PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Mansell & Neil Mansell Concrete P/L v. Marrochy Shire Council & Ors* [2007] QPEC 086
PARTIES:	**Neil Mansell & Neil Mansell Concrete Pty Ltd**
	(ACN 010 296 401) (Appellant)
	AND
	Maroochy Shire Council (Respondent)
	AND
	State of Queensland (First Co-Respondent)
	AND
	Marie Boniface and Murray Browning (Second Co-Respondent)
	AND
	Samuel Reardon (Third Co-Respondent)
	AND
	Linda Reitano and Angelo Reitano (Fourth Co-Respondent)
	AND
	Anne Nolan and Boyd Qualtrough (Fifth Co-Respondent)
	AND
	Yandina Creek Progress Association Inc (Sixth Co-Respondent)
	AND
	Dean Watson and Samantha Watson (Seventh Co-Respondent)
	AND
	Alan Hubbard (Eighth Co-Respondent)

FILE NOS:	137/2005
DIVISION:	Planning and Environment Court of Queensland, Maroochydore
PROCEEDING:	Appeal
ORIGINATING COURT:	Maroochydore Planning and Environment Court
DELIVERED ON:	19 October 2007

DELIVERED AT:	Maroochydore
HEARING DATE:	21 – 25 May and 15 – 17 August 2007
SUBMISSIONS RECEIVED:	22 August 2007 – 13 September 2007
JUDGE:	Judge J.M. Robertson
ORDER:	Appeal Dismissed.
CATCHWORDS:	Development application for quarry refused by Council, site previously designated Extractive Industry but removed from Strategic Plan Map and not included as Key Resource Area in State Planning Policy for Extractive Industry, balancing of need to protect and develop hard rock resource with the need to avoid unacceptable impacts on amenity of encroaching residential development, noise conditions proposed which involve untested technologies; dust, vibrations, flyrock; expectations; precautionary principle; role of Environmental Protection Agency; whether concurrence agency can change it's response after appeal instituted, issues of protection of environment and visual and character amenity, whether proposal conflicts with planning scheme; whether there are planning grounds; planning need.

Legislation:
Integrated Planning Act 1997 (Qld)
National Environment Protection Council Act 1994 (Cth)

Cases Considered:
Arksmead Pty Ltd v Council of the City of Gold Coast and Ors [1999] QPELR 322
Berry & Ors v Caboolture Shire Council & Johnston [2002] QPELR 96
Broad v Brisbane City Council & The Baptist Union of Queensland [1986] 2 Qd R 317
Corporation of the City of Unley v Claude Neon Ltd (1983) 32 SASR 329
Cutprice Stores Retailers & Ors v Caboolture Shire Council [1984] QPLR 126 at 131
GFW Gelatine International Limited v. Beaudesert Shire Council & Ors [1993] QPLR 342
Koerner & Ors v Maroochy Shire Council & J.T. Barnes [2004] QPELR 211
Luke v Maroochy Shire Council [2003] QPELR 447
McBain v Clifton Shire Council [1996] 2 Qd. R. 493
McKellar Development Corporation Pty Ltd v Mulgrave Shire Councl & Anor (1985) QPLR 234
Mison and Ors v Randwick Municipal Council (1991) NSWLR 734
Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council [1996] 1 Qd. R. 347
Norris Clarke & O'Brien Pty Ltd v Brisbane City Council [1996]

QPELR 262
SEQ Properties Pty Ltd v Maroochy Shire Council [1999] QPELR 36
Skateway Pty Ltd v Brisbane City Council & Ors [1980] QPLR 245
Sol Theo as Trustee for the Solon Theo Family Trust v. Caboolture Shire Council & Anor [2001] QPELR 101
Vacuum Oil Company Pty Ltd v Ashfield Municipal Council (1956) 2 LGRA 8
Woolworths Ltd v Maryborough City Council & Rokay Pty Ltd [2006] QPELR 63
Weightman v Gold Coast City Council [2003] 2 Qd. R 441

COUNSEL: Mr W Cochrane for the Appellant
Mr C Hughes SC with Mr M Williamson for the Respondent
Mr S Keim SC for the First Co-Respondents
Mr T Trotter with Ms N Kefford for the 2nd-8th Co-Respondents

SOLICITORS: p&e Law for the Appellant
Maroochy Shire Legal Services for the Respondent
Crown Law for the First Co-Respondent
Sajen Lawyers for the 2nd – 8th Co-Respondents

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INTRODUCTION

[1] Mr Neil Mansell and his company Neil Mansell Concrete Pty Ltd (ACN:010296401) (the Mansells) have appealed against a decision of the Council dated 23 March 2005 to refuse an application for material change of use to permit land at 2 Zgrajewski Road, Yandina to be developed and used for the purpose of a hard rock quarry. The proposal, the subject of the refusal, changed during the course of the appeal process. Prior to the hearing, there were changes made in relation to access and staging which were declared 'minor' by me in terms of s4.1.52(2)(b) of the *Integrated Planning Act 1997* (Qld) on 2 April 2007. Further changes were made to the proposal during the adjourned stage of the appeal hearing, and these changes are set out in a letter from the Mansells' solicitors to the legal representatives of the other parties dated 7 August 2007 which is Ex33 in the proceedings. The plans attached to that letter exclude a substantial portion of the original stages 5 and 6 from the extraction area which will have the effect of reducing the working life of the quarry (as estimated by the Mansells) to 35 years. There being no contrary submission, I declare that the changes to the application brought about by Ex33 are minor for the purposes of s4.1.5(2)(b). The following reasons will therefore relate to the application changed accordingly.

[2] The land the subject of the development application is described as Lot 2 on RP165748 and has an area of 18.29 hectares. It is rectangular in shape, except for an irregular southern boundary where it lies adjacent to a concave bend in Zgrajewski Road. Its long axis has a rough north-south alignment, the average side length being approximately 650m and width 300m. The total length of the frontage is 325.07 meters. The northern boundary of the property intersects the summit of the hill where the elevation is approximately 105m. South from this boundary the land drops steeply to the 25m contour over half the length of the block, giving an average slope of about 14º. Over the remaining southern half the land flattens out, reaching a lowest level of about 10m near its south-western corner. The hill is dissected by a number of small gullies fed by springs and flowing into a stream which flows from east to west across the flat southern portion of the property.

[3] The site is located in an area characterised by either rural activities or native bushland. The rural activities can by divided into two categories:

- Cultivated land either used for sugar cane production or banana growing. Sugar cane generally grown on the flatter floor plain type lands and bananas on the steeper hill slopes.
- Uncultivated but cleared land used either for cattle grazing or left vacant.

[4] Approximately 600 meters to the south of the subject land (at its closest point) and approximately 650 meters from the extractive industry proposed on the subject land is a strip of rural residential allotments focused on Musgrave Drive, Leichardt Drive and Auburn Court.

[5] An existing hard rock quarry, operated by Boral, is situated approximately 2 kilometres to the south of the subject land, in Toolborough Road.

[6] The natural bushland is similarly divided. Bushland on the lower floodplain land is generally comprised of paper bark and ti tree swamps. The bushland on hill slopes is a mixture of rainforest and eucalypt forest.

[7] The description given above of the Musgrave Drive and (part of) Leichardt Drive as a "strip of rural residential allotments" comes from Mr Ryter's report, but this description was not borne out on the inspection of these areas. The Coolum Heights Estate which is serviced by these streets presents as residential development of a very high value with substantial homes built on large allotments with extensive rural and mountain views. There are also residences due south (which is quite close to the Zgarjewski Road frontage), and to the east, including the residences of Kelly O'Shea and Alan Hubbard which are on acreage and share a boundary to the site.

[8] The proposal is to extract 150,000 tonnes of rock per annum in a staged manner. It is proposed that access to the site be about 10m from the common boundary of the site with the adjoining site to the west, and that the designated haul route be between Zgrajewski Road west from the site entrance and Toolborough Road between Yandina Creek Road and Yandina – Coolum Road.

[9] A number of local residents joined the appeal as co-respondents by election and were represented by Mr Trotter and (for part of the hearing) by Ms Kefford of Counsel. A number of the co-respondents and local residents gave evidence against the proposal and I will deal with their evidence in more detail later.

[10] The State of Queensland (on behalf of the Environment Protection Agency (EPA)) was represented throughout the appeal by Mr Keim SC of Counsel and took an active role in the hearing insofar as issues involving environmentally relevant activities (ERA's) arose. From the perspective of Council and the objectors, the role of the EPA, firstly as a referral agency, and then during the course of the appeal process caused some tension, and I will discuss this discrete issue later.

[11] During the IDAS, the EPA, as a concurrence agency directed Council to refuse the application in its capacity as assessment manager but, during the appeal process (and prior to the hearing) it changed its response to require the imposition of certain conditions should this Court allow the appeal.

[12] A number of issues were resolved prior to the hearing, but a number of disputed issues remain for this Court's determination. The issues in dispute focussed on planning issues and relate to the balancing of the need to protect a valuable hard rock resource against the protection of amenity of encroaching incompatible residential development and the environment.

THE PLANNING CONTEXT

[13] At the time the development application was lodged on or about 30 March 2002, the Mansells requested that the application be assessed under the Superseded Planning Scheme, however, Council resolved to assess the application under Maroochy Plan 2000 (MP2K). There was substantial agreement amongst the planning experts as to the relevant planning extracts. Mr Schomburgk (for

Council) and Mr Challoner (for the co-respondents by election) considered that it was particularly significant that the site was not included in any area identified as a Key Resource Area (KRA) in the State Planning Policy for Extractive Industries (SPPEI), which was a draft until it come into effect on 3 September 2007. Mr Ryter (for the Mansells) regarded the SPPEI as relevant but that the recognition of the site in the relevant parts of the MP2K at the time of the application and subsequently, as an extractive industry resource were, in his opinion, very significant.

[14] The difference in opinion between the town planners focuses directly on the joint submission of the Council and the residents that the time for development of this undoubted hard rock resource on this site has simply passed because of the gradual encroachment, particularly in the last 10 years, of residential development which everyone recognises as an incompatible use when associated with a hard rock quarry.

[15] In the joint statement of the three town planning experts, the issue is put this way:

> "In some cases, protection of amenity and environment may result in an extractive resource being sterilised.
> The key planning principle in this case is balancing the need to permit the extraction of a valuable hard rock resource, with protection of amenity of nearby residences and the environment. Where encroachment of potentially incompatible land uses has occurred for whatever reason, extra care needs to be taken to ensure the maintenance of amenity."

[16] Mr Schomburgk in his report (Ex17), after referring to impacts, summarised the position of the Council and the Objectors succinctly (at 5.5.7):

> "In my opinion, those impacts (visual as well as noise, blasting and traffic) are likely to change the character and amenity in an unacceptable way. In this case, it will then be a matter for the Court to balance these impacts with the technical advice of other experts. In my opinion, however, the balance in this case favours refusal. Encroaching residential development has simply compromised the ability of this resource to be won without unacceptable impacts on the environment and the amenity of the locality as it is today."

[17] Although the application stands to be assessed against the MP2K scheme, nevertheless Mr Ryter in his report sets out various extracts from the Superseded Planning Schemes to demonstrate the 'planning designation' history of the site.

[18] In the 1996 Strategic Plan, the site was designated as an Extractive Industry Resource and was included in the Rural or Valued Habitat designation. In that Plan, there were statements suggesting a significant planning intent to protect designated Extractive Industry areas from "incompatible uses". There were also statements accepting a recognition that "encroaching urban development of any density" would represent "a significant threat to (such) areas". There are also statements of planning intent designed to ensure "that extraction of protected

extractive material deposits has a minimal impact on the amenity of the surrounding area".

[19] Similar sentiments continued with the commencement of MP2K on 1 June 2000. The site was identified as containing an area of Extractive Industry resources. It was (and still is) designated as Rural or Valued Habitat (for the northern half of the site) and the Agricultural Protection (for the southern half) Preferred Dominant Use designations of the Strategic Plan in Volume 2 of the Plan.

[20] In the more specific Planning Areas and Precincts (Vol 3 of MP2K), the site is included partly within Planning Area No.24 (Yandina Creek Valley), Precinct 3 (Yandina Valley Uplands) and partly (only a small part of the north eastern corner) within Planning Area No.25 (Northern Coastal Plains), Precinct 7 (Northern Coastal Uplands). Both of these precincts have the Precinct Class of General Rural Lands which is relevant to the assessment levels of that Precinct Class.

[21] The Vision Statement for the Yandina Creek Valley Planning Area in 3.24.2(1) of the Maroochy Plan 2000 states that:

> "It is intended that: Cane lands within the Yandina Creek Valley be protected for commercial rural production, with the steeper lands of the Ninderry Range accommodating environmentally sensitive and sustainable rural residential use and State Forest activities."

[22] It is intended this Vision will be achieved by, inter alia: "... providing for further sustainable rural residential development on suitable lands along the Ninderry Range" (3.24.2(2)(b)); and "…allowing for the ongoing working of identified extractive resources in the area in ways which are environmentally responsible" (3.24.2(2)(c)).

[23] The Key Character Elements for the Yandina Creek Valley Planning Area set out in 3.24.3 include:

> "This Planning Area is intended to retain its key rural and open space characteristics supporting sustainable cane growing and other rural activities" (3.24.3(1)(a);
>
> "Any extractive Industry should be carried out in accordance with best management practices including effective rehabilitation of disturbed areas" (3.24.3(1)(c)), and
>
> "The extraction of sand and gravel resources should be carried out in accordance with best management practices, including effective rehabilitation of disturbed areas" (3.24.3(3)(b)).

[24] Within the Yandina Creek Valley Planning Area, the stated intent for the Yandina Valley Uplands Precinct (which includes the subject land), and the Preferred and Acceptable Uses, are set out in 3.24.4(3) and includes:

> "…extractive industry activities are allowed for where the workings are, or are proposed to be, in relation to a site-specific resource that is proven to be commercially and environmentally suitable for exploitation and is carried out in accordance with an approved programme of works and restoration. In assessing any application for development for such purposes, particular consideration will be given to the intended method of working, the measures used to limit adverse environmental impacts to acceptable levels"; and
>
> "…extractive industry may also be an acceptable use of land in this precinct where a community benefit and acceptable environmental impacts can be demonstrated by the proponent to Council's satisfaction."

[25] Within the Northern Coastal Plains Planning Area, the stated intent for the Northern Coastal Uplands Precinct is set out in 3.25.4(7) and includes:

> "…It is intended to allow for a wide range of rural activities within this precinct, while favourable consideration could be given to other "broad hectare" activities that are compatible with a rural setting and do not require urban services and infrastructure."

[26] This statement of intent is very similar to that of the Yandina Valley Uplands Precinct, except that no mention is made of extractive industry activities. Given the similarity in precinct class and intent, and the location of the site predominantly in the Yandina Valley Uplands precinct, I consider the planning provisions pertaining to the Northern Coastal Uplands precinct to be of little relevance for assessment of the development application

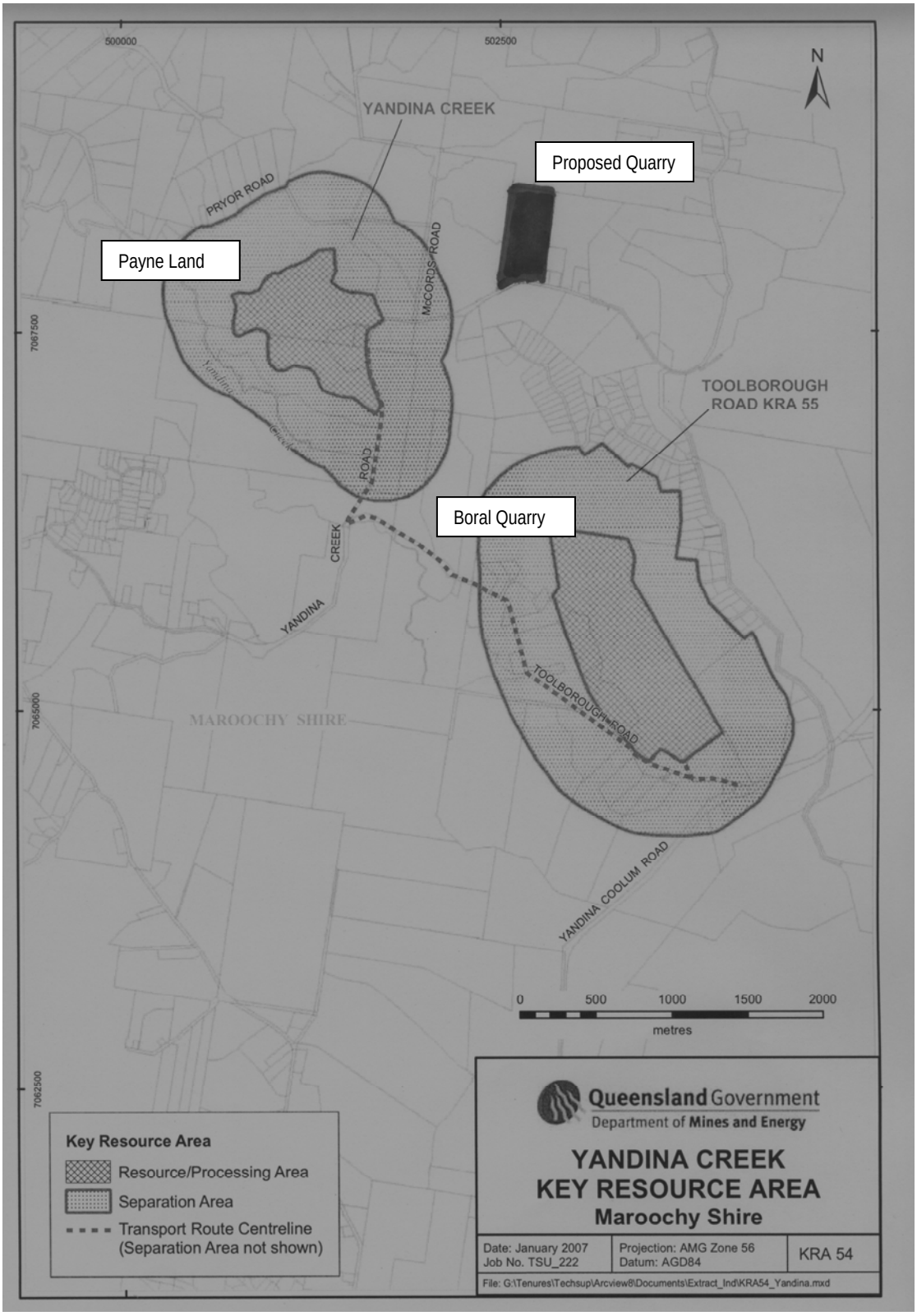
[27] The Table of Development Assessment for Rural Precincts (Table 5.1) for General Rural Lands does not mention extractive industry in Column 1 (self assessable development) or in Column 2 (code assessable development). By default then, as is the custom of this Planning Scheme format, an extractive industry is a non-preferred, impact assessable use.

[28] Similar themes appear in the Code for Protection of Extractive Industry in Vol 4 of MP2K. The purpose of the Code is to:

> "…protect extractive resources in the Shire by preventing incompatible development and use of premises, which could sterilise valuable extractive resources. This can occur when incompatible premises are locates (sic) on or near existing or potential resource areas and associated haulage routes."

[29] In 2001, the Queensland Government prepared a draft SPP dealing with the protection of extractive resources. It was released for public comment in late 2004 and took effect on 3 September 2007. Its significance to this appeal is that the site is not identified as a KRA. The site of the nearby quarry operated by Boral is identified as a KRA, as is an area to the immediate west of the site, referred to

throughout the hearing as "the Payne land". This result is very well represented in Map KRA54 which is the last page of Ex35. I have incorporated that map in these reasons because of the significant emphasis on this planning issue in the hearing and in the submissions. I have identified both the site, the Payne Land and the Boral Quarry.



[30] It is clear that the decision not to include the site as a KRA in the SPPEI directly affected the Round 2 amendments to MP2K adopted in August 2006, whereby the Extractive Industry Resources designation on the Strategic Plan Map previously allocated to the subject land was removed. So much is obvious from Council minutes of 23 March 2005 where it was resolved (in the same motion) to refuse the Mansell's application for material change of use, and to seek deletion of the resource from the Strategic Plan Map 2.1 and from Regulatory Map 4.6 in the Code for Protection of Extractive Industry Resources within MP2K at the next review of the Planning Scheme. The executive summary leading up to that resolution states:

> "In January 2003, the Minister for NR&M advised Council that the subject site resource is not considered by the Department to be of State interest and that she would not object to its removal from the planning scheme if the subject application fails."

[31] The Payne Land retains the extractive industry designation in the strategic plan.

[32] There was some evidence going to the reasons why the site was excluded as a KRA. Mr Cochrane submits that it should have qualified having regard to the Criteria for State Significance set out in Appendix 1 to the SPPEI Guideline which is Ex35A, however that does in turn depend on matters of judgment as to whether any of the criteria set out in A1.1 of Appendix 1 have been satisfied. The reality is that those responsible for making these decisions have decided not to include the site as a KRA which has in turn influenced what the Council and co-respondents by election say is a significant change in a planning sense.

[33] Some interesting background to the decision making process emerged in the evidence of Dugald Gray who gave evidence on the issue of need on behalf of the Mansells. At p17 of his report (Ex 5) Mr Gray observes:

> "The Zgrajewski Road site is not nominated as a Key Resource Area under the draft State Planning Policy for Protection of Extractive Resources. Nor is the Parklands quarry where Mansells currently produce their aggregates.
>
> We have held discussions with Mal Irwin, resource geoscientist from the Department of Mines and Energy (DME) who was involved in the identification of key resource areas for inclusion in the SPP. The verbal response we have received from Mr Irwin was that the Zgrajewski Road resource was one of many potential KRA's throughout Queensland but not included in the final draft SPP because of DME's view at the time that the resource was small (under 5 million tonnes), there was residential development nearby and the Yandina Creek 'diorite' outcrop one kilometre to the west was a similar but larger resource with larger buffer distances and was therefore included as a KRA. The Parklands quarry was not included in the draft SPP because the quarry was towards the end of its life and had limited remaining reserves."

[34] Attached to Mr Gray's report are a number of reports written by various geologists historically, it appears, to assist in identification of key resources of hard rock in the State. The reports contain interesting comparisons between the Payne Land and the site which, it can be assumed, influenced the decision not to include the site in the SPPEI as a KRA. The reports (or relevant extracts) are set out presumably in chronological order as Attachments 1.1-1.3 to Mr Gray's report. The later reports of O'Flynn (December 1991) appear to predict some of the very issues that arise now in 2007 in relation to the proposal to establish a hard rock quarry on the site.

[35] O'Flynn says this (in relation to the Payne Land):

> "At grid reference 016678 (Payne Land), hard intrusive diorite crops out on a conical hill. Bulk testing of rock from a shallow test pit indicated potential for the production of polish-resistant bituminous aggregates as well as concrete aggregates, although precoating of sealing aggregates may be required.
>
> This deposit is possibly the most important on the Sunshine Coast because of the homogeneity and quality of the source rock, strategic location, and the range of products offered. Its future availability is important for the supply of aggregates to the market. It is also designated Extractive Materials Deposit on the Shire Council's strategic plan and is adjacent to land owned by the Maroochy Shire Council which is zoned Extractive Industry on its current town planning scheme.
>
> An application to quarry this deposit is believed to have been rejected in 1990 and is now subject of appeal to the Planning and Environment Court. Irrespective of the outcome of the present appeal, planning action should ensure that this deposit is available for future exploitation."

[36] He then says (of the subject site):

> "A low hill to the northeast at Grid Reference 025684 consists of similar diorite which extends to a depth of at least 25m on the basis of one diamond drill hole (Willmott, 1978). The depth of weathering indicated by isolated outcrops is likely to be variable at this site and further investigations would be necessary. Proposals for rural residential development in the vicinity may preclude future utilisation of the deposit." (my emphasis)

[37] Before turning to a detailed discussion of the issues, I will refer briefly to the Payne Land decision because (relevantly) part of that land lies in the same Precinct Class and Area as the site.

[38] As Mr O'Flynn notes in his report, Council had rejected a proposal to quarry this land in 1990 and this decision was overturned by this Court in a decision of O'Sullivan DCJ on 23 January 1992. Subsequently, the rezoning approval with conditions was granted by order of this Court, and a copy of these conditions is Ex26. This approval subsequently lapsed. It is clear from her Honour's judgment

that many of the same issues (including opinion evidence from some of the same witnesses) arose in that appeal.

[39] As I have noted the planning experts regarded the exclusion of the site as a KRA in the SPPEI as "relevant" (Mr Ryter) and "particularly significant" (Mr Schomburgk and Mr Challoner). I have set out in the above reasons some of the evidence which impacts on the reasons behind the decision to exclude the site and these reasons all point one way in my opinion, and that is as indicating a strong policy trend (in the case of the SPPEI at a State level) towards sterilizing what is undoubtedly a valuable hard rock resource because of the historical reality that incompatible residential development has encroached to such an extent that the time for extracting the resource has now passed. This theme is evident in the planning scheme extracts to which I have referred, and is taken up in part of the Explanatory Statement which forms part of the SPPEI in the following extracts:

> "The main markets for extractive resource products are the urban communities around Queensland experiencing high and sustained population growth. The location of extractive resources is determined by geological conditions and is finite. They need to be accessed where they naturally occur and also be close to their markets. Unfortunately this can result in conflict between extractive industry and other, incompatible land uses, such as residential uses, that have the potential to sterilise the availability of the extractive resource."

[40] In relation to a site (such as the Payne Land) which is designated a KRA, it is stated in the explanatory statement:

> "SPP 2/07 identifies those extractive resources of State or regional significance where extractive industry development is appropriate in principle, and aims to protect those resources from developments that might prevent or severely constrain current or future extraction when the need for the resource arises.
>
> The Policy identifies the location of such extractive resources as Key Resource Areas (KRAs), each of which contain three elements – a resource/processing area, a separation area and an associated transport route, which also includes a transport route separation area, where such a link is needed from the resource/processing area to a major road or railway. The resource/processing area generally identifies the location of the extractive resource itself. The adjoining separation area identifies the area that may be affected by the residual impacts of the existing or future extractive operations in the resource/processing area, and also provides a buffer between those operations and any incompatible uses beyond and adjoining the separation area."

[41] The Mansells (according to Mr Neil Mansell) purchased the land five years before the application was made in 2002. He frankly conceded that the reason for delaying making the application was largely commercial.

[42] Mr Cochrane also makes a robust submission to the effect that the decision by Council to remove the Extractive Industry Resource designation on the Strategic Plan Map, which decision was made at the same time as refusal of the application, is unexplained and not supported by any town planning study. There was no town planning study certainly but the Council's decision is explained by the executive summary which is attached to the minutes of Council dated 23 March 2005 in which the decision was made. Mr Cochrane is correct when he notes that the then draft SPPEI was not referred to in Council's reasons for refusal but it is clear from that same executive summary that its existence and effect was clearly in the mind of Council when the decision to refuse was made.

[43] Pursuant to s4.1.52(2)(c) the Court must decide the appeal based on the laws and policies applying when the application was made, but may give weight to any new laws and policies the Court considers appropriate. Because it is the focus of the disagreement between town planners, Mr Cochrane has submitted that the Court should not give much weight to the SPPEI and no weight at all to the subsequent (and associated) removal of the site as an extractive industry resource from the Strategic Plan Map.

[44] For the reasons I have identified, I do not accept this submission. These reasons, and the evidence of the background relevant to the decision to exclude the site as a KRA in the SPPEI, show a long term planning trend (because of encroaching residential development) to permanently sterilise the extractive resource on the site. Mr Cochrane referred to historical approaches in this Court to planning policies in cases such as *SEQ Properties Pty Ltd v Maroochy Shire Council* [1999] QPELR 36 and *Norris Clarke & O'Brien Pty Ltd v Brisbane City Council* [1996] QPELR 262. In the later case, his Honour Judge Quirk said (at 264):

> "It is the substance of a policy rather than its form that is important. The planning objectives upon which the policy is founded must always be recognised and, where it is feasible, applied."

[45] There is no suggestion here from any other party that the SPPEI be considered on its own. As I have conveyed, its force here is in the overall context of all of the relevant planning scheme extracts.

[46] Pursuant to s4.1.50(1) it is for the Mansells to establish that the appeal should be upheld.

NOISE

[47] As I have noted, because a number of ERA's were involved in the Material Change of Use application, the EPA was a concurrence agency for the development application. On 7 August 2002 the EPA directed Council to refuse the application. Its reasons for refusal were in these terms:

> "The application has been refused on technical grounds, specifically in relation to noise. The proponent has failed to demonstrate a commitment to protecting the values of the local acoustic environment. The proponent has provided

> technical information which concludes noise levels associated with the proposed quarry will not be able to be managed to adequately protect the local acoustic values and acoustic objectives including residential amenity, health and well-being. The information provided by the proponent states that the residences closest to the quarry site would experience Laeq noise levels from general quarrying and processes in the order of 65db to 70db."

[48] Thereafter, the Mansell's consultants sought a review of the EPA's decision and the material indicates that a lot of technical data dealing with noise levels was forwarded to the EPA.

[49] After the appeal was commenced (3 May 2005), on 17 August 2006, the EPA provided to Council and the Mansells a notice of changed concurrence agency response which was to the effect that certain conditions must be included in any development approval.

[50] The EPA's changed position calls into play a consideration of ss3.3.16 and 3.3.17 of the IPA and in particular whether or not, pursuant to s3.3.17(1), a response may be amended or changed after the application has been decided by Council, but before an appeal has been determined by this Court.

[51] The Council has made a positive submission that the EPA does not have power under the IPA to amend it's concurrence agency response once an appeal is commenced. In their written submission Mr Hughes SC and Mr Williamson expressed the argument this way:

> "The EPA is, as a matter of law, *functus officio* once it has given its response under section 3.3.16 of IPA. Accordingly, the document is no more than a statement of the EPA's position as a party to the appeal."

[52] Mr Keim SC and Mr Cochrane essentially submit that it is not necessary for me to decide this question as a matter of law in the context of this appeal. This is because pursuant to s 4.1.52(1) the appeal is by way of hearing anew irrespective of whether or not a concurrence agency can, as a matter of law, change its response after the institution of an appeal. The EPA's amended conditions now form part of the material for me to consider, as does extensive acoustical expert evidence that was not available at the time it purported to change its response.

[53] Council's argument does appear to have merit because of the positioning of these provisions in Part 3 of Chapter 3 of the IPA as part of the IDAS which would tend to favour the view that "before the application is decided" refers to the decision made by the assessment manager as part of the IDAS, and not the decision of a Court after the filing of the appeal. The wording of s3.3.1 also appears to favour this outcome. However, I agree with Mr Keim SC and Mr Cochrane that there is no need for me to decide this now for the reasons I have set out. I agree with Mr Keim SC that although there were inconsistencies identified in his client's changed response, these have now been clarified in the evidence; and the EPA's amended conditions relating to ERA's does provide this Court with a guide as to the types

of conditions which should be imposed in the event that the Court decides to allow the appeal.

[54] Mr Keim SC referred to "inconsistencies" in his submission and it is necessary for me to deal with an apparent inherent conflict in the EPA's changed concurrence agency conditions relating to noise and vibration which are set out behind Tab 19 in Volume 1 of Exhibit 1. The inherently inconsistent conditions are D1-4 and D1-5 (which are set out below together with (D1-1)):

> "(D1-1) Noise from the ERA must not cause an environmental nuisance at any sensitive place…
>
> (D1-4) Without limiting the applicability of other criteria relevant in particular circumstances in relation to the operation of condition (D1-1), noise from the ERA and any associated activities on the site shall not exceed 45dB(A) at any noise sensitive place measured as LA,max,adj,10min.
>
> (D1-5) For the purposes of condition (D1-1), the ERA will not cause environmental nuisance where noise from the ERA does not exceed the criteria specified in Schedule D – Table 1."

[55] This table sets out outdoors noise criteria and sets a relevant criteria of background + 5dB(A), which it is accepted by the experts here would equate to a level of 40dB(A).

[56] The inconsistency is dealt with on page 3 of the first of three joint statements of the noise experts which is Ex 6. At (iv) the experts (Mr Rumble for the Mansells, Mr King for Council and Mr Kamst for the EPA) say this:

> "In essence the EPA has set two apparent noise limits which apply outdoors at any affected noise-sensitive receptor premises:
>
> (i) $L_{A\ max\ adj} \leq$ 45dBA (D1-4), and
>
> (ii) $L_{A\ max\ adj} \leq$ background + 5dBA (D1-5)
>
> The background noise level in the area has been measured to be of the order of 35dBA (TTM report). On the surface, this would appear to indicate a contradiction in the EPA requirements. D1-4 sets a limit of 45dBA whereas D1-5 would indicate a limit of 40dBA.
>
> It is thought that the EPA criteria stem from an old guideline from the then Department of Environment and Conservation: *E3 – Noise from Extractive Industries.* A copy of this guideline is attached for reference. The relevant paragraph is repeated below:
>
> > *Table 4 specifies that range of background levels to be used with Table 3. If the measured $L_{A\ bg}$ is above the range, the upper limit of the appropriate range should be used. If the measured $L_{A\ bg}$ is below the*

> *range, the lower limit should be used to determine the recommended* $L_{A\ max\ adj}$.
>
> In this instance, the relevant range of $L_{A\ bg}$ for daytime period 7am-6pm from Monday to Friday and 7am-Noon on Saturday is 40 – 50dBA. As the measured level in this instance (~35dBA) is less than the lower value, a value of 40dBA should be used in setting the noise limit:
>
> $L_{A\ max\ adj} \leq 40 + 5dBA$
>
> This interpretation explains the apparent discrepancy in the EPA conditions."

[57] In other words, for the purpose of giving their opinion evidence to the Court, the experts agreed that D1-4 should be used as the correct standard for the purpose of assessing potential impacts on noise sensitive places which includes all of the nearby residents. In this context, Mr Rumble was prepared to concede in his cross-examination by Mr Hughes SC, that at the 45dBA level, the operator will have a difficult task to comply and it would be more difficult at 40dBA. Mr King and Mr Kamst were more cautious (appropriately so in my opinion) in stating in evidence that it will be very difficult for the operator to achieve the 45dBA standard and no chance of achieving the 40dBA.

[58] The final joint expert report (Ex8) highlights one of the most important issues that arise in this case on this important issue:

> "It was agreed that it is technically feasible to achieve the required attenuation performance, but it would involve leading-edge design and site management which in some cases is unproven in respect of this long-term sustained performance."

[59] All experts acknowledged that the proposed conditions, which are to be formulated in accordance with their joint report (Ex8), are the most onerous any of them have ever seen. All are very experienced consultants in this area and have given evidence in this Court on noise issues on countless occasions. Mr Kamst gave evidence in the 1992 decision relating to the Payne Land.

[60] Their joint experts report is remarkable by its reference to the complexity and difficulty of achieving the noise emission target of 45dBA, and all conceded that the difficulty of achieving the target throughout the life of the quarry, bearing in mind subjective issues such as human error, would be of a very high level.

[61] The uncertainty and risk that they jointly acknowledge is expressed in this way in Ex 8:

> "There is uncertainty at this time as the information on which the various computer modelling by Carroll Engineering has been based and the information used in the calculations carried out by the experts, has all been hypothetical. It is in the right ballpark but actual outcomes of say the rock drill

enclosures or the enclosures on the crushing and screening plant may differ significantly.

Because of the uncertainty, there is a risk. But the risk is largely with the Appellant. If the operator fails to meet the noise performance goals, he will be forced to close down under the terms of the Environmental Authority. The risk to the local residents would be if the operator fails to meet his obligations and the Authorities for whatever reason, do not take the appropriate action.

The direction preferred by the experts is one which minimises risk and provides re-assurance to all parties that the proposed development will meet and maintain the noise performance goals."

[62] One of the issues that arise in this area focuses on the expert's recommendation that any approval be conditioned with a Noise Quality Plan. The essential elements are stated in (Ex8) in these terms:

"Establishment Phase:

- Identify and prioritise design issues in order of importance e.g. rock drill enclosure, crushing plant enclosure modification to excavators, loaders, trucks etc.
- Design and develop prototype samples and test to obtain realistic noise data which can be incorporated into a computer model.
- Prepare computer model incorporating real data and real operating parameters to demonstrate compliance or to identify areas where improvement is necessary.
- Iterate the above process until satisfactory outcomes are achieved.

Note that these steps should be completed prior to commencement of site operations. It would also be appropriate at this point to involve the Respondents/Co-Respondents who would review the material and give approval to proceed. In the jargon of QA, this would be a *Hold Point.*

If the performance goals are not met or adequately demonstrated at this point, which would be prior to any work occurring on site, there would be no approval to proceed.

- Acquire and install plant and equipment together with the noise control measures developed and proven previously. This would be accompanied by site testing and evaluation to confirm the noise performance, both singly and collectively.
- Adjust plant and/or operations if necessary to achieve compliance.

There would be a further *Hold Point* at this stage which would involve testing and certification of performance. This would complete the establishment phase.

Operational Phase:

- The objectives in this phase are to meet and maintain the noise performance goals throughout all stages of the operation, including times when plant is modified or replaced.
- Noise issues should be identified and resolved before they become problems. For example, an important assumption relied upon by the experts has been that truck traffic to and from the site would travel only via Zgrajewski Road to the west of the site. A process is required in which drivers are educated, monitored and controlled.
- A noise management structure is required which defines the responsibilities at all levels of the organisation and the levels of authority to take corrective action.
- A formal process is required wherein noise issues can be anticipated, identified, evaluated and resolved.
- A noise monitoring regime is required which includes performance verification of new plant and processes prior to implementation and verification after maintenance. The programme shall also include regular performance evaluation of the entire site.
- A process for record keeping is required which contains all records relating to noise management, including any complaints received and their resolution. These records should be available for audit by Council.
- A set of written procedures is required covering all aspects of noise management, including but not limited to training procedures, monitoring and test procedures, information recording and storage procedures."

[63] A number of discrete issues arise out of this aspect of their evidence:

Obtaining Realistic Noise Data

[64] It is implicit in the joint opinion of the experts that the modelling done thus far to estimate noise levels is not based on sufficiently realistic data. All experts agree that the technology is available to obtain this more "realistic data", and that if the data obtained by the Mansells' consultant is subject to audit by experts for the Council and other parties then there is no real problem in them using this by application of approved computer modelling software. Like so much of the expert evidence on this highly important issue of noise from a working quarry in close proximity to a significant number of residences, it has to be accepted as technically correct, but not surprisingly gives no comfort to those residents. This perhaps echoes the frank comment made by Mr Rumble in his cross examination by Mr Hughes SC to the effect that it is dangerous to say hypothetically that because the computer says there is no risk therefore there is no risk.

If the performance goal is not met "there would be no approval to proceed".

[65] This observation (described in the joint report in Quality Assurance terms as a "Hold Point"), coupled as it is with the provision of "realistic data" earlier discussed, lead to discussion during the hearing about whether a condition in these terms would offend the finality principle.

[66] Mr Keim SC obviously anticipated an argument along these lines in his written submission at para's 27-40 however such an argument did not eventuate. The law

on this issue is settled. It refers back to the judgment of Clarke JA in *Mison and Ors v Randwick Municipal Council* (1991) NSWLR 734 in which his Honour quoted with approval part of an earlier judgment of Wells J in *Corporation of the City of Unley v Claude Neon Ltd* (1983) 32 SASR 329 at 332. At 740 of his judgment in *Mison*, Clarke JA said:

> "*Where a consent leaves for later decision an important aspect of the development and the decision on that aspect could alter the proposed development in a fundamental respect it is difficult to see how that consent could be regarded as final."*

[67] As Mr Keim SC points out, the principles enunciated in these earlier cases have been accepted and applied in Queensland by the Court of Appeal in *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* [1996] 1 Qd. R. 347 at 354 and *McBain v Clifton Shire Council* [1996] 2 Qd. R. 493 at 496.

[68] These cases refer to the need to test the impugned condition by reference to "objective criteria necessary" to arrive at noise levels that are scientifically ascertainable. All the experts say (with the very significant proviso that to achieve the required level technologies that are either not yet tested or even available have to be applied) that the performance goal can be scientifically tested by reference to acceptable objective criteria. In any event, any concern about the terminology in the Noise Quality Plan (NQP) establishment phase i.e. "if the performance goals are not met…there would be no approval to proceed", are overcome in Crown Law's letter to Council (Ex36).

[69] Messers King and Kamst expanded in their oral evidence on the reservations expressed by them both in Ex8. Mr Cochrane cross examined them both about the rock drill which is described by the manufacturer in the brochure which is Ex19. Mr Mansell is prepared to use leading edge technology in his operation so as to achieve compliance with conditions such as those relating to noise and dust, and this rock drill is an example of the type of equipment he is prepared to use in order to comply with conditions. The noise data and claims for a noise reduction of 10dbA by using such a machine has not been tested by any of the experts here (the rock-drill is not in use in Australia); however as Mr Kamst said, even accepting that the drill can produce a 10dbA reduction in noise emission from the rock drill operation alone, to achieve the overall noise emission target of 45dbA, the rock drill component alone would have to be reduced by 22dbA. As Mr Kamst noted at p6 of Ex8 as one of his areas of concern:

> "In essence all equipment on the site requires a high degree of attenuation to be able to meet relevant noise limits at surrounding noise sensitive locations. The degree of noise attenuation required for some or all of the proposed equipment is beyond the experience of the noise experts. The noise attenuation measures for each item of equipment have to be effective both at the commencement of operation and have to be maintained thereafter. If one of these measures is not maintained over the life of the quarry, then it is likely that the 45dbA noise limit would not be met.

> In other words, to operate the quarry in such a manner as to achieve the noise limit requires extraordinary diligence on the operator, at a level which could be difficult to maintain continuously."

[70] In cross-examination, a question was put to him that was premised on the proposition that he was "guardedly" supporting the proposal. He frankly responded: "I'm not sure I am supporting it".

[71] Mr Rumble in his response in Ex8 and in his evidence did not really deal with these concerns expressed by Mr Kamst and I prefer Mr Kamst's evidence on this issue.

[72] In cross-examination, Mr Rumble eventually conceded that, accepting that the correct test for the Court to apply was whether on the balance of probabilities it can be satisfied that if approved the quarry will operate without unacceptable acoustical impacts, on the evidence of the acoustical engineers, presently available, that test could not be satisfied.

[73] These uncertainties about noise level data, equipment etc and the highly cautious tone of the joint opinion to the effect that it is "technically feasible" to achieve the target of 45dbA and bearing in mind that the issue of noise in this environment (along with issues of vibration, and dust) leads to a consideration of the precautionary principle. It is relevant that in ultimately making its decision not to refuse the proposal it is assumed that the EPA also applied the principle but as the decision maker here, it is for me to reconsider it anew in the light of the evidence I have now accepted. I will discuss this principle after considering all the environmental impacts issues that arise.

DUST

[74] Mr King gave expert evidence on this issue on behalf of the Council and Dr Peter D'Abreton of Pacific Air Environment gave evidence on behalf of the Mansells.

[75] Clearly a working quarry is a significant generator of dust, the potential sources being; loading of material using excavators; trucks dumping fragmented stone; conveyor transfer; screening; crushing; loading stockpiles with crushed stone; wheel generated dust; wind erosion; and drilling. It has a potential to impact upon off-site land uses, in this case residential uses, by way of dust emissions which can be categorised as both nuisance dust, for example, that which then falls on outdoor areas, on washing, or builds up within a house; and airborne dust which has the potential for ill effect upon health due to respiration of dust particles.

[76] There are a number of existing residences in quite close proximity to the proposed quarry. Although the actual topography of the site itself and the existence of trees and vegetation between the quarry operation and the residences particularly to the east of the site may act to ameliorate the problem, as Mr King observes, the site is part of one side of a small valley which in his opinion, does not promote the suitability of the site for the proposed use.

[77] Figure 2 in Mr King's report (Ex15) shows the location of the closest residences. Given that the prevailing breezes are from the south-east, the most likely adverse effects of dust emission from the quarry will be experienced by the residents of houses A, B and C. These are respectively the homes of Kelly O'Shea (A) who lives there with two young children, Samantha Watson (B) whose home is approximately 15 meters from the eastern boundary of the site, and Alan Hubbard (C). Residence D (Annie Nolan) is opposite the Zgrajewski Road frontage to the site and quite close to the road itself. All of these people gave evidence about their significant concerns about amenity issues, including dust. Not surprisingly, none were comforted by the opinions of the experts which concerned the technically feasible options for achieving appropriate dust emission levels and noise output by the imposition of appropriate conditions.

[78] At a joint experts meeting held 17 November 2006 (at a time when Ms Richardson was representing the Mansells and not Dr D'Abreton) they agreed that the appropriate standard for assessment of particulate emissions from the proposed quarry should be:

> - "Health related impacts: PM_{10} – 50 μg M^{-3} (24-hour average), Total Suspended Particulates (TSP) – 90 μg m^{-3} (annual average).
> - Nuisance related impacts: Total insoluble solids (deposited particulates) – 120 mg/m^2/day.
>
> These criteria are to apply at the nearest potentially sensitive receptors."

[79] The criteria used in relation to health related impacts differs from the criteria set out in the EPA conditions (in Doc 19 of Ex 1 Vol 1) B1-2(b) namely:

> "…a concentration of suspended particulate matter with an aerodynamic diameter of less than 10 micrometers (μm) (PM10) of 150 micrograms per cubic metre over a 24 hour averaging time at a sensitive place downwind…"

[80] This criteria is taken from Schedule 1 to the Environmental Protection (Air) Policy 1997 (EPPA).

[81] The more stringent standard agreed by Mr King with Dr D'Abreton's predecessor comes from the National Environment Protection (Ambient Air Quality) Measure made under s20 of the *National Environment Protection Council Act 1994* (Cth) and adopted in Queensland (the NEPM).

[82] Mr King and Dr D'Abreton differed as to the appropriate standard. Dr D'Abreton's argument essentially comes down to this: in its terms the NEPM is intended to be applied to what he described variously as "major airsheds" and "general ambient air, allowing for the protection of the overwhelming majority of Australians where they live", whereas the EPPA is to be applied to site specific environments such as this quarry.

[83] Mr King maintained his position in his evidence that the NEPM measure was the appropriate standard to apply here, notwithstanding the adoption as an acceptable

measure in the Code for Extractive Industries in MP2K of the EPPA standard. He did so because of the close proximity of Kelly O'Shea's house in particular to the quarrying operation. The other issue that arose in the evidence of the dust experts was the validity of Dr D'Abreton's modelling exercise, based as it was on ambient dust levels at the nearest EPA monitoring station at Mountain Creek and not on the levels at the site itself. Mr King was of the opinion that ambient levels at the site would be higher because Zgrajewski Road is a dirt road, there are surrounding agricultural uses, and the operating Boral quarry is nearby.

[84] Mr King and Dr D'Abreton agreed with the methodology for disposition modelling at their meeting on 20 March 2007, and both agree that the modelling (based on EPPA standard) done in relation to Stage 1 and Stage 5 and subject to the conditions referred to in Dr D'Abreton's report, and with the extensive mitigating factors that will be contained in conditions (including the EPA conditions) indicated the quarry will not exceed that standard at any of the sensitive receptors. The NEPM standard if adopted would result in exceedance at one of the residences at both stages.

[85] These various areas of difference between the experts do not in my opinion really take the issue further in relation to the air issue. At the end of the day both experts were very guarded about the reality of the quarry operator being able to maintain such a high degree of control over the life of the quarry in order to comply with the very onerous conditions set out in the experts reports. Dr D'Abreton frankly (and properly in my opinion) accepted that given the close proximity of a number of homes to the proposed hard rock quarry, a further condition should be imposed such that modelling based on ambient dust levels at the site be conducted to ensure that there is no exceedance of the approved standard.

[86] He also agreed that the modelling outcomes in any event depend on the ability of the operator to maintain control efficiently by complying with the extensive and onerous control conditions agreed by the experts. He agreed that with so many controls, there are many assumptions built into the opinion he expresses which may not be borne out by management issues over the life of the quarry. It could also be observed that this resolution has more force when one considers that it is Stage 5 which is some years down the track when the quarry will be fully operational and dust emissions will be at their highest.

[87] Mr King was even more cautious. He told Mr Cochrane that the conditions (both in relation to noise and dust) would require absolute compliance to achieve acceptable outcomes. He was not comforted by strict monitoring conditions which he regarded as essential, but in effect, after the fact and thus incapable of preventing an exceedance in the first place. He was even more forthright in his evidence in chief. He told Mr Hughes that even with all these conditions in place he did not think it could be said that there would be no unacceptable impact on the residential amenity by reason of dust. He summarised his position in this way:

> "…the quarry, to technically comply with the dust emission, or the dust criteria, requires extremely high level of dust control, which needs to be maintained at all times. This high level of control, coupled with the fact that local – local residences are within two or three hundred metres of the quarry,

> for me to not have adequate confidence to agree that the quarry can operate without adverse impact at times."

[88] To demonstrate why, in the context of this appeal, I prefer Mr King's lack of optimism to Dr D'Abreton's qualified support, I need only mention one aspect of the extensive and onerous conditions agreed by the experts. At the joint meeting of experts held 17 November 2006 one of the mitigating measures agreed was:

> "Crusher and screening plant to be fully enclosed and operated under negative pressure with all extracted air passed through a dust filter extraction unit prior to discharge."

[89] Dr D'Abreton was not a party to this agreement but the Mansells have agreed to such a condition. He agrees with Mr King that because of the very nature of the crushing and screening operation i.e. there has to be a big opening to receive raw materials and outlets for conveyor belts to transfer crushed rock to stockpiles; it will be "very very difficult" to maintain negative pressure. He says however that he has not premised his modelling on any achievement of negative pressure inside the crushing and screening plant. This point demonstrates (by reference to only one of the many onerous conditions) the point made earlier in relation to Mr King's more cautious approach given the close proximity of nearby residences and the obvious capacity of this aspect of the quarry to produce dust.

[90] The Court is left in the same state of doubt as it is in relation to noise – the experts say it is technically feasible but given the reservations expressed in the evidence that I have preferred it could not be said on the balance of probabilities that even with the onerous conditions suggested there would be no unacceptable impacts on nearby residents as a result of dust.

VIBRATIONS

[91] Hard rock can only be extracted effectively by controlled blasting using explosives. Dr John Heilig gave expert blasting evidence on behalf of the Mansells and Dr Cameron McKenzie was called to give evidence on behalf of the Council. The EPA amended conditions are set out at p10 of the changed response dated 17 August 2006 which is behind Tab 19 in Ex1 Vol. 1. In the Code for Extractive Industry in Vol. 4 of MP2K, under "Element: Management of Operations, Performance Criteria" p2 states:

> "The siting and extent of operations must allow for an area to be provided around the perimeter of the site to effectively buffer surrounding areas from noise, dust and visual impacts."

[92] And Acceptable Measure A2.1:

> "No hard rock extraction and processing activities involving blasting are carried out within 10 meters of any boundary of the site or within 500 metres of any existing or approved noise sensitive place on surrounding land."

[93] If approved, there will be a number of residences (11 according to Dr McKenzie) within that 500m buffer, so Dr Heilig has designed conditions to which the Mansells agree, that will once again be the most onerous either expert has ever seen for a start up quarry.

[94] To cater for this obviously important difficulty, Dr Heilig has designed an operation that is unique in the experience of both experts involving a much reduced scale of blasting to that normally used in quarry blasting. To cater for adverse amenity impacts due to vibration and over pressure from blasting, Dr Heilig's design allows for more intense blasting in areas remote from residences, and smaller scale blasting in areas closer. In their joint experts report to the Court (Ex25) the experts agree (in relation to vibration):

> "…there remains doubt as to whether these charge configurations can comply with EPA Ecoaccess Guidelines. The "Other Methods Extraction" or "No Blasting" zone identified in Figure 3 of the Heilig and Partners May 2007 report may have a radius greater than the 200 metres anticipated in that report, and could be as large as 300 metres for the specified charge configurations, in which case recovery of the resource may be significantly affected by the requirement to comply with EPA Permit Approval Conditions."

And (in relation to overpressure impacts):

> "…there is also uncertainty as to the proposed quarry's ability to comply with normal EPA overpressure limits, even with the reduced scale of blasting as proposed in the Heilig and Partners report. The reduced charge configurations proposed in the Heilig and Partners report will reduce impacts, but on the basis of impacts from similar activities at the Boral Coolum quarry, compliance is uncertain."

[95] Dr Heilig agreed (in cross examination by Mr Hughes SC) that the smaller benches and more charges (to cater for the number of residences within the 500m buffer zone) will increase the probability of flyrock.

[96] The Mansells and the EPA accept that the proposed EPA conditions set out in Document 19 should be amended to allow for the standard preferred by both experts set out in the first paragraph of Ex25 namely:

> "Queensland Government Ecoaccess Guidline for Noise and Vibration from Blasting (at least 9 out of 10 consecutive impacts <115dBL).

The Mansells have also agreed that there be no blasting on a Saturday.

[97] Dr Heilig did seem to hesitate about accepting this as the appropriate standard in his oral evidence, but given the EPA's acceptance of it, and my preference for Dr McKenzie's evidence on this point (he told me that he has been involved in four quarrying extension applications in the last year where this more stringent standard (to that mentioned in the changed EPA conditions) was applied) is the standard that should be adopted given the proximity of existing residences.

[98] As with the ambient noise data, there has been no testing on the actual site for the purposes of predicting vibration impact, however Dr McKenzie has used data from the nearby Boral quarry which both experts accept as the best evidence to predict impacts if the quarry is to proceed.

[99] While acknowledging that the reduced charge configuration would certainly reduce vibration and overpressure impacts, Dr McKenzie expressed significant reservations about whether, even with these very unusual measures, and given the many practical difficulties that can lead to error (particularly so given the much greater number of charges now proposed), acceptable impacts i.e. as against the standard, could be achieved throughout the life of the quarry. I share Dr McKenzie's reservations. He was a most impressive expert witness whose experience in quarry and mining operations in this country and overseas is extensive indeed. On a number of occasions he came back to the importance of buffers as a very important factor in reducing impacts from blasting on residences.

[100] In relation to blasting evidence, probably most time was taken up with the issue of flyrock. This is because although flyrock incidents are rare, (Dr McKenzie told Mr Cochrane when he initially gave evidence on 25 May 07 that he was aware of eight incidents only in 20 years work) flyrock has the potential not only to cause damage to property but to injure and kill nearby human beings. As Dr McKenzie observes (at para 46 of Ex14):

> "Flyrock can generally be controlled by adoption of good practices, and meticulous care while loading explosives into blastholes, as outlined in the Heilig & Partners report. However, it is impossible to guarantee that an accident will not occur, and it is unusual to see long term projects such as a quarry operating with residents less than 300 meters from blasting faces. Unknown rock conditions are probably the greatest cause of flyrock. The best method to avoid flyrock injury and damage is to not be there – i.e., because flyrock represents a potentially life-threatening threat, a two-pronged approach is recommended, consisting of adequate buffering and meticulous control over charging. This two-pronged approach is consistent with extraction industry risk management principles."

[101] The experts diverged somewhat as to the source of flyrock in a blast. Dr Heilig's evidence was that the most danger comes from the face of the quarry during an explosion. Dr McKenzie says it comes from the collar of the blast which is actually on the bench.

[102] The problem for the Mansells here is that in attempting to present a design that will reduce amenity impacts from overpressure and/or vibration by having an increased number of blastholes, this potentially increases the risk of flyrock.

[103] Again the recommended and desirable 500 metre buffer around a quarry operation (which is absent here) looms large in the expert evidence. In Ex25 they say:

> "The EPA recommended buffer distance of 500 metres around quarry operations is considered "safe" as regards flyrock risk, and many operations operate with distances around 300 metres. Fewer long-term blasting operations regularly involve blasting at distances of 200 metres or less from residences. Many incidents have occurred in which large rock fragments have been projected much greater distances. As the buffer distance is reduced, the need for meticulous procedures in explosives charging increases, and the tolerance to errors can become very narrow."

[104] During the adjournment a number of issues arose which lead to the recall of Dr McKenzie on 17 August 2007. On 29 June 2007 a serious flyrock incident occurred at the Waihi Gold Mine in New Zealand which was investigated by both Dr McKenzie and Dr Heilig. During blasting using similar levels of explosives to that proposed here, a 2kg piece of rock flew 200 metres and crashed through the roof of a residence narrowly missing the occupants. Both experts identified the reason for the incident as insufficient stemming i.e., the section of the blast hole above the explosive was not completely filled with gravel, or the explosive was too near the surface. Dr Heilig swore another affidavit which is Ex34 in the proceedings and he deals with the incident in paragraph 18 of the affidavit. He was not required for cross examination so I can comfortably accept his evidence on this point. As he notes, the blast designs he proposes for this quarry are even more conservative than those proposed by Dr McKenzie to avoid further incidents at this mine. The gold mine is depicted in Ex30 and it is immediately obvious that it is a long established open cut mine in the centre of a small town so comparisons are difficult.

[105] The real issue in this case is the difference in opinion between the experts as to whether or not meticulous care and attention to detail throughout the life of the quarry can avoid flyrock incidents given the proximity (particularly of the two closest residents) to the blasting source.

[106] Dr McKenzie has concerns that it will not and Dr Heilig believes it can be done.

[107] The other issue that arose on 17 August 2007 in the recall of Dr McKenzie, was an alleged discrepancy between his evidence to me on this point, and some statements he made in a report in support of a quarry extension at Petrie. Dr Heilig apparently discovered this report in the break and brought it to the attention of the solicitor for the Mansells and Dr McKenzie was recalled to respond, and to discuss the Waihi mine flyrock incident.

[108] In a report he authored in June 2006 Dr McKenzie said this (Ex34):

> "Although flyrock projection distances can be large, flyrock can be eliminated through meticulous care and attention to detail. Boral, and its explosive supplier Orica, operate the West Burleigh quarry with blasting occurring to within approximately 60 metres of the M1 Motorway, without the need for road closure, and without flyrock incidents. The procedures and controls which have allowed this site to successfully operate adjacent to a major interstate highway will be applied to the Petrie Quarry when operating within similar distances of Dayboro Road."

[109] Dr Heilig says in his affidavit (Ex34):

> "8. It is my opinion that some of the assertions in the report seem to contradict the evidence provided by Dr Cameron McKenzie, on 25 May 2007.
> 9. It is my opinion that all of the assertions in the report support the statements made in respect of my report on the proposed Zgrajewski Road quarry.
> 10. Further, it is my opinion that none of the assertions in the report contradict any of the statements made in my report for the proposed Zgrajewski Road quarry."

[110] No objection was made to these obviously adversarial observations which clearly are not within his province as an expert on blasting so I will take them into account with that observation in mind.

[111] Dr McKenzie did not accept there was a conflict, stating that the nearest house at Petrie was 500 metres, here it is 200 metres. He conceded that the Petrie quarry is 200 metres from Dayboro Road. In this context, Dr McKenzie pointed out that in relation to the Boral Quarry at Petrie, given its history, there has accumulated a large amount of data which makes it much easier to predict impacts whereas here there is no site specific data i.e. for the purposes of their opinions the experts used data from the nearby Boral Quarry.

[112] In my opinion, the differences between the experts are more imagined than real when one has regard to the totality of their evidence. There is their agreed statement in Ex25 which I have set out above and, in any event, Dr Heilig properly conceded that even with the best practices and meticulous care (as he proposes here) there can be no guarantee that there can be no flyrock. The real difference between them is that he is of the opinion that with his designs the level of risk can be reduced to an acceptable level whereas Dr McKenzie disagrees because of his concerns particularly relating to the two nearest residences.

[113] What Dr McKenzie also said in his further evidence on 17 August 2007 was that when he and Dr Heilig investigated the recent Waihi Mine incident they discovered that there had been an earlier incident many years ago as a result of which the operator introduced systems to avoid a repeat which had now failed because of human error.

[114] I prefer Dr McKenzie's more cautious approach here because of the close proximity of the two residences on the eastern boundary. Kelly O'Shea, who is

one of the closest home owners, expressed great fear about flyrock and was not comforted by the expert's conditions relating to notifying the residents of blasting.

[115] Dust is also a consequence of blasting and the Mansells propose extensive measures to attenuate dust effects from blasting which will (in aggregate) only occur for 4 seconds per month, according to Dr Heilig and I accept that these measures will keep amenity impacts from dust associated with blasting to acceptable levels.

VISUAL AND CHARACTER AMENITY

[116] Amenity issues loom large in this appeal because of the tension reflected in the planning documents as a result of the incompatibility of extractive industry and urban development. There is no doubt that the amenity enjoyed by residents of this area is very high. The site is in an area which presents as a quiet rural valley, and the visual amenity and views enjoyed by the residents at the northern end of Musgrave Drive is of a very high quality. A number of residents, including some from Musgrave Drive gave evidence, and Mr Allan Chenowith gave expert opinion evidence on behalf of the Mansells. Amenity includes not only an assessment of impacts based on the opinion of experts in noise, dust etc but also includes the subjective perception of residents in the immediate locality. As the cases show, the concept in planning law has a wide and flexible meaning.

[117] In *Broad v Brisbane City Council & The Baptist Union of Queensland* [1986] 2 Qd R 317, de Jersey J (as the Chief Justice then was) said (at 326):

> "There is no doubt that the concept of amenity is wide and flexible. In my view it may in a particular case embrace not only the effect of a place on the senses, but also the resident's subjective perception of his locality. Knowing the use to which a particular site is or may be put, may affect one's perception of amenity."

[118] In that same case, his Honour quoted with approval (at 326) some observations of Sugerman J in *Vacuum Oil Company Pty Ltd v Ashfield Municipal Council* (1956) 2 LGRA 8 at 11 which I respectfully adopt in relation to the relevant evidence in this case:

> "(Amenity) relates also to the preservation of such characteristics of a neighbourhood as make it pleasing in appearance as well to the passer-by as to the resident, and as well to those across the road, who may be unaffected by (impacts), as to the adjoining and other occupiers on the same side. 'Amenity' may be taken to express that element in the appearance or layout of town and country which makes for a comfortable and pleasant life rather than a mere existence."

[119] At 319 of the same decision, Thomas J (as his Honour then was) said, after referring to part of the above quoted observations of Sugerman J:

> "… the ultimate enquiry is an objective one at the same time recognising that it involves wide-ranging and subtle criteria that may affect different individuals in different ways. It is inevitable that individual perceptions be received and evaluated in the course of ascertaining what the amenity is in a particular neighbourhood and what effect the relevant proposal will have upon it."

[120] In *Arksmead Pty Ltd v Council of the City of Gold Coast and Ors* [1999] QPELR 322 (a case in which the proposal under consideration was for a mixed development and tavern in Mudgeeraba in the Gold Coast Hinterland) Brabazon DCJ said (at 333):

> "Amenity does not include just the physical appearance of the surrounding. It also includes the emotional or sentimental feelings that people may have about a place."

[121] On appeal, his Honour's statement was approved by the Court of Appeal in *Arksmead Pty Ltd v Council of the City of Gold Coast and Ors* [2000] QPELR 285 at 286.

[122] Not surprisingly the evidence of the residents is all one way. It has to be observed that all the residents who gave evidence purchased their properties at a time when the site in the applicable planning scheme was identified as containing an area of Extractive Industry Resource and none made enquiries that would have identified this fact. The weight to be given to their universal fear that the amenity of the area will be adversely changed permanently if the quarry proceeds must be assessed in that light.

[123] This takes up the concept of expectations referred to by Mr Cochrane in his submission by reference to the *Suncoast Quarries* case and *Berry & Ors v Caboolture Shire Council & Johnston* [2002] QPELR 96 and *McKellar Development Corporation Pty Ltd v Mulgrave Shire Councl & Anor* (1985) QPLR 234. As Mr Trotter observes, expectations must be based on the whole of the planning scheme, and I agree with him that even in 2002 when the application was made, a person reviewing the whole of the scheme might well have concluded that because of the many references to incompatibility between extractive industry and residential development, it would be unlikely that a quarry would be approved on the site.

[124] The Council makes the same submission by reference to both the relevant planning scheme extracts at the time of the application and the changes since, in particular the exclusion of the site as a KRA from the SPPEI, and the removal of the extractive industry designation from the site in August 2006 consequent upon Council's decision in March 2005 at the time it decided the application. Any assessment as at the time of the application would have required impact assessment thus involving the residents. I agree with both the Council and the co-respondents that even absent the important planning decisions since then, reasonable expectations at that time would not be to assume that the balancing exercise necessary, between impacts on nearby residential development and the

protecting of a valuable hard rock resource, would necessarily favour the development of the quarry over the protection of residential amenity.

[125] The most significant impact on visual amenity will occur in relation to the residents at the northern end of Musgrave Drive. In the conclusion in his report at 5.2 Mr Chenoweth puts it this way:

> "The main impacts will be on part of Stage 5 of the Coolum Chase estate, and in particular on approximately 10 hilltop houses at the northern end of Musgrave Drive, where proposed quarrying will have a significant detrimental impact on the visual amenity. However these impacts will be mainly temporary during the 35 year period of quarrying, and will be considerably ameliorated by the 'best practice' setbacks, screening, rehabilitation, quarry staging, coating of bare rock faces and revegetation. It should be noted that these same houses (and several others on Musgrave Drive) also overlook forested hills identified in draft State Planning Policy as a KRA, and the measures proposed for the subject land may serve as a model for visual impact mitigation for future quarries in the area."

[126] His reference to the Payne Land is somewhat misleading as the KRA map reproduced earlier in these reasons demonstrates. Because of the topography of the area the most significantly affected residences here will not overlook any future quarry development on that site, and in any event, the designated buffers around the Payne Land may tend to significantly ameliorate visual amenity impacts for the residences which lie to the south of the residences most affected in this regard by the proposal. His reference to "main" impacts is also somewhat misleading, as although it is correct that the mining of the quarry in Stage 5 will produce the most effect on visual amenity, there is no doubt that as the quarry develops from Stage 1 to Stage 4 this too will very significantly affect the high level of visual amenity enjoyed by these residents.

[127] Another statement made by Mr Chenoweth in this part of his report to the effect that "these impacts will be mainly temporary during the 35 year period of the quarrying…" is the sort of statement made by experts from time to time that understandably, in my view, leads the people most affected to lack confidence in the predictions of such experts. This lack of confidence is reflected in the statement of two of the residents of Musgrave Drive (Glenda Davis and Margaret Jeffries) who gave evidence on behalf of the 2nd – 8th co-respondents. Mrs Davis expressed it in this way in her statement:

> "There has been discussion in this courtroom about buffer zones & re-vegetation. While such a buffer zone may screen the quarry from view to those travelling along Zgrajewski Road, it will make no difference to the outlook from Musgrave Drive. From our elevated position we will be overlooking a quarry, and there is no way to disguise that fact. The suggestion of spraying the exposed rock face with bitumen is abhorrent to everyone I have spoken to!"

[128] During the site inspection I was able to view the site from a number of these residences and there is no doubt that there will be a significant impact on visual amenity for the residents at the northern end of Musgrave Drive from a very early stage in the development of the quarry.

[129] Mr Chenoweth's use of the word "temporary" in part related to his strong disagreement with the montages prepared by Mark Elliott, an architectural illustrator, which depicts the proposed quarry at various stages of its life from designated viewing points. Mr Elliott's "Digital Photomontage Methodology Report" dated May 2007 is Attachment F to Mr Schomburgk's report Ex17. Mr Chenoweth's criticisms were mainly directed at Fig03 which is a view from a Musgrave Drive residence after the quarry has been fully developed. In his evidence, Mr Elliott made rough changes to the photomontage to take into account the amended proposal to remove part of Stage 5 and Stage 6.

[130] Mr Cochrane (and Mr Chenoweth) made what I think are some legitimate criticisms of Mr Elliott's montage particularly the depiction of the quarry floor as white. To appear as it does would also require direct sunlight and Mr Elliott conceded that although he selected the colours for his montage from the Boral quarry he did not know the actual colour of the rock extracted from the site. On the other hand, Mr Chenoweth's response in Ex31, based on rehabilitation etc. at the end of the life of the quarry is also, in my view, quite unrealistic. To depict a fully developed quarry on a sloping site such as this, as blending almost completely into the surrounding landscape, as Mr Chenoweth's drawing does, is to simply ignore reality. In my view the quarry will appear at the end of its life to be somewhere between the montage prepared by Mr Elliott and Mr Chenoweth's response. It will constitute not a temporary but a permanent significant impact on the visual amenity of those residents in the northern part of Musgrave Drive most affected by the proposal.

[131] There will undoubtedly also be significantly reduced character amenity to the closer residents on Zgrajewski Road. Anna Nolan lives at 105 Zgrajewski Road directly opposite the quarry site. Her home which is apparently the home of the original Zgrajewski family is being restored and is quite close to the road. Although the relocation of the entrance to the quarry will reduce impacts on her, it is clear that the amenity of herself and her family will be significantly affected if the quarry proceeds. The same observation applies to the other residents of Zgrajewski Road, and to the residents in Musgrave Drive which overlook the site.

TRAFFIC

[132] The issues in dispute between the experts (Mr Burgess for the Mansells and Mr Holland for Council) have largely been resolved by the letter from their solicitor to Council dated 7 August 2007 (Ex33). I am satisfied on the basis of the evidence, that the proposed haul route be sealed and that the traffic conditions set out at pp7-8 of that letter are appropriate. It is desirable that Council act to reduce the speed limit on Zgrajewski Road to address the concerns expressed by Mr Holland about sight distances as a result of moving the entrance to the quarry to the west.

THE PRECAUTIONARY PRINCIPLE

[133] Sections 1.2.3 of IPA sets out certain matters to be taken into account for the purpose of advancing its purposes. These include (relevantly to this appeal):

> "(a) ensuring decision-making processes –
>
> …
>
> (iii) apply the precautionary principle
>
> …
>
> (c) avoiding, if practicable, or otherwise lessening, adverse environmental effects of development …"

[134] I agree with Mr Trotter that the principle does come into play here but only in the sense that the Schedule 10 definition of "environment" includes:

> "…(c) those qualities and characteristics of locations … that contribute to their … amenity, harmony, and sense of community; …

[135] In other words, it only comes into play in this case in a very limited way.

[136] Section 1.2.3(2) sets out a definition of the precautionary principle:

> "For subsection (1)(a)(iii), the precautionary principle is the principle that, if there are threats of serious or irreversible environmental damage, careful evaluation must be made to avoid wherever practicable serious or irreversible environmental damage including, if appropriate, assessing risk weighted consequences of various options."

[137] The precautionary principle is not concerned with "bare possibilities" of serious or irreversible environmental damage (per McLauchlan QC DCJ in *Sol Theo as Trustee for the Solon Theo Family Trust v. Caboolture Shire Council & Anor* [2001] QPELR 101 at 109); nor is the appellant required to prove the complete absence of any likely future environmental harm (per Quirk DCJ in *GFW Gelatine International Limited v. Beaudesert Shire Council & Ors* [1993] QPLR 342 at 353). These cases, and many others establish that where the precautionary principle is applied, it is not necessary for an appellant to prove with scientific certainty the absence of any possibility of serious environmental harm in the future. It comes into play here because of the real doubt, based on the evidence I have preferred that the proposal with all the onerous conditions, can proceed without unacceptable impacts, in relation to noise, air, flyrock and visual and character amenity.

CONFLICT WITH THE PLANNING SCHEME

[138] As I have noted, the proposal has undergone a number of significant changes both after the appeal was lodged and during the course of the hearing, all designed undoubtedly to lessen the adverse impacts on surrounding residential development. Despite the obviously sincere efforts of the Mansells to deal with these impacts by

acceptance of conditions more onerous than any expert has previously encountered which call up (in the case of noise impacts) technologies not yet used or tested in this country and technologies not yet in existence and which resort to management plans that call for extraordinary diligence and "worlds best practice" to bring impacts to acceptable levels; on the basis of the expert evidence that I have preferred I am not satisfied that the amended proposal will not have unacceptable impact on amenity particularly in relation to noise, dust, blasting, and visual and character. In my view, the proposal therefore does conflict with the planning scheme.

[139] The respondent (and co-respondents by election) argue that the proposal compromises the achievement of a specified desired environmental outcome (DEO) for the area and also conflicts with the planning scheme. This is a reference to s3.5.14 of the IPA which deals with decision making for impact assessable applications, and states relevantly:

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

[140] In *Woolworths Ltd v Maryborough City Council & Rokay Pty Ltd* [2006] QPELR 63, Fryberg J (with whom the President and Holmes J, as her Honour then was, agreed) dealt with the meaning of the words "conflict" and "compromise" in this context (at 23):

> ""Conflict" in this context means to be at variance or disagree with. It describes a quality of a relationship between the subject (the decision) and a part of the predicate (the scheme). Unlike "compromise" in para (a), it implies no particular impact by a subject upon an object. A determination that there has been a breach of the requirement that "the assessment manager's decision must not … conflict with the planning scheme" requires the identification of the decision, the identification of some part or parts of the scheme with which the decision might be said to conflict and a decision whether the former conflicts with the latter. Only if such a determination has been made is it necessary to consider whether there are sufficient planning grounds to justify the decision."

[141] The decision making process contemplated by this provision is that mandated by the Court of Appeal in *Weightman v Gold Coast City Council* [2003] 2 Qd.R 441 at 453:

> "The proposal must be refused in such a situation if there are not sufficient planning grounds to justify the approval *despite the conflict*. The discretion, as White J observed in *Grosser v. Council of the City of the Gold Coast*, is couched in negative terms, that is, the application must be dismissed unless there are sufficient grounds. This is a mandatory requirement.

> If there is a conflict, then the application must be rejected unless there are sufficient planning grounds to justify its approval despite the conflict.
>
> The primary judge wrongly held that it was directory only.
>
> In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s4.4(5A)(b) of the P & E Act, the decision maker should:
>
> 1. examine the nature and extent of the conflict;
> 2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;
> 3. determine whether the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict.
>
> The first task required of the decision maker, as the learned primary judge recognised, is to consider the nature and extent of the conflict. The conflict may be minor or major in nature or indeed anywhere on the continuum between those two extremes."

[142] In *Woolworths* (at para 25) Fryberg J said:

> "If s 3.5.14(2)(b) is dealt with in the sequence suggested by its form the identity of any conflicts between the decision and the scheme will have been established by the time the question of justification comes to be considered. That question will require the identification of planning grounds which might justify the decision and the determination of their sufficiency to do so. In making that determination regard will doubtless be had to the nature and extent of the conflict. That is substantially the process approved by this Court in *Weightman v Gold Coast City Council* in relation to a previous section. It would, however, be a mistake to treat the relevant passage in that judgment as if it were a code for the determination of justification."

[143] It follows that in applying the so called "Weightman formula", I should proceed in the manner mandated by the later Court of Appeal decision of *Woolworths*.

[144] Mr Trotter submits that as the proposal will dramatically change the appearance of the area in an adverse way, it compromises the achievements of DEO 1 – Environmental Management, which is in these terms:

> "The Shire's unique natural, open space, climatic, rural and scenic attributes are protected to maintain biodiversity, ecological processes, and visually attractive and varied landscapes and managed so as to provide a sustainable focus and setting for the Shire's community and economic development. This includes:

- The variety of ecosystems and the species they support being maintained or enhanced,
- Prominent natural landscape elements such as escarpments, ridgelines, beaches, headlands and mountain peaks, which serve as distinctive visual landmarks within the Shire, being protected,
- The Maroochy, Mooloolah and Mary River systems and other water resources, being protected,
- High standards of water and air quality, and acceptable noise levels, being maintained, and
- Premises which are sensitively sited and designed having regard to local climatic conditions, vegetation cover and topography."

[145] The respondent's submission simply adopts this submission without any embellishment. It is accepted that the approach of his Honour Judge Wilson SC in *Koerner & Ors v Maroochy Shire Council & J.T. Barnes* [2004] QPELR 211 is correct. His Honour said (at 215):

> "The DEO's simply form part of all of the relevant elements of the Plan which the Court must consider, including those matters to which the scheme itself pays significant obeisance: community need, and demand; the desirability of, and possible benefits from, the proposal; the impact it would have; and, of course, the prevailing realities – whether development in the area has advanced, or will advance, in accordance with the Plan."
>
> "There is … a distinction between compromising the achievement of DEOs, and conflicts with the Planning Scheme. For a development to compromise the achievement of a DEO there would, it is clear, have to be an obvious and significant cutting across of that DEO in such a manner that its achievement on a Shire wide basis had plainly been compromised."

[146] Applying that approach, I am satisfied that the proposal does not obviously and significantly cut across the DEO in such a manner that its achievement on a Shire-wide basis has been compromised.

PLANNING NEED

[147] The appellant's principal argument that the proposal does not conflict with the planning scheme has been rejected by me and I now turn to need which was the only discrete planning ground relied on which, in terms of s3.5.14(2)(b) could be said to justify approval notwithstanding the conflict.

[148] The concept of planning need has been analysed by Courts on many occasions and essentially is encapsulated in the following extract from *Skateway Pty Ltd v Brisbane City Council & Ors* [1980] QPLR 245 at 249-250:

> "In ordinary parlance, one hears reference to phrases such as, 'a person in need', which conveys as a matter of objective fact the idea that that person, if not in distress, is nonetheless deprived to the extent that his wellbeing is at

> risk. One cannot sensibly translate that concept into the town planning context. Need in planning terms is a relative concept…(it) is firstly a community need, not in the sense that there is an element of urgent community necessity for a facility or for land so zoned on which the facility can be provided. Rather, it connotes the idea that the physical wellbeing of a community or some part of it can be better and more conveniently served by providing the means for ensuring that the provision of the facility, subject always to other considerations of the town planning kind, including all considerations that the wellbeing of a community also depends significantly on an acceptable residential amenity."

[149] As the quote from *Skateway* demonstrates, the concept does not mean pressing or critical need or widespread desire or anything of that nature.[1]

[150] The Mansells relied on the evidence of geologist Mr Andrew Waltho to establish the extent of the resource and its value as hard rock. He had only "walked over" part of the Payne Land deposit so was unable to provide any useful comparisons. Some comparisons can be drawn from the various geological reports annexed to Mr Dugald Gray's report (Ex5) to which I have earlier referred.

[151] One of the Mansell Group of companies owns and operates one of the quarries which presently supplies the Sunshine Coast. This is the Parklands quarry which is on the northern outskirts of Nambour and west of the Bruce Highway. The Court inspected the quarry on the first day of the hearing and it is depicted in some photographs controversially produced by one of the co-respondents (Ex37). Parklands has operated as a quarry for many decades and is reaching the end of its productive life. According to the amended Table 7 at p29 of Mr Gray's report, it produces between 200,000 - 250,000 tonnes of aggregates, roadbase, and oversized rock products per annum and is expected to be depleted in less than three years. A representative of the Parklands quarry's main customer, Mr Mark Finney of Hy-Tech Industries gave evidence on behalf of the Mansells on this issue of need. His company supplies 25 per cent of the Sunshine Coast market and presently obtains raw material for it's products from a number of sources some of which are outside the Sunshine Coast area. Presently, his company obtains approximately half of its material from Parklands, although he modified that somewhat in his cross-examination. The company does however, have a strong aggregate supply relationship with the other main source of raw material, the Bracalba quarry, operated by the Brisbane City Council outside the area. There is also a concrete plant operated by one of the Mansell group of companies from the Bracalba quarry.

[152] Mr Gray's Table 7 is an instructive document as it summarises in tabular form both the operating hard rock quarries for the Northern Sunshine Coast market and also the potential hard rock reserves including the site. I accept his evidence that by reference to that table, the proposed quarry will potentially be able to supply about seven percent of the Sunshine Coast market. As against that, the table shows a number of significant and existing quarries with large reserves into the future

[1] *Cutprice Stores Retailers & Ors v Caboolture Shire Council* [1984] QPLR 126 at 131

and well beyond the expected life of the proposed quarry. There is no doubt that the Sunshine Coast market is expanding and I accept the evidence of Mr Finney and Mr Gray that it is, and will remain, a quite competitive market. The issue of need also has to be considered in the light of the presently untapped reserve on the Payne Land which is potentially available for exploration in the future, and which, for the reasons I have identified has more planning support than this site. On the limited evidence available, it probably also has larger reserves of hard rock.

[153] While it is true that the approval would clearly enhance the commercial arrangement between the Mansells and Hy-tec, I am unable to conclude that the need identified on the evidence is such that it would justify approval in the face of the conflict that I have earlier identified.

CONCLUSION

[154] It follows that the appeal should be dismissed and I so order.