

# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Vynotas Pty Ltd and & Anor v Brisbane City Council & Anor*  
[2000] QPEC 091

PARTIES: **VYNOTAS PTY LTD AND PERMANENT TRUSTEE  
AUSTRALIA LIMITED**  
Appellants  
v  
**BRISBANE CITY COUNCIL**  
Respondent  
and  
**TOTAL PROJECT CONTROL PTY LTD**  
Co-Respondent

FILE NO/S: 3001 of 1999

DIVISION: Planning and Environment Court

PROCEEDING: Submitter Appeal

ORIGINATING COURT: Brisbane

DELIVERED ON: 28 July 2000

DELIVERED AT: Brisbane

HEARING DATE: 22-26 May, 29 May, 1-2 June, 14-16 June & 21 June 2000

JUDGE: Judge Robin Q.C.

ORDER: **Appeal dismissed**

CATCHWORDS: SUBMITTER APPEAL against Council development approval for a shopping centre – site zoned Future Urban and designated in Local Area Outline Plan as a desirable “suburban centre” – LAOP and Brisbane Strategic Plan generally apply as a Transitional Planning Scheme – accordingly *Local Government (Planning and Environment) 1990* s 4.4 referred to – whether “need” had to be shown by co-respondent in view of designation - “need” established in any event – matters considered included traffic impacts and ameliorating changes to road system considered likely to eventuate - whether visual impacts of proposed building because of its bulk and height were unacceptable (especially as site was, for special reasons, relatively isolated from surrounding residential development) - whether proposal was premature and should await establishment of an approved “major neighbourhood centre” 1.7 km away (which would be prejudiced if the proposal went ahead), local bus services and circumstances permitting “integration” with adjacent land in

a larger suburban centre - whether application was piecemeal for omission of easements required by approval conditions to allow access to adjacent lands – *Integrated Planning Act 1997*

COUNSEL: Mr Bowie for the appellant  
Mr Trotter for the respondent  
Mr Lyons QC with him Mr Hughes for the co-respondent

SOLICITORS: Minter Ellison for the appellants  
Brisbane City Legal Practice for the respondent  
Corrs Chambers Westgarth for the co-respondent

### **The appeal and the parties**

- [1] This is a submitter appeal commenced by owners of the Grand Plaza Shopping Centre located at the corner of Mr Lindsday Highway and Browns Plains Road, Logan against the Brisbane City Council’s approval of the co-respondent’s development application for a shopping centre on land at 2605–2617 Beaudesert Road, Calamvale made towards the end of October 1998, to permit the carrying out of building works, of plumbing and drainage works and of operational work, a material change of use of premises, and reconfiguration of a Lot. In March 1999 the Council advised approval of the application and accompanying “decision notice details” under s. 3.5.15 of the *Integrated Planning Act 1997*. Aspects of the approval were unsatisfactory to the co-respondent. Following representations, a Negotiated Decision Notice under s.3.5.17 was issued, varying the conditions. The application was made under a Transitional Planning Scheme; pursuant to ss. 6.1.29 and 6.1.30 of the *Integrated Planning Act* regard must be had to the matters set out in s.4.4.(3) of the *Local Government (Planning and Environment) Act 1990* so far as they may be relevant. By s. 4.1.50(2) of the *IPA*, the co-respondent bears the onus of establishing that this appeal should be dismissed.

[2] Mr Trotter, for the Council, noted that the appellants were a commercial competitor of the applicant/co-respondent. This in no way cuts down the merit of the arguments they present to the court, but it may explain the scattergun approach which produced many lines of argument, creating some uncertainty in the court's mind as to their real or relative importance. The application was said to be in conflict with Brisbane's Strategic Plan (without sufficient planning grounds to justify approval) and with the Draft Plan which will in the future replace it, and to be premature. Those broad positions were amplified by detailed complaints that the proposal:

- is supported by insufficient local population;
- is not needed, alternatively there is other land in the area suitably zoned;
- is too small (to suit its asserted role of "suburban centre");
- is too big (as a development for the site);
- is not integrated (itself, or with adjoining land to which the centre may "expand");
- will produce traffic congestion;
- will produce traffic dangers;
- offers inappropriate parking;
- is not served by public transport;
- destroys trees within a Vegetation Protection Order;
- has a building that is too high;
- has a building that is too long;
- has a building that is insufficiently set back from boundaries;
- fails to contain or ameliorate its visual impacts within the site;
- may impact adversely on at least one existing centre;

will compromise or frustrate the establishment of an earlier approved “major neighbourhood centre” 1.7 km away; was an invalid piecemeal application.

In the end, as will be seen, those objections do not stand in the way of approval of the application.

- [3] That the commercial interests the appellants may be protecting are located in a local government area outside Brisbane is irrelevant. No one asserted it weakened the appellants' case in any way. As areas of Brisbane close to its perimeter are more intensively developed, this situation will be reflected more and more. The Strategic Plan in relation to centres in 3.3.4.1 and Map 4 acknowledges the existence of centres outside Brisbane and in respect of “higher order centres” (categories not including the relatively humble suburban centre the subject of this appeal) takes some care not to permit expansion which would “impact inappropriately on similar or planned centres outside the city” – see paragraph [9][H] below; it is also recognized ([9][E]) that review of the hierarchy of centres “represent(ing) the distribution of centres currently intended” may occur following assessments carried out on a south-east Queensland regional basis.

### **The site and the development proposal**

- [4] The site (in the Urban Area designation in the Strategic Plan, and in the Future Urban Zone) is described lots 15 & 16 on RP 7330, Parish of Yeerongpilly. Lot 15 is located on the south west corner of Beaudesert Road and Nottingham Road and contains 1.0504 hectares; Lot 16 adjoins on the west, facing Nottingham Road, covering 1.1746 hectares. The aggregate frontage to Nottingham Road is about 162

metres; that of lot 15 to Beaudesert Road is 128 metres. Main Roads Department requirements preclude the long term use of a service road running parallel to Beaudesert Road for access to that frontage. Beaudesert Road is a major arterial road presently carrying 40,000 vehicles per day, which is destined to be widened to six lanes. Nottingham Road is a major sub-arterial (or suburban) road presently carrying 8,000 vehicles per day. The intersection (at which the continuation eastwards of Nottingham Road is known as Honeysuckle Way) is congested already at peak hours; it seems to be particularly so at peaks generated by setting down and picking of children at the Calamvale State School and Pre-School which are located opposite the subject site at the north western corner of the intersection; access is gained via a northern extension of the service road and the greatest delays to school related traffic appear to affect drivers coming from the south along Beaudesert Road who wish to turn left into Nottingham Road and then immediately right into the service road. The restriction of access to and from the subject site to the Nottingham Road frontage has created problems for the design of traffic circulation associated with the proposal and concerns for the safety of pedestrians in Nottingham Road, in particular school children, some of whom attend a special school immediately to the west of the primary school and pre-school. West of the special school is a child care centre.

- [5] The co-respondent's proposal is for a shopping centre centred on a 3,200 square metre supermarket located in the south western corner of its site and a 300 square metre free-standing fast food outlet in the north eastern corner (that is, right at the intersection); there is to be a further 2,000 square metres devoted to retail tenancies; as proposed, there may be about 15 speciality shops. The supermarket would be

operated as a Woolworths “full-line supermarket”. Although documents accompanying the application suggested the fast food outlet would be a McDonalds, which on the evidence might generate more vehicle movements on and off the site and greater demand for parking than some of McDonalds’ competitors, the co-respondent’s case was that it was uncertain who would operate the fast food shop.

- [6] The general area fronting on Beaudesert Road and extending west to the Brisbane-Sydney railway line, north to Compton Road, south to the Logan Motorway and east to the extension of the Gateway Arterial Road, appropriately identified as the “primary catchment” or trade area for the proposed shopping centre by the marketing experts, is one of the fastest growing in Queensland. The development is essentially residential. The Council’s approval of the proposal is unsurprising given that the site (perhaps more correctly, the general area at the south west of the Beaudesert Road-Nottingham Road intersection) has for some years been designated a Suburban Centre in relevant planning documents, in particular a Local Area Outline Plan.

### **Strategic Plan provisions**

- [7] The Strategic Plan for Brisbane has the purpose of “setting the broad framework for managing private development to help achieve the Vision for Brisbane” and incorporates a “planning horizon” of the year 2011, that is some 15 years from its inception (3.1.1). The Composition of the Strategic Plan is set out in 3.1.2:-

“In accordance with Section 2.4 of the Local Government (Planning and Environment Act) 1990, the Strategic Plan, which forms part of the Town Plan for the City of Brisbane, comprises objectives,

implementation criteria and Strategic Plan Maps. The objectives and implementation criteria are derived by reading the Strategic Plan Maps together with:

- (a) a focus statement which primarily identifies outcomes to be achieved;
- (b) a directions statement which explains how these outcomes will be achieved;
- (c) provisions dealing with land in the Non Urban Zone;
- (d) provisions dealing with Local Area Outline Plans; and
- (e) a series of maps dealing with land in the Non Urban Zone and Local Area Outline Plans..”

The Focus of the plan is defined in 3.2:

“In order to achieve the Vision for the City, the Town Plan focuses on specific desired outcomes, namely:

- an environmentally responsible city;
- an accessible city;
- a well serviced and equitable city;
- a well designed and culturally dynamic city; and
- an economically prosperous and progressive city.”

As to the second dot point, 3.2.2.2 provides:

**“establishing an integrated land use pattern and movement system which minimises detrimental impacts on urban amenity whilst maximising the efficient use and accessibility of the movement system, through:**

- ...
- (d) safeguarding the capacity of the road network by avoiding pedestrian-traffic conflicts as well as frequent and heavy vehicle turning movements generated through gaining access to properties fronting higher levels of the road hierarchy, or through the introduction of new roads to these levels of the road network;

...”

A well designed and culturally dynamic city by 3.2.4.1:

“will be achieved by:

**Identifying, maintaining and enhancing the scenic and visual amenity of the City through:**

...

- (d) ensuring development complements the character and style of the surrounding area;

...

- (i) retaining and enhancing the desirable landscape features of existing urban areas; and
- (j) ensuring the physical separation of visually incompatible land uses through zoning provisions, buffering and/or screening as appropriate.”

As to the last of the dot points, 3.2.5.5 is:

**“promoting the establishment of a diverse range of accessible, viable employment opportunities within the hierarchy of centres and within the capacity of the Movement System and infrastructure network through:**

- (a) ensuring the orderly development of commercial facilities that generally accords with the preferred hierarchy of centres; and
- (b) encouraging the development of centres which support the function and capacity of the Movement System.”

The Directions are set out in 3.3. They “identify how the preferred pattern of development and character described in the Vision and the desired outcomes established in the Focus will be achieved.” By 3.3.1.4:-

“Lands with Environmental or Scenic Constraints form an important element of the Brisbane Green Space System.

This element includes lands in zones which could allow development to higher densities than their current uses.

However, these lands or part of these lands contain areas of significant historic, architectural, topographic, landscape, scenic, bushland, ecological, social or cultural interest. They may also be considered significant for the retention of flora and fauna habitat, wetlands and waterway corridors and therefore unsuitable for development. These lands are located throughout the City and often occur adjacent to large tracts of bushland and semi rural areas.

In any subdivision or development of the land, sites or parts of sites which are unsuitable for development, by reason of any one or more matters referred to in the paragraph above, must be identified and either excluded from the development or developed in such a way that the Green Space System values of the site are preserved.

Lands with Environmental and Scenic Constraints are generally zoned Future Urban or Future Industry.”

[8] The Statement of Intent for Urban Areas (3.3.2.1) provides *inter alia*:

“The integration of subdivision and development in emerging community areas within the Future Urban Zone will be encouraged to provide a diverse range of housing types and supporting uses consistent with the social and environmental outcomes sought in this Strategic Plan. Local Area Outline Plans are intended to assist in this process.

It is intended that development in this designation will preserve or achieve character and identity specific to local areas within the broader Urban Area, including aspects of character or identity resulting from any adjoining land which forms part of the Green Space System.

It is intended that the Urban Areas of the City will also provide for a range of necessary services and facilities required to support those needs of residents not catered for in other preferred dominant land use areas.”

“Non residential activities in the Urban Areas are intended to serve local communities and their environmental and amenity impacts are to be managed to acceptable levels. The co-location of these activities in centres will be encouraged to minimise potential amenity problems and enhance opportunities for the use of public transport, walking and cycling. In the Urban Areas, these Centres will be limited to Suburban, Major and Minor Neighbourhood and Convenience Centres as described in Section 3.3.4 of this Strategic Plan.”

[9] A good deal of the Statement of Intent for Centres in 3.3.4.1 is important (for ease of reference paragraph letterings in square brackets have been added):

[A] “It is intended to promote a hierarchy of centres based on existing and potential population catchments, access and servicing requirements, and consumer demands, as well as recognising the role of existing facilities. This hierarchy is intended to:

- provide for the orderly and rational groupings of non-residential uses in centres well located to serve their particular catchments;
- provide substantial employment opportunities and services close to where people live so as to reduce the need to travel long distances to access these facilities;
- provide locational certainty to investors and businesses locating in centres;

- support the vitality of individual centres as places of community activity; and
  - ensure appropriate location of centres in relation to the Movement System.
- [B] This hierarchy represents the distribution of centres currently intended for the City, at least until such time as the related hierarchy of centres throughout south east Queensland is finalised by work recommended in the South East Queensland Regional Framework for Growth Management 1995. This may result in some review of this hierarchy.
- [C] The hierarchy is based primarily on the population which each level in the hierarchy is intended to serve. Generally, the primary catchments of each centre in a particular level in this hierarchy will not overlap.
- [D] It is intended that centres be developed as places of employment, community interaction, retailing and commerce. Within centres, it is intended that more intense and higher impacting uses, including those uses characterised by larger buildings, should be located centrally, with uses characterised by smaller buildings and lower impacts on residential amenity located toward the edge of a centre merging with surrounding higher density housing. The extent and density of this supporting housing around a centre shall be related directly to its level in the hierarchy. Centres of a Major District Centre level and higher are also intended to provide service trades facilities, usually in a discrete part of the centre.
- [E] Retailing and other commercial development, as well as entertainment and community uses, should wherever possible occur in a centre. Commercial ribbon development along suburban or arterial routes or free-standing retailing, commercial and entertainment development will be discouraged.
- [F] It is intended that there will be a close correlation between centre location and public transport accessibility. Centres will be an important focus of the public transport system, with a direct correlation between the level of a centre in the hierarchy and the frequency of public transport. Generally, the higher order centres are located to maximise their accessibility by frequent public transport provided by rail, line haul bus routes (including busways) and ferries; while lower order centres are intended to be located where they are serviced by at least local bus routes. New centre development will not be supported in locations not serviced by public transport in this way. Centres should also be located so that they have ready and safe access by bicycle and pedestrian trips.
- [G] New Regional, Major District or District Centres are not supported. Consolidation and reinforcement of existing centres is the preferred means of meeting community needs. New centres will only be

allowed at the lower end of the hierarchy, where it can be demonstrated that they are required to meet community needs, that these needs cannot be met from an expansion of existing centres, and are consistent with any applicable Local Area Outline Plans.

- [H] Proposed extensions to existing centres will generally be assessed for their impacts on nearby lands, the movement system and the hierarchy of centres. It will also be necessary to ensure that any expansion of higher order centres does not impact inappropriately on similar or planned centres outside the city. Map 4 of this Strategic Plan indicates the location of some of these centres outside the City.
- [I] Any development proposal which would result in a centre moving to a higher role in the hierarchy than indicated in this Strategic Plan will generally not be supported; and will only be considered for approval where it is demonstrated that this is required to meet community needs and that it will not adversely effect the overall hierarchy of centres.
- [J] It is intended to ensure that centres develop as focal points for community activity. Consideration is required in the design and development of centres to ensure that they cater for the social needs of communities, as well as the commercial needs of the market place. To achieve this, centres should develop in a co-ordinated way, ensuring that all elements (including community spaces, retail, commercial, community services, public transport, landscaping, site access, emergency access and internal movement systems) are integrated. Provision should also be made for internal and external spaces which promote community interaction and public security and safety.

.....

.....

.....”

[10] “The Hierarchy of Centres of Centres” is set out in 3.3.4.2

“Each of the centres in the City provides a range of functions and services characteristic of their role within the hierarchy of centres. Strategic Plan Map 4 designates those centres in the hierarchy down to the level of ‘District Centre’. These are the higher order centres, the lower order centres being the Suburban, Neighbourhood and Convenience centres.

The hierarchy of centres consists of the following:

- the Central City

- Regional Business Centres (RBC)
- Major District Centres
- District Centres
- Suburban Centres
- Major Neighbourhood Centres
- Minor Neighbourhood Centres
- Convenience Centres”

[11] Regional Business Centres are to meet the need of a catchment population of the order of 200,000 to 250,000, Major District Centres those of a catchment population of the order of 100,000 to 150,000 and District Centres the needs of a population generally of about 50,000. Suburban Centres and Major Neighbourhood Centres are dealt with in 3.3.4.2(e) and (f):

“(e) Suburban Centres

Suburban Centres provide mostly retail facilities, small scale commercial and community facilities and some recreational facilities to service mostly the weekly needs of a population generally less than 25,000.

There will be an overlap in some of the suburban retail services and functions with the District Centre. Hospitality and community services are expected to comprise only a small component of these centres.

There may be some higher-level commercial and community facilities located in Suburban Centres rather than in District Centres, because of advantages in location or other reasons peculiar to the location and the nearby population.

The retail component is most likely to comprise only a full-line supermarket and specialty shops. A department store or discount department store will not be approved in a suburban centre unless it is demonstrated that the centre should operate at a higher level in the hierarchy and can do without impacting on other centres in the hierarchy.

Suburban Centres are intended to be accessed by Suburban and District Roads, and by at least one mode of public transport, cycling and walking.

Suburban Centres may be established to provide for the needs of developing or redeveloping urban areas.

(f) Major Neighbourhood Centres

Major Neighbourhood Centres are intended to provide the retail and small scale commercial and recreational facilities for discrete residential areas of populations not likely to exceed 8,000. Usually there will be several Major Neighbourhood Centres within the influence of a Suburban Centre. The catchments of Major Neighbourhood Centres may overlap in some instances.

This type of centre provides convenience shopping facilities at a lower level than a full-line supermarket.

Major Neighbourhood Centres may also contain professional services, local business, some limited entertainment facilities and minor community facilities. They may also provide a suitable location for serviced offices for local resident workers.

Retail facilities will provide mostly for the daily or weekly shopping needs of the population.

Recreational facilities in Major Neighbourhood Centres will be supported to enhanced their use throughout the day.

Major Neighbourhood Centres are intended to be served by public transport and be located on District Roads and Neighbourhood Access Roads. They should be readily and conveniently accessible by cycling and walking.

There will be a need for additional Major Neighbourhood Centres to provide for growing populations in developing urban areas.

Existing and future Major Neighbourhood Centres should be located to allow for adequate adjacent land to support the co-location of compatible community services.”

[12] Local Area Outline Plans are dealt with in 3.5:

**“3.5.1 Introduction**

In order to achieve certain focus objectives of the Strategic Plan ‘potential development ares’ have been identified and planned for in greater detail to achieve more functional and integrated communities. The resulting plans are referred to as Local Area Outline plans. Council has applied Local Area Outline Plans to the following localities:

...

- Algester/Calamvale/Parkinson/Stretton

...

Further Local Area Outline Plans may be prepared in the future.

The plans are the result of concept planning which integrates all of the necessary components of the urban and natural environment into a physical pattern for each area. The outcome of this process will assist the development of more efficient and effective urban areas.

The plans draw on the forward planning focus objectives of the Council, State Government and infrastructure providers. Preparations of the plans has taken into account factors including urban design, transport planning, water supply and sewerage provision, drainage, public transport, bikeways, open space, recreation and environmental matters.

...”

### **“3.5.2 Intent**

The intent of the Local Area Outline Plans is to provide a framework for the development of land in each area, ensuring the integration of urban development, open space, service infrastructure, transport networks, access and mobility, as well as the protection of areas subject to environmental and scenic constraints.

It is intended that the plans will provide a statutory framework within which the development community will be able to prepare proposals with a clear understanding of Council’s intentions for the areas and accordingly for Council to be able to assess any application against the respective Local Area Outline Plan.

The Local Area Outline Plans do not replace the existing zoning of properties, but rather put forward the most desirable potential land use for that area. In some cases the existing zoning may be inconsistent with the desired land use identified in the Local Area Outline Plan and in cases such as these it will be necessary to rezone the subject site to an appropriate zone.

Service providers will also be able to make more informed decisions and undertake long term programming based on the overall development framework indicated by the Local Area Outline Plans.

### **“3.5.3. Implementation**

The Local Area Outline Plans are intended to be a schematic base to express Council’s policies and a physical planning framework for the study areas. They are not static documents, but are capable of amendment as available information or circumstances change. However, major land use and infrastructure components have been derived from a consultation and design process and significant departures from the plan are unlikely during the life of the Strategic Plan.

...

...

The Local Area Outline Plans have identified patterns of preferred land uses, open space and transport corridors to guide Council's discretion when assessing development applications. In some cases they identify privately owned sites as desirable for community facilities. The process of private development or public acquisition of these sites will occur in response to demands created by development in the areas.

..."

3.5.4.6 deals with "Desirable Parklands". There is an indication that not all parklands may be required – for example, if expected population increases in the locality do not eventuate. The listed means of the Council obtaining suitable parkland areas includes "where appropriate, development contributions at the time development approval is granted."

3.5.4.11 provides for LAOPs to identify desirable primary/secondary school locations, and 3.5.4.12 deals specifically with Centres:

"Each of the Local Area Outline Plans includes at least one centre to serve the retail, commercial, entertainment and other demands of the residents of the area. Each Local Area Outline Plan area has been examined and will be adequately serviced by existing or proposed facilities in the area or in adjacent areas.

The City-wide hierarchy is as set out in paragraph 3.3.4.

The Local Area Outline Plans include centres up to Major District Centre level. The nominated centres are expected to grow to provide the level of service and facilities detailed in paragraph 3.3.4, over the next 10 to 15 years. Where a centre is indicated as covering a road intersection, the centre may be located on any of the corners adjoining the intersection."

Finally, it is desirable to note parts of 6.1 which sets out the Intent for the Future Urban Zone:

- [A] "The Future Urban Zone is intended to implement the Urban Areas Directions of the Strategic Plan as they apply to developing or not yet developed areas.

- [B] Land included in the Future Urban Zone is comprised mainly of land which is generally suitable for urban or suburban residential purpose in the future. This zone represents a stock of land which is intended to be developed at some time in the future for residential and associated purposes.
- [C] It is intended that all new dwellings developed in this zone will have good access to public transport, open space, schools, shops and community facilities. These services and facilities should be provided as early as possible and should be co-located in and around centres.
- [D] Similarly locations for other land uses which are usually associated with residential areas should be identified at an early stage to ensure compatibility with surrounding uses, maximisation of land use efficiency and to promote more self contained communities.
- [E] Areas close to centres and accessible to higher frequency public transport are the preferred locations for medium density housing and non-residential uses which contribute to the utility and vitality of centres. Areas more remote from centres are preferred for lower densities typified by detached housing.
- [F] While land in the Future Urban Zone is to be used primarily for residential purposes it is intended that other land uses which provide services or amenity to newly developing areas should also be provided for in appropriate locations. This includes uses such as centres, schools, open space, personal services, health care facilities, youth clubs and emergency services.
- [G] These land uses are to be accommodated in locations which maximise the service they provide to the surrounding community while minimising any associated impacts.
- [H] Locations for such land uses should be identified at an early stage so that the community will be aware of future development in the area and so that infrastructure and services can be efficiently planned and provided.
- [I] While land within the zone is generally suitable for urban and suburban purposes some lands within the zone have been identified as containing areas of environmental significance.  
...
- [J] It is intended that as land in the zone is developed, significant natural features will be retained and incorporated as part of the overall development of the area. In some cases the careful and sensitive development of all or part of sites within these areas may be possible, while for other sites, development would not be possible without detracting from the natural features.

...

- [K] Applications for rezoning and/or subdivision in areas to which Local Area Outline Plans apply will be required to be supplemented by town planning reports. These reports should address the integration of the proposal uses into their surroundings in the context of the Local Area Outline Plan. The criteria for the location of residential uses and other development are outlined below.”

**“Residential Development**

...

**Other Uses**

- [L] Well serviced, amenable communities will be developed in this zone by allowing for a range of complementary commercial and employment opportunities and ensuring that land is provided for local community purposes and other community facilities and public purposes. These facilities should be central or highly accessible to their respective catchments and wherever possible be co-located in or near centres.

- [M] Land uses which are likely to draw significant levels of non local traffic into residential streets will not be approved

...

- [N] **Fast Food Stores** should generally be located only in or at the edge of centres.

...

- [O] **Shops** should be located in centres nominated in the Local Area Outline Plans. Additional smaller centres and local stores may also be approved provided that the scale and timing of any such development is not likely to significantly defer or affect the viability of any centre nominated in a Local Area Outline Plan. Small shopping groups or corner stores should be located such that all residents in the Future Urban Zone are within 400 metres walking distance or cycling distance of convenience shopping facilities.

...”

- [13] Other provisions upon which the appellants placed reliance include: - from “The Vision”:

**“2.2 Principles**

The vision is underpinned by principles of environmental quality, social justice and economic efficiency.

**Environmental quality** ensures the protection of biological diversity and maintenance of essential ecological processes and life-support systems. The Town Plan seeks responsible environmental actions to achieve and maintain a high level of beneficial and sustainable aspects of environmental quality, health and well being of the community.

**Social Justice** ensures that available social, economic and ecological resources are distributed equally across the sectors of the community and between individuals, accessible to the population they serve and are adequate to meet the needs and priorities of individual communities. It also promotes opportunities for people to participate in the process determining the distribution of these resources.

**Economic efficiency** ensures that social, economic and ecological resources are productively and sustainably utilised. The Town Plan seeks to encourage economic development that safeguards the welfare of existing and future generations.

Where anything in this Strategic Plan is capable of more than one interpretation, the interpretation which best satisfies these principles will be preferred.”

#### “10.3.4 Development Standards – Business Zone

10.3.4.1 The provisions of 10.3.4.2 to 10.3.4.7 are development standards applying to development involving the erection or use of any non-residential building or composite building in the Business Zone.

#### 10.3.4.2 Height of Building

The planning unit of any non-residential building or composite building –

- (a) ...
- (d) where not in a Regional Business Centre, shall not contain more than two storeys above ground level;
- (e) in determining whether any relaxation of the maximum height standard for any building is warranted the Council shall have regard to, amongst other things –
  - (i) the nature of existing and likely future development in the vicinity of the site;
  - (ii) the zoning of land in the vicinity of the site;
  - (iii) the likely height of future development in the vicinity of the site;

...

#### 10.3.4.5 Boundary Clearance

- (a) Subject to clause (b) where any site abuts land included in the Residential “A” Zone , the Residential “B” Zone or the Inner Residential Zone no part of any non-residential building or composite building above the level of the adjoining ground shall be within a distance measured on a horizontal plane –
- (i) equivalent to half the height of that part or three metres whichever is the greater, from a side boundary of the site;
  - (ii) equivalent to half the height of that part, or six metres whichever is the greater, from the rear boundary of the site.
  - (iii) In determining whether any relaxation of the side boundary clearance or rear boundary clearance standard is warranted the Council shall have regard to, amongst other things –
    - (A) the topography of the site and adjoining land;
    - (B) the design of the proposed building;
    - (C) the nature of any development on adjoining land.

...

#### 10.3.4.7 Relaxation of Requirements

- (a) Subject to clause (b), and clause (c), the Council may relax any development standard as set out in this paragraph other than a development standard relating to maximum allowable gross floor area of any development;
- (b) any relaxation of the height of any building not in a Regional Business Centre shall not result in that building exceeding three storeys in height above ground level.

...”

#### “24.3.3 Matters to be Considered in Deciding an Application

The following matters, to the extent they are relevant to the proposal the subject of an application, shall be considered by the Council in deciding, the application:--

- (a) the extent to which the proposed development would be in accordance or in conflict with the Strategic Plan
- (b) the extent to which the proposed development would be in accordance or in conflict with the applicable development

standards including the reasons put forward for the justification of any proposed relaxation, waiver or variation of them;

...

(e) the environmental impact of the proposal including:

...

(iv) the effect on any Vegetation Protection Order, significant trees or other vegetation on the site;

...

(vi) the economic impact of the proposal including, but not limited to, the impact on the hierarchy of centers as set out in the Strategic Plan;;

...

(f) the areas proposed to be cleared of vegetation;

...

(k) the impact the proposed development would have on the existing traffic situation and the extent to which the proposed development would create a traffic problem or increase an existing traffic problem;

...”

[14] The provisions set out above are likely to be replaced in about October 2000 when the Draft Plan is gazetted. This document, like its predecessor, is the product of considerable community consultation, and may be taken into account under the principle expounded in *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117. There should be no changes of great significance for the present appeal. There will be Outer Suburbs Local Plans derived from Local Area Outline Plans for localities including Algester/Calamvale/Parkinson/Stretton. In relevant maps, Nottingham Road loses its equality of status with Beaudesert Road,

becoming a Suburban Road. Chapter 3 deals with Centres. The number of types of Multi-Purpose Centres is reduced to four:-

**“7.2.1 Intent**

Four types of Multi-purpose centres are identified in the Plan:

- **the City Centre** (MP1) is the political, administrative, economic and social heart of Brisbane
- **Major Centres** (MP2) are the major concentrations of Centre Activities outside the City Centre. Major Centres are located at Fortitude Valley, Toowong, Indooroopilly, Upper Mt Gravatt, Carindale, Toombul-Nundah, Chermside and Brookside-Mitchelton
- **Suburban Centres** (MP3) provide a variety of services. They may be characterised by small tenancies within a limited area, or lower density larger tenancies over a broader area. They generally contain more than 6,000m<sup>2</sup> of gross floor area.
- **Convenience Centres** (MP4) are smaller centres providing local services within walking distance of residents. They generally contain less than 6,000m<sup>2</sup> of gross floor area.”

7.2.2 “Desired Environmental Outcomes” is, in part:

“...

5. Suburban Centres provide for a variety of Centre Activities, Building bulk and form is more substantial than that of the surrounding residential neighbourhood, while building height is generally consistent with that of surrounding suburban development.

...”

**The proposal represents the planned “suburban centre”**

[15] I agree with Mr Lyons Q.C’s submission that the effect of the Intent provisions in 6.1 is that :

- “(a) areas for new dwellings are to have good access to shops;

- (b) shopping and other non-residential land uses should be provided as early as possible;
- (c) commercial and community facilities should be co-located in or near centres;
- (d) it is intended that land in the future Urban zone should, in addition to being used for residential purposes, be used for centres;
- (e) centres are to be accommodated in locations which maximise the service they provide to the surrounding community;
- (f) commercial uses which are complementary to residential communities are to be developed in the zone;
- (g) commercial and community facilities should be central or highly accessible to their respective catchments;
- (h) fast food stores should be located in or at the edge of centres, and not elsewhere.”

and that the Statement of Intent for land designated Urban (3.3.2.1) reinforces the Intent for the Future Urban zone. That the planning documents identify the site as a suburban centre is a significant factor in favour of the application. Cf *Bayview Country Club Pty Ltd v. Redland Shire Council* (1998) QPLR 173, 176D, *Heilbronn & Partners Pty Ltd v Brisbane City Council* (1999) QPELR 267, 269I; *Creed v Caboolture Shire Council* (1994) QPLR 97,98.

[16] On the face of things, the present proposal fits ideally into the planning scheme, indeed it supplies the centre the planners envisaged for the site. The primary catchment population was 22,800 in June 1999 (22,600 on Mr Norling's figures, up from 12,196 in June 1991 and 18,333 in June 1996), is projected to be 26,700 two years from now, 30,080 (and still growing) by June 2006 - Mr Norling says 30,300. The secondary catchment (at any stage) will add about 11,000 more potential consumers. The supermarket proposed to be operated by Woolworths is a “full-line supermarket”, as is common ground, and (subject to what is said later about the Foxdawn site) no other is planned for the primary catchment. The expression is not defined, but was taken to refer to a supermarket containing departments such as

fresh produce, delicatessen, bakery and a meat department, and possibly one selling fish. Following overseas trends, the space thought to be necessary to accommodate such a facility is coming to be estimated ever more generously; the minimum area is now understood to be 3,000m<sup>2</sup> or so, as presently proposed. In fact, the “majors”, Woolworths, Coles and Franklins were said to require “modules” of particular sizes to accommodate stores stocked at various levels. A full-line supermarket not only offers a full range of departments, it is likely to carry extra lines, and certainly will carry additional brands and a large (if not full) range of package sizes for the lines it does carry. Mr Finlay, who gave evidence for the appellants, works for a company seeking to establish a large chain of independently operated supermarkets to be badged “IGA” which will provide competition for the majors. He said a “full-line supermarket” could be accommodated in 2,500m<sup>2</sup>, and indeed that such a supermarket is contemplated at the “Foxdawn site”, located at the intersection of Nottingham Road and Algester Road, 1.7 kilometres away from the subject site. The Council has given a relevant approval for the Foxdawn site; the loss or downgrading of what is proposed there has been one of the appellants’ principal arguments in this appeal. The Foxdawn site is now designated in planning scheme maps as a Major Neighbourhood Centre; in the Draft Plan Local Plan it becomes a desirable Convenience Centre; its merits include the immediate availability of local public transport.

### **The Foxdawn site’s prospects and significance**

- [17] The history of the Foxdawn site, more particularly of proposals for a shopping centres there, is somewhat chequered: According to Mr Lyons QC’s submission for the co-respondent (paragraph 67) the Council gave an approval in principle for a

shopping centre on the Foxdawn site in 1991, which seems to have been a selling point in the marketing of nearby residential blocks by the original subdivider, Stockland – it sold the shopping centre site to Foxdawn Pty Ltd. Whether the date 1991 is accurate or not, a shopping centre has been slow in coming to fruition. The approval relied on in this appeal, attachment GRB1 to ex 50, was a Negotiated Decision Notice dated 23 September 1999, which refers to representations made to Council by letter of 8 March 1999. The plans (ex 46) are stamped to refer to an approval dated 17 February 1999. GRB1 suggests the underlying application was lodged with the Council on 20 August 1998. Foxdawn Pty Ltd found itself unable to proceed, and Mr Gregory Ross Beatty of Melbourne and two partners purchased the Foxdawn site at a mortgagee auction, probably in November 1999, through a company GJB Developments Pty Ltd, settlement occurring on 20 December 1999. They seem to have purchased on the basis of limited investigation, without knowledge of the co-respondent's proposal, Mr Beatty not inspecting the Foxdawn land until after the auction – he was for a time in confusion as to whether the relevant local authority was the respondent or Logan City Council. Foxdawn Pty Ltd was a submitter in the present matter, but not a party – nor was Mr Beatty's company. I did not understand any argument to be mounted that it had any reasonable expectation the present application would be refused: given the lack of enquiry, any contention along these lines would attract little sympathy. However, the approved Foxdawn proposal (as I shall continue to call it) is much relied on by the appellants to show what facilities residents of the nearby sections of Parkinson and Algester will lose if this appeal fails. Mr Beatty's evidence, if presented to persuade the court that there are prospects of a shopping centre going up, should the appeal fail, does not satisfy the relevant standard of proof. The ex 46 and ex 50

plans have been substantially recast in ex 53, which has not gone to the Council yet. Mr Beatty asserted his entitlement to develop as per ex 50, but was careful to avoid expressing any commitment or willingness in any circumstances to do it. As things happened the Foxdawn application and approval ran a few weeks ahead of the co-respondent's, giving the appellants a technically correct argument that Foxdawn gained a chronological priority requiring it to be taken into account from the points of view of "orderly" development of the area, assessment of need for further facilities and the potential loss of facilities "presently enjoyed by a community or planned for it". Such an argument founders here, for lack of a factual basis. Sad as it may be to contemplate the continued disappointment of Parkinson residents at their failure to gain a local supermarket, medical centre and pharmacy, the fact is that there has never been more than a chance of such enterprises establishing on the Foxdawn site. Mr Beatty has no firm tenants, no building. Whether Parkinson would be deprived of anything by the failure of this appeal is pure speculation. The Foxdawn approval will be unaffected.

- [18] If the proposal the subject of this appeal goes ahead, the Foxdawn one is unlikely to for some years, unless it be in much smaller form, such as 800m<sup>2</sup> for the whole centre. It is difficult to feel any confidence that, even if this appeal be allowed, Foxdawn would go ahead to provide useful services for the residents of Parkinson. This is because success in this appeal may serve only to delay the co-respondent's proposal, or something like it, and maybe for only a short time. One possibility is that by some means there would be a consolidation bringing in the land to the west so that a Suburban Centre on a larger scale would be developed, which might be less problematical from many points of view including scale or bulk of buildings

(especially near boundaries with private neighbours), parking and traffic flows into Nottingham Road. Mr Michel has confirmed that Woolworths' enthusiasm for the subject site is such that they would wait for five years, and possibly longer. Were Woolworths to withdraw, the Suburban Centre designation in the Planning Scheme maps would remain; any Foxdawn developer would have to look over its shoulder at the Suburban Centre site, knowing that competition likely to be devastating could come from there at any time. The evidence is overwhelming that the subject site, from the point of view developing a successful shopping centre based on a large supermarket, is vastly superior to Foxdawn in visibility and drawing power. It is not reasonable to expect that the subject site should be sterilized, especially so, given its designation as a "suburban centre". It is clear and was common ground in the appeal that the planning scheme contemplates the hierarchy of centres operating more or less independently at each level so that, say, the catchments of three or so major neighbourhood centres and a single suburban centre will roughly co-incide. (This comment does not overlook Mr Bowie's argument that the present proposal is premature, and should await a population increase.)

- [19] The appellants placed considerable reliance on *Kentucky Fried Chicken v Gantidis* (1979) 140 CLR 675, in which Stephen J said at 687, with the concurrence of Gibbs, Mason and Aickin JJ, in relation to matters proper for consideration by the Victorian Town Planning Appeals Tribunal:

"The learned primary judge described one submission urged before the Tribunal, namely that the establishment of the appellant's proposed fried chicken shop would 'adversely affect existing food shopping facilities' in the neighbourhood as being just such a consideration as I had earlier held, in *Spurling v. Development Underwriting (Vic.) Pty. Ltd.* [1973] V.R., at pp. 12-13, to be a proper planning consideration. I would with respect, agree with his Honour; the significant word, quite vital to the nature of the

submission to which his Honour referred, is 'facilities'. If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration."

Such a statement is entitled to the greatest respect, although it would appear to be unnecessary to the High Court's decision, given that Barwick CJ, who expressed similar views at 681, noted that the parties "were in agreement that the proposed use did not threaten the amenity of the neighbourhood." It is difficult to know what to make of Stephen J's reference to "shopping facilities presently enjoyed by a community or planned for it in the future." I was attracted to the opinion expressed by Mr Challoner, a town planner who gave evidence, that crushing competition leading to the blighting of existing facilities was of concern, rather than impacts on facilities merely proposed, and not yet in existence or even under construction. (I appreciate that a town planner may not give evidence of the meaning of planning scheme provisions and that a similar proscription would apply to a town planner's view of the meaning of a dictum of a High Court Judge.) At present, there is insufficient definition of what might go on the Foxdawn site. The present owners clearly are contemplating making significant changes to the Council-approved proposal. For the moment, the residents of Parkinson have no more than an ill-defined prospect of the amenity of their suburb being added to by development of a shopping centre of some kind at the Foxdawn site. On the

evidence before this court, the factual basis for applying the town planning principle recognized in *Gantidis* is not shown: what Parkinson might be deprived of, if the present proposal goes ahead, if anything, is completely uncertain. Further, the present proposal will considerably improve, above present levels, the facilities available to Parkinson residents. It may attract some of the tenancies Mr Beatty envisages (- in relation to the pharmacy this may involve relocation of the pharmacy at Kameruka Street, in light of present restrictions based on proximity of other pharmacies).

### **Need**

[20] The appellants' contention that the Strategic Plan makes "need" a relevant consideration is accepted. While the view is open that the mere designation of the site as a Suburban Centre is conclusive of the question of need, there are indications to the contrary. The Strategic Plan was conceived as looking to a planning horizon still a decade away. While there may be discerned a philosophy of getting facilities in place to serve a population that may still be well short of its potential maximum, there is nothing to say that every development foreseen or allowed for by the plan should be approved at the earliest possible time. Indeed, Mr Bowie, for the appellants, argued that reference can be found in 3.3.4.1 of the Strategic Plan (set out in paragraph [9] above, in particular to the paragraph thereof marked [G]) to the relevance of need in just such a context as the present. "New centres" are only to be allowed that "are required to meet community needs that ... cannot be met from an expansion of existing centres". There was argument as to whether the present proposal is for a "new centre" at all, given the Suburban Centre designation of the site in the planning scheme. For the affirmative view, Mr Bowie claimed support in

the reference to “existing centres”, likewise to “existing facilities” in the first paragraph of 3.3.4.1. The co-respondent’s proposal, he says, is not in existence, therefore must satisfy the requirements for a new centre if it is to be approved. On the other hand, 3.3.4.1 alludes to the “distribution of centres currently intended for the City”. The LAOPs refer to “nominated centres” without distinguishing between those centres which exist and those centres which do not. The subject site, as it happens, appears to be the only example in the planning documents of a nominated centre which not only does not exist, but has (apart from the approval under appeal) no development approval. While recognizing the argument that the centre should not be regarded as a new one, the court ought to proceed on the cautious basis of assuming that need as mentioned in the statute or needs of the community as mentioned in 3.3.4.1 should be demonstrated.

- [21] The evidence of Mr Norling, Mr McCracken and Mr Michel shows such need(s) in the planning sense. The decided cases adjudicating upon need probably cannot be reconciled. Mr Bowie, understandably, emphasised those such as *Queensland Investment Corporation v. Toowoomba City Council* (Appeals 3643, 3646 and 3628 of 1999, 2.6.00) where Judge Brabazon QC said:

“What has been shown is that there will probably be a substantial demand for the new complex ...

However, demand is not the same thing as need. That was pointed out by Judge Skoien in *All-a-wah Cara Park v Noosa Shire Council* 1989 QPLR 157. The question here is , whether there is a need for this development.

The question of need is an elusive concept. Here, planning need is in issue. The commercial needs of competitors are not the same as the needs of the community as a whole. It has been made clearer, in one respect, by the recent decision of the Queensland Court of Appeal in *Arksmead Pty Ltd v Council of the City of the Gold Coast* (Appeal 4436 of 1999 10 March 2000 unreported). The large

number of cases cited by counsel in this appeal illustrate the uncertain boundaries of the concept of need. The issue can be put this way – is there in existence at this time a latent unsatisfied demand on the part of those in the Toowoomba region, for cinema facilities, which is not being met at all, or not being adequately met, by the present facilities? It must also be kept in mind that while the Wilsonton complex would be convenient for those in that locality, it would not be as convenient as a CBD cinema, for those coming from the other side of Toowoomba.

The evidence does not show a planning need for this cinema complex.”

(- it might be noted that *All-a-wah* was a case quite unlike the present, in which the court’s view that the proposed shopping centre would not be successful suggested there was no need for it) - and *Intrafield Pty Ltd v Redland Shire Council* (4337 of 1999, 12.5.00) where Judge McLauchlan QC said:

“There is no real evidence of inadequacy in respect of the two major service stations I have mentioned, or the Shell Select at Victoria Point. There is, for example, no evidence of queuing or overcrowding at existing outlets. Of course convenience for the motorist is a major element in establishing planning need, but in my opinion in this case the evidence does not go further than to show that the proposal would be an attractive and additional choice for some of those motorists. That falls short of showing that the needs of motorists are not at present adequately catered for: *William McEwans Pty Ltd v Brisbane City Council* (1982) 2 APAD, 165 at 170; *Prime Group Properties v Caloundra City Council* (1995) APER 147 at 149. Whether or not the proposal, if approved, would be a viable operation, is a matter hotly contested by the two expert witnesses. If it was, it would achieve this result at the expense of other service stations currently providing the service to the residents of Victoria Point and Redland Bay (although it is not suggested that any of these would be rendered “uneconomic”). The fact that a number of these commuters would be likely to purchase their petrol supplies and convenience goods at the proposed service station instead of at outlets currently patronised by them no doubt indicates a degree of convenience offered by the proposed outlet in comparison with the existing outlets. This does not, however, in my opinion, of itself demonstrate that there is a demand for the provision of a new facility in the vicinity of the proposed service station. Given an addition to existing choices a number of consumers are likely to avail themselves of it as a matter of human experience. While this indicates a consumer preference, to an extent which is, however, debatable, it does not demonstrate

inadequacy in the existing arrangements and therefore falls short of showing a planning need for the development”.

One of the factors in assessing need is the existence of earlier consents, which arguably should not be prejudiced, and the availability of other land appropriately zoned, although “the existence of appropriately zoned land may be of little consequence where that land has not been used for a purpose for which it could be used under the relevant Planning Scheme” – per Row DCJ in *Hervey Bay Projects v Hervey Bay City Council* (1993) QPLR 104, 114. In this application, unlike *Castro v Douglas Shire Council* (1992) QPLR 146,153 for example, a rezoning has not been applied for, and it may be that none ever becomes necessary. Whether or not reference need be made to zoning maps in this appeal, assessment of need does require consideration of the Foxdawn site and what is likely to happen there.

[22] It is convenient to quote Mr Trotter’s submission (for the Council) as revealing authorities to somewhat different effect from Mr Bowie’s:

“28. Need

A thing is needed if its provision, taking all things into account improves the physical well being of the community (see *Cut Price Stores Retailers Pty Ltd v Caboolture Shire Council* 1984 QPLR 126, 131; *Indooroopilly Golf Club v B.C.C.* 1982 QPLR 13, 33 to 36; *Begley v Pine Rivers Shire Council* 1995 QPLR 134, 139).

29. If need can be met by the proposal and is therefore of advantage to the community and does not thereby deny or otherwise affect the satisfaction of community need in other respects to its disadvantage, the rezoning can be justified because it is consistent with the community will. (See *Williams McEwans Pty Ltd v B.C.C.* 2 APAD 165; *Reiken v Ipswich City Council* 1984 QPLR 147, 150; see also *Aussi Hire Pty Ltd v Brisbane City Council* 1996 QPLR 270, 274).

30. Furthermore, as Skoien SJDC said in *Palmwoods Residents and Ratepayers Association Incorporated v Maroochy Shire Council and Anor* 1977 QPLR 331, 335C:

*“Of course, the absence of need is not fatal to an application to rezone. Section 4.4.(3)(b) of the Act simply requires need to be taken into account. Then, as has frequently been said, need relates to the improved physical well being of the overall community rather than to some pressing necessity. See, for example Cut Price Stores Retailers Pty Ltd v. Caboolture Shire Council (1984) QPLR 126 at 131. Considered in that light, it seems to me that the availability of the residential subdivision of the type proposed, in a growth area of the State will accommodate a need.”*

31. ... the question of need was recently considered by the Court of Appeal in *Arksmead Pty Ltd v. Council of the City of Gold Coast* (Appeal 4436 of 1999, 10 March, 2000 unreported). Such decision, it is submitted, has little relevance to the present circumstances. In that case the Court said at p. 18 of the Judgment:

*‘Taking those matters into account, we conclude that the legislature did not intend to deprive the Planning and Environment Court of the authority to consider the question of need or the absence of it in a case like the present one.’*

It is still true to say that:

*‘Need in planning terms is a relative concept. It does not connote pressing urgency but rather relates to the general well being of the community. A use would be needed if it would, on balance, improve the services and facilities available in a locality.’ (See *Roosterland Pty Ltd v. Brisbane City Council* (1986) 23 APAD 58 at 60.)*

In my opinion, reinforced by the view that determination of the future of the Foxdawn site is likely to await clarification of the ultimate (as opposed to immediate) fate of the subject site, there is a planning need for what is presently proposed for it. To the extent that the planning scheme itself calls for a suburban centre the finding of planning need is further strengthened.

[23] In planning matters, need (which is not necessarily exactly the same thing in 3.3.4.1 as in section 4.4(3)(b) of the *Local Government (Planning and Environment Act) 1990*) is something far less than necessity. The area which both Mr

McCracken and Mr Norling accept as the primary catchment for the proposed development includes sufficient population already to warrant establishment of a Suburban Centre, and has grown significantly since the inception of the Strategic Plan. To access a full-line supermarket of the size proposed, residents of the primary catchment must travel outside the area to the appellants' shopping centre Grand Plaza, at Browns Plains – outside the area of the City of Brisbane, or north to Sunnybank Hills at Compton Road (where there is no Woolworths). Grand Plaza has been very successful, indeed the Woolworths there so much so that it “over-trades” and is under stress. For whatever reason, Sunnybank Hills has not been entirely successful; it may be because access, for many, requires a detour along Compton Road and because entry is by a rather unwelcoming multi-storey carpark, of a kind which the evidence suggested many people find uncongenial; the closest parking to both the Franklins Big Fresh and the recently-rebadged Pick and Pay Hypermart (operated by Coles) at store level is some distance away; the evidence suggests that many residents in the presumed catchment area to the north prefer to shop further north at one of the three shopping centres at Sunnybank. Home-based trips by residents of Calamvale, Parkinson, Algester, Stretton or Drewvale to Sunnybank Hills or Grand Plaza to carry out their weekly “chore shopping” will obviously add to pressure on busy Beaudesert Road. No witness expected otherwise than that the proposed new Woolworths full-line supermarket would trade well; Mr Michel thought that not much trade would transfer from Woolworths at Grand Plaza, and expected a good deal of its custom would come from the North. On the evidence, the proposed full-line supermarket and shopping centre would provide shopping facilities to residents of the catchment area superior to what is available to them at present, fulfilling the Vision as expressed in the Strategic Plan.

The evidence does not support the view that the existing amenity of any locality will suffer if the development goes ahead. The residents of Parkinson, in particular, while perhaps condemned to further delay in seeing any substantial development at the Foxdawn site, will have, relatively handy, facilities superior to anything available to them at the moment.

### **The proposal is too small**

- [24] One objection raised by the appellants was that at 5500m<sup>2</sup>, the proposal was too small for a suburban centre, having regard to the 6000m<sup>2</sup> minimum indicated in the draft plan. Even if the draft plan were in force, it is far from mandatory in this respect, the minimum being one which “generally” (but not inevitably) applies. In the special circumstances of this case, the well-used adjoining facility of the Community Hall may reasonably be aggregated with the proposal – indeed, the conditions of the Council’s approval require provision for access to and from the Hall through the site, which would become necessary on closure of the service road, along Beadesert Road, which is the present access.

### **Prematurity**

- [25] A related objection was that the proposal may be seen as premature, because land to the south of the site and land to the west could and should be incorporated in the nominated suburban centre, which would then be designed as a unit. The land to the south located behind the Community Hall is not likely to form part of the

suburban centre, except as recreational space. It is designated “Desirable parkland in this approximate vicinity” in the present LAOP and in the local plan included in the draft plan, a description which, in the court’s view, may be taken as indicating its likely future.

[26] The land to the west of the site, where a residence presently exists, is likely to be redeveloped in a commercial way, as an extension of the suburban centre. The available area, as things stand, will be confined at the west, by the extension of Lakewood Avenue north to Nottingham Road – although further land for the centre might possibly be made available by relocating that extension. Either way, the probability is that a substantial enlargement of the proposed suburban centre to the west will happen. Ideally, the enlarged suburban centre might be designed as a single development (there seems no legal necessity that a suburban centre be in single ownership or developed that way). However, the court has no information whatsoever as to the intention of the owner(s) of the western land, and it is not demonstrated that there is any point in waiting to find them out.

[27] The Council’s expectation of expansion of the suburban centre to the west explains its insistence that the co-respondent provide by way of easement access across its site to the property immediately to the west. While criticism may properly be made of the location of that easement, the appropriate place for traffic interconnection between the properties cannot sensibly be identified until the future of the “dominant tenement” is known. Commercial interests will no doubt dictate that the interests concerned cooperate to bring about suitable arrangements for traffic movement, along with any appropriate relocation of the easement presently envisaged and creation of new cross-easements.

[28] Such expansion of the suburban centre promises beneficial effects from the standpoint of the co-respondent and its proposal –firstly, by permitting improved access between the centre and Nottingham Road via new means of ingress and/or egress west of the present site; secondly, by disposing of concerns that the co-respondent’s proposal might have an unacceptable visual impact on residential areas immediately to the west and (to an extent) the south west. The general principle that a development should not rely on neighbouring land to contain or reduce its impacts is accepted; but should not be invoked without due recognition of features special to this case, whereby in the long term, the visual impact of the rather massive bulk of the structures presented to the south and west will be contained or reduced by the Community Hall and “desirable parkland” and by new commercial development to the west which can be placed and designed so that the co-respondent’s supermarket comes to be “located centrally” conformably with 3.3.4.1 – [D] in para [9].

### **Orderly development**

[29] The appellants argued that the present suburban centre proposal did not represent the “orderly” development envisaged by the Strategic Plan, and was premature from various points of view, that local population is still too small to warrant it, public transport services are almost existent, and should not be anticipated – nor should projected improvements in the road system, associated with the state schools nearby or generally. Orderly development was said to require that the Foxdawn project be established first, in acknowledgment of its priority and the just claims of nearby

residents. There were suggestions that existing centres might suffer from the advent of this new competitor, to the extent of suffering “blight” which (while “healthy competition is generally for the public good”) has been seen as an outcome a court with a planning function should take some care to avoid: *Jadmont Pty Ltd v The Council of the Shire of Miriam Vale* (1998) QPELR 351, 354-5. The only centre identified as being at risk of a “downward spiral” was Sunnybank Hills – on the basis that Mr Michel of Woolworths was correct in his view that the centre and his company’s supermarket particularly would draw most of their trade from it. Sunnybank Hills, on the evidence, has had its ups and downs over the years in any event. The evidence overall does not persuade the court that the application should fail, so that Sunnybank Hills which already has several competitor centres can be protected against additional competition. We are supposed to be in a free economy. It should not be the business of the Council or of the court to act to assign citizens as consumers to particular centres. It was accepted in *Jadmont* that the court should eschew approving a shopping centre that might never be built (there, the applicant’s) and compromising future planning by granting an approval for a site which may never be acted on. Here, the approval that may never be acted on is not the co-respondent’s, but the Foxdawn one. Mr Bowie placed much more weight on the argument that the Foxdawn proposal should be protected from the chill winds of competition than on his argument that existing centres should be.

[30] One of Mr Bowie’s authorities was *Kakavas v Council of the City of Ipswich* (1996) QPELR 340, which at 346-49 contains an interesting discussion by Judge McLauchlan Q.C. of the considerations where shopping centres approved or applied for will create over-capacity. The court allowed an objector appeal against a

rezoning approval which would permit extension of the existing Camira Shopping Centre onto adjacent land. The judge's view was that there was no economic need or planning need, because of his confidence that a proposed neighbourhood shopping centre two kilometres away would go ahead; that centre, to be called Springfield Fair, was regarded as premature by something like six years, and one whose viability would depend on the tenants being subsidised, which the developer was willing to do, as part of its wider marketing strategy in the overall development of the Springfield Estate. In the circumstances, no extension of Camira was needed. The court was unwilling to add to overcapacity by approving the rezoning. The applicant could have adduced evidence that improvements at Camira Shopping Centre required more land, but had not attempted to do so. Interestingly, his Honour at 349 expressed the view that if there was a planning need for the extension, the amenity impacts of the proposal would be acceptable, but in the absence of such a need, they were unacceptable.

### **Traffic Impacts**

- [31] The Council's traffic engineer, Mr Mogg, and Mr R. Holland, a traffic engineer engaged by the co-respondent, expressed the view that the traffic impacts of the proposal would be acceptable. The approval conditions require the co-respondent to pay for relatively modest works to provide three "through" lanes in Beadesert Road at the intersection, where there are now only two, and additional left-turning lanes into Nottingham Road and Honeysuckle Way. Mr Brameld disagreed with their sanguine expectations. He was particularly critical of the "Draft" Guidelines emanating from the Main Roads Department in about 1995 for estimating the traffic generated by shopping centres, which he said produced figures which were too low.

The data used to produce the draft have never been made available, and there are grounds for thinking that they may be largely “hearsay” and guesstimates, rather than based on accurate counts. Mr Brameld plainly preferred rather higher figures which he said he adopted himself, and were supported by traffic counts apparently done by Mr Holland’s son (and now partner) as part of the requirements for a master’s degree and apparently set out in a thesis or paper held in a university library. The counts related to a shopping centre at Kenmore, said to be comparable with the one presently proposed, to one at Corinda and to one at a shopping centre at Kameruka Street, fairly close to the subject property. Although presumably available, Mr Stewart Holland, the author of the thesis, has not been called to give evidence. Understandably, his father, who was, spoke highly of Mr Stewart Holland and his work. In the circumstances, with no opportunity for that work to be subjected to the scrutiny of cross-examination, it seemed to me completely wrong to accept the counts apparently referred to in it. There has simply been no opportunity to explore possibilities that the counts may have been erroneous, or “flukey” in some way or vitiated by some error in methodology. While the counts underlying the Main Roads Department “Draft” Guidelines, which have never attained any greater status than that of draft, may be even more unreliable or doubtful, if the whole truth were known, the draft, on the evidence, is widely accepted and acted on by professional people in the field, and, for all that appears, without untoward effects. Mr Hughes achieved a minor triumph by demonstrating that Mr Brameld himself has adopted the draft, notably in relation to the Foxdawn proposal, and, relatively recently, permitted his own firm to continue to use figures taken from the draft.

- [32] The unknowns that complicate assessment of traffic flows to and from the site include whether the fast food outlet will be a McDonalds, likely to generate higher flows, or not.
- [33] The traffic engineers were at variance as to the traffic flows to be allowed for in Nottingham Road. There is a general consensus that the road is overused already in peak hours and that work needs to be done to improve traffic flow at the intersection with Beaudesert Road whether or not the proposed development proceeds. It seems to me the limited works which would have to be done by the developer pursuant to approval conditions set by the Council would accommodate increases in traffic flow attributable to the conduct of the proposed shopping centre. On the evidence before the court, there is hope that other works entirely will substantially alleviate the congestion presently experienced in Nottingham Road and at the intersection. The first group of such works concerns the creation of a new link to the west and north of the school site which will give access to Beaudesert Road along Muirhead Street. This will essentially clear Nottingham Road in the vicinity of the site of school related traffic, creating a vastly improved “set-down” arrangement for students along a significantly increased frontage, with associated off-road parking. Mr Brameld suggested there is doubt as to this proposal proceeding. However, I was impressed by the confidence with which the Minister for Education announced that the new school at Calamvale (incorporating a high school) will be open for the school year 2002. At a more practical level, there is a suggestion that the Council will be unwilling or unable to provide the half share of the cost of roadworks (totalling \$1million) which the Education Department would like the Council to contribute. Suggestions to similar effect did not sway the court

in *Yu Feng Pty Ltd v Maroochy Shire Council* (1999) QPELR 16,24. While acknowledging such problems, I have concluded that the prospects of the new school and associated roadworks coming to fruition at the time indicated are sufficiently good to be accepted as constituting a probability on which the court may act. The new school is being designed with the new frontage in mind and most of the existing buildings will be demolished. The change will not only alleviate the traffic situation in Nottingham Road, it will do away with the serious concerns which numerous parents hold for the safety of their children who are being set down or picked up at the school. So far as the new shopping centre, and the takeaway food outlet in particular, may operate as an enticement to students, the new arrangements will render the usual school exits and entrances quite remote from the shops. Evidence of at least one parent confirms that, as things are, many students pay scant regard to their own safety once outside the school grounds, and take their chances going across Beaudesert Road, for example, wherever it suits them to do so, rather than at designated crossing points.

- [34] The foregoing comments do not cover the situation of the Special School in Nottingham Road. It is convenient to note at this point Mr Challoner's rather stern approach (to which there is really no alternative) that parents are responsible for their children's safety and safety education. The court can assume that the parents of special school students will be appropriately vigilant. Unfortunately, the demands of the wider, growing city community cannot be rejected on the basis that the amenity of a small institution must be preserved. The special school and its community will have to (and surely will) adapt to whatever change comes.

[35] Further into the future, perhaps about 2004, there will be a new east-west link across Beaudesert Road at Illaweenah Street, when Algester Road is extended to Beaudesert Road. Indeed, the roadworks at the new intersection itself have already been carried out: what remains to be achieved is the completion of the extension of the existing Algester Road from the north-west to make the link. Further to the north, indeed, north of Muirhead Street, when another short missing link is completed, there will be another useful connection from Parkinson and Algester eastwards to Beaudesert Road, at Ormskirk Street.

[36] No-one suggested the shopping centre would be operating before the year 2002. It has to be conceded that to the extent that the period before then sees construction of the proposed shopping centre, there will be construction related traffic in Nottingham Road. Mr Brameld told the court that vehicle trips generated by a dwelling house were taken as the same whether the house was occupied or under construction. There was no evidence as to the traffic construction of the shopping centre might generate. I do not think concern in this respect would justify forbidding or delaying the proposed development. Any problems might be exacerbated by traffic generated by the construction of the new school and associated roadworks. It might be feasible to impose conditions which would quarantine at least parts of the construction related traffic to times outside the Nottingham Road peak hours, and in particular the school-related peak hours.

### **Pedestrians crossing Nottingham Road**

[37] Mr Brameld's main concern, which the court shares, is the danger associated with vehicles exiting the site to turn right into Nottingham Road, at the entrance close to

the western boundary of the site. There is proposed an entrance to the east, roughly in the middle of the site, the only one which will allow vehicle ingress to the site from Nottingham Road by a right hand turn (from a dedicated turning lane). Both entrances will cater for left-turning ingress and egress; egress for vehicles turning right will be available only at the western entrance. The danger is that drivers who may well have become impatient waiting to exit in a queue will move, turning right, as soon as a break, perhaps an inadequate one, emerges in westbound traffic in Nottingham Road. Such a driver's attention is focussed on the stream of traffic coming from the right; a pedestrian who is crossing Nottingham Road from the north at the indicated crossing on Ex.9 heading for the marked pedestrian refuge within the median strip might not be noticed, and the pedestrian, concentrating on traffic in Nottingham Road, may not notice the turning vehicle. Their intended paths cross. The other aspect of danger is that the driver exiting the site in stressful conditions may pay so much attention to what is happening to the right as to miss traffic heading along Nottingham Road from the west – drivers in that stream of traffic cannot be relied on to be alert to notice a vehicle turning across their line of travel from private land on the far side of the road.

- [38] Serious as this potential hazard is, I do not regard it alone, or combined with other matters, as requiring the co-respondent's development application to be refused. Notwithstanding that the centre will tend to attract persons of all ages to cross Nottingham Road to go to it in a way the undeveloped site would not, I consider that significant changes to pedestrian and vehicular traffic patterns will happen, and in time to alleviate the hazard to an extent, such as reduced school traffic and relocation of school entrances away from the site. Some helpful things are likely to

happen over time, especially if the land to the west of the site becomes part of the suburban centre. Other measures are plainly available already, such as strong encouragement to pedestrians to cross Nottingham Road to or from the site only at the intersection of Beaudesert Road, which is controlled by traffic lights; barriers might be constructed to preclude pedestrians crossing at unsafe locations as illustrated in Ex.70, if pedestrians are to be invited to cross elsewhere than at the intersection (no compelling reasons for this appearing); any permitted crossing locations might be indicated by signs, or flashing lights; more drastically, egress from the site might be limited to left turning, if development to the west permitted safe U turns in Nottingham Road or even a roundabout at the intersection with an extended Lakewood Avenue. These matters were not properly explored in evidence, but seem to me to warrant some further consideration.

[39] While one would expect traffic planners to anticipate and plan for the worst case scenario, by adopting the peak traffic generation numbers and the like, I record my respectful agreement with Judge Quirk's comments in *Hollis v Brisbane City Council* (2494 of 1999, 28.2.00) at page 5 of the unreported reasons:

“...while I do not question the credibility of the witnesses for the Co-Respondent, it is the approval (and its reasonable possibilities) upon which one should focus ... having said that I believe that **it would also be equally inappropriate to take an unduly negative view of what is intended and suppose that a ‘worst case scenario’ in traffic engineering terms was inevitable.** Unfortunately that seemed to underlay the case put forward by the Appellant and the assumptions made by his consultant.”

I would add that it is not necessarily a disaster if occasional traffic holdups do occur; motorists who find they cannot tolerate them will travel at different times, or by different routes, which, as seen, will increasingly become available in the Calamvale area.

### **Public Transport**

[40] There is a busstop in front of the site in Nottingham Road. However, the only services presently utilizing the stop are limited commuter-type ones presumably designed to suit city workers, and confined to peak hours on week days. These can hardly be seen as providing a useful local service or as facilitating access to and from the site for the shopping population the suburban centre is intended to serve. The surrounding areas west of Beaudesert Road are still too thinly populated to warrant local bus services (which do, however, operate in Alger Road past the Foxdawn site); such services will come if there is enough demand to satisfy whatever “viability” criteria are applied. While the co-respondent cannot support its application by referring to public transport availability, this issue should be looked at in a practical, reasonable way, with some faith that if public transport facilities (which no rational operator would run at the moment) came to be required, they will be offered. The application should not fail because they are not operating yet. The planning scheme enthusiastically backs public transport, cycling and walking. Even if one is cynical about the likely level of willingness of residents of the primary catchment to embrace them (and especially for purposes of weekly shopping) one would expect the Council to support its planning instruments through reasonable efforts to establish bus services, bikeways, etcetera.

### **Visual Amenity Impacts**

[41] What follows is substantially a reproduction of Mr Bowie’s written submissions on this issue:

“92. The subject land abuts land in the Future Urban Zone and is near land in the Residential ‘A’ Zone. Professor Brannock has identified a range of design deficiencies, the effect of which is to result in a centre which will

have unacceptable impacts on the visual amenity enjoyed by residents of the Lakewood Estate; and which will result in a centre which will not, ultimately, satisfy the Council's long-term strategy for development of a suburban centre as shown on the LAOP.

93. The court should consider the Application as constituting an application to rezone the site from the future Urban Zone to the Business Zone. Section 10.3.1 of the Town Plan provides that development in the Business Zone is '*generally limited to a height consistent in scale with the surround [sic] residential area*', a requirement with which this proposal is clearly in conflict. Mr Bennett (the Council's planner) conceded that the proposed building is greater in height than currently existing development in the locality and that the proposed development may not meet certain outcomes required by the strategic Plan.
94. Professor Brannock says that the southern boundary of the shopping centre will constitute an extensive rear building wall, together with an elevated service road, extending for almost the entire length of the site. He says that the height and length of the proposed shopping centre would be excessive given the existing and likely future character and scale of development in the vicinity and the proposal would be incompatible with the height and scale of future residential development in the vicinity.
95. Further, Professor Brannock says that the height and length of the proposed development will result in a visually obtrusive built form which would be discordant with the scale and character of existing and likely future development within the vicinity. In his opinion, the height of the building at its south-western corner (14.9 metres) equates to a four-five storey building, well beyond the two storeys (8.5 metres) permitted in a suburban area.
96. ..
97. ..
98. It may be suggested that the Particular Development Zone is an alternative choice of zone. But that zone is used where the development options in the generic zone are too broad for a sensitive site, it is not intended as a means of allowing development which would be unacceptable in the appropriate generic zone, in this case, the Business Zone. See Town Plan 5.15.1
99. The architect, Mr De Clara, concedes that the building height and bulk are such that the eye needs distraction – yet the Applicant presents a development which does not even comply with the minimum setbacks provided for in the Town Plan. The Applicant gives no justification (other than its own requirement for an over-developed site) for the relaxation it needs.
100. Mr Chenoweth (environmental planner and landscape architect) concedes that the design solutions adopted by the Applicant are those used to

disguise a large warehouse. Mr De Clara says that some of the concerns could be overcome by re-design – but no amendment is proposed.

101. As to the elevation of the building, Mr De Clara stressed that he wanted to maximise the centre's exposure to Nottingham Road and Beaudesert Road. He also acknowledged that he elevated the development above the level of previous residential development; and conceded that the building could have been lowered by one or two metres. He conceded that one available design solution was to step the building down the slope, but that solution was not adopted.
102. Professor Brannock emphasised in practical terms the bulkiness (one and a half football fields in length) and height of the building – and did not regard the design 'solutions' put forward by the architect as at all successful. Professor Brannock identified the real difficulty with the centre design; the site is inadequate for the degree of development proposed – and the resulting design will not only have unacceptable impacts on the visual amenity, enjoyed by the Lakewood Estate residents (to the south and west) it will prejudice future inclusion of land to the west in an expanded suburban centre, leaving the residents of the houses on that land with unacceptably impaired amenity.
103. Mr De Clara also conceded that a fast food store was not an essential component of a shopping centre of this size and conceded that commercial opportunism was the basis for isolation of the fast food store from the centre itself. Professor Brannock identified the spatial requirements (especially carparking needs) as a cause of some of the centre's design problems.
104. Mr De Clara conceded that in terms of obtaining sufficient at grade parking, the size of the site was a constraint – and it is the basement car park which is most responsible for the eventual total building height, as Mr Chenoweth concedes.
105. As to the false facade panels, (free standing decorative structures placed in the foreground from the point of view of observers to the south and to the west) Mr De Clara conceded that they have no three dimensional component, but on that basis there seems to be no justification for them at all. The court might conclude that when seen from any angle they will look highly unusual; and may well emphasise the visual dominance of the building.
106. Mr De Clara's decision to place the building as close as possible to the southern boundary of the site not only contributes to the visual dominance of the building; but also limits opportunities for screening it from the residential development to the south and south-west. Mr Chenoweth concedes that the building looks worst from the south west corner.

107. The Development Standards for the Business Zone require building setbacks to side and rear boundaries to provide opportunities for buffering and screening of development.
108. The southern boundary is, in the appellants submission, the rear boundary. The buildings face Nottingham Road, not Beaudesert Road. The centre is accessed only from Nottingham Road.
109. Treating the southern boundary as a side boundary, the required setback is half the height of the relevant part of the building. The service road balustrade is at a height of about 8 metres (requiring a 4 metre setback);
110. The scheme does provide for relaxation but no relaxation can be justified here.
111. Mr Chenoweth concedes that the 2.85 metre landscaped area to the south is insufficient to provide for the screening of the shopping centre, even to the limited extent proposed.
112. He concedes that the difficulty lies with the extreme narrowness of the landscaping strip available.
113. He further concedes that the screening of the shopping centre on the southern boundary will rely on trees in the adjoining property, not only those in the proposed park but also the eucalypts at the Calamvale Recreation Hall. The Applicant must keep its impacts within its own property – if it seeks a relaxation of setback requirements where it is unable to do so, that relaxation ought not be granted.
114. It is clear from Mr Chenoweth's evidence that not only would a 6 metre setback have assisted with on site screening, the process of moving the buildings further away from the southern boundary would also have the effect of reducing their visual impact, a proposition with which Professor Brannock clearly concurs.
115. Both building height and bulk are unacceptable; and the setback relaxation the proposal requires cannot be granted.

[42] As to the aesthetics of what is proposed, Professor Brannock's views were not supported by other witnesses; they had their own ideas. Mr Challoner thought Mr De Clara had gone to too much trouble to decorate the building to soften its lines and reduce the impression of bulk. Likewise, Mr Chenoweth approved of the architect's methods of "breaking up" the built form. As well as the court can judge

based upon drawings (unusually difficult given that the relevant exhibits split the main elevations into two overlapping sections), the appearance of the development will be no worse than that of several similar developments (larger and smaller) inspected with the parties' legal representatives on the first day of the hearing, and will be appreciably better than some. Professor Brannock thought the reduction in height offered by the architect would make no useful difference. The height problem is exacerbated by the site's falling away to the south and west from Nottingham Road and Beaudesert Road. The proposal is at ground level at Nottingham Road. In light of strong evidence that customers prefer single level projects for visits for weekly or convenience shopping, and "at grade" parking, it does not seem practicable to have a stepped development. In the court's view there are objections to a "sunken development", not only as to its visual impact from the road and footpaths above (as to which there was no evidence), but also as to the convenience and safety of the necessary vehicle ramps (as to which there was evidence).

- [43] The falling away of the land means that the building is significantly elevated to the south and west, effectively on a raised podium which accommodates a roadway around the perimeter. Roughly a quarter of the site, at the south west, is a basement carpark largely beneath the supermarket pedestrian access to which will also give access to the community hall and the 'desirable parkland'. Experience is, the evidence indicated, that patrons dislike basement carparks – no doubt they will use them as a last resort. If that expectation proves too sanguine, the applicant and its tenants will probably pay the commercial price of the underground car spaces and the shops being empty. If the court is permitted to philosophise, it could be thought

a good thing to intensify land use in this way (that is, by basement parking facilities) and limit the amount of open space concreted or asphalted to accommodate parked vehicles. One of Mr Beatty's proposed changes for the Foxdawn site is to do away with basement parking. In my opinion the development would be less workable, less attractive and convenient for its patrons, if the appellants' apparent suggestion of lowering the supermarket were adopted.

[44] Their argument that the development is too small (to qualify as a suburban centre) is accompanied by one that it is too big, in the sense that the architect has put too much on the site. As to the fast food outlet, which it is suggested could be omitted, it seems odd to contemplate that the court would force amendment of a development proposal to deprive the developer of a commercial advantage at the behest of a commercial rival. It might be noted that the proposed fast food outlet is exactly where the town plan says it should be, "in or at the edge of (a) centre" 6.1 – set out above in [12][N]. Over development of the site is said to be the reason for inappropriate relaxations of boundary clearances, or setbacks. Assuming Mr Bowie is right about those, as to which boundary, if any, is the rear boundary, the relaxations granted here are reasonable in the special circumstances (of the existing and likely future use(s) of all adjoining land).

[45] The objection to the height of the building was based on its equivalence to 4 or 5 "storeys", its location near to residential areas and the contention that the site (for assessing the visual impacts of what may be done there,) should be considered as a candidate for inclusion in the Business Zone. I do not agree with that assumption – as noted elsewhere, the site may never be rezoned, and yet the proposal may still go ahead; "Business" is not the only relevant rezoning, but there is some utility in

enquiring whether the proposal would exceed what is permitted in the Business Zone.

- [46] There is no definition of “storey”. The appellants relied on *Macedonian Orthodox Church and Community Gold Coast Inc v The Council of the City of Gold Coast* (Appeal 15 of 1995 - Southport, Judge Newton. 14.1.00) and *Queensland Investment Corporation v Toowoomba City Council* (Appeals 3643, 3646 and 3688 of 1999, Judge Brabazon QC 2.6.00), in each of which there was a relevant limit of two (undefined) “storeys”, and developers asserted that in church and cinema uses respectively, they proposed a single storey; the Judges, noting surrounding residential development, thought it appropriate to refer to the height of a two storey house, and concluded they were dealing with buildings of 3 and 4 storeys respectively, with inappropriate development in each instance. I am not prepared to construe “storey” in a similar fashion here. Any “storeys” contemplated here are in commercial buildings, which in a practical sense in this case are not in a residential area. The intensive residential development across Beaudesert Road is relatively far away, the development across Nottingham Road is educational in nature, to the south of the site will be the buffer of the community hall, behind it (more likely than not) the designated parkland, featuring tall vegetation. To the west is a residence (whose owner was not a submitter); the likely future of that property, indeed, one could say all of the western land to the extended Lakewood Drive, is to be incorporated in the Nottingham Road suburban centre. The co-respondent’s proposed development, bulky as it is, is going to be significantly isolated from, rather than an intrusion into the surrounding residential precinct.

[47] While the arguments against the building proposed based on visual impacts deserve considerable respect, in the special circumstances of this site, they cannot be assessed as unacceptable.

### **Character of the area**

[48] A number of witnesses (and doubtless numbers of submitters and other people) opposed the proposal because of the changes it threatened to the character of the area, including Nottingham Road's becoming busier and more dangerous to children and losing some of its capacity for parking. Mr Griffin is apprehensive that the possibility of safely setting down his child at the footpath outside the special school will be lost, and with it an important opportunity for the child to exercise some independence. Mrs O'Reilly said the primary school was chosen for her children on the basis of its apparently being in a safe, pleasant, residential area. It is clear that many will regret the loss of a sizeable tranquil, well-vegetated area at a busy intersection. While the court is sympathetic to such concerns, it cannot usurp the Council's position as the planning authority for Brisbane. cf. Per Quirk DCJ in *Elan Capital Corporation v Brisbane City Council* (1990) QPLR 209, 211 citing *Brazier v Brisbane City Council* 26 LGRA 322, 327 and *Sheezel v Noosa Shire Council* (1980) QPLR 130. In times past, the expectation may have been that areas close to the perimeter of Brisbane might retain some rural or semi-rural character, and that their residents must accept relative remoteness from facilities of kinds located handily for inner city dwellers or suburbanites. That is contrary to the current planning philosophy which envisages that residents in every part of Brisbane will have comparable convenience of access to basic shopping facilities of the kind proposed here. While the concerns listed in this paragraph are entitled to

consideration as part of the overall circumstances, they are deprived of weight by a planning philosophy which requires that residential areas of the growing City of Brisbane will be much the same in presently relevant respects whether they are 10 km from the GPO or 20.

### **Vegetation Protection Order**

[49] The site is affected by at least one Vegetation Protection Order (printed on recycled paper) A512 GT46 of 2 November 1993 in respect of “a particular group of trees - all trees contained within hatched area.” The order assigns as the reason for it that “the trees have distinctive scenic and landscape value”; the most valued trees on the site are the stand of scribbly gums. Inspection of the site confirms that the making of the order was warranted. However, Ex.72 proves a dozen revocations of Vegetation Protection Orders in Calamvale in late 1996 and on 14 May 1998 – a bad day for flora, none of which orders is shown to have less merit than the present one(s). It is impossible to resist the conclusion that a developer with a useful project may readily obtain revocations, which represent part of the price of growth and progress. It would be unfair to reject the present proposal because of a VPO. It allows for the retention of a certain number of existing trees and particularly so along the western boundary – with the effects of rendering the location of the western entrance less than optimal and compromising the access that may become available between the site and the land to the west.

### **Centre Integration**

[50] The appellants contended the applicant’s proposal did not meet the requirement of integration of design within centres. Section 7.1.1 of the draft City Plan (not yet in

force, of course) promotes the concept of centres which are “well integrated effectively and attractively connect by way of **built form** (emphasis added) and pedestrian movements to other elements of the centre beyond the shopping mall’s car park or any other existing barriers.” It is not so clear that the strategic plan calls for the same focus on integration but the notion may inhere in expressions such as “orderly”. It was said it would be difficult in the extreme for any developer of land to the west to achieve integration of built form, given that such development will face the blank end wall of the “big box” supermarket and that Mr Chenoweth conceded, in terms of integration with land to the west, that the only planned integration is to allow for the car parking areas to be cross connected; he acknowledged that there is a potential conflict between the access point for that proposed connection and the various traffic within the site (service and loading dock etc) – yet approval has been given by the Council and is sought for now from the court for that access point.

- [51] Ultimately, the appellants argued, the real difficulty for the architect was the over-development which the applicant sought on site, including an isolated fast food store at the intersection, requirements which have, in effect, “skewed the design of the centre so as to have a maximum adverse impact on the community interest.” As a matter of history, the Council tried to get the applicant to redesign its centre to meet certain strategic planning requirements it had, but, in the end, abandoned the attempt. The prospects for the future are probably not as bleak as Mr Bowie claims. The Council has been willing to compromise, placing a high value on getting this suburban centre established; the court agrees that the “integration” aspect should not defeat the application.

**Is there conflict with Strategic Plan?**

[52] The appellants contended the application conflicted with the Strategic Plan, within s.4.4(5A) of the *Planning and Environment Act*, for example:

- (a) because the site is not and may not for some time (until large scale residential development occurs to the north) be served by local bus routes;
- (b) because “community need” cannot be proved;
- (c) because of traffic impacts;
- (d) because of visual impacts, particularly the bulk of the building proposed, which calls for impermissible relaxations (assuming the rules for Business Zone apply);
- (e) because of failure to meet requirements for centre integration.

Explanations appear elsewhere in these reasons for the court’s view that clear conflict with the Strategic Plan, read as a whole, is somewhat difficult to identify. Assuming that conflict exists, the court’s view is that there are sufficient planning grounds within s.4.4(5A)(b) to justify approving the application.

**Need to read Plan as a whole:**

[53] In a complex appeal such as this, the court should read the planning scheme as a whole. I have set out extensively passages which I accept are relevant, and have taken into account. The scheme is bulky, often repetitive, and not devoid of conflicting messages. Provisions are there which come close to providing “support

for almost any argument”, to quote Senior Judge Skoien in *Drivetype Pty Ltd v Council of the Shire of Caboolture* (1995) QPLR 141, 143J. See also *Agtec Holdings Pty Ltd v Kilcoy Shire Council* (1999) QPELR 208, 209L, *Holts Hill Quarries Pty Ltd v Gold Coast City Council* (1999) QPLR 415 418 and *Aussie Hire Pty Ltd v Brisbane City Council* (1996) QPLR 270, 273. Mr Bowie referred to *Z W Pty Ltd v Peter R Hughes & Partners Pty Ltd* (1992) QdR 352, 360. Examples of conflicts presently relevant are whether shopping facilities in centres should be “provided” as early as possible (6.1) while new centres are allowed only on demonstration “they are required to meet community needs that .... cannot be met from an expansion of existing centres” (3.3.4.1), whether a building whose levels would preclude its approval in the (not necessarily applicable) Business Zone (10.3.4) and is out of scale compared with the nearby residential development may be approved if justified in a suburban centre as a department store or discount department store (3.4.2 (e)); there is a “chicken and egg” argument as to which has to come first, a suburban centre or public transport. *Ibid*, which seems to contemplate transport may follow, contrast with 3.3.4.1 in paragraph [9] [F] above

### **The “Pioneer Concrete” point**

- [54] I have had occasion to reject development applications as “piecemeal” under the principle of *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485. See *Cunningham v Brisbane City* (2139 of 2000, 22.6.00, reasons published 12.7.00) *Martin Lewis v Mareeba Shire Council* (Cairns 4 of 2000, 4.7.00) and *Mitchell Ogilvie v Brisbane City Council* (1032 of 2000, 21.6.00). It is

argued that the present application is afflicted with this deficiency by reason of the condition of the approval (insisted upon by the Department of Main Roads) that easement access through the site be provided to the Community Hall, that the site is therefore proposed to be used for hall purposes, which would be a material change of use not applied for. The easement to the western land is likewise relied on; given that the future use of that land is unknown, impacts, especially traffic impacts, cannot be assessed. *Ecovale Pty Ltd v Brisbane City Council* (1999) QPELR 189, 191 shows that such arrangements made informally may not offend *Pioneer Concrete*. In this case, I find the submission of Mr Lyons persuasive:

“The effect of the condition is to ensure that as a matter of ownership, the community hall will have the legal right to pass over the subject land. The condition does not have the effect that the Applicant will use the subject land for community hall purposes. Its effect goes to title rather than land use. The result would be the same if, as a result of negotiations between the owner of the subject land and the owner of the community hall, an agreement were reached to grant an easement over the subject land to the owner of the community hall. The condition simply ensures that as a matter of title, access is available through the subject site.

If the owner of the community hall seeks to avail itself of the benefit of the easement, a question will arise whether such use is lawful, under the legislation which regulates planning and development at that time. That will depend upon the form of the planning scheme, and the form of the legislation (currently IPA). If the effect of the legislation is that it is necessary to obtain some form of approval, then the owner of the community hall will have to seek that approval, in order to use the easement lawfully under the planning legislation. However, that use is not part of the Applicant’s use of the subject site. It cannot be said that use of the easement by the owner of the community hall site is ‘incidental to or necessarily associated with’ the Applicant’s proposed development of a shopping centre. See the definition of ‘use’ in the IPA in Schedule 10, and in the P&E Act in s.1.4; see also *Boral Resources (Qld) Pty Ltd v Cairns City Council* [1997] 2 Qd R 31. (If it were, separate identification of the use in the application would have been unnecessary in any event).”

The same reasoning applies to the other easement.

## **Conclusion**

[55] The court is not able to pronounce the applicant's proposal ideal. It understands that the various impacts it will have will not all be improvements measured against the status quo, which is an unused "oasis" in a developing area attractively vegetated - moreso since the demolition of whatever residential development used to be there. Some of the impacts apprehended cause more concern than others, none of them is unacceptable, in this rapidly developing area; none of them is surprising or unexpected since the LAOP designated the site in the way it did.

[56] My conclusion is that the appeal should be dismissed. The parties will have the opportunity to submit for further or other orders consistent with these reasons, both in respect of the traffic aspect identified as concerning to the court, and generally.