In the Planning and Environment Court
Held at: Cairns Nos. 232 and 234 of 2005

Between: **FRANK SUDDABY, LINDA SUDDABY, HELEN JONAS, IAN MORRISON AND JANET MORRISON**
First Appellant

Between: **COMMUNITY FOR COASTAL AND CASSOWARY CONSERVATION INC**
Second Appellant

And: **JOHNSTONE SHIRE COUNCIL**
Respondent

And: **JOHN & LEE-ANN CAVANAH & WELLACIA PTY LTD (ACN 067 609 198)**
Co-Respondents

And: **STATE OF QUEENSLAND**
Co-Respondent by Election

CLOSING SUBMISSIONS OF THE SECOND APPELLANT

1. This is an appeal under s 4.1.28 of the *Integrated Planning Act 1997* ("**IPA**") against the decision of the Respondent ("**the Council**") to approve a material change of use and a reconfiguration of a lot for a 22 lot rural residential subdivision at Mission Beach. The application has now been reduced to 21 lots.

Issues in dispute

2. The Second Appellant's grounds of appeal involve four main issues:

   (a) **Planning:** Whether the proposed development conflicts with the relevant planning scheme provisions and, if so, are there sufficient planning grounds to justify approving the development application despite the conflict?

   (b) **Good quality agricultural land:** Whether the proposed development conflicts with State Planning Policy 1/92 (Development and the Conservation of Agricultural Land) ("**SPP 1/92**") and, if so, whether that warrants refusal of the application?

   (c) **Adverse impact on the environment:** Whether there will be any adverse impact on the environment, in particular to Southern Cassowary, and, if so, whether this warrants the application being refused?

   (d) **Need:** Whether there is a need for the development?

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3. To potentially simplify and narrow the issues in dispute, the Second Appellant concedes that, either alone or in combination, the second, third and fourth of these issues is not strong enough to defeat the application unless the Court finds the application strongly conflicts with the relevant planning scheme provisions. It will, therefore, not be necessary for the Court to consider those issues in detail unless the Court finds there is a strong conflict with the planning scheme and turns to the question of whether there are sufficient planning grounds to approve the application despite the conflict. The potential conflict with the planning scheme provisions is, therefore, the key to resolving this appeal and will be the focus of these submissions. Short mention of the other three issues will be made in conclusion, along with short submissions in relation to conditions should the Court decide to allow the development to proceed. Turning then to the relevant planning scheme provisions.

The relevant planning schemes

4. The application was made on 17 December 2004 and the planning scheme in force at that time was the *Johnstone Shire Planning Scheme 1997* ("**the 1997 planning scheme**"), which was a transitional planning scheme under the IPA.

5. Section 4.1.52(2)(a) of the IPA requires the Court to:

> 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. Section 4.1.52(2)(a) of the IPA has been held to reflect the principle established by *Coty (England) Pty Ltd v Sydney CC* (1957) 2 LGRA 117 ("**the Coty Principle**").[1] Fitzgerald P stated in *Yu Feng Pty Ltd v Maroochy SC* (1996) 92 LGERA 41 at 62:

> *Coty* establishes no more than that, when determining whether to approve or refuse a planning application, it is permissible, in appropriate cases, to take account of any provisions affecting the site which are included in a general planning scheme in the course of preparation; the weight to be accorded to either consistency or inconsistency between the draft planning scheme and the application will depend on the circumstances, and usually will be only one of the factors to be considered, although in a particular case it might be decisive. … Theoretically, it would be open to a local authority and, provided that it had available and appropriate evidence, to the Planning and Environment Court, to conclude that there were "sufficient planning grounds to justify approving [an] application despite [its] conflict" with a strategic plan and a draft strategic plan. However, such a decision might reasonably be expected to occur infrequently, especially when a draft strategic plan "has progressed a substantial distance along the statutory path to gazettal;" an approval of a major development in such circumstances by either local authority or Planning and Environment Court would frustrate, and tend to diminish public confidence in, the planning process.

7. At the time the application was lodged the new planning scheme was in the final stages of progress along the statutory path to approval. At the time when the application was lodged the new planning scheme had been publicly advertised under Section 5 of Schedule 1 of the IPA and was undergoing consideration of State interests in Part 2 of Schedule 1. It came into force shortly after the application was lodged in March 2005 as the *Johnstone Shire Planning Scheme*

[1] See *Chellash Pty Ltd v Maroochy SC* [2000] QPELR 139 at 144 (Dodds DCJ); *Edgarange Pty Ltd v BCC* [2002] QPELR 183 at 195, [98] (Brabazon QC DCJ); and *Kentbrock Pty Ltd v GCCC* [2003] QPELR 587 at 591-592, [29] (McLauchlin QC DCJ).

2005 ("**the 2005 planning scheme**"). It is common ground that there is no material difference between the advertised scheme and the scheme that subsequently came into force.

8. One complication that the existence of two planning schemes creates in this case is that there are slightly different tests that must be applied to resolve conflicts with the scheme.

The test for assessing conflicts with the 1997 planning scheme

9. In assessing the application against the 1997 planning scheme, ss 6.1.29(h)(i) and (iii) of the IPA have the effect that the application is to be assessed against the matters stated in ss 4.4(3) (Rezoning) and 5.1(3) (Subdivision) of the *Local Government (Planning and Environment) Act 1990* ("**P&E Act**"). These include the assessment of whether the proposed development would have an adverse impact on the environment.

10. Section 6.1.30(3)(a) and (c) of the IPA has the effect that the appeal is to be decided under ss4.4(5) and (5A) and 5.1(6) and (6A) of the P&E Act. Most relevantly, ss 4.4(5A) and 5.1(6A) provide that:

> the local government must refuse the application if:
> (a) the application conflicts with any relevant strategic plan or development control plan; and
> (b) there are not sufficient planning grounds to justify approving the application despite the conflict.

11. The decisions of the Court of Appeal in *Grosser v Gold Coast City Council* [2001] QCA 423; (2001) 117 LGERA 153 and *Weightman v Gold Coast City Council* [2002] QCA 234; (2002) 121 LGERA 161 provide important statements of principle in the application of these provisions under the IPA. Of particular relevance to the present appeal, Atkinson J (with whom McMurdo P agreed) stated in *Weightman* at [35]:

> The proposal must be refused [where it conflicts with the strategic plan] if there are not sufficient planning grounds to justify the approval *despite the conflict*. The discretion, as White J observed in *Grosser v Council of the City of the Gold Coast* (at [50]), is couched in negative terms, that is, the application must be dismissed unless there are sufficient grounds. This is a mandatory requirement. If there is a conflict, then the application must be rejected unless there are sufficient planning grounds to justify its approval despite the conflict. …
>
> In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s 4.4(5A)(b) of the P&E Act, the decision-maker should:
>
> (1) examine the nature and extent of the conflict;
>
> (2) determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme, and if the conflict can be justified on those planning grounds; and
>
> (3) determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application despite the conflict

The test for assessing conflicts with the 2005 planning scheme

12. Section 3.5.14(2) of the IPA provides the relevant test against which to assess the proposed development under the 2005 planning scheme. It provides:

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

13. The first limb of this test, compromise of a desired environmental outcome ("**DEO**"), requires "an obvious and significant cutting across of [a] DEO in such a manner that its achievement on a shire-wide basis had plainly been compromised": *Koerner v Maroochy SC* [2003] QPELR 447 at [25].[2] The Second Appellant accepts that the evidence presented to the Court does not go as far as to establish that any compromise of the DEOs in 3.1.1(2) and 3.1.2(6) of the 2005 planning scheme from the proposed development will be of such as shire-wide scale as to satisfy this test. The Second Appellant accepts, therefore, that ground 2 of its Notice of Appeal is not made out.

14. In relation to the second limb of the test, conflict with the planning scheme, Fryberg J (with whom McMurdo P and Holmes J agreed) stated in *Woolworths Ltd v Maryborough City Council* [2005] QCA 262 at [25]:[3]

> If s 3.5.14(2)(b) is dealt with in the sequence suggested by its form the identity of any conflicts between the decision and the scheme will have been established by the time the question of justification comes to be considered. That question will require the identification of planning grounds which might justify the decision and the determination of their sufficiency to do so. In making that determination regard will doubtless be had to the nature and extent of the conflict. That is substantially the process approved by this Court in *Weightman v Gold Coast City Council* in relation to a previous section. It would, however, be a mistake to treat the relevant passage in that judgment as if it were a code for the determination of justification. Some of the submissions in the present case smacked of that error. Notwithstanding some differences in terminology, I think the same approach now has to be taken to s 3.5.14(2) of the IPA, and that the authorities require the Court to identify with some precision the extent of the conflict with planning scheme provisions that will, in the end result, be excused.

15. Ultimately, therefore, while the relevant tests have a slightly different form, the approach in *Weightman* should be taken by the Court to resolve any conflicts with both the 1997 planning scheme and the 2005 planning scheme in this case.

Construction of the planning schemes and the limits to the Court's role

16. As Skoien SJDC stated in *Sinnamon v Miriam Vale Shire Council* [2002] QPEC 051 at [47] that:

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[2] Adopted in *Handley v BCC* [2004] QPEC 039 at [19]; *Woolworths Ltd v Maryborough SC* [2004] QPEC 068 at [26].

[3] Footnotes omitted. The approach in *Weightman* has been used by the Planning and Environment Court in applying s 3.5.14(2) of the IPA: *Mantle Pty Ltd v Maroochy SC* [2003] QPELR 122 at [52] per Robin DCJ; and *Luke v Maroochy SC* [2003] QPELR 447 at 467, [103]-[104] per Wilson DCJ.

His Honour Judge Wilson SC recently observed in *Stariha v Redland Shire Council & Anor* [2002] QPEC 039 at para [18] that the correct approach to the interpretation of planning documents including strategic plans is that summarised in *Harburg Investments Pty Ltd* [2000] QPELR 313 at 318 in these terms:

> *"(a) it is seldom appropriate in matters such as these to rely on any specific statement of intent or of aims or objectives in the planning documents as determinative. It is rare that an express imprimatur or injunction can be found in them for a particular proposal. Almost invariably a diligent search of the planning documents can unearth in such statements passages which appear to argue for or against the proposal but generally speaking it would be unwise to place too much weight on such a passage. The planning documents, while they are given the force of law ... are not drawn with the precision of Acts of Parliament and the statements of intent or of aims or of objectives are intended to provide guidance in the difficult task of balancing the relevant facts, circumstances and competing interests in order to decide whether a particular proposal should be approved or rejected. So such statements should be read broadly. Degee v Brisbane City Council [1998] QPELR 287 at 289.*
>
> *(b) A Strategic Plan only sets out broad desired objectives and not every objective in the plan has to be met before the proposal of an applicant may be accepted (see Lewiac Pty Ltd v Gold Coast City Council (1994) 83 LGERA 224 at 230. The interpretation of the strategic plan ought to involve a 'common sense approach' (see ZW Pty Ltd v Hughes & Partners Pty Ltd [1992] 1 Qd. R. 352 at 360); in interpreting a strategic plan the document should not be read too narrowly; it should be read broadly rather than pedantically; and one should adopt a sensible practical approach (see Yu Feng Pty Ltd v Maroochy Shire Council (1996) 96 LGERA 4 at 73, 75 and 78; ... a conflict must be plainly identified and, in any event, such a conflict alone may not have the result of ruling out a particular proposal (see Fitzgibbons Hotel Pty Ltd v Logan City Council [1997] QPELR 208 at 212)."*

17. Another useful summary of these principles and relevant case law was given by Wilson DCJ in *Luke v Maroochy Shire Council* [2003] QPELR 447; [2003] QPEC 005 at [45]-[48] but his Honour continued:

> [49] At the same time, the process of construction must not become one by which the Court usurps the role of local government. As Quirk DCJ said in *Elan Capital Corporation v Brisbane City Council* (1990) QPLR 209, at 211:
>
> > It should not be necessary to repeat that 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 way has chosen to adopt.[4]
>
> [50] It is also to be remembered, in the context of this appeal, that it is not this Court's function to determine whether a better site exists for a particular proposal but rather, simply whether approval should or should not be given for the particular use proposed on the particular site.[5] This appeal does not, then, involve any element requiring an assessment of other current proposals for [similar developments], or which is the "best" proposal or involves the "best site".

18. Similarly, Brabazon DCJ said in *Edgarange Pty Ltd v Brisbane City Council* [2002] QPELR 183 at 196-197, [98]:

> the Council, and not this Court, is the planning authority … It is not the Court's function to substitute planning strategies, which in a particular appeal might seem to be attractive, for those which the planning authority in a careful and proper way has seen fit to adopt (to note the words of this Court in *Elan Corporation Pty Ltd v BCC* (1990)

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[4] And see *Pacific Exchange Corporation Pty Ltd v Gold Coast City Council* (1998) QPELR 335 at 339; and, *Sheezel v Noosa Shire Council* (1980) QPLR 130, at 134.

[5] *Queensland Adult Deaf and Dumb Society v Brisbane City Council* (1972) 26 LGRA 380, at 386; *SEAQ v Warwick City Council* (1970) 24 LGRA 391, at 394; and, *Castro v Douglas Shire Council* (1992) LGRA 146, at 158.

QPLR 209-211). See also the Court of Appeal in discussing such issues in *Holts Hill Quarries Pty Ltd v Gold Coast City Council & Ors* (2001) QPELR 5.[6]

19. The relevant planning schemes, then, must form the basis for the acceptance or rejection of this application.

Conflict with the 1997 planning scheme

20. The 1997 planning scheme as a whole follows the traditional structure of planning schemes and is comprised of a strategic plan, zones, development control plans ("**DCPs**") and general provisions applying throughout the shire.

21. There are four preferred dominant land uses in the strategic plan: conservation; economic; rural; and urban. The subject land is included in the Conservation Preferred Dominant Land Use area.

22. There are only six zones in the planning scheme: Conservation Zone; Rural Conservation Zone; Economic Development Zone; Rural Zone; Rural Residential Zone; and the Urban Zone. The subject land is included in the Rural Conservation Zone.

23. There are three DCPs: Innisfail; Village Development; and Mission Beach. The subject land is included in the Mission Beach DCP.

24. As the application is for re-zoning, its consistency or otherwise with the strategic plan forms the core part of assessing whether to approve or refuse it.

25. A major conflict exists between the proposed development and the strategic plan because the development significantly conflicts with the Conservation Incentives Framework provided in s 5.1 of the strategic plan. That framework is explained broadly in s 5.1.1.2 (2) of the strategic plan:

> 2) **Conservation Incentives Framework**
>
> a) The Planning Scheme is structured to encourage land owners to re-zone from the *Rural Conservation Zone* into the *Conservation Zone* in exchange for land use or other benefits provided by Council and/or other agencies.
>
> b) Bonus development rights (ie. Rights which exceed basic use rights allowed in the *Rural Conservation Zone*) may be considered in priority areas where land is rezoned from *Rural Conservation* to *Conservation*, in exchange for the conservation of the balance area of land, provided that the additional development is compatible with the substantial value of habitat in that area (as described in the Johnstone Shire Planning Scheme – Planning Study). Development in these cases must be able to satisfy the servicing and planning standards promoted in the Planning Scheme. Priority areas are identified in Regulatory Map R5 – Potential Bonus Development Right Areas.
>
> c) Council will retain the flexibility to expand the range of incentives available to land owners, and will require the relevant land to be rezoned to the *Conservation Zone* in exchange for the receipt of these benefits.

26. The final sentence of paragraph (b) of this section contains an apparent conflict that is material to availability of bonus development rights for the subject land. The sentence says that "priority areas are identified on Regulatory Map R5", which suggests that the areas identified are simply those in which Council will be most willing to grant bonus development rights, but <u>these are not the only areas in which bonus development rights will be granted</u>. However, the title of the map is

[6] [2000] QCA 268 at [41]-[45] per Davies JA, Muir and Douglas JJ.

"Potential Bonus Development Right Areas", which suggests these areas are the only areas in which bonus development rights will be granted. Thinking of the intent of the Council in creating the Conservation Incentives Framework and the fact that there are large amounts of land in the Rural Conservation Zone that is outside the areas identified on Regulatory Map R5, the latter interpretation does not make sense. Why would the Council include land in the Rural Conservation Zone but not include it in Regulatory Map R5 if both are required to gain access to the Conservation Incentives Framework?

27. Reading the planning scheme as a whole, resolving the availability for bonus development rights for land not included in a priority area identified on Regulatory Map R5, the explanation of the bonus development rights in the descriptions of zones in the planning scheme may be of assistance. Section 3.4 of the planning scheme provides:

> **3.4 SPECIAL PROVISIONS: CONSERVATION AND RURAL CONSERVATION ZONES**
>
> 3.4.1 EXPLANATION
>
> A) The Planning Scheme is structured to allow land to be rezoned from the Rural Conservation Zone and into the Conservation Zone, upon which re-zoning a mutual benefit is achieved where-by:
>
> (i) an applicant is granted Bonus Development Rights, entitling a premises to be developed to a greater extent than could otherwise be achieved in the Rural Conservation Zone …
>
> (ii) portion of the site is formally protected for conservation purposes.
>
> B) Council may exercise its discretion to grant bonus development rights in accordance with 3.4.2 below.
>
> C) To exercise that discretion, that portion of the site subject to the proposed development and referred to in clause A) (i) above, and that portion of the site intended to be protected and referred to in clause A) (ii) above, will be required to be re-zoned to the Conservation Zone, which provides for such discretion to be exercised. If a balance portion of the site remains in addition to that referred to in clauses A(i) and (ii) above, Council may use its discretion for that land to be retained in the Rural Conservation Zone or re-zoned to another appropriate zone.
>
> **3.4.2 DETERMINATION OF BONUS DEVELOPMENT RIGHTS**
>
> A) The issuing of Bonus Development Rights may be considered in relation to land where it is:
>
> (i) not already protected for conservation purposes.
>
> B) The type and extent of bonus development rights issued, including land use, the size of lots and/or lots and the site density, will be based on:
>
> (i) the capacity of the habitat system affected by the development to withstand the likely impacts of the proposed development and maintain its integrity, in accordance with the General Provisions, 4.6, Habitat Management; and
>
> (ii) the potential for the proposed development to enhance and protect the preferred habitat system identified in the Preferred Dominant Land Use conservation as indicated on the Strategic Plan Map; and
>
> (iii) the ability of the proposed development to satisfy the balance of requirements of the Planning Scheme,
>
> (iv) good quality agricultural land is not adversely affected by the proposed use.
>
> Provided that Council will not approve a subdivision which results in exceeding a density of 1 dwelling unit or concessional lot per 5 ha of site lot area subject to a maximum of 4 bonus lots or dwelling units per site lot (subject to the fulfillment of the other requirements of the Planning Scheme), unless it can be demonstrated that a higher density of development is compatible with maintaining the substantial habitat function of the area. Where Council is of the opinion that the habitat

> system affected by a proposal has a high sensitivity, it may determine that for a particular site, that these densities are reduced.
>
> Bonus concessional lots granted under this provision shall not exceed an area of 1 ha each.

28. The explanation of bonus development rights in section 3.4.2 contains no reference to the program being limited to the areas identified on Regulatory Map R5. Together with the inherent contradiction contained in s 5.1.1.2 (2)(b) of the strategic plan, this suggests that bonus development rights are potentially available on all land in the Rural Conservation Zone, not simply those areas identified in Regulatory Map R5. This would mean that an application for bonus development rights can be made for the subject land.[7]

29. Returning to the provisions of the strategic plan, s 5.1.1.2(3) discusses development within conservation zones. It includes the following statements suggesting that further development of land in these zones must be in accordance with the Conservation Incentives Program:

> Council may use its discretion to allow bonus development rights on both land use and subdivision lot sizes, where land is rezoned to the *Conservation Zone*, provided that the development proposal is consistent with maintaining the substantial habitat value of the land and provided that there is a gain to the community by way of a significant balance area of land being retained for conservation purposes. …

30. Re-zoning of land in a conservation zone is discussed in s 5.1.1.2(5):

> a) Rezoning of land away from a conservation zone will only be granted when the land has no significance to the habitat system as identified on the Strategic Plan Map as *Preferred Dominant Land Use – Conservation*. Land previously cleared of habitat may still have significance, as the Planning Scheme deliberately seeks the revegetation of areas for habitat purposes.
>
> b) It is not intended that re-zoning from the Conservation zone to another zone will occur. In the event that a site is rezoned from *Conservation* to another zone and incentives have previously been provided for conservation purposes in relation to the subject land, Council will require as part of the re-zoning approval that a value equivalent to that of the incentive or benefit received be returned …

31. The strategic plan created a considered framework for the incentives for improved conservation outcomes on privately owned land in the Rural Conservation Zone. It was a system that was intended to regulate development of these areas. It seems reasonable to assume that Council based this system on an assumption that environmental impacts increase with the number of people and decrease in lot sizes. The bonus development rights gave a compromise by allowing further development in a limited way according to prescribed formulas.

32. The Conservation Incentives Framework and system for awarding bonus development rights for development of land in the Rural Conservation Zone that improves the conservation outcomes for the land are a major component of the strategic plan. The proposed development is seeks to avoid this system by re-zoning land to a higher density zone, Rural Residential.[8]

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[7] Note that this is contrary to the particular 1(a)(iii) given in the Notice of Appeal of the Second Appellant. However, it seems unnecessary to seek leave to amend that particular as the Co-Respondents say they do not rely on the bonus development rights so the distinction makes no difference to the issues in dispute.

[8] It is significant to note that the benefit offered by the Co-Respondents to support their application was first a conservation covenant over the vegetated area and now dedication of that land as National Park.

33. The avoidance of the Conservation Incentives Framework, which would limit the development to far fewer lots than it seeks to obtain, is a major conflict with the strategic plan of the 1997 planning scheme.

Conflict with the 2005 planning scheme

34. If Council, as the planning authority, had decided to allow higher density development that envisaged under the Conservation Incentives Framework on the subject land, it failed to take the opportunity presented by the preparation of the 2005 planning scheme to achieve that result.

35. The structure of the 2005 planning scheme is materially different from the 1997 planning scheme because there is no strategic plan in the new scheme. Rather, there is a very broad statement of strategic intent in s 1.2.2, supported by broad shire-wide DEOs in Part 3. Seven main zones are created: Rural Zone; Conservation Zone; Rural Residential Zone; Industry Zone; Innisfail Zone; Mission Beach Zone; and Village Zone. No re-zoning is permissible under this system and the use of the land must be consistent with the zoning.

36. Within the Rural Zone two precincts are created: Rural Use Precinct and the Rural Conservation Zone.

37. Reference to the relevant zoning map, Zoning Map IJ,[9] indicates a very deliberate zoning strategy to concentrate residential development around the townships of Mission Beach, Bingil Bay, El Arish, and Kurrimine Beach. There is also a clear zoning intent to establish a core conservation area in the Clump Mountain National Park, with Rural Conservation used as a buffer around that core area. Rural Residential Zones are specifically provided in several areas in the locality, but not on or near the subject land, which is included in the Rural Conservation Precinct.

38. It is very significant that the subject land has been included in the Rural Conservation Precinct, as has the land to its south immediately adjacent to Clump Mountain National Park, rather than in the Rural Residential Zone. This displays a very clear zoning plan by the planning authority, which, it is submitted, the Court should be very hesitant to compromise.

39. The stated intent of the Rural Conservation Precinct in s 4.2 of the 2005 planning scheme is (footnote in original):

> Rural Conservation Precinct: includes land that has all or part of the lot containing land suitable for conservation. It includes *areas of significant conservation value* and also includes land that may require revegetation. Council may exercise its discretion to allow for development at a higher density in exchange for permanent protection of habitat[10]. Part of lots in the rural conservation precinct may include good quality agricultural land suitable for agricultural use.

Under the bonus development right scheme the vegetated area could have been re-zoned to the Conservation Zone, offering an intermediate form of protection between the two offered by the Co-Respondents but yielding far fewer lots for development. The conservation benefits under the Conservation Incentives Framework may, therefore, have been greater overall that that achieved under the proposed development.

[9] See the Book of Plans & Maps, page B1.

[10] Refer to Planning Scheme Policy 4 – *Protection of habitat values*.

40. The purposes of the Rural Zone are stated in s 4.2 and include, to protect ecosystem function of existing habitat by promoting the protection from removal and destruction of habitat in the Rural Conservation Precinct.

41. A table of specific outcomes required under the Rural Zone Code in s 4.2.2 states that lots must have a minimum area of 60ha, or 30ha if the lot contains at least 30ha of Good Quality Agricultural Land identified on Map 5.

42. Planning Scheme Policy 4 – Protection of Habitat Values identifies when Council may favourably consider development applications resulting in a higher density of development than provided for in the Rural Zone Code and the planning scheme generally. The policy states a number of criteria that Council requires before it will consider an application for higher density development then states:

> When determining the appropriate density of development the following is a guide to ensure that that the integrity of the habitat to be protected:
>
> …
>
> (b) For reconfigurations, one (1) allotment of one (1) hectare in area is permitted for each five (5) hectares of habitat protected using a conservation covenant up to a maximum of four (4) additional lots.
>
> …
>
> Note that when calculating the maximum proposed density the above criteria is used plus the density of development permitted on the site using the criteria in the planning scheme. …

43. This system clearly carries forward the Conservation Incentives Framework from the 1997 scheme to the 2005 scheme and applies it to the subject land.

44. Under the new system for protection of habitat values, the subject land could expect to gain 4 bonus blocks in addition to the one existing block that is permissible under the Rural Conservation Zone, making 5 blocks in total.

45. The proposed development conflicts in a major way with the protection of habitat system created in the 2005 planning scheme by far exceeding the maximum number of permissible lots. It may also be noted that similar conservation outcomes (though not the dedication of land to National Park) could be achieved under the new scheme.

46. Having identified the conflicts with the strategic plan and planning scheme, to apply the three-stage test in *Weightman*, the planning grounds in support or against the development need to be analysed.

Impacts on the environment

47. The focal point for the impacts on the environment of the development were the potential impacts on cassowaries.

48. The three expert ecological witnesses agreed with two broad propositions, namely that:

    (a) the cleared area is not cassowary habitat, although cassowary may move across it from time-to-time;

(b) the essence of good management for cassowaries is to maximize the forested area in order to support as many cassowary territories as possible and to keep cassowaries away from hunters, dogs, motor vehicles and artificial food.[11]

49. Mr Slack considered that adverse impacts on cassowaries could be managed through fencing, excluding dogs, and dedicating the vegetated area to National Park.

50. Mr Sullivan considered fencing around the entire perimeter on the northern, western and southern sides of the property was required but also agreed that the impacts would increase with the number of lots in the subdivision. Despite the fence, he was particularly concerned about the impacts of human interactions with cassowaries.

51. Dr Harrington also considered that adverse impacts to cassowaries from the development would be substantially reduced by the fencing the entire (northern, western and southern) perimeter,[12] excluding dogs, and dedication of the vegetated area to National Park, but remained concerned about the impacts of human interaction generally, which he said were likely to increase with increasing density of the development. The scale of this impact is difficult to quantify.

52. To the extent that the expert ecologist disagreed, Dr Harrington's evidence should be preferred because he is far better qualified in the relevant field of expertise. Therefore, it should be accepted that the likely impacts of residential development on cassowaries will increase with increasing density. The scale of this increase cannot be quantified. The mitigation measures proposed significantly reduce the impacts, but a total reduction in the density of the development would remove a large part of the cause of the impacts and thereby be likely to substantially reduce the impacts.

Good quality agricultural land

53. SPP 1/92 recognises the importance of protecting good quality agricultural land ("**GQAL**").[13]

54. The first principle of SPP 1/92 is that GQAL has a special importance and should not be built on unless there is an overriding need for the development in terms of public benefit and no other site is suitable for the particular development.

55. The second principle of SPP 1/92 recognises that some alienation of productive agricultural land will inevitably occur as a consequence of development, but it should not be supported unless no equally viable sites exist, particularly where developments do not have very specific locational requirements (for example, rural residential).

56. The sixth policy principle of SPP 1/92 provides that where a planning scheme does not contain adequate agricultural land provisions, the Government should be guided by the principles in the SPP 1/92. The Court should not adopt the role of

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[11] See Exhibit 16 (Dr Graham Harrington) at [31]. See also Exhibit 18 (Scott Sullivan) at [5.1] and Appendix 1, pages 5-7; and Exhibit 5 (Cameron Slack) at pages 5-7.

[12] Subject to a proviso that if fencing suitable for excluding cassowaries effectively covering the entire southern boundary already exists, further fencing of it is not required.

[13] See Exhibit 9. There are several, instructive judgments of the Court in relation to SPP 1/92, including *CW Edmonston & Assoc v Emerald Shire Council* [1994] QPLR 123 (Quirk DCJ); and *Daley v Redland Shire Council* [2005] QPEC 041 (Robin DCJ).

the planning authority, but in applying SPP 1/92 the Court can obviously have regard to the facts of the specific land in question to consider whether there is an apparent error in the planning scheme.

57. The seventh principle of SPP 1/92 is that the fact that existing farm units and smallholdings are not agriculturally viable does not in itself justify their further subdivision or rezoning for non-agricultural purposes.

58. Mr Gibson QC, in opening the Co-Respondent's case, pointed to s 4 of SPP 1/92 as indicating it places the onus on local government to recognize GQAL in its planning scheme and that in this case the subject land is not so recognized. The Second Appellant accepts that if the Court accepts that interpretation of SPP 1/92, then the subject land should not be regarded as GQAL.

59. However, the Second Appellant also submits that the fact that the State Government, through the Department of Primary Industries mapped the land as Class A1 (Crop land – Land that is suitable for current and potential crops with limitations to production which range from none to moderate levels) is significant.

60. In this case the expert witnesses, Mr Hine[14] and Ms McAvoy,[15] diverged dramatically in their assessment of the land capability. Mr Barnes also provided facts of the difficulty of operating a viable farm based on his local knowledge.[16]

61. Perhaps the fundamental distinction between them was a difference of opinion in relation to the necessary farm size and economy of scale to have a viable farming enterprise. Mr Hine considered the land was too small to be used alone or in conjunction with neighbouring land to the south for any fruit, in particular bananas. Ms McAvoy considered the land was large enough to support a range of horticultural crops and was particularly suited to organic production.

62. Mr Hine's approach conflicts with the seventh principle of SPP 1/92. On this basis Ms McAvoy's opinion should be preferred and the subject land regarded as GQAL.

Need

63. A great deal of case law has dealt with the issue of "need"; however, an oft quoted early judgment of this Court is the decision of Carter DCJ in *Skateway Pty Ltd v Brisbane City Council* (1980) 1 APAD 417 at 423-424:[17]

> Need in planning terms is a relative concept. As Hardie J pointed out in *Chartres Constructions Pty Ltd v Randwick Municipal Council* (1972) 25 LGRA 193 at p195, consideration of need in a town planning case 'must yield to the decisive effect of amenity and other town planning considerations'. In a rezoning application the need contended for is firstly a community need, not in the sense that there is an element of urgent community necessity for a facility or for land so zoned on which the facility can be provided. Rather it connotes the idea that the physical wellbeing of a

[14] Exhibit 8.
[15] Exhibit 15.
[16] Exhibit 22.
[17] See also *Williams McEwans Pty Ltd v Brisbane City Council* (1981) 2 APAD 165 at 169-171 per Carter DCJ; *Cut Price Stores Retailers v Caboolture City Council* [1984] QPLR 126 at 131 per Skoien DCJ; *Anka Builders (Gold Coast) Pty Ltd v Maroochy Shire Council* [1986] QPLR 436 at 459-460 per Row DCJ; *Roosterland Pty Ltd v Brisbane City Council* (1986) 23 APAD 58 at 60; *All-a-wah Carpark v Noosa Shire Council* [1989] QPLR 155 at 157 per Skoien DCJ; *Jadmont Pty Ltd v Miriam Vale Shire Council* [1998] QPELR 351 at 354 per Skoien DCJ; *Warradale Holdings Pty Ltd v Caloundra City Council* [1998] QPELR 498 at 513-514 per Brabazon DCJ.

> community or some part of it can be better and more conveniently served by providing the means for ensuring the provision of that facility, subject always to other considerations of a town planning kind including the consideration that the wellbeing of a community also depends significantly on an acceptable residential amenity. If the provision of a facility which would otherwise advance the physical wellbeing of a community will affect the capacity of residents in that community to enjoy life, then it can in truth be said that there is no need.

64. "Need" does not mean simply market demand[18] and while the availability of other land in the locality of the same zoning is relevant it is not necessarily determine-ative.[19] Rather an overall public benefit is required as stated in *Roosterland Pty Ltd v Brisbane City Council* (1986) 23 APAD 58 at 60 per Skoien DCJ:[20]

> "Need" in planning terms is a relative concept. It does not connote pressing urgency but rather relates to the general wellbeing of the community. A use would be needed if it would, on balance, improve the services and facilities available in the locality. See *Skateway Pty Ltd v Brisbane City Council* (1980) 7 QL 296; [1980] QPLR 245 at 250. It is not, of course, the sole or even the most important criterion to be considered and indeed must give way to the decisive effect of amenity and other town planning considerations, ibid.

65. The nature of planning need and the fact that it does not invariably carry weight was considered by Fryberg J in *Ecovale Pty Ltd v Gold Coast City Council* [1999] 2 Qd R 35 at 46-47:[21]

> What is important [in considering the concept of need in planning appeals] is that neither in the concept as judicially developed nor in the statute is need propounded as a matter which invariably carries weight. Often it may be a factor of no importance at all. The [*Local Government (Planning and Environment) Act 1990*] requires a council to assess it to the extent it is relevant. It requires no more than that.
>
> Secondly, it should be remembered that need has many aspects. It may in some cases be argued that an amendment to a planning scheme is necessary because the development proposed is one of a type of which there is shortage in the community, or for which there is an economic demand. In such cases, the focus of the evidence will understandably be upon the proposed development. In other cases the focus may be upon the question of whether a particular zone is more appropriate than another zone. In yet others, the issues may revolve around the market availability of suitable land to permit a particular development, both lawfully and practically – the 'supply and demand' aspect of need. No one aspect of need must necessarily apply in every case. …

66. The authorities confirm that need is a relative concept to be given a greater or lesser weight depending on all of the circumstances which the planning authority has to take into account.[22]

67. While the Second Appellant accepts that there is a market demand for rural residential land around Mission Beach, the proposed development is not needed on the basis that it will not, on balance, improve the services and facilities available in the locality or the general well-being of the community because:

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[18] *All-a-wah Carpark v Noosa Shire Council* [1989] QPLR 155 at 157 per Skoien DCJ; *Leeglade v Mulgrave Shire Council* [1995] QPLR 122 at 125 per Daly DCJ.

[19] *Hervey Bay Projects v Hervey Bay City Council* [1993] QPLR 104 at 114 per Row DCJ; *Warradale Holdings Pty Ltd v Caloundra City Council* [1998] QPELR 498 at 514 per Brabazon DCJ.

[20] See also *Warradale Holdings Pty Ltd v Caloundra City Council* [1998] QPELR 503 at 513 (Brabazon J).

[21] See further *Ballymont Pty Ltd v Ipswich City Council* [2002] QCA 233; (2002) 120 LGERA 318; and [2003] QPELR 41 at [49] where Fryberg J reiterated these comments.

[22] *Intrafield Pty Ltd v Redland Shire Council* [2001] QCA 116; (2001) 116 LGERA 350; [2001] QPELR 413 at para [20]; *Ballymont Pty Ltd v Ipswich City Council* [2002] QCA 233 at [49].

(a) the proposed development conflicts with the strategies in the 1997 planning scheme and the 2005 planning scheme to provide for habitat protection through granting a limited number of bonus development rights for subdivision of land within the Rural Conservation Zone/Precinct protecting conservation values, thereby ensuring large lot sizes (in this case of around 2ha or greater);

(b) the loss of good quality agricultural land to a greater extent than if the land were developed in accordance with the bonus development rights creating lot sizes of around 2ha or greater; and

(c) adverse impacts on the environment due to increased human interaction with cassowaries despite reasonable and relevant conditions being imposed on the development such as fencing of the entire southern, western and northern boundaries of the cleared area on the land.

Conclusion

68. The Court is not the planning authority for the Johnstone Shire. In this case, whatever planning grounds are attractive to allow the proposed subdivision, the relevant planning schemes clearly indicate that it should be rejected. The strategic plan of the 1997 planning scheme showed a strong intention to limit subdivision of land in the Rural Conservation Zone through the Bonus Development Rights procedures. Whatever question may have been raised about whether this regime could be avoided by a re-zoning application for a higher density must have been answered by 2005 planning scheme.

69. The retention of the subject land in the Rural Conservation Precinct under the 2005 planning scheme is a clear statement of planning intent by the Council. The scheme limits increases in the density of development in this precinct to a maximum of 4 lots in addition to the existing lot. The land is not included in the Rural Residential Zone under the 2005 planning scheme. If the Co-Respondents wished to develop the land as rural residential lots they should have lobbied the Council to place the land in that zone under the 2005 planning scheme. The fact that they have not done so, or have failed in their attempt, is no reason for the Court to embark into the role of the planning authority for the area and do what has not been done by the Council.

70. The Court may consider that the "highest and best use of the land" is a rural residential development but that is not the primary question that must be asked. The primary question that must be asked is what the planning scheme allows to be developed on the land. The 1997 planning scheme and, even more clearly, the 2005 planning scheme do not allow development of the land beyond 5 lots in total. For this reason the Court should allow the appeal. The Co-Respondents, of course, will be able to apply for a 5 lot subdivision in the future should they wish to do so.

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Counsel for the Second Appellant
6 April 2006