SUPREME COURT OF QUEENSLAND

CITATION:	*Tendiris Pty Ltd & Anor v Moreton Bay Regional Council & Ors* [2010] QCA 349
PARTIES:	**TENDIRIS PTY LTD** (appellants/applicants) **LEONARDUS GERARDUS SMITS** (appellants/applicants) **v** **MORETON BAY REGIONAL COUNCIL** (first respondent/respondent) **STATE OF QUEENSLAND** (second respondent/not party to the appeal) **CLIFFORD ALLEN WILLMET** (third respondent/not party to the appeal) **PAMELA ANNETTE OLSON** (fourth respondent/not party to the appeal) **DARRYL THOMAS HONOR** (fifth respondent/not party to the appeal) **SAMFORD AND DISTRICT PROGRESS AND PROTECTION ASSOCIATION** (sixth respondent/not party to the appeal) **PETER JAMES EDMISTON** (seventh respondent/not party to the appeal) **SUSAN LOUISE EDMISTON** (eighth respondent/not party to the appeal)
FILE NO/S:	Appeal No 5340 of 2010 DC No 1313 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	10 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	10 September 2010
JUDGES:	Holmes and Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application refused with costs**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where a prior applicant sought a development permit for a material change of use – where the proposed development

was in accordance with a concept plan, the "Birt proposal" – where the application was refused by the Council and the prior applicant appealed to the Planning and Environment Court – where, in 2006, Tendiris Pty Ltd and its Director replaced the prior applicant – where Tendiris proposed to change the development application to refer to a second concept plan, the "Tendiris proposal" – where Tendiris applied for declarations that the change to the development application made by its proposal was a minor change and the appeal should proceed on the basis of the Tendiris proposal – where the primary judge declared that changes to the development application were not minor and ordered the appeal proceed on the basis of the Birt proposal – where the applicants applied to this Court for leave to appeal from that decision – whether the primary judge erred in holding that the change was not a "minor change" as defined in s 350(1)(d)(i) of the *Sustainable Planning Act* 2009 (Qld) – whether the primary judge took into account irrelevant considerations – whether the applicants established any error of law in the primary judge's reasons sufficient to warrant a grant of leave to appeal

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – PARTICULAR CASES INVOLVING AN ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS – where the applicants argued that the primary judge did not provide sufficient reasons for rejecting the evidence of two expert witnesses called by Tendiris – whether the primary judge's omission to refer to the evidence of two expert witnesses rendered his Honour's reasons insufficient

Sustainable Planning Act 2009 (Qld), s 350, s 350(1)(d)(i), s 498, s 759(1)(c), s 819(1), s 819(2), s 821(2)
Integrated Planning Act 1997 (Qld)(repealed), s 4.1.52(2)(b), s 4.1.56

Archibald v Byron Shire Council (2003) 129 LGERA 311; [2003] NSWCA 292, cited
Camden v McKenzie [2008] 1 Qd R 39; [2007] QCA 136, cited
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, applied
H A Bachrach Pty Ltd v Caboolture Shire Council (1992) 80 LGERA 230; [1992] QCA 384, cited
Holts Hill Quarries P/L v Gold Coast C C & Ors [2001] QPELR 5; [2000] QCA 268, cited
Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd [1983] 3 NSWLR 378; (1983) 58 ALJR 553, applied

Smits & Anor v Moreton Bay Regional Council & Ors [2010] QPEC 31, related
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited
Wiki v Atlantis Relocations (NSW) Pty Ltd (2004) 60 NSWLR 127; [2004] NSWCA 174, cited

COUNSEL: A J Greinke for the applicants
C L Hughes SC, with A N S Skoien, for the respondent

SOLICITORS: Morgan Conley Solicitors for the applicants
Moreton Bay Regional Council for the respondent

[1] **HOLMES JA:** I agree with the reasons of Fraser JA and with the order he proposes.

[2] **FRASER JA:** Many years ago Mr Ogle sought a development permit for a material change of use for a special residential development on some 400 hectares of steeply sloping dense forest land at the foothills of Mt Glorious which was designated rural in the Pine Rivers Shire transitional planning scheme strategic plan. The form of the proposed residential development was generally in accordance with a concept plan prepared by Birt & Associates Pty Ltd dated June 2002. The "Birt proposal" involved:

> "(a) the creation of 207 residential allotments, with a minimum lot area of 4000m^2, over approximately 148 hectares (comprising some 34 per cent of the subject site);
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> (b) a balance area of open space of approximately 292 hectares, including a link through the subject land from north to south;
>
> (c) access for the residential development from Mount Glorious Road (at the south-east corner of the subject land);
>
> (d) emergency access for the residential development via a track connecting to Harland Road (on the western boundary of the subject land)."

[3] The Pine Rivers Shire Council refused the application. Mr Ogle appealed to the Planning and Environment Court. There followed a series of disputes between Mr Ogle and Tendiris Pty Ltd and its director, Mr Smits, which resulted in Tendiris Pty Ltd commencing its own appeal. Ultimately Mr Smits replaced Mr Ogle as the appellant in the first appeal, the two appeals were consolidated, and the appellants shared the same legal representation. The Moreton Bay Regional Council replaced the Pine Rivers Shire Council as the local government and the respondent to the appeal.

[4] In 2006 Tendiris Pty Ltd proposed to change the development application so that it referred to development generally in accordance with a concept plan prepared by LandPartners dated 28 September 2006. The "Tendiris proposal" involved:

> "(a) the creation of a body corporate arrangement involving:

(i) the creation of 160 residential allotments, with a minimum lot area of 1,250m^2 totally (sic) approximately 137 hectares;

(ii) four areas of common property totalling approximately 49 hectares, including a "community precinct", a "conservation precinct", fire management areas and access road;

(b) three balance open space allotments totalling approximately 255 hectares;

(c) access for the residential development from Mount Glorious Road (at the south-east corner of the subject land); and

(d) emergency access for the residential development via an access road connecting to Harland Road (on the western boundary of the subject land)."

[5] In 2006 Tendiris Pty Ltd applied for declarations that the change in the development application made by the Tendiris proposal was a minor change and that the appeal should proceed on the basis of that proposal. The Council opposed the application. That application was set down for hearing once it became clear that Mr Smits and Tendiris Pty Ltd were entitled to pursue the appeal. Following the hearing the primary judge declared that the changes to the development application were not minor changes and ordered that the hearing of the appeal proceed on the basis of the Birt proposal.[1]

[6] Tendiris Pty Ltd and Mr Smits have now applied for leave to appeal from that decision. The grounds of such an appeal are confined to error or mistake in law and jurisdictional errors.[2] The applicants contend that the primary judge made errors or mistakes in law.

The issue in the Planning and Environment Court

[7] The appeal to the Planning and Environment Court against the refusal of the development application and the application for a declaration were commenced when the *Integrated Planning Act* 1997 (Qld) ("IPA") was in force. The IPA was repealed on 18 December 2009 upon the commencement of the *Sustainable Planning Act* 2009 (Qld) ("SPA"). The effect of ss 819(1) and 819(2) of the SPA is that the proceedings in the Planning and Environment Court must continue as if the IPA had not been repealed.

[8] Section 4.1.52(2)(b) of the IPA provides that if the appellant in the Planning and Environment Court is the applicant for a development application that court "must not consider a change to the application on which the decision being appealed was made unless the change is only a minor change." The expression "minor change" was defined in the IPA but it is the definition in the SPA which applies in this case. Section 821(2) of the SPA provides that for deciding an appeal to the Planning and Environment Court under s 4.1.52(2) of the repealed IPA that Act applies as if the reference in it to a minor change were a reference to a minor change as defined in the SPA. Section 350 of the SPA defines "minor change" as follows:

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1 *Smits & Anor v Moreton Bay Regional Council & Ors* [2010] QPEC 31.

2 *Sustainable Planning Act* 2009 (Qld), s 498, which reproduced the provision in s 4.1.56 of the *Integrated Planning Act* 1997 (Qld) (repealed).

> "(1) A ***minor change*** in relation to an application, is any of the following changes to the application—
>
> (a) a change that merely corrects a mistake about the name or address of the applicant or owner, or the address or other property details of the land to which the application applies, if the assessment manager is satisfied the change would not adversely affect the ability of a person to assess the changed application;
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> (b) a change of applicant, if the assessment manager is satisfied the change would not adversely affect the ability of a person to assess the changed application;
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> (c) a change that merely corrects a spelling or grammatical error;
>
> (d) a change that—
>
> (i) does not result in a substantially different development; and
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> (ii) does not require the application to be referred to any additional referral agencies; and
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> (iii) does not change the type of development approval sought; and
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> (iv) does not require impact assessment for any part of the changed application, if the original application did not involve impact assessment.
>
> (2) In deciding whether a change is a minor change under subsection (1)(d), the planning instruments or law in force at the time the change was made apply (the ***applicable law***).
>
> (3) Application of the applicable law does not stop a change mentioned in subsection (1)(d)(ii) or (iv) from being a minor change only because the applicable law, if applied to the application as originally made, would require referral to any additional referral agencies or involve impact assessment."

[9] The issue for the primary judge was whether the Tendiris proposal would result in "a substantially different development" from the Birt proposal within the meaning of that expression in s 350(1)(d)(i) of the SPA as it was used in s 4.1.52(2)(b) of the IPA. His Honour found that it would and held accordingly that the change to the development application was not a minor change.

Taking into account hypothetical objections

[10] The applicants argued that the primary judge erred by taking into account the question of whether members of the public should have been given an opportunity to consider and make submissions about the proposed changes and the likelihood

that the proposed changes would have attracted a submission. The Council argued that the primary judge did not take those matters into account and that in any event they were relevant considerations which advanced the Council's case.

[11] The primary judge referred to the Council's submission that such matters were relevant considerations and observed that the relevance of those considerations should be accepted "in general terms", but his Honour added that it should be noted that "neither the definition in section 350 of the SPA nor the matters in the Statutory Guideline"[3] required any consideration to be given as to whether or not the proposed change would be likely to prompt the hypothetical objector to make a submission. [4] The primary judge did not thereafter refer to those matters. Rather his Honour examined the differences between the two proposals and considered whether the Tendiris proposal should be characterised as "a substantially different development".

[12] I accept the Council's submission that the primary judge did not take into account the matters which the applicants argued were irrelevant. It is therefore not necessary to rule upon the Council's submission that those matters were relevant.

Taking into account a change to the titling arrangements

[13] The primary judge noted the Council's submission that the relevant considerations included "the change from a more standard reconfiguration to a body corporate format with road infrastructure to be private rather than public".[5] The applicants argued that this was an error because there was no evidence that the Birt proposal involved a "more standard reconfiguration", but that was merely a reference to the uncontentious fact that under the Birt proposal road infrastructure would be dedicated to public use. The primary judge again referred to the change to the titling arrangements in the following passage (I have omitted footnotes):

> "[21] In relation to the Tendiris proposal including the creation of a body corporate titling arrangement, Mr Simonic considers that this would change the nature of the proposal from a residential development freely accessible to the general public to that of a private development. Whilst I accept the observations made by Mr Simonic in relation to the changes to the layout plan, I am of the view that his comments in relation to the impact of the proposed development are particularly apposite. Mr Simonic considers that while the proposed Tendiris (sic) has fewer lots, and the average lot sizes are greater, the impact of the proposed development is still high, particularly in the central portion of the site where a higher density is proposed than was the case with the original application. Mr Simonic considers that the provision of smaller lots with a lower percentage of protected vegetation per lot will result in a change in character to that closer to a convention (sic) subdivision than was the case with the original application. Mr Simonic

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3 Statutory Guideline 06/09 "Substantially different development when changing applications" was issued by the Minister on 18 December 2009 pursuant to s 759(1)(c) of the SPA.

4 *Smits & Anor v Moreton Bay Regional Council & Ors* [2010] QPEC 31 at [13]-[14].

5 *Smits & Anor v Moreton Bay Regional Council & Ors* [2010] QPEC 31 at [13].

contends that the average lot size as depicted on the Tendiris revised plans is misleading in that a number of larger lots (in excess of 16 hectares could be seen as rural lots) increase the average size. The average lot size of the residential character lots (those less than 16 hectares in size) is only approximately 3,503m^2. Mr Simonic notes that this is substantially less than the average size of 5,738m^2 in the original application and will change the character of the area from that originally proposed. In my respectful opinion the observations made by Mr Simonic as to the alteration of the character of the area as a result of the Tendiris proposal are most pertinent.

[22] The reduction in open space and connectivity between the open spaces and the more intense development together with the higher visual impact within the residential component as a result of smaller lot sizes and the relatively close proximity of houses will have the effect of changing the character of the area from that originally proposed under the Ogle application. I have formed the view that this alteration in the character of the area from what was originally proposed makes the proposal under the Tendiris plan a substantially different form of development. In coming to this view I acknowledge that the development in the Tendiris proposal remains a form of residential development and further that the number of allotments has decreased in that proposal while the average area of residential allotments has increased. However, I accept that the inclusion of the larger allotments in the Tendiris proposal means that comparisons of the average lot size and the total lot numbers do not accurately reflect change in the size and intensity of the proposed development. This is a product of a number of features of the Tendiris proposal:

(i) the minimum lot size has decreased in the Tendiris proposal from 4,000m^2 to 1,250 m^2;

(ii) the bulk of the development in the Tendiris proposal occurs by way of the smaller blocks being concentrated in the center (sic) of the subject land; and

(iii) the area remaining in public open space under the Tendiris proposal has decreased by some 40 hectares."

[14] The applicants argued in their written submissions that the change in the titling arrangements mentioned in the first sentence of paragraph 21 was not relevant to the town planning issues which arose in connection with the application for a material change of use, that the question whether the open space was to be publicly or privately owned was not relevant because the purpose of the plans were merely to show the feasibility of a proposed development that would meet particular guidelines, and that the titling arrangements would become relevant only in relation to any subsequent application for reconfiguration of the lot.

[15] However in oral argument the applicants' counsel acknowledged that the primary judge did not take the change in the titling arrangements into account in determining in paragraph 22 that the Tendiris proposal would result in a substantially different development from the Birt proposal. That acknowledgment was required by the second sentence of paragraph 21, the subsequent references to quite different matters in the course of deciding the issue, and the primary judge's observation earlier in the reasons that, to the extent that his Honour's acceptance of the relevance of the change to private ownership in "general terms" might imply that the application included an application for a reconfiguration of the lot, rather than merely a change of use, that "implication should be disregarded".[6] It is apparent that the error of law for which the applicants contended could not have influenced the primary judge's decision. An appeal on this ground would raise only hypothetical questions. Such an appeal would be incompetent.[7]

[16] If the change in titling arrangements was a relevant consideration it supplied another reason for the primary judge's decision, but it is not necessary to rule upon the Council's argument that it was relevant.

Adequacy of reasons

[17] The failure of a court from which an appeal lies to give sufficient reasons constitutes an error of law.[8] The applicants argued that the primary judge's reasons were insufficient because of the omission of reasons for rejecting the evidence of two expert witnesses called by Tendiris, Mr Cugola and Mr van Pelt. The Council argued that the reasons were sufficient.

[18] It was evident merely upon a comparison between the two proposals that the Tendiris proposal involved an increase in the density of lots in the central portion of the site. The joint expert report by the two expert town planning witnesses identified what seems to be little more than a semantic dispute. Mr Simonic (the Council's witness) referred to a "more intense development" whereas Mr Kay (the applicants' witness) considered that "the development has not intensified but rather become more compact". The primary judge referred to Mr Simonic's evidence that the increase in density in the central portion resulted in "greater visual impact and less space between the houses in that area",[9] that there was a higher intensity of use within the central area of the site of 140 lots (87.5 per cent of the total number) with areas less than the previously proposed minimum lot size of 4,000m^2, and that this would result "in a higher concentration of houses and related structures in close proximity to each other further increasing the visual impact and loss of rural character."[10] The primary judge also recorded Mr Simonic's evidence that the reduction of open space of just over 37 hectares, a reduction in the order of 12.7 per cent,[11] was a "significant change" and that the loss of "connectivity" of the open

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6 *Smits & Anor v Moreton Bay Regional Council & Ors* [2010] QPEC 31 at [14].

7 See *H A Bachrach Pty Ltd v Caboolture Shire Council* (1992) 80 LGERA 230 at 237-238; *Holts Hill Quarries P/L v Gold Coast C C & Ors* [2000] QCA 268 at [9].

8 See *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at 237, paragraph [57], per Muir JA (Holmes JA and Daubney J agreeing) and the authorities analysed by his Honour.

9 *Smits & Anor v Moreton Bay Regional Council & Ors* [2010] QPEC 31 at [18].

10 *Smits & Anor v Moreton Bay Regional Council & Ors* [2010] QPEC 31 at [19].

11 The joint report by the two town planning expert witnesses recorded their agreement that the overall quantum of land to be dedicated as open space had been reduced from 292.117 hectares to 254.851 hectares, which is a reduction of the magnitude mentioned by the primary judge. The open space remained in excess of the 50 per cent site area sought by the relevant planning instrument.

space (because the residential lots in the central portion of the site separated the open spaces in the northern and southern portions) reduced the effectiveness of that open space.[12] There then followed the primary judge's analysis and conclusion in paragraphs 21 and 22 of his Honour's reasons which I have already set out.

[19] The applicants did not argue that the primary judge's reasons did not sufficiently deal with the evidence of Mr Simonic and Mr Kay.

Mr van Pelt's evidence

[20] Mr van Pelt was qualified as a landscape architect. He gave evidence that the Tendiris proposal significantly improved upon the Birt proposal in terms of visual impact. The applicants argued that the primary judge's finding that there would be greater visual impact and loss of rural character under the Tendiris proposal was contrary to Mr van Pelt's evidence, that there was a conflict in the expert evidence on this point, and that the primary judge failed to provide sufficient reasons for preferring the evidence of one expert over another. If the primary judge had resolved a conflict in the expert evidence in that way the argument would have merit, but I accept the submission for the Council that there was no such conflict.

[21] Mr van Pelt provided a report of his "visual assessment study", the object of which was to "address the visual amenity issues related to the development proposals on the site comparing the visual merits of the current proposal to those of the Ogle proposal, and to consider whether someone would object to the current proposal who would not have objected to the Ogle proposal." Mr van Pelt's conclusion was that:

> "In view of the vastly superior visual outcomes of the current proposal when compared to the Ogle proposal, it would be highly unlikely that anyone would object to the current proposal who did not object to the Ogle proposal."

[22] Despite the apparent generality of that conclusion, Mr van Pelt's report made it clear that his opinions concerned views of the proposed developments from specified public places at considerable distances from the site. In the course of oral argument the applicants' counsel acknowledged that focus of the report. He did not argue that Mr van Pelt's evidence conflicted with the evidence about internal impacts given by Mr Simonic but he argued that it was not clear that Mr Simonic's evidence was confined to internal impacts. However the relevant finding in paragraph 22 of the primary judge's reasons was that there would be a higher visual impact "within" the residential component. There was a clear contrast between Mr van Pelt's references to the visual impacts at specified places distant from the site and Mr Simonic's evidence about impacts within the site. The brief cross examination by the applicants' counsel of Mr Simonic on this topic was confined to issues about visual amenity within the site. Mr van Pelt's evidence was not put to Mr Simonic and he did not comment upon it. When the primary judge adverted to this difference in the subject matter of their evidence during final addresses the applicants' counsel did not refute the distinction or submit that Mr van Pelt's evidence conflicted with or should be preferred to Mr Simonic's evidence.[13] It seems clear that Mr Simonic's evidence was understood at the hearing to refer only to internal impacts.

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12 *Smits & Anor v Moreton Bay Regional Council & Ors* [2010] QPEC 31 at [20].

13 Transcript 12 March 2010, at 3-30, ln 53.

[23] We were referred to statements about the duty to give reasons where there are conflicts in evidence concerning an issue resolved by the trial judge,[14] but that is not this case. The issue for the judge did not concern any assessment of the competing merits of the two proposals but rather whether the change to the Tendiris proposal resulted in a substantially different development. Mr van Pelt's evidence was of no relevance to the grounds upon which the primary judge resolved that issue in paragraph 22 of his Honour's reasons.

[24] In *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd*[15] Mahoney JA observed that it is not the duty of a judge to decide every matter raised in argument; the judge "may decide a case in a way which does not require the determination of a particular submission: in such a case he may put it aside or, as Lord Scarman said, merely salute it in passing: *R v Barnet London Borough Council; Ex parte Nilish Shah* [1983] 2 AC 309, at 350." Where it is submitted that evidence is relevant, or where it is not clear that it is irrelevant, it may be necessary in a particular case for the reasons to explain why the judge has concluded that it is irrelevant, but Mr van Pelt's evidence was clearly irrelevant and it was treated by the parties as being irrelevant to the grounds upon which the primary judge resolved the dispute.

[25] In these circumstances the duty to give reasons did not oblige the primary judge to refer to the evidence of Mr van Pelt.

Mr Cugola's evidence

[26] Mr Cugola was qualified as a civil design engineer. He compared engineering issues which arose in relation to the Birt proposal with those which arose in relation to the Tendiris proposal. The applicant argued that the evidence of Mr Cugola was to the effect that in relation to the engineering issues the proposals were similar, that the primary judge found that the physical changes to the road system and its construction were significantly different as between the two proposals, that there was a conflict in the expert evidence and submissions on these issues, and that the reasoning of the primary judge was therefore insufficient because it failed to refer to the conflict or how the primary judge resolved it.

[27] The engineering evidence is discussed only in paragraph 23 of the primary judge's reasons:[16]

> "[23] In addition to the matters discussed above, changes to the location of the proposed main access road in the Tendiris proposal also contribute to the conclusion that the Tendiris proposal is a substantially different development from the Birt proposal. In this regard I note that the location of the main access road in the Tendiris proposal is to be further to

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14 *Camden v McKenzie* [2008] 1 Qd R 39 at 47, where Keane JA referred to the necessity to refer to evidence "which was important to the determination of the matter" and to state the basis on which the judges come to prefer one body of evidence over "a competing body of evidence"; also *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at 237 to 239, paragraphs [59]-[65]; *Wiki v Atlantis Relocations (NSW) Pty Ltd* (2004) 60 NSWLR 127 at 135 to 137, paragraphs [56]-[64]; *Archibald v Byron Shire Council* [2003] NSWCA 292 at [54]; and *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 273.

15 [1983] 3 NSWLR 378 at 385 to 386; affirmed sub nom *Tatmar Pastoral Co Pty Ltd v Housing Commission of New South Wales* (1984) 58 ALJR 553.

16 *Smits & Anor v Moreton Bay Regional Council & Ors* [2010] QPEC 31 at [23].

> the southwest which involves additional stability and drainage issues. Because the proposed new location of the main access road involves construction through steeper terrain there will, in my view, be additional erosion and pollution risks in adjacent waterways. Furthermore connection of the main access road to the emergency access road closer to the Harland Road connection under the Tendiris proposal is likely to make the use of Harland Road by occupants of the proposed development far more likely."

[28] When assessing the sufficiency of those reasons it must be borne in mind that they were not essential to the decision but referred to additional matters which also supported the primary judge's previous conclusion in paragraph 22 of his Honour's reasons that the Tendiris proposal was a substantially different form of development. My observations should be understood in that context.

[29] The applicants argued that the finding in the last sentence of paragraph 23 of the primary judge's reasons conflicted with Mr Cugola's evidence that the length of the emergency road was similar for both proposals, that it maintained a "similar buffer" between the existing community and the proposed development, and that when that access route would be required the usage would be similar in either proposal. However the primary judge's finding did not relate to the frequency of use of the emergency access route in emergencies but to the frequency of every day use of a different road, Harland road. That finding reflected evidence given by Mr Douglas (an engineer called by the Council) that certain features of the layout of the roads in the Tendiris proposal would result in more frequent use of Harland road.[17] Mr Douglas adhered to that evidence in cross examination.[18] Mr Cugola's report and evidence in chief did not deal with that topic, he was not cross-examined upon it, and he was not recalled to comment upon Mr Douglas's evidence. In the final address by the applicants' counsel on this topic he did not submit that Mr Cugola gave any evidence which conflicted with that given by Mr Douglas.[19] The primary judge's finding reflected his Honour's acceptance of Mr Douglas' evidence and it did not imply rejection of any evidence given by Mr Cugola. His Honour did not mention that the finding was referable to the evidence of Mr Douglas, but that should have been clear to the parties from the way the trial was conducted. In these circumstances the reasons were not insufficient.

[30] During the course of oral argument the applicants' counsel acknowledged that the evidence of Mr Cugola itself supported the findings in the first and second sentences of paragraph 23 of the primary judge's reasons that the location of the main access road in the Tendiris proposal involved additional stability and drainage issues and additional erosion and pollution risks in adjacent waterways. There was in that respect no dispute between Mr Cugola's evidence and the evidence of Mr Douglas or the evidence of another engineer called by the Council, Mr Settle. In these circumstances the primary judge's omission to refer to the evidence did not render the reasons insufficient.

[31] The parties joined issue on the question whether increases in the risks associated with the construction of roads were relevant to the issue whether there will be

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17 Transcript 11 March 2010, at 2-56 to 2-57.

18 Transcript 11 March 2010, at 2-61 to 2-64.

19 Transcript12 March 2010, at 3-35 and 3-36.

a "substantially different development" in terms of s 350(1)(d)(i) of the SPA where, as here, the evidence was that the risks could be managed by conventional construction methods and would be assessed at a later stage in the regulatory process. Resolution of that question in the applicants' favour could not establish any error of law in the primary judge's conclusion in paragraphs 21 and 22 of his Honour's reasons that, for unrelated reasons, the Tendiris proposal substantially differed from the Birt proposal. It is therefore not appropriate to grant leave to appeal merely to consider this question.

Proposed order

[32] The applicants have not identified any error or mistake in law in the primary judge's decision. I would refuse leave to appeal with costs.

[33] **CHESTERMAN JA:** I agree that the application for leave to appeal should be refused with costs, for the reasons given by Fraser JA.