

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Shardlow & Ors v Moreton Bay Regional Council* [2012]
QPEC 82

PARTIES: **ROSS WAYNE SHARDLOW**
JUDY MARY SHARDLOW
FRANCIS LEONARD LIPPETT
and **FRANCES NOELA LIPPETT**
(appellants)

and

MORETON BAY REGIONAL COUNCIL
(respondent)

and

**NORTHERN SEQ DISTRIBUTOR-
RETAILER AUTHORITY**
(co-respondent)

and

BRETT JAMES WORSLEY
JUDITH ANN WORSLEY
ANTHONY PAUL MARKS
JAMES TIMOTHY MARKS
and **NICOLA RUTH MARKS**
(co-respondent by election)

and

DEREK DAVIS
and **KATHRYN DAVIS**
(co-respondent by election)

and

GERALD HUGO REE
and **BERENICE CECILIA REE**
(co-respondent by election)

and

**THE SAMFORD AND DISTRICTS PROGRESS AND
PROTECTION ASSOCIATION INC.**
(co-respondent by election)

and

PETER J.M. BOOTH
(co-respondent by election)

and

UNITYWATER
(co-respondent by election)

FILE NO: 4115/11
 DIVISION: Appellate
 PROCEEDING: Appeal
 ORIGINATING COURT: Brisbane
 DELIVERED ON: 11 December 2012
 DELIVERED AT: Brisbane
 HEARING DATE: 13-16; 29-30 November 2012, 6 December 2012
 JUDGE: Robin QC DCJ
 ORDER: **Appeal dismissed.**
 CATCHWORDS: *Integrated Planning Act 1997* s 3.1.6, s 3.5.14A

Appeal against deemed refusal of a preliminary approval varying the effect of the planning scheme to treat two Park Residential lots in Samford Village (aggregating 17,000m²) for most purposes as Residential A, capable of reconfiguration (not applied for) to produce 20 lots of a minimum of 600m² – Residential A lots in the Village in demand – issues included character and amenity, need, whether the proposal was premature or compromised future planning for Samford, whether infrastructure could be efficiently provided, significance of South East Queensland Regional Plan

COUNSEL: Mr M. A. Hinson SC for the appellants
 Mr A. N. S. Skoien for the respondent
 Mr M. J. Batty for the sixth co-respondent by election

SOLICITORS: Carvosso & Winship Solicitors for the appellants
 Moreton Bay Regional Council Legal Services for the respondent
 Unitywater Legal Services for the sixth co-respondent by election

[1] The appellants by their agent on 5 June 2009 lodged with the respondent Council a “properly made” Development Application for a Material Change of Use for Lots 5 and 10 on Registered Plan 855076, having street addresses of 12 Trentham Place and 2 Corbett Street, Samford Village for a “proposed Residential Estate (consistent with the Residential A Zone)”. They sought a preliminary approval to override the Planning Scheme (being the Pine Rivers Planning Scheme 2006) under s 3.1.6 of

the *Integrated Planning Act 1997* (IPA). By 11 successive monthly requests, the Council secured extension of the decision period to 17 June 2011. A second information request dated 21 April 2011 was responded to by the appellants by letter dated 12 September 2011. The Council failed to decide the Development Application before 6 October 2011 or at all, placing the appellants in a position to commence this appeal against a deemed refusal. The application was made while IPA was in force; transitional provisions in the *Sustainable Planning Act 2009* require that it be determined under IPA.

- [2] Lot 5 (containing 6,005 square metres) and Lot 10 (11,010 square metres) are owned by the Lippetts and the Shardlows respectively.

Parties

- [3] The co-respondent, which trades as Unitywater, applied under r 69 of the *UCPR* to come in as a party. It is the authority responsible for supplying water and for delivering sewerage services. There is no problem raised about the former, but an issue arises in respect of the latter. Samford Village is located a valley, meaning that sewerage must be pumped to the south over a range to a receiving station at Ferny Grove, from where it is sent on for treatment and disposal. The crucial pumping station (602) is close to the limit of its theoretical capacity, so that the establishment of new residences, potentially creating a total of 20 where there are but two now, may be problematic. While there is no application for reconfiguration at this stage, an indicative proposal would create 8 Lots out of Lot 5, 12 out of Lot 10. Unitywater is inclined to support the proposal, which bodes to bring new customers it could profitably service, on the basis of work being done at the appellants' expense to upgrade water mains. So far as sewerage is concerned, the support is based on actual experience in the relevant catchment, which is said to indicate that the proposal could be accommodated, although the applicable guidelines may indicate otherwise. The court ought to look to concern that existing consumers not suffer because infrastructure is stretched too far. Unitywater's position, set out in Mr Batty's written submissions, was that:

- “(a) the proposed development is in an area where there is sufficient infrastructure, by way of water and sewer, to service the development;
- (b) Unitywater can provide the required level of service for future development in this area, if the proposed development is approved. However, whether the proposed development would prejudice the adoption of future planning in this area, if it were serviced by Unitywater, is a matter for the Court to determine on the basis of town planning evidence to be led by the Appellants and the Council. As a matter of principle, Unitywater supports properly considered long term town planning.
- (c) the proposed development would not lead to inefficient and costly infrastructure and services; and
- (d) the Appellants have no right in law to the provision of water supply and sewerage services to facilitate the proposed development of the subject site. However, on this occasion, Unitywater will exercise its discretion to service the proposed development, should the

Appellants' appeal be allowed and the proposed development approved."

- [4] The five co-respondents by election, who were among 32 adverse submitters in the "impact assessment" process that the development application went through, took no active part in the hearing. There were submitters favouring the appellants' proposal, including a direct neighbour of Lot 10, who very likely has in mind to develop his land in a similar way at some time in the future, should the proposal be implemented, although the submission rather laments the possible loss of current Park Residential amenity in Trentham Place.
- [5] Lots 5 and 10 find themselves part of what was called an "enclave" of park residential land in Trentham Place and the last "leg" of Corbett Street which connects with Mount Glorious Road. It heads west (or south west) more or less opposite Main Street then south, then west again as the stem of a "T" junction with Trentham Place. A cul-de-sac forming the southern arm of Trentham Place gives access to Lots 6, 7 and 8 on the Registered Plan and also to the rear of Samford State School. Lot 5 is on the southern corner. The northern arm provides the frontage for Lots 1, 2, 3 and 4 (the other corner block) on the east and Lots 9, 10 and 11 on the west. Formerly, Trentham Place connected with Mount Glorious Road. However, it has been closed off at the intersection, which cannot be traversed by vehicles owing to the installation of a "landscaped" mound. The whole street arrangement is thus a cul-de-sac depending for access to the outside world on Corbett Street. In such situations, a coincidence of emergencies in which Corbett Street was blocked might have bad consequences, the more serious the higher the number of residents. Traffic experts were satisfied that Corbett Street had the capacity to serve the development, and no party made traffic an issue. The undesirability of there being only one way in and out was among the issues mentioned by submitters. In an emergency there would be opportunity to take access through the school.
- [6] There are Residential Allotments (with houses on them) on the northern boundaries of Lots 1 and 11, seven in each case, with frontages to Mount Glorious Road. Across Mount Glorious Road and sweeping along it to the east and the heart of Samford Village, is more Residential A, Village Centre, neighbourhood facilities and (rather enclosed by Residential A back fences), Park and Open Space. There is a tiny amount of pink Residential A land further north across Station Street, extending to the middle of the middle section of Samford Village Locality's staggered northern boundary. The other Village locality recognised in the planning scheme is Dayboro. West of Lots 9, 10 and 11 is State land, apparently including a cemetery, and south of that (north and west of Lot 8) is the school. South of Lots 8 and 7 is a sliver of Park and Open Space along Samford Creek, which forms the southern boundary of the Samford Village Locality. To the east of the enclave, at least of Lots 2, 3, 4, 5 and 6, is a swathe of Special Residential Land accessed via Corbett Street. Its north-south leg provides frontages to that half of the Special Residential lots, and eastern cul-de-sac running off it (Chalmers Court) which runs parallel, servicing the others. Lot sizes in Corbett Street were said to be 1200 m², typically.

What the appellants apply for

- [7] As described in Mr Hinson SC's written submissions, the development application sought a preliminary approval overriding the Planning Scheme for a Material Change of Use for a proposed residential estate consistent with the Residential A Zone. Proposed assessment tables setting out levels of assessment for future uses accompanied the application, likewise a reconfiguration concept plan. That plan illustrates lot sizes ranging from 600 m² to 1800 m² (very large lots being needed to accommodate existing dwellings). The application avoids the pitfalls, where s 3.1.6 is invoked, of failing to state the way in which the Planning Scheme's effect is sought to be varied, as illustrated in *Stockland Developments Pty Ltd v Thuringowa City Council* [2007] QCA 384 or of seeking a "rezoning" as in *Lagoon Gardens Pty Ltd v Whitsunday Regional Council* [2009] QPEC 66; [2010] QPELR 74; cf *Moncrieff v Townsville City Council* [1910] QPEC 45; [2010] QPELR 651 at [13]. It was presented as a virtue of the application and an indication of its inoffensiveness that there was no need to vary the level of assessment for the uses for which a preliminary approval for a Material Change of Use was sought, namely detached house, associated unit and home business, or to vary the use codes. Those three uses are consistent uses if compliant with applicable codes in the Park Residential Zone, the Residential A Zone and the Special Residential Zone and self-assessable, code assessable or impact assessable in zones of concern according to the same criteria; the same use code applies, regardless of the zoning. The application deliberately forgoes "Animal Accommodation – if maximum of two stalls", a consistent use in the Park Residential Zone (see Specific Outcome 1 (SO1)), relegating it to SO2 ("inconsistent ... and not to be located in the ... Zone") and the SOs for either zone, to which are relegated Duplex Dwelling and Low Density Multiple Dwelling Units which are ordinarily consistent uses in Residential A. Indeed, except for the three nominated uses, any other use proposed for the site would be inconsistent and require an impact assessable development application.
- [8] The foregoing considerations should not lead to the conclusion that success of the application would achieve or change very little. While the uses of the sites may be unchanged, there is a very considerable difference between a total of two detached dwellings exploiting the use (the present situation, a maximum of one detached house per lot being "consistent" development) and twenty detached dwelling houses on modest lots, broadly of a standard 600 m² – recognising that the average as per the concept plan is 726 m².
- [9] In the local government area are four residential "typologies" as Mr Humphreys, the appellants' planning expert called them. In Park Residential, where the site is, SO4, the reconfiguration standards stipulate a minimum lot size of 4,000m² but a maximum density of 1.25 lots per hectare. Rural Residential Lots, unsurprisingly, must be larger. Curiously, there is no minimum lot size for Residential A. Maximum site coverage is 50 per cent (SO3). The remaining (SO3) "typology" is Rural.
- [10] This appeal does not present the common case of an application under s 3.1.6 attracting complaints that all manner of unspecified proposals may be made in the future in respect of which members of the public have no entitlement to make submissions, because the planning scheme is varied to make them code assessable or self assessable. The public have had (and availed themselves of) the opportunity to make submissions against the application, with a fairly good idea of what bodes to happen on the site. The Residential A Zone Specific Outcomes insist on built forms compatible with the low scale residential nature of the area, compatibility

with the existing streetscape and predominantly detached housing character etc. Other recent Residential A developments in Samford closer to the village centre show what may be expected. That will be more intensive development than in the special residential zoned land in Corbett Street. There, the lots are of about twice the size. Special Residential is a zone offering a great deal of flexibility where development occurs according to a plan of development acceptable to the Council (see Special Residential Zone SO3). The zone is used for retirement villages, where quite close settlement is required.

- [11] The Residential A Specific Outcomes are proposed to be changed in two other ways, not yet mentioned. The first affects SO9, to delete a requirement that building setbacks be consistent with the building line for residential development on adjoining land. Such a restriction would preclude the future development envisaged. There will remain a requirement that setbacks be compatible with the existing streetscape and not compromise the amenity of the surrounding residential lots. It is proposed to add an additional specific outcome, requiring that subdivision be in accordance with the Urban Residential Sub-Division Design Code. The requirements of it are unsurprising and begin with:

“Specific Outcomes for Assessable Development	Probable Solutions
2.3.1 Lot Layout – Single Detached Housing	
<p>SO 1 Residential lots have appropriate area and dimensions for:-</p> <ul style="list-style-type: none"> (1) siting and construction of a dwelling and <i>ancillary outbuildings</i> (2) the provision of private open space; (3) convenient and safe vehicle access; and (4) on <i>site</i> car parking 	<p>PS 1 All residential lots:-</p> <ul style="list-style-type: none"> (1) contain a rectangular building envelope of 13m x 25m minimum, using standard setbacks; (2) provide for a private open space area of 80m² min x 2.5m minimum width; (3) have frontage access to a road not exceeding Collector standard (i.e. no frontage access to Trunk Collector Roads and Major Roads); and (4) accommodate car parking on <i>site</i> for 3 medium passenger vehicles with at least one within the building envelope. <p>Accessways for rear lots:-</p> <ul style="list-style-type: none"> (1) have a minimum width of 5m; (2) have a maximum length of 40m; (3) have a minimum length of 15m; and (4) are constructed and sealed to a minimum width of 2.5m <p>OR</p> <p>All residential lots, except rear lots, have a minimum area of 600m² and contain a minimum rectangle of 15m x 25m. All</p>

	<p>residential rear lots have a minimum area of 800m² and contain a circle 25m in diameter.</p> <p>Accessways for rear lots:-</p> <p>(1) have a minimum width of 5m;</p> <p>(2) have a maximum length of 40m;</p> <p>(3) have a minimum length of 15m; and</p> <p>(4) are constructed and sealed to a minimum width of 2.5m”</p>
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The 600 m² compares with 6,000 m² (for practical purposes) in Park Residential.

- [12] The case law regarding s 3.1.6 applications typically reflects a Council willing to have the effect of a local planning instrument varied. The court becomes involved because a submitter appeals, or perhaps because the applicant appeals about a condition. This is not such a case. From finding itself unable to decide the application, perhaps in response to the weight of submissions against it, the Council has become firmly opposed. As is often said, it is the planning authority, not the court. Council opposition does not mean the application must fail. *Australand Holdings Limited v Gold Coast City Council* [2007] QPELR 451 is the only instance Mr Hinson has been able to identify of a Council’s opposition being unavailing. From [26] ff, Judge Rackemann helpfully sets out the special assessment procedure for aspects of development applications involving a request to vary the effect of a local planning instrument on the relevant land.¹ He then said:

“[29] In this case, the witnesses called by the Council were prepared to acknowledge that Australand’s proposal had some merit. It was submitted however, on behalf of the Respondent, that the Court ought give significant weight to the Council’s position as planning authority and ought not depart from its preference, as reflected in its decision, unless there was an obvious lack of merit in the strategy or outcome preferred by the Council.

[30] While the Court has, on many occasions, in assessing a development application in the context of an appeal, recognised that it is not the planning authority for the relevant local authority area, the subject appeal, which falls for determination by the Court, requires the Court to determine how the effect of the LAP should be varied for the subject site, at least in respect of the matters in issue. That is not to say that the Council’s role as planning authority more generally or its view with respect to the matters in issue with respect to the subject site ought to be disregarded. The Court is however, obliged to conduct the appeal by way of a hearing anew² and, in effect, stand in the shoes of the local government³ for the purposes of deciding the variations in

¹ These are ss 3.5.5A and 3.5.14A, as opposed to ss 3.5.5 and 3.5.14 which otherwise govern the assessment.

² Section 4.1.52(1).

³ See the explanatory note to s.4.1.52, the position reflects that under previous legislation – see *Walker v Noosa Shire Council* [1983] 2 Qd. R. 86 per Thomas J at 88.

response to Australand's application. The Respondent's written outline acknowledged as much.⁴ It would be wrong for the Court to approach its jurisdiction on the basis that the appeal should be dismissed unless the Council's decision was unreasonable, in the *Wednesbury Corporation* sense⁵, or otherwise defective at law. While the onus in the appeal is upon the Appellant, there is nothing in the legislation which confines the Court's discretion by reference to whether the position contended for by the Council is obviously bereft of any merit whatsoever. As the Respondent's written outline acknowledged⁶, the Court exercises an independent mind in deciding the appeal.

- [73] In the circumstances, Australand's appeal should not be dismissed on the basis that its proposed variations in this respect, which are appropriate judged on their merits, strike an appropriate balance and are, in substance, consistent with the LAP provisions, do not require provision for a continuous public canal front pathway along the entire canal frontage as envisaged by the HICMP."

In *Australand*, a relevant performance criterion (and the acceptable solution) required provision of continuous and unencumbered public access/publicly assessable pedestrian promenade along the development's (entire) waterfront: see [20]. The developer proposed as an alternative a "boardwalk" passing over waterbodies, necessitating variation of the relevant planning instrument. That would have been consistent with the Local Area Plan.

- [13] Accepting the statements of principle quoted in the reasons, I am of the opinion that in the context of the Samford Village locality in all the circumstances, the implications of the appellants' proposal are relatively much greater. Although the outcome here will not, as a matter of law, constitute a precedent, in practical terms, as was conceded, approval of the proposal will open the way for similar development throughout the enclave. Although Mr Hinson says the fate of this development application will not determine any wider or other issue, it would hardly be open to the Council or the court to knock back a similar application over Lot 11 (which would be surrounded by Residential A) or one over Lot 4 (whose owners put in an objection); it would face eight Residential A blocks immediately across Corbett Street on the south and 12 immediately across Trentham Place on the west. There is no agreement here along lines encountered from time to time that there is room for only one of competing proposals in a market. The present situation is one in which, effectively, the planning future of the entire enclave, which would logically be considered as a whole, is up for determination. Unitywater would support a Residential A outcome. While water is supplied throughout the enclave, sewerage is not. Unitywater indicates that it would not be prepared to provide sewerage in the enclave except to lots subdivided along the lines envisaged here. It has prepared designs to demonstrate how to do that. Capital works would be necessary to upgrade the system. By s 3.5.5A of IPA, in respect of the part of an application for a preliminary approval mentioned in s 3.1.6 stating the way in which it is sought to vary the effect of an applicable local planning instrument:

⁴ Paragraph 32.

⁵ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] 2 All. E.R. 680.

⁶ Paragraph 20.

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

- (1) Subsection (2) applies to 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.
- (2) The assessment manager must assess the part of the application having regard to each of the following-
 - (a) the common material;
 - (b) the result of the assessment manager’s assessment of the development under section 3.5.4 or 3.5.5; or both;
 - (c) the effect the proposed variations would have on any right of a submitter for following applications, with particular regard to the amount and detail of supporting material for the current application available to any submitters;
 - (d) the consistency of the proposed variations with aspects of the planning scheme, other than those sought to be varied;
 - (e) if they are not identified in the planning scheme as being appropriately reflected in the planning scheme-
 - (i) State planning policies; or parts of State planning policies; and
 - (ii) for the planning scheme of a local government in the relevant area for a State planning regulatory provision – the provision; and
 - (iii) for the planning scheme of a local government in a designated region – the region’s regional plan;
 - (f) the matters prescribed under a regulation (to the extent they apply to a particular proposal).”

I have considered (c) elsewhere, favourably to the appellants. As to (d), I agree with Mr Hinson that consistency of the proposed variations with Park Residential requirements is not something that can be expected, the point of the exercise being to do away with some of them, at least. That does not mean that the amenity of those neighbours who would like to see Park Residential continue to prevail does not require consideration. As Mr Skoien pointed out, the outlook and amenity of a single resident was thought appropriate for consideration in *Begley v Pine Rivers Shire Council* [1995] QPELR 134, although that did not determine the outcome. Further, realisation of the development envisaged ultimately on the “site” will change the character of the enclave, which remains in the Park Residential Zone. The appellants acknowledge as much. According to their written submissions (para 63), the conflict with the planning scheme is confined to an inconsistency between the proposed density of development and overall outcomes 1 and 4 of the Park

Residential Zone⁷ and Specific Outcomes 3 and 4 of the Park Residential Zone.⁸ Summing it up, the proposal is said to be consistent with the planning scheme except in respect of the density of the development, the conflict being minor having regard to the nature of adjacent development. Indeed it is submitted that the site's present low density of development is "anomalous in planning terms".

[14] As to (e), the South East Queensland Regional Plan was much relied on by the appellants. It came out in 2005, having been some time in gestation, as was the Pine Rivers Plan of 2006. It is a matter of speculation to what extent the former was influential in the form the latter has taken. The Pine Rivers Plan does not identify the regional plan; accordingly, it is appropriate for the court to have regard to it.

[15] Section 3.5.14A of IPA is:

“3.5.14A Decision if application under s 3.1.6 requires assessment

⁷ **“2.5 Overall Outcomes Sought for the Park Residential Zone**

The overall outcomes for the Park Residential zone are the following:-

- (1) *Detached dwellings on large lots catering for semi-urban lifestyles with a high standard of amenity is the predominant form of development;*
- (2) *Non-residential uses that are allied to and compatible with the local area are established where residential character and amenity will not be detrimentally affected;*
- (3) *Intensive rural pursuits, commercial and industrial uses are incompatible with the amenity and character of the Park Residential zone and are not located in the zone;*
- (4) *Urban residential development is not located in the Park Residential zone; and*
- (5) *Development is of a scale, size and bulk that is appropriate for the lot and compatible with the surrounding residential development.”*

(Italics added)

⁸ **“6.1 Assessment Criteria for Assessable Development in the Park Residential Zone**

PARK RESIDENTIAL ZONE	
Specific Outcomes for Assessable Development	Probable Solutions
Reconfiguring of Lots	
SO 3 Reconfiguring to create additional lots occurs at a maximum density of 1.25 lots per hectare.	PS 3 No solution provided.
SO 4 Reconfiguring to create additional lots may occur at a lot size less than that stated in <i>PS 1</i> of the <i>Park Residential Subdivision Design Code</i> (Ch. 6, Part 2, Div. 3) if:- (1) the minimum lot area is 4000m ² ; and (2) the <i>site</i> contains:- (a) significant vegetation; or (b) significant habitat; or (c) desired environmental corridors; and (3) the maximum density is 1.25 lots per hectare; and (4) 50% of the <i>site</i> is transferred to Council for environmental purposes.	PS 4 No solution provided.

”

- (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.

- (2) However-
 - (a) to the extent development applied for under other parts of the application is refused, any variation relating to the development must also be refused; and
 - (b) the assessment manager’s decision must not compromise the achievement of the desired environmental outcomes for the planning scheme area; and
 - (c) paragraphs (a) and (b) do not apply if compromising the achievement of the desired environmental outcomes is necessary to further the outcomes of any of the following if they are not identified in the planning scheme as being appropriately reflected in the planning scheme-
 - (i) State planning policies, or parts of State planning policies;
 - (ii) for the planning scheme of a local government in the relevant area for a State planning regulatory provision – the provision;
 - (iii) for the planning scheme of a local government in a designated region – the region’s regional plan.”

Thus, the South East Queensland Regional Plan, to which regard must be had, may constitute warrant for ignoring compromise of DEOs.

[16] The Regional Plan (2009-2031) provides at pp 15-16:

“Urban Footprint

Intent

The Urban Footprint identifies land that can meet the region’s urban development needs to 2031 in a more compact form.

Description

The Urban Footprint includes established urban areas, broadhectare and remnant broadhectare areas that could be suitable for future urban development. It incorporates the full range of urban uses, including housing, industry, business, infrastructure, community facilities and urban open space.

Remnant broadhectare lands are undeveloped lots that could potentially be developed for urban residential purposes but are not currently zoned for higher density development. They are located within the Urban Footprint, and are usually surrounded by urban development or near existing or planned urban infrastructure services.

The Urban Footprint defines the extent of urban development to 2031 by using cadastral or other clearly defined boundaries.

The Urban Footprint does not imply that all included land can be developed for urban purposes. For example, national parks and state forests will continue to be protected and managed under state legislation such as the *Nature Conservation Act 1994* and the *Forestry Act 1959*, and remnant vegetation will continue to be protected under the *Vegetation Management Act 1999*.

Land in the Urban Footprint may be unsuitable for urban development for other reasons, including constraints such as flooding, land slope, scenic amenity, and the need to protect significant biodiversity values.

Local government planning schemes are the main instrument that will establish and refine the desired use of land and the preferred timing of development within the Urban Footprint.

The Urban Footprint focuses urban growth in locations that:

- provide reliable and effective transportation choices or otherwise reduce car use, particularly for infill and redevelopment in and around existing urban centres; and along high-frequency public transport corridors
- physically connect to existing communities wherever possible, or otherwise provide new development with direct transport linkages to established urban areas early in the development
- promote cohesive communities that support a wide range of services and facilities
- include or have access to existing or planned employment centres.

The Urban Footprint includes some areas designated or already developed for rural residential purposes that are well located with respect to urban services and facilities. Local government is required to review these areas to identify potential opportunities for developing or redeveloping them for urban purposes.”

- [17] Samford falls within the urban footprint. There are contexts in which the Regional Plan may count against a development proposal. This is not one. On the other hand, the Regional Plan does not require or necessarily expect that urban development, residential in particular, as envisaged here, will occur everywhere within the urban footprint. It expressly leaves it to local government through planning schemes to establish and refine desired uses of land within the urban footprint. I am uncertain of the implications of local government being “required” to undertake certain things (after the fourth “dot point”). I would be astounded if it created any imperative or even urging to decide the present development application in any particular way. Attention was drawn to what is said at page 75 under 5.3 Rural Communities regarding a principle to: “ensure rural communities benefit from regional growth, and participate fully in the planning and development of the region.” It is left to the Council to decide what planning arrangements are fitting. There follows:

“5.3.2 Accommodate the required growth of rural villages through the planning scheme revision process.

Program

5.3.3 Assist rural communities to identify strategies for economic development and growth that capitalise on their rural character, local attributes and cultural heritage values.

The regional land use pattern provides sufficient land around rural towns to facilitate future planning and growth of these centres. The intent is to reduce isolated rural residential developments by consolidating growth around discrete, serviceable urban centres. The SEQ Regional Plan also identifies a number of rural activity centres that deliver higher order infrastructure, community services, commercial activities and transport into rural areas.

Local governments will need to demonstrate that:

- extensions to rural villages are required to assist in the provision of housing, employment, services or facilities for the locality and do not undermine the roles of nearby towns or urban areas
- the village’s character and surrounding rural production capacity will be protected
- there is insufficient supply within existing and proposed urban lands.”

Such provisions may indicate that Samford, if it is a “rural village” (which Mr Hinson refuted) may be expected to play its part in accommodating population growth in South East Queensland. I do not think there is any sensible way in which use can be made of these provisions in the present appeal.

- [18] Samford does get a mention in the special provisions at page 24 and following for Moreton Bay. That forecasts 84,000 additional dwellings in the local government area by 2031. Samford is not mentioned among the residential areas (broad hectare or existing urban areas) or in identified growth areas, residential and employment. Samford is mentioned, with Dayboro as providing district level services in a

network of centres expected to “continue to provide an appropriate mix of business, community and government services, facilities and employment.”

- [19] The appellants’ proposal is consistent with the Regional Plan, which counts as a positive. However, there is nothing about the Regional Plan, in my view, which justifies overriding the Pine Rivers Plan, whether to respond to “conflict” with that Plan or otherwise. I reject any suggestion that the Regional Plan’s listed reasons why land in the urban footprint may be unsuitable for urban development is intended to be complete or exclusive.

Need

- [20] The evidence of Mr Assink (who was not cross-examined) and Mr Humphreys demonstrates a high demand for Residential A-type allotments in Samford. It is difficult to say that this amounts to what used to be called a “planning need” or “community need”. This can be important where “grounds” which means “matters of public interest” are being sought for the purposes of s 3.5.14 in cases of conflict between a proposal and a local planning instrument. Even if there were a need constituting a “ground” it remains a question whether some identified ground(s) can be judged “sufficient”. The determinations have to be made in context. Here, context is the small community of Samford Village, which the planning scheme does not wish to see extended. Space is limited, and the character of the place is plainly jeopardised if small housing lot developments, however much in demand, are to be introduced in appreciable numbers. This may be a case of a need which simply cannot be satisfied from the constrained resource available, without unacceptable harm to that resource.

Conflict with the planning scheme

- [21] A proposal under s 3.1.6 to vary the effect of a planning scheme so far as it relates to particular land will, by definition, conflict with the scheme to that extent. The court must disregard that conflict. But it will look for conflict with the planning scheme otherwise and, in my opinion, at the implications for other land of the provisions being varied.
- [22] Pine Rivers Plan contains 19 desired environmental outcomes, numbered in an unusual way that reflects their being listed in different categories. Among them, the following were discussed:

“Division 2 Economic Development Desired Environmental Outcomes

2.1 Urban Corridor

Urban land use and development are consolidated and contained within interconnected urban areas forming an urban corridor comprising the *localities* of Urban, Major Employment Centres and North Lakes and bounded by the *localities* of Catchment, Semi-Urban and Coastal River Lands.

2.4 Urban Residential and Ancillary Development and Land Use

Residential development and land use provides housing choices

that match the housing needs of the community and maintain high quality living environments.

2.5 Rural and Low Density Residential and Ancillary Development and Land Use

Development and land use satisfies the rural and semi-rural and semi-urban lifestyle aspirations of the community and substantially maintains ecological processes and natural systems as far as practicable.

Division 4 Community Wellbeing and Desired Environmental Outcomes

4.2 Infrastructure Energy

Reliable infrastructure is provided in a manner that minimises total life cycle costs, efficiently satisfies the desired standards of service and facilitates effective utilisation.

4.7 Amenity

Reasonable and appropriate standards of amenity are maintained and promoted.

4.8 Community Identity

The distinct character and identity of the communities in the *Shire* are promoted.”

Much about the proposal is consistent with those DEOs. Arguments can be made both ways. Mr Humphreys, the appellants’ planning expert emphasised the high demand for Residential A-type lots in Samford, which he characterised as a need that the proposal could satisfy. What the planning scheme seeks is satisfaction of “housing needs of the community”. Submissions indicate that in the Samford Valley are some who dream of moving into the village on a small block of land. Their need would be a “community” one in a way that the desire of outsiders to move to Samford Village, undoubtedly a salubrious location from many points of view, may not be. The Council and its planning expert Ms Roughan contend that DEO 2.5 does not welcome the highly urban housing form of Residential A. They claim that intrusion of it into the enclave offends 4.7 and 4.8. I am inclined to think that approach is correct. The benefits of creating small lots for housing close to the school, an attractive notion at first blush, would come at the cost of largely destroying the amenity and character of the enclave.

[23] The court is not necessarily driven to reject the proposal pursuant to s 3.5.14A(2)(b) – in circumstances where (c), in my view, offers no ameliorating possibilities. To the extent that s 3.5.14 is relevant, compromise of achievement of DEOs for the planning scheme area (which may be difficult to establish, given the broad focus of the relevant enquiry) is not the only situation requiring refusal of a proposal; conflict with the planning scheme (in the absence of sufficient grounds to justify another decision) has the same effect. In my view such conflict will also be important, and perhaps determinative, when a decision has to be made under s 3.5.14A, (1) of which, in my view, emphasises the discretion which the decision

maker has in a striking way in describing the three options open, namely (a), (b) and (c). In my view, conflict with the planning scheme should be taken into account. It exists here, in the ways identified by Mr Roughan. Quoting the planners' joint expert report:

- “(138) **Ms Roughan** says that the planning scheme specifically differentiates between residential zones at different intended densities and therefore, character, in the Samford Village locality. Residential A is the only zone intended to occur at typical urban densities. The Park Residential zone is specifically intended to accommodate a particular range of densities, with a minimum lot size of 4000m² and an average density of 1.25 lots per ha. The Special Residential area around Corbett Street accommodates lots of around 1200m².
- (139) In her view the area to the south of Mt Glorious Road in which the subject land is located is not one that has a highly developed character despite the presence of the school. It does not have a substantially different size or feel to other Park Residential land to the north of the village centre. For example, the Park Residential enclave on the north western corner of the village locality contains 16 lots and is accessed after traversing the village centre and Residential A zoned land.
- (140) **Ms Roughan** says that the proposed development is at a substantially higher density than both the Park Residential and the nearby Special Residential area. Proposed lot sizes are generally in the order of 600m² and are clearly of a typical “urban” character. In addition, the proposed development provides for the possibility of medium density housing types via the parameters of the preliminary approval sought. She says that this proposal also effectively pre-supposes the redevelopment of the entire pocket at urban densities, with the only means of access via Corbett Street.”

And:

- “(168) **Ms Roughan** says that the proposed development conflicts with DEO 2.4 which says that development should satisfy the rural and semi rural and semi urban lifestyle aspirations of the community, because it is an urban development within an area that was specifically intended for semi-urban living. The DEOs and related provisions represent the strategic intentions of the 2006 planning scheme. It is also in conflict with the overall outcomes for the Park Residential zone as it does not cater for a semi urban lifestyle at the densities intended (outcome 2.5 (1)), it constitutes urban development (outcome 2.5 (4)) and is not of a scale that is compatible with the surrounding residential development (outcome 2.5(5)). In her view, it also conflicts with the overall outcomes for the village locality generally because it does not maintain or enhance the low intensity character (outcome 2.2 (3)), nor is it compatible with the intended lifestyle, nature and appearance of the locality (outcome 2.2(4)). The proposed development is also in conflict with overall outcomes in the bushfire overlay code which seek to limit the number of people living in high or medium hazard areas.

- (169) Additionally, **Ms Roughan** says the proposed development does not comply with a range of specific outcomes within the village locality code which flow from these overarching intentions, including SO4 to SO6 and SO9 in section 3.1, and SO2-SO4, SO6-SO9 and SO11 in section 6.1. In her view, the proposed development layout is also inadequate having regard to relevant specific outcomes in the subdivision design code dealing with integration, orientation, and pedestrian accessibility and convenience. She notes that the engineering experts' assessment will inform whether or not the proposal is consistent with servicing related provisions.
- (170) She says that if the current properly held policy of the planning authorities is to be altered this should be the result of an appropriate planning process that may form part of the planning scheme review. In her view, there is no planning need to deviate from the current planning policies prior to the completion of those processes.
- (171) She refers to her comments made in paragraph 130(1) regarding the intentions of the regional plan for rural towns and villages, and in paragraphs 138 and 139 regarding the particular character of the "enclave" in which the subject land is located."

[24] The specific outcomes referred to by Ms Roughan are:

"3.1 Assessment Criteria for Assessable Development in the Village Locality

VILLAGE LOCALITY	
Specific Outcomes for Assessable Development	Probable Solutions
Nature and Scale of Development	
SO 4 Urban residential development is accommodated and only located in the Village Locality where appropriate infrastructure is available.	PS 4 No solution provided.
Character and Amenity	
SO 5 New development is complementary to and well integrated in the traditional rural village character.	PS 5 No solution provided.
SO 6 The village character is enhanced by careful design considerations and details relating to scale, form and texture of the proposed buildings and signage and the retention of verandahs and awnings.	PS 6 No solution provided.
SO 9 The scale, density and character of development are in keeping with the existing and likely future development of the surrounding area and the adverse impacts of intrusive uses noise, and through traffic area minimised.	PS 9 No solution provided."

6.1 SO 11 is a specific outcome for assessable development in the Park Residential Zone requiring that building setbacks:

- (1) are consistent with the building line for residential development on adjoining land;
- (2) are compatible with the existing streetscapes; and
- (3) do not compromise the amenity of the surrounding residential lots.

In no case does the planning scheme offer a probable solution. I think Ms Roughan has made a case in respect of SO 5, SO 9 and SO 11.

- [25] Further, I am persuaded by her point that it is appropriate for the Council to review planning arrangements in a more wide-ranging way, rather than compromise the outcome of such an exercise by what amounts to a quasi “spot rezoning” of the appellants’ properties. I am troubled by the absence of any indicated timetable for a review. Matters to do with future planning for Samford Village have not reached a stage comparable with that considered in *Glenella Estates Pty Ltd v Mackay Regional Council* [2010] QPEC 132. However, I am firmly of the view that it is appropriate in this appeal to take the same approach regarding foreclosing of options available to the local government, as planning authority.
- [26] So far as clashes of aspirations are concerned, I cannot see that the appellants could justifiably argue that they had reasonable expectations of getting the planning scheme changed along the lines now proposed. On the other hand, it is easy to accept that the local residents, the objecting submitters in particular, would not have expected the planning arrangements to change to the extent now proposed. Of course, I acknowledge the many statements in the cases to the effect that landowners must allow for the planning arrangements changing. It ought to be observed that there are areas north of Mount Glorious Road suitable for being turned to Residential A development.
- [27] It is helpful to set out (for the purpose of commenting thereon by way of summary) Mr Skoien’s abridged version of the Council’s points from his written closing submission:

“1.7 Following the deemed refusal and the commencement of this Appeal, Council provided its reasons for refusal. Those reasons (14 in number) can be summarized as follows:

- (a) the proposal cannot be serviced by infrastructure;
- (b) provision of infrastructure for the subject land would lead to inefficient and costly infrastructure and services;
- (c) the Appellants do not have any right in law to the provision of water and supply and sewerage services to facilitate the proposed development;
- (d) the proposed development is premature and will prejudice further planning for the Samford Village Locality;
- (e) the proposal will have adverse impacts upon the character and amenity of both the immediate surrounds and the Samford Village Locality;

- (f) the proposal conflicts with the provisions of Pine Rivers Plan (from the higher order provisions of the Desired Environmental Outcomes through to the more specific provisions in respect of the Samford Village Locality and this area of land in the Park Residential Zone; and
- (g) there are not sufficient grounds to justify approval of the Development Application despite its conflicts with the Pine Rivers Plan.”

In my opinion, Unitywater’s evidence tends to dispose of (a), (b) and (c), although I am left with an uneasy feeling that capacity restrictions, if the proposal went ahead, would exacerbate the Council’s complaint (d), which I think is a sound objection to the proposal. It might be mentioned that Unitywater’s witness confessed to some puzzlement as to why sewerage arrangements in Samford were working effectively, notwithstanding their being so close to capacity, as indicated by the guidelines established. One reason advanced was that significant connections that had been approved have not yet come online. On balance, I find that the Council (which does not bear the onus of proof) has made out (e), (f) and (g) as well as (d).

[28] The appeal should be dismissed.