

# PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Moncrieff v Townsville City Council [No.2]* [2011] QPEC  
100

PARTIES: **S & D MONCRIEFF**  
(Appellant)

**AND**

**TOWNSVILLE CITY COUNCIL**  
(Respondent)

**AND**

**DEPARTMENT OF MAIN ROADS**  
(Co-Respondent)

FILE NO/S: D59/09

DIVISION: Planning and Environment Court

PROCEEDING: Appeal

ORIGINATING  
COURT: Planning and Environment Court, Townsville

DELIVERED ON: 16 May 2011

DELIVERED AT: Townsville

HEARING DATE: 13 – 16 September 2010

JUDGE: Durward SC DCJ

ORDERS: **1. Substantive appeal allowed**  
**2. Decision of respondent dated 27 January 2009 set aside.**  
**3. Development Application for a Development Permit for a Preliminary Approval approved subject to lawful conditions.**  
**4. Appeal adjourned for determination of appropriate conditions of approval.**

CATCHWORDS: PLANNING & ENVIRONMENT - PLANNING SCHEMES  
- preliminary approval overriding planning scheme - rural to park residential - land contiguous with but outside urban growth area boundary - extension of existing park residential area - balancing of public and private interests

PLANNING & ENVIRONMENT - MINOR CHANGE - development application - park residential - reduction in

number of proposed lots - non-reticulated in lieu of reticulated sewerage proposed - whether latter is a minor change

PLANNING & ENVIRONMENT - ASSESSABLE DEVELOPMENT - compliance with rural planning area code and urban growth area code

PLANNING & ENVIRONMENT - IMPACT ASSESSMENT - CONSTRUCTION OF PLANNING SCHEME - whether compromise of DEO's - whether conflict with planning scheme - whether sufficient grounds to justify decision despite conflict

LEGISLATION: *Integrated Planning Act* 1997 ss 1.3.3, 1.3.6, 3.1.6, 3.5.5, 3.5.5A, 3.5.14, 3.5.14A and 4.1.52; *Sustainable Planning Act* 2009 ss 350 and 819; *Local Government Act* 2009 ss 250, 251.

PLANNING SCHEME: City of Thuringowa Planning Scheme 2003

CASES: *Moncrieff v TCC* [2010] QPEC 45; *Westfield Management Ltd v Pine Rivers Shire Council & The Warehouse Group (Australia) Pty Ltd* [2004] QPELR 337; *Webster v Caboolture Shire Council* [2009] QPELR 455; *Luke v Maroochy Shire Council* [2003] QPELR 447; *Woolworths Ltd v Maryborough City Council (No 2)* [2006] 1 Qd R 273; *Weightman v Gold Coast City Council* [2003] 2 Qd R 441; *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157; *All-a-wah Carapark v Noosa Shire Council* [1989] QPELR 155; *Arksmead v Council of the City of Gold Coast* [2000] 107 LGERA 60; *ALDI Stores (A Limited Partnership) v Redland Shire Council* [2009] QCA346; *Rich v Central Highlands Regional Council* [2010] QPEC 36; *Plafaire Projects Australia Pty Ltd v Council of the Shire of Maroochy & Anor* [1991] QPELR 87; *Grosser v Gold Coast City Council* [2001] 117 LGERA 153; *Casagrande Investments Pty Ltd v Redland City Council & Ors* [2010] QPEC 54; *HA Bachrach Pty Ltd v Minister for Housing* (1992) 80 LGERA 230; *Yu Feng Pty Ltd v Maroochy Shire Council* (2000) Qd R 306; *Cut Price Stores v Caboolture Shire Council* (1984) QPELR 126; *Intrafield Pty Ltd v Redland Shire Council* [2008] QPELR 455; *Harderan v Logan Shire Council* (1989) 1 Qd R 524; *Adam & Anor v Gold Coast City Council* [2007] QPELR 379; *Leda Holdings Pty Ltd v Caboolture Shire Council* [2006] QCA 271; *Gelling v Cairns City Council* [2008] QPEC 38; *Acland Pastoral Co Pty Ltd v Rosalie Shire Council* [2007] QPEC 112; *Bullock & Ors v Maroochy Shire Council & Anor* [2008] QPELR 115.

COUNSEL: C.L. Hughes SC and M.A. Williamson for the appellants  
R.A. Quirk for the respondent

SOLICITORS: p & e law for the appellants  
Townsville City Solicitors for the respondent

- [1] The appellants in about October 2006 made a Development Application for a Development Permit for a Preliminary Approval overriding the Planning Scheme in respect of a property (“the land”) situated at Granitevale Road, Alice River (the “development application”).

### **The proposed development**

- [2] The land situated at Granitevale Road, Alice River, Townsville City (formerly in Thuringowa City) is located in the Rural Planning Area under the City of Thuringowa Planning Scheme 2003 (the “planning scheme”), described as Rural 400 (property description Lot 2 on RP 738646 and part of Lot 2 on RP 728339, comprising an area of 420 hectares). It adjoins the existing rural residential estate of Rupertswood.
- [3] The development application originally proposed a master planned Park Residential Subdivision of 1,100 lots as an extension to the existing Rupertswood Rural Residential community. Modifications were subsequently made to reduce the number of lots to 850, with an increase of parkland and open space and conservation and riparian corridors. The lot sizes directly the adjoining existing Rupertswood Estate were also increased to satisfy adjoining owner’s amenity concerns.

### **Notice of Appeal**

- [4] On 27 January 2009, the respondent (the "Council") refused the development application. The appellant filed a Notice of Appeal on 2 March 2009. In the course of the hearing of the appeal the Council abandoned reliance on DEOs 1, 2 and 5. The appeal also sought relief against the decision of the co-respondent (“DMR”) made on 25 February 2008 to impose conditions on the approval of the development application. However, that part of the appeal was deferred until after the principal appeal was resolved in this hearing. DMR were earlier in the proceedings excused from participation in this hearing.

### **Decision Notice and Grounds of Appeal**

- [5] The Decision Notice dated 30 January 2009 identified four reasons for refusal. The edited grounds of appeal, in *italics*, follow each of the four reasons for refusal:
- ‘a. the proposed material change of use of land does not comply with the character statement for the Rural Planning Area specifically s 3.1.1(b)(i), (iii), (iv) and s 3.1.1(f) and (g)(iii);

- *A dominant feature of the area is the Rupertswood Residential Area.*

- *The land is separated from other rural land by road, river and power easement*
  - *The development proposal is consistent with Rupertswood rural residential area and thus consistent with the established character of the area*
  - *Rupertswood provides infrastructure to the boundary of the land*
  - *There is a minimisation of adverse environmental impacts including retention of park, conservation and riparian corridors*
  - *The proposed development consolidates the existing Rupertswood Residential Development*
  - *The expansion of Rupertswood was anticipated by sizing of infrastructure and the design of future road connection points*
  - *The proposed development will support and improve the efficiency of established infrastructure*
  - *There are limited locations for 'park residential' developments under the Planning Scheme*
  - *The land is no longer a viable rural property, because of its size and location, water sources and soil structure and slope*
  - *Any concerns are able to be addressed by conditions.*
- b. the proposed material change of use does not comply with the Rural Planning Area Code, specifically P1 (character in built form), P2 (separation distances), P5 (lot size), P6 (non-rural development) and P7 (existing and future rural amenity);
- *The grounds referred to in a. above are relevant to this reason*
  - *With respect to conflict, the 'conflict' is that of the continual rural use of the land which is adjacent to Rupertswood residential area.*
- c. the proposed material change of use does not comply with the City-Wide Codes, specifically 5.5.3 P1 (transport) and s 5.6 (urban growth boundaries) and s 5.2 (Natural Areas Code – P1 and P3);
- *The grounds referred to in a. above are relevant to this reason*
  - *The proposed development complies with City Wide Codes; AS is consistent with 5.5.3P1A1 (transport)*
  - *5.6 (Urban Growth Boundaries): the land adjoins Urban Growth Boundaries and rather than inhibit or restrict implementation of the Urban Growth Boundary Code it assists by contributing to the*

*urban efficiencies of Rupertswood. Hence there are sufficient grounds for approval despite any conflict*

- *The proposed development complies with CWC s 512 (Natural Areas Code - P3) because the concurrence agency NRW supported the proposal subject to conditions.*
- d. the proposed material change of use does not comply with the Desired Environmental Outcomes of the IPA Planning Scheme, specifically DEO 6 (land use patterns) 2.6.2(a), (b), (c) and (d); DEO 2 (environmental quality) 2.2.2(d)(ii); DEO 5 (economy) 2.5.2(b)(iii); and DEO 1 (nature) 2.1.2(iii) and (iv).'
- *DEO 6 (Land Use Patterns - the proposed development is consistent with s 2.6.2 a, b, c and d: there is integration with the adjoining Rupertswood estate, there is consolidation with the adjoining Rupertswood estate, it promotes co-location and there are transport network advantages. (NB: DEO6 was at the end of the hearing the only relevant DEO).*

### **The Appeal**

- [6] Pursuant to s 819(1) and (2) of the *Sustainable Planning Act 2009* ("SPA"), the court is required to hear and determine the appeal as if SPA had not commenced. The appeal is made under s 4.1.27 *Integrated Planning Act 1997* ("IPA") and s 3.1.6 IPA (preliminary approval overriding the Planning Scheme).

### **Overriding the planning scheme: the Preliminary Point decision**

- [7] I do not need to consider the sufficiency of the application in respect of the requirements inherent in s 3.1.6 IPA or its application to this development application. That has already been determined as a preliminary point.
- [8] In *Moncrieff v TCC* [2010] QPEC 45 His Honour Judge Robin QC ruled that the development application was an application to which s 3.1.6 of the *IPA* applied. His Honour expressed the view that "the planning scheme was sought to be varied by the site being treated as if included in the park residential planning area and not in the rural planning area or the sub-area to which it is currently assigned by the planning scheme." [11]. His Honour continued and wrote:

*"[12] Nothing like the analysis or 'expertise' necessary to appreciate the effect of varying the applicable planning scheme provisions in Stockland would be required here. There were nearly 200 submissions, the content of which shows that the authors were fully aware that the developer proposed an extension of the existing Rupertswood Estate beyond its boundaries, which coincide with the Growth Area Boundaries in this locality. The change in character from rural and the foreseeable impacts of more intensive residential development were well understood and objected to. Plans show the proposed street pattern and the number of residential lots in particular sections or stages etc.*

[13] *The application can possibly distinguish from the one which failed at Lagoon Gardens Pty Ltd v Whitsunday Regional Council [2009] QPEC 66; [2010] QPELR 74 for seeking not 'development', but a 'rezoning'; readers were left to speculate which of the uses in the new zone might actually be contemplated by the developer. The present development application avoids this pitfall. It is not sought to re-assign the site to another planning area, but to have it treated as if it were in another planning area to facilitate the future development outlined. The distinction may be subtle, but it is a distinction.*

[14] *In my opinion, the appellant's development application sufficiently 'states the way in which the applicant seeks the approval to vary the effect of any [or any applicable] local planning instrument for the land; for the purposes of s 3.1.6 to do with characterisation of the application and for purposes of s 3.5.5A for the purposes of assessment of the application, which could sensibly proceed. It appears the Council did not apprehend any difficulty in either regard until some time in 2010. The Council did assess (and reject) the development application. The preliminary point which Judge Durward SC on 8 March 2010 ordered be determined must be decided against the Council.'*

### **The IPA Provisions**

[9] The material IPA provisions, so far as are relevant about impact assessment, provide as follows:

#### **“3.5.5 Impact Assessment**

- (1) This section applies to any part of the application requiring impact assessment.
- (2) If the application is for development in a planning scheme area, the assessment manager must carry out the impact assessment having regard to the following:-
  - (a) the common material;
  - (b) the planning scheme and any other relevant local planning instruments;
  - (d) any development approval for, and any lawful use of, premises the subject of the application or adjacent premises.”

#### **“3.5.14 Decision if application requires impact assessment**

- (1) This section applies to any part of the application requiring impact assessment.

- (2) If the application is for development in a planning scheme area, the assessment manager's decision must not -
- (a) compromise the achievement of the desired environmental outcomes for the planning scheme area; or
  - (b) conflict with the planning scheme, unless there are sufficient grounds to justify the decision despite the conflict.”

[10] Where the application is for a Preliminary Approval that may override the planning scheme the assessment is subject to s 3.1.6, which provides for additional things an approval may do under Part 5 IPA. The application must be assessed against ss 3.5.5A and 3.5.14A IPA. Those sections provide, so far as is relevant:

**“3.5.5A Assessment for s 3.1.6 preliminary approvals that override a local planning instrument**

- (1) This section applies to any part of the application that requires impact assessment.
- (2) If the application is for development in a planning scheme area, the assessment manager must carry out the impact assessment having regard to the following –
  - (a) the common material;
  - (b) the planning scheme and any other relevant local planning instruments;
  - (c) .....
  - (d) any development approval for , and any lawful use of, premises the subject of the application or adjacent premises;

.....”

and

**“3.5.14A Decision if application under s 3.1.6 requires assessment**

- (1) In deciding the part of an application for a preliminary approval mentioned in section 3.1.6 that states the way in which the applicant seeks the approval to vary the effect of any applicable local planning instrument for the land, the assessment manager must –
  - (a) approve all or some of the variations sought; or

(b) subject to section 3.1.6(3) and 5 – approve different variations from those sought; or

(c) refuse the variations sought;

.....”

## **The planning Scheme**

### **A. Planning Intent**

- [11] The construction of the Planning Scheme against the legislation is a matter for judicial determination. The Court must consider the merits of the development proposal against the relevant provisions of the Planning Scheme. The opinions of town planners as to the planning intent inherent in a planning scheme, if it is expressed in evidence, are an irrelevant matter: *HA Bachrach Pty Ltd v Minister for Housing* (1992) 80 LGERA 230; and *Yu Feng Pty Ltd v Maroochy Shire Council* (1996) 92 LGERA 41. In *Grosser v Council of the City of Gold Coast* (2001) 117 LGERA 153, White J referred to the proper approach of the Planning and Environment Court to matters of planning policy. It is a self-limiting approach, at least when considering town planning matters. Her Honour wrote:

*"It is not this Court's function to substitute planning strategies ... for those which a Planning Authority in a careful and proper has to adopt (sic) ..."*

- [12] The section reference in *Grosser* to s 4.4(5A) is to the repealed legislation. The section, so far as is relevant, is materially the same as s 3.5.14 of IPA. See also Fitzgerald P in *Yu Feng Pty Ltd v Maroochy Shire Council* (2000) Qd R 306 at 332.

### **B. Relevance of Strategic Plan and Policies**

- [13] In *Grosser v Council of the City of Gold Coast* (supra), Her Honour wrote at 163-164:

*"[38] The proper approach of the Planning and Environment Court and of its predecessor, the Local Government Court to matters of planning policy has long been recognised as one of restraint. Most recently this Court affirmed the desirability of a self-limiting approach, at least when considering town planning matters in Holts Hill Quarries Pty Ltd v Gold Coast City Council [2000] QCA 268 unreported decision of 14 July 2000. The Court quoted with apparent approval at [42] the following passage from the judgment of Quirk DCJ in Elan Capital Corporation Pty Ltd v Brisbane City Council [1990] QPLR 209 at 211: 'It should not be necessary to repeat it but his (sic) Court is not the Planning Authority for the City of Brisbane. It is not this Court's function to substitute planning strategies (which on evidence given in a particular appeal might seem more appealing) for those which a Planning Authority and a careful and proper has to adopt (sic) (Brazier v Brisbane City Council (1972) 26 LGERA 322 at 327). As was observed by Carter CJ in Sheezel v Noosa Shire Council [1980] QPLR 130*

*(when he then constituted this Court), it would be quite inappropriate for this Court to deal with an individual application for rezoning in a way which might be construed as determinative of some wider question. Adopting the phraseology of those cases which deal with the non-derogation principle, I feel that to allow this appeal would be to 'cut across' in quite unacceptable manner, a planning strategy which has been adopted by the Planning Authority and publicly exhibited for community comment.' This stated a proposition which the Court said was 'common sense ... for which no authority was required' [46]. See also Ampol Petroleum (Qld) Pty Ltd v Pine River Shire Council [1989] QPLR 133 per Row DCJ at 134, 136; Bullock v Hervey Bay Town Council [1983] QPLR 98 per Carter DCJ at 100; Cherrabun Pty Ltd v Brisbane City Council [1985] QPLR 205 per Quirk DCJ at 208; and the discussion in Fogg, Land Development in Queensland (1987) pp 390 et seq."*

- [14] In *Rich & Anor v Central Highlands Regional Council* [2010] QPEC 36, His Honour Judge Rackemann wrote:

*"The relevant provisions, however, also envisage that development may be justifiable where there is an overriding need for the development in terms of public benefit and no other site is suitable and available for the purpose. In this respect, the planning scheme mirrors provisions of the State Planning Policy"; and*

*"As the state planning policy itself acknowledges, development of this nature (large rural residential or rural living allotments) is locationally flexible. That is, it is not the type of development which necessarily has to be located on a particular parcel of land or in a particular area within the Shire. It can be accommodated in a number of different locations."*

## **Discussion**

- [15] Mr Quirk submitted that there was no evidence to support the contention that there will be a reduction in the level of service (in Rupertswood and environs) if the application was refused. I do not think that there was a strong contention, if any, to that effect. Rather, the emphasis in the proposed development was the further benefit in service and infrastructure that would flow from a larger population.
- [16] Similarly, he submitted that the environmental benefits were presently achievable by intervention from appropriate regulatory bodies and that there was no evidence that the existing roads network was other than satisfactory. That may well be correct. However, such contentions are not a basis for refusing the proposal, which at the very least is another way in which environmental benefits can be provided and the road network enhanced.
- [17] I accept that the court is not a planning authority. My approach to this matter is unremarkable and consistent with the authorities to which I have referred. I will have something further to say about that when discussing the evidence and the Urban Growth Boundaries Code.

### C. Construction of the Planning Scheme

[18] In *Weightman v Gold Coast City Council* [2003] 2 Qd R 441, the Court of Appeal held that the requirement imposed by s 4.4(5A) of the Repealed Legislation was mandatory and not merely directory. Atkinson J applied the following test:

"[36] *In order to determine whether or not there are sufficient (planning grounds) to justify proving the application despite the conflict, as required by s 4.4(5A)(b) of the P & E Act, the decision maker should:*

1. *Examine the nature and extent of the conflict;*
2. *Determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;*
3. *Determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify proving the application notwithstanding the conflict."*

[19] In *Woolworths Ltd v Maryborough City Council* (2006) 1 Qd R 273, the Court of Appeal analysed the issue of conflict between the decision and the scheme and the test applied in *Weightman*:

"[23] *'Conflict' in this context means to be at variance or disagree with. It describes a quality of a relationship between the subject (the decision) and a part of the predicate (the scheme). Unlike 'compromise' in para. (a), it implies no particular impact by a subject upon an object. A determination that there has been a breach of the requirement that 'the assessment manager's decision was not ... conflict with the planning scheme' requires the identification of the decision, the identification of some part or parts of the scheme with which the decision might be said to conflict and a decision whether the former conflicts with the latter. Only if such a determination has been made is it necessary to consider whether there are sufficient planning grounds to justify the decision.*

[24] *Section 3.5.14(2)(b) differs in several respects from s 4.4(5A) and s 4.1.3(5A) of the Local Government Planning & Environment (Act) 1990, provisions which may be regarded as its predecessors. Under those sections, the subject of the putative conflict was under the application; here it is the assessment manager's decision. Under those sections the object of the conflict was any relevant strategic plan or development control plan; under the present section it is the whole planning scheme. Under those sections (if they applied) the result was a refusal of the application in the absence of sufficient planning grounds; here the result in the same circumstances is simply a non-conflicting decision. Under those sections what required justification was approval of the application; under the*

*present section what requires justification is the decision. Moreover, the grammatical structure of the two sections is significantly different. These differences mean that care must be used in complying the cases decided under those provisions to the present section."*

[20] Fryberg J (with whom Holmes J agreed) referred to the process approved in *Weightman* in respect to the repealed section. However, he said it would "[be] a mistake to treat the relevant passage in that judgment as if it were a code for the determination of justification"; and "[T]he purely mechanical application of the *Weightman* dictum should be avoided, particularly when dealing with the current statute rather than the one under consideration in that case" (at p 286 and 296 respectively).

[21] In *Westfield Management Ltd v Pine River Shire Council & Anor* (2004) QPELR 337, Britton SC DCJ said with respect to the construction of planning schemes:

*"[18] I accept that the following principles apply to the construction of planning schemes:*

- (a) they should be construed broadly rather than pedantically or narrowly and with a sensible, practicable approach;*
- (b) they should be construed as a whole;*
- (c) they should be construed in a way which best achieves the apparent purpose and objectives;*
- (d) in the light of the prescription against prohibiting development contained in IPA (s 6.1.2)(3);*
- (e) Statements of Intentions or Aims or Objectives are intended to provide guidance for the task of balancing the relevant facts, circumstances and competing interests in order to decide whether a particular use should be rejected as inappropriate;*
- (f) a Strategic Plan sets out broad desired objectives and not every objective needs to be met before a proposal can be approved;*
- (g) a Strategic Plan should be read broadly and not pedantically;*
- (h) although planning documents have the force of law they are not drawn with the precision of an Act of Parliament;*
- (i) a conflict alone may not have the effect of ruling out a particular proposal;*
- (j) implementation objectives must be read sensibly and in context. They are but a function of the principle objective; The purpose of the objective is better understood by reading*

*all of the implementation objectives and understanding the strategy that is inherent."*

*(Citations have been omitted from the cited passage.)*

## **D. Sustainability**

### **“1.3.3 Meaning of *ecological sustainability***

*Ecological sustainability* is a balance that integrates -

- (a) protection of ecological processes and natural systems at local, regional, State and wider levels; and
- (b) economic development; and
- (c) maintenance of the cultural, economic, physical and social wellbeing of people and communities."

### **“1.3.6 Explanation of terms used in *ecological sustainability***

For section 1.3.3 -

- (a) ecological processes and natural systems are protected if -
  - (i) the life supporting capacities of air, eco-systems, soil and water are conserved, enhanced or restored for present and future generations; and
  - (ii) biological diversity is protected; and
- (b) economic development occurs if there are diverse, efficient, resilient and strong economies (including local, regional and State economies) enabling communities to meet their present needs while not compromising the ability of future generations to meet their needs; and
- (c) the cultural, economic, physical and social wellbeing of people and communities is maintained if -
  - (i) well-serviced communities with affordable, efficient, safe and sustainable development are created and maintained; and
  - (ii) areas and places of special aesthetic, architectural, cultural, historic, scientific, social or spiritual significance are conserved or enhanced; and

- (iii) integrated networks of pleasant and safe public areas for aesthetic enjoyment and cultural, recreational or social interaction are provided."

[22] The Council has several published Planning Scheme Policies, including one for Rural Areas and one for Urban Growth Boundaries, made in December 2003 to support the Urban Growth Boundaries Code. Its purpose is to ensure orderly development, provision of a reasonable level of infrastructure, service and create "vibrant and liveable communities that provide a range of infrastructure, facilities and services to meet the needs of the community"; see: "1.1. Purpose of this Policy".

### **Urban Growth Boundary Policy and Urban Growth Boundaries Code**

[23] The Urban Growth Boundary is defined as "an officially adopted and mapped line that separates an urban area, existing or planned, from its surrounding, predominantly rural land. Urban Growth Boundaries identify the location of land that will accommodate the City's future residential growth. Urban expansion shall be limited to those areas within the defined boundaries."

[24] In paragraph 3.5 of the Policy, *ecological sustainability* is sought to be achieved in the planning scheme. It is described as "a balance that integrates the protection of ecological processes and natural systems, facilitates economic development and maintains the cultural, economic, physical and social wellbeing of people and communities" and is detailed in the DEO's.

[25] In paragraph 4 the policy provides *guidance* (my emphasis) as to how a development proposal involving land outside the urban growth boundaries identified on map 5.6 of the planning scheme can address Performance Criterion P2 of the Urban Growth Boundaries Code. The paragraph expresses the intention that:

*"the land outside the urban growth boundary areas will be retained for specific economic, social or environmental reasons such as agricultural land, areas of scenic protection, significant water catchments and World Heritage Areas. Land beyond the urban growth boundary areas will be used only for activities such as farming, forestry, open space and tourism."*

[26] The policy requires, for urban development beyond the urban growth boundaries, information to be furnished that the location be demonstrated as necessary and represented a well planned, orderly development. An amendment of the defined urban growth boundaries must be justified in respect of the following:

- "(a) Reasons justifying why the Urban Growth Boundary Code should not apply;*
- (b) Demonstration that areas within the urban growth boundaries cannot reasonably accommodate the proposed urban development;*
- (c) Demonstration that the long-term environmental, economic, social and energy consequences resulting from the use of the proposed site with measures designed to reduce adverse impacts are not*

*significantly more adverse that would typically result from the same proposal being located within the defined boundaries, and*

- (d) *The proposed development is compatible with other adjacent uses or will be so rendered through measures designed to reduce adverse impacts."*

[27] The appellant referred specifically to the four matters taken into account by the planning authority in justifying development outside the urban growth boundary. Mr Hughes SC submitted that there was a specific statutory policy about permitting residential development beyond the urban growth boundary and that the proposed development was compliant with the planning scheme policy.

[28] Mr Quirk submitted that residential development was not 'non-urban' development' and that the land was not within the urban growth boundary, and was in a rural area retained for non-urban development; and that the development was not compliant with the Code, section 1.8.1 of the planning scheme.

### **Discussion**

[29] The correct construction of the Policy and Code is that, by way of guideline, it allows consideration to be given to residential development outside the boundary.

[30] Mr Hughes SC submitted that the planning scheme had not made sufficient provision to satisfy "the need for a type of residential accommodation in a particular locality"; there was a potential for positive community benefits to be provided, without adverse impacts, on the land; there is no evidence to support the contention that – in the planning context – the land has or should be retained for an economic, social and environmental purpose; and the Council has approved residential development elsewhere outside the Urban Growth boundary, at Jensen and Bluewater Park.

[31] In paragraph 1.1(b) the policy refers to a "reasonable level of infrastructure service": Rupertswood does not have this. The urban growth boundary goes around Rupertswood in a rather artificial way that recognises it as an existing residential area (even though it might be some distance from other urban areas). It also does so at Rangewood. The appellant submitted that the proposed development will potentially provide that reasonable level of infrastructure service referred to in paragraph 1.1 (b).

[32] The four matters of justification in order for an amendment to the boundary to be made seem to me to be met in this case, in the following respects:

- (a) The development is a logical extension to Rupertswood:

- Integration between Rupertswood and the land;
- A need for the development in this locality;
- The services and stub road to the boundary of the land, from Rupertswood;
- The agreement exhibit 31;
- Community benefits from services and infrastructure provision;

- Community expectation;
  - Achievement of the ecological sustainability purpose in the Code.
- (b) Other areas within the urban growth boundary do not reasonably accommodate the development:
- The land is a logical extension to the existing Rupertswood;
  - ‘Need’ in this locality is now emphasised by the virtual completion of Rupertswood (which was not the case in 1996 and 2003);
  - Locations in the former Townsville City Council planning area are not relevant in the context of the planning scheme;
  - Other locations within the urban growth boundary do not meet the ‘need’.
- (c) There are no adverse environmental, economic, social and energy consequences:
- There are beneficial environmental, economic and social outcomes;
  - The imposition of anticipated reasonable conditions will have no greater impact than if the land was within the urban growth boundary;
  - There are no unacceptable impacts on amenity.
- (d) The proposed development is compatible with the adjacent Rupertswood and with the rural area:
- The development is compatible with and of the same character as Rupertswood;
  - The development is compatible with adjacent uses;
  - There is separation from and buffers to the rural properties.
- [33] I understand the intent of the policy and its support for the content of the Code. However, Rupertswood is a reality. It is a community. It should not be shunned as an unwanted planning mistake of the past, undeserving of improvement. It cannot be simply be discounted or ignored in the holistic planning scheme context. The proposed development has the potential to create the sort of community envisaged in the policy. Whilst all planning policies are by their nature speculative in the context of planning guidance for future development, the urban growth boundary at Rupertswood is in my view an arbitrary line that recognises the existence of the residential estate but condemns it as a distant urban location with a less than optimal residential community status.
- [34] The conclusions referred to at (a) to (d) above are further explained in my discussion of the evidence and other matters that follow in this judgment.

## **The evidence**

### **Town Planning**

- [35] The proposed development is of the nature of rural residential. Section 2.16.2 of the City of Thuringowa Planning Scheme (19 December 1996) described Park Residential as follows: "these lands are intended to provide a lifestyle option to that part of the population who wish to incorporate some aspects of rural living in their residential environment particularly the separation between buildings while still having access to urban facilities. This form of development is regarded as essentially residential in character."
- [36] That description in the predecessor to the planning scheme in 2003 which is relevant to this appeal, reflects what a number of the residents have said, from their own perspectives and interests, about lifestyle options. The uptake of allotments within the adjacent Rupertswood estate has been more significant in recent years than at the commencement of that particular development, which might, amongst other things, reflect the consumer preference for park residential lifestyle in or about this locality, as distinct from alternative localities within the present local government area for Townsville City. That is a matter which in some respects is reflected in the evidence of experts and of residents in this case and to which I will make reference in the discussion of evidence that follows.
- [37] The respondent in oral submissions referred to the planning history of Council. Mr Quirk said that the planning strategy was lengthy and consistent in respect of the type of development it intended to permit in the locality of this land and that there could only have been one expectation, namely that the land was intended for rural development. He referred to the regional strategies in the 1996 Planning Scheme, including the regional structure plans, which he said showed that the exclusion of land outside the urban growth boundaries was a clear planning strategy decision that was then implemented in the 2003 Planning Scheme. He referred to the performance criterion with respect to land outside the urban growth boundary and its retention for economic, social and environmental purposes. In other words, it did not include urban development.
- [38] However, Mr Hughes SC for the appellant said that there was "no evidence that there is a planning strategy relevant to the area of Alice River, nor is there any evidence that the planning authority has carefully and properly adopted any particular strategy". He expressed the view that the effect of the 2003 Planning Scheme was that there would be further development of park residential development in the Alice River locality. He submitted that section 3.5.5(2)(d) required one to take into account the lawful use of adjacent land. Mr Hughes SC said that the Urban Growth Boundary Planning Scheme Policy - adopted by section 2.1.23 of the Planning Scheme - was a guideline (s 2.1.23 (4e)) and was not inconsistent with section 2.1.17A of *IPA*.

### **1. The Joint Report**

- [39] The town planners - Ms Rayment for the appellant and Mr Davies for the Council - prepared a joint report. They agreed that the primary planning issues in the appeal were:

1. The degree to which the proposal complies with the IPA Planning Scheme, including:
  - A. **the Character Statement for the Rural Planning Area;**
  - B. **the Rural Planning Area Code;**

and is consistent with:

  - C. **the City Wide Strategies;** and
  - D. whether or not **Desired Environmental Outcomes** (“DEOs”) of the IPA Planning Scheme are compromised; and
  - E. whether or not there are planning merits of the proposal to vary the effect of the IPA Planning Scheme and **sufficient grounds** to support the proposal despite any identified complex with the planning provisions.

**A. The Character Statement for the Rural planning Area**

[40] The relevant Rural Planning Area Character Statement provides:

*"3.1.1 Character Statement*

(a) ...

(b) *The Rural Planning Area is intended for Rural Development that contributes to the amenity and landscape of the area. In particular*  
-

(i) *Buildings and structures and sited to protect the amenity of adjoining premises and contribute to maintaining the rural landscape.*

(ii) ...

(iii) *Development is compatible with the rural landscape or has a nexus with Rural Development;*

(iv) *Development is adequately serviced by infrastructure."*

[41] "Rural Development" is defined in Part VII of the Planning Scheme to include agriculture, animal husbandry, aquaculture, host farm, intensive animal husbandry, rural accommodation units, rural dwelling, rural home occupation and rural industry. Those terms have their ordinary meaning. They are assessed as impact assessable development unless otherwise indicated in the planning scheme.

**a) s 3.1.1(b)(i)**

[42] Mr Davies considered that a Park style residential development was not rural development as defined in the planning scheme. The land was "distinctly rural of a singular character" and consistent with the area surrounding Rupertswood.

- [43] Ms Rayment acknowledged the inconsistency in the context of the type of application made in this case. She considered there was merit in the proposal: economic need, community demand, that the land was suitably located and provided the logical expansion to Rupertswood (which she believed had been contemplated by reference to the stub road and infrastructure "connections" on the boundary, was of the urban growth area and had "hard" physical boundaries to the east, west and south. She considered that the proposal would provide community benefits from additional population and additional public open space. The houses to be built were the subject of the same or similar planning and Queensland Development Code requirements respectively as between rural and Park residential lots and consistent with existing development in Rupertswood.

**b) s 3.1.1(b)(iii)**

- [44] Mr Davies said that the proposal would create a semi-urban character in and was incompatible with a rural landscape. The Rural Planning Area comprise Rural 10, 40 and 400 sub-areas that were intended for some form of agriculture. Mr Davies was critical of the "expanded negative effect" of the proposal on the natural environment.

- [45] Ms Rayment referred to the protection of Mt Margaret and the riparian corridors and buffer zones.

- [46] Both witnesses referred to the 4,000m<sup>2</sup> lots proposed on the boundary with Rupertswood. Ms Rayment regarded these as "transitional" between Rupertswood and the land. Mr Davies questioned why it was necessary to have a "buffer" between the two if there was a "nexus" between them.

**c) s 3.1.1(b)(iv)**

- [47] Mr Davies considered that existing infrastructure (water, sewerage and traffic) to service the proposed development was non-existent or required significant augmentation and that despite the developers undertaking to provide the necessary infrastructure there would be a cost, not planned for, to Council. Ms Rayment referred to the requirement for these services being met by conditions imposed on the development.

**d) s 3.1.1(f)**

- [48] Mr Davies considered that amalgamation was the appropriate answer to non-viable holdings rather than something of the nature of the proposal.

Ms Rayment referred to the planning scheme not "locking out" (*my expression*) other forms of development in the Rural Planning Area and to the positive amenity, "need" and environmental aspects of the proposal. She regarded it as a logical extension to Rupertswood and that it would consolidate it, particularly in terms of the desired Townsville Thuringowa Strategy Plan ("TTSP") threshold.

**e) s 3.1.1(g)**

- [49] Mr Davies referred to the "agricultural intent" in the planning scheme designation Rural 400. He said that there was no compelling need to abandon rural uses for urban uses when there were alternative locations for Park style residential uses.

[50] Ms Rayment referred to the planning merits supporting the proposal.

### **B. Rural Planning Area Code**

[51] Section 3.1.3: Rural Planning Area Code provides:

*"P1 - Buildings, pens and other structures do not detrimentally impact on development on adjoining premises and in the surrounding area.*

*P2 - A separation distance between rural development and sensitive receptors is provided to prevent adverse impacts of spray drift, odour, noise, smoke, dust, vibration and ash.*

*P5 - The proposed Rural Living Area maintains farm holdings capable of sustainable production in terms of ...*

*P6 - Development, other than Rural Development, is only located in the Rural Planning Area where no viable alternative location exists.*

*P7 - Development will not detrimentally affect the existing and future rural amenity and landscape of the Rural Planning Area."*

[52] Mr Davies has the view that the amenity of the existing rural planning area and the residential amenity of Rupertswood would be adversely affected by the proposal. Ms Rayment referred to the retention of important rural features. The land had physical separation (the rivers, transmission lines and Rupertswood Estate) from other rural land. The rural character of the immediate area was altered by the existence of Rupertswood.

### **C. The City Wide Codes**

[53] The City Wide Codes provide from a town planning perspective:

*"5.6 Urban Growth Boundaries Code*

*The purpose is to ensure -*

- (a) Development occurs in an orderly, efficient and cost effective manner;*
- (b) The community is provided with a reasonable level of infrastructure service;*
- (c) Council Infrastructure and State Government Infrastructure is coordinated and provided in an orderly, efficient and cost effective manner;*
- (d) Areas outside the City's Urban Growth Boundaries are retained for economic, social and environmental purposes such as agricultural land, visual and natural resource protection, significant water catchments and World Heritage Areas; and*
- (e) Development within the City's Urban Growth Boundaries -*

- (i) *does not prejudice premises for urban development in the long term;*
- (ii) *creates vibrant and liveable communities; and*
- (iii) *provides an example for sustainability in the City."*

- [54] Mr Davies considered that the achievement of ecological sustainability would be defeated if the principle of "identification of land needs to accommodate future growth" was not adhered to. He referred to the proposal being "out of sequence" development, the land being "unconnected to the existing urban concentration, and that the proposal even when completed would not "suddenly emerge as a sustainable community."
- [55] Ms Rayment referred to the Performance Criteria and Acceptable Solutions. They provide as follows:

**P1 Urban Development -**

- (a) occurs in an orderly, efficient and cost effective manner;
- (b) maintains a reasonable level of service to the existing community; and
- (c) provides infrastructure in an orderly, efficient and cost effective manner.

**A1 - Urban Development** occurs within the defined urban growth boundaries defined on map 5.7 (sic - it is in fact map 5.6)

- [56] She expressed the view that "urban development occurs within the defined urban growth boundaries etc" as only one way in which the performance criteria is achieved. In other words, there may be another acceptable solution.

**D. Desired Environmental Outcomes**

- [57] The Desired Environmental Outcomes of the planning scheme. Whilst the experts addressed DEO 2 Environment Quality, DEO 5 Economy, and DEO 1 Nature, the only relevant DEO for my consideration at the end of the trial is *DEO 6*.
- [58] **DEO 6 - Land Use Patterns** - provides that the City's land use patterns create cohesive communities that balance economic, social and environment considerations. In the City Strategies, DEO 6 is intended to be achieved by -

- "(a) Integrating new and existing development and providing a range of land uses that create cohesive, safe and sustainable communities.*
- (b) Establishing the City's Urban Growth Boundaries (refer to map 5.7) to create an efficient urban form by -*

- (i) *providing for higher residential densities and a mix of uses around centres and public transport nodes.*
  - (ii) *ensuring orderly and sequential growth defining Urban Growth Boundaries*
  - (iii) *providing linkages between residential, public spaces and facilities and workplaces; and*
  - (iv) *establishing a land use pattern that is consistent with the location and capacities of existing infrastructure items, plans and programmes of service providers.*
- (c) *Protecting land from encroachment by incompatible development, promoting the co-location of compatible and complementary development and allowing development where need is demonstrated.*
- (d) *Developing and maintaining a transport network considering frictional, functional and impact characteristics that -*
- (i) *improves assessability;*
  - (ii) *enhances mobility;*
  - (iii) *facilitates efficient and convenient access and mobility within and through the City for all transport and travel modes (maritime, vehicle - passenger and freight, bicycle, public transport and pedestrian);*
  - (iv) *reflects the road function and protects areas from inappropriate traffic movements;*
  - (v) *encourages walking and cycling through the provision of direct, safe and secure routes to local facilities such as shops and schools; and*
  - (vi) *minimises environmental impact."*

[59] Mr Davies considered Rupertswood and the proposal to be inconsistent with DEO 6 and that:

*"There is no reason why this DEO needs to be compromised as the Land Use Patterns have been carefully planned to accommodate future growth within the Urban Growth Boundary so that infrastructure can be delivered efficiently and effectively, so that communities can benefit from the existing services and facilities already provided for and that communities can integrate in a sustainable manner."*

[60] Ms Rayment referred to the beneficial aspects of the proposal and expressed the view that it achieves the main goal of DEO 6, expressed in (a) above.

## E. Sufficient Grounds

[61] The town planners agreed that the proposal conflicts with various elements of the planning scheme, but disagreed as to the extent of that conflict and whether there are planning merits and sufficient grounds that would justify an approval despite that conflict.

### 2. Ms Rayment

[62] Ms Rayment in her report considered that Rupertswood was designed in a manner which provided for integration with the land to facilitate its future development, with road connections and other services extending to the shared common boundary of Rupertswood and the land. She referred to the adjacent Rupertswood having water, electricity, telecommunications and waste collection services as well as to Ring Road (Brogan Road) which connects to the land. She said that in addition to the latter stub road essential services, including water supply and electricity supply, had been provided to that point at the common boundary between Rupertswood and the land. Hence she expressed the view that "future connectivity to the subject site was contemplated and facilitated by the approved plan of subdivision incorporating Brogan Road."

[63] She referred to the intention of the developer that all necessary infrastructure would be provided by it and without burden on the Council. She referred to the fact that this could be conditioned in a development approval.

[64] The TTSP is described as a "Framework for Managing Growth Development" and is said to have been the outcome of a cooperative planning exercise between what were then the two city councils and the State government in consultation with the regional community.

[65] Two strategy plans were tendered: one dated March 2000 and the other a revised strategy plan dated June 2007. Ms Rayment referred to two of the key features of the regional structure plan, namely:

- "• *Continued encouragement of infill and fringe urban development within and adjacent to, existing urban areas to promote efficient use of, and to consolidate demand for urban infrastructure and services; and*
- *Consolidation of rural residential development, within and adjacent to existing rural residential areas including those at the Upper Ross corridor, Bluewater and Alligator Creek. "*

[66] She emphasised the inclusion of the phrase "adjacent to" in each of those features. The two key features are expressed in the same words in each of the two strategy plans. In the Regional Structure Plan there is shown in map form existing rural residential at Rupertswood with an attached proposed rural residential is predicated for less than 15 to 20 years, to the east of Rupertswood in the March 2000 plan and proposed urban development to the north east (being part only of the earlier area described) of Rupertswood in the revised June 2007 plan. Ms Rayment referred to

the provision in the strategic plan for urban growth management and Priority Action 1: "The preferred settlement pattern shown in the Regional Structure Plan and the Regional Planning Policies contained in the TTSP should be incorporated into Local Government Planning Schemes" and to the Residential Development section of the strategy plan which in the third principle stated "new residential development should occur predominantly as part of an existing or new community of sufficient population (approximately 3,500 minimum population) to facilitate the provision of local community services." The two strategy plans are expressed in the same words so far as those extracts are concerned.

- [67] Ms Rayment expressed the view that the development of the land for a rural residential purpose given that it was immediately adjacent to Rupertswood, was consistent with the TTSP because it promoted efficient use of and consolidated demand for existing urban infrastructure. She expressed the view that the TTSP:

*"specifically envisages out-of-sequence development, provided the developer pays the bring forward costs of the infrastructure. Therefore, provided the provision of infrastructure is achieved without up-front costs to the Council, development outside the Urban Growth Boundary can be consistent with the TTSP."*

- [68] Ms Rayment referred to Exhibit 31 – the agreement between the Thuringowa Council (as purchasers) and the appellants (as vendors) about the easement for the reservoir, pipeline and road – and clause 3 (d) that provided to the appellants an entitlement to domestic water supply “for six (6) rural/residential allotments” on the land and said that it contemplated additional rural residential allotments on the land south of Rupertswood, the agreement being one that related to water supply for the estates at Rupertswood and Rangewood.

- [69] She referred to the threshold or "critical mass" figure of 3,500 people and by way of analogy referred to that number being the threshold for the provision of a Neighbourhood Shopping Centre in the planning scheme. She considered that sensible planning should encourage population in a location such as this so as to achieve the threshold or critical mass of population to support retail and community facilities and services. She considered that from a planning merit point of view, the benefits included the threshold population which would make the provision of services sustainable, the additional public open space, the taking up of spare capacity and the satisfaction of a community demand or need. In other words, she considered that the addition of the projected population in the proposed development to the population in Rupertswood (which appears to have been in excess of 2,000 people in 2006) would provide a total population what would enable a range of community services to be provided in a viable way.

- [70] Ms Rayment referred to the present landscape of the land being dominated significantly by the rural residential style of the development at Rupertswood and the proposed development being consistent with that style to its north at Rupertswood. She expressed the view that future development of buildings and structures would not detrimentally impact on the development on adjoining premises and surrounding land. She considered that the site only had a small boundary to other rural properties and was predominantly separated from the surrounding area by road, river or proposed open space buffers.

- [71] The land was not good quality agricultural land ("GQAL"), was constrained in terms of size and slope and had existing sensitive environmental forms at its edges as well as the dominant central feature of Mt Margaret.
- [72] Ms Rayment disagrees with Mr Davies' comment that the Rupertswood Estate is an "isolated and unsupported settlement unrelated to and disconnected with the greater urban footprint of Thuringowa": she said it is connected and supported in a community sense. She referred to exhibits 28 to 30 (the Smart Maps) which show the land taken up for residential use and compared them with map 3.5B which shows the filling of lots in areas not otherwise identified in that way.
- [73] She also said in evidence that Park Residential land was being developed in some of the areas north of the Bohle River as Traditional Residential use. She was questioned by the respondent's counsel about her having adopted a "market view" as to the preference of potential residents. However she said that if a particular need is identified then one expects the planning scheme to accommodate it: If it doesn't, then one should expect a departure from the planning scheme to so do.

### **3. Mr Davies**

- [74] Mr Davies in his report said that the settlement of Rupertswood "has a negative impact upon the amenity and landscape of the area as it diminishes the values, and in particular, 3.1.1(b)(i), which the rural planning area seeks to protect. The proposal will extend and exacerbate this impact which will threaten the rural landscape beyond Rupertswood. The development is not compatible with the rural landscape". He said that if alternative development areas are readily available for this kind of development, namely Park Residential, "... then why risk damaging a distinctly rural environment for the sake of expanding an unsustainable community". He expressed the view that it was debatable if a nexus could be achieved between the proposed development and the existing Rupertswood estate. He described the Rupertswood estate as "an isolated and unsupported settlement unrelated to and disconnected with the greater footprint of Thuringowa". There is no justification to expand this anomaly and compound the issues which have been raised. There are numerous viable locations for park style residential development with approvals in place." He referred to 532 lots available through the current Townsville City Council area. Hence he concluded that the number of lots and what he referred to as significant choice offered, within the existing 2003 scheme and the Townsville City Plan 2005 that there was no requirement to override the 2003 scheme. There was no logical reason to expand upon Rupertswood because of the existence of "viable alternatives".
- [75] Mr Davies said that "the creation of an unsustainable pocket of park residential land has no planning merit as viable alternatives do exist". He made reference to the city white codes with respect to matters not within his expertise and I have already referred to my preference for evidence of others about transport ecological and conservation matters and engineering.
- [76] Mr Davies referred to the urban growth boundary and correctly said that the acceptable solution or performance criteria could not be met. The appellant recognises this but addresses the matter constructively from a valid and alternative prospective. At the time of writing the report Mr Davies was of the view that reticulated sewerage infrastructure was still sought by the appellant. That, of

course, is not the case. He made some other statements upon which he was taken to task in cross-examination. He said that "there is no merit in creating an isolated community which would impose a cost upon the greater community of Townsville" and "as infrastructure and services are virtually non-existent the proposal is not in sequence with the current service provision and cannot be provided in an orderly efficient and cost effective manner".

- [77] Mr Davies said that the development of Rupertswood had taken some 30 years and was nearly complete, much of that having occurred in the last 10 years. He said it was "agreed that there is a demand for park residential lots driven by market conditions" and referred to developments within the urban growth boundary, particularly in Kelso and Burdell. He said that "peripheral areas and ad hock settlements like Rupertswood struggled to provide the level of community infrastructure required to sustain a healthy and robust local economy".
- [78] By reference to DEO6 he said that the proposal did not deliver sequential development nor integration with existing development, including integration with Rupertswood. He said "to perpetuate and encourage the growth of Rupertswood, is to compromise the integrity of the planning scheme". He referred to the TTSP and observed that it did not identify the land for future urban development. That of course is correct. However, that is not the end of constructive consideration in regard to this proposal.
- [79] Finally, he expressed the view that there were no grounds to support the approval despite the conflict and said that the proposal "will only perpetuate the unsustainable characteristics and conditions which already persist" at Rupertswood. He referred to an absence of original documentation in respect of the establishment of Rupertswood estate and hence being unable to account for any grounds for justification for its development.
- [80] Mr Davies did not know if vacant rural land in the planning scheme maps was "on the market." He said that "vacant" did not mean that the land was for sale immediately. He did not agree with "choice" in the planning scheme between localities.
- [81] He conceded he had not seen the tendered reports of the experts other than Ms Rayment's. He conceded that a convenience store, for example, may benefit the community through this development. He conceded that he didn't give sufficient weight to the new store approval that had been made.
- [82] He suggested that residents at Rupertswood chose to have a low level of services to live there. With respect to his statement about Rupertswood Estate being unsupported and isolated as a community, he said that was a reference to "reticulated sewerage."
- [83] He said the reasons for his statement in his report that "perpetuation of the unsustainable characteristics and conditions which currently persist" is a reference to dwellings and distance from urban concentration. His reference to "isolated community" in his report was a reference to a perpetuation of isolation. He agreed that Rupertswood "cannot be moved."

- [84] He said that they did not refer to the Urban Growth Boundaries in his report because it was not referred to in the Reasons for Refusal. He denied that he had mistaken the 4,000m<sup>2</sup> lots on the northern boundary as a "buffer" even though he was not aware of the Mayor's letter requesting larger lots. He did not consider that rivers and powerlines constituted a physical barrier or containment. He conceded that the TTSP referred to land "adjacent" to existing rural residential development. He said he was not aware until he saw Exhibit 31 that the purchase of the reservoir land contemplated development south of Rupertswood on the land.

### **Discussion**

- [85] In so far as the town planners were concerned, I have preferred the evidence of Ms Rayment. She was more objective and responsive in her report and testimony. Mr Davies was an intense witness who was continually guarded in his responses in cross-examination, was reluctant to make objectively reasonable concessions and had on his own several admissions in cross-examination 'chosen words poorly' in expressing himself in his report. Indeed he employed strong language in his report with little to commend its use. I did not find him to be a convincing witness. It seems to me that he had arrived at a view and then sought to justify it. His report made assertions that were unsustainable in light of objective evidence of others in the case. I did not find his evidence to be particularly helpful to me in my assessment task.
- [86] The prominent and central geographical feature of the land is Mt Margaret. In the past in the planning scheme it was identified as an Extractive Resource. However, it seems almost inevitable that it is no longer likely to be used in that way because of its proximity to Rupertswood. Hence it is not identified as a Key Resource Area in the planning scheme.
- [87] Mr Quirk submitted that the planning history of Council was consistent about the type of development it intended to have in this area and that there could have only been one expectation, namely that it was intended for rural development. So much was apparent, he submitted, from the 1996 planning scheme which he contended had implemented that intention in the 2003 planning scheme.
- [88] On the other hand, Mr Hughes SC submitted that the "proposal is entirely in character with what's there - with the land use which presently dominates Alice River in terms of human activity", namely Rupertswood.
- [89] A planning scheme policy may apply to all or part of a planning scheme area: s2.1.17 IPA. A planning scheme policy may include guidelines or advice about satisfying assessment criteria in the planning scheme: s 2.1.23 (4) (e) IPA. This is what the Urban Growth Policy is, a guideline. So much is apparent from the language of the policy in the heading to clauses 1.2 and, for example, in 1.2 (a) and (b) and 4.
- [90] As I have said elsewhere the Urban Growth Boundary Map 5.6 shows a partially developed Rupertswood estate and a number of other areas outside the main suburb delineation lines. The map is already behind the pace of development so far as Rupertswood is concerned. In the development context the Policy is 'off the pace' in this area.

- [91] The expression “desired environmental outcomes for the planning scheme area” has been judicially considered by several Judges of this Court and by the Court of Appeal.
- [92] The expression “does not mean that the achievement of a DEO ‘on a shire-wide basis’ is the correct application of the statute”: Judge Brabazon QC at [106] in *Webster v Caboolture Shire Council* [2009] QPELR 455, which was approved in *ALDI stores (A Limited Partnership) v Redland City Council* [2009] QCA 346 (per de Jersey CJ at [16] – [19], with whom Muir and Holmes JJA concurred generally).
- [93] Insofar as the easement (Ex 31) is concerned, Mr Quirk submitted that the agreement was old and any relevance it had was, in effect, historical: two planning schemes had been made without any reference to an extension to the Rupertswood residential area. As true as that may be in specific terms, no development application has historically been made by the appellants. Rupertswood has only become substantially developed over the past ten years. This proposed development may only have become feasible now, hence its timing. In other words, the relevance of the agreement is tempered by many factors. The point is, in my view, that it did on the face of the document contemplate further residential style development adjacent to Rupertswood and outside the urban growth boundary. It is not the answer to the issues on this appeal, but the appellant is entitled to refer to it in support of the other matters relied on in contending for the proposed development.
- [94] In the planning context, the matters discussed above in the context of the urban growth boundary are equally relevant to this discussion of the evidence of the town planners.

### **The Council’s objection to the evidence of Mr Sutherland and Mr Brady**

#### **a) The objection: Mr Sutherland**

- [95] The evidence of Mr Sutherland was heard subject to my determining an objection to its admission insofar as it related to the non-reticulated sewerage proposal. The original proposal was for a reticulated system and a number of options were canvassed in the report of Mr Brady dated 18 September 2006 (page 102 of the Appeal Book Ex 2).
- [96] The original development application proposed reticulated sewage. The revised development application proposed on-site treatment and disposal of household waste water on each lot, rather than connection to the reticulated sewerage system. The Council relied on a number of matters to support the objection:
- (a) The new proposal post-dates the Decision Notice and amounts to a minor change.
  - (b) The issue was not raised in the directions about expert evidence.
  - (c) There had not been an opportunity to consider the impact of further effluent disposal into land that was between two rivers.
  - (d) Submitters had not had an opportunity to consider the issue.

- (e) The AS of the PC for the park residential area is that reticulated sewerage be provided.

[97] The submission by the appellant was that the issue was overtly a part of the common material considered by the Council in its assessment of the development application and was not a new issue, that Council had foreshadowed that it would not permit connection with the reticulated sewerage system (*see the evidence of Mr Phillips infra*) and that reliance by the appellant upon such evidence in the appeal could hardly have been unexpected.

[98] In responding to the joint information request, which followed the issuing of the Acknowledgment Notice, the appellant informed Council, through its officer who ultimately reported on the application, of its response to a number of issues revealed in properly made submissions, including ‘sewerage and infrastructure provision’, described in the following terms:

“Sewerage and Other Infrastructure

*Submitters argue that the proposed development cannot be adequately serviced with sewerage infrastructure, with respect to potential environmental impact and visual impact. Further concern is raised regarding the inadequacy of existing infrastructure, particularly water reticulation infrastructure, and the limited capacity in these infrastructure systems.*

Sewerage

All allotments can be adequately serviced with on-site sewerage treatment systems. It is proposed that each individual allotment be serviced with Biolytic on-site sewerage disposal systems, which provide for a minimum secondary standard of effluent treatment. This is a higher standard of treatment system than most of those which presently service dwellings within Rupertswood.

The developer envisages placing a covenant on each lot to ensure each dwelling is serviced with such a standard of infrastructure.

It is considered that the development can be adequately serviced with such infrastructure without the impacts described in the submission. It is considered that this point is adequately addressed.”

[99] Mr Hughes SC referred to an email dated 07 November 2008 from an engineer consultant acting for the appellant, that referred to a covenant requiring each lot to have such an on-site ‘sewerage treatment plant’ and describing its function and relevant utility for the land; and to the report by the Council officer dated 23 December 2008 that recommended refusal of the development application.

[100] Finally, Mr Hughes SC referred to the directions that I made on 08 March 2010 that required that “the parties exchange lists specifying the name and area of expertise of any additional experts, if any, the party intends to call to give evidence in the appeal”. The Council nominated its town planner on 17 March 2010 and, so far as is relevant, the appellant nominated Mr Brady on 31 May 2008 and Mr Sutherland on

03 June 2008. No issue was raised by the council contemporaneously about any delay or non-compliance with my directions.

- [101] In the end the Council relied on its assertion that the non-reticulated sewerage system proposal was a minor change. The appellant submitted that it was not, because it had been articulated prior to the decision of Council to refuse the development application and not between the decision date and the hearing.
- [102] I made an ex tempore ruling on the objection and allowed the evidence of Mr Sutherland, on the basis that it had been part of the common material and the council had notice of it in the context of its foreshadowed intention to refuse to allow a connection to the reticulated sewerage system. I left the minor change issue to be resolved in this judgment.

### **Is the revised proposal a ‘Minor Change’?**

- [103] The proposed development was changed in the course of the IDAS process and before the decision by the Council. The number of lots was reduced and the sewerage arrangements revised.
- [104] The minor change issue was raised by the Council. The primary basis for the submission is that the revised sewerage infrastructure proposal makes the proposed development a substantially different development: s 350 *SPA*. The *SPA* provision permits a broader and more flexible assessment of change to development applications, however, some of the principles referred to in cases determined under *IPA* nevertheless remain relevant considerations.
- [105] However, in the circumstances of this case I do not need to consider the submission about "minor change" in any depth. The revised sewerage infrastructure proposal was fully articulated to and by Council in reports and correspondence before the decision being appealed was made.
- [106] Section 4.1.52(2) *IPA* provides that the Court:

*"(b) must not consider a change to the application on which the decision being appealed was made unless the change is only a minor change" (my underlining).*

I do not consider that there has been a minor change. Nothing by way of change so far as is relevant to the submission by the Council was made after the decision. Accordingly, the objection is overruled.

### **b) The objection: Mr Brady**

- [107] The Council foreshadowed an objection to the evidence of Mr Brady on the same ground as that relied on with respect to Mr Sutherland. I heard the evidence subject to my determining the objection. Mr Sutherland was called as a witness before Mr Brady and I had determined the issue about the admissibility of a non-reticulated sewerage system before Mr Sutherland gave evidence. Hence the objection in respect of Mr Brady's evidence was in effect determined in the same ruling. In any event, the objection was not further articulated when Mr Brady gave evidence.

#### 4. Mr Sutherland

- [108] Mr Sutherland is an agricultural and environmental scientist (relevantly in soil and water resource assessment).
- [109] The land use was currently low intensity cattle grazing. He considered that the land was not good quality agricultural land ("GQAL") and this was confirmed by Map 2 in the Planning Scheme.
- [110] With respect to drainage, the land to the west drains to Alice River and to the east to Little Bohle River, influenced by the central feature of Mt Margaret.
- [111] There were four matters to consider for effluent disposal: slope, lot size, soil permeability and water table height. He recommended soil testing to "inform the effluent disposal area size" on each site. The system implementation was entirely amenable to conditions.
- [112] In respect of slope, the majority of the proposed internal road network avoided slopes greater than 5%. The inference at least is that degree of slope is acceptable and manageable for roads. The slope analysis for effluent disposal is mostly less than 5% and certainly the bulk is less than 10%, which is consistent with the Australian Standard that no clearing occur on slopes greater than 20% although slopes greater than that are facilitated in the Standard. Hence the non-reticulated system can be installed at a good market price.
- [113] He said that any remnant vegetation areas (none on slopes greater than 5% were to be cleared), development can in effect be modified. He regarded this as a normal constraint at the detailed design stage.
- [114] The lot sizes were well above what might be regarded as minimum requirements, being at least 2000m<sup>2</sup>. There was a 100m setback from the Alice River and the ephemeral nature of the wetland area but he did not consider that these were problematic and they were also amenable to conditions.
- [115] There were three soil types, generally of a non-dispersive type and largely kurosol (I infer a preferable soil type) and some sodosol soils that needed management. Mr Sutherland said "as there are minimal signs of surface erosion within the development areas, the observed soil types provide no constraint to effluent disposal on the site or the employment of standard sediment and erosion control practices."
- [116] Mr Sutherland said that groundwater was 21m to 24m from the surface. He was satisfied "that a minimum separation distance of 500mm from the highest seasonal groundwater level to the base of the constructed effluent disposal areas is achievable." Combined with the soil types, the transmission of nitrogen and phosphorus to ground water was minimal. Standard soil erosion control and sedimentation deposition techniques were proposed. The biolytic system proposed was more conservative than some others and standard site-specific solutions for each dwelling were achievable. He favoured greater consumer choice in system selection in fact.
- [117] Standard sediment and erosion control practices were available during the construction phase. The site was fairly open woodland and not one that he had concerns about vegetation having to be cleared for effluent disposal.

- [118] Mr Sutherland disagreed with the assertion by Mr Davies that the soils are a ‘dispersive’ type, although there may be such areas within the site. The implication in his evidence is that Mr Davies ‘opinion “that disturbed areas will be subject to extensive erosion and that significant measures will be needed to be taken to protect slopes, vegetation, riparian zones and ground water” is wrong.

### **Discussion**

- [119] The opinions expressed by Mr Davies, to which Mr Sutherland responded, are plainly outside the expertise of Mr Davies. In any event, they were in my view superficial and lacked intellectual rigour. I prefer Mr Sutherland’s opinion about soil and water resource matters.
- [120] The analysis is, on present design intent, reasonably sound and the environmental concerns are capable of being satisfied in my view. The proposal is achievable with appropriate conditions. There is no evidence that the rivers will be detrimentally affected; there are no water quality issues; and there are no visual or air quality issues. Rupertswood has non-reticulated sewerage and there have been no demonstrative problems and only a few expected and acceptable individual system issues.

### **5. Mr Brady**

- [121] Mr Brady's firm had prepared three reports in the course of the IDAS process. A supplementary report was made to reflect changes to the development proposal. The reports addressed water supply and sewerage.
- [122] He refers to infrastructure terminations which he said are suggestive of anticipated further development beyond Rupertswood: a stub road and reticulated water supply connection, at the end of Ring Road.

### **Water**

- [123] The current number of lots connected to and serviced by the Mount Margaret reservoir is 1,107. The spare capacity is estimated at 322 lots. The proposal for the development is a "looped system" which "will provide improved water pressure to areas of the existing Rupertswood estate around the Brogan Road connection, via a looped back-feed connection. This may assist in resolving an existing deficiency issue identified during the public consultation and submission process." He means that supply will be boosted. The reservoir has an ‘in’ and ‘out’ pipes. The looped system as I understand it, in simple terms, involves a second ‘out’ pipe to a connection point, with a valve connecting the two ‘out’ pipes and a pipe from the connection point to the development.
- [124] Mr Brady referred to an upgrade to the reservoir. The main reservoir is of sufficient size, but the pump capacity is not. A second reservoir may be necessary as the uptake of lots is maximised. It would also reduce pumping time.

### **Sewerage**

- [125] The closest reticulated sewerage plant is 11km distance from the land, at Condon.

- [126] On-site treatment systems, similar to Rupertswood but with improved design and functionality were proposed in the development. However, Mr Brady said that whilst that solution was acceptable for management of domestic waste water, a reticulated system ultimately would be the optimal solution.

### **Discussion**

- [127] Of course, the latter is not intended by the Council nor is it a part of any future plans that it currently has for the Rupertswood area. Undoubtedly a reticulated system is the optimal solution but there are many examples of other waste water and sewerage management systems which are effective and appropriate for residential lots.
- [128] There are benefits flowing from the proposed loop reticulated water system to the residents of Rupertswood, such as improved water pressure.
- [129] I do not consider that there are any issues that cannot be dealt with by appropriate and achievable conditions.

### **6. Dr Olsen**

- [130] Dr Olsen is a specialist in field Botany, Taxonomy, Ecology and Landscape Assessment.
- [131] The boundaries of the land are relevant to his report: the land adjoins Rupertswood on the northern boundary, Alice River on the western perimeter, Granitevale Road on the eastern perimeter and there is a power easement across the southern perimeter.
- [132] He described the vegetation on the land being degraded through agricultural and grazing practices in the past. He considered that retention of park, conservation areas and riparian areas would enhance the bio-diversity values of the land.
- [133] He considered that the retention of significant vegetation on Mt Margaret; retention and rehabilitation of a vegetation riparian corridor along the Alice River and a vegetation corridor link to the Little Bohle River east of Granitevale Road, would minimise adverse environmental impacts and enhance environmental values. Box culverts would retain wildlife management. He did not agree with Mrs Jensens concerns about wildlife and habitat, nor Ms Edmunds concern about impacts on natural environment and habitat.
- [134] He considered that the development would benefit the community in an ecological and environmental sense by preserving significant assets: Mt Margaret, the Alice River system and the eradication of significant weed infestation, including siam weed – a declared noxious weed that is spread by movement and difficult to manage.
- [135] Dr Olsen also disagreed with Mr Davies' view (expressed by Mr Davies as 'unqualified experience') about there being no positive benefit for Mt Margaret or the riverine values; and Mr Davies' non-qualified observation about 'leaving undeveloped areas undisturbed because of the dispersive nature of the soils'. Dr Olsen referred to the application of DNRW conditions in the conduct of a positive intervention strategy.

- [136] He agreed generally with the DNRW mapping of ecosystems. There was remnant and non-remnant vegetation, including regrowth. I infer that landscape features such as individual trees of significance could be retained by proper management and design. Clearing was permitted by conditions.
- [137] He recognised the significance of the habitat corridor, recommended in the C&R report, connecting Mt Margaret with the Alice River riparian habitat and maintenance of unimpeded wildlife access with appropriately designed culverts. He considered that this would meet the requirements of PR A8 in the NRM&W Guidelines: Conservation and Protection of Regional Ecosystems for Ecological Processes and Wildlife Habitat.
- [138] In cross-examination there was a discussion about the maintenance of Mt Margaret: that is, public or private responsibility. Dr Olsen regarded Mt Margaret as a community asset rather than a proprietary property. He thought 'people on the ground' in the community were better placed to manage the asset.
- [139] He considered that the proposed development conformed to the principles of ecologically sustainable development with the retention and enhancement of the most significant biotic assets on the site and the ability to create living spaces with minimal environmental footprint on the degraded portions of the site.
- [140] Dr Olsen concluded that the proposed development addressed the Planning Scheme requirements and brought with it important ecological benefits and secured in public ownership the significant local asset, Mt Margaret. It would provide for an approved landscape with rehabilitation/revegetation at the currently "tenuous riparian flanks of the Alice River" and the retention of the significant vegetation on Mt Margaret and protect and enhance the ecological linkages between Mt Margaret and the Little Bohle and Alice Rivers. He expressed the view that the proposed development complied with the City Wide Codes s 5.2.

### **Discussion**

- [141] In my view the development proposal adequately takes into account the relevant ecological, wildlife and environmental issues. The issues can be met by appropriate design and management and are amenable by the imposition of reasonable conditions.
- [142] In so far as Mr Davies views are concerned, he trespassed into areas clearly outside his expertise in respect of botanical, environmental and landscape issues and I prefer Dr Olsen's opinion about such matters.

### **7. Mr McClurg**

- [143] Mr McClurg carried out a traffic and transport assessment. He noted that the initial access to the proposed development was to occur in two locations: firstly by connection to the stub road at the southern end of Ring Road and secondly by connection to Granitevale Road.
- [144] Insofar as the City Wide Code is concerned (with respect to transport) it provided for design of transport networks - road, pedestrian, bicycle and public transport - in an integrated, safe and efficient way in accordance with the planning scheme. Mr McClurg's view was that the proposed development represented "a logical extension

to the existing residential community of Rupertswood" and was evidenced by the stub road connection at Ring Road directly to the site boundary.

- [145] Herveys Range Road is a Rural Arterial road from west of Shaw Road. It could cope with the extra traffic. There was a proposal to upgrade the intersection with Herveys Range Road. Both Ring Road and Granitevale Road are classified as Major Collector Streets. Collector Streets provide for circulation of traffic having a trip in within the local area. Both these roads are able to be widened if that was considered necessary and conditioned accordingly. Granitevale Road required further sealing.
- [146] He considered that pedestrian and cycling pathway networks were achievable with appropriate design if required by conditions although no design information was available in the current extent of development design.
- [147] Mr McClurg said that the development "does not result in through traffic within the existing or proposed developments" and that road use safety was achievable. 3000 vehicles per day (major collector carrying function) increase in vehicle movements on Ring Road was significant but was not considered unacceptable. He said a bus route can be accommodated with stops within 400 metres of 95 percent of residences, designed in a similar fashion to those that existed currently in Rupertswood. The extended shopping centre was factored into the vehicle movement analysis for Ring Road.
- [148] He was referred to the revised development plan. Only one roundabout was four-way. Other intersections were T-intersections. Mr Brady said his opinion was not affected by the Granitevale road access not being available at the completion of the first stage of 190 lots. Fifty percent of the increase in traffic would be generated in the north and northwest stages of the development, rather than in the stage west of Mt Margaret.
- [149] Flooding issues (such as were raised by Mrs Jensen) were not considered by Mr Brady. The Department of Main Roads and Transport conditions were significant.
- [150] The final design of the road network was a matter to be determined by conditions on an approval. He expressed the view that the traffic related issues identified by Council in its grounds of refusal "do not present reasonable reasons for refusal"

### **Discussion**

- [151] The traffic analysis at this stage of the development proposal addresses reasonable concerns. Acceptable road and intersection design, vehicle movement, public transport and pedestrian movement levels are designed and achievable. This is likely to remain a significant conditioned part of the proposal. Two access points is a favourable feature. The location of the Granitevale Road access is not critical although moving it to the boundary of the water reserve makes sense and incidentally benefits the neighbour.
- [152] The stub road leads to the Moncrieff property. There may be another entrance to the Mt Margaret holding. Whilst it is suggested that the stub road is indicative of an intention to expand Rupertwood it may equally simply be a road entrance formed to replace a road that previously provided access through what is now Rupertswood Estate.

## **8. Adjacent residents, landholder and business proprietors**

### **a) Mr Preston**

- [153] The Prestons operate the Rupertswood general store and service station and have done so for 25 years. They support the development because an increase in the number of residents would increase the level of service and range of goods available at the store and service station. He referred to previous plans for a supermarket and speciality shops (part of Ex 14) but I understand it lapsed because it was unviable. He had an approval for a convenience centre/supermarket on the present shop site (Ex 26) with an on-site sewerage plant (Ex 27), although that proposal was dependant on the appellant's development proposal being approved. Mr Preston said that the Rupertswood locality is popular for persons seeking a rural residential environment.

### **b) Mrs Riley**

- [154] The Rileys own the property to the east of the land (Ex 12). They are in favour of the development because it would, in their view, improve local services, roads and assist with weed eradication programmes.
- [155] However, they prefer the point of access from Granitevale Road to be moved to the northern boundary of their property, adjacent to the water reserve access, because of the potential increase in traffic and the consequent dislocation of their property from the dissection of it by the proposed access road (See also Ex 25). However, she said that if not changed, the access location proposed was nevertheless manageable insofar as her horses were concerned.
- [156] Mrs Riley, in her Statement, said that her recent experience in pasture improvement on her property did not indicate that her land was particularly good grazing country and she believed the neighbouring land would be similarly described.

### **c) Mrs Haber**

- [157] She supports the development. She operates a 75-place child care centre at Rupertswood that currently has spare capacity. She refers to the development as one which would increase the numbers of children at her facility and opening up further possibilities for employment for local persons with the increased size of the placement at the facility. She agreed in cross-examination that there had sometimes been full capacity in the past.

### **d) Ms Edmunds**

- [158] Ms Edmunds opposes the development. She has concerns about the strain on current infrastructure, particularly water supply, destruction of the natural environment and rural lifestyle and the increase in traffic.

### **e) Mrs Jensen**

- [159] Mrs Jensen opposes the development. She refers to loss of amenity of a rural environment and lifestyle, loss of wildlife diversity and natural habitat, increase in traffic, potential for increased flooding, water supply depletion, infrastructure costs imposed on Rupertswood residents and the negative impact on the value of

properties currently regarded as rural which by implication, she believes, would be regarded as something other than rural residential properties if the proposed development was approved.

### **Discussion**

- [160] Three of the other witnesses – Mr Preston, Mrs Riley and Mrs Haber - were called to give evidence. They supported the proposed development. All have a quite specific benefit potentially flowing to them if the proposed development proceeded. That is no doubt a further matter of weight in the court's assessment of their evidence and I have made an assessment on that basis.
- [161] The statements of Ms Edmunds and Mrs Jenkins were tendered without cross-examination. Their views about the potential impacts of the development proposal are really matters of perception or belief. I will take them into account and give them such weight as is considered appropriate in the context of the evidence as a whole. Community expectation is not, of itself and considered alone, a critical factor: See the observations, for example, of Dodds DCJ in *Acland Pastoral Co Pty Ltd v Rosalie Shire Council* [2007] QPEC 112 at [40].
- [162] The evidence of those who live or work in the locality is anecdotally connected to the opinions expressed by a number of the expert and other witnesses. They reflect in a living sense upon the abstract evidence of assessment and analysis that informs the opinions expressed by divers others.

### **9. Affidavit evidence: Mr Hughes and Mr Phillips**

- [163] The deponents of two Affidavits relied on by the Council were not required for cross examination by the appellant. There was no objection to the affidavit evidence of Mr Hughes although some curiosity was expressed as to its relevance. However, a ruling was required to determine objections by the appellant to some of the affidavit evidence of Mr Phillips.
- [164] I was referred to *Casagrande Investments Pty Ltd v Redland Shire Council & Ors* [2010] QPEC 54. His Honour Judge Rackemann rejected the tender of an expert report on the morning of trial in circumstances where the engagement of the expert had not been notified in accordance with directions and no variation had been sought to the directions. The circumstances are to some extent, but not wholly, similar here with respect to the affidavit of Mr Phillips, where it seems that there was no advance notice given to the appellant that the evidence of opinion and analysis was sought to be tendered.
- [165] I excluded those parts of the affidavit that expressed an opinion or drew upon analytical modelling about the sewerage infrastructure issue, in the context of Mr Quirk not having sought to challenge the evidence of Mr Brady by the admission into evidence of those parts.

### **Mr Hughes**

- [166] Mr Hughes, an employee of the Council, provided an Affidavit that exhibited historical title searches, survey plans and locality plans of land owned by the appellants, effectively connected in one contiguous area (that appears to be what may be called the 'Mt Margaret ' holding), including the subject land.

### **Mr Phillips**

[167] Mr Phillips is the executive manager strategic planning for the Council. His Statement provides, as far as was admissible, the following information:

- Council has no existing plans for any future infrastructure in the Alice River area.
- No Council investigation has been made into costing of future infrastructure in the area.
- The development would require additional reservoir storage, with a duplication of the existing reservoir being the most likely solution.
- Council's 10 year capital works programme commencing 2010-2011 did not include any upgrade for existing infrastructure in the area.

### **Discussion**

[168] If the intent of Mr Hughes evidence (the relevance being a matter about which I am still uncertain) is that there is a potential in the future for other land to be the subject of similar development applications, I would consider that to be too long a bow to draw and speculative at best. In any event, it would not be a valid consideration in assessing this development application.

[169] The four matters referred to by Mr Phillips reflect a number of the Council's responses to the properly made submissions received by Council: the concern expressed about Rupertswood being connected to a reticulated sewerage scheme, the sewerage reticulation options for the development being 'out of sequence for the overall infrastructure provisions for the city' and upgrades to the water system being required to cater for the increased population. The Council had (as the appellant submitted in relation to the objection to Mr Sutherland and Mr Brady's evidence) it seems to me, already formed an early and adverse view to the original and the revised infrastructure proposals.

### **The objection to the evidence of Mr Stack**

[170] Mr Stack is a registered property valuer and real estate agent. He was engaged by the appellant over a period of time to advise them with respect to the development application. His experience includes assignments for the former Townsville City Council and former Thuringowa City Council for the provision of advice on residential and industrial land assessment and availability in the planning and infrastructure context. He had been appointed chairman of the Council's CBD Task Force.

[171] He provided a number of reports on need and demand issue for park or rural residential areas in the Alice River locality.

[172] Mr Quirk had foreshadowed an objection to the qualifications of Mr Stack to give the evidence, which in other cases he submitted was given by economists. Mr Stack is not an economist.

- [173] Mr Hughes SC submitted that the witness was qualified to do what he did, namely research into matters of fact, and that it was the town planning evidence that would draw, amongst other things, on those facts to establish "need".
- [174] Counsel agreed that the evidence be admitted on the hearing subject to my determining the objection in this judgment.
- [175] The Council in submission said that Mr Stack was not an economist and spoke only of demand, that his evidence was simply about vacant lots without identification of what was "new to market" as distinct from movement from lot to lot (selling one lot and moving to another).
- [176] Mr Stack conceded as much in cross-examination.
- [177] Mr Hughes SC simply iterated and emphasised in submissions, in effect, that the evidence of Mr Stack about demand was part of the "need-public benefit-planning" contextual architecture, I infer, in the holistic sense.
- [178] Mr Stack's evidence is not tendered as a subject for that of an economist. No attempt was made to qualify him as such. He plainly is not an economist. I regard his evidence as being an assemblage of factual data that compliments rather than drives the expert evidence of others. He has given of "demand", but in the context of a continuum of sales level across several years. He did not attempt a "development feasibility" analysis. His "demand analysis" was market based rather than predicated on "feasibility" or "viability".
- [179] I consider Mr Stack's evidence does not go beyond the boundary of his qualifications. He expresses some opinions but restricts it to his area of training and expertise: the factual data and explanation of it. To the extent that he expresses a view about community benefit, that view is limited to what I think is both reasonable and irrefutable; that is, that critical mass (in this case of population numbers) is a driver of the provision of service and social infrastructure in a community of people.
- [180] The objection to Mr Stack's evidence, which falls to be assessed with the limitations I have referred to, is overruled.

## **10. Mr Stack**

- [181] Mr Stack conducted a Need's Analysis in January 2005 and a Need's Analysis Update in August 2007. Both reports form part of the common material in ex 2.
- [182] In those reports he made the following conclusions:
- (a) an ongoing underlying demand for 1,350 new households annually exists in the Twin Cities;
  - (b) this is likely to increase to 1,500 new households by 2015-2020;
  - (c) *the projected annual underlying requirement for household creation determined in the 2005 report was too conservative; and population growths since 2004 in the Twin Cities region has been one of a growth recorded in previous decades;*

- (d) the rural/park residential sector consistently achieves a market share of sales of 8% to 12%; the volume of sales in this sector of 100-120 sales per annum;
- (e) there is very limited diversity of product and location in the rural/park residential area;
- (f) *the land development sector in the Twin Cities' market is not being prepared for consistent high rates of population growth; significant affordability issues are now becoming evident in the local market through lack of supply of vacant land for residential accommodation and new dwelling supply;*
- (g) an opportunity exists in the market for a dominant rural/park residential development;
- (h) *the demand for park residential land in Rupertswood is now stronger than at any time in the past fourteen years;*
- (i) there is no proposed rural/park residential development proposed that will provide a diversity of product, in a close proximity to existing services;
- (j) *stage 3 of the Townsville bypass (Shaw Road connection) will be completed by late 2008, improving the proximity for Bohle Plains' residents, particularly the major employment corridors in the Douglas to Stuart precinct.*

[183] In the 2007 report he also concluded that the most significant measure of need that had become evident in the past two years was greater affordability for residential accommodation. A lack of supply generally meant that value growth for most residential property types in the Twin Cities in excess of 50% has occurred since June 2005. In Rupertswood, values for 4,000 m<sup>2</sup> sites have increased by more than 100% in that period. An increase in supply will assist in approving the level of affordability for consumers.

[184] Mr Stack said that "the opportunity for a competitive Park Residential development [with service and social infrastructure as already exists in Rupertswood] to be development in the wider Townsville region is now limited. The only development fronts capable of providing a similar level of amenity, with a similar extension of existing services are situated at the Kelso and of the Upper Ross and adjacent to Black River at Jensen. Both of these locations are equally, or more, distant from the existing Thuringowa Central Commercial Centre and the imminent route of the Townsville bypass than Rupertswood."

[185] In January 2009, Mr Stack's firm conducted a Need's Assessment for another site seeking a material change of use for park residential use west and north of the Bohle River to Yabulu (further north from the land). He referred to the available Park Residential Lots that were ready for market, including 9 lots at Rupertswood - sold by the time of Mr Stack's third report on 07 December 2009 (ex 20). He said, "underlying demand for park residential sites should remain at 10% to 12% for the total market share in the short to medium term future": that is, 100 to 120 lots per annum.

- [186] In a fourth report dated 22 June 2010 (ex 21) Mr Stack said "all potential lots capable of being developed in Rupertswood estate have now been established" and that some 50-100 sites remain vacant in the wider Rupertswood estate. None of the lots without dwellings were developer owned.
- [187] In a fifth report dated 06 September 2010 he confirmed their continuing application of the previous reports to and in "the current market". He referred to the effects of the global financial crisis and economic conditions between 2008 and 2011. He described it as a "tough old market".
- [188] In the 2009-2010 financial year, Park Residential to Urban Residential sales showed 14.95% for the former, consistent he says with previous years and supportive of a long term trend in market share. There were 29 sales in Rupertswood.
- [189] There were no new Park Residential estates being developed and marketed west of Bohle River in Townsville. There was Park Residential land in small lot numbers being marketed at Alligator Creek, south of Townsville. He estimated about 70 lots remained in Rupertswood. In the financial year 2009-2010, 20 new lots were sold in Alligator Creek and 29 existing vacant lots were sold in Rupertswood.
- [190] He also referred to an internet search of lots for sale as at 13 September 2010 (minimum 2 hectares but less than 5 hectares). There were 105 lots in the Greater Townsville area, including 26 at Alligator Creek and 2 at Rupertswood.
- [191] Mr Stack did not think that non-reticulated sewerage was a significant adverse factor in the development proposal, but considered reticulated sewerage was a likely beneficial factor.
- [192] He had not counted vacant sites in the Need's Analysis - they were not necessarily available. Hence he did not dispute Mr Davis' estimate of 532 lots. He referred to Map 5.6 in the Planning Scheme (Urban Growth Boundaries) and expressed the view that the areas identified in other suburbs were generally comparable with Rupertswood (save for schooling availability at Jensen and Mount Low). He agreed in cross-examination that there was sufficient land available elsewhere to provide the number of Park Residential lots proposed in the development. He said market support for sales depended on a number of factors, including pricing. He referred to Map 3.5B in the Planning Scheme and noted it did not reflect the Traditional Residential development of "Bushland Park" and "Sanctum" which was occurring in rural designated areas (or be it within the Urban Growth Boundary). He did not identify at Rupertswood what Mr Davis described as "unsustainable characteristics". He considered that the available lot "take-up" was higher in Rupertswood than in Townsville.
- [193] Mr Quirk in submissions said that need in the context of residential development was not "locational", that is, was not a "requirement" for the whole planning scheme community. He said that even if one was simply referring to locality community, need had to be established.
- [194] Mr Hughes SC submitted that the community was the whole planning scheme area. He referred to the DEO's and s 5.6 of the Planning Scheme and the use of the expression "communities".

- [195] Mr Quirk submitted that whether there was viable alternative land required a focus on the planning scheme, although that did not restrict the satisfaction of such need by land outside the previous Local Government area of Thuringowa City. He said the issue was whether there was need for the proposed development: could it be accommodated on other suitable and available land? He submitted that Mr Stack's evidence showed that need could be so satisfied. I assume the expression "viable alternative" means land that is available and able to be used.
- [196] Mr Hughes SC in submissions said that a planning "need" was something that will enhance the physical wellbeing of a community and that the proposed development would do so by providing positive community and public benefits without their being unacceptable impacts on amenity.
- [197] He identified the public benefits as those referred to by Mr Preston (the store owner), Mrs Haber (the child care centre proprietor), by Dr Olsen (ecological) and Mr Brady (infrastructure). Those matters are referred to in the preceding paragraphs relevant to each of those witnesses and the relevant discussion.

### **Discussion**

- [198] In *All-a-wah Carapark v Noosa Shire Council* [1989] QPELR 155, Skoien DCJ wrote at 157-158:

*"I interpret the phrase 'public need' as involving a different concept from the word 'demand'. The latter suggests a subjective desire for the development. The phrase 'public need' suggests an objectively perceived need for the development and connotes 'the idea that the physical well-being of a community, or some part of it can be better and more conveniently served by providing the means for insuring the provision of that facility, subject always to other considerations of a town planning kind'. See Skateway Pty Ltd v BCC & Ors (1980) 1 APAD 417 at 424. To illustrate by example, most residents of a small country town, if asked, might voice a demand for the establishment in the town of a large department store. However, an objective judgment might well conclude that there was no public need for a development which was doomed to fail, for example, because of lack of sufficient resident population and the presence in a nearby large city of similar established stores. It is difficult to imagine the existence of a public need without the presence of a recognisable demand, but the presence of the latter does not necessarily establish the existence of the former."*

- [199] In *Luke v Maroochy Shire Council* [2003] QPELR 447, Wilson SC DCJ wrote:

*"[34] [T]he phrase 'public need' involves the notion that the physical well-being of a particular community, or a measurable part of it, can be better or more conveniently be served by providing the means for insuring the provision of the proposed facility, subject always to other relevant town planning considerations.*

*[35] The question whether need exists is to be decided from the perspective of a community and not that of the applicant, the development, its competitors, or objectors. Otherwise, the weight to*

*be afforded to it is not fixed and where, as here, the apparent public or community need for the proposed facility is strong and relates to a basic requirement of the resident population it is, plainly, a matter to which considerable weight must be given.*

[36] *In this case that strong need must, however, be weighed against other factors including, in particular, impact upon the amenity of the residents. At the same time, of course, the community consists of more than just particular members of it. As the Court said in Holts-Hill Quarries Pty Ltd v Gold Coast City Council (1999) QPELR 415 at 418-419:*

*'An attempt should be made to reconcile the various provisions where there is apparent conflict. However, there may be occasions when approval may properly be given to a proposal even though it may apparently conflict with some town planning objectives. Provisions exist for exceptions to be made to the general planning policy in appropriate circumstances, and this may mean that on occasions what may be regarded as genuine and legitimate concerns of some members of the community who may be adversely affected by a proposed development may have to be overridden by what is in the best interests of the community as a whole.'*

[200] *In Rich & Anor v Central Highlands Regional Council (supra), His Honour Judge Rackemann made observations about the use of the word "available" in the context of need (at p 7):*

*"In this respect, counsel for the appellant suggested that the use of the word 'available' meant that one should seek to identify a parcel of land which was on the market and could be purchased for sub-division purposes. In my view, that is construing the provision too narrowly. What the provision is concerned with is whether the overriding need for development can be otherwise accommodated on suitable and available land. The evidence demonstrates that there is other suitable land and that the land is available to be both subdivided and brought to market by the owners. As Dr Brown pointed out, if there is a significant need for such allotments, one would imagine that they would be brought to market to respond to that need.*

*In addition to the area set aside by the Planning Scheme, the evidence shows that there are other areas, particularly in the Glengallan Road area, where sub-division to allotments of this size is occurring and can potentially occur, even though they are outside the area nominated in the Planning Scheme."*

[201] *In Cut Price Stores Retailers Ltd v Caboolture Shire Council (1984) QPLR 126, the planning need was described as follows (at p 131):*

*"Need in cases such as this, does not mean pressing need, critical need, widespread desire, or anything of that nature. A thing is needed if its*

*provision taking all things into account, improves the physical well-being of the community."*

See also Skoien DCJ in *All-a-wah Carapark v Noosa Shire Council* [1989] QPELR 155 (at 157 to 158); and *Luke & Ors v Maroochy Shire Council & Anor* (supra).

[202] Need is a "relative concept to be given greater or lesser weight depending on all of the circumstances which the planning authority was to take into account": *Intrafield Pty Ltd v Redlands Shire Council* (2001) 116 LGERA 350 at 354.

[203] In *Webster v Caboolture Shire Council* (supra), his Honour Judge Brabazon QC wrote:

*"[153] If no particular level of need is prescribed, then attention has to be paid to the facts of a particular case. The need may be weak, or strong, depending on the facts. It is also a relative concept, to be given greater or lesser weight, depending upon all of the circumstances which the planning authority has to take into account. See Isgrow v Gold Coast City Council [2003] QPELR 414.*

*[154] Like "grounds", need is to be considered from an objective point of view, and not from the subjective positions of kangaroo, bus lines or the neighbours who object to which proposal. As a Judge of this Court has explained:*

*'Public or community need has always been highly material in this jurisdiction and, under Maroochy Plan 2000, is broadened to include community "benefit" as well as community "need" and "the public interest". The phrase "public need" involves the notion that the physical well-being of a particular community, or a measurable part of it, can better or more conveniently be served by providing the means for ensuring the provision of the proposed facility, subject always to other relevant town planning considerations.*

*The question whether the need exists is to be decided from the perspective of a community and not that of the applicant for development, its competitors or objectors. Otherwise, the weight to be afforded that is not fixed, where as here, the apparent public or community need for the proposed facility is strong and relates to a basic requirement of the resident population it is, plainly, a matter to which considerable weight must be given."*

[204] His Honour went on to cite the passage of the Court in *Holts-Hill Quarries Pty Ltd*, cited in *All-a-Wah Carapark v Noosa Shire Council*, at [36] (supra).

[205] The appellant submitted that "the need could be met on the subject land absent unacceptable impacts on amenity. It is well recognised that the existence of a planning need coupled with an absence of unacceptable impacts is a strong, if not

determinative, planning ground in favour of approval: *Arksmead v Council of the City of Gold Coast* (2000) 107 LGERA 60."

- [206] Rupertswood had been established for about 30 years and has progressively developed towards saturation point. Mr Davis in his evidence was very critical of the establishment of Rupertswood estate. He called it "an isolated and unsupported settlement unrelated to and disconnected with a greater urban footprint of Thuringowa." He said that "infrastructure and services are virtually non-existent". He also said that "to perpetuate and encourage the growth of Rupertswood, is to compromise the integrity of the planning scheme".
- [207] Those expressions, which were the subject of vigorous cross-examination and to which I have already referred in dealing with the town planning evidence, are somewhat inflammatory. They ignore the undeniable fact that even if the establishment of Rupertswood estate was a mistake in proper town planning principle, nevertheless the estate exists, has grown to its capacity for resident population and is going to exist into the future. The need in the Rupertswood community is for a critical mass of population that will enable the provision of services to which other residential communities are accustomed to be provided on a viable basis.
- [208] It is not good or sound town planning and environment practice to simply assert that a residential area has been created in error and then to effectively "write it off". Rather than abandon Rupertswood as a planning error, it is more beneficial to the planning scheme community and it is open upon a proper construction of the planning scheme, to enhance the capacity of that single community by allowing it to grow sufficiently to enable the provision service and social infrastructure to the whole of the existing and new community that a development such as proposed would provide and to restore integrity to the residential area. I do not see that course as destroying the integrity of the planning scheme. Quite to the contrary, I consider that it enhances it.
- [209] In *Plafaire Projects Australia Pty Ltd v Council of the Shire of Maroochy & Anor* [1991] QPLR 87, His Honour Judge Quirk referred to community interests in the context of a rezoning application from rural to residential. So far as is relevant, His Honour wrote (at pages 87 to 88):

*"The subject land is presently undeveloped but has been cleared for grazing purposes. Attempts have been made in the past to farm some of it for the growing of sugar cane. Sippy Creek forms part of the southern boundary and further to the south some sugar cane is still grown. To the east across Claymore Road is found the Mooloolah River National Park"; and*

*"The need for the 'earmarking' of land that can be developed in a suitable and reasonably economical manner for residential use could not really be sensibly denied. However, it was argued that the Strategic Plan had already identified other areas as being suitable for urban expansion. In response evidence was given which doubted the suitability of some of this land for residential use; drainage problems were identified and the feasibility of providing appropriate services and access to other areas was questioned. Much time was taken in a study of what land within this local*

*authority area and adjacent areas was or was not available for urban purposes.*

*A resolution of many of these questions may well have been called for had we been dealing in this case with an important departure, for the first time, in relation to this particular area of the Shire, from the provisions of the Strategic Plan. The Court has, on many occasions, recognised the importance of a Strategic Plan as a planning instrument and the undesirability of any action on the part of the Planning Authority or the Court that might run contrary to the important objectives of the Strategic Plan.*

*However, in this Appeal, it is my view that we are dealing with a plan which (so far as this particular area is concerned) has simply been overtaken by events. Furthermore, to put in bluntly, the most significant of these events was the decision of the Respondent to approve of the rezoning to residential A of an area of land immediately to the west of the subject land. Attempts made, somewhat lamely, by Planning Consultants called by the opponents to the rezoning, to "colour" this decision as regrettable simply missed the point entirely. For all practical purposes it is a decision unlikely to be reversed and has affected the future of this area in a very significant way. If one also takes into account other decisions which have been made in regard to the land destined for educational purposes, the futility of debating the Town Planning propriety of seeing this area as a "node" of future urban activity must be readily apparent."*

- [210] Mr Quirk said in submissions in reply that it could not be asserted that the planning scheme had been ‘overtaken by events’ since it had been commenced only in 2003. Whilst only eight years have passed, the point is not so much the recency of the commencement of the planning scheme but rather the fact that it seems not to have taken into account a means of developing Rupertswood, so as to overcome the disadvantages referred to in such strong language by Mr Davis.
- [211] Whilst I do not think ‘overtaken by events’ is a particularly apt expression in that context, the urban growth boundary in the Rupertswood locality has an appearance of artificiality and it is clear that when the policy was created and when the planning scheme was made Rupertswood was an incomplete development. That has changed in the last ten years and is no longer the case.

### **Is there an infrastructure burden on the Council inherent in the Preliminary Approval?**

- [212] The application does not require Council to provide new or extensions to existing infrastructure. The application when first made referred to connection to reticulated sewerage. It was clear that the Council was not going to provide that facility. Hence the application was modified to incorporate non-reticulated sewerage at each allotment (consistent with Rupertswood). Hence considerations of the nature of those referred to in *Harderan v Logan Shire Council* (1989) 1 Qd R 524 and *Adam & Anor v Gold Coast City Council* [2007] QPELR 379 are not involved in this matter.

### Conflict and Sufficient Grounds

- [213] In *Luke & Ors v Maroochy Shire Council & Anor* (supra), Wilson SC DCJ referred to the sufficiency of planning grounds, notwithstanding conflict with the Planning Scheme:

*"[103] IPA s 3.5.14(2)(b) provides that the assessment manager's decision (or, in this case, the decision of this Court) must not conflict with the Planning Scheme unless there is sufficient (planning) grounds to justify the decision. The existence of conflict is a question of law. Any conflict said to arise must be plainly identified that that is a process undertaking by looking at the scheme as a whole, rather than isolated provisions. The word 'sufficient' refers to the weight to be afforded on any particular ground which is advanced as a reason for approval, despite conflict; and the phrase 'sufficient (planning) grounds' refers to those (planning) grounds of sufficient weight to justify approval, despite the conflict, and includes any grounds which relate to the merits of the application"*(my parentheses).

- [214] The decision, of course, refers to "sufficient planning grounds" whereas the applicable expression in the IPA is "sufficient grounds".

- [215] The term 'grounds' is defined in IPA in Schedule 10:

***"Grounds, for sections 3.5.13 and 3.5.14 –***

*(1) Grounds means matters of public interest.*

*(2) Grounds do not include the personal circumstances of an applicant, owner or interested party."*

- [216] 'Grounds' are not limited to merely planning issues, but refer in a broader sense to the purposes and objects of IPA: *Bullock & Ors v Maroochy Shire Council & Anor* [2008] QPELR 115.

- [217] See also *Leda Holdings Pty Ltd v Caboolture Shire Council & Ors* [2006] QCA 271 per Jerrard JA at pp9-10; and *Australian Capital Holdings P/L & Ors v Mackay City Council; Australian Capital Holdings P/L v Mackay City Council & Ors* [2008] QCA 157, at [54] to [57].

- [218] In a case such as this, the correct approach requires the Court to identify the nature and extent of the conflict and to assess, in the context of the Planning Scheme as a whole, whether there are grounds of sufficient weight to justify approval, despite conflict and bearing the mind the proscription in the Act against prohibiting development. In this case the fact that there is conflict is not an issue - it is plain that conflict does exist and is readily apparent from the very nature of the application. The process has been described by the Court in *Gelling v Cairns City Council* [2008] QPEC 38 per Dodds DCJ at [83] – drawing on the judgment of Muir JA in *Australian Capital Holdings* (supra) and adapted to s 3.5.14 (2) (b) IPA – as:

“(a) identifying the grounds which may justify approval;

- (b) assessment of the role and importance to the planning scheme of the provisions which would be infringed should the proposal be approved;
- (c) the adverse consequences, if any, which might flow from such infringement; and
- (d) the competing merits and weight of the grounds relied on to justify approval.”

[219] I have in discussion through this judgment identified grounds which justify approval in the context of the planning scheme and in particular the urban growth boundary and reservation of the rural area within which the land is located. I am satisfied that there are no adverse consequences that will flow from an infringement of the planning scheme provisions and indeed there are positive benefits inherent in the proposed development. The land in its location, in the context of the existing Rupertswood, is somewhat uniquely situated. An approval of the application is unlikely to set a precedent in respect of the relevant planning considerations. In my view there is sufficient merit and weight in the grounds relied on and that are largely summarised in my discussion about the urban growth boundary, to justify approval.

### **Conclusion**

[220] Ecological and landscape considerations, traffic, water supply and sewerage disposal are all adequately dealt with in the development application. There are in my view no issues that are not amenable to and manageable by the imposition of reasonable conditions.

[221] I have expressed views in the course of discussion about the issues in the appeal. From a town planning context, there are good reasons why the planning scheme can properly be seen as having not made proper provision for the development of Rupertswood. The growth of Rupertswood to a completion of that development indicates a preference for this area for the type of lifestyle and lot size that rural residential developments of the nature proposed. They are consistent with those in the neighbouring estate.

[222] There is a need for the development that cannot be supplied by alternative sites located elsewhere in the planning area. The land is not GQAL. There have been and are no specific plans for the land that reflect a rural character, beyond what I consider to be a marginal rural use at present. Its character is defined by its connection with neighbouring Rupertswood rather than by rural land on its other boundaries, which is in a real sense disconnected by two rivers and riparian corridors and a power transmission line.

[223] The land is immediately adjacent to Rupertswood with a common boundary and has connectivity with that residential estate. It is historically arguable that there was expectation, on the part of Council and the appellants, of residential development of some sort - albeit of a more limited scope than the proposal - that has the potential to provide a critical population mass, through an increase in residents added to those in the Rupertswood Estate, for infrastructure and services that brings with it positive benefits for the community.

- [224] The urban growth boundary policy contemplates other uses, including residential use, outside the boundary. The proposed development meets the requirements of the Code in that respect.
- [225] I am satisfied that there will be no compromise of DEO 6. I am satisfied that there are no town planning or infrastructure matters that would justify a non-approval of the application for preliminary approval.
- [226] There is conflict with the planning scheme. However, I am satisfied that there are sufficient grounds to approve the application despite that conflict. I am satisfied that there is good reason for and that it is appropriate to approve the application even though it overrides the planning scheme in the context of the development being on the border of but outside the urban growth boundary and in a rural area. I do not consider that the approval of this application will change the planning scheme intent with respect to the planning area generally.
- [227] The appellants have discharged their onus of proof. The appeal should be allowed, the decision of Council set aside and the development application approved subject to lawful conditions.

### **Orders**

1. Substantive appeal allowed.
2. Decision of respondent dated 27 January 2009 set aside.
3. Development Application for a Development Permit for a Preliminary Approval approved subject to lawful conditions.
4. Appeal adjourned for determination of appropriate conditions of approval.