# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

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| CITATION: | *Beerwah Land Pty Ltd v Sunshine Coast Regional Council* [2018] QPEC 10 |
| PARTIES: | **Beerwah Land Pty Ltd (ACN 158 073 842) (Appellant)**<br>**v**<br>**Sunshine Coast Regional Council (Respondent)** |
| FILE NO/S: | 5073/16 |
| DIVISION: | Planning and Environment Court, Brisbane |
| PROCEEDING: | Hearing of an appeal |
| ORIGINATING COURT: | Planning and Environment Court of Queensland, Brisbane |
| DELIVERED ON: | 14 March 2018 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 19 February to 23 February 2018 |
| JUDGE: | RS Jones DCJ |
| ORDER: | **1. The appeal is dismissed.**<br>**2. I will hear from the parties as to any consequential orders.** |
| CATCHWORDS: | APPEAL AGAINST REFUSAL OF DEVELOPMENT APPLICATION – where respondents refused appellants application under the respondent's Superseded Planning Scheme for a Development Permit to reconfigure a lot in to 16 separate lots – where development included a new road – where subject land located proximate to an existing poultry farm operation.<br>ALLEGED CONFLICT WITH PLANNING SCHEME – where numerous conflicts with the Planning Scheme alleged – inappropriate and unsafe access – inappropriate design – adverse amenity impacts including emissions from nearby rural activity – "reverse amenity" and failure to maintain appropriate "urban design".<br>NEED – whether in the event there was conflict with the planning scheme – the extent and nature of the conflict – whether sufficient grounds to warrant approval despite the conflict. |

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| | *Sustainable Planning Act 2009* |
| | *ALCAN (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] 239 CLR 27 |
| | *Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QCA 157 |
| | *Beerwah Land Pty Ltd v Sunshine Coast Regional Council & Anor* [2016] QPEC 55 |
| | *Elan Capital Corporation Pty Ltd & Anor v Brisbane City Council & Ors* [1990] QPLR 209 |
| | *Grosser v Council of the City of Gold Coast* [2001] QCA 423 |
| | *Leda Holdings Pty Ltd v Caboolture Shire Council & Ors* [2006] QCA 271 |
| | *Lockyer Valley Regional Council v Westlink Pty Ltd* [2011] 185 LGERA 63 |
| | *Newing & Ors v Silcock & Ors* [2010] QPELR 692 |
| | *Weightman v Gold Coast City Council & Anor* [2003] 2 Qd R 441 |
| | *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] 201 LGERA 82 |
| COUNSEL: | Mr D Gore QC with Mr B Job QC for the appellant |
| | Mr C Hughes QC with Mr M Batty for the respondent |
| SOLICITORS: | Mullins Lawyers for the appellant |
| | Sunshine Coast Council Legal Services for the respondent |

[1] For the reasons set out below, the orders of the court are:

1. The appeal is dismissed
2. I will hear from the parties as to any consequential orders.

**Background**

[2] The subject land is described as Lot 100 on SP268980 which contains an area of approximately 1.656ha. It has access via to Geordy Close and Lloyd Street, and is located in the Beerwah Township Planning Area and the Township Residential Precinct under the Superseded Caloundra City Plan 2004. Of particular significance is that while the land is located near residential development to the north-east, south and east, it is located near a poultry farm and feed mill to the north-west.

[3] On 20 May 2015, the applicant made a request to the respondent for the application of a Superseded Planning Scheme, the Caloundra City Plan 2004 (CP2004). CP2004 was superseded by the Sunshine Coast Planning Scheme 2014 on 21 May 2014. Relevantly, the application sought the reconfiguration of one lot into 16 lots and, among other things, the construction of a new road to provide access to some of those lots.[1] On 16 June 2015 the respondent consented to that request.

[4] On 7 December the appellant made the foreshadowed development application (DA) to the respondent. That application under CP2004 was code assessable and did not require referral to any relevant agencies.

[5] For reasons it is unnecessary to dwell on for the purpose of this proceeding, on 15 January 2016 the applicant sent to the respondent a Deemed Approval Notice in respect of the DA. Upon receipt of that notice the respondent purported to issue a Decision Notice which would have had the effect of limiting the sub-division to only three lots. Within that notice under the heading "ENVIRONMENTAL HEALTH" it was asserted:

> "Residential dwellings are not permitted within the 400m poultry farm buffer contour".

[6] Following a hearing in this court in April 2016 Rackemann DCJ determined, among other things:[2]

> "The deemed approval arose because of the Council's failure to decide the application within the decision making period, or to extend the period so that it could do so;
>
> The Council's failure to decide the application within the decision-making period (if not also its failure to do what was required to give effect to its intention to extend that period), involved relevant non-compliance which enlivens the Court's jurisdiction under s 440;
>
> It is in the circumstances of this case, appropriate to exercise the discretion under s 440 and to make orders which, in effect, return(s) the development application to the decision making stage with the consequence that, by reason of the order, that application should no longer be deemed to be approved."

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1 E.g., see layout plan at Exhibit 1, p 2.

2 *Beerwah Land Pty Ltd v Sunshine Coast Regional Council & Anor* [2016] QPEC 55 at [69].

[7] Consequential upon his Honour's findings, on 28 November 2016 the respondent refused the DA alleging numerous conflicts with CP2004. The nature and extent of those conflicts are dealt with below.

[8] On 22 December 2016, the appellant filed its notice of appeal, asserting that the proposal should have been approved.

**"Issues" in the Appeal**

[9] On 5 June 2017, Rackemann DCJ made a number of orders and, of particular relevance, identified that the issues in dispute were those identified in paragraphs 16(a) (i) and (v), 16 (b)(v), 16(c)(i) (ii) and 16(d) of the notice of appeal "*and any further issues identified by the respondent by 19 June 2017."* Those paragraphs relevantly asserted:

> "16. The Development Application should be approved as:
>
> (a) The development does not conflict with the Beerwah Township Planning Area Code-Overall Outcome (k) and Specific Outcome O13 because the development;
>
> (i) will provide and maintain a high level of residential amenity;
>
> …….
>
> (v) provides effective buffering to adjoining rural areas and users;
>
> (b) The development does not conflict with the Reconfiguring a Lot Code – Overall Outcome (b) and (d) and Specific Outcomes O1, O8 and O18 because;
>
> …….
>
> (v) the development creates additional lots in locations that are adequately buffered from potential adverse impacts on future use of lots, incorporates adequate buffers to separate lots from potential adverse impacts on adjacent sensitive of land and does not create reverse amenity situations where the continued operation of existing uses is compromised by closer settlement nearby;
>
> (c) the development does not conflict with the Nuisance Code – Overall Outcomes (a) and (b) and Specific Outcome O9 because:
>
> (i) the location, design, construction and operation of the development will maintain suitable levels of

amenity and environmental performance by not being subject to unacceptable emissions from nearby development;

(ii) environmental values will be protected by preventing or minimising potential environmental nuisance or environmental harm resulting from the release of contaminants particularly noise, odour, light, dust and particulates;

……

(d) Further or in the alternative to the above, to the extent that the Development Application conflicts with the Superseded Planning Scheme (which is not admitted) there are sufficient grounds to justify the Development Approval despite the conflict."

[10] On 27 June 2017 the respondent filed and served its "Reasons for a Refusal".[3] Instead of setting out in detail all of those reasons for a refusal, it is more convenient to summarise the issues in dispute as being:

- design issues, including the failure to adequately take into account the existing poultry farms by failing to provide adequate buffers;
- the failure to appropriately integrate with existing development in surrounding areas and;
- the failure to provide a suitable access arrangement.

[11] In respect of the last matter, the allegations included that:

(a) Alleged unacceptable impacts arising from the construction of a "*long cul-d-sac road"*;
(b) The failure to provide convenient, safe and efficient movement for all modes of transport;
(c) That the new roads would have adversely affect the amenity, access pattern, and "*legibility"* of existing areas.

[12] Of particular significance in this case were the allegations that the proposed development would result in unacceptable "reverse amenity" impacts. In paragraphs 4 and 5 of the respondent's Reasons for Refusal it was asserted:

> "Approval of the application would be in conflict with the following provisions of code 9.8 – Nuisance Code of the Caloundra City Plan 2004:
>
> (a) Overall Outcome (2)(a) – the location and design of the proposed development will not maintain suitable levels of amenity and environmental performance. The proposed development will be subject to unacceptable emissions from nearby development.

[3] Exhibit 4, tab 3.

Further, approval of the proposed development would not protect or minimise environmental values by preventing or minimising potential environmental nuisance from odour.

(b) Specific Outcome O9 – the proposed development would be subject to environmental nuisance, due to odour, from other nearby uses.

Approval of the application would be in conflict with the following provisions of code 8.12 – Intensive Rural Uses Code of the Caloundra City Plan 2004:

(a) Overall Outcome (2) – Approval of the proposed development would result in nearby rural uses being unable to acceptably manage environmental and amenity impacts relating to odour;

(b) Specific Outcome O2 – Approval of the proposed development would result in nearby rural uses being unable to provide a sufficient setback to road frontages and the proposed residential lots;

(c) Further, as the proposal significantly fails to comply with Acceptable Outcome 2.1, the proposal requires careful scrutiny, which scrutiny the proposed development is unable to withstand."

[13] In the joint expert report (JER) of the town planners, Ms Rayment for the appellant and Mr Schomburgk for the respondent agreed that "*the issues in this Appeal have been grouped and broadly relate to –"*[4]

"Air quality and associated residential amenity;
Subdivision layout with respect to the traffic network; and
Sufficient grounds to justify the approval in the event of any conflict with the City Plan.

It is **agreed** that the key issues in the Appeal relating to air quality and transport are predominantly matters for others, but have a town planning dimension, which we have discussed throughout the report."

[14] Thereafter, unnecessarily in my view, in the JER slabs of the referred to provisions of CP 2004 are set out in full. I say unnecessarily because, at the conclusion of the cross-examination of Mr Schomburgk by Mr Gore QC, the following exchange took place:[5]

"**Q** And when you say it hasn't been demonstrated by our client, you're really leaning towards Mr King's evidence; correct?

**A** Well, what I'm leaning to is the combination of Mr King and Mr Baulch where they can't agree. And I've said in the joint report at least once that that, to me – two experienced experts can't agree whether there will be an odour problem or not. That, to me, is a serious concern and is cause for me, if I was in the assessment manager's position – as did the Council

[4] Exhibit 10, p 20, para 82.
[5] Transcript (T) 4-14, ll 8-22.

officer – to run up some flags.

**Q** But, Mr Schomburgk, with all respect, this court has to commonly resolve disputes between experts – differences of opinion?

**A** Of course.

**Q** **And if His Honour finds that in all the circumstances, there will not be unacceptable odour impact, your opposition to this project disappears?**

**A** **Absolutely**."
(Emphasis added).

[15] Accordingly, in my view, it is unnecessary to set out in full many of the provisions of the CP2004 as was done in the JER of the town planners but need only, in any detail, deal with those concerned with odour and reverse amenity.

[16] For the sake of completeness, I will however refer briefly to the traffic and design issues that arose during the course of the proceeding.

[17] The appeal was commenced under the *Sustainable Planning Act* 2009 (SPA). It is to be decided under that Act notwithstanding it now being repealed by the *Planning Act* 2016. It is of course incumbent upon the appellant to satisfy me that the appeal ought to be allowed and the DA approved.

**The site and subdivision layout**

[18] The 1.656ha to be developed is a residual parcel of land immediately to the west of an existing residential subdivision. That subdivision, and as a consequence the creation of the subject land (Lot 100), came about pursuant to decisions of this court in 2012 and 2014. For reasons which will become clear when dealing with the issue of odour and residential amenity, it was a condition of the original subdivision that "*any dwelling on proposed lot 100… must be located outside of the 400m poultry farm buffer contour…"*[6]

[19] Leaving aside for the moment the existing poultry farm, the site is ideally suited for subdivision of the type proposed. Not only does it have the benefit of an urban designation under the CP2004, but its location and other physical characteristics make

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6 Condition 39.

it well, if not ideally suited for residential development. In this context, as Ms Rayment noted, it would form a natural extension of an existing and successful residential subdivision.

[20] Turning to the design of the proposed subdivision layout;[7] while I can accept the concerns expressed by Mr Schomburgk that the lot layout at the head of the cul-de-sac at Geordy Close is less than ideal, it is not an unacceptable outcome and would not result in any appreciable adverse amenity issues (including traffic). The subdivision layout would certainly not warrant refusal of the application.

**Traffic/Access**

[21] Unlike the "reverse amenity" issue, the traffic matters can be dealt with quickly. Mr Pekol, the traffic engineer relied on by the respondent summarised his concerns as being:

> "Cul-de-sac connectivity; and
>
> An excessive number of lots proposed to be accessed from the Geordy Close cul de sac."[8]

[22] According to Mr Pekol "*…by their nature cul-de-sacs do not provide a legible and connected street network, which is contrary to the objectives of the planning scheme, and their use should be avoided where possible."*[9] In respect of the number of lots gaining access from the cul-de-sac it was his opinion that "*…there would not be enough kerb length for on-street parking, driveways and rubbish bins, in accordance with the provision of the Superseded Planning Scheme…"*[10]

[23] According to Mr Pekol, his concerns could be addressed by either:[11]

- "Replacing the cul-de-sacs in Geordy Close and Lloyd Street with a new road connecting the two; or
- Modifying the layout in Geordy Close so that no more than four lots are served from the cul-de-sac head."

[24] Mr Douglas, the traffic engineer relied on by the appellant, considered that the current design adequately addresses all appropriate design criteria and policies, including the

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7 E.g. Exhibit 1, p 2.
8 Exhibit 9, p 3, para 14
9 Ibid para 17.
10 Ibid p 4, para 23.
11 Ibid p 5, para 27.

planning scheme. That was so, notwithstanding his concession that the matters raised by Mr Pekol would or could result in some "minor" benefits. His conclusion was that there were no material transport or traffic reasons that would preclude approval (on traffic/access grounds) of the proposal.[12] However, notwithstanding that, Mr Douglas in his individual report identified that in the event that it might be considered necessary to remedy the matters identified by Mr Pekol, they could be addressed in various ways. First, a condition requiring the provision of one visitor parking space in or adjacent to the driveway on Lots 42 and 47. Or, a condition requiring that at least one visitor parking space with a turn-around area on site on each of Lots 44 and 45. Such a condition may also include a requirement for signage to indicate that visitor parking was available on-site. Or, the amalgamation of Lots 43 and 44 and Lots 45 and 46 to reduce the number of lots accessed off the Gordy Close cul-de-sac from 6 to 4.[13] Mr Pekol agreed that such conditions would also provide acceptable outcomes.

[25] In my view it is not necessary for me to resolve the contest between Mr Pekol and Mr Douglas to the extent that any contest might really exist, as it is abundantly clear that there are no traffic and/or access issues that would warrant refusal. And, in the event that the concerns raised by Mr Pekol were shown to be sufficiently serious, they can be readily addressed as acknowledged by both engineers.

**The poultry operations and complaints**

[26] The various operations on the poultry farms to the northwest of the subject site were referred to during the course of this proceeding as the "Woodlands" operations. Those operations were described by Mr Sprenger, the general manager of Woodlands in his affidavit.[14] Significant features of those operations include that it is a major privately owned egg and chicken meat producer in southeast Queensland. Its growing farms are located primarily in the Beerwah and the wider Sunshine Coast region, but facilities also exist at Kilcoy and Harlin. In total, Woodlands produces up to 420,000 day-old chickens per week in its hatcheries. Of particular significance is that it employs approximately 190 staff, primarily in the Beerwah region, as well as 30 independent farm managers and numerous contractors such as bird catchers,

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12 Ibid p 6, para 35.
13 Exhibit 13, p 12, para 41.
14 Exhibit 20.

maintenance contractors and cleaning contractors. Indeed, Woodlands is the largest employer in the Beerwah local area.

[27] Of particular relevance in this proceeding was what occurs in poultry Farms 6 and 7 because of their proximity to the subject land, particularly Farm 7 which comprises of eight sheds. Those sheds have electrical lighting which, on occasions, will be activated for up to 20 hours per day. They also involve automatic watering devices and ventilation devices. Farm 7 operates on a nine-week cycle which involves:

(i) the progressive placement of day old chickens in the eight sheds, which takes approximately two weeks to complete;

(ii) the growing of the chickens and their progressive thinning and cleanout at the following times:

- 5 weeks, at which time they weigh approximately 2 kgs;
- 6 weeks, at which time they weigh approximately 2.7 kgs;
- at 7 or 7.5 weeks at which time they weigh approximately 3.4 kgs.

[28] Once all the birds have been depleted from the shed, the removal of the litter and the cleaning and disinfection stages commence in preparation for the next cycle. Approximately 150,000 chickens will be housed in the sheds during a normal cycle and this operation continues year round.

[29] It is clear that not only is Woodlands a financially successful operation, but also an extremely important part of the commercial viability of this part of the respondent's local government area.[15] It is also a responsible corporate citizen and there is no reason to believe that that situation would not continue into the future. In this context, Mr Schomburgk readily agreed that having regard to the nature and extent of its operations and the years it has been in operation, there have been very few complaints from residents to the surrounding areas.

[30] It is probably correct, as was suggested during the course of the cross-examination of various witnesses, that persons who live in rural communities tend to be more robust about matters such as farm odours that would likely offend more sensitive city nostrils, but even allowing for that, there can be no doubt that over the years Woodlands has operated in a manner that has resulted in only very few complaints

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15 The full extent of Woodlands' operations proximate to the subject land can be seen in Exhibits 17 and 18.

about odour being received. That said, it has to be borne in mind that the respondent has made provision for what is essentially a 400m buffer intended to separate Woodlands operations from residential development.

[31] Under the heading "*Woodlands concerns*" Mr Sprenger stated:[16]

> "In my time at Woodlands, I have observed a steady expansion of urban and/residential uses towards Woodlands operations and a consequential encroachment into the historical poultry buffer zone between the Woodlands' operations and urban and residential areas. The Proposed Development represents a further encroachment into those separation areas.
>
> It is has become increasingly difficult in recent years to find suitable land for poultry farms in this region. Representations have consistently been made on behalf of Woodlands to the Council and state government agencies to maintain poultry buffer zones from poultry farms.
>
> Woodlands is concerned by the Proposed Development for the reason that it will result in the creation of residential lots in close proximity to its existing operations which will result in:
>
> (a) odour impacts, both real and perceived, on the future users of those lots;
> (b) complaints being made by those future users;
> (c) pressure being placed on Woodlands, by the local community or the government to relocate or reduce the scale of its operations; and
> (d) woodlands being unable to comply with the conditions of its development approval for Farm 7, which requires that the release of noxious or offensive odours do not cause an environmental nuisance at any odour sensitive place, such as a residential lot …"

[32] I consider Mr Sprenger's concerns to be both genuine and reasonable.

[33] Turning to the issue of complaints more particularly, it is also not an irrelevant consideration that complaints concerning odour have not been received from residents who had built closer to Woodlands operations prior to the introduction of the 400m buffer. That, together with the low level of complaint is a significant matter to be taken into account, as is the evidence of Ms Templeton, a resident at the existing subdivision at 2 Geordy Close. She states that neither she nor anyone else she is aware of who resides in Geordy Close has complained about being affected by odour. Ms Templeton was not required for cross-examination.[17] Her evidence is consistent

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16 Exhibit 20, paras 27-29.
17 Exhibit 15.

with that of Mr Laruccia who has some eight years' experience on or very near the subject land.[18] That said though, there have, as a matter of fact, been complaints from local residents and various experts who visited the site, Mr Schomburgk and Messrs Balch and King stated that they detected odour from Woodlands when they visited the site. None of those witnesses, however, stated that they found the odour particularly offensive.

**Odour/Reverse Amenity**

[34] Perhaps not surprisingly, there are three particular features of this case. First, in a local government area where rural activities play an important role, there are a number of elements or parts of the planning scheme that are intended to address the amenity issues that can arise from competing land uses. In particular, to address problems that can arise as a consequence of the rapid spread of urban growth in South-East Queensland. Second, there is a degree of overlap if not outright repetition in a number of the provisions of the planning scheme. Third, not only do the town planners naturally defer to the engineers and scientists on the issues of odour, as already identified in respect of the evidence of Mr Schomburgk, their opinions on the acceptability or otherwise of the proposed development depends entirely on the opinions of those experts.

[35] The relevant provisions of CP2004 provide as follows:

*Beerwah Township Planning Area Code* (BTPA Code):

| Specific Outcomes | Acceptable solutions for self-assessable development* and probable solutions for assessable development |
|---|---|
| ***Reconfiguring a Lot in the Township Residential Precinct (Subject to Structure Planning Code)*** | |

[18] Exhibit 14.

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| **O13** Reconfiguring a lot in the Township Residential Precinct:<br>(a) is sympathetic to the rural township character of Beerwah;<br>(b) avoids development of land subject to constraints; and<br>…<br>(d) provides effective buffering to adjoining rural areas and uses. | **S13.1** Reconfiguring a lot on land identified on **Map BTP3** as being subject to the Structure Planning Code:<br>(a) maintains land identified as "constrained land not intended for development" free of development; and<br>… |
| | **S13.2** Reconfiguring a lot provides for an effective rural buffer to be provided between allocated Township Residential and Rural Precincts in accordance with **"State Planning Guidelines: Separating Agricultural and Residential Land Uses"**.<br>*Note:*<br>*Section 9.11 (Structure Planning Code) sets out requirements for development on land that is subject to the Structure Planning Code.* |

[36] The BTPA Code map[19] identifies that the subject land is subject to the *Structure Planning Code* (SP Code). That Code relevantly provides:

| Specific Outcomes | Probable Solutions |
|---|---|
| **O1** Development in a local structure planning area achieves the following:<br>(a) appropriate address of geographical constraints;<br>(b) protection of environmental and cultural heritage values;<br>(c) integration with existing or approved development in the surrounding area;<br>…<br>(k) a satisfactory level of amenity and safety for future residents. | **S1.1** No probable solution prescribed. |

[19] See Exhibit 5, p 33.

[37] The *Reconfiguring a Lot Code* (RL Code) relevantly provides:

> "(2) The Overall Outcomes sought for the Reconfiguring a Lot Code are that lot reconfiguration results in well designed development where:
>
> (a) …
> (b) lots are provided with safe and appropriate access;
> (c) the size, dimension and layout of lots is consistent with the Planning Area Overall Outcomes and Specific Outcomes for the Planning Area or Master Planned Area in which the development is locates;
> (d) lot layout has due regard to the geographical constraints, identified hazards, and environmental management issues applicable to the subject site;
> (e) …"

| Specific Outcomes | Probable Solutions |
|---|---|
| ***Lot Layout, Sizes and Dimensions*** | |
| **O1** Lot and street layout provides neighbourhoods with a strong and positive sense of identity by:<br><br>(a) responding to geographic constraints, site characteristics, setting, landmarks, places of cultural heritage significance and views; and<br>… | **S1.1** The layout of the subdivision:<br><br>(a) incorporates a street system which provides for safe and efficient vehicular, pedestrian and cyclist movement; and<br>(b) provides for open space and park in accordance with the Priority Infrastructure Plan in Part 10 (Priority Infrastructure Plan) and the *Caloundra City Open Space Strategy* or a Structure Plan and the terms of an Infrastructure Arrangement applicable to a Structure Plan. |

[38] The RL Code specifically addresses the issues of severe amenity and provision of buffers:

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| ***Buffering*** | |
| **O18 Additional lots are created in locations that:**<br><br>(a) **are adequately buffered from potential adverse impacts on future users of the lots;**<br>(b) **incorporate adequate buffers to separate the lots from potential adverse impacts on adjacent sensitive land; and**<br>**do not create "reverse amenity" situations where the continued operation of existing uses is compromised by closer settlement** | **S18.2** No part of any lot included in the Residential Precinct Class, the Emerging Community Precinct or the Rural Residential Settlement Precinct is located within the setback requirements from existing intensive rural uses contained in **Table 8.2 (Siting and Setback Requirements for Intensive Rural Uses)** of the **Intensive Rural Uses Code.** |

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| **nearby.**<br>(Emphasis added) | **S18.3** Where located adjacent to good quality agricultural land, setbacks for any part of a proposed lot included in the Residential Precinct Class, the Emerging Community Precinct or the Rural Residential Settlement Precinct comply with the buffer design criteria contained in Table 2 and other relevant design components of the *Planning Guidelines-Separating Agricultural and Residential Land Uses (DNR and DLGP, August 1997).*<br><br>**S18.4** Lots included in the Residential Precinct Class, the Emerging Community Precinct or the Rural Residential Settlement Precinct:<br><br>(e) are not located within areas subject to unacceptable noise, vibration, lighting or **odour**<br><br>*Note:*<br>*Section 9.8 (Nuisance Code) sets out requirements for managing noise, light and odour nuisance.*<br><br>**nuisance**. (Emphasis added) |

[39] Probable Solution 18.2 (S18.2) nominates setbacks for "*Intensive Rural Uses"* by reference to Table 8.2 of the IRU Code which identifies that, in respect of *"Animal Husbandry – high impact (Poultry Farm)",* such uses are to be located no less than 400m from *"residential building on surrounding land.*"[20]

[40] The juxtaposition of the subject land and the 400m buffer reveals that all but for proposed Lot 41 and part of Lot 42 would be located within 400m of the closest element of the existing Woodlands operations at Farm 7.[21]

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20 Exhibit 5, p 65.

21 See Exhibit 18, Exhibit 23 at p 5 para 1, and Exhibit 1 at p 2.

[41] While arguably it is not strictly necessary to refer to the *Nuisance Code*, for the sake of completeness I will do so. Section 9.8.1 of that Code identifies the overall outcomes sought to be achieved:[22]

**9.8.1 Overall Outcomes**

(1) The Overall Outcomes are the purpose of the Nuisance Code.

(2) The Overall Outcomes sought for the Nuisance Code are as follows:

(a) the location, design, construction and operation of development maintains suitable levels of amenity and environmental performance by:
  (i) not imposing unacceptable noise, light or odour emissions on nearby development; and
  (ii) not being subject to unacceptable imissions from nearby development; and

(b) environmental values are protected by preventing or minimising potential environmental nuisance or environmental harm resulting from the release of contaminants, particularly noise, odour, light, dust and particulates.

Specific Outcome 9 (O9) specifically deals with the issue of odour:[23]

| Specific Outcomes | Probable Solutions |
|---|---|
| ***Odour*** | |
| **O9** Odour emissions or imissions do not cause environmental nuisance either in the surroundings of proposed development (odour emission) or at the proposed development (imission) | **S9.1** No probable solution prescribed |

[42] It is tolerably clear that the primary purpose of the Nuisance Code and Table 8.2 of the Intensive Rural Uses Code (IRU Code)[24] is to ensure that, as far as is practicable, uses capable to creating adverse environmental impacts on urban development are located and developed at a "safe" distance. On the other hand, the provisions of the RL Code set out above are designed to ensure that, as far as is practicable, local residents are not exposed to adverse environmental impacts by the creation of residential development too close to potentially offensive land uses.

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22 Exhibit 5, p 66.
23 Ibid p 69.
24 Ibid pp 63-65.

**Consideration**

[43] Bearing the relevant provisions of CP2004 in mind, it is then necessary to consider the evidence of the relevant experts. The appellant relied on Mr Balch, a scientist who is also qualified to carry out odour analysis by dynamic olfactometry. The respondent relied on Mr King, a mechanical engineer. Both of these gentlemen are highly credentialed and experienced. Mr King apparently has had more direct experience with the operation of and impacts caused by poultry farms. However, in the circumstances of this case very little, if anything, turns on that.

[44] Mr Balch's work involved extensive modelling which, to put it somewhat crudely, was utilised to try and predict the likely odour impacts on the proposed development from the operations of the Woodland's Farms 6 and 7.[25] The objectives of the modelling (odour dispersion modelling) were described in the second JER of the air quality experts:[26]

> "The objective of the odour dispersion modelling was two-fold, i.e. to:
>
> - Better understand the potential odour dispersion pathways linking the nearby Woodlands poultry farms nos. 6 and 7 to the subject site; and
> - Determine whether the odour intensity surveys were conducted during meteorological conditions similar/representative of those under which the odour dispersion model predicted the highest ground-level odour concentrations to occur.
>
> As described in the first Joint Expert Report issued on 13 October 2017, odour intensity observations were made at one-week intervals during twenty on-site investigations spanning the period 26 October 2016 to 8 March 2017 (Air Environment Consulting report dated 5 July 2017). Meteorological data was also collected by an automatic weather station (AWS) located on the subject site including the period of the field odour intensity observations. Meteorological and odour dispersion modelling has been conducted for the full year period between 19 March 2016 and 18 March 2017 to better understand the odour impact conditions occurring at the subject site over the full year."

[45] In addition to the modelling, Mr Balch's odour impact assessment involved an extensive number of on site "*instantaneous odour intensity measurements",*

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25 The location of the subject land and Farms 6 and 7 are conveniently shown in Exhibits 17 and 18

26 Exhibit 8, p 1.

somewhat inelegantly referred to as "sniff test". Helpfully, Mr Balch provided a summary of his investigations and results:[27]

> "A field ambient odour assessment program was conducted in two individual series between 24 February and 30 October 2015 and 26 October 2016 to 8 March 2017. The initial program conducted in 2015 was reported in AEC (2015). The supplementary program was conducted to complete each month of a full 12-month cycle. A total of 47 odour survey days were completed and presented in the ambient odour assessment report, AEC (2017) dated 5 July 2017. The surveys were performed to assess the impact of poultry odour at the subject site and the surrounding area over varying daily and seasonal conditions. Daily survey times were targeted to coincide with the conditions most likely to generate odour impacts. Such conditions occur in the morning (i.e. from sunrise to mid-morning) and the late afternoon and evening (i.e. from before sunset and into the late evening) periods.
>
> An on-site metrological monitoring program, to record weather observations at the site using an automatic weather station (AWS), was implemented to determine the frequency of winds that blow from Woodlands odour sources towards the subject site. This monitoring program was conducted between 27 March 2015 and 20 March 2017. An assessment of local meteorological observations was provided in both AEC (2015 and 2017) reports with an analysis and interpretation of local wind and atmospheric stability conditions relevant to the dispersion of odour emissions and their impact upon the subject site. This assessment included an analysis of the frequency of occurrence of the conditions that have the potential to disperse poultry shed odour over the subject site.
>
> The analysis of observed winds determined that winds blow towards the subject site from the direction of the nearest poultry farm odour emission sources, based on a sector between 290° (west-northwest) and 0° (north) from the subject site, approximately 13% of the time. In addition to this, the frequency of corresponding stable and neutral atmospheric conditions most likely to generate ground level odour impacts during winds from this sector was also low.
>
> Field odour assessment surveys were conducted using both instantaneous odour intensity measurements consistent with the European EN16841 (2016) standard approach and the dynamic 10-minute odour intensity measurement approach promulgated in the German VD13940.3 (2010) and European EN16841 (2016) standards. The odour intensity measurement method is based on experienced, calibrated odour assessors ranking the intensity of observed odour on a seven-point scale.
>
> …

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27 Exhibit 11, vol 1, pp 5-6.

> The ambient odour assessment determined that during the twenty sampling surveys conducted at weekly intervals to assess each week of the bird growing cycle over two batches between 26 October 2016 and 8 March 2017, distinct, weak and very weak odour was only detected for 10 (i.e. 0.06% of the time), 238 (1.4%) and 1,036 (6.2%) instantaneous samples out of 16,680, respectively. The incidents of detectable poultry odour were determined to be infrequent and of a short duration, typically occurring between two to three seconds, and one to two minutes at a time. The assessment determined that no exceedances of the Queensland odour criterion (2.5 OU, 99.5$^{th}$ percentile for the 1-hour average concentration) were observed, and that the highest observed 1-hour average odour concentration was 1.32 OU, which is equivalent to 53% of the odour criterion."

[46] The reference to the "*Queensland odour criterion of 2.5 OU,*[28] *99.5th percentile*" is a reference to the guidelines provided under the Odour Impact Assessment from Developments Guideline published by the then Department of Environment and Heritage Protection.[29]

[47] Essentially, what I am being asked to decide is whether or not on the balance of probabilities, the residents of the proposed lots would be exposed to an unacceptable risk that odour would exceed 2.5 odour units in excess of the 99.5 percentile, being 0.5% or 44 hours in any given year. As already stated, the burden of satisfying me that there is no unacceptable risk rests with the appellant. The existence of such risks must also be real and genuine and not too remote or speculative.

[48] Based on primarily Mr Balch's work but supported by the evidence of the lay witnesses, it was submitted on behalf of the appellant:[30]

> "46. Unlike the usual circumstance in which a poultry farm has been considered in the context of the farm itself being proposed, this facility exists. The Court has the benefit of the following important matters to assist in the determination of whether the subject land is subject to environmental nuisance or unacceptable impacts from odour:
>
> (a) the conditions which are imposed upon Woodlands by the development approvals it holds;
>
> (b) the expert evidence of Mr Balch including the two comprehensive ambient odour assessments for which he was the project director. They are the subject of

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28 Odour Units.
29 Exhibit 27, pp 20-21.
30 Submissions on behalf of the Appellant, paras 46-48.

the 2015 and 2017 reports appended to his individual Court Report;

(c) evidence on the part of two witnesses who also have *"on the ground"* experience in and around the subject land, namely a close neighbour Ms Templeton, and Beerwah Land's representative Mr Laruccia who has spent considerable time on the land for many years;

(d) Mr Sprenger's evidence, on behalf of Woodlands, regarding the very low level of complaint over many years, and the absence of any enforcement action by either Council or DAFF;

(e) the very low level of complaint from community for the long period between 2002 and the present;

(f) the absence of any evidence from any officer of the Council or the DAFF suggesting that they were any odour problems associated with the Woodlands operations.

47. In addition the Court has the benefit of the substantial areas of agreement in the odour expert's JERs, including in relation to the relative contours which demonstrate that other parts of the immediate residential locality would be affected by odour from Woodlands to a greater extent than the subject land.

48. Those matters provide very important context to the consideration of the odour issue, and of the Council's contention, through Mr King, that is not that the land <u>is</u> subject to odour nuisance or unacceptable impact, but merely that it has not been conclusively demonstrated that it is not."

[49] To a significant extent these submissions can be readily accepted because, as Mr Gore pointed out, the methodology adopted by Mr Balch and the results produced were, within themselves, not criticised by Mr King. Mr King, however, was critical of Mr Balch's modelling only taking into account Farms 6 and 7 and not the totality of the Woodlands operations including the feedmill/hatchery and Farms 1, 2 and 3.[31] In his Court report Mr King expressed the following conclusions:[32]

"…

34. It remains my opinion that without modelling of each shed on the basis of batch timing, bird density, emission rate and k factor adjustment as per standard modelling practice, there is

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31 E.g., see Exhibit 18.

32 Exhibit 19, pp 15-16.

> no adequate certainty as to verifiable predicted odour exposure of the subject development site upon which to provide reliable assessments of likely impacts. Without such, there remains in my opinion too great a degree of uncertainty, and hence risk, that the subject development lands may experience excessive odour levels from poultry farming activities.
>
> 35. The risk that possible complaints by future residences of the subject development may result in a reverse amenity constraint upon the current operations of Woodlands Enterprises is a significant consideration in this Appeal.
>
> **6.0 CONCLUSION**
>
> 36. It remains my opinion that there is too much uncertainty and risk in approving the subject residential lots in such close proximity to operating poultry farms. That is my opinion notwithstanding the screening assessment conducted as part of the join expert report and the fact that other existing residences are predicted to experience higher odour exposure than the subject. In my opinion each site must be assessed on its merits and in this instance, the site is located in too close a proximity to large poultry farming operations."

[50] Mr King, for obvious reasons, did not criticize the results of the "sniff tests" carried out, but clearly had reservations about their probative value.

[51] Neither Mr King nor Mr Balch were seriously shaken in cross-examination. Mr King stood by his concerns and the opinions expressed in his report. As already mentioned, he had no criticism of Mr Balch's modelling and results as far as they went and was involved in the "refinement" of the process.[33] He also accepted that the level of meteorological data was sufficient and that a significant number of the days that odour intensity survey measurements were taken were taken under "critical conditions."[34]

[52] However, Mr King remained adamant that the modelling was based on insufficient data. To use his words "*…in this case there's not suitably available data to demonstrate that there is not an issue with respect to compliance from the Woodlands Poultry Farm.*"[35]

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33 T3-38 ll 27-32.
34 T3-39 ll 1-26.
35 T3-39, ll 44-46.

[53] Following that evidence the following exchange took place between Mr Gore QC and Mr King:[36]

> "**Q.** What more could you possibly want?
>
> **A.** The – the only problem is that the measurements, as I said earlier, were conducted – they were conducted under times of worst case. The thing is, that you don't – we don't understand because we're using unit emission or [indistinct] modelling. Again, it doesn't provide us any information on the 2.5 odour unit criteria. The modelling assisted in affirming that, as you say, Mr Balch was there during periods of worst case – that those conditions are coincident with worst case emissions from the poultry farm, or that his surveys – sorry, his surveys were undertaken at the time that emissions from the poultry farm were representative of worst case. And that if we go to, I'll just find the page, if we go to page 23 of the second joint report ---
>
> **Q.** Yes? ---
>
> **A.** Which is the scatter plot meteorological conditions under which the highest two per cent of ground level odour concentrations are predicted at the site, so they're the grey circles, and the conditions when the odour intensity surveys were conducted. In any of this there are red – the surveys are the red dots, so there certainly are periods when the survey occurred during periods of worst case conditions. There's also periods outside of those worst case conditions where surveys were conducted … and higher intensity of odour were found. So that, to me, provided there was a degree of uncertainty still with respect to what was being measured on the field as to what was being modelled.
>
> **Q.** But there's a large amount of data that's being made available by the field surveys sufficient, I suggest to you, to give comfort that they are representative of worst case conditions?
>
> **A.** No, I don't agree with that."

[54] According to Mr King, the failure to take into account the whole of the nature and extent of the operations described by Mr Sprenger failed to properly address "*…the potential for cumulative (or more frequent) impacts".*[37]

[55] While remaining confident about his modelled results, Mr Balch readily accepted that he did not make any enquiries to identify exactly what was happening at Woodlands

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36 T3-40 ll 9-33.

37 Exhibit 19, p 14, para 30. See also Exhibit 8, pp 31-32.

on a day to day basis.[38] Of significance in this context was that he agreed that in trying to model the odour impacts from a poultry farm there were two "essential" inputs, meteorological data (about which there was no criticism) and "source emissions data."[39] It is the latter that was a matter of concern to Mr King. Indeed, Mr Balch himself agreed that different results were likely if all of the relevantly proximate poultry farms were brought into account.[40]

[56] That this might occur was, at least to an extent confirmed by an earlier study Mr Balch had carried out in 2011.[41] That report took into account "*factors that influence odour generation"* and data downloaded from the Woodlands website. Of particular significance is that in the 2011 modelling, not only were Farms 6 and 7 brought into account but also Farms 1, 2, 3 and 11.[42]

[57] The objective of the 2011 report was to achieve a 2.5OU result at a site (that included the subject land) which was intended for residential development. The worst case scenario placed the subject land well inside the 2.5OU contour.[43] However, the worst case scenario was not considered to be realistic because it was said to be inconsistent with the record of complaints from the public and because:

> "*…the total farm daily average odour emissions…are considered unrealistically high for the type of agricultural operation. It was not until a number of "reductions" were applied that the 2.5 OU objective for this was achieved.*[44]

[58] The rationale for those "*reductions*" were explained.[45]

> "The assessment found that for Scenario 1, that represents the most conservative, worst case set of assumptions, the DERM odour criterion is likely to be exceeded across the majority of the subject site. The analysis also indicates that significant odour impacts are predicted throughout the local area including in the existing Township Residential Precinct and commercial areas of Beerwah. Notwithstanding this, the level of odour complaints in the local community, according to Council's records, does not support this finding. In addition to this, the total farm daily average odour emissions of 45,015 ou/s (± 31,616) are considered unrealistically high for this type of agricultural operation.

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38 T2-61 ll 25-30.
39 T2-54 ll 4-7.
40 T2-72 ll 4-9.
41 Exhibit 24.
42 Ibid, pp 17-19.
43 Ibid, p 41, figure 10.
44 Ibid, pp 50 and 52, figures 19 and 21.
45 Ibid, p 29.

> The analysis of ground-level odour concentrations for the various emission scenarios suggests Scenario 4 (30% reduction) or Scenario 5 (40% reduction) represent the most likely emissions scenario for the poultry farm with 22,687 ou/s (± 15,934) and 13,612 ou/s (± 9,561) respectively. The predicted ground-level odour concentrations associated with these emission scenarios are in closer agreement to the likely level of odour impact in the local area. While some poultry farm odours are expected to be detected in the local area from time to time, the magnitude and frequency of the ground-level odour concentrations for Scenarios 4 or 5 are considered to be more realistic.
>
> The study found that there is not likely to be any exceedances of the odour criterion at the subject site based on scenario 5 emissions, while exceedances are predicted at R1 (7), R4 (5), R5 (6) and R7 (1) for scenario 4. Katestone Environmental considers the ground-level concentrations predicted for the scenario 4 odour emissions to represent an upper bound across the site and that odour impacts are likely to be between those predicted for scenarios 4 and 5.
>
> As discussed in Section 6, an extension of the existing vegetative buffer currently situated between the subject site and the Woodlands Enterprise poultry farm into receptor grid cells R1, R2 and R4, will help to mitigate the impact of odour across the site. The predicted highest 99.5$^{th}$ percentile ground-level odour concentration at the subject site (grid cell R5) exceeds the odour criterion by less than 9%. The extension of the vegetative barrier by between 50 and 100 metres is expected to mitigate the odour impact across the subject site by more than 9%."

[59] I did not find Mr Balch's explanations to justify the adoption of the 40% reduction scenario particularly convincing either in his report or during cross-examination by Mr Hughes QC.[46] It appeared to me to be a "ballpark" compromise between two extremes,[47] albeit based on expertise and experience.

[60] The final matters I consider it necessary to mention are first, Mr Balch's concession that even under his most recent modelling "*...exact odour concentrations were not able to be predicted due to the lack of detailed information on Woodlands Poultry Farm operations ---"*[48] That concession, to a very significant extent, embodies the very concerns about the lack of certainty surrounding Mr Balch's predicted outcomes expressed by Mr King. The second was Mr King's evidence concerning the low level of community complaints. As to the latter, I accept his evidence about that history.

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46 T2-62 ll 32-47 to T2-71.
47 T2-71 ll 1-4.
48 Exhibit 8, p 28, para 2.

It neither guarantees that the appropriate standard of 2.5OU can be met nor that more complaints would not occur in the future.[49]

[61] Those extracts from CP2004 set out above make two things clear. First, the intention to maintain a high level of residential amenity. Second, to reduce, if not avoid, the risk of "reverse amenity" impacts. The latter, as has already been stated, is of particular significance in a local government area where rural enterprises such as exist here play an important role in maintaining a robust economy, including as a source of employment. There is a significant public benefit in protecting the ability of these activities to continue to operate into the future.

[62] On the evidence before me, I am unconvinced that the proposal is not in conflict with relevant provisions of CP2004, for primarily for two reasons. First, I am not satisfied that the proposal does not carry with it a real risk of unacceptable amenity impacts being caused to potential future residents of the proposed lots. However, that is so only as a consequence of odour. I have already concluded I do not consider anything turns on the traffic and/or layout issues raised by the respondent. The second and related matter is that I am also not satisfied that the proposal would provide an adequate buffer to address the "reverse amenity" objectives intended under CP2004.

[63] As a consequence I am not satisfied that the proposal should be approved on the basis of there being no material conflict with CP2004. Indeed, the evidence has lead me to conclude that the proposal is in direct conflict with specific outcome O18 of the RL Code, specific outcome O1(k) of the SP Code and specific outcome O13(d) of the BTPA Code, by creating an unacceptable risk of adverse impacts on amenity as a consequence of odour emissions from Woodlands, by failing to provide an adequate setback/buffer from that "*high impact"* rural use.

[64] It is well settled that in construing planning schemes, they need to be construed broadly, rather than pedantically or narrowly and with a reasonable and practical approach in mind.[50] It also has to be borne in mind that words such as "*sympathetic to"*, "*a satisfactory level of amenity"* and "*preserve"* have to be construed in context. Almost inevitably most forms of development will have some adverse impacts on

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49 T3-43.

50 *ALCAN (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] 239 CLR 27 at [47]: *Newing & Ors v Silcock & Ors* [2010] QPELR 692 at [62]-[63] also *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* [2014] 201 LGERA 82 at [56].

neighbouring or nearby land users. In this context the Court of Appeal in *Lockyer Valley Regional Council v Westlink Pty Ltd* said:[51]

> "…phrases such as "maintain and preserve" and "preserve and enhance" must be read in context in bearing in mind that when any development occurs some amenity impairment will generally result… planning schemes should be construed broadly, rather than pedantically or narrowly, and with a sensible, practical approach…" (Citations omitted).

[65] It also needs to be borne in mind that this court, while the decision maker for determining the outcome of this proceeding, is not a planning authority. It is well recognised that this Court should adopt a "*self-limiting approach, at least when considering town planning matters…"*[52]

[66] That it is not the function of this court to substitute planning strategies has also been stated in a number of cases. In *Elan Capital Corporation Pty Ltd & Anor v Brisbane City Council & Ors*[53] the court said:

> "It should not be necessary to repeat it but this Court is not the Planning Authority for the City of Brisbane. It is not this Court's function to substitute planning strategies (which on evidence given in a particular appeal might seem more appealing) for those which a Planning Authority in a careful and proper (sic) has chosen to adopt…. Adopting the phraseology of those cases which deal with non-derogation (sic) principle, I feel that to allow this appeal would be to, 'cut across', in quite (sic) unacceptable manner, a planning strategy which has been adopted by the Planning Authority and publicly exhibited for community comment."

[67] In *Australian Capital Holdings Pty Ltd v Mackay City Council*,[54] Muir JA (with Holmes JA, as she then was and White J, as she then was, agreeing), after citing with approval a number of cases and, in particular, *Grosser v Council of the City of Gold Coast*[55] also went on to cite with approval the reasoning of Jerrard JA in *Leda Holdings Pty Ltd v Caboolture Shire Council & Ors*:[56]

> "Those authorities were cited to show that conflict between a development application and strategic plan was often fatal to the application, even prior to the introduction of s 4.13(5A) and its

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51 [2011] 185 LGERA 63 at [20].
52 *Grosser v Council of the City of Gold Coast* [2001] QCA 423 at [38].
53 [1990] QPLR 209 at 211.
54 [2008] QCA 157 at [56].
55 (2001) 117 LGERA 153 at [55].
56 [2006] QCA 271.

> counterparts in 1992…
> (As has been said repeatedly, this Court is not the planning authority for this area and it is my view that it would be inappropriate for the court to approve a proposal which is squarely in conflict with the formally expressed planning strategies of that authority…the Strategic Plan and the Strategic Plan Map are legitimate planning tools adopted by a Local Authority for the future planning of the Local Authority Area … There may be cases where a departure from the Strategic Plan could be justified; where, for example, the planning strategies which it represents, having been overtaken by events (or for some other reason), clearly no longer have any application; or where it can be demonstrated plainly the land has been given a designation on the basis that was and remains invalid…" (Citations omitted).

[68] White J (as she then was) after agreeing with the reasons for judgment of Muir JA in *Australian Capital Holdings* went on to say:[57]

> "[I] agree with his Honour in finding that there were insufficient planning grounds to justify approval of the development application by the Judge below departing, as he did, from the well-established principle that a planning court ought not substitute its own preferred planning strategies in place of carefully developed schemes of the planning authority, particularly where the schemes have recently been reviewed."

[69] The introduction of the 400m setback or buffer was a conscious and legitimate planning decision introduced by the respondent to, as far as is practicable, on the one hand protect residential amenity and, on the other, protect established rural activities from their existence being threatened by the spread of urban development.

[70] Before moving to the next topic, I should address some specific submissions made on behalf of the appellant. It was submitted that "*there is a legitimate expectation that the subject land may be developed for residential purposes.*"[58] Having regard to the land use designation that statement is correct as far as it goes. However, legitimate expectations would also be tempered by the relevant provisions of CP2004. In this context, it is also not an irrelevant consideration, but by no means decisive, that the

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57 [2008] QCA 157 at [73].
58 Submissions on behalf of the Appellant, para 2.

subject land was created pursuant to an approval that was subject to a condition[59] that required any dwelling to be located outside of the 400m poultry buffer contour.

[71] It was also submitted that Mr King and Mr Schomburgk seemed to consider the 400m separation distance from poultry farms to be, in effect, "*an immutable requirement."*[60] I cannot accept that submission. It is contrary to the concession made by Mr Schomburgk referred to above and, in my respectful opinion, unfairly states the position of Mr King. It seemed tolerably clear from his evidence, both written and oral, that he did not consider the 400m separation to be the be all and end all of the matter. His concerns were not dependent upon whether the lots were within or outside the 400m radius, they were based on the science or, perhaps more accurately, the lack of science in support of the appellants' case.[61] After considering the evidence on this issue I am left with the same concerns.

[72] Finally on this topic, it was submitted on more than one occasion that approval of development within the 400m buffer does not of itself give rise to conflict with the relevant provisions of CP2004. That is correct. There may well be areas of land within that radius that for various reasons may be capable of being developed without creating conflict. Those reasons may include by way of examples, being upwind of the prevailing wind direction from the poultry farm,[62] topography and extensive timbered areas between it and the poultry farms. These are all features that may influence the odour impacts on any given parcel of land.[63] This proposal was found to be in conflict with CP2004, not because it lies within the 400m contour, but because it gives rise to conflicts with relevant provisions of the planning scheme. A development that was shown to have an "*effective rural buffer"*[64] and provide a *"satisfactory level of amenity"*[65] may well expect to be approved where it was able to be shown that it did not create unacceptable risks of adverse amenity impacts notwithstanding that it was within 400m of a poultry farm. That is not the case here.

**Sufficient grounds**

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59 Condition 39.
60 Submissions on behalf of the Appellant, p 4, para 5.
61 See Exhibit 8, pp 31-32.
62 That is not the case here as the prevailing or dominant wind is from the west (T2-37 L 43).
63 See the evidence of Mr Balch regarding topography and wind direction: T2-41 ll 40-47, T2-42 ll 38-45, T2-43 and influence of treed spaces: T3-21.
64 Exhibit 5, p 62, BTPACode acceptable solution s 13.2.
65 Ibid, p 83, SPCode specific outcome O1(k).

[73] Having established that there is material conflict with the CP2004, it is now necessary to consider whether there are sufficient grounds to warrant approval notwithstanding that conflict.

[74] Section 326 (1) of the SPA relevantly provides:

> "**326 Other decision rules**
> (1) The assessment manager's decision must not conflict with a relevant instrument unless—
> (a) …
> (b) there are sufficient grounds to justify the decision, despite the conflict…"

Here of course, this court stands in the position of the "*assessment manager."* Sufficient grounds for the purposes of section 326 means matters of public interest, and does not include the personal circumstances of an applicant, owner or interested party.[66] In *Weightman v Gold Coast City Council*[67] Atkinson J (with the other members of the court agreeing) said:

> "In order to determine whether or not there are sufficient planning grounds to justify approving the application despite the conflict, as required by s. 4.4(5A)(b) of the P & E Act, the decision maker should:
> 1. examine the nature and extent of the conflict;
> 2. determine whether there are any planning grounds which are relevant to the part of the application which is in conflict with the planning scheme and if the conflict can be justified on those planning grounds;
> 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."

[75] In addition to articulating the necessary "tasks" to be considered in cases involving conflict, Her Honour expanded:[68]

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

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66 SPA Schedule 3.

67 [2003] 2 Qd R 441 at [36]. Endorsed in *Lockyer Valley Regional Council v Westlink Pty Ltd* (2011) 185 LGERA 63.

68 *Weightman v Gold Coast City Council* [2003] 2 Qd R 441 at [35], [37], [44]-[46].

> **conflict. The primary judge wrongly held that it was directory only**…
>
> The **first task** required of the decision maker, as the learned primary judge recognised, is to **consider the nature and extent of the conflict**. The conflict may be minor or major in nature or indeed anywhere on the continuum between those two extremes. The conflict in this case is a major one, arising as it does from an absolute prohibition on the height of any development exceeding the maximum stipulated height of three storeys...
>
> The **second** question the decision maker has to consider is whether there are any **planning grounds** on which to approve, or which militate against approval of, that part of the application which is in conflict with the planning scheme. The nature and extent of the conflict may be such as to suggest that there are significant planning considerations against that part of the application.
>
> The decision maker should then **consider other aspects** of the development and determine whether they are consistent with proper planning grounds. Those are the planning grounds which apply whether or not the conflict exists.
>
> It is only after consideration of all of these matters that the decision maker is able properly to assess whether or not the planning grounds in favour of the application as a whole are, on balance, sufficient to justify approving the application notwithstanding the conflict." (Emphasis added)."

[76] Here as I've already indicated I consider the conflict to be serious. In the written submissions of the appellant it is asserted that any conflict "*would be readily overcome by the grounds which exist here …".*[69] Those grounds were:[70]

> "(a) the proposal enables residential development of land which enjoys a very high amenity associated with its location, outlook, and proximity and ease of access to a broad range of local services and facilities;
>
> (b) the development represents a logical extension to the established existing residential estate;
>
> (c) the development provides an opportunity to develop residential zoned land for residential purposes within an emerging growth town as anticipated be the SEQRP, and in so doing contribute to the achievement of housing growth

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69 Submissions on behalf of the Appellant, para 150.

70 Ibid, sub paras (a)-(d).

targets set for the area by the SEQRP;

(d) associated with that, is that residential land of the type proposed is in high demand as is confirmed by Mr Laruccia, and the high demand for development of the type proposed to which he refers."

[77] As to each of those matters, I can readily accept their accuracy to the extent that, as already indicated, the physical characteristics of the land make it a desirable residential development site and a natural extension of existing residential development. Further, there can be no doubt that if allowed to proceed it would contribute to the achievement of housing growth targets. However, in the scheme of things, this could only be described as a very modest addition to the housing market in the Beerwah area. Only 16 lots are proposed. Also, I was not taken to any evidence that would indicate in any probative way that there was some underlying unsatisfied demand for housing in the Beerwah area that could not be met by the development of residential land elsewhere in the township of Beerwah. In fact the evidence of Mr Schomburgk that I accept suggests to the contrary.[71]

[78] On the evidence before me I have reached the conclusion that there are not sufficient grounds to warrant approval of this proposal. To perhaps put it another way, the grounds advanced are not sufficient to overcome the nature and the extent of the conflict involved.

[79] In reaching this conclusion I am conscious of the fact that Mr King was asked if any of the proposed lots were *"suitable for residential purposes from an air quality perspective?"* and that he replied in the affirmative in respect of Lot 41 and part of Lot 42, because they *"are outside the 400m buffer"*.[72] As already addressed, I am satisfied that Mr King's conclusions were based on the science. Indeed, in this context he observed that all of the proposed lots were likely to be affected be odour.[73] His reference to Lots 41 and 42 were, I am satisfied, no more than a recognition of that aspect of the respondent's planning scheme.

[80] For the reasons discussed the appeal must be dismissed.

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71 T3-92 ll 27-46, T3-93, and see also Exhibit 31.
72 Exhibit 23, p 5, para 1.
73 Ibid, paras 2 and 3.

**Orders**

[81] Accordingly the orders of the court are:

1. The appeal is dismissed;
2. I will hear from the parties as to any consequential orders.