PLANNING AND ENVIRONMENT COURT

OF QUEENSLAND

CITATION:	*Stariha v Redland Shire Council & Anor* [2002] QPEC 039
PARTIES:	JOHN AND VANESSA J STARIHA Appellant and REDLAND SHIRE COUNCIL Respondent THE WILDLIFE PRESERVATION SOCIETY OF QUEENSLAND BAYSIDE BRANCH (QLD) INC. Co-Respondent
FILE NO/S:	1325 of 2001
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Brisbane
DELIVERED ON:	5 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	5,6,7,8,9 and 13 November 2001
JUDGE:	Judge Alan Wilson SC
ORDER:	Appeal Dismissed.
CATCHWORDS:	**PLANNING AND ENVIRONMENT –** STRATEGIC PLAN – Construction of Strategic Plan.
COUNSEL:	Mr C L Hughes SC for the appellants the Starihas Mr S M Ure for the first respondent Redland Shire Council Mr S Keliher for the co-respondent The Wildlife Preservation Society
SOLICITORS:	McCarthy Durie Ryan Neil for the appellant Hopgood Ganim for the respondent Environmental Defenders Office (Queensland) Inc for the co-respondent

Introduction

[1] This is an appeal against a decision of the Redland Shire Council to refuse an application for a Development Permit (Material Change of Use) to develop land at 65-89 Duncan Street, Wellington Point for the purpose of a residential estate. The Wildlife Preservation Society of Queensland Bayside Branch (Qld) Inc. is a co-respondent.

[2] The land is comprised of three allotments with a total area of 19.73 hectares, described as Lots 3 and 11 on RP 219149, and Lot 12 on RP 14089, Parish of Capalaba. It lies between the Brisbane-Cleveland Railway Line and Hilliards Creek, and is about 1.5 kilometres south east of the Wellington Point Business Centre. Duncan Street is unformed, and comprises the northern boundary; the railway line and associated railway reserve make up the western boundary, and Hilliards Creek forms the eastern side. To the south is a triangular shaped allotment following, roughly, the line of the creek which is also owned by the appellants and was included in the original application, but subsequently withdrawn. The land is generally flat. It has been used for some years by the appellant's family as a turf farm. They occupy a two-storey house in the south-east corner beside the creek. The family has a long-term interest in horses and there are stables on the parcel at the south they are retaining, and a trotting track on the south-western part of the development site.

[3] The appellants purchased the property in 1972, and were living on it by 1974. Initially, they grew vegetables and small crops while, simultaneously, using the land to pursue their interest in horses. They obtained a permit to build twenty stables in 1975, and constructed thirteen. They concentrated on raising and training trotting horses between 1978 and 1986. Thereafter, they used it for small crops before switching to turf farming in the early 1990's.

[4] Part of the land was resumed in 1986 to build the Brisbane-Cleveland Railway Line and that resumption, the appellants said, took away their access to the property

which, until then, had been across an old railway reserve and, then, via the Duncan Street Road Reserve. Since the construction of the line, access has been via a dirt road beside it, coming off Station Street. The local authority and Queensland Rail have not been able to resolve the long-term question of the appellant's ultimate access which has been, effectively, postponed to the outcome of this appeal.

[5] The Development Application was first submitted in February 1999, and included Lot 3 on RP 14096 which was, however, withdrawn from it on 30 March 1999. On 21 June 1999 the Department of Local Government and Planning issued an Information Request incorporating the requirements of the local authority, the Department of Primary Industries, the Department of Natural Resources, and the Environmental Protection Agency. The appellant's response was submitted to Council on 23 October 1999 and included an environmental investigation report prepared by John Wilson and Partners; a traffic impact assessment report, from the same firm; and a letter from Max Winders & Associates dealing with rail noise aspects. A water supply and sewerage analysis report, also prepared by John Wilson & Partners, was delivered to Council in January 2001. The application was publicly notified between 31 October 2000 and 13 December 2000. It was considered by Redland Shire Council on 30 January 2001, and refused at a subsequent General Meeting.

[6] Following the refusal an amended Concept Plan showing 144 lots, eleven designated as potential multiple dwelling sites, was prepared. It shows areas for public, and private open space, with the public space having an area of about 5 ha (about 23 per cent of the total area), mainly located along the creek. It is shown with picnic facilities, children's play facilities, and a multi-purpose court suitable for use for tennis, basketball, volleyball etc. A horse trail is also proposed. The private open space area includes part of the area occupied by an existing trotting track which, together with Lot 3 on which the stables are located, is to be substantially redeveloped with equestrian facilities including an indoor arena, new stables and trotting track. Application will, the appellant says, be made for a development permit to carry out this redevelopment.

Relevant Town Planning Legislation

[7] Under the *Integrated Planning Act (IPA)* the proposal constitutes an assessable development. This local authority's Town Planning Scheme is a "transitional" one so, under *IPA* s 6.1.29 it is to be assessed under the relevant provisions of the repealed legislation – *Local Government (Planning and Environment) Act* 1990 (*LGPEA*). Section 4.3(1) of that Act applies and the matters to be considered, in dealing with the appeal, are set out in s 4.4(3). Those matters include:

> *a) Whether the proposal will create a traffic problem, or increase an existing problem, or detrimentally affect the efficiency of the existing road network;*
> *b) Whether the proposal will affect the amenity of the neighbourhood;*
> *c) Whether the proposal will create the need for increased facilities;*
> *d) The balance of zones in the area, and the need for rezoning;*
> *e) Whether the land or part of it is low lying, or subject to inundation to the extent that the uses which may be undertaken are unsuitable;*
> *f) The impact on the environment;*
> *g) The situation, suitability and amenity of the land in relation to neighbouring localities; and*
> *h) Whether any alteration should be made to the plan of development attaching to the application.*

[8] Under *IPA* s 6.1.30 applications under a transitional planning scheme are also decided under the *LGPEA*, ss 4.4(5) and 4.4(5A). The latter provides:

> *"(5A) The Local Government must refuse to approve 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."*

[9] The appellant bears the onus of proof: *IPA* s 4.1.50. The application was for development which before the commencement of *IPA* s 6.1.30 would have required an application to be made under LGPEA s 4.3(1), i.e. it would have needed a rezoning from the rural/non-urban zone to the residential A zone. Even if the appeal is allowed, the Court has power to impose conditions: *LGPEA* s 4.4(5), subject only to the requirement that they be relevant, or reasonable: *LGPEA* s 6.1(c); *IPA* s 3.5.30.

[10] The transitional scheme for the shire of Redland is comprised of the Town Planning Scheme[1] (1988); the Development Control Plan[2] (1988) (DCP); and, the Strategic Plan[3] (1998).

[11] The parties also agree that pursuant to *LGPEA* s 4.4(3A), which provides that a Local Government must have regard to a relevant State Planning Policy in making a decision on a rezoning, State Planning Policy No. 1 of 1997[4] "Conservation of Koalas on the Koala Coast" is relevant.

[12] The respondent argues the proposal is in conflict with the Strategic Plan, DCP No. 1, and that State Planning Policy; and, in its original Decision Notice refusing the application on 22 February 2001,[5] also asserted conflict with its policies on Waterways, Wetlands and Coastal Zone (Local Planning Policy EMPE 104), and that the development was "contrary to reasonable expectation for development in the locality". On 4 May 2001 this Court gave directions requiring notification of any further issues within 14 days of completion of an inspection on 1 June, but it was not until 29 October 2001, very belatedly, that the respondent provided a List of Issues which included (as particulars of the allegation that the proposed use of the subject land for residential purposes was contrary to reasonable expectations[6]) claims that refusal was warranted because of transport planning, traffic, noise, and flooding issues.

Issues

[13] Counsel for the appellant and respondent each provided written submissions which effectively coincided, in regard to the matters in issue, save that Mr Hughes SC for the appellant also addressed the alleged conflict with DCP No. 1 while Mr Ure, for the respondent, did not. (Counsel for the co-respondent did not provide written submissions). The DCP is now old (1988) and has been overtaken by the Strategic Plan, gazetted 10 years later. This Court has previously found that its considerable age means it is of limited assistance.[7] In the absence of a submission from the respondent relying upon it I accept the appellant's argument that no relevant weight should be placed upon the DCP, save insofar as it may be relevant to the proper interpretation and application of the more modern planning documents.[8]

[14] I accept, then, that the issues are:

(a) alleged conflict with the Strategic Plan (including its Environment Strategies, and Greenspace provisions);

(b) alleged conflict with State Planning Policy No. 1 of 1997 (Conservation of Koalas in the Koala Coast);

(c) alleged conflict with Council's Local Planning Policy (Waterways, Wetlands and Coastal Zones); and

(d) alleged conflict with reasonable expectations for development in the locality (having regard to traffic, flooding, noise, and associated issues).

The Strategic Plan

[15] In the Strategic Plan, Part 4.0 ("Preferred Dominant Land Use Intents") most of the subject land is within an area categorised as "Specific Planning Intent No. 2"[9], described in these terms:

> *"Specific Planning Intent No. 2 is located between Hilliards Creek and the railway line at Wellington Point and is considered to be potentially suitable for a range of outdoor recreation uses including some limited residential component. Any future development would however need to address a range of considerations relevant to the site including ecological values, flooding and drainage, soil conditions including acid sulphate potential, hydraulic services, access and traffic, biting insect issues and public control of the foreshore.*
>
> *It is Council's preference that privately owned land in this designation be developed in a single, coordinated project so as to optimise both the opportunities for environmental protection and enhancement and the potential for appropriate development within the environmental, planning and infrastructure constraints of the area.*
>
> *Council will continue to manage land that it controls in this area primarily for conservation purposes and will promote the management of other publicly owned land for conservation purposes with the relevant government agencies such as Queensland Rail." (My underlining).*

[16] The parties' respective arguments about the issues raised by this designation - whether this development contains a "limited" residential component, involves an outdoor recreation use, and addressed the stipulated range of considerations (ecological values, etc) - involve an examination of the proper method of construing the Strategic Plan in the context of the application.

[17] A Strategic Plan must, Mr Hughes SC for the appellant said, be read as a whole. As it will almost invariably have some passages both for and against a proposal, it is

unwise to place too much weight on any individual passage. A proper reading involves a common sense or practical approach rather than a pedantic, or narrow process of construction. Certainly, there is authority that these plans set out no more than broad, desired objectives, and not every objective has to be met before a proposal will be acceptable.[10] As Mr Ure for the respondent Council reminded me, however, this Court has repeatedly and consistently stressed the importance of strategic planning, and the obeisance which should be paid to the Strategic Plan as an important planning document representing strategies for development of the particular area. It will be a rare occasion on which the Court finds a significant departure from the Strategic Plan can be justified,[11] and the plan should be given significant weight.[12]

[18] The correct approach is, I think, appropriately summarised in *Harburg Investments Pty Ltd v Brisbane City Council*[13] per Skoien SDCJ:

> *"(31) It is appropriate to set out some recorded judicial comments in relation to the application of statements planning documents, which include Strategic Plans:*
>
> 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 by s 2.15(9) of the Local Government (Planning and Environment) Act 1990 (see now s 2.1.23 of IPA) 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 p 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 p 230; the interpretation of the Strategic Plan ought to involve a 'common sense approach' (see* ***Z W Pty Ltd v Hughes & Partners Pty Ltd*** *(1992) 1 Qd R 352 at p 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) 92 LGERA 4 at p 73, 75 & 78); to enliven the provisions of s 4.4(5A) (of the P&E Act) 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 (by virtue of s 4.4(5A) (see* ***Fitzgibbons Hotel Pty Ltd v Logan City Council*** *(1997) QPELR 208 at p 212."*

Does the development include "some limited residential component"?

[19] The Strategic Plan does not define this phrase, or the word "limited". For the appellant, it is submitted that a large part (23 per cent) of the whole area is set aside and preserved in the public domain and the development is, therefore, "limited" in the relevant sense. Further, it is said the proposed residential component is clearly limited when compared with other residential estates, or with the original proposal.[14] Against that, the respondent Council says the proposal is unarguably for an intense urban residential use, with a density like the former Residential A. Each refers to the Strategic Plan itself in support of these arguments, an approach which properly accords with ordinary principles for the analysis and construction of legal documents,[15] statutes and subordinate legislation.

[20] These Specific Planning Intent designations fell for consideration by Skoien SJDC in *Edgarange v Redland Shire Council*[16]*:*

"[14] Both Mr Hughes of counsel for Edgarange and Mr Haydon of counsel for the Council submitted that the central question is the planning intent expressed in that section of the Strategic Plan headed Specific Planning Intent ("SPI"), in particular SPI No. 1, the particular designation in which the site lies. It is clear to me that this must be so. Part 4 of the Scheme, which contains the SPI designations is the part which sets out the preferred dominant land use intents of the scheme and must be taken to over-ride the now much dated, albeit still existing, development control plans. Indeed the introduction to Part 4 is:-

> 'The preferred future distribution of and relationship between land uses in the Shire is (sic) shown on the Preferred Dominant Land Use Map. The intent of the preferred dominant land uses and their special distribution is an important means to implement the goals and strategies of the Strategic Plan. The preferred dominant land uses and other symbols shown on the Preferred Dominant Land Use Map are:
>
> <u>Urban - Residential Orientated</u>
> - Urban Residential
> - Medium Density Residential
> - Residential Low Density
> - Park Residential
> - Specific Planning Intent

There then follow other headings such as 'Urban - Employment and Service Oriented'; 'Open Space'; 'Non-Urban', each with various sub-categories.

[15] At s.4.2 of the Strategic Plan, the intent for the Urban-Residential land use commences with these two paragraphs:-

> 'This group of preferred dominant land use designations relate to those parts of the Shire where development is intended to be primarily residential in nature, accommodating a wide range of housing forms and densities.
>
> The intent of the plan is to discourage large tracts of housing of a single type and density in favour of a more varied mix of housing types and densities, providing a

> variety and choice in housing and retaining the "permeability" of the neighbourhood.'

[16] Reference to the PDLU map shows that the site is contained in S{I - No. 1. The land in that designation commences at Hardy Road and(between the railway line to the north and Marlborough Road to the south) extends to the east for about 600 m. The site lies towards the western edge of this rectangle, separated from Hardy Road by the residences referred to in paragraph [6] above. SPI - No. 1 also contains land to the south of Marlborough Road, that is, opposite the site, and that land extends a considerable distance (about 1½ km) to the south-east. In its entirety the land designated SPI - No. 1 is an irregularly shaped area almost entirely surrounded by urban residential land.

[17] It is not easy to discern any consistent theme in the six SPI regions identified in the Strategic Plan. Indeed the introductory words in s.4.2.5 are:-

> 'Specific Planning Intent
> This designation covers land in respect of which there is, for varying reasons, a requirement to adopt detailed individual development guidelines as set out below.'

There follow the descriptions of the six intended SPIs. However it must be noted that the SPI categories all lie under the heading "Urban - Residential Orientated" and consistently with the intent for that use which I have set out in para [15] above, it must be taken that use for residential purposes was at the forefront of the drafter's mind for these SPI's.

[18] It is appropriate to set out the entire text for SPI - No. 1, which is:-

> 'Specific Planning Intent No. 1 has been designated to highlight Council's objective of maintaining and reinforcing the substantial visual separation provided by this area between the urban communities of Wellington Point, Birkdale and Alexandra Hills. Development of a range of residential, recreational, institutional, commercial or mixed use activities may be considered for this location provided that they exhibit a high standard of design and contribute, in an innovative way, to the maintenance of the substantial open or non-urban visual character of the area.
>
> In order to achieve the objectives of visual separation whilst allowing for a range of activities to occur on the land, a Local Area Plan will be formulated for the area. This plan should examine amongst other things the role this area performs as a visual buffer between urban areas, areas of higher and lower visual sensitivity, differing types of built form and opportunities for alternative forms of development compatible with the maintenance of the open character of the area.'

[19] An examination of the other five SPIs indicates a general intention to permit residential development, tailored to suit each specifically. Thus, for example, SPI - No. 2 warns of potential physical difficulties in the area; SPI - No. 4 envisages large residential allotments (60000m^2 - 10,000m^2); SPI - No. 5 expresses concern for the environment and the poultry industry. One matter of significance that I can discern by reference to the other five SPIs is that only SPI - No. 4 lays down any preferred minimum allotment sizes. It is noteworthy that SPI - No. 1 contains no such indication."

[21] I respectfully adopt his Honour's comment, at para [17] that it is not easy to discern a consistent scheme in the six SPI regions identified and indeed, as he appears to acknowledge at [19], there may not be one. The appellant relies upon the remark at [17] that each must, in light of the general categorisation at para 4.2 ("Urban - Residential Oriented") be intended primarily for residential purposes but that does not, I think, address the question of density when, for example, SPI - No. 4

envisages very large residential allotments of 6,000 - 10,000m^2. Inclusion under the general heading "Urban - Residential Oriented" is, rather, merely an indication that residential development is permitted in contrast with the other PDLU categories, where it is not - e.g. "Open Space", or "Non-Urban". It simply speaks to that very broad distinction. Equal weight might be given, for example, to the fact that in the Town Planning Scheme[17] this land is included in the rural/non-urban zone. The fact that zone includes land which may be rezoned, and taken up for urban development (statement of intent, Exhibit 4, p 15) illustrates the risk of error if too much emphasis is given to one part, or another, of the various town planning documents.

[22] The marginal relevance of these general categorisations, and the absence of a specific connection between the six areas described in para 4.2.5 ("Specific Planning Intent") mean, in my opinion, that the drafter's primary intent is more likely to be contained within the description of each SPI. Analysis in that fashion, by individual reference to the separate SPIs is encouraged by the introductory remarks to the section dealing with all six:

> *"4.2.5 Specific Planning Intent*
> *This designation covers land in respect of which there is, for varying reasons a requirement to adopt detailed individual development guidelines as set out below."* (My underlining).

SPI - No. 2 exhibits a clear emphasis on environmental protection, and outdoor recreation, and promotion of private land "for conservation purposes". Within the SPI categories, this emphasis may be contrasted with SPI-5 and SPI-6, each of which refers to a specific area as being "*suitable for* …" (5) or "*to be developed for* …" (6) urban residential purposes.

[23] Certainly there are, as the appellants point out, some contra-indications in the Strategic Plan, and steps the Council has taken in the past, to the notion that environmental and recreational interests are paramount in this SPI but I do not think they go so far as to show that the drafters of the Plan envisaged significant residential development in this area. Exhibit 30 shows that reticulated water and sewerage are available to the land, but that signifies nothing more than cautionary forward planning and does not imply acceptance, by the local authority, of a large residential development. To the north-west, the land which is SPI-2 has been the subject of a permit for urban residential subdivision, with dedications for open

space[18], but no meaningful comparison can be drawn: that land involved a small extension of residential development of land which already had developments of that kind immediately to the west and south. It does not have an equivalent greenspace allocation to the subject land; and, is not within a major koala habitat area under State Planning Policy No. 1 of 1997.

[24] As that portion of the judgment in *Harburg Investments*[19]set out earlier shows, undue weight ought not be placed on particular passages in, or pieces of, planning documents and I think the same stricture reasonably applies to the acts of a local authority.

[25] The word "limited" is acknowledged in modern dictionaries (OED, Websters) as having two quite distinct meanings: traditionally, it meant having limits which were usually defined by number, or quantity; but, more recently, has come to be used to convey, for example, a small number, or a low quantity. The two are well summarised by Nicholas Hudson in "Modern Australian Usage"[20] as follows:

> *"The word means having limits, its antonym being unlimited. It does not mean small or low, though it is often so used, as in such phrases as a person of limited intelligence and…of limited means. It is sad that so precise and useful a word should be abused in this way."*

[26] I do not think it can be gainsayed that this development involves a quite intense urban residential use. There are 144 lots, with an average size of 700m^2, and some multiple dwellings. Exhibit 32 illustrates this intensity which is, as the respondent's town planning expert Mr Priddle says, characteristic of an essentially urban form of residential development.[21] The appellants rely upon the fact that 23 per cent of their private land is to be dedicated to public use and this is well in excess of the norm - represented, they say, by the 10 per cent maximum contribution required under s 5.6(2) of the repealed *LGPEA*. By that equation, of course, the difference between the norm and this development is only 13 per cent.

[27] The absence of any number or formula referable to the word "limited" means the first definition of it is not apt. By itself that suggests the drafter of the Strategic Plan used the word in the secondary, modern sense identified by Hudson – i.e. a small, or of low number and that inference is strengthened, I think, by other matters identified earlier: the inclusion of the land, under the Town Planning Scheme, in the rural/non-

urban zone; its greenspace allocation, and position within an area important for koalas; and, most persuasively I think, the wording of SPI–2 itself, with its primary emphasis on outdoor recreation uses, ecological values, public control of the foreshore, and development which is consonant with the local authority's express desire to manage land which it controls itself "primarily for conservation purposes".

[28] This analysis indicates the drafter used the word to mean "having a number, or quantity measurably less than normal urban development" and I am satisfied that is both a reasonable, and the probable meaning intended. A development proposal which has the essential characteristics of an urban form, even with a small reduction in density cannot, I think, sit comfortably with that construction.

[29] It follows I am of the view this proposal is in conflict with the Strategic Plan in that it is not one containing some limited residential development, in the sense that phrase is used in para 4.2.5.

[30] It remains necessary, nevertheless, to address the second limb of *LGPEA* section 4.4(5A), that is to determine whether there are (or are not) sufficient planning grounds to justify approving the application despite that conflict. That exercise has another incidental but satisfactory element. Inherent in the appellant's argument is the possibility that, in speaking of "limited" development, the Strategic Plan intends the limitation to be determined with reference to the other matters of which SPI-2 speaks. To put the matter another way, is the residential component of the development "limited" in the context of the other matters to which SPI-2 directs attention - outdoor recreation, ecological values, flooding and drainage, access and traffic, biting insect issues, etc?

Does the proposal involve a range of outdoor recreation uses?

[31] This issue was not addressed in the respondent's written submissions, or, directly by its town planning expert Mr Priddle.[22] It is clear that within the constraints which arise because so much of the land is taken up with residential development, thought and effort have been devoted towards providing outdoor recreation facilities of the

kind referred to in the Town Planning Scheme.[23] There are facilities for walking, riding, bicycling, picnicking, children's play, and some active recreation (the all-purpose court). Of particular significance is the associated proposal for ultimate development of an equestrian centre in conjunction with the appellant's remaining land. The evidence of Mr Stariha, and his daughter[24] showed a deep and abiding interest in equestrian recreation and I am satisfied they would, ultimately, pursue their plans to build further stables on the retained land, for which they have approval.[25] The differing conclusions reached by Mr Priddle and the appellant's town planner Mr Challenor[26] sprang essentially from their opposing views about the nature of the development permitted in SPI-2. As follows from the analysis set out earlier, I think that is a matter of construction, and not of expertise. While the proposals for outdoor recreation use are, in the appellant's own terms, perfectly satisfactory they are nevertheless by definition inadequate if, as I have concluded earlier, a much less intense residential component is intended in SPI-2 - leaving, commensurately, much more land available for those purposes.

Is the proposal in conflict with the provisions of the Strategic Plan with respect to Environment Strategies?

[32] Clause 3.1.1(a) of the Strategic Plan expresses the goal of conserving significant environmental landscape and visual elements by protecting areas identified in s 5.0 "Greenspace" and on the Greenspace Map in the plan from incompatible forms of development which would adversely effect the environmental landscape, and the visual significance and attributes of these locations. Clause 3.1.2(a) proposes that ecologically sustainable development will be achieved by adopting a "compact urban form" which does not intrude on sensitive environmental areas of the Shire, and through appropriate planning controls to exclude further large-scale or intensive urban development activities from most areas identified on the Greenspace Map. Clause 3.2(b) identifies, as an objective, the exclusion of urban development from major areas identified as being of environmental, landscape and visual significance. The Greenspace Map is a product of an Environmental Inventory undertaken for the respondent in 1995/96. The entire map may be found as figure 3.4.1 in the Redland Shire Council Strategic Plan Review - Planning Study,[27] and the part relating to this land is extracted in the report of Mr McNeilage, an environmental scientist.[28] Part

of this land has been included in a Special Protection area (along the creek) and this, according to the Environmental Inventory, is of "priority significance". The balance of the land is of "enhanced significance", described in the Redland Strategic Plan Review[29] as:

> *"Cleared or degraded areas near bushland areas of environmental significance representing opportunities for rehabilitation, habitat extensions, buffers and/or links."*

Elsewhere[30] these areas are classified as consisting of cleared or highly disturbed land with varying land uses where opportunities exist for revegetation and rehabilitation to extend present habitats.

[33] Mr McNeilage expressed the strong view that this development would have an adverse impact on the water quality and ecological functioning of Moreton Bay, coastal areas, and streams in contravention of the Strategic Plan, s 3.1.1, a view actively supported by Miss Roberts, an environmental consultant called by the co-respondent.[31] The appellant addressed these issues through Mr Siddle in his report, initially, of October 2000[32] but, more directly, in his further reports of October and November 2001.[33] All these experts' reports and their oral evidence raise a multiplicity of issues touching, directly, such matters as water quality, "buffer" zones and the "vegetation communities" of the area.

[34] While I found Mr McNeilage, in particular, to be an impressive and interesting witness, there are three matters which, I think, either negate the claimed conflict between the proposal and the Strategic Plan's environment strategies or, at least, mean any conflict is not decisive: first, the area is already highly disturbed by the appellant's current lawful activity of turf farming which is continued to the banks of Hilliards Creek while the proposed development, in contrast, provides significant additional buffering that will be revegetated and enhance the riparian corridor. Secondly, clause 3.1.1(a) includes, as one of the Council's conservation strategies, the purchase of land "… considered necessary to be in public ownership to conserve these values" and there has been no intimation the respondent has ever had this intention. Thirdly, these general goals are constrained by a matter raised earlier, in the context of the proper construction of the SPI-2 designation: namely, that in every Strategic Plan statements potentially adverse to an applicant can be found.

[35] For these reasons, I am not persuaded the proposal is necessarily in conflict with the environment strategies. While the land is included in the "greenspace" designation it is, as a consequence of its position and that of the railway line, and the layout of surrounding land, virtually invisible and provides no apparent visual or landscape buffer visible to any person with the exception of those who might pass it in the train. I accept that the Greenspace Map gives way, as Mr Hughes SC submitted, to the deliberate decision to include the land in SP1-2 which, on any view, permits some residential development.

Does the proposal adequately address ecological values, flooding and drainage soil conditions, hydraulic services, traffic access and biting insect issues?

[36] These issues, together with matters relating to noise, and flooding were originally raised as particulars of the allegation that the proposed use of the subject land for residential purposes was contrary to reasonable expectations,[34] and are more conveniently dealt with under that heading.

State Planning Policy No. 1 of 1997: Conservation of Koalas in the Koala Coast

[37] This Policy was promulgated by the Governor-in-Council under s1A.(1) *LGPEA*. The introductory Position Statement explains its purpose:

> *"The Queensland Government considers that the extensive koala habitat areas in the Koala Coast should be conserved to allow for the long-term survival of the koala population. Important koala habitat should be protected from inappropriate future developments and changes and land use, without affecting existing uses and development rights or removing development commitments."*

Section 4.13(3A) *LGPEA* provides that a Local Government must have regard to this policy in making its decisions on town planning consent applications. It has been specifically incorporated into the Redland Shire Strategic Plan: s 3.1.1(c).[35] Section 4.1 of the Policy establishes three broad categories: koala conservation areas; other major habitats; and, the Koala Coast balance area. The first comprises a large, integrated and relatively undisturbed area of koala habitat: s 4.3; the second is identical, save that it does not form part of a single, cohesive area, is generally located in existing or developing urban areas, and may have its boundaries altered. This land falls within the second, i.e. "other major habitat". Nevertheless, Robin

QC, DCJ has held that the structure of the Policy shows this second category is not to be seen as inferior to or less deserving of protection, than the first.[36]

[38] Section 5.4 of the Policy requires that development in areas of this kind be compatible with conserving koala habitat values except where the development is a "development commitment". That term is defined in the guidelines as:

> *"A designation in a planning scheme (e.g. Strategic Plan) where the development intent is clear."*

The appellants argued that the inclusion of the subject land in the SPI designation under the general heading "Urban - Residential Oriented" signifies a clear intent the land may be developed. For the reasons given earlier it is not possible to discern a clear "development intent" concerning SPI-2, and the phrase "some limited residential component" in it cannot be described, either by itself or, more particularly, in light of the qualifying phrases which follow it, as signifying any clarity of intent concerning future use. At the highest, as Robin QC, DCJ said in *Garbler v Redland Shire Council*[37] nothing more than a possibility is indicated.

[39] The weight to be given to this Policy was also considered by his Honour[38] and he apparently adopted, as I do, remarks of Quirk DCJ about an earlier, but broadly similar policy in *Norris Clarke & O'Brien Pty Ltd v Brisbane City Council*[39] in which his Honour said, at 264:

> *"It is the substance of a policy rather than its form that is important. That is not to say that there is any room for arbitrary or capricious application of a policy. The planning objectives upon which the policy is founded must always be recognised and, where it is feasible, applied."*

[40] This land has an existing koala population. Mr Stariha, who I found to be an honest and helpful witness, said he sees them "everywhere" - around the creek, and on his own property, and often moving, but in no particular direction.[40] A great deal of evidence was received in the form of reports, and orally, from environmental scientists (Mr Siddle, Mr McNeilage, and Miss Roberts), all of which confirmed their presence. The appellants contended that the development proposal involved little clearing of habitat trees, and appropriate revegetation with new, suitable trees which would enhance movement of koalas through the site, particularly along the creek and maintain "habitat values" to, at least, a "substantial" level. Mr Siddle, who gave evidence for the appellants on these points conceded, however, that he

was not an expert in koalas and their habitat, and that construction of the development would involve, at least, removal of something just under 30 per cent of the trees presently on the site and, potentially, up to 35 per cent.

[41] Mr McNeilage and Miss Roberts were of the view that removal of trees, and revegetation, and the disruption caused by the presence of a large number of inhabitants with their dogs, fences and the like, and the presence of roads and vehicles would all be substantially disruptive and, potentially, seriously injurious to the koala population. In light of their expertise and, in Miss Roberts' case, great familiarity with the area I found this evidence compelling.

[42] Under the Policy, s 5.4, development must be compatible with conserving koala habitat values except where there is a development commitment (or overriding need exists). Development proposals are only compatible, under s 5.7, if little or no clearing of habitat would be required; any impedance or threats to the movement of koalas through or across the site would be minimised; there would be no other significant detrimental environmental impacts on the koala habitat values in the surrounding area; and, those values would be substantially maintained, or enhanced. I accept Mr McNeilage's evidence that this area comprises a valuable koala habitat;[41] and, that the site will not be enhanced by, e.g. replanting the trees;[42] and, that the development as proposed creates a clear detrimental impact on habitat values, in clear conflict with the requirements of the Policy.[43] This is not surprising, since the Policy's own guidelines recognise in s 5.13 that Urban Residential and Low Density Residential developments are, generally, incompatible with conserving those values and are generally inappropriate in the "other major habitat" areas. I am satisfied, then, that the proposal is in conflict with the Policy.

***Local Planning Policy: Waterways, Wetlands and Coastal Zones*[44]**

[43] This Local Planning Policy was adopted by the respondent under s 1A.4 of the *LGPEA*. It seeks to promote, amongst other things, the establishment of appropriate buffers between development activities and certain waterway elements as a means of accommodating "the maintenance of physical and biological processes, storm surge or flooding inundation, public use and access and visual amenity" and, to this

end, expresses objectives that development be set back from waterways, wetlands and the coastal zone to allow for the preservation and rehabilitation of vegetated riparian zones for physical and ecological processes, the maintenance of species and the establishment of wildlife corridors, and to ensure the protection, preservation and rehabilitation of any tidal wetlands or freshwater wetlands.

[44] This proposal provides for buffer distances of between 30 metres and 40 metres. The Policy suggests as a general rule minimum buffer widths of 30-60 metres, although the Queensland Fisheries Service of the Department of Primary Industries has a generic policy position recommending minimum buffers of 100 metres from the highest tide, in tidal areas. Hilliard Creek, adjacent to the site, is tidal. Mr McNeilage contends the appellant's buffer distance is inadequate, and that it is inappropriate the buffer area is itself "heavily disturbed"[45] by a playground, picnic area, multipurpose court and equestrian trail. In the alternative, he says the appellant's reports do not provide sufficient information to determine whether the intent of the policy has been complied with. Mr Siddle contended[46] that because the majority of the site is already highly disturbed turf farm which extends to the banks of the creek, little additional buffering value would be achieved by applying extended buffer widths beyond the vegetative channel. Inspection confirmed this to be correct but Mr McNeilage contends that in the context of a new, and quite different development, reliance upon existing circumstances is irrelevant or, at least, highly inappropriate. He suggested[47] that there should be an undisturbed zone of 40 metres.

[45] Having regard to the density of this development, and the objectives expressed in the Policy directed towards the protection of the creek and its associated "ecology", a buffer which incorporates recreational facilities and involves clear disturbance of the buffered area does not, I think, properly comply. Although the Policy does not enjoy the same status as a formal planning document, proximity to an important waterway is highly material. There should be an undisturbed buffer of at least 40 metres. This, the appellants say, can be the subject of appropriate amendments, with new conditions to provide a 40 metre buffer which excludes public access and recreation. The Policy, and that proposal, are elements to be weighed in the appeal.

Reasonable Expectations for Development in the Locality

Traffic and Transportation Issues

[46] Access to the proposed development would be via Station Street east, Noel Street and part of the Duncan Street reserve, all of which have been preserved notwithstanding the absence of resolution of the applicants' access to their land after the building of the railway. The road reserves are either included in the SP1-2 area, or left out of any designation including, in particular, the SP1 designation otherwise applied in the locality. Mr Beard, the respondent's expert on this topic, identified six features which he said were undesirable or unacceptable aspects of the proposal including excessive local street travel distance to the major road network, and hydraulic, environmental and road safety problems with construction of an otherwise unnecessary access road through low-lying lands.

[47] He conceded, however, that no single traffic issue would itself warrant refusal of the application and Exhibits 43 and 44 include an acknowledgment, from the respondent, that it cannot reasonably refuse to permit access to the land along those streets. The evidence of Mr Joughlin on this matter for the appellant (Exhibit 10A) showed, I thought, that Mr Beard's concerns were unduly critical and, in the absence of any other countervailing features about the development, would not tell against it.

Flooding and Drainage

[48] Mr Settle, the expert called for the appellant on this issue, performed modelling exercises based on actual survey data[48] (and his modelling has previously been accepted by this respondent in this catchment[49]). He concluded the land to be developed would be above Q100 levels,[50] and would not create unacceptable impacts around the site in terms of either flood flows or water qualities. Mr Jones, for the Council, performed no modelling himself but expressed a lack of confidence in Mr Settle's conclusions. Many of his concerns were, with respect, speculation, and were not fully put to Mr Settle. Mr Jones' evidence included a photograph[51]

said to show substantial flooding on the subject land during the Q100 flood but which, I am persuaded, actually depicted land further to the north.

[49] Another Council flood study of September 1997[52] suggested inundation levels much higher than those predicted by Mr Settle's models was, Mr Settle's evidence persuaded me, of dubious value: notes to the study[53] gave rise to doubts about its accuracy; and, Mr Settle had been engaged by the respondent to review it and concluded it predicated excessively conservative flood levels adjacent to this site.[54]

[50] A culvert would need to be constructed on the Noel Street road reserve which might, at worst, result in some increase in levels immediately upstream of it, and a concentration of water flowing over the land downstream, but this area is all included in the drainage problem area zone, and most is owned by the respondent. Some adverse effects have already been created, in any event, by culverts under the railway reserve. It is to be noted, too, that the planning documents always indicated a roadway would be constructed on the Noel Street reserve. In circumstances where the appellants are entitled to access and proper access would always, more probably than not, give rise to minor problems of this kind in any event, they ought not weigh against the development.

Stormwater Quality

[51] While no final, detailed design has been done I accept Mr Settle's evidence that he was satisfied that the allocation of two substantial portions (.48 ha and in excess of .6 ha) meant adequate areas of land are available to design appropriate stormwater controls. I did not understand the appellant to advance a contrary view and by inference it accepts areas of this kind can provide appropriate water quality controls, since it is constructing a wetland immediately upstream.

Noise

[52] I was satisfied, too, that the potential problem of noise from the railway line could be dealt with by appropriate forms of barrier, after consultation with acoustics experts.[55] The respondent conceded this, while submitting that the presence of the

railway line is an indication the land does not have a "high residential amenity". It is obvious a residential development abutting a busy suburban railway line has some drawbacks for future occupants, but is so common (as much in this area as others) its presence, as a factor, is of minimal relevance.

Biting Midges and Mosquitoes

[53] In clause 3.1.1(b)[56] the Strategic Plan aspires, as an environmental protection strategy, to the separation of future residential and recreational development from biting insect pest breeding habitats. The respondent, while conceding the issue may not, of itself, be sufficient reason for refusal, points out that the proposal would result in the relocation of 400-500 people immediately proximate to a biting midge and mosquito breeding area and, very likely, result in further pressure on the respondent to control the problem. Although I have concluded this proposal involves a development which is too intense for the relevant SPI designation it nevertheless, plainly, acknowledges some future level of human occupation and use. Other residential developments exist as close to the breeding habitats as this proposal. Mr McNeilage conceded that biting insects were not an issue sufficient to warrant refusal. Mr Siddle shows, in his response report[57] that the respondent is addressing this problem on an holistic, shire-wide basis.

Ecological Values

[54] As noted earlier the subject land is identified in Council's Greenspace Map. Mr Challenor suggested the land had an Enhancement Designation under the Environmental Inventory that reduced its importance as part of the greenspace, but I accept the inventory is nothing more than it purports to be. The designation of the land, in the planning documents, was a consequence of a substantial planning study,[58] which included that inventory.

[55] The appellant places some weight upon the fact the property is presently used as a turf farm, and to stable and train horses, and that use has caused some degradation of its ecological value which would, therefore, be enhanced by the development. Those issues must be weighed, however, under the umbrella of the SPI-2

designation which, for the reason expounded earlier, directs any future development in a way which places great emphasis on environmental and ecological values while permitting, as I have concluded, residential development which is on a smaller scale than that proposed. The respondent has no right to interfere with the appellant's present use, or the continuation of it. When, however, some quite different use is proposed, all of these matters are brought into the spotlight and must be given their proper weight, regardless of former use.

Summary

[56] I am not persuaded any of these matters, separately, give rise to a conflict with the Strategic Plan warranting refusal. Nor can they be categorised, however, as favourable to the proposed development. Certainly, they do not constitute "planning grounds" sufficient to warrant approval, despite the conflict with the SPI-2 designation, etc.: *LGPEA* s. 4.4(5A)(b).

Conclusion

[57] The proposal is in conflict with the provisions of the Strategic Plan and, in particular, the PDLU designation, Specific Planning Intent No. 2, and State Planning Policy No. 1 of 1997. It is also in conflict with Council's local planning policy No. 104, Waterways Wetlands and the Coastal Zone. Having regard to the SPI-2 designation while it is not, in any individual element, strongly contradictory of reasonable expectations for a development in the locality it is, overall, discordant with those expectations. I do not think these conflicts are supervened by any cogent planning grounds, under *LGPEA* Section 4.4(5A). Nor am I of the view the conflicts I have identified could be circumvented by conditions imposed by this Court. The Strategic Plan envisages a much less intense residential development requiring, at least, a significant reduction in the size and intensity of the present proposal and, realistically, its reconstruction.

[58] The appeal is dismissed.

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[1] Exhibit 4
[2] Part of Exhibit 4
[3] Exhibit 5
[4] Exhibit 23
[5] Exhibit 14, p 2A
[6] Exhibit 14, p 10
[7] *Edgarange v Redland Shire Council*, unreported (Skoien SJDC, 10 January 2001, 343/00)
[8] See *Playfaire Projects v Maroochy Shire Council* (1991) QPLR 87, at 88
[9] Exhibit 5, clause 4.2.5, p 35
[10] Lewiac Pty Ltd v Gold Coast City Council (1994) 83 LGERA 224, at 230; and, see Fitzgibbons *Hotel v Logan City Council* (1997) QPELR 208, at 212
[11] *Beck v Council of the Shire of Atherton* (1991) QPLR 56, at 59
[12] *Thomas Holdings Pty Ltd v Gold Coast City Council* (1991) QPLR 32, at 36
[13] 2000 QPELR 313, at 318
[14] Exhibit 2, fig 5
[15] "Statutory Interpretation in Australia" (4th Ed), Pearce & Geddes, para 4.2
[16] Unreported, Appeal 3558/2000, 23 February 2001
[17] Exhibit 4
[18] Exhibit 62
[19] *supra*
[20] Oxford University Press, Melbourne, 1993
[21] Exhibit 22, para 6.1.1(2)
[22] Exhibit 22
[23] Exhibit 4, p 10
[24] Exhibit 17: statement of John Stariha; Exhibit 18: statement of Louise Stariha
[25] Exhibit 1
[26] Exhibit 2
[27] Exhibit 54
[28] Exhibit 21, fig 12
[29] Exhibit 54, p 3-14
[30] At p 3-16
[31] Her report, Exhibit 25
[32] Exhibit 9
[33] Exhibits 16 and 16A
[34] Exhibit 14, p 10
[35] Exhibit 5, p 10
[36] *Garbler v Redland Shire Council* (2001) QPE 028, at para 36
[37] *supra* at para 35
[38] *supra* at paras 31-38
[39] 1996 QPELR 262
[40] T 206, l 15 - T207, l 17
[41] T 345, ll 35-40; Exhibit 9, appendix 2
[42] T 347-248
[43] Exhibit 21, paras 187-190
[44] Exhibit 16, appendix C

[45] Exhibit 21, para 152
[46] Exhibit 16, para 4.3
[47] T 353
[48] Exhibit 15, appendix B
[49] Exhibit 15, p 17
[50] Exhibit 15, fig 1
[51] Exhibit 19, fig 5
[52] See Exhibit 19, para 4.8
[53] Exhibit 31
[54] Exhibit 15A, part 4, 2nd page
[55] Such as Mr King – see Exhibit 11
[56] Exhibit 5, p 9
[57] Exhibit 16B, part 5
[58] Exhibit 54