SUPREME COURT OF QUEENSLAND

CITATION:	*Nerinda Pty Ltd v Redland City Council & Ors* [2018] QCA 146
PARTIES:	**NERINDA PTY LTD** **ACN 001 325 720** **(applicant)** **v** **REDLAND CITY COUNCIL** (first respondent) **LIPOMA PTY LTD** **ACN 002 203 581** (second respondent) **LANREX PTY LTD ACN 010 740 191 as trustee for IDL INVESTMENT TRUST & ANOR** (third respondent) **VICTORIA POINT LAKESIDE PTY LTD** **ACN 106 781 757** (fourth respondent)
FILE NO/S:	Appeal No 11075 of 2017 P & E Appeal No 4940 of 2015 P & E Appeal No 2 of 2016 P & E Appeal No 44 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Planning and Environment Application and Appeal
ORIGINATING COURT:	Planning and Environment Court at Brisbane – [2017] QPEC 53
DELIVERED ON:	29 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	30 April 2018
JUDGES:	Fraser and Morrison JJA and Bowskill J
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is allowed.** **3. The order made by the Planning and Environment Court on 8 September 2017 is set aside.** **4. The matter is remitted to the Planning and Environment Court to be determined according to law.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where on an appeal by submitters from the Council's approval of a development

application, the Planning and Environment Court refused a development application on the basis of conflict with the relevant planning scheme – where a draft new planning scheme, which essentially replicated the existing planning scheme, had been made publicly available for inspection by the time the Council approved the application, but was not in force, including by the time of the appeal – where the Council led expert evidence, and argued, that its planning scheme provisions were deficient, due to population growth, and supported approval of the development application on public interest grounds, despite the conflict – where the Planning and Environment Court found there was significant force in the expert evidence discrediting the contemporary planning for the area, but found that the evidence, and the Council's arguments, were diluted by the fact of replication of the existing scheme in the new draft scheme, and that it was a matter for the Council to address perceived deficiencies in its scheme, not the Court – whether the Planning and Environment Court erred in law in giving weight to the draft planning scheme under s 495(2)(a) of the *Sustainable Planning Act* or, by inference, under the *Coty* principle – whether the Planning and Environment Court erred by failing to perform the role imposed on the Court by ss 326 and 329 of the *Sustainable Planning Act*, standing in the shoes of the Council in its capacity as the assessment manager (in contrast to its role as the planning authority)

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – MATTERS FOR CONSIDERATION OF CONSENT AUTHORITY – GENERALLY – MATTERS TO BE CONSIDERED – whether the Planning and Environment Court erred, by taking into account an irrelevant consideration, namely the potential economic impact of the development on nearby existing or future centres, in the absence of a finding of any prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development were approved – whether the Planning and Environment Court erred in its application of the decision rules in relation to an application for preliminary approval under s 242 of the *Sustainable Planning Act*

Planning and Environment Court Act 2016 (Qld), s 63, s 311
Statutory Instruments Act 1992 (Qld)
Sustainable Planning Act 2009 (Qld), s 242, s 316, s 324, s 326, s 329, s 495(2)(a), s 496

Coty (England) Pty Ltd v Sydney City Council (1957) 2 LGRA 117, considered
Elan Capital Corporation Pty Ltd v Brisbane City Council [1990] QPLR 209, considered
Kentucky Fried Chicken Pty Ltd v Gantidis (1979) 140 CLR 675; [1979] HCA 20, considered

Lewiac Pty Ltd v Gold Coast City Council [1996] 2 Qd R 266; [1994] QCA 2, considered

COUNSEL: D R Gore QC, with J G Lyons, for the applicant
R Lister QC, with K Wylie, for the first respondent
C L Hughes QC, with M J Batty, for the second, third and fourth respondents

SOLICITORS: Anderssens Lawyers for the applicant
Redland City Council Legal Services for the first respondent
McCullough Robertson for the second, third and fourth respondents

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Bowskill J. I agree with those reasons and with the orders proposed by her Honour.

[2] **MORRISON JA:** I agree with the reasons of Bowskill J and the orders her Honour proposes.

[3] **BOWSKILL J:** The applicant wishes to develop land at the corner of Boundary Road and Panorama Drive, in Thornlands, by building a Coles supermarket, specialty shops, tavern, medical centre and service station, as well as residential housing. For that purpose, it applied to the Redland City Council for a development permit to reconfigure the lot (from 1 into 2) and for a preliminary approval for a material change of use and to vary the effect of the local planning instrument, by altering the levels of assessment for various parts of the development, and specifying the assessment criteria. The Council decided to approve the application. The second, third and fourth respondents are commercial competitors, who own and operate three nearby shopping centres at Victoria Point (I will refer to them as the respondents). They appealed the Council's decision to the Planning and Environment Court. For reasons given on 8 September 2017 that Court allowed the appeal, and refused the development application.[1]

[4] The applicant seeks leave to appeal the Decision, arguing that the primary judge made a number of errors of law.[2] For the reasons given below, in my respectful view the reasoning in the Decision does reveal an error of law, in particular in relation to the treatment of a draft planning scheme, which could have materially affected the Decision.[3] Accordingly, it is appropriate to give leave to appeal, to allow the appeal, and to remit the matter to the Planning and Environment Court for further hearing.

The draft planning scheme

[5] Relevantly, at the time the application for development approval was made and decided by the Council, and at the time of the hearing of the appeal, the planning

---

1 *Lipoma Pty Ltd & Ors v Redland City Council & Nerinda Pty Ltd* [2017] QPEC 53 (the **Decision**). Although the cover sheet of the Decision states it was delivered on 6 September 2017, the material indicates this is an error, as the Decision was delivered on 8 September 2017. See T 1-31.24 and AR p 1730 (final order made on 8 September 2017).

2 See s 63 of the *Planning and Environment Court Act* 2016 (Qld); formerly s 498(1)(a) of the *Sustainable Planning Act* 2009 (Qld) (now repealed by the *Planning Act* 2016 (Qld), but see s 311 as to continued operation of the repealed Act).

3 *Savage v Cairns Regional Council* (2016) 214 LGERA 192 at [8].

scheme in force was the *Redlands Planning Scheme 2006*. By the time the Council approved the application, a draft planning scheme, the *draft Redlands City Plan 2015*, had been made publicly available for inspection,[4] but had not been adopted by the Council, or approved by the Minister, or notified in the gazette. The draft planning scheme therefore was not in force and had no operable effect.[5]

[6] In determining an appeal by an applicant for a development application, the Planning and Environment Court, under s 495(2)(a) of the *Sustainable Planning Act*:

> "must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the court considers appropriate".[6]

[7] The reference in s 495(2)(a) to "new laws and policies" is a reference to laws and policies which are in force and which have operable, legal effect. Once it takes effect, a planning scheme is a law, being a statutory instrument under the *Statutory Instruments Act* 1992.[7] The draft planning scheme was not a new law (or policy); it was merely a draft proposed law. Therefore, this provision did not authorise any weight to be given to the draft planning scheme.

[8] I do not accept the respondents' submission to the contrary, which sought to rely upon a distinction between the language used in s 317(1) (which refers to a "law or policy that came into effect after the application was made") and s 495(2)(a), which does not use those words. The reference to a law implies that it is something which is in force, and which therefore has legal effect.[8] A draft planning scheme has no legal effect, unless and until it is promulgated as a planning scheme under the Act.

[9] There is therefore no legislative authority to take a draft planning scheme into account in assessing a development application.

[10] There is however common law authority, derived from the decision in *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117, which established a principle, recognised in Queensland, that it is possible to give some weight to planning decisions that are in train but which do not yet have the force of law.[9]

[11] In *Coty* this was on the basis of public interest considerations, it being considered important, in the public interest, that whilst a Council's planning scheme was under consideration, the court should avoid, as far as possible, giving a judgment or establishing a principle which would render more difficult the ultimate decision as to the form the scheme should take; and that it is also important, in the public

---

4 Decision at [4] and [19]. See ss 117 and 118 of the *Sustainable Planning Act* and the Statutory Guideline 04/14, in relation to the making and amendment of local planning instruments (dated 9 October 2014). One of the first steps required in the "public consultation" phase of the process of making a planning instrument is to make the proposed planning scheme available for inspection by the public.

5 Cf s 120 of the *Sustainable Planning Act*.

6 Underlining added.

7 See s 80 of the *Sustainable Planning Act*; see also s 7(1) of the *Acts Interpretation Act* 1954 (in an Act, a reference to a law (including the Act) includes a reference to the statutory instruments made or in force under the law).

8 See, for example, ss 7(1), 14H, 35E of the *Acts Interpretation Act*.

9 See, for example, *Lewiac Pty Ltd v Gold Coast City Council* [1996] 2 Qd R 266 at 270-271 per Thomas J (with whom Macrossan CJ and McPherson JA agreed); see also *Yu Feng Pty Ltd v Maroochy Shire Council* [2000] 1 Qd R 306 at 328 per Fitzgerald P.

interest, that during the drafting period, the court should, as far as possible, arrive at its judgment in consonance with town planning decisions which have been embodied in the local scheme in the course of its preparation. Applying that principle, it was held that an approval, as sought in that case, for a new, large and permanent industrial building, would "cut across to a substantial degree the considered conclusion of the … council and its town planning committee", as expressed in the draft planning scheme, that the relevant land should be zoned residential.[10]

[12] But as Thomas J observed, in *Lewiac Pty Ltd v Gold Coast City Council* [1996] 2 Qd R 266 at 271, it is possible to give too much weight to such a factor, and that is the error that in my respectful view has been made here. It is an error of law, by acting on a wrong principle.[11]

[13] In the Decision at [19]-[20] the learned primary judge said:

> "[19] The *draft scheme* was publicly exhibited between 20 September 2015 and November 2015, being a year after the Council issued the acknowledgement notice for the development application on 29 September 2014. The Council approved the proposed development on 18 November 2015. The *draft scheme* has not yet commenced and the likely commencement date is unknown. The draft scheme effectively replicates the current zoning pattern of the Kinross Road area with the land zoned a mixture of medium density residential, low-medium density residential, and open space.
>
> [20] It seems to me that the *draft scheme* ought be afforded due weight."

[14] Although it is not clear from this what "due weight" means, it is apparent from later parts of the Decision that the learned primary judge afforded considerable, essentially decisive, weight to the draft planning scheme.

[15] At [23] of the Decision the learned primary judge referred to s 495(2)(a), as follows:

> "Pursuant to s 495(2)(a) of *SPA* the appeal must be decided based on the laws and policies in force on the date the application was made in August 2014, although weight may be given any new laws and policies that the court considers appropriate. The *2006 scheme* was in force when the application was made and is applicable to the assessment. The *draft scheme* was publicly notified before the appellant's development application was approved."

[16] At [31] of the Decision his Honour identified the "disputed issues" as:

(a) the nature and extent of the conflict with the 2006 scheme;

(b) the nature and extent of the conflict with the draft scheme;

(c) the nature and extent of the conflict with the South East Queensland Regional Plan 2009-2031; and

---

10 *Coty (England) Pty Ltd v Sydney City Council* (1957) 2 LGRA 117 at 125.

11 *Osterley Pty Ltd v Caboolture Shire Council* [1996] 2 Qd R 34 at 39 per Pincus JA, referring to *Housing Commission of New South Wales v Tatmar Pastoral Co Pty Ltd* [1983] 3 NSWLR 378 at 382.

(d) whether there are sufficient grounds to justify the approval despite the conflicts.

[17] It appears from these paragraphs of the Decision that the draft scheme was given a status it does not have under the legislation;[12] and that it was afforded weight under the Act, rather than in terms of application of the *Coty* principle (or on some other basis). There is no reference in the Decision to *Coty*; but even if it could be inferred that his Honour proceeded on the basis of that principle, in my respectful view there has been a misapplication of it.

[18] The learned primary judge found that the development proposal "plainly and seriously conflicts" with the 2006 planning scheme, as a consequence of, inter alia, the size and location of the retail components of the proposed development and non-compliance with the prescribed and mapped centres hierarchy (at [79]). That centres hierarchy emerges from the Desired Environmental Outcomes (DEO) in the 2006 scheme, which includes within the "Redland City's Centre network" differing levels of centres, including major, district, neighbourhood and local centres, with the range of uses and types of permitted development depending on the centre (see the Decision at [40]-[44]). Capalaba, Cleveland and Victoria Point (where the respondents' shopping centres are located) are major centres; Birkdale and Alexandra Hills (but not Thornlands) are district centres; Wellington Point, Redland Bay, Mount Cotton Village, Dunwich and another part of Victoria Point (again, not Thornlands) are neighbourhood centres (at [39]).

[19] Although one of the purposes of the preliminary approval was to "provide for a neighbourhood centre to serve the southern Thornlands and Kinross Road areas",[13] the learned primary judge described the proposed development as "more like a District Centre" because it seeks to develop the largest Coles full-line supermarket, and the second largest full-line supermarket in the Redland City local government area (at [44]). The proposed development would represent "out of centre development" which is expressly discouraged under the 2006 planning scheme (at [47]-[48]).

[20] At [82]-[84] of the Decision the learned primary judge said:

> "[82] The *draft scheme* effectively replicates the current zoning pattern, and attracts the same issues as the *2006 scheme* discussed above. The only material difference is that 'Neighbourhood Centres' will be called 'Local Centre' to conform with Queensland Planning Provisions centre zone designations.
>
> [83] It seems to me that the *draft scheme's* maintenance of full-line supermarkets in the centres hierarchy and centre zoning, after a whole scheme review, dilutes Council's arguments and expert opinion of a planning deficiency to meet population growth in the Kinross Road Structure Plan area, and the broader Thornlands area. Whilst there is significant force in this

---

12 In fairness, I observe that the applicant and the respondents (but not the Council) also proceeded on the basis that s 495(2)(a) permitted weight to be placed on the draft scheme (although the applicant contends on this application for leave to appeal that the learned primary judge erred in the manner in which his Honour did so).

13 AR p 566.

> argument and opinion, it is a matter for the Council to address perceived deficiencies in its scheme.[14]
>
> [84] At this point, the argument is not supported by the expression of intent in the *draft scheme*."

[21] The "Council's arguments and expert opinion of a planning deficiency to meet population growth" are referred to by his Honour at [102]-[113]. At [106] there is reference to evidence that the 2006 scheme reflects an intention that the existing centres would serve a catchment of less than 50,000 people, whereas in 2016 they were serving a catchment of 60,651 people. The evidence of the experts is referred to at [107]-[111], including the evidence of the planning expert called by the Council, Mr Ovenden, who said it was "important not to read the planning scheme too rigidly, particularly in circumstances where the planning authority has not got the planning quite right" (at [110]) and who said there was a gap in the current centres hierarchy (at [111]). Mr Norling, the need expert called by the Council, also considered that the "development of supermarkets in Redland City has not kept pace with this population growth, nor has the centre hierarchy been amended to cater to the needs of the emerging Thornlands population" (at [111]). The learned primary judge acknowledged the "significant force in this body of expert opinion discrediting the contemporary planning for the area" (at [112]).

[22] At [113], his Honour recorded that the Council also acknowledged that the planning scheme was inadequate, observing at [114] that:

> "It is very rare that a Council is so critical and damning about its own current scheme. But this submission and the body of expert opinion must be properly considered in light of the legislative force and intent of the *2006 Scheme*, which is reinforced by the evolvement of the *draft scheme*."

[23] His Honour then said:

> "[115] The *2006 scheme* has not been left derelict. It has been amended over 15 times in its life. The Major Amendment Package 01/2013 upgraded the Redland Bay Neighbourhood Centre to a District Centre. That amendment demonstrates that the Council is attentive to some changes in population that justify revision of its centres network strategy and has made such amendments to its centres network as it considers appropriate.
>
> [116] The argument is also diluted by the maintenance of full-line supermarkets in the centres hierarchy and centre zoning in the *draft scheme*, after a whole scheme review. The *draft scheme* effectively replicates the current zoning pattern, and attracts the same issues that arise under the *2006 scheme* and have been dealt with above.
>
> [117] Mr Ovenden on behalf of the Council is of the opinion that the *draft scheme*:

---

[14] See also at [121] of the Decision. Underlining added.

> *'... has perpetuated an identified gap in the retail hierarchy that has been carried through from the current planning scheme. It is appropriate that this gap in centre allocation be filled to meet a strong community need in this part of the City and in doing so satisfy the higher order strategic outcomes of the draft scheme.*
>
> *The planning authority may take action to review the draft scheme following review of submissions or choose to amend the scheme to reflect the subject proposal, should the Court [be] of a mind to approve this application.'*

[118] I think this is very sound and timely advice.

[119] However, notwithstanding sound expert opinion or Council's submitted aspiration, the court is bound to have regard to the relevant scheme and ought not usurp the role of the local authority. A summary of the relevant principles with respect to construction of planning schemes can be found in *Westfield Management Limited v Pine Rivers Shire Council.* As Quirk DCJ said *Elan Capital Corporation Pty Ltd v Brisbane City Council*:

> 'It should not be necessary to repeat it but this 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 in a careful and proper has chosen to adopt (*Brazier v Brisbane City Council* 26 LGRA 322 at 327).'

[120] I would be less reticent about addressing the perceived deficiencies in the *2006 scheme* identified by the experts, co-respondent and Council, if they were remedied and reflected in the *draft scheme*. But they aren't. The *draft scheme* effectively replicates the current zoning pattern, and maintains full-line supermarkets in the centres hierarchy and centre zoning after a whole scheme review.

[121] Whilst I accept the significant force in the co-respondent's arguments, it is a matter for the council to address perceived deficiencies in its scheme. It is bound to properly consider the application according to law and respect the role of the local authority's primacy as a legislature."[15]

[24] There was some debate on the hearing of this appeal as to the meaning of [118] – which part of the "advice" of Mr Ovenden was his Honour accepting as "sound and timely"? Is it the second sentence of the first paragraph (that it is appropriate that the gap in centre allocation be filled), or the suggestions in the second paragraph (of reviewing the draft scheme following review of submissions, or amending the scheme to reflect the current proposal if it is approved by the court), or both? On the face of the Decision, it would seem to be both.

---

15 Underlining added.

[25] It was accepted by all parties that the reference to "it" in the last sentence of [121] must be taken to be a reference to the Planning and Environment Court.

[26] The criticism of the learned primary judge's approach essentially focussed upon the conclusion at [121] (also reflected in [83]) of the Decision that "it is a matter for the Council to address perceived deficiencies in its scheme". It was argued by the applicant and the Council that this reveals the error on the part of the primary judge, which was failing to perform the role imposed on the Court by ss 326 and 329 of the *Sustainable Planning Act*, standing in the shoes of the Council in its capacity as the assessment manager (as distinct from its capacity as a planning authority). Those provisions permit the assessment manager – in this case the Court – to make a decision (approving an application or part of it) which conflicts with a planning scheme. Those provisions therefore permit both the Council, and the Planning and Environment Court standing in its shoes as assessment manager, to address deficiencies in a planning scheme.

[27] I accept that such an error has been made. It would appear that, by placing what in my view was too much weight on the draft planning scheme, the learned primary judge has diverted his attention from the role of the Council as assessment manager, in whose shoes the Court was standing for the purposes of the Decision, and focussed instead on the role of the Council as the legislator, the body responsible for making the planning scheme provisions.

[28] The learned primary judge observed, at [119] of the Decision, that the Court is bound to have regard to the relevant planning scheme and "ought not usurp the role of the local authority", referring in this regard to *Elan Capital Corporation Pty Ltd v Brisbane City Council* [1990] QPLR 209 at 211. All parties acknowledged the desirability of restraint on the part of the Planning and Environment Court where matters of planning policy are concerned.[16] However, two apt points are made by the applicant and the Council about the application of *Elan* in the present context. The first is that *Elan* was decided at a time when there was no equivalent of s 495(2)(a) in the legislation then in force,[17] and the observations of Quirk DCJ in *Elan* need to be read in that context. The second is that the restraint, or self-limiting approach his Honour spoke of there, is not apposite in the circumstances of this case, having regard to the expert evidence and the position of the Council.

[29] In my view, the learned primary judge erred in proceeding on the basis that s 495(2) permitted him to give weight to the draft planning scheme. Even if it be reasonable to infer his Honour did not proceed on that basis, but rather by application of the *Coty* principle, in my respectful view he has misapplied that principle. On the application of the *Coty* principle the draft planning scheme may have been significant if it heralded a new planning policy, or a shift in planning policy that warranted refusal of the proposed development. But in circumstances where it replicated the planning scheme provisions in force, which the experts and the Council said revealed a planning deficiency in light of population growth, it is difficult to see why the draft scheme would be of much significance at all. The question to be determined was whether, despite the conflict with the planning scheme provisions in force (and replicated in the draft planning scheme) there were

---

16 As endorsed by the Court of Appeal in *Grosser v Council of the City of Gold Coast* (2001) 117 LGERA 153 at [38] per White J (Thomas and Williams JJA agreeing).

17 An equivalent was first introduced in 1992: see the *Local Government (Planning and Environment) Amendment Act* 1992.

sufficient grounds (being matters of public interest) to justify a decision approving the development.

[30] The misapplication of principle (in either case, whether in terms of s 495(2)(a) or the application of the *Coty* principle) affected, in what could have been a material way, the learned primary judge's consideration of that question. That is, whether – in light of the expert evidence, which his Honour accepted was of "significant force", and the position of the Council, in its capacity as the assessment manager, both strongly supporting the development proposal,[18] and also being "critical and damning about its own current scheme" – there were sufficient public interest grounds to approve the proposed development, notwithstanding the conflict with the 2006 scheme.

[31] The applicant submitted that as a consequence of the approach taken by the learned primary judge, his Honour abdicated the responsibility to make the decision conferred on the Court by s 326 and/or s 329.[19] I am not persuaded it could be said the learned primary judge failed to exercise the discretion to make a decision conferred on the Court. But I do consider that as a consequence of the error of law which I have found taints the Decision – affording too much (decisive) weight to the draft planning scheme, either incorrectly under s 495(2), or by misapplying the *Coty* principle – his Honour has erred in the manner in which he approached the decision he was required to make, in a manner would could have materially affected the outcome. Making an error of law in the course of making a decision is not equivalent to abdication of responsibility for making the decision at all.

[32] This error is such as to warrant the grant of leave to appeal, allowing the appeal, and remitting the matter for further consideration.

Relevant considerations

[33] Whilst the applicant does not dispute that the proposed development is in conflict with the 2006 planning scheme, it contends that in concluding that conflict was "plain and significant" the learned primary judge failed to take into account relevant considerations.

(a) In relation to the conclusion at [48] of the Decision that the proposed development would result in an additional "centre" inconsistent with the 2006 scheme's planned centre network, and impact on Redland City's planned centre-driven economic and employment opportunities at Cleveland and Victoria Point, the applicant submits that his Honour failed to take into account:

(i) the 2006 planning scheme was past the end of its "effective life" of eight years, by two and a half years;

(ii) the 2006 planning scheme revealed an intention that the "centres" would serve a catchment of less than 50,000 people but they were, as at 2016, serving a much greater catchment of 60,651 people;

---

18 *Scurr v Brisbane City Council (No 5)* (1973) 133 CLR 242 at 257 per Stephen J; *R v Brisbane City Council; ex parte Read* [1986] 2 Qd R 22 at 28 per McPherson J; see also *Bird v Logan City Council* [2012] QPELR 502 at 511-512 [20] per Robin QC DCJ.

19 Relying, inter alia, upon the statement of principle in *Golder v Maranoa Regional Council* [2015] QPELR 292 at 301 [35].

(iii) the Council had departed from the planning intent in the 2006 planning scheme with various other approvals; and

(iv) the "significant force" in the evidence and the arguments presented by the applicant and the Council about the deficiencies in the 2006 planning scheme.[20]

(b) Further, in relation to the conclusion at [48] of the Decision, that the proposed development would impact on Cleveland and Victoria Point centres, the applicant submits that in light of the following findings made by his Honour, he failed to take into account that there was no relevant impact on the Cleveland and Victoria Point centres, or upon any other centre:

(i) the learned primary judge found that any impact upon the centres at Victoria Point would be "relatively small" and "within tolerable limits";

(ii) the learned primary judge did not find that there was any relevant impact upon the centre at Cleveland, consistently with the evidence of the economist engaged by the respondents who determined that the impact on that centre would be within acceptable limits;

(iii) the learned primary judge found that the proposed development would be "viable, without inflicting adverse impacts on the viability of the larger existing and planned supermarket or centres" (at [186]) and expressed satisfaction "that the proposed development will not detrimentally impact other existing and planned centres" (at [152]).[21]

[34] As to (a), it is apparent the learned primary judge did take those things into account (see the Decision at [37], [47], [72], [83], [96]-[98], [99], [102], [103]-[121], [186]), and I am unable to discern any error of law on this basis.

[35] As to (b), I do not consider this is a "failure to take into account relevant considerations" argument either. The learned primary judge did consider the question of the economic impact on other centres (see the Decision at [151]-[166]). The applicant's real complaint is that, given the conclusion apparently reached by the learned primary judge (at [152] of the Decision, that he was not satisfied the proposed development would detrimentally impact other existing and planned centres), there ought to have been a different outcome. That is a merits argument; not a relevant considerations argument. I say "apparently", because there is some ambiguity in this part of the Decision, which gave rise to debate at the hearing of the application before this Court.

[36] At [152] of the Decision, his Honour said:

> "It was agreed between the need experts that, with respect to detrimental impact, anything more than 15% impact on turnover would give rise to real concern. For the reasons which follow, I am satisfied that the proposed development will not detrimentally impact other existing and planned centres."

---

20 Applicant's submissions at [22]-[23].

21 Applicant's submissions at [22], [25]-[26].

[37] At [153]-[158] his Honour addressed the potential impact on the supermarkets at Victoria Point, describing this as "relatively small" and "within tolerable limits, and would lessen over time". The potential impact on the Crystal Waters local centre was addressed at [159]-[162]. The effect of his Honour's conclusion at [162] appears to be that there will be some impact on Crystal Waters (which is a smaller centre, with an IGA supermarket), but generally preferring the assessment of one of the experts, Mr Norling, who considered it would not be considerable (at [159] and [160]). The third centre addressed, at [163]-[166], is the Kinross Road local centre, a proposed centre not yet constructed. At [166] the learned primary judge concluded that the proposed development "will unduly impact on the planned local centre on Kinross Road". That conclusion appears to be inconsistent with the conclusion in [152], although the two conclusions may be able to be reconciled if [152] is read as referring to a particular kind of "detrimental impact", in terms of the level of impact on turnover.

[38] At [185]-[186] his Honour concluded:

> "[185] The proposed development would be of a higher order and provide facilities and generally complement the future land uses envisaged for the Kinross Road Structure Plan area. It may even stimulate residential development and employment in the Kinross Road Structure Plan area. But it will have a significant impact on the planed (sic) local centre on Kinross Road.
>
> [186] The co-respondent has shown a marginal community, economic and planning need for the development. It will be viable, without inflicting adverse impacts on the viability of the larger existing and planned supermarket or centres. I think that the development would fill an obvious gap in the Redland City's existing and planned hierarchy and network of centres. However, it's (sic) larger size and function (more than a Neighbourhood Centre and more like District Centre) would erode and prejudice the existing and planned smaller proximate centres, and the centres hierarchy, given it's (sic) size, location, overlap and function."[22]

[39] Reading [152] with [166] and [186], the conclusion reached by the learned primary judge is clear. Whilst there is some tension between the second sentence of [152], and the conclusion at [166] and [186], the conclusion reached is, in my view, clear from the latter. In any event, as I have already said, I do not accept that any error of law has been shown in this respect.

[40] In its reply submissions the Council raised a slightly different point in relation to this issue, which was that, on the basis of the High Court's decision in *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675, in the absence of any finding by the learned primary judge of overall adverse effect on the extent and adequacy of shopping facilities available to the local community, in the event of approval of the proposed development, his Honour's findings of impact (to the extent such finding was made) on nearby existing or future local centres was not a

---

22 Underlining added.

relevant consideration. The applicant adopted this argument, in its oral submissions in reply at the hearing.

[41] In *Kentucky Fried Chicken v Gantidis* Barwick CJ said, at 681, "economic competition feared or expected from a proposed use is not a planning consideration within the terms of the planning ordinance governing this matter". Stephen J[23] said, at 687:

> "If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, whether that jeopardy be due to physical or financial causes, and if the resultant community detriment will not be made good by the proposed development itself, that appears to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration."[24]

[42] This was an argument raised by the Council below.[25] It is not referred to in the Decision. In my view there is merit to the Council's argument that, in the manner in which the learned primary judge dealt with the issue of impact upon other centres (commencing from [151] of the Decision), it appears he has, inconsistently with the principle established in *Kentucky Fried Chicken*, taken into account an irrelevant consideration (impact on lower order centres, in the absence of a finding of any overall adverse effect upon the extent and adequacy of facilities available to the local community more broadly). It must be noted, however, that the point was not the subject of detailed analysis or argument before this court.

Irrelevant considerations – the decision rules

[43] The applicant also argues the learned primary judge took into account an irrelevant consideration, namely that the draft scheme replicated the 2006 planning scheme. This is addressed by the discussion above.

[44] Separately, the applicant contends the learned primary judge took further irrelevant considerations into account, in that he took into account inconsistencies between the proposed development and the existing zone and precinct provisions applying to the subject land. The applicant contends these provisions were rendered irrelevant by s 316(4)(d) of the *Sustainable Planning Act*.[26] The Council supports this argument, and also contends the learned primary judge, at [25] of the Decision, misstated the test for deciding the part of the application for preliminary approval to vary the effect of a local planning instrument.

---

23 With whom Gibbs J, at 681, Mason J and Aickin J, both at 687, agreed.

24 Underlining added. See also *Koerner v Maroochy Shire Council & Ors* [2004] QPELR 211 at [17] per Wilson SC DCJ (as his Honour then was).

25 Council's submissions below at [57], AR p 1554.

26 Applicant's submissions at [24A].

[45] This argument raises for consideration the proper construction of the provisions setting out the "decision rules": ss 323 to 326 (decision rules – generally) and ss 327 to 329 (decision rules – application under section 242) of the *Sustainable Planning Act*.

[46] Section 241 of the Act provides for a preliminary approval to be given, which approves development, but does not authorise assessable development to take place. Section 242 contemplates that an application for preliminary approval may include an application which states the way in which the applicant seeks the approval to vary the effect of any local planning instrument for the land (s 242(1)(b)). The application for preliminary approval in this case sought approval for a material change of use for a mixed use development, including a shopping centre, and sought to vary the effect of parts of the 2006 planning scheme, by altering the levels of assessment for development within the various precincts comprised within the development, and specifying the assessment criteria for such development (see the Decision at [1], [5], [8]-[10]).[27]

[47] At [22] and [25] of the Decision the learned primary judge observed that:

> "[22] The appeals are by way of a hearing anew. The court must assess the development permit component of the application in accordance with s 314 of the *SPA* and decide the application in accordance with ss 324 and 326 of *SPA*. For the preliminary approval component under s 242, the assessment must be in accordance with ss 314 and 316 of *SPA*, and the decision must accord with ss 323, 327 and 329 of *SPA*.
>
> …
>
> [25] Pursuant to ss 326 and 329 of *SPA* the decision must not conflict with the planning scheme unless there are '*sufficient grounds'* to justify that decision despite the conflict…"

[48] Section 316 of the *Sustainable Planning Act* provides as follows:

> "(1) This section applies to an application for a preliminary approval mentioned in section 242.
>
> (2) Sections 313 and 314 apply to <u>any part</u> of the application requiring code or impact assessment.
>
> (3) Subsection (4) applies to the part of the application that states the way in which the applicant seeks to vary the effect of any applicable local planning instrument for the land.
>
> (4) The assessment manager must assess the part of the application having regard to –
>
> (a) the common material; and
>
> (b) the result of the assessment manager's assessment of any parts of the application requiring code or impact assessment; and

---

27 See also the preliminary approval granted by the Council, at AR pp 600-625.

(c) all of the following to the extent they are relevant to the application [including the State planning regulatory provisions] …;

(d) the consistency of the proposed variations with aspects of the local planning instrument, other than the aspects sought to be varied; and

(e) 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; and

(f) any referral agency's response for the application."[28]

[49] Subdivision 2 sets out the "decision rules – generally". It commences with s 323 which provides that subdivision 2 does not apply to the part of an application for a preliminary approval mentioned in s 242 that states the way in which the applicant seeks approval to vary the effect of any applicable local planning instrument for the land. Section 326 then sets out the test already referred to, that the decision must not conflict with a relevant instrument (including the planning scheme), unless there are sufficient grounds to justify the decision despite the conflict (s 326(1)(b)). By s 326(2) "relevant instrument" means a matter or thing mentioned in s 313(2) or s 314(2), other than a State planning regulatory provision, against which code assessment or impact assessment is carried out.

[50] Subdivision 3 sets out the "decision rules – application under section 242". This subdivision applies in deciding the part of an application for a preliminary approval that states the way in which the applicant seeks approval to vary the effect of any applicable local planning instrument (s 327). The test in s 329(1)(b) is worded in the same way as s 326 – that the decision must not conflict with a relevant instrument unless there are sufficient grounds to justify the decision despite the conflict. But the meaning of "relevant instrument" is different. Section 329(2) defines "relevant instrument" to mean a matter or thing mentioned in s 316(4)(c) or (d), other than a State planning regulatory provision, that the assessment manager must have regard to in assessing the part of the application. Section 316(4)(d) in particular presents quite a different lens through which to consider the part of an application which seeks approval to vary parts of the planning scheme – that is, *consistency* of the proposed variations with aspects of the local planning instrument, *other than the aspects sought to be varied*.

[51] Apart from [22] and [25] of the Decision, the learned primary judge does not mention any of these provisions again in the Decision. Consistently with the "disputed issues" identified at [31] of the Decision (referred to at [16] above), his Honour proceeded to consider the nature and extent of any conflict between the development approval sought, and the planning scheme. However, apart from the summary at [22] of the Decision, his Honour does not draw any distinction, in the course of his reasons, between his analysis of the part of the preliminary approval which seeks to vary parts of the planning scheme, and any other part of it (relevantly, the part seeking approval for a material change of use).

---

28 Underlining added.

[52] Although the applicant seemed to submit, on this application for leave to appeal, that there was no basis for any consideration of conflict with the parts of the planning scheme that it sought to vary, by its application for preliminary approval, I am not persuaded that accords with a proper construction of the provisions. The application for preliminary approval also sought approval for a material change of use, which presumably was required to be considered under ss 313 or 314. It does not seem correct to construe the provisions in such a way that a developer could apply for a preliminary approval, inter alia, seeking to vary the effect of planning scheme provisions, so that a different level of assessment would apply in the future (relevantly, here, code assessment for a large shop, where impact assessment would previously have applied) without the assessment manager (or the Court standing in its shoes) at some point giving consideration to whether that was an appropriate thing to do, having regard to conflict with the (unvaried) planning scheme provisions, and whether there are public interest grounds to approve, despite the conflict.[29]

[53] On the basis of the exposed reasoning in the Decision, I consider that there has been a failure to properly apply the decision rules, because it is not possible to discern, from the Decision, how those rules have been applied.

[54] I do not go so far as to find that the learned primary judge has taken into account irrelevant considerations, as contended by the applicant, because I am unable to determine, from the Decision, what part of the preliminary approval the learned primary judge was considering, when he considered the existing zone and precinct provisions about which the applicant complains. For example, it may be the case that his Honour was considering the part of the application which sought approval for a material change of use.

[55] In circumstances where it does not appear this issue of construction was the subject of detailed argument before the learned primary judge;[30] where, as I have said, it is unclear how the decision rules were applied by the learned primary judge, and therefore difficult to deal with the contended error; and where, because of the conclusion reached in relation to the treatment of the draft planning scheme, the matter ought to be remitted in any event; in my view it is unnecessary to, and indeed preferable not to, embark on a detailed analysis of this statutory construction question. It would be better dealt with in a case where there was argument before the primary judge, and clear consideration of it, such that the opposing arguments could be properly addressed if the point were to be raised again in this court.

Inadequacy of reasons and delay

---

29 There is support for this view in the explanatory notes to the Bill which became the *Sustainable Planning Act*, which states at p 163, in relation to what became s 316: "The location and substance of this clause in relation to clauses 313 and 314 is intended to clarify that the development the subject of the application must be assessed under the code or impact assessment rules in clauses 313 and 314 before the assessment for the part of the application dealt with under this clause is carried out. In other words, the assessment of the proposed development is not carried out against the planning instruments as they are proposed to be varied, but as they are at the time the application is made. Only if the development is to be approved are the proposed variations considered under this clause." (Underlining in the original).

30 Cf the applicant's submissions in reply at [6(a)], referring to its submissions below at AR p 1570 and the respondents' submissions below at AR p 1500.

[56] The applicant otherwise contended the Decision lacked a rational foundation, and submitted there were inadequacies in the reasons given. In this regard, the applicant also relied upon the fact that the Decision was delivered 11 months after the hearing of the appeal, as an operative delay, which ought to be taken into account by this court in reviewing the primary judge's conclusions and considering the adequacy of his Honour's reasons.[31] In my view, there is no merit to this complaint. The ambiguities in some parts of the Decision are likely a consequence of human error in proof reading; not delay. Other than in the respect just addressed (the application of the relevant decision rules), the Decision cannot be criticised for insufficiency of reasons.

Partial approval

[57] Lastly, the applicant contends the learned primary judge erred by failing to ask himself, in view of his Honour's findings, whether he should approve the application in part; and that he ought to have invited the parties to make submissions about whether a partial approval should be granted. Approval of part of an application by the assessment manager is provided for by s 324 of the *Sustainable Planning Act*, and is a power available to the Planning and Environment Court, standing in the shoes of the assessment manager, on an appeal (s 496(2)(b) and (c) of the *Sustainable Planning Act*).[32] The learned primary judge recorded that the focus of the appeal was on the retail/commercial component of the proposed development (there being no issue with the residential component, or the reconfiguration of the lot component) (at [6]). However, his Honour was not asked by the parties to consider a partial approval. In those circumstances, it is unreasonable to conclude that his Honour erred in failing to consider a matter not adverted to by any party before him. The onus is on the parties to raise for consideration by a trial judge potential alternative orders, or for that matter to request in advance that no orders be made, until the reasons have been considered. In any event, if, as I consider is appropriate, the matter is remitted, this is a matter that can be expressly raised and considered on the rehearing.

Orders

[58] I would grant the application for leave to appeal, allow the appeal, set aside the order of the learned primary judge, and remit the matter to the Planning and Environment Court to be determined according to law.

---

31 Relying, inter alia, upon *Expectation Pty Ltd v PRD Realty Pty Ltd* (2004) 140 FCR 17 at [76].

32 Cf *Metroplex Management Pty Ltd v Brisbane City Council* [2010] QCA 333 at [59] per Chesterman JA.