

IN THE PLANNING AND ENVIRONMENT P & E Appeal No. 146 of
COURT 1991

HELD AT BRISBANE

QUEENSLAND

Before O'Sullivan DCJ

[Bachrach Pty. Ltd. v. Council of the Shire of Caboolture
& Anor]

BETWEEN:

H.A. BACHRACH PTY. LTD. Appellants

- and -

COUNCIL OF THE SHIRE OF CABOOLTURE Respondent

- and -

OSTERLEY PTY. LTD. Respondent by Election

REASONS FOR JUDGMENT

Judgment delivered: 12th August 1993

Catchwords:

Counsel: P Lyons QC with him T Kirk for the
Appellant

S Ure for the Respondent

J Webb with him M Rackemann for the
Respondent by Election

Solicitors: Phillips Fox for the Appellant

King & Co for the Respondent

Minter Ellison Morris Fletcher for the
Respondent by Election

Hearing 5, 6, 7 July 1993

Date(s):

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AND:

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REASONS FOR JUDGMENT - O'SULLIVAN D.C.J.

Delivered the 12th day of August 1993

This matter has been remitted from the Court of Appeal, in accordance with its Reasons for Judgment delivered 12 November, 1992, "for the Planning and Environment Court to determine the appeal according to law on the basis of the evidence already called and such other evidence as the court allows to be called". The only further evidence called were affidavits by the Shire Planner of the Respondent and by Mr Kevin, Solicitor engaged by the Respondent and oral evidence from Ms de Chastel, Project Leader, South-east Queensland Planning Division of the Department of Housing, Local Government and Planning. This evidence concerned the current position of the Draft Strategic Plan adopted by the Respondent since the original hearing of the Appeal.

The appeal was an Objector Appeal against the proposal to re-zone land from the Special Rural Zone to the Central Commercial Zone, to allow a shopping centre with a total gross floor area of 19,780 square metres to include a Woolworths supermarket, a Big W discount department store, an expanded Franklins, specialty shops and a Mall ("the proposal"). The proposal is for a subregional centre, and represents an increase of 9,600 square metres over existing and approved development.

Counsel also made oral and written submissions concerning the admissibility of the Draft Strategic Plan, and on 20 May, 1993 I delivered my Reasons for Judgment, ruling that the Draft Strategic Plan is admissible, but

"what weight ought to be given to the Draft Strategic Plan provisions, and the relevance and importance of the differences (if any) between them and the provisions of the existing Strategic Plan will no doubt be the subject of lengthy submissions at the hearing".

The appeal in the Court of Appeal concerned the interpretation of Objectives 6(1), 6(2) and 6 (4) of the Strategic Plan. I do not propose to set out in full all the matters canvassed in the Reasons for Judgment of the Court of Appeal. They include the following: The Central Business Area of Caboolture ("the CBA") is to remain the administrative centre of the Shire, the business centre of the Shire and the retail centre of the Shire (page 10 of the Reasons for Judgment); The Council would not approve an application.....unless it could be clearly demonstrated that the proposed development represented an expansion of, or is complementary to, the existing centre functioning as the town centre for Morayfield (pages 10-11); "Except for the area that is to function as the town centre for Morayfield, the Morayfield Road area generally will not detract from but will complement the retailing and business activities of the Caboolture town centre, thus ensuring its pre-eminence as the major retailing and business centre of the Shire" (page 11); There are two limitations on competition between the CBA and uses along Morayfield Road, namely, the latter is "allowed to compete only to the extent that it functioned as the town centre for Morayfield" and an application to increase the area zoned Central Commercial in Morayfield Road would not be approved unless "it could be clearly demonstrated that the proposed development represented an expansion of the existing centre functioning as the town centre for Morayfield" (page 12).

Conflict with the Strategic Plan:

The importance of strategic planning has always been recognised by Town Planners, the Local Government Court and this Court.

In his evidence at the hearing of the Appeal, Mr McInnes, the Town Planning Consultant engaged by the

Respondent by Election, specifically recognised the importance of the Strategic Plan.

The application of the Court of Appeal interpretation leads to the conclusion that the proposal conflicts with Objectives 6(1) and 6(2) of the Strategic Plan, and is not consistent with Objective 6(4) of the Strategic Plan. This was conceded by all parties. Counsel for the Respondent and Counsel for the Respondent by Election submitted that, notwithstanding this conflict, the proposal should be approved.

I was referred to a large number of authorities concerning the consequences of a conflict with the Strategic Plan. I have read those authorities, and several others to which I was not specifically referred, and I do not propose to specifically discuss or quote all of them. They include the following:

Family Assets Pty Ltd v Gold Coast City Council (1989)
QPLR 163:

"A Strategic Plan is of significance when considering rezoning applications in particular in that in broad terms it deals generally with the future preferred dominant land use in a locality. In such circumstances considerable weight ought to be given to the provisions of the Strategic Plan when considering a rezoning application." (page 166)

"On a balancing of the various factors, significant weight should in the circumstances, be given to the provisions of the Strategic Plan. As the proposed rezoning and subsequent development is in conflict with a number of the Objectives of the Strategic Plan, the application should be refused." (page 168)

Thomas Holdings Pty Ltd v The Council of the City of Gold Coast and Skygain Pty Ltd & Anor. (1991) QPLR 32:

"A Strategic Plan is an important document in considering the future or forward planning of a local authority area, and should, particularly on rezoning applications, be given significant weight. The fact that a proposal substantially conflicts in many instances with various objectives as set out in the Strategic Plan, is particularly important."

McPherson v Caloundra City Council (1990) QPLR 272:

"Considerable weight in my opinion should be given to the fact that the proposal would conflict with the Strategic Plan in relation to the rezoning of land to Rural Residential outside of those areas shown on the Strategic Plan Map".

Brownless v Council of the Shire of Caloundra (1990) QPLR 260:

"The Court is not the planning authority and it would, in my view, be inappropriate for it to approve a rezoning squarely in conflict with the formally expressed planning strategies of the Respondent".

It is clear from these authorities, and others, that considerable weight must be given to the provisions of a Strategic Plan, and the fact that this Court is not the planning authority for the Caboolture Shire.

The role of the Strategic Plan has been notably canvassed in numerous authorities, notably in **Curtis v Beaudesert Shire Council** (1983) Qd.R. 201. In that case Kneipp J. said, on behalf of the Full Court:

"In the result, I hold that the provisions of a strategic plan which has become part of a town planning scheme have effect as policies only, and are to be applied accordingly.

That was the view adopted by His Honour Judge Row following the view taken by His Honour Judge Byth in **New York Enterprises Pty. Ltd. v. Beaudesert Shire Council** (1981) 7 Q.L. 240. I think that they were right."

This issue was also discussed in **Zieta No. 59 Pty. Ltd. v. Gold Coast City Council** (1987) 2 Qd.R. 116, 123.

It does not follow that because a proposal conflicts with some provisions of a Strategic Plan, then it should be refused. In **Mookai Rosie-Bi-Bayan (Aboriginal Torres Strait Islander) Corporation v Council of the City of Cairns and Kelly (Unreported - Row DCJ - delivered 29 January, 1993)** the Court recognized this, as follows:

"The respondent has a discretion where there are sufficient planning grounds which would justify approving the application despite the conflict".

In **Suncorp Insurance & Finance v Logan City Council & Ors.** (1987) QPLR 112, the Court said:

"It is generally accepted that a strategic plan is a flexible document from which there may be departures based on significant town planning considerations."

In that case the subject land was zoned part Rural and part Open Space. The proposed rezoning to commercial industry, medium industry and heavy industry conflicted with the Strategic Plan. The proposed rezoning and subsequent development of the subject land would be in conformity with the Strategic Plan if the proposed amendment was gazetted. The Court found that the introduction of an area zoned as proposed, would not be out of keeping with the probable future development in the area. The Court referred to the upgrading of roads, the construction of the Logan Tollway, traffic flows, the development of a shopping centre and private hospital, a public hospital and proposed estate.

In **Caber Investments Pty Ltd & Ors v Douglas Shire Council** (1989) QPLR 52 the Court said:

"A local authority may have regard to such policy in reaching a decision upon a town planning application but each application must be considered on its own merits. An applicant does not have to meet each objective stated in a strategic plan before the application can be approved".

(In any event the Court found that the rezoning was not in conflict with the Strategic Plan.)

In **Duncombe v Council of the Shire of Caboolture and anor.** (1990) QPLR 257 the Court said:

"I take the view that their evidence, even if accepted, is not sufficient to overcome the objection to the proposal based on the Respondent's Strategic Plan. I am satisfied that the plan calls for an exclusion of urban development on this land. As has been said repeatedly, this Court is not the planning

authority for this area and it is my view that it would be inappropriate for the Court to approve a proposal which is squarely in conflict with the formally expressed planning strategies of that authority."

In that case the Court was concerned with the protection of a water catchment area and the need to deal with it on a strategic planning basis and not on the basis of a piecemeal consideration of one application after another.

The same approach should in my view apply to the necessity for strategic planning of a subregional shopping centre in Caboolture Shire.

Counsel for the Respondent by Election submitted that the Strategic Plan had been overtaken by events, citing **Beck v Council of the Shire of Atherton & anor.** (1991) QPLR 56 and **Plaifaire Projects Aust. Pty Ltd v Council of the Shire of Maroochy & anor.** (1991) QPLR 87.

In **Beck (supra)** the Court said:

"I am well aware that the Strategic Plan designations are indicative of preferred dominant land uses and do not have the force of zonings. The Court has however, repeatedly stressed the importance of strategic planning and the need to respect and support the integrity of the important planning tool which the Strategic Plan is. There may be cases where a departure from the Strategic Plan could be justified; where, for example, the planning strategies which it represents, having been overtaken by events (or for some other reason), clearly no longer have any application; or where it can be demonstrated plainly the land has been given a designation on the basis that was and remains invalid. One would expect such cases to be rare and I am far from persuaded that this is one of them."

I note that in a later passage in the same case the Court recognized the importance of careful strategic planning and the undesirability of interfering with the strategy "except for reasons which are very compelling".

In **Plaifaire (supra)** the Court said:

"However, in this appeal, it is my view that we are dealing with a plan which (so far as this particular area is concerned) has simply been overtaken by events."

Counsel for the Respondent by Election submitted that in this appeal the "overtaking events" were population growth, and the need thus created.

I am not persuaded that the Strategic Plan failed to take population growth into account. Indeed, growth at a relatively high rate had been given due consideration. It emerged from the evidence during the hearing of the appeal that the population growth figures which were used were rather optimistic, and in some instances projected figures were higher than actual growth figures. It also emerged there were some modifications of figures by the Council and that the Council has since 1988 undertaken regular population studies and revised its projections on an annualised basis. However, even if the Strategic Plan did not envisage the high growth rate, I am not persuaded that this is an "overtaking event" which calls for less weight being given to the Strategic Plan.

It remains to decide whether there are sufficient planning grounds which would justify approving the proposal despite its conflict with the Strategic Plan.

Weight to be given to the Draft Strategic Plan:

Adopting the principles from **R v Lukin; ex parte Sunshine Pty Ltd** (1967) Qd.R. 49 and **Behrens v Caboolture Shire Council** (1979) QPLR 43, the Court must take into consideration changes in the law which occur after an appeal is instituted and must apply the law as it exists at the date of hearing and determination of the appeal. The Court must consider the facts and circumstances as they exist at the date of the hearing.

A Draft Strategic Plan (Exhibit 4A) was put on public exhibition from 7 September to 11 December 1992. A Draft Strategic Plan (Exhibit 3A) was sent to the Minister of Housing, Local Government and Planning on 2 April, 1993. There are differences between these Draft

Strategic Plans which were summarized in a Schedule prepared by Counsel for the Respondent by Election.

The evidence of Ms de Chastel was that the Department had sought reports from approximately 10 government agencies and 6 local authorities. The Minister had received possibly up to 20 submissions from affected persons. The Department now has all comments it sought; some of them have been assessed by her, some have not. She has not yet written comments to be sent to the Council. She had prepared an earlier schedule of queries which had been forwarded to the Council on 11 January. She said that the document recently received by the Department from the Council did not address all of the concerns raised in that schedule.

When asked whether there was any problem identified with the planning concept of the regional shopping centre at Morayfield, Ms de Chastel replied: "No, we didn't raise it as a state issue."

Ms de Chastel explained that she reports to her team leader and to the Director who in turn reports to another person and the General Manager of the Department. None of these people have yet reviewed the Draft Strategic Plan.

Ms de Chastel explained that the next stage is for the Department to review the comments and representations it has received. After that review, what it does is to put the comments in a letter to the Council to ask for information and suggest changes to the document (if this is what the Department is going to do). Generally speaking, what the Department has done in the past is have meetings with the Council about it as well. She agreed that one option that is open is to amend the Draft Strategic Plan. She considered that if changes were made to the Draft Strategic Plan it would be unlikely to be re-exhibited. She said that until she had examined all the representations and comments she could not rule out as an option a major change to the terms of the Draft Strategic Plan.

Ms de Chastel said that the Department had been advised by the Council that it is preparing a development

control plan for Caboolture/Morayfield centres and the Department has been asked for input into those plans.

In view of this evidence, it is not possible to say if the Draft Strategic Plan in its present form will be gazetted, or, if it is, when it will be gazetted. It is not open to me to speculate on either of these matters.

It was submitted that it has not been the practice of this Court to consider whether changes might be made after submission of the Draft but prior to gazettal. This Court and the Local Government Court have always considered that the extent of progress along the legislative path is relevant. However, neither Court has adopted the view that it can be inferred or presumed that changes will not be made and that gazettal is a mere formality.

There are numerous authorities concerning the weight to be given to a Draft Strategic Plan, including the following:

In **Family Assets (supra)**, the Court said at page 168:

"The draft Development Control Plan has not achieved the status where it has been put on public exhibition. Because of the number of inconsistencies which appear therein between it and the provisions of the Town Planning Scheme particularly in the Strategic Plan, little weight should, in my opinion, be placed on it in relation to a consideration of the subject application".

In **Trinity Drafting Service & anor. v Council of the Shire of Mulgrave** (1992) QPLR 287, the Court said:

"The fact that the proposal is contrary to the provisions of the proposed planning scheme is also relevant. In addition, the fact that the respondent has been considering objections since May 1991 is a matter which is of some importance in determining the weight that should be given to the provisions of the proposed planning scheme.....In the circumstances herein little weight should be given to those provisions of the proposed planning scheme which are relevant to a determination of the issues before the

Court in that those proposed provisions significantly cut across the provisions in the existing scheme."

At the time of hearing of the appeal in **Trinity Drafting** the objections were being considered by the Respondent Council. No further steps had been taken in relation to the progression of the proposed new planning scheme along its legislative path.

In **Trinity Drafting (supra)**, the Court distinguished **Sam Industries Pty Ltd v Council of the Shire of Mulgrave** (1992) QPLR 248. In **Sam Industries** at the time of hearing of the appeal, the objections were being considered and no steps had been taken to forward the proposed Planning Scheme documents, the objections and the Respondent's comments thereon to the Minister for submission for gazettal. The Court found that the proposed planning scheme was, to a substantial extent, consistent with earlier planning intents and planning concerns of the Respondent. It was satisfied that the proposed rezoning and subsequent group title subdivision would significantly cut across the proposed planning scheme of the Respondent "to which significant weight should, in the present circumstances, be given".

Counsel for the Appellants submitted that no weight, or little weight, should be given to the Draft Strategic Plan, for a number of reasons: approval of the application would render more difficult the ultimate decision as to the form any future Strategic Plan would take; those provisions of the Draft Strategic Plan which deal with a retail centre at Morayfield should be disregarded, because they conflict significantly with the present Plan; those provisions of the Draft Strategic Plan which deal with a retail centre at Morayfield should be given little weight, because they are not shown to have a proper town planning basis. I propose to deal with each of these in turn.

The 'Coty principle':

The relevant passage from **Coty (England) Pty Ltd v Sydney City Council** (1957) 2 LGRA 117, 125 is as follows:

"It is important, in the public interest, that whilst the respondent council's local scheme is under consideration this Court should, in the exercise of its appellate jurisdiction under cl. 35 of the County Ordinance, avoid, as far as possible, giving a judgment or establishing any principle which would render more difficult the ultimate decision as to the form the scheme should take. It is also important, in the public interest, that during that period this Court should, in the exercise of the jurisdiction referred to, arrive at its judgment, as far as possible, in consonance with town planning decisions which have been embodied in the local scheme in the course of preparation".

A careful perusal of this passage leads to the conclusion that there are two components to 'the Coty principle'. The first component leads to the query whether approval or refusal of the proposal "would render more difficult the ultimate decision as to the form the scheme should take". This "ultimate decision" will be that of the Governor in Council pursuant to sub-section 2.20(6) of the **Local Government (Planning and Environment) Act 1990** (as amended).

I consider that approval of the proposal would, by virtue of its nature and scale, render more difficult the ultimate decision of the Governor in Council.

The second component from **Coty** is whether approval or refusal of the proposal is "in consonance with the town planning decisions" in the Draft Strategic Plan.

I consider that approval of the proposal would be in consonance with the town planning decisions embodied in the Draft Strategic Plan which is presently being reviewed by the Department (which may or may not be the Draft Strategic Plan which is gazetted).

Conflict between the Draft Strategic Plan and the Strategic Plan:

The provisions of the Draft Strategic Plan presently with the Department embody significantly different retailing for Morayfield and for the CBA, and for their

relationship, than those contained in the Objectives of the Strategic Plan as interpreted by the Court of Appeal.

The relevant provisions of the Draft Strategic Plan currently with the Department are as follows:-

"Commercial Areas.

(2) Objective

"To recognise, reinforce and consolidate the role of the existing and future retail development occurring along Morayfield Road as a dominant retailing area.

Implementation

(a) ...

- (b) "Council will encourage the development of a future regional shopping centre facility in the vicinity of Morayfield Road and Caboolture River Road. Should the development of this centre not proceed, for whatever reasons, by the time the population of the Shire has reached 100,000 persons Council may consider applications for a centre on another site pursuant to this objective."

(3) Objective:

"To establish a hierarchy of retail facilities through the Shire, which serve the needs of the Shire and surrounding areas.

Implementation

- (a) "Council considers that hierarchy of retail facilities need to be identified to ensure that the orderly development of individual centres and townships occurs within the Shire.

The hierarchy which Council supports is as follows:

- (i) The maintenance of the subregional centre at Caboolture Town Centre to compliment (sic) its function as the administrative centre.
- (ii) The development of the Morayfield Road area as a subregional centre will be encouraged, to

compliment (sic) the operations of the future regional centre.

- (b) While the retail hierarchy differentiates between various centres, the hierarchy is based not solely on size of the centres but also on the function that such centres play in the economic development of the Shire".

These Objectives are significantly different from Objectives 6(1), 6(2) and 6(4) of the Strategic Plan, as interpreted by the Court of Appeal.

I note that in the Draft Strategic Plan as exhibited, the words "the dominant retailing area" were used rather than "a dominant retailing area" (Objective (2) in the Draft Strategic Plan forwarded to the Department).

I was specifically referred to pages 148-9 and 160-1 of the Draft Planning Study (Exhibit 3C), to assist in an understanding of the provisions of the Draft Strategic Plan.

The Draft Strategic Plan Map shows the following:

CBA - "Caboolture Town Centre" and "Subregional Retail Centre"

Morayfield - "Future Regional Centre" and "Subregional Centre"

Counsel for the Respondent submitted that the words "retail" ought to be inserted between "Regional" and "Centre" for Morayfield so that Morayfield is designated for a Future Regional Retail Centre and a Subregional Retail Centre.

I note that both the CBA and Morayfield are designated as Subregional Retail Centres. This is a significant difference from the Strategic Plan.

I do not accept the submission of Counsel for the Appellants that the existence of conflict between the provisions of the Strategic Plan and the Draft Strategic Plan necessarily means that the latter should be

"disregarded". However, the existence of conflict is a relevant factor in deciding what weight ought to be given to the provisions of the Draft Strategic Plan in the decision to approve or refuse the proposal.

Counsel for the Respondent by Election submitted that the Draft Strategic Plan "gives comfort to the proposal". Counsel for the Appellants conceded that "the general effect of the Draft Strategic Plan is to support the proposal" but they submitted that little weight ought to be given to it for two reasons. These were the lack of town planning input into section 9 of the Draft Planning Study, and the fact that the review of the Strategic Plan is not part of a review of the Planning Scheme (the zonings remaining in place). I do not accept that either of these matters (even if they be true) lead to the conclusion that less weight ought to be given.

I consider that weight ought to be given to the Draft Strategic Plan. It is a seriously entertained planning proposal which has progressed substantially along its legislative path.

Findings of Fact:

In my Reasons for Judgment delivered 2 March, 1992 I made a large number of findings of fact. These were not challenged in the Court of Appeal. Counsel for the Respondent and Counsel for the Respondent by Election submitted that these findings remain. Counsel for the Appellants submitted that a few of them need to be reviewed, in light of the Court of Appeal interpretation of the Strategic Plan.

The relevant findings of fact to which they referred are:

1. Need:
 - (a) "I accept that the area is likely to continue to be one of significant population growth, and that this is relevant to the question of need for the proposal" (page 12).

- (b) "I find that it is possible that some traders in Caboolture Park may be forced to close down, or move to the proposed centre, as a result of the impact of the proposed centre" (pages 13-14).
- (c) "The evidence does not establish that there will be an overall adverse effect on the extent and adequacy of facilities available to the local community. Indeed, the evidence is to the contrary" (page 14).

I have reviewed these findings and consider that they are still open.

2. Impact:

- (a) "At the end of the day, most of the witnesses accepted that it is possible that there will be greater retail floor space and greater retail expenditure at Morayfield than in the CBA" (page 16).
- (b) "I accept that the Strategic Plan envisages that these two centres will be able to compete for the potential shoppers' choice. This choice is relevant to the assessment of need in a rezoning appeal" (page 16).
- (c) "For people living north of the CBA, the CBA will be the dominant centre; for people living south of the CBA, the proposed centre will be the dominant retail centre.....Moreover, for all Caboolture residents there will be a choice" (page 17).
- (d) "...the CBA may have different types of higher order shopping or specialty shops or different types of retailing which do not require a large area or large number of parking spaces" (pages 17-18).
- (e) "I find that the proposal will impact on the businesses at Caboolture Park to varying degrees, and on the centre owner. Some may move to the proposed shopping centre. Some may move out, and

vacancies may result or different types of tenancies may replace them" (page 18).

- (f) "I consider that there was no evidence to establish that this (non-retailing may follow the shift in retailing) is probable" (pages 21-22).
- (g) "The CBA will probably remain the centre for a range of quality comparative shopping" (page 22).
- (h) "On balance, I am satisfied that any problems which may arise as a result of the timing of the proposal are not sufficient to justify refusal of the application, and on the evidence as a whole I consider that the proposed development is not premature" (page 23).
- (i) "...Town Planning should not provide protection for poorly designed and less attractive developments, particularly when a proposal of this nature offers the sort of things shoppers and potential consumers would enjoy is supported by the Strategic Plan" (page 24).
- (j) "I find that the proposal will impact on retailing in the CBA, especially Caboolture Park, in the period between mid-1994 (when at least parts of it may open) and 1996. Balanced against this are the advantages to the consumer. On the whole of the evidence, I am not satisfied that the impact is such as to warrant a refusal of the application. I am satisfied on the evidence as a whole that there is a public or community need for the proposed development and that the proposed rezoning would cater for such a need" (page 25).

Findings (b) and (c) are not consistent with the Court of Appeal interpretation of the Strategic Plan and should accordingly be disregarded. Finding (i) is possibly qualified by the Court of Appeal interpretation of the Strategic Plan. I consider that the other findings are still open, and they remain relevant to the decision whether or not to approve the proposal.

3. Balance of Zones:

In my Reasons (page 30) I said: "As I have already indicated, I consider that the proposal is not inconsistent with the Respondent's town planning documents. I am satisfied that the proposed rezoning will not adversely affect the balance of zones in the planning scheme areas as a whole".

Counsel for the Appellants submitted that this view was affected by my construction of the Strategic Plan, and that it is necessary for me to re-consider the question, adopting the Court of Appeal interpretation of the Strategic Plan. They submitted that if the proposal is in conflict with the Strategic Plan, it follows that the balance of zones is different from that envisaged by the planning strategy embodied in the Planning Scheme and the Strategic Plan. I have reviewed the town planning evidence concerning the balance of zones presented at the hearing, and I find that the proposed re-zoning would not adversely affect the balance of zones in the planning scheme area as a whole.

The decision to approve or refuse:

Section 33(6A)(e) of the **Local Government Act (1936)** (as amended) lists the wide range of matters which are relevant to this decision.

There are a number of factors which point to approval of the proposal, including need for the proposal, the fact that there is currently no appropriately zoned land available which would accommodate the proposal, and the fact that the proposal is in consonance with the town planning decisions embodied in the Draft Strategic Plan in its current form. Also relevant are the other factors which were outlined in my earlier Reasons and which were not challenged in the Court of Appeal.

There are a number of factors which point to refusal of the proposal, including the conflict between the proposal and some important provisions in the Strategic Plan, the significant differences between the relevant

provisions of the Strategic Plan and the Draft Strategic Plan and uncertainty about the final form of the Draft Strategic Plan at gazettal.

Understandably perhaps, Counsel for the Respondent by Election stressed the positive factors, especially need, while Counsel for the Appellants stressed the negative factors, especially conflict with the Strategic Plan. None of the factors, positive or negative, is determinative of itself. I have taken all of them into account in my decision.

On a balancing of the various factors I consider that the proposal ought not be approved.

I consider that there is a further reason why the proposal ought not be approved, namely, my finding that approval of the proposal would render more difficult the ultimate decision as to the form the Strategic Plan (now in draft form) should take.

I find that the Appellants have discharged their onus of proving that the proposed re-zoning ought not be approved.

I allow the Appeal.