



PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Wingate Properties P/L & Anor v BCC & Ors* [2001] QPE 005

PARTIES: WINGATE PROPERTIES PTY LTD & QUEENSLAND CEMENT LIMITED
Appellants
V
BRISBANE CITY COUNCIL
Respondent
And
PIONER CONCRETE (QLD) PTY LTD
First Co-Respondent
And
BORAL RESOURCES (QLD) PTY LTD
Second Co-Respondent
And
SAVE OUR RIVERFRONT BUSHLAND
Third Co-Respondent
And
CENTENARY RIVERFRONT ADVISORY COMMITTEE (INC)
Fourth Co-Respondent
And
DIANNE SCOTTE AS CHAIRMAN - SEVENTEEN MILE ROCKS PROGRESS ASSOCIATION
Fifth Co-Respondent

FILE NOS: 3219 of 1999 and 1625 of 2000

PROCEEDING: Submitter Appeal

DELIVERED ON: 2 February 2001

DELIVERED AT: Brisbane

HEARING DATES: 9, 10, 11,12, 13 October and 2 and 3 November 2000

JUDGE: Judge Brabazon QC

ORDER: **Appeal by the Third Co-Respondent in 1625/00 allowed.**

CATCHWORDS: Local Government - Town Planning – transitional plan – weight to be given to new scheme – City Plan in force – effect of master plan – factors in approval process – *R v*

Brisbane City Council (1986) 2 Qd R 22 followed.

COUNSEL: Mr Gore Q.C. for the Appellants
Mr Rackemann for the Respondent
Mr Keliher for the Third Co-Respondent

SOLICITORS: Clayton Utz for the Appellants
Brisbane City Legal Practice for the Respondent
Environmental Defender's Office (Qld) for the Third Co-Respondent

JUDGMENT

The Parties

- [1] At the hearing of the appeal, the active parties were the Brisbane City Council, Wingate Properties and Queensland Cement Limited (who had an allied interest in supporting the development approval) and an unincorporated organization called Save Our Riverfront Bushland (who opposed the approval for development). Those parties were represented by counsel.
- [2] The first and second co-respondents, Pioneer Concrete (Qld) Pty Ltd and Boral Resources (Qld) Pty Ltd did not appear. However, Exhibit 1 contains correspondence which shows that their non-appearance was on the basis of an agreement reached out of court with Wingate Properties and QCL. That agreement was on the basis of a certain condition being added to the present conditions of development. No-one objected to their non-appearance, on that basis. Indeed, the Council agreed with the suggested condition.

- [3] Other parties who did not appear were the Centenary Riverfront Advisory Committee (Inc) and Ms Dianne Scotte, the chairman of the Seventeen Mile Rocks Progress Association. An affidavit was read on behalf of the Progress Association. It was sworn by Ms Scotte and Ms Sugden. That affidavit recorded their views about the merits of the appeal, especially in relation to the treatment of the ridgeline. They have been taken into account.

The Subject Land

- [4] At about the time of the First World War, QCL established a cement making operation on large areas of land at Seventeen Mile Rocks. In 1998, the company's activities were relocated to Gladstone. About 160 hectares of land, in several different areas, were no longer needed by the company. A master plan for the land's development was drawn up, after many meetings between Wingate, QCL, the Council and local residents (See Exhibit 18). Wingate was appointed by QCL as its development manager.
- [5] Under the master plan, QCL's land is divided into four precincts;
- (a) The Western precinct comprises about 14 hectares. It has been dedicated to Council, to be incorporated into a regional open space network.
 - (b) The Works precinct comprises about 49 hectares. It is being developed as an industrial estate.
 - (c) The Central precinct comprises about 64 hectares. It is presently being developed for residential purposes, and is built around Jindalee Creek. The land has been sold to a developer.

(d) The Riverside precinct comprises about 34 hectares. It is the precinct which is the subject of this appeal.

[6] The Riverside precinct was used by QCL to unload limestone as it arrived by barge. Stockpiles were made on level land near the riverbank. Material was then loaded onto a conveyor belt which headed in a south-westerly direction, passed under Seventeen Miles Rocks Road and then went through the Central precinct to the Works precinct. Those past activities mean that the flatter parts of the Riverside precinct are extensively cleared and modified. There is a wharf and many signs of industrial use, including large pieces of machinery and the remaining parts of the conveyor line.

[7] It is the high land in the Riverside precinct which has given rise to this appeal. Much of it is in a relatively undisturbed state. It is illustrated in the aerial photograph (figure 4 to Exhibit 2 - Mr Zahnleiter's report). In the south east corner, the land is elevated, rising about 60 metres above the river flats. Facing the river is a steep escarpment. The escarpment runs up to the ridgeline, which runs roughly north-northwest for a distance of about 500 metres. From the ridge, the land falls steadily away to the south, until it reaches Fremont Street.

[8] The Riverside precinct is divided into a number of separate titles. They appear in Figure 2 to Mr Zahnleiter's report. The aerial photograph also gives a good idea of the surrounding uses. South of Fremont Street, there is a residential settlement. To the south-west, there is the Central precinct, presently being developed for residential housing. To the west and north-west there are industrial areas.

- [9] Under the Town Plan, the site was split into three different zones. As Mr Zahnleiter's Figure 9 shows, the sloping southern hillside above Fremont Street was Future Urban. Much of the vegetated area, including parts of the ridge, were Non Urban. The river flats, and some of the higher land to the north west, was Future Industry.
- [10] Since 30 October 2000, there has been a considerable change in the preferred land uses. Under the City Plan, the position has changed considerably, as will be seen. Much of the Future Industry Zone is to be devoted to Open Space.

The Council Approval

- [11] The final Council approval for the whole of the Riverside precinct was the product of much negotiation. It should be noted that the present appeal is about only part of the precinct. However, to understand the controversy between the parties it is necessary to understand the scope of the whole concept of the Riverside precinct.
- [12] The Council's final decision was given on 20 March 2000. This development package deals with part of the Riverside precinct. The consequences can be understood by looking at the aerial photograph, with the reconfigured lots superimposed in yellow.
- [13] Lot 1 is the subject of this appeal. It is a triangular area of 7.355 hectares, sloping up from Fremont Street. It includes most of the southern slopes between Fremont Street and the ridgeline. The indicative site plan provides for 71 lots to be developed for residential purposes. Seventeen of those would be on the ridgeline,

looking towards the Brisbane River. Those lots are the main reason for this appeal. However, it is necessary to understand the approvals for the rest of the Riverside precinct.

[14] The new lot 5 is subject to an arrangement with the Hari Krishna organization. There is no controversy about that.

[15] The effect of the conditions is to preserve the escarpment, below the ridgeline, as open space. Their second effect is that the land on the river flats will be kept as open space, rather than for industrial uses, and will be developed into a major regional park. Overall, the consequences of the approvals are that an area of about 25 hectares will be provided for public open space - about three-quarters of the whole precinct. Those areas of open space include a corridor to the north-west of Lot 1 to link it to the Central precinct to the west.

[16] The reconfiguration of the land is to be in accordance with the landscape master plan of 21 May 1999 prepared by EDAW. (see Figure 22 to Mr Zahnleiter's report). Figure 22 indicates that the actual number of residential lots may be up to 90. However, during the hearing, counsel for Wingate and QCL gave an undertaking on their behalf, that in any event the residential development on Lot 1 would be limited to 71 lots, as shown on the plan.

The Appeal

[17] This is an appeal about a decision of the Council. It is the duty of the court to decide the matter on all the evidence before it. It is a new hearing, so the appeal has

to be decided on the facts now established, and not just on those put before the Council.

[18] When the application was made to Council, on 9 June 1998, the 1987 Town Plan for Brisbane was in force. On 30 October 2000, the new City Plan came into force, replacing the Town Plan. Under those circumstances, s.4.1.52(2)(a) of the *Integrated Planning Act* says that the appeal must be decided under the provisions of the laws and policies in force when the application was made, while this court may give weight to any new laws and policies as it considers appropriate. Therefore, the role of the Town Plan, and the impact of the City Plan, are important factors in this appeal.

[19] Since the introduction of *IPA*, the Town Plan has been considered a transitional planning scheme. Some of the decision making criteria in the earlier *Local Government (Planning and Environment) Act* were preserved. In effect, the application must be decided according to the criteria in s.4.4(3) and s.4.4 (5A) of the *P&E Act*. The most significant provision is the latter - that an application must be refused if it conflicts with any relevant strategic plan, and there are not sufficient planning grounds to justify its approval, despite that conflict.

[20] According to s.4.1.50(1) and (2) of *IPA* it is for the applicants, Wingate Properties and QCL, to establish that the application should be approved.

The Role of the Court

[21] Counsel for QCL and Wingate Properties emphasized some propositions which are now well established. It is not the function of this Court (or indeed any planning authority) to refuse an application because it considers that the proposed use is not the best possible use for the site. It is not the function of the Court to redesign a proposal. Its function is to pass judgment on that which is proposed. In this case, the issue is whether or not the current proposal has been shown to be acceptable. The fact that some alternative proposal may be thought to be even more acceptable is by the way. If the current proposal is acceptable, then that is enough.

[22] The Brisbane City Council is the planning authority for this city. It is not the function of the Court to conduct a review of its planning schemes, or hold any opinions as to whether its schemes are good or bad. The role of the Court is a narrow one. It is to resolve appeals in particular cases. It is the subject to the same principles and constraints which apply to the planning authority. Whilst the Court acts on all the evidence given in the appeal, there is no reason why it might not place weight on an approval by a local authority, as that represents an expression of the views of the response of the planning authority (see the High Court of Australia in *Scurr v BCC* (1973) 133 CLR 242 and 257).

The Issues

[23] It is necessary to keep in mind the substantial issues which gave rise to this appeal, and which have to be resolved. There are issues of town planning, the treatment of the environment, and of visual amenity. In concrete terms, much attention was paid to the development of the new Lot 1. What would be the impact of the houses to be built on the southern slope, down to Fremont Street? The effect on the environment

and the appearance of the slope was debated. What is going to be the effect of the proposed lots along the ridgeline, at the top of the escarpment? Will they destroy an important visual part of the landscape? Should the houses be there at all? If so, can their impact be sufficiently controlled by a vegetation management plan? Should there be seventeen ridgeline houses? What effect will the development of Lot 1 have on the flora and fauna?

[24] While the evidence dealt with those issues the position of the development's opponents became clearer as the hearing progressed. They recognized that development would have to be allowed on the southern slopes, down to Fremont Street. Their opposition became concentrated on development along the ridgeline, and especially the 17 lots facing the river. (See T. 515 and 596). (There is some ambiguity in the expression "ridgeline". It can refer to the line where sloping ground reaches the top and flattens into a ridge. It can refer to the highest level. It can also refer to an area of land, more or less flat, along the highest part of the land. The expression "ridgetop" will ordinarily have that meaning. In this judgment, it can be seen that the expression "ridgeline" is usually meant to refer to an area of land, and not just the edge of the highest land or the highest point.)

[25] The opponents of the development of Lot 1 concentrated on only that proposed lot. However, the Council, Wingate Properties and QCL urged that a global view be taken of the master plan for the whole of the Riverside precinct. The value to the city of achieving a regional park, to be built on land otherwise intended for industrial uses, was put forward as a major achievement, balancing any detriments to the land in Lot 1.

- [26] There are issues arising out of the rapidly changing town planning controls over this part of the city. What does the City Plan say about the development of Lot 1? What impact might the overall plans for the Riverside precinct have?

The Town Plan

- [27] The development application was lodged on 9 June 1998. The land was then divided into three different zones. See Figure 12 to Mr Vann's report. The pink triangle north of Fremont Street was zoned Future Urban. To the north of that there was a large boomerang-shaped piece of land zoned Non Urban. That covered most of the ridgeline. Land towards the Brisbane River and the adjoining industrial areas was zoned for Future Industry.
- [28] In 1997 the Town Plan was amended to divide the non-urban land into different categories. In this case, the land was included within Category A. That was a category for "natural or semi natural areas having high value for habitat conservation, landscape protection or waterway quality protection."
- [29] The intent and requirements of the non-urban zone are set out in the Town Plan, para. 5, commencing at p. 5-13. It clearly intends to give a high level of protection to Category A land. While no particular development is absolutely forbidden, as the merits of individual proposals are to be considered, the usual intention about Category A lands was this: "...because of the ecological and landscape values of the land within this category, it is intended that development be limited to large allotments for residential use and other activities which, because of their nature and

scale, would not adversely impact on either habitat or visual quality or water catchment areas".

[30] There are strong indications that the minimum allotment size would be four hectares.

[31] It can be seen that the exact location of the Non-Urban zone is curious, in that it covers the ridgeline, but stops short of protecting the lower part of the escarpment as it falls away towards the river. There are also some anomalies, closer to Fremont Street in the south. A creek bed in the south western corner of the site, which would be difficult for development, is included in the Future Urban Zone. Then, as one goes up the southern slopes towards the ridgeline, there is a disturbed area of vegetation around the site of an old house. That is within the Non Urban zone.

[32] Paragraph 3.3.1 of the Strategic Plan dealt with the Brisbane Green Space System. An intention was to ensure that areas of habitat and scenic value were retained. Attention is also paid to land with scenic constraints. It can be seen from Map 2 to the Strategic Plan that all of proposed Lot 1 was recognized as having natural scenic value. The ridgeline and the bushland strip running south west along Yalford Street, is shown as having Habitat Value. Then, on Map 3, the proposed Lot 1 is shown as land with environmental or scenic constraint, while the ridgeline is a "conservation and recreation area."

[33] The Strategic Plan also deals with the Western Gateway Local Area Outline Plan. This land is part of that Plan. In the map attached to the Strategic Plan to show the preferred land uses, (see Mr Zahnleiter's Figure 10, being Figure 14a of the Plan)

most of Lot 1 is shown as an area "subject to environmental and scenic restraint", applying to the southern slopes, above Fremont Street" while the ridgeline, and the bushland corridor to the south west, is shown as Non Urban zone land. The southern slopes are also shown to be "unresolved". In Figure 11, (Figure 14b of the Plan) which shows the preferred staging of development, the whole of the Riverside precinct is shown as being "unresolved", and subject to constraints. (Category S) If these plans are inconsistent then Figure 10 should be taken as the dominant one, with respect to the preferred land uses. See the note to that effect, on 14(b). Those plans were inserted in November 1998.

- [34] Paragraph 3.5.13.1 explains the consequences of "Category S - subject to major constraints" (the category of this land on Strategic Plan Map 14b):

"Development approvals are required in these areas. Development of this land is generally constrained by ... areas of environmental and scenic significance."

- [35] Land in the "unresolved" category is specifically mentioned, in para. 3.5.13.7:

"Options for the future development of this site are subject to further investigation. The intention of the Council is to balance development opportunities with the likely impacts of adjoining existing and committed development, and with the open space, ecological and landscape values of this area.

No development will be permitted forward of the ridge overlooking the Brisbane River."

- [36] The Strategic Plan explains the designations of habitat value, natural scenic value, conservation and recreation areas, and land with environmental or scenic constraints. Respectively, they are as follows:

"Para 3.3.1.1 Habitat Value

The value of these sites is in the preservation of vegetation in its own right or as a habitat for wildlife, as core areas of habitat, movement

corridors or as refuges for migratory animals. Land with these values (includes) ... the heavily vegetated foothills and ridges in the city's west."

"Para 3.3.1.1. Natural Scenic Value

These lands exhibit scenic values that are identifiable with the character of Brisbane and hence form an important landscape function. These areas typically include bushland and wetlands that occur throughout the city, the forested ridges and foothills on the eastern and western boundaries of the city and the Brisbane River and adjoining lands."

"3.3.1.2 - Conservation and Recreation Area

Within this component of the Brisbane Green Space Area it is intended to retain the significant natural, semi-natural ecological and landscape values provided to the city by areas such as ... the forested foothills and ridgelines that occur throughout the city and other significant natural areas. The role of these areas to act as flora and fauna habitat, provide recreational opportunities and form distinctive and significant landscape features of the city is intended to be preserved."

"3.3.1.4 - Environmental or Scenic Constraints

However, these lands or part of these lands contain areas of significant historic, architectural, topographic, landscape scenic bushland, ecological, social or cultural interests. They may also be considered significant for the retention of flora and fauna habitat, wetlands and waterway corridors and therefore unsuitable for development."

[37] The Western Gateway Plan deals with areas subject to environmental and scenic constraints, in para. 3.5.4.2:

"...These constraint areas reflect an intention to deliver a high degree of scenic amenity to protect environmental qualities and retain bushland values. Council will expect any acceptable development to ... include only low impact development forms that ensure least disturbance of these natural areas. Parts of those areas may not be suitable for development, and consequently, may form part of parkland contributions, be acquired by council or be protected through other arrangements.

Any development proposal in these areas will need to be accompanied by detailed environmental assessment (including

geotechnical studies) and visual amenity studies to satisfy Council that the existing values would not be unduly compromised. In order to protect scenic values, sites for dwellings will not be approved where the subsequent dwelling would protrude above the ridgelines."

With respect to work on Non Urban land, within the Western Gateway Plan, para.

3.5.4.4 states, relevantly:

"Acceptable development proposals will be required to demonstrate that sensitive land clearing runoff management and design and construction techniques have been addressed and will be employed".

[38] The Town Plan also deals with the development of the southern slopes, zoned Future Urban. Within para. 6.1 this appears:

"While land within the zone is generally suitable for urban and suburban purposes some lands within the zone have been identified as containing areas of environmental significance.

It is the intention of Council to preserve areas of significant, architectural, topographic, landscape, scenic, bushland, ecological, social or cultural interests and to protect or preserve fauna habitats and fauna movement corridors and wetlands and waterway corridors. ... some land or parts of land in the zone is unsuitable for (urban or suburban residential purposes) and such an unsuitability may be due to one or more of the aforementioned matters. The circumstances under which development will or may be disallowed for any of the reasons outlined in this paragraph are contained in a Planning Policy. ... in cases where development within these areas is possible, the development of sites will require innovative approaches and occasionally lower development yields to ensure the retention of these natural features.

... the land in this zone is located close to, or in areas included in the Brisbane Green Space System or 'land with environmental or scenic constraint' in the Strategic Plan, or identified in Local Area Outline Plans, development will only be approved where it is consistent with the intent of the relevant part of the Green Space System or the relevant Local Area Outline Plan. Development proposals will be required to identify and provide for the retention and protection of these features. (i.e. significant natural features)"

[39] The Council adopted planning policies which applied to this application for development. They are these:

- (a) Planning Policy 5.02 - Development in the Non Urban zone - Adopted June 1987.

This policy makes it clear that development is expected to be dominated by broad-acre residential uses, together with agricultural and similar pursuits. The aim is to retain the semi-rural environment. While other activities can be established subject to the consent of Council, they do not include denser residential uses.

- (b) Planning Policy No. 6.01 - Determination of whether land in the future urban zone is unsuitable for development - Adopted October 1994.

The policy seeks to clarify the circumstances under which Council may find Future Urban zone land unsuitable for urban or suburban residential development. A number of guidelines are then set out.

The most relevant here seems to be (p):

“The land is of significant topographic, landscape or scenic interest and exhibits one or more of the following characteristics:

- (i) It is important to the scenic amenity of the city in that it has a very high scenic quality and low capability of visually absorbing development
- ...
- (iv) It is important in establishing the scenic character and identify of the local area in that it contains a rare or uncommon landscape of the local area, a distinctive or memorable feature of the local area or a good representative example of natural landscape types once, in the local area ...”

- (c) Planning Policy 19.07 - The preservation of natural areas and sites of special significance – Adopted May 1996.

This policy requires that any development application should pay regard to the conservation of land or places listed within the Brisbane Conservation Atlas. It may be necessary to transfer such land for park purposes, to ensure its protection. The policy applies to bushland and natural vegetation areas, and fauna habitats.

[40] The reference is to the Conservation Atlas, which says about this land:

“This locality lies over a hill which is highly visible both locally and to the other side of the river. The bushland locality has important visual significance when viewed from the suburbs across the river. The vegetation on the northern slope is in good condition with relatively few weeds. It is valuable as fauna habitat. The site has local significance biologically and scenically”.

[41] Finally, it should be noted that all land in Lot 1 is presently protected by a Vegetation Protection Order, (Figure 3.4 to Exhibit 6)

The City Plan

[42] The provisions of the City Plan, with respect to this land, are different from those in the Town Plan. There is a new Strategic Plan. At para. 4.1.1 preservation of green spaces is identified as a challenge. In particular, a key challenge is to:

“Maintain the forested foothills and ridgetops that are uniquely Brisbane. ... (at 4.1.2) the Plan recognizes the importance of looking at the long term and ensuring the potential to meet the greenspace needs of future generations is not eroded. As a balance to growth, important greenspace values and functions will be identified, retained and enhanced through the greenspace system. ... (at 4.1.2.2).

Conservation and recreation components include assets that will be preserved such as ... the city’s forested foothills and ridgelines. These components act as flora and fauna habitats, provide recreational opportunities and form distinctive and significant landscape features of the city ...

Environmental protection components include land that will be retained and enhanced for habitat conservation, landscape protection and/or water quality protection. These components may accommodate a range of private development only if environmental impacts are minimized and greenspace values are retained. Some larger sites currently used for major institutions fall into this category. Fragmenting this land has detracted from its biodiversity and landscape values and is no longer considered appropriate. This practice will be discouraged.”

[43] Map B to the Strategic Plan demonstrates certain values within the greenspace system. The proposed Lot 1 is described as having “natural scenic value”. However, there is a contrast when one looks at Map C which shows the greenspace system. Rather than all of proposed Lot 1 being shown, only a small boomerang shaped area to the north of Lot 1 is shown as being subject to “environmental protection components”. It might apply to the escarpment, or to the escarpment and the ridgeline. The reader is warned by the note to the Plan which reads “This map is notional only and should not be used for interpreting City Plan provisions relating to specific sites. To properly interpret the Strategic Plan the Strategic Plan maps must be referred to”.

[44] (It should also be noted, that the version of Map C, exhibited before the City Plan was adopted, shows a larger area than the present small boomerang – see Mr Zahnleiter’s Figure 13A. There, environmental protection would have been extended to included the ridgeline.)

[45] The City Plan then provides for a detailed system of area plans. The Strategic Plan sets out Desired Environmental Outcomes (DEO’s) for the whole city. Significant development proposals may be assessed for consistency with those strategies, where area based DEO’s do not provide sufficient guidance. The Local Plans put

forward more locally focused desired land uses, and override any parts of the City Plan with which they conflict. (see Chapter 3, page 8 and Chapter 4, page 3).

[46] One then turns to the Western Gateway Local Plan. (see Chapter 4, page 353.) The subject land is within the Seventeen Mile Rocks Precinct – see para. 3.1. That paragraph declares that: “A riverfront park of regional significance is to be established at Seventeen Mile Rocks. Greenspace corridors are also to be provided along the Brisbane River and Jindalee Creek.” The extent of that park is shown on Map A, which also shows the preferred land uses. See also Performance Criteria P3, P4 and P5 on p. 357. There is no particular mention of the ridgeline – it is part of a residential area.

[47] Map A is at page 362. It shows the Seventeen Mile Rocks Precinct. None of the Riverside Precinct is shown as being subject to environmental or scenic constraint. A triangle of land north of Fremont Street is apparently to be residential. On the adjoining page, Map B, which indicates the preferred staging of development, shows residential land within that triangle.

[48] A note on that map does say, that the extent of preferred land uses is indicative only. Not all lands identified in those categories are suitable for development.

[49] Next, attention should be paid to the scheme map which shows the area classification. That is the present analogue of the former zoning map. Map EO6 (Exhibit 7) shows the triangle to the north of Fremont Street as an Emerging Community Area. It is surrounded by parkland. The map is of a sufficiently large scale to enable the proposed Lot 1 to be located with precision. In fact, it is

apparent that the Emerging Community Area is meant to cover precisely the land in Lot 1. That is, it includes the ridgeline at the top of the escarpment. Once the land falls away steeply towards the river, then it is in the Parkland area. (It might be noted that access to proposed Lot 1 is to be from an extension of Jennifer Street, to the northwest, while that extension is not shown on Plan EO6. There, any access would appear to be from Fremont Street.)

[50] The City Plan describes the consequences of an Emerging Community Area classification. The basic provision is at para. 4.2.2.6:

“Development in Emerging Community Areas is to be orderly, well planned, and will provide a diverse range of housing types and supporting uses. New subdivision and development is to achieve good urban design outcomes, connectivity in roads and open space and support local character identified in any relevant Local Plan. Isolated subdivisions in appropriate and new development will conform with Local Plans and detailed Neighbourhood Structure Plans ...”

There is a limitation in para. 4.1.2.3:

“Some parts of the Emerging Community Area ... are unsuitable for urban development where there is a need to protect or preserve:

- Areas of significant historical, architectural, topographical, landscape, scenic, bushland, ecological, social, recreational or cultural interests;
- Fauna habitats and fauna movement corridors.

Proposals for development on land subject to these considerations must demonstrate that the values of the site and locality have been properly considered and will be protected.”

[51] To similar effect, in Chapter 3 at page 23 it is noted that ... “these areas have not been fully investigated and may contain pockets of land unsuitable for development because of scenic or environmental constraints. All land in the area requires a preparation of a neighbourhood structure plan before development can occur. ...

Land is developed in an orderly sequence, and in accordance with the neighbourhood structure plan and/or local plan.” (see also para. 4 of 4.2.).

[52] At page 26 of Chapter 3, it is said that “Reconfiguring a lot to create additional lots where any of those lots are smaller than 10 hectares where no structure plan has been approved, is generally inappropriate.

[53] The Structure Planning Code is to be found at Chapter 5, page 217. The purposes of the Code are to ensure that Emerging Community Areas are planned and developed in an orderly fashion, and that significant environmental assets are preserved.

[54] The requirements of a structure plan are set out in para. 5 on page 218. There seems to be no reason why Figure 22 of Mr Zahnleiter’s report might not be regarded as a structure plan. Paragraph 6 also notes that land in an emerging community may have environmental or scenic constraints. Areas of landscape, scenic or bushland interest areas are to be preserved or protected. The paragraph goes on:

“Larger tracts of land are generally identified in Local Plans. Smaller pockets are to be identified through the structure planning process.

As the Structure Plan is developed, land with environmental or scenic constraint will be retained and incorporated as part of the overall development. In some cases it may be possible to develop all or part of the constrained sites carefully and sensitively. For other sites, development will not be possible.

Where development is possible, alternatively approaches may be required, for example lower development yields or clustering of development to ensure the retention of land with environmental or scenic constraint.

Land subject to environmental or scenic constraint includes:

- Land shown in a Local Plan as subject to environmental and scenic constraint ...
 - Land of significant topographic, landscape or scenic interest that exhibits one or more of the following characteristics;
 - important to the scenic amenity of the city because it has a very high scenic quality and low capability to accommodate development visually
 - high scenic quality, exposure to major routes or major viewing prospects and a low capability to accommodate the development visually
 - Establishes the scenic character and identify of the local area because is contains:
 - a rare or uncommon landscape or distinctive or memorable feature of the local area, or is a good representative example of natural landscape types once common in the local area
 - forms part of an escarpment or other slope greater than figures 1 in 4 and is unsuitable for urban development because of potential instability, erosion or other hazard caused by clearing steep land
- ...”

[55] Para. 7, at page 220, sets out principles for a Neighbourhood Structure Plan.

Relevantly:

“Although land in an Emerging Community Area is intended primarily for residential uses, provision should also be made for other uses in appropriate locations. These uses should provide services or amenities to newly developing areas. They may included uses such as ... open space....

Some lands in Emerging Community Areas have been identified for specific uses or are subject to environmental or scenic constraint. This may limit development possibilities on or adjacent to these sites. In addition, short term and cumulative impacts are to be identified and considered. Non-residential land uses should be accommodated in locations that maximise the service they provide to the community and minimise the associated impacts.

The predominant form of residential development will be houses of low density including conventional and small lot housing.

On constraint sites, substantially lower development yields will be required where this serves to protect natural features of the site, but

may be balanced by higher densities on unconstrained parts of the site.”

- [56] It is apparent from the above provisions, that land may be subject to environmental or scenic constraints, even though it is not shown as such on Map C or on a Local Plan. These provisions are consistent with the terms of para. 4.1.2.2, which say that the major lands within the green space system are shown in Map C, and that smaller components will be identified as part of the development assessment process. The change in the maps, showing no constraints over the ridgeline, are not conclusive. It is necessary to consider the value of the ridgeline, compared to the consequences of development on it, which has been approved.

The Negotiations

- [57] It will be realised that Council’s consideration of this application coincided with its much larger concerns about the development of a new planning scheme for Brisbane. It is clear that QCL’s master plan was so significant that it was the impetus for some particular provisions which now appear in the City Plan. At Chapter 4 page 357, with reference to the development of the parkland, it is said that: “a regionally significant riverside park must be provided on part of the land previously occupied by QCL.” There is a reference to Map A, where the parkland is shown.

- [58] It is also clear that the creation of the new Lot 1 has influenced the town planning controls which apply to it. The express constraints which applied to it are not mentioned in the City Plan. Land that was Non-Urban has become part of an

Emerging Community. The triangle of land above Fremont Street, potentially available for residential development, has been enlarged to include the ridgeline.

[59] It was submitted for SORB that such changes in the planning controls were made for an impermissible purpose, and should be held to be invalid. However, it would not be right to reach such a conclusion in this litigation. There was no declared issue between the parties which would have alerted them, and the court, to the possibility of such a conclusion. Secondly, the evidence, as far as it goes, does not sustain such a finding. It must be accepted that the present provisions of the City Plan have been validly made. However, the evidence did touch on the ways in which the application was dealt with, and its impact on the final form of the City Plan. That evidence emerged because of the emphasis by the developers, and Council, on the need for the court to look at the development of the whole Riverside Precinct and not just at Lot 1.

[60] The evidence shows that there were extensive, high level negotiations between the Council and the developers. Different departments of the Council were involved. The final result was considered by a full Council meeting.

[61] Mr L J Fleming, a senior program officer for local planning within the Council, outlined the process of negotiation. He explained that Figure 14(a) was influenced by the unresolved stage of negotiations, in late 1998, between the applicant and the Council. Those negotiations also were the underlying reason expanding the area classification to cover the ridgeline – compare Exhibit 38, the advertised draft plan, and the final City Plan. (Figure 18(a) to Mr Zahnleiter’s report). In mentioning that result, it should also be noted that submissions from other interested community

groups were taken into account. Importantly, it should also be kept in mind that the negotiations led to the creation of a large regional park alongside the Brisbane River. That change meant that the former Future Industry Zone was changed to Open Space.

[62] Mr Fleming then dealt with the most contentious part of this appeal – that is, the approval to have 17 residential allotments along the ridgeline. As Mr Fleming put it:

“I think we’ve reached the stage now where we are quite comfortable with the outcome that we are going to get ... It was Council’s view that we were happy with some residential development up on top, but on the riverflat the original proposal was for units much like Windemere Estate further up towards Jindalee... we said “No, we didn’t want any development down there. The developer was trying to maximise how much development he could have up on the ridge, sort of, in lieu of having foregone this down the bottom. That was what the negotiations and the conflicts were. At the end of the day, Council is certainly of the view that we have looked after the environmental corridor and we have also got an outcome that will also set aside the visual amenity.since this appeal was lodged there have been further negotiations about that 10 metre setback from boundaries and so on. I think that what we are currently looking at it quite acceptable.
... that’s been our position, that the landscape views from the river and from the other side of the river, they were important and we didn’t want the ridge line dominated by built form elements ... we’ve struck the balance (in para 3.5.13) – see p. 11, supra) in the approval we have negotiated” (T 493 - 500)

[63] Mr Fleming went on to explain that negotiations led to the creation of the corridor which linked the riverside land, and the escarpment, to the land on the western side.

[64] Mr Fleming went on to describe the negotiations. The Council feared that QCL would walk away from the negotiations and develop its industrial land along the river. The Council’s aim was to capture the industrial lands as parkland, while restricting QCL as far as possible, in its plans to develop up on the ridgeline. There

was a conflict between the parties about those aims. As Mr Fleming put it: “It was a process of (the Council) trying to take the park on the one hand and contain the amount of residential development up on top.” In the result, he thought that the Council had managed to achieve an appropriate balance of the sort envisaged by s.3.5.13.7 of the Town Plan.

[65] There is no reason to doubt Mr Fleming’s evidence. There is nothing in it to suggest that the impact of this proposal and its approval, on the final form of the City Plan, was in some way underhand or improper. It is undeniable that there was a link between this development, and the final form of the City Plan. It was submitted on behalf of Wingate and QCL that it was the proper result of the Council carrying out the balancing exercise required by the Town Plan, in weighing up the impact of development on Lot 1 together with benefits to be obtained by the City, particularly in gaining a large area of parkland. It was submitted that the totality of the exercise should be looked at in judging the appropriateness of the balancing exercise, particularly as it affected the ridgeline. The submission for QCL recognized that there might be some detriments to the land in Lot 1, but that they would be acceptable, if balanced by positive features elsewhere.

[66] No evidence was given about the developers’ position and whether or not they might have agreed to a better deal for the city. That was the right approach – this court cannot be asked to weigh up the tactics of Council and the developers, as part of a balancing exercise. The only question is this – was the Council right in being persuaded to approve the development of land, as it did? In considering that question, it is necessary to consider the planning decision that should be made, in the light of the evidence that is now available. Is there room for any detriments that

may be done to Lot 1, because of the benefit to be gained from the parkland? In answering these questions, attention now has to be focused on the ridgeline, rather than the lower slopes down to Fremont Street, where it is accepted that development will take place.

The Ridgeline

[67] The Town Plan recognized the importance of the scenic and visual values of the ridgeline. The City Plan does not give it that specific recognition. However, the proposed development along the ridgeline was supported on the basis that it would not unduly interfere with or destroy its scenic and landscape values. It was accepted that the ridgeline did have those values. The effect of Mr Fleming's evidence was that the Council had done as much as it could to preserve the ridge line. Counsel for the developers, in final submissions, recognized that the views of the ridge line were important and should not be unduly affected. The contest at the hearing concentrated on the impact that the proposed development would have on views of the escarpment and ridge line.

[68] This ridge is not a dominant feature in the city compared to, say, the ridgelines of Mount Cootha. It is of significance in its own district. It remains the only relatively undisturbed escarpment and ridgeline close to the river as it winds its way through the city. It is the last remaining undisturbed ridgeline in the centenary suburbs. It is a relatively large area. It can be seen by those using the river, and from the other side of the river (primarily including Botticelli Park, the Queensland Equestrian Centre, and the houses along Botticelli Street and Figtree Pocket Road).

While the visual catchment is mainly a local one, it is likely to become more important, especially as the use of the river for transport and recreation increases.

[69] The efforts made by the Council to ensure that views of the ridgeline would not be unduly damaged, have good town planning foundations. In the case of the Town Plan, they are expressly set out and reflected in the Non-Urban zoning. In the case of the City Plan, while the express provisions are downgraded, it has become clear that the assessment process has identified the ridgeline as an area of significant landscape, scenic and recreational interest. The question here is, does the proposed development sufficiently protect that interest? The parties, and the expert witnesses, were divided over the likely impacts of development along the ridgeline.

[70] The 17 lots average about 1,300 square metres in area. As part of the development approval, they are subject to a Bush Fire Management Plan. See pages 505-512 of vol 2 of Exhibit 3. The Plan applies to those 17 lots, and not to the residential lots on the southern and lower side of the access road. (see Fig 1.).

[71] The Plan recognizes that a bush fire hazard exists for houses at the top of the escarpment. The risk of bush fire in any bushland area is increased by the north facing slope. Eucalypts are volatile, because of their high oil content.

[72] The Plan introduces the requirement for building envelopes. That is, any structures on the land must be within the envelope, rather than scattered about at random within the property boundaries. This Plan requires a 10 metre buffer between all built structures and the property boundary which joins the escarpment. A side set

back of 5 metres is required. The 10 metres between structures is required to minimize the risk of a fire jumping from one house to the next. Also, building envelopes must be located away from particularly tall trees, wherever possible. Those set backs are illustrated in Fig 2.

[73] The Plan requires particular treatment of the vegetation:

- ◆ all ground litter and undergrowth will be removed by mechanical means;
- ◆ any remaining trees will be thinned to break a continuous tree canopy, particularly along the northern edge of the ridge line (i.e. overlooking the river);
- ◆ all trees will be removed that have the potential to overhang designated building envelopes;
- ◆ lower limbs of any remaining trees will be removed to increase the effective distance between the canopy and any ground fuel;
- ◆ all dead trees and significant dead branches of remaining trees will be removed.

[74] Figure 3 shows the recommended planting of new vegetation. Low trees and areas of lawn are dominant.

[75] The rear of each allotment (that is, the side which faces towards the escarpment) will be marked by a wire fence. It will have fencing wire rather than mesh.

[76] The Development Concept Plan (of which the Bush Fire Management Plan is a part) says that “The Conservation Area that surrounds both the north and east sides of the development will be retained providing wild life habitat and access for wild life migration. This Conservation Area will be integrated into the residential lots through minimal tree removal and minimal regrading on the back of the ridgeline

lots. Additionally, a low-profile post and wire fence will be installed on the rear of the ridge line lots by the developer.” (Vol. 2 p. 490)

[77] Condition 22 of the approval allows the houses on the 17 allotments to be erected within 4 metres of the road boundary on their southern side. The intention is to ensure that “Large allotments are provided behind the ridge line adjacent to the Riverside Park. This condition flags that larger allotments may be required adjacent to the ridge line to fulfil bush land management requirements.”

[78] Condition 25 requires that as much of the existing vegetation as possible be retained on the proposed Lot 1 – but cognisant of the bush fire management measures required to be adopted as per condition 29.

[79] Condition 33 of the approval package requires that a Vegetation Management Plan for the development of Lot 1 be prepared prior to the commencement of any site works. That is to deal with removal of existing vegetation, and rehabilitation of vegetation, when works have been carried out at the time of the hearing, such a plan had not been prepared. (If any approval is not final without such a Plan in place, then it can be dealt with in conditions, which this Court can approve).

[80] There was much debate at the hearing about the impact of further development proposed for Lot 1 – including the 17 ridgeline lots. The purpose of the development is to change the southern slopes, between Fremont Street and the ridgeline, from the existing bush land into a closely settled residential area. After construction of the road and the houses, some vegetation will remain, and more will soon be planted. After a time, the result will be that the hillside is changed from

bush land to one of a residential character. That is the impact which the opponents of the development came to accept. While such development will have a considerable impact on the wildlife and vegetation of that area, it will take place on a sloping hillside which is not nearly as visually significant as the ridgeline above the river. The area does not have such outstanding views, and it will adjoin the existing development which presently finishes along Fremont Street. The need for more residential development cannot be ignored. On the evidence here, it was quite right that such concessions should have been made.

[81] The real task is to assess the impact of the 17 ridgeline houses. There were some differences of opinion at the hearing, among the experts who dealt with those impacts. On the evidence, those differences of opinion should be resolved in these ways:

- (a) The size of the allotments, the impact of the Bush Fire Management Plan (with its requirements for clearing and thinning), the need to build the access street and the further clearing of vegetation to allow houses to be built, will all have a substantial impact on the vegetation along the ridgeline. The size of the allotments makes that result inevitable. It is likely that houses will be built on concrete slabs. Their construction will require considerable earthworks on individual allotments.
- (b) With regard to the effects of development along the ridgeline, the evidence of Ms Savage and Ms Bita should generally be preferred. Their predictions about the inevitable impacts, as outlined above, seem to be realistic and understandable. While the good intentions of the developer may be sincerely expressed, in the Development Concept Plan, the realities on the ground are

likely to be less attractive. Any Vegetation Management Plan will be unlikely to repair the impact of development. As Ms Bita puts it:

“In the long term, the measures proposed in the Development Concept Plan may result in a pleasant and green residential subdivision, however it will be no different in character to any other residential development in any suburb in Brisbane. The measures proposed to retain the existing vegetation and incorporate it into the new development are unrealistic and will be ineffective. In short, the proposed Concept Plan provides no hard evidence that the existing unique nature of the site will be retained, and the current level of visual amenity protected.”

[82] It should be understood that the 17 allotments have been sited so that the northern edge of the building envelopes is on the edge of the ridgeline, before it falls steeply away. Therefore, the northern boundaries, which are to be at least 10 metres from the building envelopes, are actually over the edge of the ridgeline.

[83] The most contentious part of the evidence related to the appearance that the 17 houses, and their eventual gardens, would have from the point of view of those travelling on the river, or looking across the river, especially from Figtree Pocket. That was a vital issue because of its bearing on the extent to which the present landscape and visual values of the ridge line would be compromised.

[84] It was always recognized that the 17 houses would have some visual impact. For example, Mr King, a landscape architect retained by the developers, put the matter this way in his report (para 5.1):

‘While there is minimal impact proposed on this (escarpment) changes to the vegetation are likely to occur over time due to changes in drainage patterns and additional water and nutrients being introduced to this area from a proposed housing development nearby. This is likely to result in denser vegetation

in this area with a change in species make-up. This change would enhance the area visually. ... The plan notes that there would be 17 lots on the 'Ridge Line Residential' area. Residences in this area are likely to be the only ones visible from vantage points to the north. Should strict controls be placed on the site by Council, and development is limited to discrete building envelopes, it is likely that some tree cover will be retained on these sites. However tree cover in this area will be removed to accommodate the buildings, driveways, paths, and outdoor living areas and other ancillary structures. Further trees are likely to be removed over time due to decline, perceived safety risk, maintenance of views, maintenance of buildings and gutters and personal preference. Other trees are likely to be planted to provide protection, screening, shade and aesthetics.

While trees may be removed in this area, the trees on the northern hillside and on the river side and river flats are likely to screen these buildings from vantage points to the north."

[85] Mr Erickson, a landscape architect, was the author of the EDAW report. He was concerned to demonstrate the likely visual impact of housing along the ridgeline. He prepared a number of computer simulations of the likely appearance of the ridge line, after development. He summaries his views this way:

- "Existing views, in general, will maintain a parkland character with the majority of the visible bush land retained when viewed from the river and areas nearby;
- Ridge line housing will be evident but not dominant and partially screened by bush land retained on mid slopes and in proposed open space/public ownership"; (emphasis added)
- "In terms of impact upon local, visual and landscape amenity, the proposal will have minimal impact. The ridgeline housing will be evident but not dominant and partially screened by bush land retained on mid-slopes within future open space. ... The result and effect of the ridgeline housing and parkland on the lower river terrace will not be out of character with nearby riverside areas. (emphasis added)
- The proposed land uses associated with the project would be compatible with this area's city-wide character designation as a Residential Parkland Precinct in the Brisbane River Corridor Management Plan. This factor, together with its discrete location, away from any known entry point or gateway to the city, would mean

the development would have no discernible impact on city-wide visual and landscape amenity.

- The assessment of the overall impact upon scenic and landscape characteristics for the proposal is mostly concerned with its potential effects along the river corridor, as this is the area of highest scenic and landscape value. From both a local and city-wide viewpoint the impact is considered negligible. The character of the area will not change detrimentally, the development would not be out of character with similar areas located nearby and the overall character would be in keeping with its existing and intended character.”

[86] (Mr Erickson’s reference to the Brisbane River Corridor Management Plan was referred to the following description of this area:

“... Here, Council intends to enhance parklands, bicycle tracks, picnic facilities, bbques and walking tracks near the river to give more people a chance to enjoy its beauty, whilst protecting and preserving natural areas. ... (by developing this plan a balance between recreational activities, natural areas and the quiet residential amenity inherent in the precinct can be achieved ...”).

[87] Mr King graphically demonstrated that the vegetation outside the property boundaries, and on the escarpment slopes, would exceed the height of a two-storey house on the ridge line. He thought that “filtered” views would be the result.

[88] Also to be kept in mind is the probability that some owners will seek to maximise their views by cutting down or killing trees which get in the way. That seemed to be a realistic assessment of what will happen in the future. It would be naïve to ignore such conduct, which has, not surprisingly, happened elsewhere.

[89] Overall, the evidence establishes that the 17 houses and their gardens, would very probably result in a quite noticeable change to the visual quality of the ridge line. At night time, their lights will be seen from the river and across the river. Trees

will remain on the escarpment and filter the views, but it will be a view which clearly shows the presence of houses along the ridge line. Is that an acceptable result in this case?

[90] It appears from Mr Fleming's evidence that Council officers held different views about the preservation of the ridgeline. Indeed, in an earlier approval, in June 1999, a condition required that all buildings in Lot 1 be located at least 10 metres behind the ridgeline. After QCL lodged an appeal against those conditions in August 1999, an alternative condition was agreed. It was then agreed that the building envelope line might be advanced to the edge of the ridgeline, where it is in the present approval (see Exhibit 39).

[91] The original condition observed the requirement in para 3.5.13.7 of the Town Plan, which it will be recalled, said that no development would be permitted forward of the ridgeline. In the Town Plan, the concept of development includes the subdivision of land. The creation of lots with their boundaries below the ridgeline offends against that prescription. The original condition would have observed that requirement. It would have had the effect of keeping the gardens away from the escarpment.

Flora & Fauna

[92] A good deal of evidence was given by ecologists about the state of the flora and fauna on the whole of the Riverside Precinct. From the point of view of those who opposed any development, it was a significant area of land containing considerable

undisturbed bushland, some degraded bushland, and the former industrial areas, the whole supporting a wide variety of permanent and migratory animals.

[93] However, as it is now clear that there will be a substantial park along the river, and that there is no continuing opposition to residential development on much of the southern slope, and because there will be a substantial area of natural bush on the escarpment, in any event, sweeping round into the bushland corridor to the north-west, the emphasis on flora and fauna has lessened. It is now necessary to consider whether the question of development along the ridgeline should take into account the impact of that particular development on the flora and fauna of that land

[94] The evidence established several things about the flora and fauna of the whole precinct. While it had value as a habitat and conservation area, it was not in the highest category. That is, it did not shelter rare or endangered species that needed protection. Nearby development and some degrading of the land had already had an impact. Small land-dwelling animals had not done well. The area of the precinct was not big enough for the larger animals in the long run, such as wallabies. While the precinct was home to about a hundred species (including marsupials, birds, reptiles and frogs) that was not unusual. Higher numbers of species appear in other, larger, protected areas in other parts of the city. In short, it should be accepted that there is no compelling reason why development should be banned from the precinct, because of its effect on the flora and fauna. Generally speaking, Dr Ingram's views about those matters might be accepted. He pointed out that the escarpment land, which is to be retained, has the better quality habitat for animals.

[95] Therefore, looking at the precinct as a whole, it can be seen that the development along the ridgeline would mean a loss of habitat for animals and, of course, a loss of native vegetation. If there were no development on the ridgeline then the preservation of that area as relatively disturbed native bushland would add to the areas of bush and animal habitat to be preserved. That preservation would mean that the already preserved escarpment land would be enlarged, as a continuous flora and fauna conservation area. While that addition cannot be said to be a decisive factor here, it should be kept in mind, when the whole impact of this approval is considered.

Recreation

[96] The ridgeline provides good views of the river below and the central city in the distance. They are attractive views. They include views of Mount Coot-tha on the skyline. From the cleared area on the eastern end of the ridge, Mount Flinders and the Macpherson Range may be seen in the far distance to the south-west.

[97] Much of the ridgeline contains relatively undisturbed areas of native bush. If the ridgeline were open to members of the public, they would undoubtedly find it an attractive place for walking and recreation. The Centenary Riverside Parks Development Strategy, appearing in a report dated June 2000, proposed the Fremont Ridge Park. The report identified a number of attractive features of such open space. From the points of view of vegetation cover, species diversity, significant species, its condition, its viability, and its linkage function, the report gave it a strong score. That Strategy was prepared by Council officers, but it has not been adopted as Council policy.

[98] The present approval makes provision for walking tracks through the bush on the escarpment. The tracks link up to the proposed street which services the ridgeline residential allotments. The allotments have a break at about the middle of the ridge, where a gazebo is to be built on a small public area. There is to be a public lookout at the eastern end of the ridgeline allotments. None of that is surprising. It is designed to recognize the obvious – members of the public enjoy walking through bushland, and they enjoy elevated areas with extensive views.

[99] If expert opinion be needed about the recreational value of the ridgeline, then that can be found in Ms Savage's report. Her opinions should be accepted. The ridgeline has significant recreational values.

Private Ownership

[100] It was submitted that the ridge line land is presently in private ownership, and that the public have no right to use it. That is so. It was submitted for QCL and Wingate that their private ownership of this land was an important factor. Reference was made to the decisions in *Sabdoem Pty Ltd v Redland Shire Council* 1989 QPLR 149, 152; *Indooroopilly Golf Club v BCC* 1982 QPLR 13, 32; *Ingram v Maroochy Shire Council* 1983 QPLR 139, 145; and *Brencorp Properties Pty Ltd v Pine Rivers Shire Council* 1997 QPELR 12, 14, 16.

[101] The importance given to private ownership in those cases should not necessarily lead to the same approach here. As always, it is a matter of seeing what the

planning controls say. In this case, owners of land in the Emerging Communities Area do not have a right to do what they like with it. Their expectations are subject to the process of assessment, and the assessment process, according to the City Plan, may see parts of their land passing into public ownership. Land may have to be given up for roads, open space or parks. The aspirations of the City Plan are unlikely to be realized, if undue emphasis is placed on an inappropriate belief that an owner of land can continue to deny the public access to it. The public may well be given access to part of the land, as part of the conditions of development. The above decisions are unhelpful. They may detract from a duty to apply the planning controls when they set out to balance private ambition with public need.

Is this Development Acceptable?

- [102] What decision would be made about this approval for Lot 1, if the provisions of the Town Plan were still in force, and there were no other complicating considerations, such as negotiations about park land? The answer is surely clear. The above provisions of the Town Plan, and the Council's adopted planning policies, strongly emphasise the level of protection to be given to the forested ridge. There is an emphasis on low density residential development, if that is to be permitted at all. There is the reference to the Brisbane Conservation Atlas. That emphasises the important visual significance of that land. It is very likely that the land would be found to be unsuitable for urban or suburban residential development (Planning Policy 6.01). The Western Gateway Plan deals with the possibility of parkland contributions, for areas found to be unsuitable for development. Where development is allowed, "Sites for dwellings will not be approved where the subsequent dwelling would protrude above the ridge lines."

[103] The cumulative impact of the Town Plan's provisions, set out at length above, means that there is really only one conclusion that could be reached in this case – that is, that the present approval would not have been allowed. The 17 allotments are too dense. The houses will be evident, and will protrude above the ridgeline. Development is to take place forward of the ridgeline. Recreational opportunities on the ridgeline will be lost. Considering Lot 1 alone, there is no good planning reason to reach a contrary conclusion.

[104] It is then necessary to turn to the impact of the City Plan. It is submitted in this case that it should be given the greatest possible weight, because it is now the planning scheme in force, and that it would be futile to give weight to the provisions of the superseded Town Plan, when a fresh application could be made and it would now inevitably succeed. (Relying on the approach of the Court of Appeal in *Osterley Pty Ltd v Caboolture S C* 1996 2 QDR 34).

[105] As the above references to the City Plan make clear, its new provisions do not provide for an automatic acceptance of the proposal in this case. On the contrary, they require it to be assessed against the criteria set out in the City Plan, especially those applying to Emerging Community Areas, and to the assessment of the structure plan. At the end of the hearing, counsel for the Council submitted that no constraints applied to this land at all. That submission was really contrary to the whole way in which this application was considered, and rightly so - that is, it was assumed that the ridgeline was an area of constraint, and that it had to be dealt with appropriately. That is why so much effort was put into demonstrating that the 17

ridge line allotments would not be unduly obtrusive, and why Council officers such as Mr Fleming were concerned about it.

[106] To paraphrase the words of the Structure Planning Code at Chapter 5, page 217, the question here is this – is it possible to develop the ridge by placing 17 allotments on it, carefully and sensitively? Or is it a site where development is not possible? Should the ridge become open space, to preserve its scenic, landscape and recreational values, provision being made for such uses in addition to the residential uses of the southern slopes?

[107] It is necessary to go to the basic aim of the strategic plan, at para 4.1.1. The challenge is said to be maintaining the forested foothills and ridgetops. They are seen as assets to be preserved, to provide recreational opportunities, and form distinctive and significant landscape features of the city.

[108] The evidence as a whole shows that this ridge should be given that sort of protection. It is the last undeveloped ridgeline in the centenary suburbs. Its importance is primarily because of its landscape value, and because of the recreational value it has. Once that is appreciated, it can be seen that the present proposal is unacceptable. Even if the 17 houses be largely hidden by a screen of trees, that would not be an adequate solution. The ridgetop would not be preserved. Its recreational value would be lost forever. In short, the strategic aim of looking at the long term, ensuring the green space needs of future generations, and providing a balance to growth, would not have been observed. The preservation of the ridgeline's flora and fauna is an additional factor. If balance be the touchstone, then the need to balance preservation and development has not been achieved. The

requirements of the Emerging Community Area classification, and the Structure Plan Code, are against development on the ridgeline. The constraints are environmental, scenic and recreational. These constraints do not allow the approved development.

[109] (The question of a need for residential housing has not been forgotten. Not surprisingly, the evidence here showed that there was a need in this part of the city. It was properly taken into account in approving development on the southern slope to Fremont Street. However, it should be given negligible weight, where development on the ridgeline is being considered. The City Plan clearly shows that other factors are to dominate.)

The Global Approach

[110] It was submitted, in support of this approval, that the plans for the whole of the Riverside Precinct should be taken into account. That was the approach taken by two town planners, Mr Zahnleiter and Mr Vann. Mr Zahnleiter's conclusions illustrate the approach:

- “1. The application will result in the creation of a substantial riverfront park, consisting of the river terrace, the timbered escarpment and parts of the low ridge line. The parkland will provide amenity, community, landscape and environment benefits for residents of the locality and residents of areas beyond the locality.
2. The application will result in the creation of a bush land corridor linking the Brisbane River Park with the future areas of open space to be created to the south-west of the site on the balance of the QCL land at Darra.
3. Overall the proposed development will result in the creation of 25.318 hectares of public open space, which is approximately 76.8 per cent of the total site area.

4. The form of residential development will be detached housing on small, medium and large residential lots. The indicative arrangement of lots within the site takes into account the topography, landscape values, corridor and habitat values and potential for bush fire hazard on the site. The form of residential development is to be consistent with the Landscape Master Plan and the Bush Fire Management Plan.
5. The application presents an acceptable and desirable planning outcome which is consistent with the Council's current planning intentions for the site and the locality is expressed initially in the draft City Plan 1999 and more recently in the modified draft City Plan 1999."

[111] Consistently with that approach, it was submitted for QCL and Wingate that the whole package of approvals had to be kept in mind, and not just that for Lot 1. That being the context, it was submitted, it could be seen that the disappearance of industrial land to be replaced by a large regional park is a very positive step. Even if there be some detriments (in the treatment of the ridgetop land), that should be seen as part of the overall balance of the whole package. It was conceded that such a balancing exercise would not allow a trade off involving the ridgetop land, if that were done for a bad planning reason.

[112] (There is a danger that there will be circular reasoning – a balancing exercise which achieves a good overall result for the city will not be seen to involve any undesirable planning reasons.)

[113] One answer by the submitters lay in the form of the present approval. The present development, described in the approval package (Exhibit 3, page 458) does not include any reference to lots 2, 4 and 6, which are intended to be public parklands. There is no doubt that it is the Council's intention to develop the Riverside Precinct as claimed. There seems to be no reason why the reality of the negotiations and

agreements with the developers should not be kept in mind, rather than some technical description in this approval package.

[114] The correct answer is to be found within the City Plan itself. The new planning scheme was influenced by the negotiations that had taken place, and Council's intentions about them. The master plan for QCL's land is reflected in aspects of the present Western Gateway Local Plan. It declares that a riverfront park of regional significance is to be established at Seventeen Mile Rocks, (para 3.1). The express environmental and scenic constraints on the proposed Lot 1 have been downgraded.

[115] Beyond that, the City Plan is not prescriptive about the development of Lot 1. On the contrary – it is described as an Emerging Community Area. The usual provisions, which are noted above, apply to such a description. The provisions of the structure planning code continue to apply. They are set out above. If Council had wished to preclude the present debate about the treatment of the ridgeline, then it could easily have done so. It expressly declared its wishes about the park, and then left this application to be considered on its merits. The application to develop Lot 1 should be dealt with according to the provisions set out above.

[116] It is right that the present proposal should be considered in its context. For example: it may be that the provision of a large regional park will mean that there is less need for park land within Lot 1 itself. However, there was no support for the present proposal by reference to such practical considerations. Rather, it was suggested that any negative or detrimental aspects of the present proposal could be

overlooked when they were seen to be balanced against the benefits of the overall development of the Riverside precinct.

[117] The fact of the matter is, as Mr Fleming's evidence indicates, that a deal was done with QCL in the belief that it resulted in a good outcome for the city. However, it was not something that was permitted by the City Plan. As has been shown, the application of the City Plan requires a different result, about the development of the ridgeline. The town planners (except Mr Feeney) have allowed their enthusiasm for the overall result to overcome the need to give effect to the City Plan's provisions. As the submissions for the developers and the Council both recognized it is inappropriate for a planning authority to trade an approval because of factors extraneous to planning considerations, even if those factors seem to be desirable, in the public interest. (see *R v Brisbane City Council* (1986) 2 Qd. R. 22)

[118] It follows that the appeal must be allowed – the development approval is not acceptable. The parties should prepare a draft order dealing with both appeals, and any other consequential matters.