PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Bennington & Ors v Sunshine Coast Regional Council & Anor* [2019] QPEC 11
PARTIES:	**KATHERINE BENNINGTON, ROWAN STANLEY, DEON LOCKE, REBECCA WESTON, GAVIN WESTON, PETER WATKINS, CAROL WATKINS, VICKY BROWNSDON, JOHN BROWNSDON, KIRRILY AUCHTER, RICHARD AUCHTER, JANET ROSENDALE, PETER ROSENDALE, LEAH SMITH, JOHN ISON, PHILIP BURKE, LINNY MCBEAN, ROBYN CROMMELIN, NATHAN RATCLIFFE, CHARLES TOMS, MICHELLE LOCKE, MICHAEL LOCKE, SHARYN HAIR, MICHAEL KAMSMA, HEATHER WATT AND GEORGE WATT** **(appellants)** **v** **SUNSHINE COAST REGIONAL COUNCIL** **(respondent)** **and** **SURFING WORLD SUNSHINE COAST PTY LTD** **(co-respondent)**
FILE NO/S:	D 129 of 2016
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court at Maroochydore
DELIVERED ON:	29 March 2019
DELIVERED AT:	Maroochydore
HEARING DATES:	4 December 2017 to 7 December 2017 (with further written submissions received up to 30 July 2018)
JUDGE:	Long SC DCJ
ORDER:	**The decision of the respondent, as set out in the Negotiated Decision Notice dated 22 August 2016, is set aside and replaced by the decision that the development application made by the co-respondent on 30 April 2015, is refused.**

CATCHWORDS: ENVIRONMENT AND PLANNING – APPEAL AGAINST APPROVAL OF DEVELOPMENT APPLICATION– where the co-respondent sought and obtained approval from the respondent for a material change of use to develop a service station and two convenience restaurants – where the appellants made a submission about the development application to the respondent – where the respondent and co-respondent concede that the proposed development conflicts with Maroochy Plan 2000 – whether the conflict is significant and serious – whether there are sufficient grounds to justify the decision despite the conflict with the planning scheme

LEGISLATION: *Local Government (Planning and Environment) Act 1990* s 4.4(5A)
Planning Act 2016 ss 45, 311
Sustainable Planning Act 2009 ss 314, 324, 326, 335, 493, 495

CASES: *Australian Capital Holdings Pty Ltd & Ors v Mackay City Council* [2008] QCA 157
Bell v Brisbane City Council [2017] QPEC 026
Bell v Brisbane City Council & Ors [2018] QCA 84
Broad v Brisbane City Council & Anor (1986) 2 Qd R 317
Clark v Cook Shire Council [2007] QCA 139
Elan Capital Corporation Pty Ltd v Brisbane City Council [1990] QPLR 209
Gillion Pty Ltd v Scenic Rim Regional Council [2013] QPELR 711
Glenella Estates Pty Ltd v Mackay Regional Council & Ors [2010] QPEC 132
Grosser v Gold Coast City Council (2001) 117 LGERA 153
King of Gifts v Redland City Council [2018] QPELR 187
Isgro v Gold Coast City Council & Anor [2003] QPELR 414
Lockyer Valley Regional Council v Westlink & Ors (2011) 185 LGERA 63
Parmac Investments Pty Ltd v Brisbane City Council [2018] QPEC 32
Peet Flagstone City Pty Ltd v Logan City Council & Anor [2016] QPELR 538
Prime Group Properties v Brisbane City Council [1994] QPLR 153
Prime Group Properties Limited v Caloundra City Council & Ors [1995] QPLR 147
Vanglow Pty Ltd v Council of the Shire of Albert [1991] QPLR 68
William McEwans Pty Ltd v Brisbane City Council (1981) 2 APA 165
Woolworths Limited v Maryborough City Council (No. 2) (2006) 1 Qd R 273
Zappala Family Co. Pty Ltd v Brisbane City Council & Ors (2014) 201 LGERA 82

COUNSEL:	M. Williamson, with H. Stephanos for the appellants
	C. Hughes QC, with M. Batty for the respondent
	S. M. Ure (A. Skoien re: further written submissions) for the co-respondent
SOLICITORS:	Ray Barber Solicitor for the appellants
	Sunshine Coast Regional Council Legal Unit for the respondent
	Butler McDermott Lawyers for the co-respondent

Introduction

[1] Pursuant to a notice of appeal filed on 22 September 2016 the appellants seek to appeal against the decision of the respondent to approve a development application for a development permit for a material change of use of premises (service station and two convenience restaurants) in respect of land described as lot 1 and 2 on RP175157 and lot 3 on SP168134 and situated at 797-833 David Low Way, Mudjimba ("the Land"). The appellants were adverse submitters in the consideration of the development application by the respondent, and the primary relief sought is that the appeal be allowed and the development application be refused.

[2] The Land is an irregular shaped lot with frontage of 340 metres to David Low Way and has an area of 7.006 hectares. It is improved by an existing house (located on the northern portion of lot 3) and contains a building platform that is clear of vegetation. The proposed development is limited to the northern part of the Land, involving an area of approximately 1.08 hectares.

[3] As the development application was lodged, by the co-respondent, with the respondent on 18 May 2015 and it is common ground that it was for impact assessable development and as a consequence of a request made on 4 March 2015 and approved on 31 March 2015, the application was and consequently is to be assessed by this Court pursuant to the superseded planning scheme, Maroochy Plan 2000 ("MP 2000").[1] Moreover, the appeal is to be determined by reference to the relevant provisions of the now repealed *Sustainable Planning Act 2009* ("*SPA*").[2]

The Issues

[4] Although, in these proceedings the co-respondent, as the originating applicant for development approval, bears the onus of persuasion,[3] the appellants being the makers of properly made submissions objecting to the proposed development have, consistently with common practice and in support of their appeal, set out in a

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1 Being a version of MP 2000 that was in effect from 16 September 2013 to 20 May 2014: see Ex. 1, Vol. 1, p. 18.

2 See s 311(1)(a) & (2) of *Planning Act* 2016 and cf: s 76(2) of the *Planning and Environment Court Act* 2016.

3 S 493(2) of SPA.

document entitled "amended consolidated reasons for refusal" particulars of the issues or contentions raised in support of their appeal.

[5] First it is contended that the decision to approve the proposed development conflicts with MP 2000 and in these proceedings so much is not in contention. However there are significant issues as to the identification of the nature and extent of that conflict. And for the appellants, a precis of the contention as why the application should be refused, is set out as follows:

> "(a) a decision to approve the application would plainly conflict with MP 2000;
>
> (b) the plainly identified conflict with MP 2000 is characterised as being significant and serious;
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> (c) there are no grounds of sufficient weight to warrant approval of the application notwithstanding the significant and serious conflict with MP 2000; and
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> (d) in any event a decision to approve the application would be contrary to well established principle – the Co-respondent's case involves an invitation for this Court to substitute its view as to an appropriate land use planning strategy in lieu of a planning strategy which was clearly articulated by Council in MP 2000."[4]

[6] The development application (superseded planning scheme) was assessed and decided under SPA. The Negotiated Decision Notice is dated 22 August 2016.[5] This appeal was filed on 22 September 2016. Accordingly, this appeal:

(a) proceeds under *SPA*;[6]

(b) by way of a hearing anew;[7]

(c) must be decided under MP 2000, with the Court disregarding the planning scheme in force when the application was made;[8] and

(d) proceeds pursuant to s 314, with the decision in accordance with s 324 and s 326 of SPA.

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4 Appellants' written submissions at [3].
5 Ex. 1, Vol. 2, p. 453.
6 Pursuant to s 311(1)(a) and (2) of the *Planning Act* 2016 and s 76(1)(a) and (2) of the *Planning and Environment Court Act* 2016.
7 S 495 of SPA.
8 S 495(4) of SPA.

[7] Section 326(1)(b) of SPA requires that the decision must not conflict with, amongst other things, MP 2000, unless there are sufficient grounds to justify the decision despite the conflict.

[8] It is well established that conflict must be plainly identified, to engage a provision such as s 326 of SPA.[9] The term "conflict" was considered by the Court of Appeal in *Woolworths Limited v Maryborough City Council (No. 2),*[10] where Fryberg J relevantly observed that conflict means to be at variance or disagree with.

The Proposed Development

[9] The proposed development is helpfully described in the Joint Expert Report, Town Planning as follows:-

> "20. The proposed development seeks to establish a Service Station and two (2) convenience restaurants on the site. The approved plans are those referred to in the Negotiated Decision Notice dated 22 August 2016.
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> 21. The proposed development comprises three separate buildings located on the northern part of the site adjacent to the David Low Way frontage.
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> 22. The proposed service station aspect (Building 2) is located centrally along the David Low Way frontage and comprises a building of 200m^2, with ancillary shop and 24 fuel pumps under a separate canopy.
>
> 23. Both proposed convenience restaurants incorporate a drive through facility, and are located on either side of the service station. The proposed restaurant on the eastern part of the site (Building 1) comprises a building of 460m^2, with the proposed restaurant on the western part (Building 3) having an area of 400m^2.
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> 24. According to the proposal plans, the total amount of building floor space is 1060m^2 (GFA). Total site cover of the structures is 1,649m^2 (include roofed ancillary waste and servicing areas) or approximately 2.5% of the site.
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> 25. Building 1 is setback approximately 40m from the eastern boundary, and Building 2 is setback approximately 120m from

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9 *Fitzgibbons Hotel Pty Ltd v Logan City Council* [1997] QPELR 208 at 212 and *Parmac Investments Pty Ltd v Brisbane City Council & Anor* [2008] QPELR 480 at [20].

10 (2006) 1 Qd R 273 at [23].

the western boundary. Due to the clustering of the proposed buildings on the frontage of the site, setbacks to the rear boundary are between approximately 120m to 160m.

26. The maximum building height on the site is 8.2m, and the structures are proposed to have a built form that is typical of a modern service centre, incorporating simple lines and a lightweight materials palette.

27. A landscaping strip with an average width of approximately 4m is proposed to the frontage of the site, with landscaping proposed to the side boundaries that interface with adjoining sites. The site will be fenced with a 1.8m high timber paling fence to the side and rear boundaries.

28. Vehicular access to the site is via a proposed new roundabout located at the north-eastern boundary of the site. The roundabout provides for entry and exit to the site for both north and south bound traffic, while a separate exit-only driveway is provided at the north-western boundary of the site. The proposed two way access road way from the new roundabout is located about 12m from the residential properties to the north east, located in Surfrider Place.

29. A total of 122 car parking spaces are provided for the proposed development within a sealed parking area, and a total of 32 bicycle parking spaces are provided for staff and public usage."[11]

[10] As to the site and surrounding locality:

(a) The town planning experts agreed that the subject site is situated within a predominantly low density residential area, with detached dwelling houses located to the south, east and north.[12] The dwelling houses to the east form part of a more recent residential subdivision known as "*Surfrider Place*", while the residential areas to the south and north are more mature established residential areas;

(b) Land adjacent to the west is vacant and contains scattered vegetation;[13]

(c) In character terms, the town planning joint report is consistent with the appellants' description of the subject site and surrounding locality as having a character of predominantly low density residential, dominated by detached dwelling houses, to the south, east and north of the site;

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11 Ex. 3, p. 3[20] - 4[29].
12 Ex. 3, [11].
13 See Exhibit 2A and 2B.

(d) The subject site enjoys access to David Low Way and a traffic count conducted for this appeal, commencing 18 August 2017 and finishing 24 August 2017, demonstrated that the total number of vehicles per day on this part of David Low Way is in the order of 15,000 to 16,000 vehicles, with the average number of vehicles travelling southbound in the order of 7,800 to 8,100 vehicles per day.[14]

(e) In the locality more broadly:[15]

(i) the Sunshine Coast Airport is located approximately 300 metres to the northwest of the site;

(ii) the Marcoola Commercial Strip (Local Centre), which contains a range of retail and commercial uses, including a service station and ancillary shop operated by 7-Eleven, is located about 1 kilometre to the north of the site;

(iii) the North Shore Centre (Local Centre), which contains a range of retail and commercial uses, including a service station (BP) with ancillary shop, is located about 1.2 kilometres from the site to the south; and

(iv) it is noted that the Council has granted a development permit for a service station (Shell with Coles Express) on David Low Way about 1 kilometre to the south of the subject land, which was yet to be acted upon at the time of the hearing of the appeal.[16]

[11] If, as the appellants contend is important, particular focus is given to that part of David Low Way which extends from the eastern side of the airport up to the change in its alignment from north-east to north, the character of this area is predominantly low density residential development. There are no commercial uses in this locality. The nearest Local Centres, as set out above, are located approximately 1 kilometre to the south and north of the subject site. And it is further contended that it is at these locations where development of a non-residential and commercial character is encouraged and indeed intended to locate under MP 2000.

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14 Ex. 6, Appendix B, Traffic Site Count Summary.
15 Ex. 3, [14].
16 Ex. 3, [16].

Approach to the planning scheme

[12] First and as to the proper interpretation of planning schemes, in *Zappala Family Co. Pty Ltd v Brisbane City Council & Ors*, it was confirmed that the ordinary principles of statutory interpretation apply to planning schemes and that planning schemes are to be read as a whole and in a practical way.[17]

[13] This development application seeks approval for a material change of use for two defined uses under MP 2000:

(a) First, it seeks approval for a service station, being an "*Industrial Use*" for the purposes of the planning scheme;[18] and

(b) The application also seeks approval for two convenience restaurants, being "Commercial *Uses*" for the purposes of MP 2000.[19]

[14] For the purposes of MP 2000, the subject site:

(a) is included within Planning Area No. 9 (North Shore Planning Area)[20];

(b) is included partly within Precinct 11 (North Shore Rural – General Rural Lands) and partly within Precinct 12 (Mudjimba – Neighbourhood Residential) of Planning Area No. 9;[21] and

(c) has been identified as partly having two preferred dominant land use areas under the Strategic Plan in MP 2000, namely "Rural or Valued Habitat" and "Urban".[22]

[15] In considering land uses for the Planning Area, it is sufficiently clear from the provisions of Planning Area No. 9, that there is awareness that the Sunshine Coast Airport is a regionally significant facility.[23] Further, it is acknowledged in the planning scheme that the Sunshine Coast Airport is located within Planning Area No. 9 and is intended to expand its role into the future.[24] The existence of David Low Way is also acknowledged in the Planning Area No. 9 provisions.

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17 (2014) 201 LGERA 82, particularly at [53]-[58].
18 See Ex. 11, p. 11, Figure 3.4, with the definition for "service station" at Ex. 11, p. 13.
19 See Ex. 11, p. 9, Figure 3.3., with the definition for "convenience restaurant" at Ex. 11, p. 9.
20 Ex. 3, [54].
21 Ibid.
22 Ex. 3, [56].
23 Ex. 11, p. 139, s 3.9.3(1)(a).
24 Ibid, p. 139, s 3.9.2(1) and (2)(d) and s 3.9.3(1)(a).

[16] Whilst acknowledging the presence of the Sunshine Coast Airport, the planning scheme recognises that land uses in the area surrounding the airport are affected by, and can affect, the airport's operations,[25] as is also to be observed in reference to a number of the precincts within the planning area, for example, the Statement of Intent for Precincts 5,[26] 6,[27] 8,[28] 11[29] and 12.[30] Notwithstanding this, the planning scheme identifies that new residential development may be appropriate in the Planning Area in appropriate circumstances. For example, in Precinct 12, the planning scheme recognises that, notwithstanding exposure to aircraft noise, land within the precinct allows for more innovative and sensitive residential development that can better respect and compliment the landscape and environmental values of the precinct.[31] And it is specifically recognised that:

> "… Therefore, future development should be limited to low density premises to reduce the extent of noise impact, and any impacts from coastal erosion, and to retain the coastal village character of the Precinct. Detached housing is therefore appropriate throughout the developed part of the Precinct as the predominant form of use."[32]

[17] The planning scheme also identifies the preferred and acceptable uses in each of the relevant Precincts. With respect to both Precinct 11 and 12 of Planning Area No. 9 (being the precincts applying to the subject land) it is common ground between the Town Planners that the proposed development (comprising a service station and convenience restaurants) is not a preferred or acceptable use in either precinct.[33]

[18] Further, the Precinct 12 provisions expressly provide that Commercial and Industrial uses (such as that proposed) are undesirable uses.[34] The planning scheme identifies locations where Commercial and Industrial uses are appropriate in Planning Area No. 9 and the subject site is not one of those locations. Commercial uses are encouraged to locate within identified centres. They are not encouraged to locate anywhere else in the Planning Area. In particular, section 3.9.3(1)(i) of MP 2000 expressly states

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25 Ibid, p. 139, s 3.9.3(1)(b).
26 Ibid, p. 146.
27 Ibid, p. 147.
28 Ibid, p. 148.
29 Ibid, p. 151.
30 Ibid, p. 152.
31 Ibid.
32 Ibid.
33 Ex. 3, [74] and [76].
34 Ex. 11, p. 153.

that commercial development is not encouraged outside of identified centres.[35] As was understood to be common ground, service stations (as Industrial uses) are envisaged as preferred and acceptable uses in two precincts of the Planning Area, namely Precincts 4 and 8. Also, commercial ribbon development is expressly discouraged along David Low Way.[36]

Issues in dispute

[19] The concession of the respondent and co-respondent that the approval of the development application would conflict with MP 2000, is consistent with the Negotiated Decision Notice issued by the respondent at first instance. Consistently with s 335 of SPA, item 15 of the Negotiated Decision Notice,[37] identified that the assessment manager considered that a decision to approve the application would conflict with MP 2000 but that there were sufficient grounds to justify the decision despite the conflict. The grounds identified in the Negotiated Decision Notice involve contentions that:

> "1. the proposal is appropriately located to support the future expansion of the Sunshine Coast Airport;
>
> 2. the proposed use is appropriately located along a major transit corridor and includes road infrastructure as well as land dedication for the future upgrade of David Low Way;
>
> 3. the site is urban land which is heavily constrained by the airport operations and inappropriate for any form of permanent residential use envisaged at the time of drafting the Maroochy Plan 2000; and
>
> 4. the Maroochy Plan 2000 has been overtaken by time and events, especially growth in the airport and planning for the new runway."[38]

[20] As is correctly noted by the appellants, the first and second contentions may be taken as facts that were known at the time of adoption of the planning scheme, and the third contention is inconsistent with what has been noted to be the Statement of Precinct Intent.

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35 Ex. 11, p. 140.
36 Ibid, s 3.9.3(1)(i).
37 Ex. 1, Vol. 2, p. 471.
38 Ibid.

[21] For the appellants, it is finally contended that approval of the development would conflict with MP 2000 in five respects:

(a) land use conflict;

(b) retail and centres hierarchy planning;

(c) the scale of the use proposed;

(d) character and amenity impacts; and

(e) ribbon development.[39]

[22] The respondent expressly concedes that the proposed development is:

> "(a) for uses that are not sought in the locality; and, at least in that regard
> (b) inconsistent with reasonable public expectations."[40]

Notwithstanding, it is contended:

> "41. To the extent that those matters are relevant to an assessment of character, the proposed development is similarly in conflict with MP 2000.
>
> 42. However, that does not mean that the nature, scale and intensity of the proposed development, when assessed as a whole, is inconsistent with the character of the surrounding area nor that reasonable public expectations would not embrace some non-residential use."[41]

And it is conceded that "a resident of the locality, based on the provisions of MP 2000, would not have anticipated the land being developed for the purposes of the proposed development."[42] However it is also contended to be of particular importance "to bear in mind (as was conceded by the Appellants' town planner, Mr Adamson)[43] that since the introduction of MP 2000, in more recent times service stations have become less industrial and more like commercial businesses. Further, over that time, the co-location of service stations and convenience restaurants has become much more common and, on the evidence, can be regarded as reasonably expected by the public."[44]

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39 Appellants' written submissions at [51].
40 Respondent's written submissions at [40].
41 Ibid at [41]-[42].
42 Ibid at [60].
43 T3-63.9-13.
44 Respondent's written submissions at [80].

[23] By way of overview, the co-respondent concedes that the neither of the uses of "Service station" and "Convenience restaurant", which are involved in this proposed development, is identified as "preferred and acceptable uses in the relevant precincts" but also seeks to point out that neither are they identified as preferred and acceptable uses in any relevant Local centre precinct.[45]

[24] It is also contended that the designation of Lot 3 as Rural or Valued Habitat, in the Strategic Plan and the Planning Scheme designation of Lot 3 as North Shore Rural (Precinct Class – General Rural Lands), is with an intent that:-

> "This precinct comprises existing undeveloped land that is intended to remain in non-urban use and comprises of:-
>
> …
>
> - areas of land south of the David Low Way which are relatively low lying and significantly constrained by the operational requirements of the Sunshine Coast Airport, …";

And it is contended that such has been overtaken by events and that it is "no longer appropriate that Lot 3 remains in non-urban use", because:

(a) Pursuant to an operational works approval, the lot has been cleared, filled and a formed building pad has been constructed which has limited any in situ environmental habitat or landscape values of the Land.

(b) It is no longer "relatively low-lying".

(c) It is an isolated lot of General Rural Lands, small in size and is unable to be practically used for a viable rural pursuit.

(d) Adjacent to Lot 3 to the east in Surfrider Place is another parcel of General Rural Lands (Exhibit 3, Joint Expert Report: Town Planning, figure 3) which has now been developed for an urban purpose, namely a residential subdivision.[46]

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45 Co-respondents written submissions at [24]-[25].
46 Ibid at [28].

[25] It is also the contention of the co-respondent that the designation of Lots 1 and 2 as Neighbourhood Residential Precinct has also been overtaken by events. Attention is drawn to the following inclusion, in the Statement of Intent for the Mudjimba Neighbourhood Residential Precinct:

> "Part of the precinct at the north-western corner remains undeveloped. This part of the precinct has lagoons and flat low-lying land much of which is subject to periodic inundation. … the land has frontage to existing streets from the developed areas of the precinct as well as from the David Low Way.
>
> Some of this land has been previously proposed for residential use but much of the land in the precinct is not considered suitable for conventional urban residential development due to locational constraints … and exposure to aircraft noise."

And it is contended that, in the context of known and the proposed further expansion of the airport since MP 2000 came into effect, the Court would accept the evidence of Mr Perkins that:

> "122. It is an accepted planning principle that sensitive land uses such as residential development should be limited or avoided in areas subject to known and/or potential noise and safety impacts from airport operations.
>
> 123. The ANEF levels for the site currently range between 15-25, with the levels extending up to 30 ANEF for the expanded airport scenario. Whilst residential development is conditionally acceptable within ANEF contours up to 25 ANEF, they require specific acoustic building treatments and can also rely on windows and doors being closed to maintain appropriate internal acoustic amenity.
>
> 124. In this regard, residential development of the site as envisaged by the planning scheme would not be a good planning outcome. It is noted that Council has recently refused an application for subdivision of land (1 lot into 2 lots, Council Ref REC17/0049) on land located at 15-23 Surfrider Place (approximately 100m to the east of the site) due to potential amenity impacts from current and future airport operations.
>
> 125. On the basis that the site is not suitable to accommodate conventional low density residential development, commercial development is not a sensitive use and could potentially establish on the site whilst not offending the principle of avoiding incompatible development.
>
> 126. In relation to the establishment of commercial development in an out of centre location, Mr Perkins relies on the arguments advanced in 6.1, and reiterates:

> (a) the establishment of a service station and associated convenience restaurants on the site does not compete with the established local centre based on Timari Street (in terms of the range of services and goods provided), and will not preclude future development of that centre as a pedestrian oriented and community focused commercial node;
>
> (b) the proposal is a complementary use to the Sunshine Coast Airport and is compatible with the predicted noise impacts from aviation operations; and
>
> (c) the proposed development is appropriately designed, located and screened such that the scale and intensity is compatible with surrounding residential development."[47]

Land use conflict

[26] As the appellants contend, it is uncontroversial between the Town Planning experts that a service station and convenience centre are not preferred or acceptable uses in Precincts 11 and 12 of Planning Area No. 9[48] and as accepted by the Co-respondent's Town Planner, Mr Perkins, in oral evidence, the Planning Area Provisions provide no encouragement or support for the proposed uses on the subject land.[49] Particular emphasis is placed upon the preferred and acceptable use provisions with respect to Precinct 12 of Planning Area No. 9, which provide, in part:

> "Undesirable use includes residential uses at higher densities and commercial and industrial uses, or buildings which are not in keeping with the desired residential character by exceeding the predominant building height of two storeys…"[50]

[27] Accordingly and consistently with the approach taken in *Lockyer Valley Regional Council v Westlink & Ors*[51] and *Gillion Pty Ltd v Scenic Rim Regional Council*,[52] it should be concluded that a decision to approve the development application would conflict with the Precinct provisions with respect to Precincts 11 and 12 of Planning Area No. 9 by reason that the proposal involves uses which are neither preferred and acceptable and indeed are expressly stated to be undesirable.

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47 Ex. 3 [122]-[126].
48 Ibid [74] and [76].
49 T3-15.42-45.
50 Ex. 11, p. 153.
51 (2011) 185 LGERA 63, [29] to [31] per Fraser JA.
52 [2013] QPELR 711 at [187]-[190].

[28] It may be accepted, as the respondent seeks to emphasise,[53] that such considerations are not necessarily determinative of this appeal and that in the examples to which reference was made: *King of Gifts (Qld) Pty Ltd v Redland City Council*[54] and *Peet Flagstone City Pty Ltd v Logan City Council & Anor*,[55] this Court found sufficient grounds to approve service stations despite being an inconsistent use in the location in which they were proposed.

[29] And it is contended for the co-respondent,[56] that there is no detraction from the explicitness of such a statement that the following evidence of Mr Perkins may be accepted:

> "165. In particular Mr Perkins notes that modern Service stations such as the proposal do not include a repair or servicing element, and are concerned primarily with the retail of fuel and oil products and associated convenience goods.
>
> 166. Further, they are designed to have a modern built form that resembles a typical retail outlet, and includes design features and engineering processes that minimise exposure and awareness of any potentially offensive or nuisance aspect such as noise, light or odour.
>
> 167. In this regard, the characterisation of the proposed service station as an industrial use is a function of the use definitions in the superseded planning scheme and does not reflect the actual intensity and character of a modern service station. Mr Perkins says that a 'service station' as defined by the Queensland Planning Provisions is more appropriately considered as part of the business activity group of defined uses and he agrees with this characterisation."[57]

Retail and centres hierarchy planning

[30] The appellants contend that conflict in this respect arises because the proposal involves a commercial use located outside of an identified Local centre, which designation is limited to land included in Precinct 3 (Marcoola Commercial Strip) and Precinct 9 (North Shore Centre) of the Planning Area No. 9. And that this is because of the express discouragement of commercial development outside of a designated centre:

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53 Respondent's written submissions at [75]-[81].
54 [2018] QPELR 187 at [107].
55 [2016] QPELR 538.
56 Co-respondent's written submissions at [97].
57 Ex. 3, [165]-[167].

(a) In s 3.9.3(1) of the Planning Area No. 9 provisions, respectively, at subsection (g) and (i):

> "(g) A commercial and community focus is to be encouraged in a central location based on the existing commercial centre in Timari Street. This centre, while remaining small-scale …. in character, will allow limited expansion of commercial and community uses and provide an activity node for the residential community of the Planning Area as a whole. Other local centres throughout the planning area are to remain at a convenience level, serving primarily the day-to-day needs of nearby residents.
>
> ……
>
> (i) Commercial development is not encouraged elsewhere in the Planning Area – in particular commercial ribbon development is not to occur along the David Low Way."[58]

(b) As reinforced by reference to the General Intent for the Neighbourhood Residential Precinct, which applies to Precinct 12 of Planning Area No. 9 which includes the following statements:

> "Non-residential purposes that may be appropriate on land in these Precincts include parks, churches, general stores, community facilities, and businesses carried out by residents in their own homes where such business activity does not adversely affect the amenity of the locality by way of noise, traffic generation or otherwise.
>
> Commercial uses other than general stores are not intended to be established on land in these Precincts, except on sites which are specifically identified in Planning Area provisions as suitable and intended for Local centre development. The Planning Area provisions may describe such sites as suitable or intended for "Local centre development….
>
> ….
>
> In the absence of such specific identification, commercial uses are intended to be established only in centre Precincts. Accordingly, where the Planning Area provisions for a Neighbourhood Residential Precinct are silent about commercial development, that does not indicate planning policy neutrality on the matter, but rather indicates a strong planning policy position that Local centres (or higher order retail or commercial development) are not supported on any site within the Precinct."

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58 Ex. 11, p. 140.

[31] Accordingly, the appellants contend and it should be accepted that MP 2000 expresses a strong planning policy that commercial uses (other than small-scale general stores) are not intended to be established on land in the Neighbourhood Residential Precinct, except where specifically identified in the planning area provisions and that there is no such identification in this case.

Scale of use

[32] There is some further support for appellants' contention as to conflict with MP 2000 in addition to the implications of involvement of commercial use and in the scale of the proposed use, because:

(a) the proposal involves a gross floor area of at least 1,000m^2 spread through three separate built forms that are not single dwelling units;

(b) whilst the Town Planners agreed that the proposal would not, of itself, constitute a Local Centre, the floor area of the proposal is nevertheless commensurate with that of a Local Centre as contemplated by the planning scheme;[59] and

(c) the evidence of Mr Duane (an economist called by the respondent) who confirmed that the turnover estimated for the proposal would greatly exceed that of a General store.[60]

Character and amenity

[33] Whilst for the appellants, it is conceded that the co-respondent and respondent have led evidence from expert witnesses with respect to the anticipated noise, air quality and lighting impacts of the proposal,[61] which establishes that the proposed development can be conditioned to comply with recognised noise criteria and air quality objectives, it is contended that the concept of amenity is far broader than "whether, in an empirical sense, impacts by reason of noise, light or unpleasant odours can comply with empirical standards". And it noted that Mr Perkins accepted, in oral evidence, that the concept of amenity is broader than simply whether noise, light and odour can be conditioned to comply with relevant standards and that the proposal would impact on the sense of place.[62]

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59 Ibid, p. 94, s 4.3.4.
60 See Ex. 7, p. 33, Table 23 and [176]-[179].
61 Exs. 4 and 5.
62 T3-9.10-16.

[34] Reference is made to *Broad v Brisbane City Council & Anor*,[63] where de Jersey J observed:

> "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."

And it is contended that, there are concessions in the evidence to support a significant objective, let alone subjective, sense of impact on character and amenity in circumstances where:

(a) The subject proposal involves uses which are expressly undesirable in the relevant planning Precinct, this site would not be reasonably expected to be put to the purpose of commercial or industrial uses, including in particular a service station or convenience restaurants; and

(b) It is clear from an objective reading of a number of lay witness statements,[64] that there is a genuine concern that the proposed development will, if approved, impact upon the perception of the area for existing residents, including their sense of place, which perception may be seen as proceeding on the footing that the area is predominantly a residential area, which is how the town planners characterised the existing character of the locality.[65]

In addition to the concession of Mr Perkins, noted above,[66] it is pointed out that the evidence of Mr Schomburgk and Mr Perkins accepted (in the Joint Experts Report: Town Planning) that the relevant planning scheme would not lead a resident of the locality to reasonably expect the proposed development on the subject land.[67]

[35] It is contended that in such circumstances, where the views of residents, subjectively held, are consistent with objectively held perceptions to be derived from MP 2000, it would be a serious step to grant an approval contrary to those views, as this Court has previously held, in similar circumstances:

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63 (1986) 2 Qd R 317 at 326.
64 Exs. 13 and 20.
65 Ex. 3, [11].
66 See fn 62 above.
67 Ex. 3, [208].

> "In my view it would be a very serious step to disappoint, perhaps destroy those perceptions. To permit this development would do precisely that. In my opinion to do that would be justified only if the need for the development were a demanding one or if the application of proper planning principles, as seen in the planning documents actually required it."[68]

And that the application of proper planning principles in this case do not require the taking of such a serious step to disappoint objectively held perceptions.

[36] These contentions should be accepted notwithstanding that as is contended for the respondent:

(a) Necessary context for the assessment of character impact is the existing impacts of the airport and the busy David Low Way, on the amenity of this locality; and

(b) There is an absence of challenge for the appellants and no contradiction as to the evidence led for the respondents as to acceptability of any amenity impacts in terms of operating hours, light, odour, noise and traffic impacts.

[37] The conflict with the planning scheme is particularly identified in respect of the "landscape and built form" provision in relation to Precinct 12, which includes:

> "New development should contribute to a high standard of residential amenity. Buildings should exhibit a residential character and respect the scale and amenity of adjacent existing premises."

[38] It is pointed out that the subject proposal conflicts with the above provision of the planning scheme as it does not exhibit a residential character, but rather involves the intrusion of a commercial and industrial use into a residential area, as has been found to be an undesirable impact in prior instances, for example *Vanglow Pty Ltd v Council of the Shire of Albert*[69] and *Prime Group Properties v Brisbane City Council*,[70] where Judge Row observed:

> "The proposed rezoning will introduce a non-residential, namely commercial use, into the existing residentially developed area. Those residences in the immediate vicinity …. that abut at the rear will have a non-residential neighbour. Accepting the landscaping measures proposed by Mr Jones, the development will nevertheless remain non-residential in character and use. The buildings will be of obvious commercial appearance and use. There will

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68 *Prime Group Properties Limited v Caloundra City Council & Ors* [1995] QPLR 147 at 150.
69 [1991] QPLR 68 at 70.
70 [1994] QPLR 153 at 158.

> be extensive sealed areas and advertising in the form of signage to indicate a non-residential use. The use will be obvious as not being of a residential nature …. Whilst noise levels and lighting can be regulated so as to cause no adverse effects to residents in the vicinity, the existence of noise and lighting is further evidence of a non-residential use. The pleasantness of place will be adversely affected by such matters to a significant extent."

[39] Here it is to be accepted, as contended for the appellants, that the contrast with the express requirement of MP 2000 that buildings exhibit a residential character, is to be found in the intention to have a development involving commercial use and of such nature, scale and intensity of the proposal will not be consistent with the character intended for the locality, particularly having regard to the intended:

(a) extensive sealed areas;

(b) advertising for the service station and fast food facilities to indicate a non-residential use;

(c) commercial built form, including lighting, that will obviously be designed as being non-residential in nature; and

(d) constant reminder to residents of the commercial use of the site, particularly in the expectation of attraction of some 2,625 vehicles to the site per day,[71] and involving travel along the internal access road from a roundabout, some 12 metres from the nearest residential property located to the east in Surfrider Place.

Particularly in the light of the last consideration, such a finding is appropriate, notwithstanding the reliance for the respondents on the setbacks, style and height restriction of the buildings and the landscaping (including retention of existing vegetation on David Low Way) and fencing requirements. The co-respondent's reliance on the evidence of Mr Schomburgk, that the proposed development has been designed to be compatible with the adjacent residential uses, is not to the point.[72] And neither are the submissions of the respondent that because "the proposed development achieves a high degree of compliance in respect of important built form metrics … [it] makes an appropriate contribution to the character and amenity of the locality" and that "when assessed as a whole … the proposed development achieves a high

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71 Ex. 6, [28].

72 Co-respondent's written submissions at [99].

degree of compliance in respect of compatibility with the existing character of the area".[73]

Ribbon development

[40] Reference is made to the planning scheme in two locations, to identify express discouragement of commercial ribbon development:

(a) s 4.4.2 of the Strategic Plan,[74] where there is recognition that ribbon commercial development has the potential to impact on amenity and have implications for traffic management; and

(b) s 3.9.3(1)(i) of the Planning Area No. 9 provisions.[75]

[41] However, it is to be noted that MP 2000 does not define ribbon development and it is difficult to conclude that this proposal is such development. Moreover, it is doubtful that any such conclusion would substantially add to the conclusion that it is intended to encourage commercial development to locate in identified centres and in avoidance of ad hoc commercial development that is inconsistent with the important retail hierarchy and centres planning, which has been noted above.[76]

Nature and extent of conflict

[42] It has been described that the test in a similar provision to s 326(1)(b) of SPA requires that the decision maker:

> "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."[77]

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73 Repsondent's written submissions at [48].
74 Ex. 11, p. 98.
75 Ibid, p. 140.
76 See above at [30]-[31].
77 *Weightman v Gold Coast City Council* [2003] 2 Qd R 441 at [36], as affirmed in *Lockyer Valley Regional Council v Westlink Pty Ltd* (2012) 191 LGERA 452 at [21].

It is to be noted that here, the test is to be applied to the subsequently enacted statutory provision in s 326(1)(b) of SPA, which refers to "grounds" (rather than "planning grounds"), which is defined in Schedule 3 of SPA as meaning "matters of public interest" and to "not include the personal circumstances of an applicant, owner or interested party".

[43] Essentially the appellants' contention as to the nature and extent of the conflict should be accepted. In circumstances where the Land is included in two precincts of Planning Area No. 9 where Commercial and Industrial uses are expressly discouraged, with the planning scheme expressly identifying an intent for the precincts to house non-urban and low density premises, the conflict is not limited to a land use issue as was repeatedly suggested during Mr Adamson's cross-examination by Counsel for the respondent,[78] but also sounds in matters with respect to scale of development and reasonable expectations of the community. Commercial (or Industrial development) would not contribute to a high standard of residential amenity. Nor would such development exhibit a residential character to respect the scale and amenity of adjacent existing residential premises.

[44] As the appellants elaborated, such conflict should be regarded as significant or serious and requiring substantial or compelling grounds to justify approval notwithstanding the conflict:

(a) Not only does the conflict arise from a deliberate planning decision evident on the face of MP 2000, with commercial and industrial uses designated as undesirable on the subject land, but also occurs in circumstances where the planning scheme recognises that there is a need for service stations to be provided in this part of the Sunshine Coast, as code assessable uses in Precincts 4 and 7 of Planning Area No. 9. And it may be accepted, as the appellants' contend, that the planning scheme thereby evinces a deliberate decision to allocate land to meet the need for service stations on land other than the subject land in full knowledge of its locational attributes and the planning scheme deliberately locates convenience restaurants only in Town Centre Frame Precincts (outside of Planning Area 9). And further that a plainly

78 T3-36.6-16, T3.34-43, T3-39.16, T3-40.28-36, T3-45.24-30, T3-47.24-28, T3-48.14-23.

evident intention for this is to preserve and enhance the residential character of the area surrounding the subject land;

(b) The proposed development is to be properly regarded as involving commercial development in an out of centre location and therefore raising inconsistency with the hierarchy of retail shopping facilities identified in MP 2000. And it is correctly noted that the importance of such considerations has been recognised by the Court of Appeal in *Australian Capital Holdings Pty Ltd & Ors v Mackay City Council*.[79] Such conflict is particularly in that:

(i) s 4.4.1 of the Strategic Plan identifies that it is intended that development consolidates and maintains the integrity of the retail and commercial centres hierarchy.[80] It may be accepted that maintenance of the hierarchy is important in protecting investment made in existing centres and promoting confidence in, and public knowledge of, the Council's continuing commitment to that investment. And in that context, it is to be further noted that the centres hierarchy planning in MP 2000 is supported by a number of key provisions which expressly discourage out-of-centre development.[81]

(ii) Further, relevant provisions of MP 2000 also discourage commercial uses on the Land of the scale and intensity proposed. The general statement of precinct intent for the Neighbourhood Residential Precinct that commercial uses, other than general stores, are not intended to establish on land except on sites where specifically identified in planning area provisions.[82] A general store is defined in the planning scheme as:

> "General store means the use of premises for the display and retail sale of goods to members of the public, combined with the use of the same premises as a single dwelling unit, where the gross floor area of

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79 [2008] QCA 157 at [58]-[59].
80 Ex. 11, p. 95.
81 Ex. 11, pp. 137, 140.
82 Ex. 11, p. 137.

the retail component of the combined use is not more than 150m^2."[83]

The proposal does not involve the use of the same premises as a single dwelling unit. It is substantially, if not incomparably, greater in scale and size than a general store as defined.

(iii) The significance of such departure from the planning scheme is exemplified in the evidence of the economist called for the co-respondent, Mr Brown, who assessed the turnover for the proposed service station as being in the order of $6.2 million in the year 2021 increasing to $7.35 million in 2026[84] and the fast food turnover component of the proposed development, as equating to $4.19 million in 2021, increasing to $4.51 million in 2026.[85]

(c) As already noted, it was conceded that the proposed development will have an impact upon amenity, in character terms. And as has been further accepted, there will be impact upon the perceptions of the local area. As contended by the appellants, this is consistent with the decision of the Court of Appeal in *Lockyer Valley Regional Council v Westlink Pty Ltd*,[86] where Holmes JA held that the absence of a negative impact or detrimental effect is a relevant consideration in the exercise of consideration of whether there are sufficient grounds to justify the decision, despite the conflict; pursuant to s 326(1)(b) of SPA. Moreover and for the reasons set out in more detail below, the reference by the appellants to the recognition of such considerations in *Bell v Brisbane City Council*,[87] has been overtaken and reinforced by the subsequent decision of the Court of Appeal in that matter.[88]

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83 Ex. 11, p. 10.
84 Ex. 7, at [106].
85 Ex. 7, at [155].
86 [2013] 2 Qd R 302 at 323.
87 [2017] QPEC 026 at [88], [108], [113] and [389].
88 [2018] QCA 84.

Sufficient Grounds?

[45] The grounds relied upon are need for the proposed development and the matters identified in paragraphs 218 and 220 of the Town Planning Joint Expert Report.[89] At paragraph 220, Mr Perkins identifies the following considerations:

> "(a) The proposal improves vehicular accessibility and safety for residents in the locality living on both sides of the David Low Way due to the provision of a roundabout, improving access to the major road corridor;
>
> (b) The proposal will assist in implementing the SEQ Regional Plan intent for the Sunshine Coast Airport to function as a Specialised Activity Centre;
>
> (c) The use of the site for commercial development is an efficient and sensible use of land that is otherwise highly constrained for conventional residential development;
>
> (d) There are no suitable sites within the Sunshine Coast Airport precinct to accommodate the proposed development;
>
> (e) The Marcoola and North Shore local centres are not suitably located to accommodate the proposed development; and
>
> (f) In addition to the above, and subject to the findings of the need experts, in their joint report, it is my understanding that there is a demonstrated need for the proposed development."

At paragraph 218, the following considerations are identified by Mr Schomburgk:

> "(a) The proposal adds to the activation of a major road close to the airport by providing a Service station and Convenience restaurant development.
>
> (b) The proposal fulfils a gap in the Service station network through increased convenience, choice and competition for local residents and the passing public.
>
> (c) Being on the left hand side of the south-bound journey, the proposal is ideally suited for south-bound persons (e.g. from Noosa etc.) with a hire car to refuel, just before returning their rental car to the airport.
>
> (d) The proposal enhances the tourist character of the area by provision of greater choice and convenience.
>
> (e) The proposal does not result in any adverse amenity or environmental impacts.
>
> (f) The General Rural Lands planning area for the part of the Land (Maroochy Plan 2000) is inappropriate and has been overtaken by

[89] Ex. 3, pp. 38 and 39.

events, namely the ongoing population growth in the locality and the region generally.

(g) The proposal will have no negative impact on the hierarchy of centres, or on any individual centre within the hierarchy; and

(h) The proposal does not represent commercial ribbon development."

[46] Conveniently, these considerations are collectively summarised, in the appellants' submissions,[90] as follows:

"(a) the proposal adds to the activation of a major road close to the airport by providing a service station and convenience restaurant development;

(b) the proposal will fulfil a gap in the service station network through increased convenience, choice and competition for local residents and the passing public;

(c) the proposal is ideally suited for southbound persons with a hire car to refuel;

(d) the proposal enhances the tourist character of the area;

(e) the proposal does not result in any adverse amenity or environmental impacts;

(f) the general rural lands planning area for the part of the land is inappropriate and overtaken by events;

(g) the proposal will have no negative impact on the hierarchy of centres or any individual centre;

(h) the proposal does not represent commercial ribbon development;

(i) the proposal will improve vehicle accessibility and safety for residents;

(j) the proposal will assist in implementing the SEQ Regional Plan intent for the Sunshine Coast Airport to function as a specialised activity centre;

(k) the use will be an efficient and sensible use of the land;

(l) there are no suitable sites within the Sunshine Coast Airport precinct to accommodate the proposed development; and

(m) the Marcoola and North Shore Local Centres are not suitably located to accommodate the proposed development."

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90 Appellants' written submissions at [134].

> And it is also noted to be contended by the co-respondent, that residential uses are not suitable on the subject land and a commercial use is more appropriate given the proximity of the land to the Sunshine Coast Airport and that, in such circumstances, it is appropriate that it be put to a less sensitive use being commercial or industrial in nature.

[47] After this matter was heard and judgement was reserved, *Bell v Brisbane City Council & Ors*[91] was decided and the parties were given the opportunity to make further written submissions as to the potential application of that decision.

[48] As to the appellants' further submissions, it should first be noted that in their earlier written submissions, specific attention had been drawn to passages in *Grosser v Gold Coast City Council*,[92] in support of a submission,[93] that the approach of the co-respondent and in particular the town planner called for the co-respondent, Mr Perkins, invited the Court into the error of substituting its planning strategy for that of the Council and therefore acting contrary to principle. In particular, it was noted that in *Grosser v Gold Coast City Council* the Court of Appeal had approved the following statement of Judge Quirk, in *Elan Capital Corporation Pty Ltd v Brisbane City Council*:[94]

> "It should not be necessary to repeat it but his (sic) Court is not the Planning Authority for the City of Brisbane. It is not this Court's function to substitute planning strategies (which on evidence given in a particular appeal might seem more appealing) for those which a Planning Authority in a careful and proper has to adopt (sic) (*Brazier v Brisbane City Council* 26 LGRA 322 at 327). As was observed by Carter J in *Sheezel & Anor v. Noosa Shire Council* [1980] QPLR 130 (when he then constituted this Court), it would be quite inappropriate for this Court to deal with an individual application for rezoning in a way which might be construed as determinative of some wider question. Adopting the phraseology of those cases which deal with the non-derogation principle, I feel that to allow this appeal would be to 'cut across' in quite unacceptable manner, a planning strategy which has been adopted by the Planning Authority and publicly exhibited for community comment."

[49] Such error was particularly identified in respect of the co-respondent's submission that the subject land is not suitable for low residential development, in consequence of the proximity to the airport and impact of the activities conducted there and

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91 [2018] QCA 84.
92 (2001) 117 LGERA 153 at [6] and [38].
93 See appellants' written submissions at [149]-[151].
94 [1990] QPLR 209 at 211. Also noting the earlier approval of the principle in *Holts Hill Quarries Pty Ltd v Gold Coast City Council* [2000] QCA 268.

therefore appropriate to a less sensitive commercial or industrial use. And it is correctly noted that a difficulty for the co-respondent is that this planning authority has decided that residential development, of a particular intensity and type, may be appropriate for the Land.

[50] And it may be further noted that:

(a) it is clear from the Planning Area provisions and particularly in respect of Precinct 12, that the planning scheme indicates acute awareness of the existence of the Sunshine Coast Airport and the impact that it has on existing and likely future uses; and

(b) despite this and the obvious potential impact on future residential uses, the planning scheme nonetheless identified that a particular type of residential use is nonetheless appropriate on the Land.

[51] Unsurprisingly in that context, the further submission of the appellants was to the effect that the *Bell* decision was applicable in terms of the statements of principle to be discerned as to the application of s 326(1)(b) of SPA, and notwithstanding that it was decided in reference to issues arising under a different planning scheme. In particular, reference was made to the following statements in *Bell v Brisbane City Council & Ors*:[95]

> "[66] Section 326(1)(b) will be engaged only where there is a tension between the application of the relevant instrument, here a planning scheme, and the public interest. If that tension exists, it will be for the decision maker to consider whether there are *sufficient* grounds, in the public interest, to depart from the instrument. Necessarily, cases where that tension exists will be exceptional, because a planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land. In *Clark v Cook Shire Council*, Keane JA, with the agreement of the other members of this Court said:
>
> > "The terms of a planning scheme inevitably reflect the striking of an overall balance, *in the public interest*, between the many interests potentially affected by the planning scheme." (Emphasis added.)
>
> [67] It is not for the decision maker (including in this context a Court), to gainsay the expression of what constitutes the public interest that is in a planning scheme. A decision maker might think that a limit of 15

95 [2018] QCA 84 at [66]-[70].

> storeys is too restrictive, and the public would be better served by a higher limit. But this decision maker must accept that it is in the public interest that the limit be 15 storeys, because that is what the planning scheme effectively provides.
>
> [68] Cases could arise where relevant circumstances have changed since the planning scheme was made, or where it can be seen that there is a factual error in the scheme itself. Cases of that kind were identified in the explanatory notes for s 3.5.14 of the *Integrated Planning Act* 1997 (Qld). There might also be cases where it is evident that the planning scheme has not anticipated the existence of circumstances which have created a need for a certain development in the public interest. In exceptional cases of all of these kinds, the decision maker might be able to conclude that the planning scheme is not, in the particular case, an embodiment of what is in the public interest.
>
> [69] The submissions for the respondents emphasise that in *Elan Capital*, Quirk DCJ used the expression "planning strategies", which they distinguish from the relevant provisions of the Scheme in this case. However, what must be applied here are the terms of s 326(1)(b) of the SPA, for which there was no legislative equivalent when *Elan Capital* was decided.
>
> [70] Consequently, any consideration of the application of s 326(1)(b) of the SPA must proceed upon the premise that it is in the public interest that the planning scheme, in each relevant respect, be applied, unless the contrary is demonstrated. Thus in the present case, it had to be assumed that the public interest would be served by confining the development of this land to buildings of a height that accorded with community expectations that buildings would not extend, or at least significantly extend, beyond 15 storeys. That was not an arbitrary limit; it was an expression of a means by which, in the public interest, the scale of any development would be kept in alignment with community expectations. The Scheme was unambiguous in providing, within AO1.1, that "[d]evelopment must comply with both parameters where maximum number of storeys and height in metres are specified." (citations omitted)

[52] It should be noted that the reference, in [69] in that passage, to the *Elan Capital* decision, is referable to an earlier acknowledgment of the argument raised in the *Bell* case, that the reasoning of the trial judge was inconsistent with the principle to be drawn from that case and as was recognised in *Grosser v Gold Coast City Council*.[96] And that by reference to an earlier decision of the Court of Appeal in *Australian Capital Holdings Pty Ltd & Ors v Mackay City Council*,[97] which appears immediately before the passage to which reference has been made above and as to the potential

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96 As noted at [48], above.

97 [2008] QCA 157 at [54]-[57]

importance of the retail and centres hierarchy in MP 2000,[98] it may be noted that an effect of the *Bell* decision is in confirming the application of well-established principles, specifically to the statutory test provided in s 326(1)(b) of the SPA. It may also be noted that in the *Australian Capital Holdings* decision, the observations were there made in respect of the statutory test pursuant to s 4.4(5A) of the *Local Government (Planning and Environment) Act 1990*, which in subparagraph (b) required identification of "sufficient planning grounds" in order to overcome identified conflict with "any relevant strategic plan or development control plan". It may be further noted that there is also express reference to the same observations of Keane JA in *Clark v Cook Shire Council*,[99] and also to the approval of the *Elan Capital* and similar observations in *Grosser v Council of the City of Gold Coast.*

[53] Further it should also be noted that a particular legal error identified at first instance, in the *Bell* decision, and as affecting the conclusion reached under s 326, was in "the judge substituting his own view of the public interest for that which was expressed in the Scheme".[100] Which error was identified as emanating from the acceptance of a number of submissions including;

> "…. the proposition that if community need and economic need were established, that would call for something of a "balancing exercise", under which there would be "a balancing consideration of all positive and negative attributes of the proposed development (for example, particular community benefits might weigh in favour of approval even where a proposal is not consistent with the community expectations)."[101]

[54] And it was identified that what was undertaken was "that broad balancing exercise in the belief that this was what s 326(1)(b) required … [and which] … misconstrued the provision… [and explained the judge's observation] … in considering s 326, that there were many provisions of the Scheme with which the proposal was either consistent or which it 'positively supports or achieves'",[102] and also that such exercise had proceeded without reference "to the Scheme as an embodiment of what represented the public interest".[103]

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98 At [44](b), above.
99 [2007] QCA 139.
100 [2018] QCA 84 at [78].
101 Ibid at [73].
102 Ibid at [74]
103 Ibid at [77].

[55] Accordingly and to the extent that submissions of the respondent and co-respondent suggested that the *Bell* decision is of little or no relevance to this matter, or may simply be distinguished on the basis that the noted observations as to principle were referrable to the provisions of a different planning scheme and which was described in *Parmac Investments Pty Ltd v Brisbane City Council*,[104] as "unusual",[105] they are not to be accepted.

[56] Neither are any of the further observations made in the *Parmac Investments* decision to be taken as indicating any such view. In the first instance, the critical point that is made is that the Court was there concerned with a different statutory test under the *Planning Act* 2016, with the observation only that the *Bell* decision was of "diminished significance".[106] Nevertheless, it was further observed:

> "[25] That said, the statement of McMurdo JA at [66] that "*a planning scheme must* be *accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land*" is persuasive, given the statement was made with respect to City Plan.
>
> [26] However, one must be cautious in the application of that observation. It is important that it is not taken out of context. The statement was made in a context where:
>
> (a) it was clear that the observation was being made about the role of a planning scheme when s 326(1)(b) of the Sustainable Planning Act 2009 is engaged;
>
> (b) the provision being construed, in terms of conflict and grounds to overcome it, was overall outcome (3)(h) of the Toowong-Auchenflower Neighbourhood Plan, which was extracted at [10] of the decision. It states:
>
> > Development is of a **height, scale and form** which is consistent with the amenity and character, community expectations and infrastructure assumptions **intended for the relevant precinct**, sub-precinct or site and is **only developed at a greater height, scale and form where** there is **both a community need and an economic need** for the development. (emphasis added)
>
> The provision is unusual in that it not only contains development standards for height, scale and form, but

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104 [2018] QPEC 32.
105 Ibid at [26(b)].
106 Ibid at [24].

> also a discretion to allow departure from the intended development standards where it is established that there is "*both a community need and an economic need for the development*". Where a proposed development does not comply with the intended development standards or the additional factors set as discretionary hurdles, one might expect that it would need to be an exceptional case, in terms of the "*grounds*" or other "*relevant matters*" relied on, to support approval;[107] and
>
> (c) the description of the planning scheme as providing a "comprehensive expression of what will constitute, in the public interest, the appropriate development of land" should not be taken as a statement that the planning scheme is a complete expression of what is in the public interest. This is apparent from the observations of McMurdo JA at [68]. It is also self-evident given planning schemes are reflective of a point in time, and are performance based. A performance based planning scheme does not, by its very nature, envisage a single development option or design; rather it presents a series of development parameters that are to be considered and demonstrated by a proposal. Further, they do not purport to provide for every form of development that may be required to meet the legitimate expectations of the community. If it were otherwise, the notion of planning need would have no work to do."[108] (footnotes renumbered)

That may, respectfully, be taken as an entirely acceptable recognition of delineation as to recognition of applicable principle, as opposed to the application of any such principle to any particular factual circumstances. It is the latter aspect which is particularly amenable to distinguishment because of the readily differing factual circumstances which may arise from case to case. However and in respect of the statement of principle by the Court of Appeal, questions of distinguishment will not arise in respect of the application of the same statutory test and in respect of which the principle is established.

[57] However, I should also and respectful, note a disinclination to reason on the basis of substitution of what may be regarded as a synonym for the adjective "comprehensive" and thereby seek to shade the meaning of a passage in the judgement of the Court of

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107 See *Stradbroke Island Management Organisation Inc v Redland Shire Council* [2002] QCA 277; (2002) 121 LGERA 390, 415–6 [105].

108 *Parmac Investments Pty Ltd v Brisbane City Council* [2018] QPEC 32 at [25]-[26].

Appeal. As noted earlier, that judgement also refers to the error in proceeding without recognition of "the Scheme as an embodiment of what represented the public interest" and that "any consideration of the application of s 326(1)(b) of the SPA must proceed upon the premise that it is in the public interest that the planning scheme, in each relevant respect, be applied, unless the contrary is demonstrated". Rather, it is the further points that are germane, in that and as expressly recognized in the *Bell* decision, the statutory test allows departure from such embodiment and premise, if there are sufficient grounds in the public interest, to do so. As the examples of "exceptional cases" there given demonstrate, the relevant scheme may be taken to be a point in time such "embodiment of what represented the public interest" and "relevant circumstance may have changed since the planning scheme was made" or "factual error might be found in the scheme" or it might be "evident that the planning scheme has not anticipated the existence of circumstances which have created a need for a certain development in the public interest". Accordingly:

> "In exceptional cases of all of these kinds, the decision maker might be able to conclude that the planning scheme is not, in the particular case, an embodiment of what is in the public interest."[109]

[58] Further and notwithstanding that, such was ultimately directed at the application of what was recognised to be a different statutory test in s 45 of the *Planning Act* 2016. the further observations which follow in the *Parmac Investments* decision, also note both the importance of the principle to be applied and also that departure from such principle and which may be allowed in the application of the statutory test, will depend upon the nature of the expression of policy in the provisions in question and the facts of the case.[110]

[59] In this case, that is reflected in the need for assessment as to the nature and extent of conflict with the planning scheme, which determines the necessary weight required in the circumstances contended to present an "exceptional case", demonstrating "sufficient grounds in the public interest to depart from the instrument".[111]

[60] Ultimately, each of the respondent and co-respondent did alternatively contend for such a conclusion. And did so on the primary basis, as had previously become

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109 All of this is expressly directed at the application of s 326 (1)(b) and there is also the potential application of s 326(1)(a) or (c) in relevant circumstances.

110 *Parmac Investments Pty Ltd v Brisbane City Council* [2018] QPEC 32 at [27]-[28].

111 See *Bell v Brisbane City Council & Ors* [2018] QCA 84 at [66].

identified in the hearing of the case, that it is the contention as to the evidence demonstrating a "strong need" for this development in this location.

[61] In the context of the submission that any conflict with MP 2000 is minor (and limited to neither the proposed service station nor to drive thru convenience restaurants being, "preferred and acceptable uses for the subject land under MP 2000"[112]) the co-respondent contends that this is an "exceptional case" as contemplated in the *Bell* decision and that there are sufficient grounds, in the public interest, to justify approval of the proposed development despite any conflict with MP 2000. Particular reliance in that regard is placed upon the existence of the following contended circumstances, as being unanticipated by the planning scheme and as creating a need for the proposed development:

(a) The circumstances of the Land have changed in that:

(i) It is no longer "relatively low-lying" given the operational works approval for the construction of a building pad; and

(ii) There are limited remaining environmental, habitat or landscape values on the site and as far as the General Rural Lands designation is applicable, it is a small parcel and practically unable to be used for any rural pursuit and adjacently so designated land, is now being developed for urban purposes by residential sub-division; and

(b) There would be difficulty in any location of a "mixed development of the sort proposed", without some level of conflict with the provisions of MP 2000 and an advantage of this proposal is that the proposed site is particularly well located with convenient access to David Low Way.

[62] Further and in addition to reliance upon the grounds provided in the negotiated decision notice,[113] the co-respondent urged the Court to accept the evidence of Mr Brown and Mr Duane, as set out in the joint report of the economists, as follows:[114]

"(a) There is strong economic and community need for the proposed development, improving the overall level of convenience, choice and accessibility to fuel and fast food facilities within this corridor.

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112 Co-respondent's supplementary written submissions at [2.9].
113 See [19] above.
114 Ex. 7, [181].

(b) A service station typically requires a catchment population of around 4,000 – 5,000 persons in a metropolitan location. The main trade area population is in-excess of 15,000 persons and growing. Using the rate of 4,000 persons per station (similar to the Sunshine Coast average of one station for every 4,300 persons) given the large amount of passing traffic as well as the airport and other tourist facilities in the immediate area indicates demand for four stations. There are currently two stations, with approval for a further one, with another station being clearly sustainable and needed.

(c) In particular, for southbound traffic along David Low Way, there is limited choice in terms of petrol stations, particularly for residents heading to the airport or onto the Sunshine Coast Motorway.

(d) Reflecting the trend in fuel service stations located along major roads, the subject site provides a high profile location for the continued successful operation of such a facility.

(e) The co-location of the proposed service station and fast food outlets would maximise convenience of motorists and local residents, reducing the need for multiple trips.

(f) The proposed development would introduce new fast food operators for resident of the trade area with only two national fast food chains currently provided (Dominos at Pacific Paradise and Subway at Marcoola). This would include the introduction of dedicated drive thru facilities that are not currently provided by existing fast food operators within the trade area.

(g) The proposed development would introduce fast food facilities that would provide additional opportunities for drivers to break their journey to avoid driver fatigue through the introduction of fast food outlets that provide dedicated seating areas.

(h) There are a limited number of national food catering tenants throughout the trade area, particularly with drive through facilities. The subject facility would provide additional choice for trade area residents.

(i) The trade area is currently serviced by two fast food facilities (Subway Marcoola and Dominos Pacific Paradise) with alternative fast food provisions located at Coolum Beach and Maroochydore. The proposed development would increase the range of dining and takeaway food opportunities available to local residents in a convenient and accessible location.

(j) The subject development would provide increased convenience, choice and competition in a growing market, serving a number of customer segments including:

    (i) Trade area residents.

    (ii) Tourists.

    (iii) Passing traffic.

    (iv) Airport visitors and rental cars.

…

(l) The proposed subject use would have little or no impact on the hierarchy of centres if approved, being much smaller in scale than other facilities in the surrounding area, nor would it undermine the viability of existing or approved service stations.

…

(n) The subject facility would provide a limited range of uses and would not be described as a Local Centre.

…

(p) Both the corridor based and catchment based demand approaches indicates that significant demand exists for the proposed development, which would be conveniently and easily accessible from David Low Way."

[63] To similar effect, the respondent made the following submission:

> "…there can be no doubt in the circumstances of this case that the relevant town planning scheme did not anticipate the need for an additional service station to be provided for the benefit of the public, not (sic) that this site would necessarily be available to satisfy that need with a proposal that is likely to be financially viable; particularly convenient for south bound traffic with a limited choice in terms of petrol stations on a "*key coastal tourism route connecting route to the Sunshine Airport...*"; in a central location for the relevant locality and along a busy major road, such that the public would find the proposed development not merely convenient but attractive (in the true sense of the word) and would, as a community, be better off should the proposal be approved and developed."[115]

And, continued to rely upon the following earlier made submissions, as "establishing the need, if not strong need, in the interests of the public, for the proposal to be approved"[116]:

> "17. **First**, that there is a clear and strong need for the proposed development is demonstrated by the strong financial viability of the proposed development. Recently, in *Lipoma Pty Ltd & Ors v Redland City Council & Anor*8, it was recognised by this Court that a fundamental element of economic need is that the development, if approved, would be financially viable.
>
> 18. In the present case, there is no doubt that the proposed development would be financially viable. Using both a corridor based assessment approach and a catchment based assessment approach, Mr Brown was able to conclude that the total turnover of the proposed development on an annual basis would be about $12 to $13 million dollars. That the proposed development is financially viable is, in the submission of the Council, a powerful indicator that the proposed development is needed. It will trade successfully at these levels because the public will choose

115 Respondent's written supplementary submissions at [5(b)].
116 Ibid at [6].

to go there; they will find it convenient.

19. **Second**, the location of the land is important and supports the conclusion that there is a need for the proposed development. For southbound traffic travelling along David Low Way, there is limited choice in terms of petrol stations, particularly for residents heading to the airport or onto the Sunshine Coast Motorway. Indeed, it was the opinion of Mr Brown and Mr Duane that the land provides a high-profile location for the operation of such a facility. That Mr Brown and Mr Duane expressed this opinion is unsurprising when it was a point of general agreement in the need joint report that, "*David Low Way serves as a key coastal tourism road connecting Maroochydore to the Sunshine Coast Airport as well as further afield to Coolum and Noosa.*"

20. The central location of the land in the locality, along a busy major road, supports the conclusion that the public will find the proposed development both convenient and attractive (in the true sense of the word) and therefore that the community will be better off if this proposal is approved. Accordingly, on the relevant tests there is a need for the proposed development. Indeed, the expert for the Appellants, Ms Meulman, went so far as to say that, "*a service station in this location could operate as an intervening opportunity for traffic on the David Low Way.*"

21. **Third**, the need for the proposed development is supported by both, specifically, the presence of the nearby Sunshine Coast Airport and, generally, tourism activity within the trade area. The experts agree that the Sunshine Coast is a popular tourist destination. More locally, within the identified trade area, 781 tourist accommodation rooms were identified by the experts, meaning that tourist accommodation within the trade area could accommodate 1500-2000 persons per night at full occupation. Clearly, the locality is a popular tourist destination.

22. Those familiar with the local beaches, from Maroochy River to Sunshine Beach know why. This is a very attractive area for tourists and day trippers alike. Notably, the experts also agreed that there is significant tourism accommodation located along the David Low Way corridor outside the trade area, which will in part, drive traffic growth along the corridor. The high level of tourism activity within the trade area is coincidental, if not directly related to, the location of the Sunshine Coast Airport which dominates the planning area. That airport now offers domestic flights to Sydney, Melbourne and Adelaide as well as international flights to New Zealand. The experts agree that the airport is expected to expand. In this respect, it is telling that the airport has achieved significant passenger growth between 2000 and 2016, at an annual growth rate of about 8.6% per annum - the airport has in excess of 1 million passengers each year – and the number is growing.

23. Ultimately, given the location of the proposed development proximate to the Sunshine Coast Airport and the popularity of both this immediate location and the Sunshine Coast generally as a visitor destination, the experts agreed that non-resident trade for the proposed development is

likely to be high. Indeed, the experts agreed that 40% of the turnover of the proposed development is expected to come from non-trade area sources. The strength of the Sunshine Coast tourist market coupled with the presence of the airport and significant tourist accommodation and the fact that the proposed development would offer such a convenient service to the public, supports the conclusion that there is a clear and strong need for the proposed development.

24. **Fourth**, the experts' audit revealed that the Sunshine Coast presently has about 1 service station for every 4,300 persons. It would be expected that the Sunshine Coast would have a provision of service stations of closer to 1 service station per 4000 persons rather than 1 service station per 5000 persons, given the large number of tourists in the area. Service stations must serve many more people than the residents in the respective trade areas – particularly those facilities on the coastal strip where tourists congregate. Presently, in metropolitan areas of Australia, the typical provision is 1 service station for every 4000-5000 persons. On the basis that the average on the Sunshine Coast ought to be closer to 1 service station per 4000 people (given the high level of tourist numbers), it is submitted that there is a demonstrated need for the proposed development.

25. **Fifth**, the need is supported by the fact that the main trade area agreed by the experts has a population in excess of 15,000 persons and is growing. Using the rate of about 4000 persons per service station, there is a demand for further service stations within the trade area. On the basis that there are currently 2 stations, with approval for a further 1 (the Coles Express which, curiously, is yet to be built) in the catchment it is understandable that Mr Brown and Mr Duane were of the opinion that another station is "*clearly sustainable and needed*." Those familiar with the existing service stations may reasonably find them far from modern or convenient facilities.

26. **Sixth**, the need for the proposed development is enhanced by the benefits that would be delivered to the public by co-locating the petrol station and restaurant facilities. In the opinion of Mr Duane, there has been an increasing trend in the co-location of drive-through facilities with petrol stations. In the opinion of Mr Duane, the co-location of a petrol station with drive-through restaurant facilities provides a number of benefits including increased convenience for the consumer, visibility requirements on major roads and longer and more flexible trading hours. The community has come to expect the co-location of such motor vehicle orientated facilities – not unreasonably we submit.

27. **Seventh**, that there is a strong need for the proposed development is supported by the proposition that the 2 restaurant facilities to be provided are facilities that are not presently provided. Indeed:

    (a) the trade area population is over 14,000 persons; but

    (b) there are only 2 national fast-food providers present within the trade area, being Subway and Dominos;

    (c) there are no drive-through restaurant facilities provided within the local area; and

(d) the restaurant component of the proposed development alone is projected to have a turnover of $4.19 million in 2021, increasing to $4.51 million in 2026 - indicating a level of public demand which supports public and community need.

28. **Finally**, it is submitted that there is clear and strong need for the proposed development in that it will deliver choice, competition and convenience in both the convenience restaurant and fuel markets to members of the public because:

(a) of the benefits of co-location of these facilities, considered above;

(b) the fact that there are only 2 other national fast food offers presently located in the trade area and those offers do not include any drive-through facility;

(c) the increased competition would benefit members of the public given that fuel industry prices can be quite volatile: having an increased number of petrol stations would add to competitiveness.

(d) the proposed development would improve convenience for members of the public as it would be on the southbound side of David Low Way (but would be equally accessible to travellers in both directions);

(e) the land is ideally placed to serve demand from the airport, in circumstances where the airport is a major generator of traffic for tourists in the broader region including for hire cars and given that the airport currently serves over 1 million passenger arrivals per year;

(f) the proposed development would provide a service to a number of different segments of the public in this locality including trade area residents, tourists, passing traffic, airport visitors and rental car customers. All of those markets would be served in circumstances where the proposed development would have no impact on the hierarchy of centres; would not cause commercial ribbon development; would not result in any unacceptable amenity impacts; and would not be inconsistent with the character of the area, dominated as it is by the airport and its activities."[117] (footnotes omitted)

Town planning and community need

[64] For the co-respondent, attention is drawn to the explanation of the concept of planning need provided by Wilson SC DCJ in *Isgro v Gold Coast City Council & Anor*,[118] as follows:-

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117 Respondent's written submissions at [17]-[28].

118 [2003] QPELR 414 at 418 [21].

> "Need, in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community … Of course, a need cannot be a contrived one. It has been said that the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or is not being adequately met …"

[65] For the appellants, reference was made to *William McEwans Pty Ltd v Brisbane City Council*,[119] as a source of the same contention as to "the basic assumption". And, also to the following statements of principle, as informative in this case:

(a) "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 that facility, subject always to other considerations of the town planning kind, including all consideration that the wellbeing of a community also depends significantly on an acceptable residential amenity";[120]

(b) "'Need' in cases such as this does not mean pressing need, critical need, widespread desire or anything of that nature. A thing is needed if its provision, taking all things into account, improves the physical wellbeing of the community";[121]

(c) "'Need', in planning terms, is a relative concept. It does not connote pressing urgency, but rather relates to the general wellbeing of the community. A use is needed if it would, on balance, improve the services and facilities available in a locality";[122] and

(d) "To provide competition and choice where none exists can represent the filling of a need".[123]

[66] From these authorities, it may be accepted, as is contended for the appellants, that the task relevant to the assessment of need in any given case involves a determination of whether the physical wellbeing of the community, or some part of it, can be better and more conveniently served by the proposal, taking all things into account. But, with the evident qualification, as noted in the passage at (a) above, that need is always

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119 (1981) 2 APA 165.
120 *Skateway Pty Ltd v Brisbane City Council* [1980] QPLR 245 at 249-250.
121 *Cut Price Stores Retailers & Ors v Caboolture Shire Council* [1984] QPLR 126 at 131.
122 *Roosterland Pty Ltd & its agents v Brisbane City Council* [1986] QPLR 515 at 517.
123 *Bunnings Building Supplies Pty Ltd v Redland Shire Council and Ors* [2000] QPELR 193 at [21].

subject to other considerations of a town planning kind, including a consideration that the wellbeing of a community also depends significantly on an acceptable residential amenity. The submission continues as to a plain relationship between need on the one hand, and amenity on the other hand, with a difficulty for a developer lying in the suggestion that a development will, on the one hand, improve the physical wellbeing of the community from an economic or town planning need perspective, such that it warrants approval, yet on the other hand have to accept that the very same proposal will give rise to unacceptable impacts on amenity and which counterbalances any such improvement.

[67] The conclusion that should be reached in this case is that the need identified in this case, is not strong. The concession from the appellants' economist was as to a "moderate need". Although that appeared to be based mainly on economic considerations. More particularly, the submissions of the appellants should be accepted, in that:

(a) the evidence falls short of establishing that there is a gap in the existing supply or level of access to, and convenience of, existing facilities;

(b) approval in this case would deliver no more than the mere addition to consumers' area of choice; and

(c) whilst the site is convenient and accessible for the proposed uses, the evidence falls short of establishing that this is any "strong" community (including travellers and tourists) need for competition and enhanced convenience and accessible access to a fuel and fast food provider.

[68] As further pointed out by the appellants, it appears to be uncontroversial that the local community is not one which is inadequately served. Indeed, the co-respondent and respondent's economists each agreed in oral evidence that the current offering for that community is not inadequate and that the community is not one suffering from a shortage of fuel or fast food providers.[124] At best, the evidence establishes that this proposal will do no more than create a choice of facilities (even if modern and more

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[124] See T2-29.1-22, T2-31.23-29, T2-50.13-15, T2-52.20-31. It was also pointed out that this may be contrasted with the facts in *Peet Flagstone v Logan City Council & Anor* [2016] QPEC 024 at [42(d)]-[42(h)], where there was no service station in the identified trade area for a population heavily dependent on fuel.

attractively convenient), in circumstances where the existing facilities available are not inadequate.

[69] Those submissions should be accepted, essentially in recognition of the acceptance of the further elaboration for the appellants, to the following effect:

(a) First, there is no evidence that an operator for the service station, let alone two convenience restaurants, is interested in taking up the proposal on the land, assuming the application is approved. In circumstances where the need experts made a joint information request during the preparation of the joint report for expressions of interest or committed tenants for both the service station and fast food outlets,[125] the absence of a confirmed tenant or expression of interest in the proposed development is appropriately relied upon by Ms Muelmann as a reason in support of her conclusion that the need for the proposal is only moderate.[126] It is then correctly pointed out that this absence is an important consideration, in that:

(i) the Court is left in doubt as to whether the service station, if approved, will offer any different choice or competition to the market;

(ii) it remains unclear as to whether there would be any commercial interest in operating two significantly sized fast food stores with drive through facilities. In circumstances where there is no other drive through facility, contrary to what might be expected if more than moderate need existed within the trade area;

(iii) contrary to more typical experience, the evidence of the economists is unsupported by evidence of a proposed operator, such as may provide more precise confirmation of the nature of the facilities to be provided and insight into the different products, or indeed choice, that it will offer the community; and

125 Ex. 7, [11].
126 Ibid, [182(b)].

(iv) the reality is the trade area in this case has, within 1.6km of the subject land, two existing service stations and a third service station approved for development. There is no evidence to suggest that the two existing service stations, let alone the three (as currently approved) are insufficient. There is no evidence to suggest that the service stations experience high periods of delay and queuing. Further, there is no evidence to suggest that the location of the existing service stations are themselves inconvenient to this community.

(b) There is also no evidence from any lay witness in support of the proposition that this proposal is required to meet the need for a further service station or indeed fast food facilities or that locals, tourists or travellers suffer any present difficulty or inconvenience in obtaining petroleum products or goods of the type likely to be sold at the service station and fast food outlets. Rather and to the contrary, there is evidence of locals that don't want these facilities in this locality,[127] and absence of any clear evidence of inaccessibility, delay or substandard service at existing petrol stations or fast food facilities. Consistently with such circumstances, neither Mr Duane nor Mr Brown suggested that residents, travellers or visitors were not adequately served at this time. Accordingly and as the appellants contend, if the service station, in particular, was to be built it would simply lead some consumers to buy from it rather than from other adequate facilities, a circumstance which may be noted to have been similarly influential in the conclusion of Senior Judge Skoien in *Prime Group Properties Ltd v Caloundra City Council & Ors*, that:[128]

> "The conclusion I draw from that is that the residents of Caloundra and the visitors (the well-being of whom are also the legitimate concern of the Council) are quite adequately served at this time. So if this service station were to be built it would simply lead consumers to buy from it rather than from another adequate outlet. A similar conclusion can be reached in relation to the convenience store, there being no evidence of problems with the existing facilities. It seems to me therefore, that all that would happen is that motorists

127 Ex. 13, [9]; Ex. 20.
128 [1995] QPLR 147 at 150.

> would have the opportunity to patronise one extra service station and convenience store. There is no evidence that products of any different or better type, would be available here.
>
> I do not consider that this mere addition to the consumers' area of choice falls into the category of 'improving' the physical well-being of the community (*Cut Price stores*, supra) nor 'improve the services and facilities available in the locality' (*Roosterland*, supra). See also *William McEwans Limited v. Brisbane City Council*, supra."

(c) A similar approach was taken in *Intrafeld Pty Ltd v. Redland Shire Council*:[129]

> "[19] The test imposed by the primary judge was said to be too a stringent definition of need; it was submitted that a use would be needed if on balance it improved the service and facilities available in a locality; *Cut Price Stores Retailers Pty Ltd v Caboolture Shire Council* [1984] QPLR 126; *Roosterland Pty Ltd v Brisbane City Council* [1986] QPLR 515; *Reiken & Ors v Ipswich City Council* [1984] QPLR 147; *Indooroopilly Golf Club v BCC* [1982] QPLR 13; *Ecovale Pty Ltd v Gold Coast City Council* [1999] 2 Qd R 35 in particular were cited.
>
> [20] Those cases indicate, as the appellant acknowledged, that need is a relative concept to be given a greater or lesser weight depending on all of the circumstances which the planning authority was to take into account. The findings of the primary judge amount to no more than that the existing facilities were adequate and the proposal would do no more than give a choice which some consumers might choose to avail themselves of."

(d) The absence of the evidence of an operator and lay witnesses, means that the two approaches adopted by the economists to the assessment of economic need in this case (the "corridor" and the "trade area" approaches) are amenable to the criticism that they represent theoretical exercises unsupported by "on the ground" evidence to give comfort to the statistical exercises undertaken, and based upon a number of assumptions. For example, the corridor approach requires an assumption to be made about the number of vehicles per day which

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129 [2001] QCA 116 at [19]-[20].

will "turn in" to access the facilities proposed.[130] Any such criticism is not to deny the two approaches adopted by the economists as undoubtedly recognised methods of establishing economic need for a proposal. But are rather directed at the weight that should be given to such evidence in the context of the question posed for the Court. As Judge Robin said in respect of such approaches, in *Glenella Estates Pty Ltd v Mackay Regional Council & Ors*:[131]

> "As can be seen from the contents of the joint economic experts' report, their exercise is essentially a theoretical one; there is no evidence of would-be purchasers of land clamouring in vain for access to stock or of land prices in Mackay being so high on relevant comparisons as to be bespeak a market which is undersupplied. It can be a comfort to have assertions of need verified by actual instances borne of experience 'on the ground' as well as by statistical exercise taking a broad general (maybe theoretical) approach cf. *Gavin Developments Pty Ltd v. Scenic Rim Regional Council* [2010] QPEC 51 at [25]-[26]."

(e) Moreover the theoretical exercises that were undertaken also included the following countervailing indications:

(i) As was accepted by Mr Duane and Mr Brown, population growth cannot be relied upon in this case to support the need for an additional service station over time. This is not a community where there is predicted to be significant population growth and only such as would result in a growth in the fuel market of no more than 0.8 million litres of fuel in circumstances where 3 million to 3.5 million litres is required for a service station to operate successfully.[132]

(ii) the economists also identified that the provision of service stations on average in Australia falls within the range of 4,000 to 5,000 persons per service station, with the Sunshine Coast presently having a supply equivalent to one service station per 4,300 persons (comparative to the Gold Coast average which is one service station per 4,700 persons), which does not

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130 The number of vehicles that could be assumed under this approach to access the Land ranges in the order of 1,080 vehicles to 2,625 vehicles: Ex 6, [28].

131 [2010] QPEC 132 at [50].

132 Ex. 7 [182(h)].

bespeak a wider community which is in any way underserviced or experiencing a latent unsatisfied demand.

(f) The economists all agreed that locating facilities such as that proposed in centres as encouraged by the planning scheme has a sensible underlying economic principle. The principle is consistent with s 4.4.1 of the Strategic Plan[133] which involves the consolidation and maintenance of the retail and commercial centres hierarchy.[134] More particularly, this provision states, in part:

> "The maintenance of the Retail and Commercial Centres Hierarchy protects the investments made in existing centres and promotes private and public sector confidence in, and public knowledge of, the Council's continuing commitment to that investment. It also provides a basis for containing the growth and function of centres, limiting their spread into the residential areas in which they play a fundamental role in facilitating the concentration of certain uses in highly accessible and appropriately serviced areas."[135]

As identified for the appellants, the magnitude of this consideration is exemplified in Table 23 of the economists' joint expert report[136] which identifies that, at least on Mr Brown's approach the projected turnover levels for the proposed development in 2021 is likely to range from $12.7 million to $13.6 million, with predicted to increase to $13.7 million and $14.08 million in 2026. And the development proposed here will have a gross floor area in excess of 1,000m^2, being the commercial gross floor area encouraged within a local centre.

Other grounds

[70] Otherwise, it should be concluded that there is no sufficiency of grounds otherwise identified in the matters that have been contended by the town planners called, respectively, by the respondent and co-respondent,[137] and particularly those which have been pressed in submissions by the respondent and/or co-respondent. In that

133 Ex. 11, p. 95.
134 Ibid.
135 Ibid.
136 Ex. 7, p. 33.
137 See [45]-[46], above.

regard, it suffices to note that the submissions of the appellants, to the following effect, should be accepted:

(a) it is difficult to see how the intrusion of a commercial use into a residential area is in the public interest where it is said to achieve the following:

(i) activating a major road close to the airport where there is no indication that such activation is intended;

(ii) fulfilment of a gap in the service station network where, as has been noted above, there is no operator identified so it is difficult to assess what the gap truly is, if any; and

(iii) to locate on the southbound side of David Low Way where the scheme has not evidenced any such anticipation by including the land in a zoning or precinct where commercial development was encouraged.

(b) The suggestion that the proposal enhances the tourist character of the area ignores that the character for this part of David Low Way is not intended to exhibit a tourist character. The tourist character is identified in other areas. There is no public interest or public benefit in enhancing any tourist character of this part of David Low Way.

(c) Insofar as it is suggested the proposal does not result in any adverse amenity impacts, or on the hierarchy of centres, neither contention has been made out on the evidence, for the reasons set out earlier.

(d) To the extent it is contended that the General Rural Lands Planning Area aspect is overtaken by events, that can be accepted in part. The operational works approval on that land has removed the flooding and environmental constraints underpinning that designation. That does not however justify granting an approval which involves commercial and industrial development on land designated for residential development. Indeed, the retail and centres hierarchy provisions expressly discourage such an outcome and have not been overtaken by events and remain as sound planning principle;

(e) As to the contention that the proposed upgrade to the road network will improve safety and efficiency for local residents and whilst it is

accepted that the proposed roundabout will improve access for the residents located to the north of David Low Way (via Fourth Avenue), the provision of the roundabout is not a ground which could assist in overcoming conflict with MP 2000. As Mr Pekol confirmed in his oral evidence,[138] the proposed development requires the provision of a roundabout to mitigate the impact of the development (in a traffic sense) on the State controlled road network.[139] In such circumstances, there is no sufficient public interest identified; and

(f) The contention, particularly of the co-respondent, that the land is not suitable for low residential development and, in such circumstances, it is appropriate that it be put to a less sensitive use being commercial or industrial in nature, not only confronts the known and acknowledged existence of and its potential impact on future residential uses, but that the planning scheme nonetheless identified that a particular type of residential use is nonetheless appropriate on the land, particularly in Precinct 12.

Conclusions

[71] Accordingly, and in summary terms:

(a) the established conflict of the proposed development on the Land, with MP 2000, is to be properly regarded as significant if not serious, rather than minor or technical, or limited to an issue as to preferred and acceptable uses of land;

(b) it is clear that MP 2000 indicates awareness of the Sunshine Coast Airport, including its expansion, the importance of David Low Way and the locational attributes of the Land, but nevertheless contains clear indication that the Land was to remain residential in nature, in keeping with the surrounding locality. And as expressly noted in the submissions of the co-respondent, this has been the nature of ongoing development of land in the vicinity; and

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138 T2-6.38-39.

139 It should be noted that this conclusion has not been assisted by reference to the decision in *Australian Capital Holdings Pty Ltd & Ors v Mackay City Council* [2008] QCA 157, at [63].

(c) there are, in the circumstances, insufficient grounds, in the public interest, to depart from the instrument to be taken as an embodiment of what is to be taken to be in the public interest, by approval of the proposed development.

[72] Therefore the appeal should be allowed and it would be appropriate to order that the decision of the respondent, as set out in the Negotiated Decision Notice dated 22 August 2016, is set aside and replaced by the decision that the development application made by the co-respondent on 30 April 2015, is refused.