SUPREME COURT OF QUEENSLAND

CITATION:	*Trinity Park Investments Pty Ltd & Anor v Cairns Regional Council* [2022] QCA 261
PARTIES:	**TRINITY PARK INVESTMENTS PTY LTD ACN 123 732 525 ATF** **L'ARMONIA PTY LTD ACN 140 784 756 ATF** (applicants) **v** **CAIRNS REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 7734 of 2022 P & E Appeal No 2386 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2022] QPEC 15 (Everson DCJ)
DELIVERED ON:	16 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	2 November 2022
JUDGES:	Bond JA and Henry and Crow JJ
ORDER:	**Leave to appeal refused with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where an application for a permit to develop a supermarket shopping centre was rejected by Council – where the developers appealed to the Planning and Environment Court – where the appeal was dismissed – where the developers seek leave to appeal – where the assessment benchmarks required a need for the proposed development to be demonstrated – where the developers did not succeed because the learned primary judge did not find there was a need for the proposed development – where the learned primary judge made factual findings about which geographical communities to be considered when assessing need – where the learned primary judge made findings about when the community would require the proposed development – where the learned primary judge did not exercise his discretion to grant approval despite non-compliance with the planning scheme because of the importance of need in the scheme – whether the primary judge erred in concluding there would not be a need

for the development by the relevant community until after the benchmark period – whether the learned primary judge erred by failing to consider whether compliance with the scheme need benchmarks could be achieved by imposing conditions – whether leave to appeal should be granted

Planning Act 2016 (Qld), s 43, s 45, s 60
Planning and Environment Court Act 2016 (Qld), s 43, s 46, s 63

Isgro v Gold Coast City Council & Anor [2003] QPELR 414; [2003] QPEC 2, followed
Williams McEwans Pty Ltd v Brisbane City Council [1981] QPLR 33, followed
Yorkeys Knob BP Pty Ltd v Cairns Regional Council [2022] QCA 168, cited
Zappala Family Co Pty Ltd v Brisbane City Council (2014) 210 LGERA 82; [2014] QCA 147, cited

COUNSEL: G A Thompson KC and E J Morzone KC, with K W Wylie, for the applicants
R S Litster KC, with K J Buckley, for the respondent

SOLICITORS: Emanate Legal for the applicants
McCullough Robertson for the respondent

[1] **BOND JA:** I agree with the reasons for judgment of Henry J and with the order proposed by his Honour.

[2] **HENRY J:** An application for a permit to develop a Coles supermarket shopping centre at Smithfield was rejected by Cairns Regional Council. The prospects of the developers' ensuing appeal to the Planning and Environment Court succeeding were dashed by the earlier approval of the development of a Woolworths supermarket shopping centre at Trinity Beach. The appeal was predictably dismissed because another supermarket was not needed. The developers now seek this Court's leave to appeal, struggling to raise arguable legal error from factual conclusions which went against them below. Leave should be refused.

[3] To address the developers' arguments, it is necessary to first say something of the assessment process which resulted in the developers' loss below.

The assessment process below

[4] In hearing the appeal below, the Planning and Environment Court was engaged in a hearing anew, per s 43 *Planning and Environment Court Act 2016* (Qld). The court was obliged by s 46(2) to decide the appeal as if it was the assessment manager for the development application. This involved a two-stage process under the *Planning Act 2016* (Qld) – the assessment stage and the decision stage.[1]

[5] The first stage requires recourse to the CairnsPlan, it being the relevant categorising instrument as defined by s 43 *Planning Act 2016* (Qld). Section 45(7) of that Act

---

[1] Sections 45, 60.

obliged Council's assessment manager, and thus the learned primary judge, "to assess the development application against or having regard to" the CairnsPlan. Because the application attracted a so-called "code assessment" under the CairnsPlan, his Honour was required by s 45 to assess the application against the assessment benchmarks in the CairnsPlan. As will be seen, an important consideration threading through those benchmarks is whether a development of the kind proposed is needed.

[6] The second stage of the process required below, informed by the outcome of the first, was the decision whether to approve the development. The approach to decision-making after carrying out the assessment is explained as follows in s 60(2) *Planning Act*:

> "**60 Deciding development applications**
>
> …
>
> (2) To the extent the application involves development that requires code assessment … the assessment manager, after carrying out the assessment –
>
> (a) must decide to approve the application to the extent the development complies with all of the assessment benchmarks for the development; and
>
> (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and
>
> *Examples –*
>
> 1 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks.
>
> 2 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks and a referral agency's response.
>
> (c) may impose development conditions on an approval; and
>
> (d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions.
>
> *Example of a development condition –*
>
> a development condition that affects the way the development is carried out, or the management of uses or works that are the natural and ordinary consequence of the development, but does not have the effect of changing the type of development applied for
>
> …" (emphasis added)

[7] A relevant effect of s 60 here is that approval was mandatory in the event of assessed compliance with all benchmarks but discretionary in the event some benchmarks were not complied with and compliance could not be achieved by imposing development conditions.

[8] Turning to some factual aspects of the assessment process below, the location of the proposed development is a triangular piece of land wedged between the Captain Cook Highway and the new Smithfield bypass as they converge just south of the James Cook University campus. The development location is within an area designated by Council's CairnsPlan 2016, within the Smithfield Local Plan, as "Sub-Precinct 3b – Future Retail and Commercial Areas". Consistently with that designation, the major component of the proposed development was a full-line Coles Supermarket.

[9] The difficulty faced by the development application was the doubtful need for it, because of the existence of other full-line supermarkets in the Northern Beaches, namely:

(a) a Coles supermarket at Smithfield Major Centre;

(b) a Woolworths supermarket at Smithfield Major Centre;

(c) a Coles supermarket at Clifton Beach;

and the fact that:

(d) a long sought and hard fought application to develop a Woolworths supermarket as the major component of a proposed development at Trinity Beach had finally been granted, 10 days prior to the commencement of the hearing below.[2]

[10] In making his assessment of need, the learned primary judge considered the evidence of two economists, the developers', Mr Duane, and the Council's, Mr Norling. It was common ground on their evidence that the need for full-line supermarkets is satisfied by provision of one supermarket for every 8,000 to 9,000 persons in Australia. Taking the recently approved Trinity Beach development into account, Mr Duane opined that the need for a fifth full-line supermarket in the Northern Beaches was unlikely to occur until around 2026, whereas Mr Norling opined it will be unlikely to occur until beyond 2031. A material difference in their approach to consideration of need was that, unlike Mr Duane, Mr Norling did not consider the Caravonica trade area, because of its ready access to two full-line supermarkets at Redlynch, or the Kuranda Trade Area because of its different demographic and greater distance from Smithfield major centre and the availability of fresh food markets at Kuranda. The learned primary judge found the approach taken by Mr Norling was correct.

[11] Given that finding, it appears to have been well open to the learned primary judge to conclude as he did, in the first stage of the decision-making process, that there had been a failure to comply with assessment benchmarks in the CairnsPlan which required the appellant to demonstrate a need for the proposed development. In the second stage, in considering whether he nonetheless ought exercise his discretion to approve the development, his Honour concluded the benchmarks about need were so important that it was not appropriate to give such approval.

---

2 *Fabcot Pty Ltd v Cairns Regional Council & Ors (No. 3)* [2022] QPEC 12.

[12] This was the only basis upon which the developers failed below. His Honour rejected other arguments from Council as to why the development should not be approved. To allow for the possibility of leave to appeal being given, Council filed a notice of contention with a view to arguing that his Honour erred in concluding the development should otherwise have been approved. That aspect of the case will not require consideration because leave to appeal will not be granted.

The nature of this application for leave

[13] Leave to appeal the decision below is required, per s 63 *Planning and Environment Court Act 2016* (Qld), which relevantly provides:

> "**63 Who may appeal**
>
> (1) A party to a P&E Court proceeding may appeal a decision in the proceeding, but only on the ground of error or mistake in law or jurisdictional error.
>
> (2) However, the appeal may be made only with the leave of the Court of Appeal. …"

[14] Section 63(2) does not circumscribe the considerations relevant to whether leave should be granted, but the effect of s 63(1) is to limit grants of leave to appeals made "on the ground of error or mistake in law or jurisdictional error". It follows leave should not be granted to appeal on grounds advanced under the guise of legal or jurisdictional error which are merely attempts to re-litigate factual findings.

[15] The developers' leave application ultimately advanced three alleged legal errors in support of the leave application. In summary they were that the learned primary judge erred:

1. in asking the wrong question by considering the fact Kuranda was not geographically within the Cairns northern beaches rather than considering that the use by Kuranda's populace of supermarkets in the Cairns northern beaches impacts the assessment of what is sufficient to satisfy the need of Cairns northern beaches residents ("the Kuranda exclusion");[3]
2. in interpreting the CairnsPlan as requiring the assessment of need to be of need at the time of the decision, yet having regard to the future meeting of need by the approved development of a Woolworths supermarket at Trinity Beach, but not assessing the need for the developers' supermarket as it would be when it would commence in 2026 ("the temporal error");[4]
3. in failing to consider, per s 60(2)(d) *Planning Act*, whether compliance could be achieved by imposing temporal development conditions ("not opting to impose s 60(2)(d) conditions").[5]

[16] Alleged errors 1 and 2 were articulated early in the developers' counsels' oral submissions. They were advanced as distilling a larger number of errors alleged by the draft notice of appeal grounds and the outline of argument. They have the

---

3 TR p9 L32 – p10 L37; p12 LL41-46.
4 TR p3 LL27 – p4 LL30; AR p7 LL22-26; AR p8 LL34-38.
5 Error 3 is stated briefly here but in full later in these reasons.

appearance of attempts to clothe factual challenges in the cloak of an error of law.[6] Alleged error 3, the nearest in form of the three alleged errors to a legal error, was alleged for the first time by the developers' counsel in the course of oral submissions.

Alleged errors 1 and 2: the Kuranda exclusion and the temporal error

[17] The first two alleged errors each relate to the assessment of need against the CairnsPlan benchmarks in the first stage of the decision-making process. Consideration of them is informed by the content of the relevant benchmarks guiding that assessment.

The need benchmarks

[18] The learned primary judge identified three sets of benchmarks relevant to need. They are set out hereunder in the sequence in which, in the event of inconsistency, each prevails over the other, pursuant to CairnsPlan part 1.5, "Hierarchy of assessment criteria".

[19] Firstly, part 3 of the CairnsPlan, "Strategic framework", contains some specific outcomes for "centres", providing for the establishment of "new centres", which the proposed development would be. Part 3.3.2.1(10) states:

> "New centres are only established where it is demonstrated that:
>
> (a) there is a need for the development;
>
> (b) the development is of a scale that is required to service the surrounding catchment;
>
> (c) the development is highly accessible within the catchment it serves and not located on the periphery;
>
> (d) the development does not compromise the character and amenity of adjoining premises and surrounding areas." (emphasis added)

The requirement, within the Cairns Plan's strategic framework, of demonstrated need for the development underscores the need's importance.

[20] Secondly, part 7 of the CairnsPlan contains the Smithfield local plan code ("the SLP Code") at 7.2.8. Part 7.2.8.4, "Criteria for assessment", contains a number of performance outcomes and acceptable outcomes including:

"Performance outcomes	Acceptable outcomes
For assessable development	
Economic activity	
PO1 Development achieves a consolidated, dominant retail centre on the existing Smithfield shopping centre	**AO1.1** Development with a cumulative floor area of greater than 2,500m^2 on any one or adjacent sites, outside Precinct 1 –

[6] A description used by the Chief Justice in a similar context in *Yorkeys Knob BP Pty Ltd v Cairns Regional Council* [2022] QCA 168 [28].

site and ensures new and additional floor space for the sale and supply of retail goods and services develops in line with the need of the Cairns Northern Beaches communities to 2025.	Smithfield Major centre demonstrates an economic and community need for the development which will not compromise the effective function of the Smithfield shopping centre site." (emphasis added)

[21] Notably, PO1 contemplates need "to 2025", as distinct from need solely at the time of the application. Need necessarily falls to be assessed based on what is known at the time of the application. In observations in *Williams McEwans Pty Ltd v Brisbane City Council*,[7] adopted in *Isgro v Gold Coast City Council & Anor*,[8] it was said that whether need exists requires consideration of whether there currently exists "a latent unsatisfied demand … which is not being met" (which might more succinctly be described as an unsatisfied demand). However, those observations need to be understood as having been expressed in the context of guarding against contrived need, rather than expressing some default position as to the temporal meaning of need. Consistently with the inherently forward-looking nature of urban planning, the language of a need criterion or the context in which it is being deployed may reach beyond existing current need to also require consideration of foreseeable future need. The language of PO1 does just that because the relevant performance outcome is development in line with need "to 2025". Pursuit of such an outcome in the years preceding 2025 necessarily requires consideration of both current need and foreseeably known need to 2025.

[22] Thirdly, the learned primary judge also noted the relevance of the content of part 9 of the CairnsPlan development codes, specifically part 9.4.1 Centre design code ("the CD Code"), which includes the following:

> "**9.4.1.2 Purpose**
>
> (1) The purpose of the Centre design code is to ensure centre activities and activity centres:
>
> (a) are developed to support community need and reinforce the hierarchy of activity centres;
>
> …
>
> (2) The purpose of the code will be achieved through the following overall outcomes
>
> (a) Development is established in accessible locations, consolidate development within existing centre zones and established areas of commerce, or meet an existing need identified within a local plan area." (emphasis added)

It is noteworthy that the need referred to in part 9.4.1.2(2)(a) of the CD Code is to "an existing need", which contrasts with the future reach of need "to 2025" referred to in PO1 of part 7.2.8.4 of the SLP Code. Also the need area referred to in part 9.4.1.2(2)(a) of the CD Code is "within a local plan area", relevantly being the

---

7 [1981] QPLR 33, 35.

8 [2003] QPELR 414, 418.

Smithfield Local Plan area, whereas in PO1 of part 7.2.8.4 of the SLP Code it is the Cairns Northern Beaches Communities, a larger area than the Smithfield Local Plan area. It follows the assessment of need in the relevant SLP Code provision is broader in temporal and geographic reach than the relevant provision in the CD Code. In any context where that gives rise to inconsistency it is the temporally and geographically more broad-reaching SLP provision which would prevail – per the Hierarchy of assessment criteria mentioned above.

The Kuranda exclusion

[23] The allegation that the Kuranda exclusion involved an error of law is that the learned primary judge asked himself the wrong question in considering need, by considering the fact Kuranda was not geographically within the Cairns northern beaches rather than considering that the use by Kuranda's populace of supermarkets in the Cairns northern beaches impacts the assessment of what is sufficient to satisfy the need of Cairns northern beaches residents.

[24] Casting what occurred as the judge asking himself the wrong question is obviously borne of the need to shape the Kuranda exclusion as a legal error. A difficulty for the developers though is that the disregarding of Kuranda occurred in the context of and in consequence of the learned primary judge preferring the evidence of Mr Norling. Mr Norling's approach to assessing need excluded the prospective needs of shoppers residing in Kuranda.

[25] His Honour observed:

> "[20] Two economists gave evidence at the hearing of the appeal. … In circumstances where the Cairns Northern Beaches was not defined in the planning scheme, they identified it in slightly different ways. Mr Duane included all areas north of the [Barron] River, whereas Mr Norling identified it as comprising three Statistical Areas Level 2, taking in various suburbs within the area described by Mr Duane. When allowance is made for not only the four (sic three) existing full-line supermarkets trading within this area, but also the recently approved full-line supermarket-based Shopping centre at Trinity Beach ("Trinity Beach Centre"), neither Mr Duane nor Mr Norling concluded there was an existing need for the proposed development.
>
> [21] Both experts agreed that the need for the proposed development, being a fifth full-line supermarket to serve the Cairns Northern Beaches may emerge in the future. Mr Duane predicts this "by around 2026", whereas Mr Norling says this will occur "by around 2031 or later". The difference in their reasoning is explained by Mr Norling. Essentially, he excludes from the assessment the Caravonica Trade Area and the Kuranda Trade Area. He excludes the former area on the basis that there are already two full-line supermarkets at Redlynch which are conveniently located to provide for the majority of residents' supermarket shopping. I accept [his] evidence in this regard. I am also comfortable with his exclusion of the Kuranda Trade Area given that it is clearly

> located outside of what both experts consider to be the Cairns Northern Beaches. Kuranda is a community on the Atherton Tablelands outside the local government area of the respondent. Therefore, on the evidence before me, Kuranda cannot be considered to be a community of the Cairns Northern Beaches. I therefore prefer the analysis of Mr Norling in terms of when it is likely that there will be a need for the proposed development. In these circumstances it is unsurprising that Mr Norling concludes that there is no economic need for the proposed development at the present time. He further concludes that, in circumstances where the Trinity Beach Centre is best located to serve the current need from the community need perspective, there is only a low community need for the proposed development."[9]

[26] The developers highlight the sentence within paragraph [21] in which his Honour observed, "Kuranda cannot be considered to be a community of the Cairns Northern Beaches". In using that language his Honour was apparently invoking the nomenclature of performance outcome PO1 in the SLP Code at part 7.2.8.4, which refers to developing new and additional floor space for the sale of retail goods in line with "the need of the Cairns Northern Beaches communities". It was submitted this use of language shows his Honour asked himself the wrong question because consideration of need for the development from the perspective of the Cairns Northern Beaches Communities should have involved consideration of the impact upon their need of supermarkets in their communities by those supermarkets being used by shoppers from Kuranda. In that consideration the point was made that it did not matter that Kuranda was not within the area of the Cairns Northern Beaches Communities.

[27] Considered in isolation the highlighted sentence is vulnerable to such a criticism but not if it is considered in context. That context was discussion of which expert evidence his Honour favoured regarding when there would be a need for the subject development, culminating in his acceptance of the analysis of Mr Norling about when it is likely there will be a need for the proposed development.

[28] That expert evidence clearly had considered the number of prospective shoppers. In that consideration Mr Norling explained he excluded residents of the Caravonica Trade Area and the Kuranda Trade Area because of the improbability of their primary supermarket trade being directed to the Cairns Northern Beaches.

[29] The approach of selecting an appropriate geographic cut-off point arose from the agreed approach of each expert. They concurred that a full-line supermarket is needed for a population range of every 8,000 to 9,000 people in Australia. Their focus though was not on the needs of all people in Australia but rather the needs of the residents of the Cairns Northern Beaches. Those residents' needs may of course be impacted by leakage in the custom of shoppers residing in other geographic areas into their local supermarkets, though there is also the countervailing consideration that there may be leakage in the shopping custom of its local residents into supermarkets in other geographical areas. The experts were alive to such considerations. Their approach necessarily required them to reason towards

---

9 *Trinity Park Investments Pty Ltd v Cairns Regional Council* [2022] QPEC 15, 10 [20], [21].

identifying a catchment cut-off point in the geographic area of population to be considered in calculating need. Each expert did so. Of his exclusion of Kuranda, Mr Norling explained:

> "Residents of the Kuranda Trade Area may also be excluded from the analysis, given their different demographic, greater distance from Smithfield Major Centre and availability of fresh food markets at Kuranda. These residents may be treated as a tertiary rather than primary area for Northern Beaches supermarkets."[10]

Such evidence illustrates consideration of the number of prospective shoppers by reference to need is properly informed, as a matter of probability, by consideration of their residential location. They are related, not mutually exclusive, considerations. Consideration of one does not bespeak an absence of consideration of the other.

[30] The Kuranda exclusion arose from a process of factual reasoning explained by evidence his Honour was entitled to accept. True it is his Honour's reference to Kuranda's geographic location was only to a factual element of, not the whole of, Mr Norling's factual reasoning. But that does not bespeak a lack of comprehension of those aspects of Mr Norling's factual reasoning which were not at that point recited by his Honour, viz, the different demographic, the greater distance from Smithfield major centre, the availability of fresh food markets at Kuranda and its residents' tertiary rather than primary status as prospective Northern Beaches shoppers.

[31] When the criticised passage is considered in context it appears to be much more likely that it was the product of brevity in expression as his Honour then transitioned to articulating his acceptance of Mr Norling's analysis of when the need for the subject development would occur. That the alleged error occurred in that context suggests it is in substance an allegation of factual error.

[32] However, even if the alleged error is correctly alleged as a legal error, it should not attract leave for two reasons. Firstly, for the reasons explained above it lacks merit. Secondly, even if it was found on appeal to be a legal error, it would be a finding without material consequence unless there could be a successful appeal relating to the second or third alleged errors below. That is because they are the only pathway around the incompatibility of the conclusion even of the developers' own expert, that allowing for the approved Trinity Beach supermarket development, there will be no need for the subject development until 2026, which is beyond the timeframe identified in the SLP Code at PO1 of part 7.2.8.4, namely "to 2025". Leave will not be given in respect of the second or third alleged errors.

The temporal error

[33] The second alleged legal error is that his Honour erred by interpreting the CairnsPlan as requiring the assessment of need to be of need at the time of the decision, yet having regard to the future meeting of need by the recently approved development of a Woolworths supermarket at Trinity Beach, but not assessing the need for the developers' supermarket as it would be when it would commence in 2026.

---

10 AR Book 2 Vol 1 p 268 [88(b)].

[34] The premise of the argument of alleged error is that if his Honour was constrained to consideration of need at the time of the decision he was thus not entitled to have regard to the impact on need of the newly approved Woolworths supermarket development but if he was not so constrained he should have assessed the need for the developer's Coles supermarket development as it would be in 2026.

[35] It may immediately be observed that the latter notion, of regard to need for the developer's supermarket development in 2026, is a distracting irrelevancy. That is both because his Honour found as a matter of fact that there would not be a need for it until 2031 and the SLP Code at part 7.2.8.4 PO1, only speaks of need "to 2025". Peeling that irrelevancy away from the argument begins to expose that if somewhere in this argument there is any real complaint of legal error it has to be in connection with whether an assessment of need can have regard to the impact on need of already approved developments.

[36] The argument of error was advanced by reference to three passages in the reasons. One such passage was in the above quoted paragraph [20] of his Honour's reasons in which, when discussing evidence, he said:

> "When allowance is made for not only the four (sic three) existing full-line supermarkets trading within this area, but also the recently approved full-line supermarket-based Shopping centre at Trinity Beach ("Trinity Beach Centre"), neither Mr Duane nor Mr Norling concluded there was an existing need for the proposed development."

This shows his Honour had regard in the assessment of need to the capacity of the newly approved supermarket to service need.

[37] The next passage relied upon was paragraph [24] of the reasons:

> "[24] I now turn to the relevant assessment benchmarks. There is non-compliance with PO1 of the SLPC as approval of the proposed development would not ensure new and additional floor space for the sale and supply of retail goods developed in line with the need of the Cairns Northern Beaches community to 2025. Even on the evidence of Mr Duane this would not occur as there is no need for the proposed development on his analysis until 2026. The non-compliance is even greater on the evidence of Mr Norling which I prefer. There is also non-compliance with AO1.1 of the SLPC as the appellant has not demonstrated an economic and community need for the proposed development. Similarly there is arguably non-compliance with Section 1(a) of the Purpose of the CDC as the proposed development will not support a community need of any consequence, however nothing much turns on this given the extent of the non-compliance with the other relevant assessment benchmarks listed above. There is also non-compliance with overall outcome 2(a) as it would not be established to meet an existing need identified within the Smithfield local plan area."

[38] It appears from the overall content of paragraph [24] that in assessing need, his Honour found the application fell short whether by reference to the existing need referred to in CD Code part 9.4.1.2(2)(a) or the need "to 2025" referred to in SLP Code at PO1 of part 7.2.8.4.

[39] The third passage emphasised by the developers appeared in paragraph [25] of the reasons, after his Honour had concluded there was non-compliance with need benchmarks and was considering whether approval should nonetheless be granted. In that context his Honour concluded:

> "In these circumstances, it is not appropriate to approve the proposed development where, on the evidence I accept, a need for it will not arise until 2031 or later. Even on the appellant's case, it will not arise until around 2026."

[40] It was argued such language meant his Honour was assessing need at the time of his decision, which, it was argued, was inconsistent with him simultaneously having regard to the future existence of the recently approved development of a Woolworths supermarket at Trinity Beach. There are two problems with that argument.

[41] Firstly, as explained above, his Honour found the developers' application fell short whether by reference to existing need or need to 2025.

[42] Secondly, even if regard had only been had to existing need it would not be inconsistent to have regard to the future existence of the recently approved supermarket. Where an assessment is confined to assessing need existing as at the time of assessment, it must be logically relevant to consider the impact on that need of already approved developments, unless it is anticipated they will not proceed. To do otherwise would be to ignore the known impact of Council's already made decisions upon local capacity to service the known existing need.

[43] The Woolworths supermarket development at Trinity Beach had already been approved. Considering how prolonged and hard fought that approval process had been and the absence of any evidence to suggest the development would not now proceed,[11] it was well open on the facts for his Honour to reason the newly approved supermarket would be developed in a timely way. It follows the capacity of that development to service need was properly considered, even if ignoring foreseeable need to 2025 and wholly confining the assessment of need to known existing need.

[44] The real nature of the error complained of is that his Honour should have taken the illogical, indeed absurd approach, of assessing the factual need for a new supermarket without regard to the foreseeable fact that the development of another supermarket was already going to occur in the next suburb north. It is both a complaint of factual error and a patently unmeritorious complaint.

Alleged error 3: not opting to impose s 60(2)(d) conditions

---

[11] The joint expert report actually noted "Woolworths' strong commitment to proceed with the development" – AR Book 2 Vol 1 p275.

[45] In declining to exercise his discretion to approve the development application, notwithstanding the absence of compliance with need benchmarks, his Honour reasoned:

> "[25] The appellant submits that "any absence of need would not warrant refusal of this application". As noted above, the proposed development is contained within the definition of Centre activities. The site benefits from an unusual designation in that a Shopping centre is code assessable. Otherwise, the strategic framework contemplates a new centre only being established where it is demonstrated that there is a need for development. [His Honour here footnoted reference to paragraph 3.3.2.1(10) of part 3 "Strategic Framework" in the CairnsPlan] There is therefore a clear strategy running through the planning scheme when it is read as a whole, applying the principles outlined in *Zappala* quoted above. Whether the proposed development is impact accessible or code accessible, a need for it must first be demonstrated to justify approval. In these circumstances, it is not appropriate to approve the proposed development where, on the evidence I accept, a need for it will not arise until 2031 or later. Even on the appellant's case, it will not arise until around 2026. The importance of this in the assessment process is such that the proposed development should not be approved, notwithstanding non-compliance with these assessment benchmarks. The appeal should be dismissed on this basis, however I will proceed to consider the other disputed issues."[12]

[46] His Honour's above reference to *Zappala* was to a passage quoted earlier in his reasons from *Zappala Family Co Pty Ltd v Brisbane City Council*,[13] to the effect that the construction of planning documents requires the language of the instrument to be read as a whole. In so reading the CairnsPlan his Honour recognised its strategic emphasis upon the importance of demonstrated need.

[47] That recognition is not challenged. The developers' complaint is that his Honour did not expressly articulate consideration of the requirement in s 60(2)(d) *Planning Act* that, in the event of non-compliance with some assessment benchmarks, the assessment manager may decide to refuse the application "only if compliance can not be achieved by imposing development conditions".

[48] While s 60(2)(d) "only" allows for refusal "if" compliance can not be achieved by imposing development conditions, it does not follow that an absence of express reference in the reasons to whether compliance can be so achieved bespeaks error. In some cases it will be so obvious from the findings of fact and the nature of the non-compliance as to go without saying that compliance cannot be achieved by conditions. Consideration of the detail of the alleged error here illustrates this is such a case.

[49] The alleged error was eventually articulated before this court in these terms:

---

12 *Trinity Park Investments Pty Ltd v Cairns Regional Council* [2022] QPEC 15 [25].
13 (2014) 210 LGERA 82.

> "The primary judge erred in law in failing to consider whether compliance with the scheme need benchmarks (PO1/AR1.1 of the Smithfield local plan code and section 9.4.1.2 of the Centre design code) could be achieved by imposing a condition that development could not commence until either:
>
> (a) 2026; or
>
> (b) when the population within the relevant catchment justifies the need for a fifth full-line supermarket, having regard to the benchmark of one supermarket per 8,000 persons;
>
> contrary to section 60(2)(d) of the Planning Act 2016."[14]

[50] Neither such condition or indeed any like condition was advanced below as a means of achieving compliance.[15] That deprived Council of the opportunity to explore the conditions' factual substratum and the learned primary judge of the opportunity to consider the conditions, considerations which each trend against a grant of leave.[16] There is however a more determinative problem for the proposed ground.

[51] Implicit in the allegation of error as now articulated is that in this case the imposition of a temporal restriction condition on when development could commence, in the form of (a) or (b), was at least an arguably open means of compliance being achieved. It was not.

[52] The imposition of condition (a), no commencement until the year 2026, would be at odds with his Honour's fact finding that the relevant need will not arise until 2031 or later. It is therefore obvious as a matter of fact that such a condition could not achieve compliance. Further, both condition (a) and condition (b), with its indeterminate reach (on the facts as found) to 2031 or later, would be at odds with the need benchmark of SLP Code at PO1 of part 7.2.8.4, which expressly reaches only to 2025. Instead of achieving compliance with that benchmark, as s 60(2)(d) requires, the proposed conditions would avoid compliance with it.

[53] The proposed ground thus lacks merit in two ways. Firstly, the nature of the non-compliance, an absence of need, was so obviously unable to be achieved by imposing conditions that the absence of express reference to potentially imposing conditions for that purpose does not bespeak error. Secondly, even if it did, so as to potentially ground this court's power to interfere on appeal, the appeal would fail because the proposed grounds posit conditions which would not achieve the compliance required by s 60(2)(d). To the contrary, they would avoid it. Leave should not be granted to pursue such a demonstrably unmeritorious ground.

[54] That conclusion makes it unnecessary to express a concluded view about whether a condition which permits a development to occur only at a time years after the giving of the permit could ever be a development condition within the meaning of s 60(2)(d). It is sufficient to observe that in this case the findings of fact and the undoubted importance of need were incompatible with the imposition of conditions of the kind now posited.

---

14 TR p32 LL15-35.
15 Eg, AR Book 2 Vol 1 p158 [7].
16 *Water Board v Moustakis* (1988) 180 CLR 491, 497; *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, 438.

Order

[55] It follows the application for leave to appeal should be refused.

[56] I would order:

1. Leave to appeal refused with costs.

[57] **CROW J:** I agree with Henry J.