolete and derelict site, not unfairly described by Mr Robinson as a blight on Everton Park, which would be transformed by a development which achieves all the broad planning objectives newly adopted for the parcel by the Local Plan. The local authority has, in that new Local Plan, plainly accepted a pressing need for development of this type and moved to recognise by extending the existing Everton Park MP3 Centre to include a significant part of the subject land, and encouraging Centre activities there.
>
> In the unusual context applying here, the requirement to demonstrate overwhelming need must be considered, again, in the light of the fact that this application initially sought a preliminary approval to override the planning scheme and, in particular, to do so in the very way which that planning scheme (in the new Local Plan) now seeks to provide guidance and direction about the location of Centre uses. …
>
> RNP makes out its case for need in the classic, town planning sense. The further statutory requirement to show overwhelming need falls to be considered in a particular, and most unusual, set of circumstances. The evidence points strongly to the conclusion that the provision of the amenities offered by the elements of the proposal is a very good thing for the local community. The 'Centre' elements of the proposal outside the MP3 designation are not remote to it, and will form a logical part of this retail centre of Everton Park around the intersection. …
>
> When, as here, the community whose need is to be considered is large and the facility is proved to be highly desirable, this conjunction of factors means the requirement, as explained in *Wincam Developments* and limited in its application and effect by the unusual history of the matter and the major changes in the statutory regime, is not difficult to meet. Any conflict with, or compromise of the provisions of the City Plan concerning out of Centre development, is, then, of a relatively minor kind."

[24] The contention of counsel for the appellant is that the judge at first instance had to focus particularly upon the question whether there was an overwhelming need for centre uses to be located to some extent further into the designation of medium

residential area on the local plan. It is said that the judge erred in focusing on the community need for the whole proposal, rather than focusing on the question whether there was "overwhelming need for those out of centre uses".

[25] In my view it is useful at this stage to return to the chronology. As already noted from about November 2004 until December 2005 when the application by RNP was approved, the Council was considering both the new Local Plan for the subject site and the proposal by RNP. It does seem a little strange that almost at the same time the Council would approve a development proposal having a particular division between MP3 activities and medium density residential and a Local Plan providing for a somewhat different ratio between those two activities. But it is not necessary to find a logical reason for that. What is critical, in my view, is that both the approval to the development proposal and the approval to the Local Plan recognised that the area of land in question should be developed for MP3 and medium residential density purposes. It is not difficult to conclude that the decision whether the ratio between those uses should be 50:50 or 60:40 (or even 70:30) would be dependant upon consideration of a particular development proposal and the various assessments made with respect to that particular proposal. Here the concern is with the overall development of a relatively large area of land, not with the question whether or not there should be some extension of an existing and functioning MP3 centre. One can well understand the significance of cl 4.4.2.6 of the City Plan if what was under consideration was some extension of a functioning MP3 centre.

[26] But in any event cl 4.4.2.6 is not on its face prescriptive. It is more in the nature of a "motherhood statement" and what will constitute an "overwhelming need" will vary enormously. There would almost be an infinite variety of facts which could impact upon the decision whether or not there was an "overwhelming need" for a proposal under consideration.

[27] Given all of those circumstances I am not persuaded that the judge at first instance erred in either construing or applying cl 4.4.2.6.

[28] The third error of law alleged on behalf of the appellant is that the judge at first instance erroneously construed the Local Plan and did not afford it the determinative force he should have. The error is said to be exposed by the statement by the judge at first instance: "The Local Plan, understood in context and properly construed, provides guidelines and does not contain, for present purposes, prescriptive development requirements." As previously indicated in these reasons that, in the particular circumstances of this case, was a correct statement as to the relevance and effect of the Local Plan. The PEC was only required to give that plan such weight as it considered appropriate; the Local Plan in the particular circumstances of this case did not have prescriptive effect.

[29] Counsel for the appellant emphasised that the Local Plan provided that the Stafford Road frontage of the site "must make a positive contribution to the traditional strip shopping character of the Everton Park Centre". The proposal by RNP does involve an element of "strip shopping" along Stafford Road which is arguably in accord with what is found on the opposite side of that street. On the other side of the road there is an area for parking between the footpath and the shops. Whilst the major shopping facility in RNP's proposal would be away from the street front, there was still provision for shops having frontage to Stafford Road. Further, the conditions imposed on the development with respect to pedestrian crossings of Stafford Road

would help to ensure and maintain major pedestrian routes covering the whole of the Everton Park shopping area.

[30] The fact that the judge at first instance gave appropriate consideration to conflict between the proposal by RNP and the Local Plan can be seen from the following extracts from his reasons:

> "The claimed inconsistencies with the new Local Plan also focussed upon the incursion of Centre activities into parts of the site outside the MP3 designation in the Local Plan, and upon alleged failures, in the MP3 section closest to Stafford Road, to retain the strip shopping character of the area generally or provide mixed use development with Centre use as a ground level and residencies above. Attacks were also mounted against alleged non-compliance with certain aspects of the Local Planning code touching building heights, and gross floor area/site ratios.
>
> Again, these assertions fall to be considered in a particular context: one in which it is not alleged any impacts flow from the conflicts or inconsistencies (or unacceptably cut across the implementation of those provisions of the Local Plan which if not, previously, been already varied by the preliminary approval) or unacceptably cut across or compromised city-wide DEOs (or failed to advance the objectives of the SEQ Regional Plan). It must also be accepted that the later Local Plan, while different in form from the preliminary approval, plainly contemplates similar Centre uses in broad terms and, in particular, a combination of retail and medium density residential uses and the proposed development meets those broad objectives.
>
> . . .
>
> Although the Local Plan contains different precincts with a different emphasis in types of use, it plainly promotes Centre activities in the expanded MP3 Centre as well as the introduction of medium density multi-level residential development. It contains design guidelines, referred to in the "intent" for both precincts one and two, which also form part of the Acceptable Solutions for each precinct identified in map B.
>
> . . .
>
> More significantly, there is no town planning imperative which would compel a rigid application of the map B design guidelines."

[31] Later the judge at first instance noted that "nothing in the language of the Local Plan indicates strong planning imperatives for a clear demarcation between the precincts." He also noted that while the proposal by RNP did not strictly comply with some of the Acceptable Solutions there were no "unacceptable impacts arising as a consequence". The judge noted that the expert evidence generally established that "the proposal does comply with the relevant criteria in that building heights are appropriate to this particular location" and "the building size and bulk was consistent with the medium density scale."

[32] In the circumstances the appellant has not established that the judge at first instance erred in construing or applying the Local Plan.

[33] The submission by counsel for the appellant that the learned trial judge erred in misconstruing and misapplying the principle derived from *Grosser* is also not established. The submission by the appellant was only directed to paragraph [43] of the judgment wherein it was said:

> "Another aspect of existing development also tells against Yu Feng's argument that the Local Plan should be construed so as to permit residential development only in that part of precinct 2(a) immediately south of precinct 1. The existing retail tenancies to the south turn their rather dull and unattractive backs to the subject land but appear to be relatively modern and well established. Development which addresses that aesthetic problem, as this proposal does, is not inappropriate in a case where, as sometimes occurs, the planning scheme has been overtaken by events or is not soundly based on the prevailing conditions."

There was then a footnote reference to *Grosser*. In my view what was said in paragraph [43] was relevant to the question to be answered at first instance, but it was probably not strictly an application of the principle derived from *Grosser*, particularly having regard to what was said by White J therein at [46] and [47]. The probably erroneous reference to *Grosser* does not detract from the relevance of what the judge said in paragraph [43] and there is no error of law such as would vitiate the decision.

[34] In the PEC and again in this Court the Council supported the approval given to the proposal by RNP. There was a deal of debate both at the level of Council approval and again in the PEC as to conditions which should attach to the approval. Much of the argument in the PEC was taken up with such matters. It has not been necessary for this Court to have regard to that aspect of the matter, and indeed much of the material relevant to those issues has not been placed before this Court. This Court was asked to consider the matter on narrow legal grounds said to demonstrate error in the reasoning of the judge at first instance.

[35] As has already been said on a number of occasions, the peculiar circumstances which confronted the PEC in this case made the decision more complex in some ways, but in other ways easier to make. In broad terms, the fundamental question was whether or not there were such inconsistencies between the proposed development and the Local Plan as would justify the PEC refusing to uphold the approval granted by the Council. That decision had to be made in the light of the fact that the Local Plan was not prescriptive, but was nevertheless the planning instrument against which the proposal should be compared.

[36] In my view the judge at first instance addressed all relevant issues and his reasoning does not disclose any appellable error of law.

[37] In the circumstances leave to appeal should be refused.

[38] **HOLMES JA**: I agree with Williams JA, for the reasons he gives, that leave to appeal should be refused in this case.

[39] **ATKINSON J:** I agree with Williams JA that the appeal should be dismissed and with His Honour's reasons for doing so. I should, however, like to add some further observations.

[40] The increasing population of south east Queensland has made co-ordinated urban planning critical to the area's future.[1] This has been recognised by the South East Queensland Regional Plan 2005-2026 ("SEQ Regional Plan") which was made pursuant to 2.5A.15 (2) of the *Integrated Planning Act 1997* (IPA). Chapter 3 of the IPA also provides for an integrated development assessment system (IDAS). This is defined in s 3.1.1 as "the system detailed in this chapter for integrating State and local government assessment and approval processes for development."

[41] Section 3.1.2 provides that under the IPA, all development is exempt development unless it is assessable development or self-assessable development. Schedules 8 and 10 of the IPA sets out which developments are assessable development and which are self-assessable developments. An assessable development also includes development declared to be an assessable development under a preliminary approval to which s 3.1.6 applies. The proposed development in this case was an assessable development. Pursuant to s 3.1.4, a development permit is necessary for assessable development.

[42] As well as development approval, an applicant for a development permit may apply for a preliminary approval. A preliminary approval approves the development to the extent stated in the preliminary approval and subject to the conditions in the preliminary approval but does not itself authorise assessable development to occur: IPA s 3.1.5.

[43] Section 3.1.6 of the IPA provides that a preliminary approval may override a planning instrument. It provides that:

> "**Preliminary approval may override a local planning instrument**
>
> (1) This section applies if –
>
> (a) an applicant applies for a preliminary approval; and
>
> (b) part of the application states the way in which the applicant seeks the approval to vary the effect of any local planning instrument for the land.
>
> (2) Subsection (3) applies to the extent the application is for –
>
> (a) development that is a material change of use; and
>
> (b) the part mentioned in subsection (1)(b).
>
> (3) If the preliminary approval approves the material change of use, the preliminary approval may, in addition to the things an approval may do under part 5, do either or both of the following for development relating to the material change of use –
>
> (a) state that the development is –
>
> (i) assessable development (requiring code or impact assessment); or
>
> (ii) self-assessable development; or
>
> (ii) exempt development;
>
> (b) identify any codes for the development.

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[1] The region has attracted on average 55,000 new residents each year over the past two decades: SEQ Regional Plan Part A: preamble.

(4) Subsection (5) applies to the extent the application is for –
  (a) development other than a material change of use; and
  (b) the part mentioned in subsection (1)(b).

(5) If the preliminary approval approves the development, the preliminary approval may, in addition to the things an approval may do under part 5, do either or both of the following for the development –
  (a) state that the development is –
    (i) assessable development (requiring code or impact assessment); or
    (ii) self-assessable development; or
    (iii) exempt development;
  (b) identify codes for the development.

(6) To the extent the preliminary approval, by doing either or both of the things mentioned in subsection (3) or (5), is different to the local planning instrument, the approval prevails.

(7) However, subsection (3) or (5) no longer applies to development mentioned in subsection (3)(a) or (5)(a) when the first of the following happens –
  (a) the development approved by the preliminary approval and authorised by a later development permit is completed;
  (b) any time limit for completing the development ends.

(8) To the extent the preliminary approval is inconsistent with schedule 8 or 9, the preliminary approval is of no effect."

[44] Assessable development will only occur once a development permit has been obtained. Such a development permit authorises assessable development to occur pursuant to s 3.1.5 (3) of the IPA to the extent stated in the permit but subject to the conditions in the permit and any preliminary approval relating to the development the permit authorises, including any conditions in the preliminary approval. It is possible to make a single application for both a preliminary approval and a development permit: see the note to s 3.2.1 (1) of the IPA.

[45] An application for preliminary approval which seeks to vary the effect of any applicable local planning instrument for the land is assessed under s 3.5.5A of the IPA which provides:

"**Assessment for s 3.1.6 preliminary approvals that override a local planning instrument**

(1) Subsection (2) applies to the part of an application for a preliminary approval mentioned in section 3.1.6 that states the way in which the applicant seeks the approval to vary the effect of any applicable local planning instrument for the land.

(2) The assessment manager must assess the part of the application having regard to each of the following –
  (a) the common material;
  (b) the result of the assessment manager's assessment of the development under section 3.5.4 or 3.5.5, or both;

(c) the effect the proposed variations would have on any right of a submitter for following applications, with particular regard to the amount and detail of supporting material for the current application available to any submitters;

(d) the consistency of the proposed variations with aspects of the planning scheme, other than those sought to be varied;

(e) if they are not identified in the planning scheme as being appropriately reflected in the planning scheme –

(i) State planning policies, or parts of State planning policies; and

(ii) for the planning scheme of a local government in the relevant area for a State planning regulatory provision – the provision; and

(iii) for the planning scheme of a local government in a designated region – the region's regional plan;

(f) the matters prescribed under a regulation (to the extent they apply to a particular proposal).

[46] The decision is then made pursuant to s 3.5.14A of the IPA which provides as follows:

"**Decision if application under s 3.1.6 requires assessment**

(1) In deciding the part of an application for a preliminary approval mentioned in section 3.1.6 that states the way in which the applicant seeks the approval to vary the effect of any applicable local planning instrument for the land, the assessment manager must –

(a) approve all or some of the variations sought; or

(b) subject to section 3.1.6(3) and (5) – approve different variations from those sought; or

(c) refuse the variations sought.

(2) However –

(a) to the extent development applied for under other parts of the application is refused, any variation relating to the development must also be refused; and

(b) the assessment manager's decision must not compromise the achievement of the desired environmental outcomes for the planning scheme area; and

(c) paragraphs (a) and (b) do not apply if compromising the achievement of the desired environmental outcomes if necessary to further the outcomes of any of the following if they are not identified in the planning scheme as being appropriately reflected in the planning scheme –

(i) State planning policies, or parts of State planning policies;
(ii) for the planning scheme of a local government in the relevant area for a State planning regulatory provision – the provision;
(iii) for the planning scheme of a local government in a designated region – the region's regional plan."

[47] A preliminary development approval must be noted by the local government on its planning scheme under s 3.5.27 of the IPA but does not amend the planning scheme.

[48] This appeal concerned a preliminary approval for material change of use, and development approval subject to conditions given to the second respondent, Ross Neilson Properties Pty Ltd, ("RNP") by the Brisbane City Council ("the Council") on 22 December 2005. The preliminary approval and the approval concern a large derelict light industrial site on which RNP proposed to construct a retail centre and multistorey residential buildings. The area was apt for a material change of use since it was no longer used as a light industrial site and could readily be used to create greater residential consolidation while enhancing rather than disturbing local community identity in accordance with principles and policies set out in the SEQ Regional Plan.[2]

[49] In this case, at the same time the applications made by the RNP were being considered by the Council, the Council was actively considering amendments to the City Plan and the relevant local area plan, the Everton Park Local Plan (the local plan). The amended City Plan and the local plan came into effect in mid 2006, not long after RNP's application was approved by Council and before the appeal by the appellant, Yu Feng Pty Ltd ("Yu Feng") was heard and determined in the Planning and Environment Court.

[50] The learned judge examined the approved development primarily against its compliance with the amended City Plan and the Everton Park Local Plan rather than the earlier City Plan which reflected previous use of the site, when Everton Park, about 10 kilometres from the CBD, was considered an outer suburb. In my view, this was the correct approach both legally pursuant to s 4.1.52 (2)(a) of the IPA and practically to determine whether it satisfied contemporary planning policies and requirements.

[51] Given that the Council was considering major changes to the City Plan and to the local plan which were consistent with the proposed development it was an appropriate case for RNP to make an application for preliminary approval for a material change of use. The utility of that course was confirmed when the Council granted the preliminary approval before it had promulgated its new local plan.

[52] The local plan was consistent with, but not identical to, the approved development. The learned trial judge applied the correct criteria to examine those inconsistencies and dismiss the appeal against the Council's decision. The decision of the Planning and Environment Court was not attended by any appellable error.

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2 *SEQ Regional Plan* Part F: Regional policies 8 Urban Development.