SUPREME COURT OF QUEENSLAND

CITATION:	*Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2011] QCA 358
PARTIES:	**LOCKYER VALLEY REGIONAL COUNCIL** (applicant) **v** **WESTLINK PTY LTD AS TRUSTEE FOR WESTLINK INDUSTRIAL TRUST** (first respondent) **CHIEF EXECUTIVE, DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT** (second respondent) **MICHAEL WILLIAM ASHLEY** (third respondent) **GERALD SCOTT** (fourth respondent) **KEEP LOCKYER RURAL INC** (fifth respondent) **LYNNE HALL** (sixth respondent) **GEOFFREY KING** (seventh respondent)
FILE NO/S:	Appeal No 6388 of 2011 P & E Appeal No 2606 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2011
JUDGES:	Fraser and White JJA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The order made by the Planning and Environment Court of Queensland on 9 June 2011 is set aside.** **4. The appeal to that Court from the decision of the applicant made on 11 August 2010 to refuse the first respondent's application for a development permit is remitted to that Court for determination according to law.** **5. The first respondent is to pay the applicant's costs of**

and incidental to the application and the appeal in this Court.

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the first respondent applied to the applicant council for development permits to develop an electricity station – where the applicant council refused the application for development permits – where an appeal to the Planning and Environment Court was successful on the basis that use proposed by the first respondent did not conflict with the planning scheme – where the applicant council argued that the primary judge misconstrued the planning scheme and did not apply the proper test to determine conflict with the planning scheme – where, in particular, the applicant argued that the primary judge overlooked a requirement that the rural character and landscape values of the Shire should be enhanced, incorrectly held that the rural general zone code contained inconsistencies, and failed to apply the plain meaning of a provision which showed the proposed use to be in conflict with the planning scheme – whether the primary judge erred in construing the planning scheme – whether the proposed use is in conflict with the planning scheme

Integrated Planning Act 1997 (Qld) (Reprint 10A), s 2.1.23(2), s 3.5.14(2)
Sustainable Planning Act 2009 (Qld), s 498

Glasshouse Mountains Advancement Network Inc v Caloundra City Council & Anor [1997] QPELR 438, cited
HA Bachrach Pty Ltd v Caboolture Shire Council (1992) 80 LGERA 230; [1992] QCA 384, cited
Harburg Investments Pty Ltd v Brisbane City Council & Anor [2000] QPELR 313; [2000] QPEC 32, cited
Main Beach Progress Association Incorporated v Gold Coast City Council (2008) 164 LGERA 233; [2008] QPEC 37, considered
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28, cited
SEQ Bond Stores Pty Ltd v Gold Coast City Council [2006] QPELR 747; [2006] QPEC 66, considered
Westlink P/L v Lockyer Valley Regional Council [2011] QPEC 96, considered
Wilhelm v Ipswich City Council [2010] QPELR 662; [2010] QPEC 46, considered
Woolworths Ltd v Maryborough City Council (No 2) [2006] 1 Qd R 273; [2005] QCA 262, applied
Yu Feng Pty Ltd v Maroochy Shire Council [2000] 1 Qd R 306; (1996) 92 LGERA 41; [1996] QCA 226, cited
Z W Pty Ltd v Peter R Hughes & Partners Pty Ltd [1992] 1 Qd R 352, cited

COUNSEL: D R Gore QC, with M Williamson, for the applicant
C L Hughes SC, with B Job, for the first respondent
No appearance for the second to seventh respondents

SOLICITORS: Connor O'Meara Solicitors for the applicant
McInnes Wilson Lawyers for the first respondent
No appearance for the second to seventh respondents

[1] **FRASER JA:** The first respondent ("Westlink") is the proponent of a development at a site within the "Rural General zone"[1] in the applicant Council's "Gatton Planning Scheme". The development would generate electricity for peak demand periods using gas-fired turbines fuelled by natural gas taken from the Roma to Brisbane gas pipeline running past the site.

[2] Westlink applied to the Council for a development permit for: a Material Change of Use for Electricity Generation Infrastructure; Environmentally Relevant Activity (ERA) No. 14 – Electricity Generation; and Operational Works – Vegetation Clearing. On 11 August 2010 the Council refused that application. Westlink appealed to the Planning and Environment Court. Following a five day hearing, the appeal was allowed on 9 June 2011, the primary judge holding that the use proposed by Westlink did not conflict with the Planning Scheme.[2] The Council has now applied for leave to appeal against that decision under s 498 of the *Sustainable Planning Act* 2009 (Qld). Such an appeal is confined to errors of law or want of jurisdiction.

[3] The Council contends that the primary judge's decision was influenced by two errors of law, namely:

(a) The primary judge misconstrued the Planning Scheme.

(b) The primary judge did not apply the proper test to determine conflict with a Desired Environmental Outcome in the Planning Scheme.

[4] Westlink contends that the primary judge did not make any error of law and that, in any event, on the basis of the findings of fact made by the primary judge, the Council is unable to establish that a different view of the law would lead to any different result in the Planning and Environment Court.

The Planning Scheme

[5] The Planning Scheme is governed by the *Integrated Planning Act* 1997 (Qld).[3] The issues in the Planning and Environment Court included whether Westlink's proposal conflicted with s 3.1(3)(e), s 4.11(2)(a) or s 4.12(k) of the Planning Scheme.

[6] Section 3 applies in relation to the various different "zones" established under the Planning Scheme. Section 3.1(2) refers to Desired Environmental Outcomes ("DEO") "sought to be achieved to the extent practicable having regard to each of the other desired environmental outcomes." Section 3.1(3) identifies the following relevant DEO:

---

1 Part of the site falls within a different zone, but it is only the Rural General zone which is significant in this application.

2 *Westlink P/L v Lockyer Valley Regional Council* [2011] QPEC 96.

3 The relevant provisions are those in Reprint 10A.

"**Character and Landscape Quality**

(e) The rural character, significant natural features, cultural heritage and landscape values of the Shire are protected and enhanced.

…

Economic Development and Natural Resource Management

(l) A strong and diverse economic base is promoted that builds upon the Shire's established rural strengths, its natural resources, its landscape character, and its location on strategic transport routes; and provides a broad range of employment opportunities.

(m) Sustainable industrial development is promoted with the concentration of industry activities encouraged in the centres of Gatton and Withcott achieving benefits of co-location, infrastructure availability and protection from inappropriate development."

[7] Part 4 allocates land covered by the Planning Scheme to 12 separate zones. Division 3 (which includes Table 1) identifies assessment categories and criteria for the Rural General zone. Division 4 is headed "Assessment Criteria for Rural General zone". In this division, s 4.11(1) identifies the "purpose of the Rural General Zone code" as being the "overall outcomes", which s 4.11(2) specifies as:

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

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

[8] Under s 4.10, development that is consistent with the specific outcomes in s 4.12 complies with the Rural General zone code. Section 4.12 identifies the "specific outcomes sought for the Rural General zone", including:

"(e) Rural service industries may be appropriate where complying with the purpose of the code.

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

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

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

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

(B) downstream water quality;

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

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

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

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

(i) the resource is of sufficient size and of an acceptable quality to provide a sustainable and economically viable operation;

(ii) there is a community need for the product;

(iii) environmental impacts are within sustainable levels; and

(iv) the likely transportation routes are constructed to an standard sufficient to accommodate haulage vehicles, having regard to the safety of other road users and the physical impact on the roads.

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

…

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

[9] One effect of s 4.12(k) is that the uses which are consistent with the purpose of the Rural General zone include those "specifically identified" in Table 1. Table 1, which is headed "Assessment Categories and Relevant Assessment Criteria for Rural General Zone–Making a Material Change of Use", includes the following entries:

Column 1 Defined Use	**Column 2** Assessment Category	**Column 3** Relevant Assessment Criteria or Applicable Codes
Animal Product Processing Industry	**Impact Assessable**	Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Extractive Industry	**Code Assessable** *where involving removal of 5,000m^3 or less per annum*	If **Code Assessable**: Extractive Industry Code Rural General Zone Code Advertising Device Code Building Work Code Earthworks Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code
	Impact Assessable *where exceeding 5,000m^3 per annum*	If **Impact Assessable**: Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Local Utility	**Exempt**	
Service Station	**Impact Assessable**	If **Impact Assessable**: Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Special Purpose	**Self Assessable** *(a) if for a local, state or federal government purpose; and* *(b) where not conflicting with Schedule 8 of the IPA; and* *(c) where complying with Probable solutions for Self Assessable development*	If **Self Assessable**: Advertising Device Code Building Work Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code
	Code Assessable in all other circumstances	If **Code Assessable**: Rural General Zone Code Advertising Device Code Building Work Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code
Telecommunications Facility	**Exempt** *if a low impact facility (as defined under the Telecommunications Act)*	
	Code Assessable *if not a low impact facility (as defined under the Telecommunications Act)*	If **Code Assessable**: Telecommunications Facility Code Rural General Zone Code Advertising Device Code Building Work Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code

Column 1 Defined Use	**Column 2** Assessment Category	**Column 3** Relevant Assessment Criteria or Applicable Codes
Transport Depot	**Code Assessable** *where no building work or only minor building work*	If **Code Assessable**: Rural Development Code Rural Service Industry Code Rural General Zone Code Advertising Device Code Building Work Code Landscaping Code Lighting Code Services and Infrastructure Code Vehicle Access, Parking and On-Site Movement Code
	Impact Assessable *in all other circumstances*	If **Impact Assessable**: Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Warehouse	**Impact Assessable**	Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA
Other defined uses and Other (not defined uses) except use for a road	**Impact Assessable**	Regard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA

[10] The definition of "Animal Product Processing Industry" includes an abattoir. "Extractive Industry" includes "winning or treatment … of gravel, rock … or other similar materials", including "ripping, blasting, dredging, storage, loading, cartage and treatment … that may involve crushing, screening … or other treatment processes". "Local Utility" includes the use of premises for any "public utility undertakings by Council, or other agency or organization providing community infrastructure including: … the conveyance of water, sewerage and stormwater drainage … the reticulation of electricity or gas … public transport facilities, including railways". "Special Purpose" is defined to mean any premises or use of land by a local, State or Commonwealth Government, or its corporation or agency or a community service organisation.

Conflict with the Planning Scheme: the Primary Judge's reasons

[11] The primary judge first addressed the question whether a proposal of the type under consideration was "in concept" in conflict with s 4.12(k), s 3.1(3)(e), or s 4.11(2)(a). His Honour considered that such a conflict might exist for a proposal of the present type only if the focus of interpretation was confined to the precise words of any of those provisions without regard to the wider context of the Planning Scheme.[4] In holding that there was no conflict "in concept", the primary judge reasoned as follows:

(a) The Rural General zone code contains inconsistencies between the "quite precise" overall outcomes in s 4.11(2)(a) of providing for agricultural production, other rural activities and the maintenance of the Shire's landscape quality that is important to the "overall character of the Shire", and the specific outcomes in s 4.12, particularly Special Purpose, Animal Product Processing Industry, and Extractive Industry.[5]

---

4 *Westlink P/L v Lockyer Valley Regional Council* [2011] QPEC 96 at [75].

5 [2011] QPEC 96 at [74].

(b) A consideration of those specific outcomes and the contemplated activities associated with them "to better understand the Overall Outcomes"[6] reveals that "images of the pristine rural environment conjured up by the words in s 4.11(2)(a) are shattered."[7]

[12] The primary judge then considered the question whether the proposal did "in fact" conflict with the Planning Scheme. After adverting to the evidence which his Honour had earlier discussed in detail, the primary judge concluded that the proposed development would not have a significant impact on the character of the area, having regard to the facts that:

(a) The proposal would not significantly impact on the amenity of the area; at worst, only the tips of the stacks of the proposed development would be visible from the Warrego Highway.

(b) The proposal was in an area where utilities had already been constructed close by.

(c) Whilst the proposal might be seen to impact somewhat upon a pristine rural environment, that was not the environment presented by the existing facilities nor contemplated by the Planning Scheme.[8]

[13] The primary judge then turned to the question of "need" and accepted the evidence of two witnesses about the benefits that would flow to the local and wider community.[9]

[14] For those reasons the primary judge was satisfied that there was no conflict between the proposal and the Planning Scheme and concluded that Westlink had made out its case on appeal.[10]

Conflict: the Statutory Test

[15] The question whether there was a conflict between a decision to approve Westlink's application and the Planning Scheme arose because Westlink's application required impact assessment under the Planning Scheme. In relation to such an application, s 3.5.14(2) of the *Integrated Planning Act* provides:

> "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 grounds to justify the decision despite the conflict."

[16] The relevant provision is subparagraph (b). It was not in issue that the correct approach to that provision was that which Fryberg J expounded in *Woolworths Ltd v Maryborough City Council (No 2)*:[11]

---

6 [2011] QPEC 96 at [74].
7 [2011] QPEC 96 at [77].
8 [2011] QPEC 96 at [78] - [79].
9 [2011] QPEC 96 at [79].
10 [2011] QPEC 96 at [80].
11 [2006] 1 Qd R 273 at 286 [23] - 287 [25].

> "'Conflict' in this context means to be at variance or disagree with. 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[12] grounds to justify the decision.
>
> 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. 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.
>
> If s. 3.5.14(2)(b) is dealt with in the sequence suggested by its form 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* 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." (footnotes and citations omitted)

[17] The primary judge held that there was no conflict and did not go on to consider whether or not Westlink's application should in any event be approved if there was such a conflict as the Council postulated.

[18] The first question in this application is whether there is a conflict between a decision to approve Westlink's application and the Planning Scheme. My

---

[12] The provision considered in that case referred to "planning grounds", rather than to "grounds", but the difference is not material for the resolution of this application.

references to a decision to approve the application should be understood as comprehending any approval subject to conditions. It was not submitted that the conditions which might be attached to any approval have any bearing upon questions raised by the application.

Section 3.1(3)(e)

[19] The Council submitted that the primary judge erred in law by overlooking the requirement in s 3.1(3)(e) that the rural character and landscape values of the Shire should be "enhanced" and by failing to undertake the analysis of character required by that provision.

[20] That submission should not be accepted. It is apparent from my summary of the primary judge's reasons that his Honour did take into account the general provisions concerning "rural character". It is also clear that the primary judge did not overlook the reference to "enhanced" in s 3.1(3)(e). His Honour referred to *Glasshouse Mountains Advancement Network Inc v Caloundra City Council & Anor*,[13] where it was said that phrases such as "maintain and preserve" and "preserve and enhance" must be read in context and bearing in mind that when any development occurs some amenity impairment will generally result.[14] As the primary judge also observed with reference to authority,[15] planning schemes should be construed broadly, rather than pedantically or narrowly, and with a sensible, practical approach. In that respect it must be borne in mind that the various DEO apply in relation to the Planning Scheme as a whole which, consistently with s 3.1(3)(l) and (m), necessarily contemplates many pursuits other than ones which are likely to enhance "rural character" or "landscape values", at least as those terms might ordinarily be understood. That is so regardless of the care which is taken to minimise the impacts of such pursuits upon the environment; examples include abattoirs, extractive industry, and "Special Purpose" uses which fall within the specific outcomes in s 4.12 and defined uses in Table 1.

[21] The general and value-laden terms of s 3.1(3)(e) do not reveal any necessary conflict between a decision to approve the use proposed by Westlink and the Planning Scheme.

Section 4.11(2)(a)

[22] The Council argued that the primary judge was mistaken in regarding s 4.11(2)(a) as being "precise" and as if it were intended to exhaust the consistent uses for the zone. The Council contended that this suggested error misled the primary judge into holding that the Rural General zone code contained inconsistencies. The correct approach, in the Council's submission, was that the Planning Scheme contemplated that compliance with the specific outcomes in s 4.12 was deemed to be compliance with the Rural General zone code, including s 4.11. The overall outcomes were not intended to exhaustively identify the consistent and inconsistent uses in the zone, that being left to the specific outcomes.

[23] This argument was premised upon a misconstruction of the primary judge's reasons. His Honour did not hold that s 4.11(2)(a) was "precise" or intended as an exhaustive

---

13 [1997] QPELR 438 at 440 - 441.

14 [2011] QPEC 96 at [71].

15 *ZW Pty Ltd v Peter R Hughes & Partners Pty Ltd* [1992] 1 Qd R 352 at 360; *Yu Feng Pty Ltd v Maroochy Shire Council* (1996) 92 LGERA 41 at 73 and 75 (per Pincus JA), at 78 (per Mackenzie J); *Harburg Investments Pty Ltd v Brisbane City Council* [2000] QPELR 313 at 318.

statement which excluded all other uses or activities. Instead, the primary judge described the overall outcomes in s 4.11(2)(a) as being "quite" precise and referred to the specific outcomes in s 4.12 "to better understand the Overall Outcomes".[16] His Honour regarded it as an error to confine the focus of interpretation to the words of any one of the provisions in issue or to ignore the wider context of the Planning Scheme.[17] That substantially reflects what the Council contends is the correct approach.

[24] It was also submitted that the uses identified in the specific outcomes in s 4.12 and Table 1 were subject to qualifications that the uses must comply with specific aspects of the Planning Scheme, including those specified in s 4.12 itself and in column 3 of Table 1 (the relevant assessment criteria or applicable codes). The Council submitted that the overall outcomes and specific outcomes, when read together in the context of the structure of the Planning Scheme, dictated the conclusion that the consistent uses in s 4.12 must comply with the overall outcomes in s 4.11(2)(a), yet those were the outcomes which the primary judge held were "shattered".

[25] That aspect of the argument incorrectly attributed to the primary judge a conclusion that the overall outcomes in s 4.11(2)(a) were "shattered". Rather, his Honour held that the "images of the pristine rural environment conjured up by the words in s 4.11(2)(a) are shattered." The point made by the primary judge was simply that reference to the specific outcomes in s 4.12 suggested that the general expressions in s 4.11(2)(a) were not as prescriptive as might be the case if attention were confined to that paragraph.

[26] The Council referred to the assessment criteria and applicable codes identified in column 3 of Table 1 and submitted that the primary judge over-simplified the degree to which the three Table 1 uses his Honour identified would impact on the amenity of the Rural General zone. It was not necessary for the primary judge to refer to the detail of these provisions. In relation to those uses for which impact assessment is prescribed, column 3 includes the general note that "[r]egard will be given to the planning scheme as a whole in accordance with section 3.5.5 of the IPA". That does not falsify the primary judge's point that some of the contemplated uses necessarily impact upon the rural character of the environment in a way which sheds light upon the scope of the general terms in s 4.11(2)(a). The requirements for the impact to be ameliorated and for consistency with the specified values and character must be borne in mind. Even so, the uses contemplated by the specific outcomes to which the primary judge referred reveal that permitted development in this zone might impact substantially upon its rural character, yet such development falls within the "specific outcomes sought for",[18] and thus "complies with",[19] the Rural General zone code.

[27] As to the codes, in relation to Animal Product Processing Industry the applicable code contemplated that the relevant facilities should prevent or minimise environmental impact[20] and required regard to "existing environmental values,

---

16 [2011] QPEC 96 at [74].
17 [2011] QPEC 96 at [75].
18 Section 4.12, introductory words.
19 Section 4.10.
20 Intensive Animal Industries, Animal Product Processing Industries, Kennels and Catteries Code, s 6.91, Specific Outcome P1.

amenity and character of the locality and adjoining land".[21] In relation to Extractive Industry, the applicable code required consideration of the "desirable character of the locality."[22] Similarly, in relation to Special Purpose, the applicable code required landscaping which "screens the views of unsightly buildings" and "positively contributes to the streetscape character".[23] I am not prepared to accept that the primary judge assumed instead that the specific outcomes might be achieved without regard to such conventional provisions. The specific outcomes discussed by his Honour nevertheless require a liberal construction to be given to the overall outcomes for the zone of "agricultural production, other rural activities and the maintenance of the Shire's landscape quality that is important to the overall character of the Shire."

[28] The Council has not established that the primary judge made any error of law in his Honour's consideration of 4.11(2)(a).

Section 4.12(k)

[29] The Council submitted that the primary judge wrongly held that the proposal was not in conflict with s 4.12(k) of the Planning Scheme. It argued that: reading the overall outcomes and specific outcomes together, the Planning Scheme identifies the specific uses which may be consistent with the purpose of the zone; Westlink's proposed use falls outside the scope of the character of those uses; and the proposal therefore conflicts with the Planning Scheme.

[30] Westlink submitted that the primary judge adopted the orthodox approach[24] of construing the Planning Scheme as a whole, where necessary adjusting the meaning of conflicting provisions to achieve a harmonious construction. It was submitted to be important that s 4.12(k) does not set its face against the proposed use. It does not provide that it is inconsistent with or in conflict with the Planning Scheme. Westlink submitted that the provision that certain uses "are not consistent with the purpose of the zone" is insufficient in itself to establish a conflict. That conclusion was submitted to find support in a comparison between s 4.12(k) and the more specific provision in s 4.11(2)(b) that closer settlement is not consistent with the zone. Westlink also submitted that the absence of conflict was revealed by the fact that the development proposal by Westlink would have constituted a "Special Purpose" (and thus a use within a specific outcome) had the proposal been a public entity.

[31] In my respectful opinion the Council's argument must be accepted.

[32] Westlink sought a decision approving its application for a material change of use "electricity generation infrastructure" in the Rural General zone. It was common ground that this is not a defined use or one which falls within any of the specific outcomes identified in s 4.12. It therefore falls within the expression in s 4.12(k) "other not defined uses". As was also common ground, the proposed use is not "specifically identified" in Table 1. In particular, it is not specifically identified by the last entry in Table 1, which refers to "Other (not defined uses)". That is expressed in the most general of terms. Plainly it was not intended to suggest that

---

21 Intensive Animal Industries, Animal Product Processing Industries, Kennels and Catteries Code, s 6.91.

22 Extractive Industry Code, s 6.85, Specific Outcome P4; Extractive/Mineral Resources and Transportation Routes Overlay Code, s 5.43, Specific Outcome P2.

23 Landscaping Code, s 6.17, Specific Outcome P1.

24 See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 - 382 [70].

all such uses are consistent with the purpose of the zone. Rather, its apparent purpose is to ensure that an assessment category and assessment criteria are specified even for uses which are **not** consistent. That was necessary because of the provision in s 2.1.23(2) of the *Integrated Planning Act* that "[a] local planning instrument may not prohibit development on, or the use of, premises." Because it is not lawful for a planning scheme to prohibit any particular use, it is appropriate to include provisions regulating the assessment of applications for all forms of development, even development which is manifestly in conflict with the planning scheme.

[33] Accordingly, the effect of s 4.12(k) is that the proposed use is "not consistent" with the purpose of the zone for which it was proposed. The expression "not consistent" is used as a synonym for the word "inconsistent", as is suggested also by the general provision in s 1.11(2) that "[u]ses not specifically identified in column 1 of each assessment table are considered to be inconsistent uses." Having regard also to the context supplied by s 4.9, s 4.10, and s 4.11, s 4.12(k) conveys that the proposed use is inconsistent with the Rural General zone code. The fact that the Planning Scheme eschews any express statement of a "conflict" or "inconsistency" between the scheme and a decision on an application concerning this proposed use, or any particular use, does not detract from that conclusion. Nor does the presence of the specific provision in s 4.11(2)(b) supply a ground for reading down the clear words of s 4.12(k). In the absence of any other provision which qualifies the operation of s 4.12(k) in relation to the proposed use, that paragraph requires the conclusion that a decision to approve the application is at variance with the Planning Scheme.

[34] The primary judge was right to take into account the content of the overall outcomes and the specific outcomes in the course of construing the Planning Scheme, but his Honour's reasons for holding that there was no conflict "in concept" do not refer to any provision which qualifies the operation of s 4.12(k). Similarly, the primary judge's discussion of the question whether Westlink's proposal "in fact" conflicted with the Planning Scheme was not directed to that question. In that discussion his Honour compared the nature and degree of the impact of that proposal upon the existing environment with the impact upon the environment which had occurred and was contemplated by the Planning Scheme. That comparison did not suggest that the proposed use was not squarely within s 4.12(k).

[35] The primary judge accepted Westlink's submission that the mere identification of the proposed use as being "not consistent with the purpose of the zone" did not necessarily result in conflict with the Planning Scheme.[25] As a general proposition that may be accepted, since in a particular case the effect of a provision in the form of s 4.12(k) might be materially qualified by other provisions of the planning scheme in which it is found. However, Westlink has not identified any provision in the present Planning Scheme which has any such effect. It is true that if the same use had been proposed by a public entity it would constitute a "Special Purpose", in which event s 4.12(k) would have no application. That bears upon the assessment of the nature and extent of the conflict, but it does not qualify the effect of s 4.12(k) in relation to Westlink's application.

[36] Westlink referred to three decisions in support of its submission that s 4.12(k) does not produce a conflict. In *SEQ Bond Stores Pty Ltd v Gold Coast City Council*,[26] Rackemann DCJ said:

---

25 [2011] QPEC 96 at [67].

26 [2006] QPELR 747 at 751 - 752 [27].

> "While cl. 7.6.1 of Ch. 2 of Div. 1 of Pt 6 speaks of such uses being considered as 'undesirable or inappropriate', the provision is not a prohibition on such uses or their approval. The clause could not properly be construed or applied as a prohibition, given s.2.1.23(2) of the *IPA*. While counsel for the Respondent submitted that the provision was as close to a prohibition as one could get under the *IPA*, the scheme admits, and must admit, of the prospect of approvals being sought and obtained, in response to impact assessable applications, for such uses. It might perhaps be debatable whether conflict with the scheme would arise simply by reason of a decision to grant approval to a use which falls into this default assessment category. Clause 7.6.1 and the Table of Development would in any event, be relevant considerations even if s.3.5.14(2)(b) were not triggered. The *IPA* otherwise requires consideration of the planning scheme in carrying out impact assessment (s.3.5.5(2)(b)). The argument however, centred on whether there are sufficient planning grounds to justify a decision to approve, notwithstanding any such conflict."

[37] Those remarks were not necessary for the decision, which instead turned upon the sufficiency of planning grounds to justify approval. The decision is also distinguishable because Rackemann DCJ did not refer to any provision which was analogous to s 4.12(k). That point of distinction more clearly appears from his Honour's subsequent analysis of *SEQ Bond Stores Pty Ltd* in *Main Beach Progress Association Incorporated v Gold Coast City Council*:[27]

> "Having observed that planning schemes under the IPA may not prohibit development, I left open the question of whether approval of an 'undesirable or inappropriate' use necessarily, without more, raised conflict with the planning scheme. I did not however, say (or intend to imply) that because IPA planning schemes do not prohibit development, an approval could never conflict with the planning scheme. Section 3.5.14 assumes to the contrary. The 'prohibition on prohibitions' under the IPA did not create a planless situation. As I also observed, the fact that a particular form of development fell within the 'undesirable or inappropriate' category would be a relevant consideration, even if it did not trigger s 3.5.14(2).
>
> The *SEQ Bond Stores Case* concerned an application for a tavern on land within the Yatala Enterprise Area LAP. **Within the relevant precinct, a tavern fell, by default, into the 'undesirable or inappropriate' category, but was not mentioned in a non-exhaustive list of activities, which the provisions stated might be considered to be incompatible**. **Significantly, the statement of intent recognised the potential appropriateness of needed non-industrial uses, which directly serve other businesses and workers in the area**. **Further, the site was in a locality expressed to be the preferred location for a consolidation of such facilities.** The evidence in that case demonstrated that, while falling, by default, into the 'undesirable or inappropriate' category, the proposed tavern was consistent with the statement of intent for the domain, in

[27] (2008) 164 LGERA 233 at 243 [41] - 244 [43] (emphasis added and citation omitted).

> so far as non-residential uses were concerned, and was proposed for a site in the preferred locality. This case is quite different.
>
> Mr Bain QC, for the Council, submitted that, given the default nature of the designation and the focus of s 3.5.14(2) on the 'decision' giving rise to conflict, I should approach the issue by construing the planning scheme as a whole, and then consider whether the use is contrary to it, with particular regard to the intent of the relevant domain, in the context of the planning scheme. That approach, when applied to the subject application, leads me to the conclusion that the planning scheme does not intend the subject land to be developed to provide the facilities proposed in the commercial component of the subject proposal."

[38] The scheme which Rackemann DCJ construed in those cases differed very substantially from the Planning Scheme in issue in this application.

[39] In the third decision on which Westlink relied, *Wilhelm v Ipswich City Council*,[28] Newton DCJ said:

> "It is asserted by the Appellant that the proposal is an inconsistent use in the Residential Low Density Zone and that therefore is in conflict with the intent of that zone. However, the mere fact that a use may be said to be an inconsistent use in the zone does not of itself result in it being in conflict with the provisions of the Planning Scheme. [*SEQ Bond Stores v Gold Coast City Council* [2006] QPELR 747 at [27]]. The Residential Low Density Zone caters 'primarily' for residential development and associated uses to the 'general' exclusion of other uses. This Court is required to consider the Planning Scheme provisions as a whole and, analysing the purpose and intent of the scheme provisions, to reach a conclusion as to whether in reality the proposal is in conflict with the Planning Scheme.
>
> Of some importance, in my view, is that the Planning Scheme recognises that there will be non-residential uses in the Residential Low Density Zone. Thus, in s.4.5.3(3) Specific Outcomes for non-residential uses are set out as follows:
>
> '**Non Residential Uses**
> **Specific Outcomes**
> Each non-residential use –
> (a) fulfils a local community need; and
> (b) is accessible to the population it services; and
> (c) where possible co-locates with other non residential uses but does not contribute to undesirable commercial ribbon development; and
> (d) does not have a significant detrimental impact on the amenity of nearby residents, including through the generation of –
> (i) odours;
> (ii) noise;
> (iii) waste products;

[28] [2010] QPELR 662 at 663 [8] - 664 [10]. I have omitted all but one of the footnotes.

(iv) dust;
(v) traffic;
(vi) electrical interference; or
(vii) lighting; and

(e) maintains a scale and appearance in keeping with the residential amenity and character of the locality with adequate buffering or screening to nearby residential uses (both existing and proposed).'

Although the issues of need and impact on amenity of nearby residents will be considered in due course, it may be noted that the evidence of Mr Perkins, a consultant town planner, indicates that he found no conflict with the Planning Scheme when read as a whole in the context of the appropriateness of land use. I agree with that view. Support for that view may be found in the report of Ms Roughan:

'I do not believe that the fact that 59 Raceview Street provides a logical site on which to expand commercial uses is a sufficient basis to justify its approval in the absence of a clear need for the facility, given the likely change to the residential character and amenity in Greenham Street.'"

[40] Although Newton DCJ referred to an assertion that the proposal in that case was an "inconsistent use" in the relevant zone, no provision which produced that effect was identified in his Honour's reasons. Furthermore, the quoted provision seems to have been sufficiently broad to encompass the proposed use ("Business Use (service station) and Shopping Centre").[29] After the hearing of this application, the Council sought leave to provide the Court with extracts from the Ipswich Planning Scheme considered in that case. Clause 4.5.5(3) provided that specified uses, which included the proposed use, "are inconsistent with the outcomes sought … and constitute undesirable development which is unlikely to be approved …". The statement of inconsistency was not qualified by the subsequent words of that provision, but Newton DCJ also took into account other provisions which recognised that there would be non-residential uses in the relevant zone. This further material serves to confirm that the decision is not applicable in the context of the different planning scheme in this matter.

[41] None of those decisions supports Westlink's submission that s 4.12(k) does not produce a conflict. I would hold that the effect of that paragraph, construed in the context of the Planning Scheme as a whole, is that a decision to approve Westlink's application necessarily would conflict with the Planning Scheme. The primary judge erred in holding that there was no such conflict.

Disposition and orders

[42] Westlink did not contest the Council's submission that such an error amounted to an error in law. Leave to appeal should be granted so that the error may be corrected.

[43] The Council's draft notice of appeal sought orders that the order made by the Planning and Environment Court be set aside and that the appeal to that Court be refused or, alternatively, be remitted to the primary judge for determination according to law. In oral submissions, it was submitted for the Council that the appropriate order was for remittal to the primary judge. In opposing remittal,

---

29 [2010] QPELR 662 at 662 [1].

Westlink emphasised the findings of fact favourable to Westlink concerning visual impact, impact on amenity generally, and town planning or community need.

[44] The appeal must be allowed unless the error of law could not have materially affected the decision.[30] That test is not satisfied. The error diverted the primary judge from the statutory task under s 3.5.14 of the *Integrated Planning Act* of considering whether there are sufficient grounds to justify a decision to approve Westlink's application despite the conflict between such a decision and the Planning Scheme. That was reflected in his Honour's failure to address the arguments which the Council advanced in opposition to a finding that there were sufficient grounds.[31] Notwithstanding the apparent strength of the primary judge's findings of fact in Westlink's favour, the necessary evaluation of the arguments and evidence should be undertaken in the specialist tribunal which was established for that purpose and with reference to the task required by the statute.

[45] It remains to mention two submissions advanced by the Council. One was that the primary judge erred in law by understating the extent of the visual impact of the proposed use in a way which was unsupported by the evidence. The second submission was that Westlink's proposed use conflicted with s 4.11(2)(b) because it amounted to "urban … development". That submission focused on the meaning of the word "urban" in isolation from the context provided by the expression "[c]loser settlement". I would be inclined to reject it for that reason. However, I think it inappropriate to rule upon either submission because neither was comprehended within the grounds of appeal.

[46] In my opinion the appropriate orders are:

1. The application for leave to appeal is granted.
2. The appeal is allowed.
3. The order made by the Planning and Environment Court of Queensland on 9 June 2011 is set aside.
4. The appeal to that Court from the decision of the applicant made on 11 August 2010 to refuse the first respondent's application for a development permit is remitted to that Court for determination according to law.
5. The first respondent is to pay the applicant's costs of and incidental to the application and the appeal in this Court.

[47] **WHITE JA:** I have read the reasons for judgment of Fraser JA and agree with his Honour's reasons and the orders which he proposes.

[48] **DOUGLAS J:** I also agree with the reasons for judgment of Fraser JA and the orders which his Honour proposes.

---

30 *HA Bachrach Pty Ltd v Caboolture Shire Council* (1992) 80 LGERA 230 at 237 - 238.

31 Respondent's final submissions dated 27 May 2011, paras 44 - 49.