PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Rainbow Shores P/L v Gympie Regional Council & Ors* [2013] QPEC 26

PARTIES:

RAINBOW SHORES PTY LTD
(Appellant)

V

GYMPIE REGIONAL COUNCIL
(Respondent)

And

CHIEF EXECUTIVE DEPARTMENT OF ENVIRONMENT AND RESOURCE MANAGEMENT
(Co-respondent)

And

J. LAWLER & ORS
(First respondent by election)

And

FRASER ISLAND DEFENDERS ORGANISATION LIMITED
(Second respondent by election)

And

RAINBOW BEACH COMMERCE AND TOURISM ASSOCIATION INC
(Third respondent by election)

And

GREGORY DAVID WOOD
(Fourth respondent by election)

And

FIONA HAWTHORNE
(Fifth respondent by election)

And

VIVIEN GRIFFIN
(Sixth respondent by election)

And

NATIONAL PARKS ASSOCIATION OF QUEENSLAND

(Seventh respondent by election)

And

COOLOOLA COAST CARE ASSOCIATION INC
(Eighth respondent by election)

And

CHIEF EXECUTIVE DEPARTMENT OF MAIN ROADS
(Ninth respondent by election)

FILE NO:	2768 of 2009
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	12 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	Site inspection on the 12 and 13 December 2011
	Trial on the 16, 17, 18, 19, 20, 23, 24, 25, 27, 30, 31 January; 1, 2, 3, 27, 28 February; 21, 22, 23, 25, 28, 29, 30, 31 May; 1, 4, 5, 6, 7, 8, 11, 13, 14, 15 June 2012
	Submissions on the 11, 12, 13, 16 July 2012
	Further written submissions received November 2012
	Further oral submissions heard 27 November 2012
	Further material and written submissions received to 14 February 2013
	Further hearing on 28 March 2013
	Further exhibits and written submissions received to 8 June 2013
JUDGE:	Rackemann DCJ
ORDER:	**The appeal is dismissed**
CATCHWORDS:	LOCAL GOVERNMENT– TOWN PLANNING – Development Application for preliminary approval for an integrated resort/commercial village within a broader residential community offering a range of housing styles and densities supported by retail, business services and community infrastructure and within vegetated community open space – application under Transitional Planning Scheme – weight to be afforded to existing planning scheme and draft planning scheme – Wide Bay Burnett Regional Plan – State Coastal Management Plan 2001 – Queensland Coastal Plan 2012 – Draft Coastal Plan State Planning Regulatory Provision 2012 – Coastal Plan State Planning Regulatory

Provision 2013, Temporary State Planning Policy 2/12 – Draft State Planning Policy – whether amendments to draft planning scheme colourable – need, economic, community and social benefit – weight attributed to a failure to demonstrate sufficient need – impacts on fauna, flora and biodiversity – importance of site to geological sciences – exposure of the site to erosion, storm surge and climate change related sea level rise – bushfire management – wastewater reuse and groundwater – impact of proposal on beach access – sufficiency of planning grounds or grounds to warrant approval – whether proposal to dispose of effluent for the "whole of the community", in addition to those on the subject site, an extraneous consideration.

COUNSEL:	Mr G Gibson QC with Mr J Houston for the appellant
	Mr S Ure for the respondent
	Mr D Gore QC with Mr M Williamson for the co-respondent
	Mr Lawler as agent for the first respondent by election
	Mr Elms as agent for the third respondent by election
	Mr Wood in person and as agent for the fifth to eighth respondents by election
SOLICITORS:	Herbert Geer for the appellant
	King & Co for the respondent
	Crown Law for the co-respondent

Introduction

[1] This appeal concerns the proposed future development of a relatively large integrated resort and residential community within the attractive, but modestly developed, locality of Rainbow Beach and Inskip Peninsula on the Cooloola Coast. The proposal envisages extensive development on a large site on the eastern (beach) side of Inskip Peninsula, which lies to the north of the current town centre of Rainbow Beach and to the South of Fraser Island, to which there is access by vessel from Inskip Point.

[2] Rainbow Beach has its own very attractive beach and lies in close proximity to places and features of great natural beauty, interest and attraction. Existing development for both residents and tourists is modest, although there are substantial camping areas at Inskip Point. The existing permanent resident population of Rainbow Beach is approximately only 1,000. Tourist numbers swell during holiday times when up to 3,000 campers descend upon Inskip Point. The subject proposal envisages faster growth and greater development in the future, resulting in a maximum population (tourists and residents) on the subject site alone of up to 6,550 persons.

[3] The appellant is the disappointed applicant for a preliminary approval for a material change of use for an "integrated resort/commercial village within a broader residential community offering a range of housing styles and densities supported by retail, business services and community infrastructure set within vegetated community open space". That development is proposed to be governed by a plan of development.

[4] The application was refused by the respondent, at the direction of the co-respondent, on the basis of perceived environmental impact. The respondent did not call any evidence at the hearing and ultimately submitted that the appeal ought to be allowed and the application approved. It was surprising that, in a case where conformity or otherwise with the Council's planning documents was in issue, and where the Council had been represented throughout the lengthy hearing, no substantive

submission was made, on the Council's behalf, about the planning documents, save for an erroneous (and later withdrawn) submission concerning an irrelevant provision of the 1997 Planning Scheme and submissions about the weight to be placed on the Council's new draft planning scheme and amendments thereof (discussed later). Refusal of the application was vigorously advocated by the co-respondent.

[5] The development application generated much interest and a large number of submissions, both for and against. Some of those submitters elected to become parties to the appeal. The third respondent by election supports the proposal, chiefly because of the perceived economic advantages of the substantial development contemplated by the proposal, should it come to fruition. The first and fourth to eighth respondents by election oppose the appeal on a number of grounds. The second respondent by election withdrew. The ninth respondent by election took no active part in the hearing, as the traffic issues were resolved (subject to the imposition of conditions on any approval) prior to trial.

The issues

[6] The issues in dispute were the subject of notification, particularisation and supplementation over an extended period. Copies of the relevant correspondence and other documents filled a volume, which became exhibit 4. Mercifully, in the course of the hearing, the parties produced a relatively brief list of agreed issues[1]. The issues pursued at the hearing[2] may be summarised as relating to:

- Town planning
- Need and benefit
- Flora, fauna and biodiversity
- Landscape character and natural amenity
- Geology and geomorphology
- Coastal processes, erosion and storm surge
- Waste water reuse and ground water
- Beach access

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1 See exhibits 68, 68A, 142 and 142A.

2 Water supply issues were dropped by Mr Lawler following completion of the evidence.

- Bushfire management
- Sufficiency of grounds or planning grounds to warrant approval

The site

[7] The land the subject of the development application, which is referred to as Rainbow Shores Stage 2 (RS2):

(a) is located at Inskip Avenue, Rainbow Beach, on the Inskip Peninsula north of the established town centre;

(b) is more particularly described as Lot 22 on Plan MCH803497;

(c) contains an area of approximately 200 hectares;

(d) is rectilinear in shape, with a long western frontage, of approximately 4.5 kilometres, to Inskip Avenue;

(e) is bounded to the east (beachside) by unallocated State land which provides a beach protection area between the subject site and the beach proper;

(f) is largely covered by vegetation which has achieved remnant status;

(g) provides habitat for important flora and fauna species;

(h) was subject to earlier sand mining and disturbance around the mined areas over a total of approximately 14% of its area; and

(i) is part of a larger area held by the appellant under a development lease granted for business, residential, tourism and recreational purposes, entered into with the State of Queensland in November 1984 ('the development lease'). That lease is due to expire next year. The development assumes that the appellant will ultimately be successful in obtaining an extension or renewal of the lease.

[8] Part of the area under the development lease is in the process of being developed as a "residential community comprising units, dwellings, retail and commercial establishments with a maximum resident population of 4,100 persons". This area, which lies approximately 1.5 kilometres to the south of the subject site, is known as Rainbow Shores Stage 1 ('RS1'). The RS2 site is separated from the RS1 site by Lot 24 on MCH5478 (referred to as the "green belt") which is unallocated State land and contains an area of about 53.6 hectares[3]. The locations of RS1 and RS2 appear on annexure 1 to these reasons.

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[3] Exhibit 7, tab 3.

History and background

[9] The appellant's pursuit of development under the development lease and of the subject development application has a long and somewhat tortured history. The site (together with other parts of Inskip Peninsula) was once sand mined. Those activities ceased in the 1970s. It would appear that the development lease was granted in the context of the relinquishment of sand mining rights.

[10] In 1987, Mr and Mrs Krauchi acquired the shares in the appellant company, with a view to exercising the rights under the development lease. The Krauchi family has controlled the appellant ever since. In 1989 the area covered by the development lease was varied so as to create the two separate sites known as RS1 and RS2, separated by the green belt that was transferred to the Crown.

[11] In 1989 an application was made to rezone the RS1 site. That was successful, with the rezoning being gazetted in 1991. Various plans of subdivision were subsequently registered and the development of RS1 commenced, although it is still far from complete, some 20 years later.

[12] The residential development in RS1 features 35 metre wide "green fingers" of retained vegetation which separate the backyards of detached houses facing one street from the backyards of those facing the next. The extent of tree retention more generally within RS1 is uncommonly high by the standards of typical suburban subdivisions. It was said that this provides an illustration of what is contemplated within RS2.

[13] Planning for the development of the much larger RS2 site commenced in 1992 with the submission of an overall design plan to the Land Administration Commission. It was not until 1999 however, that a pre-application report was submitted to the Council and to the Department of Natural Resources ('DNR').

[14] In 2000 the DNR was requested to provide "owners consent" to permit the appellant to make its development application over RS2. The DNR delayed in doing so. It first wished to examine various merit-based issues in relation to the substance of the

application. Ultimately it took some four years for the appellant to secure the consent which it needed before it could lodge its development application. The development application was lodged on 11 August 2004. It was met with an extensive information request which was not responded to until 2006. In the course of discussions, the referral agency assessment period was ultimately extended until August 2009.

[15] In early 2007 the State approached the appellant to open negotiations for a "land swap" which would have seen the appellant develop other land instead of the RS2 site. Negotiations proceeded for some two years until, in 2009, the appellant was informed that the State no longer wished to proceed with a land swap. In the same year, the co-respondent, as a concurrence agency for the development application, directed the Council to refuse the development application for the RS2 site. It has resisted the subsequent appeal on bases which, if accepted, would mean the RS2 site has, at best, more modest development potential, given its environmental values.

[16] The co-respondent has been vigorous in its opposition to the proposal. It also provided public funding to some of those co-respondents by election who are opposed to the development, so that they could engage experts in the fields of town planning and economics.

[17] In the circumstances one might be forgiven for having a degree of sympathy for the appellant. The State was content to grant a development lease in the context of the relinquishment of mining rights. It was content for development to proceed on RS1. Subsequent attempts by the appellant to pursue an application for similar development (albeit on a larger scale) on the RS2 site were, however, delayed for four years (before "owners consent" was given to the making of the application) before being refused at the direction of the co-respondent. The State, through the co-respondent, now asserts that RS2 has environmental values which at least significantly diminish its development potential. It so contends notwithstanding that, with the demise of the mooted "land swap" proposal, the appellant would be left with no "in kind" compensation.

[18] Ultimately however, the decision in this matter cannot be driven by notions of sympathy. Rather, it must be the result of a dispassionate assessment of the relevant considerations. Further, as was submitted on behalf of the co-respondent:

(a) The development lease is not a town planning document;

(b) The development lease put the onus upon the appellant to obtain the necessary town planning approvals;

(c) The decision to grant the development lease cannot validly fetter statutory planning discretions conferred under separate legislation; and

(d) There is no relevant coincidence of identity, function or time in respect of the grant of the development lease and the direction to refuse the development application. The development lease was granted by the Governor-in-Council in the exercise of a legislative authority to deal with the occupation of Crown land, while the direction to refuse development was made by the Chief Executive of a Department pursuant to separate statutory powers.

The role of the co-respondent

[19] The development application was referred to the Environmental Protection Agency (which was subsequently absorbed into the co-respondent) as a concurrence agency. The referral jurisdiction was described in the relevant regulation as:

> "Coastal management, other than amenity and aesthetic significance or value."

[20] In the course of the hearing the co-respondent relied on a range of issues including matters made relevant by the statutory town planning documents. The connection between such matters and the co-respondent's referral jurisdiction is perhaps not immediately obvious. As was pointed out for the co-respondent however, 'coastal management' is a term of wide import and s 3.3.15 of the *Integrated Planning Act 1997* ('IPA'), in stating how, at the relevant time, a referral agency was to assess an application, provided, in part as follows:

> "(1) Each referral agency must, within the limits of its jurisdiction, assess the application—
>
> (a) against the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, the referral agency; and
>
> (b) having regard to—

(i) any planning scheme in force, when the application was made, for the planning scheme area; and

(ii) any State planning policies not identified in the planning scheme as being appropriately reflected in the planning scheme; and

(iii) if the land to which the application relates is designated land—its designation; and

(c) for a concurrence agency—against any applicable concurrence agency code.

…"[4]

[21] Section 3.3.15 therefore obliges a concurrence agency, such as the co-respondent, to assess the development application within the limits of its jurisdiction, but having regard to the planning scheme and State planning policies. Having directed Council's refusal of the development application, the concurrence agency became a co-respondent for the appeal, with an entitlement to be heard as a party.

The assessment and decision making regime

[22] The development application was made during the currency of the IPA. For the purposes of the development application, provisions of the IPA continue to apply as if the *Sustainable Planning Act 2009* ('SPA') had not commenced[5].

[23] There are two aspects of the development application before the court, namely:

(a) A development application for preliminary approval for material change of use; and

(b) A request to vary the effect of a local planning instrument for the land.

[24] The development application for the preliminary approval for material change of use was made during the currency of the Council's now superseded 1997 Transitional Planning Scheme. For the purposes of that planning scheme, the land was included in the Rural Zone where commercial premises, hotel, multi-unit accommodation, shop and shopping centre were prohibited development. In the old terminology, a rezoning would have been required for the material change of use

4 *Integrated Planning Act 1997* (Qld) s 3.3.15 in force on the DA submission date of 11 August 2004.

aspect. As the application would have required a rezoning under the repealed Act[6] ('PEA')[7] and, in turn, would have required public notification, the application was to be processed as if it were an application requiring impact assessment[8].

[25] The application for the preliminary approval for a material change of use is to be assessed pursuant to s 6.1.29 of the IPA which relevantly provides, in part:

> "**6.1.29 Assessing applications (other than against the Standard Building Regulation)**
>
> (1) This section applies only for the part of the assessing aspects of development applications to which a transitional planning scheme or interim development control provision applies.
>
> (2) Sections 3.5.4 and 3.5.5 do not apply for assessing the application.
>
> (3) Instead, the following matters, to the extent the matters are relevant to the application, apply for assessing the application—
>
> (a) the common material for the application;
>
> (b) the transitional planning scheme;
>
> ...
>
> (e) all State planning policies;
>
> (f) the matters stated in section 8.2(1) of the repealed Act;
>
> ...
>
> (h) if the application is for development that before the commencement of this section would have required an application to be made under any of the following sections of the repealed Act—
>
> (i) section 4.3(1)—the matters stated in section 4.4(3);
>
> …
>
> (i) any other matter to which regard would have been given if the application had been made under the repealed Act"[9].

[26] Section 8.2(1) of the PEA provided as follows:

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5 *Sustainable Planning Act 2009* (Qld) s 802(2).
6 *The Local Government (Planning and Environment) Act 1990* (Qld).
7 See *The Local Government (Planning and Environment) Act 1990* (Qld) s 4.3(1).
8 IPA s 6.1.28(2)(a).
9 IPA s 6.1.29.

"8.2 (1) Without derogating from any of its powers under this Act or any other Act, a local government, when considering an application for its approval, consent, permission or authority for the implementation of a proposal under this Act or any other Act, is to take into consideration whether any deleterious effect on the environment would be occasioned by the implementation of the proposal, the subject of the application."

[27] The matters stated in s 4.4(3) of the PEA were as follows:

"4.4(3) In considering an application to amend a planning scheme or the conditions attached to an amendment of a planning scheme a local government is to assess each of the following matters to the extent they are relevant to the application—

(a) whether the proposal, if approved, or buildings erected in conformity with the proposal, or both the proposal, if approved, and the buildings so erected would—

(i) create a traffic problem, increase an existing traffic problem or detrimentally affect the efficiency of the existing road network;

(ii) detrimentally affect the amenity of the neighbourhood;

(iii) create a need for increased facilities;

(b) the balance of zones in the planning scheme area as a whole or that part of that area within which the relevant land is situated and the need for the proposed planning scheme amendment;

(d) whether the land or any part thereof is so low-lying or so subject to inundation as to be unsuitable for use for all or any of the uses permitted or permissible in the zone in which the land is proposed to be included;

(e) whether, having regard to the permitted or permissible uses of the land and the potential for subdivision in the zone in which it is proposed to be included water, gas, electricity, sewerage and other essential services should be made available to the land and to each separate allotment thereof if the land were subsequently subdivided;

(f) the impact of the proposal on the environment (whether or not an environmental impact statement has been prepared);

(g) the situation, suitability and amenity of the land in relation to neighbouring localities;

(i) the advice given by it, in respect of any consideration in principle concerning the relevant land pursuant to section 4.2;

(j) whether any plan of development attaching to the application pursuant to a requirement of the planning scheme should be altered;

(k) where the land is land prescribed pursuant to section 8.3A, the site contamination report in respect of the land;

(l) such other matters, having regard to the nature of the application, as are relevant."

[28] The 1997 Planning Scheme included a list of matters to be taken into account, to the extent they are relevant to the application. Those included[10]:

"• 6 when considering an application to amend the scheme, whether there is a need for the proposal
• 11 the extent to which the proposal is affected by State Planning Policies
• 12 the impact of the proposal on the environment …"

[29] The application for the material change of use is decided pursuant to s 6.1.30 of the IPA which relevantly provides:

> **"6.1.30 Deciding applications (other than against the Standard Building Regulation)**
>
> (1) This section applies only for the part of the deciding aspects of a development application to which a transitional planning scheme or interim development control provision applies.
>
> (2) Sections 3.5.13 and 3.5.14 do not apply for deciding the application.
>
> (3) Instead, the assessment manager must, if the application is for development that before the commencement of this section would have required an application to be made under any of the following sections of the repealed Act—
>
> (a) section 4.3(1)—decide the application under section 4.4(5) and (5A);
>
> ……"

[30] Sections 4.4(5) and 4.4(5A) of the PEA provided as follows:

> "4.4(5) In deciding an application made to it pursuant to section 4.3 a local government is to—
>
> (a) approve the application; or
>
> (b) approve the application, subject to conditions; or
>
> (c) refuse to approve the application."
>
> "4.4(5A) The local government must refuse to approve the application if—
>
> (a) the application conflicts with any relevant strategic plan or development control plan; and
>
> (b) there are not sufficient planning grounds to justify approving the application despite the conflict."

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[10] Cooloola Shire Council Planning Scheme 1997 s 15.10.6.

[31] With respect to s 4.4(5A) of the PEA, White J (as she then was) observed in *Grosser v Council of the City of Gold Coast*[11]:

> "Section 4.4(5A) is a simple two-stage process which first requires the identification of conflict with the Strategic Plan, then, if conflict is present, the application must be refused if there are not sufficient planning grounds to justify approving the application despite the conflict."

[32] That aspect of the application seeking to vary the effect of a local planning instrument is to be assessed having regard to s 3.5.5A of the IPA[12].

[33] That aspect of the application seeking to vary the effect of a local planning instrument is decided having regard to s 3.5.14A of the IPA which provided, in part, that:

> "(1) In deciding the part of an application for a preliminary approval mentioned in section 3.1.6 that states the way in which the applicant seeks the approval to vary the effect of any applicable local planning instrument for the land, the assessment manager must—
>
> (a) approve all or some of the variations sought; or
>
> (b) subject to section 3.1.6(3) and (5)—approve different variations from those sought; or
>
> (c) refuse the variations sought.
>
> (2) …."

[34] The appeal to this court proceeds as a hearing anew of the merits of the development application. The court must decide the appeal based on the laws and policies applying when the development application was made, but may give weight to any new laws and policies the court considers appropriate[13]. The appellant bears the onus.

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11 [2002] QPELR 207 at [49].

12 That section was inserted in the *Integrated Planning and Other Legislation Amendment Act* 2003 (No. 64), which was assented to on 16 October 2003, but relevantly did not commence until 4 October 2004. The subject application was made within that period, in August 2004. Section 3.5.5A of IPA is relevantly prospective in operation, in a case such as the present.

13 *Integrated Planning Act 1997* (Qld) s 4.1.52.

The plan of development

[35] The proposed development of RS2 would be governed by a Plan of Development (POD), which would vary the effect of the planning scheme. The proposed POD sets out the approval framework that would apply to the RS2 development. Future applications for development permits would be assessed against the POD. The POD includes provisions dealing with levels of assessment and a series of codes.

[36] The POD seeks to achieve "triple bottom line" development, which it describes as follows:

- "The development will incorporate state of the art ESD principles and systems, designed to preserve and enhance the natural assets of the site, particularly the sensitive foreshore dune ecology;
- The development will incorporate new urbanist town planning principles adapted to the site's Queensland coastal context: principles that promote pedestrian permeability over reliance on cars; access to dedicated open space corridors; and the provision of amenities that encourage social interaction amongst visitors and residents. The town centre and resort will be designed to enhance the sense of community; and
- The development will provide a balance of opportunities for permanent residents and short term holiday accommodation, with the inclusion of commercial, recreational and institutional facilities required for an economically sustainable community. Jobs created from the tourist related components of the resort development and ancillary services are expected to offer a major boost to the local economy."

[37] The overall outcomes for RS2 are said to be:

- "The location, extent and mix of development, including open space, is generally in accordance with the Plan of Development Precinct Plan;
- The location and nature of roads are generally in accordance with Plan of Development Indicative Vehicle Access Plan;
- The location and nature of pedestrian and bike access ways are generally in accordance with the Plan of Development Indicative Pedestrian Access Plan.
- Rainbow Shores Stage 2 planning area will accommodate up to a maximum population of 6,550 persons.
- The amenity of the Rainbow Shores Stage 2 planning area is maintained providing an attractive place to live, work and visit.
- Development is undertaken having regard to significant environmental areas.
- Natural coastal processes continue to occur with minimal interference from development; and

- Buildings and structures in the Rainbow Shores Stage 2 utilised materials and forms appropriate to the surrounding natural setting."

[38] The Plan of Development Precinct Plan divides the site into four precincts as well as a number of sub-precincts as follows:

(a) Housing precinct – which is to accommodate up to 4,900 persons in a range of housing styles and at variety of densities across four sub-precincts as follows:

H1 – sub-precinct 1 – providing single detached houses on lots of 450 m^2 to 1250 m^2.

H2 – sub-precinct 2 – providing attached housing comprising duplex dwellings and townhouses.

H3 – sub-precinct 3 – providing low density resort style bungalows.

H4 – sub-precinct 4 – providing high density apartments.

Sub-precincts H3 and H4 are also intended to accommodate low key small scale commercial entertainment and convenience retail uses.

(b) Resort Precinct – which is to accommodate up to 1,122 persons in resort style accommodation together with up to 1,500 m^2 of retail and commercial space.

(c) Mixed Use Precinct – which is to accommodate a maximum of approximately 5,500 m^2 of retail and commercial space together with accommodation for 330 persons.

(d) Community precinct –

C1 – sub-precinct 1 – providing for community facilities.

C2 – sub-precinct 2 – providing community open space.

The various precincts and sub-precincts are shown on the Plan of Development Precinct Plan, a copy of which is Annexure 2 to these reasons. The overall future development pattern, across the site, is shown indicatively on the "Indicative Land Use Plan" a copy of which is Annexure 3 to these reasons[14].

[39] Figures 2-4 and 2-5 in the POD, copies of which are annexures 2 and 3 to these reasons, are plans for "standard lot development" for dwelling houses and multi-residential developments respectively. They show the incorporation of "green

fingers" of retained vegetation, similar to those provided in RS1. At 25 m wide, they are narrower than provided in RS1, but reliance is placed upon controls on clearing in the adjoining backyards of developed lots. These "green fingers" are relevant to the appellant's case on the environmental issues, discussed later.

[40] It is intended, as a first step towards realising development, that a Master Population Distribution Plan (MPDP) would be prepared and submitted as part of an application for another preliminary approval affecting the whole of the site. This would show how the intended maximum population is to be distributed across the site, between precincts of different types and in different locations.

[41] Following approval of the first MPDP, each development application for a Reconfiguration of a Lot (ROL) (where development for a house or other form of accommodation on a lot is intended to occur subsequently by self-assessment or code assessment without a further ROL approval) would be accompanied by a Vegetation Management Plan (VMP) a Development Envelope Plan (DEP) and a Local Population Distribution Plan (LPDP).

[42] The preparation of a VMP would be informed by a survey of existing trees with a diameter of 30 cm at 1.3 m above ground level. The DEPs are intended to restrict the area of any individual site which may be cleared of vegetation for development.

[43] It is intended that, at the ROL stage, aspects of the development such as the alignment of streets and the size and location of individual allotments and the development envelopes within them could be varied in order to be sensitive to the preservation and protection of valuable on site vegetation[15].

[44] It was pointed out, on behalf of the co-respondent, that the POD makes the protection of vegetation subject to the realisation of development as otherwise contemplated in the POD. For example, it provides as follows (emphasis added):

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14 That document is not part of the Plan of Development but shows, indicatively, what might be expected.

15 Exhibit 11C p.61 s 4.3.3.

> "A VMP optimises the protection of vegetation that is valuable for habitat purposes and other reasons <u>having regard to the development outcomes required for the site</u> of the proposed lot reconfiguration[16]."
>
> "A DEP optimises the protection of vegetation that is valuable for habitat purposes and other reasons and has been identified in the VMP vegetation survey …<u>having regard to the development outcomes required for the site</u> of the proposed lot reconfiguration…[17]."

Further, if the probable solutions to the relevant performance criteria in the applicable codes are to be adopted then lot reconfiguration plans, DEPs and VMPs lodged in support of ROL applications in its mixed use, resort and housing precincts should (emphasis added) "optimise the retention of vegetation on the development site <u>having regard to the imperative to develop the site</u>" for the relevant purpose.[18]

[45] What constitutes vegetation of value is undefined in the POD. That is presumably to be left to professional judgment consequent upon the vegetation survey. The significance of these matters in determining the sensitivity of the proposal to the values of the site is discussed later in the context of the fauna, flora and biodiversity issues.

The Statutory Planning Documents

[46] It has already been observed that this Court must decide the appeal on the basis of the laws and policies applying when the application was made (11 August 2004), but may give weight to later laws and policies. The planning scheme in force when the application was made was the 1997 Transitional Planning Scheme. The State Coastal Management Plan (August 2001) was also in force[19].

[47] The later statutory planning documents discussed in this case are:

(a) the 2005 IPA Planning Scheme;

(b) the Wide Bay Burnett Regional Plan (2011);

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16 Exhibit 11C p.60 s 4.2.3.

17 Exhibit 11C p.61 s 4.3.3.

18 See the Plan of Development Codes for the Mixed Use Precinct PS-7, Resort Precinct PS7 and Housing Precinct PS9; exhibit 11C p.25 & p.33.

19 State Planning Policy 1/03, mitigating adverse impacts of flood, bushfire and landslip (SPP 1/03) was also in force, but did not feature in the debate on the issues pursued at trial.

(c) the State Planning Policy 3-11 and the Queensland Coastal Plan (February 2012);

(d) Temporary State Planning Policy 2/12 (August 2012);

(e) the Draft Coastal Protection State Planning Regulatory Provision – October 2012 (2012 DCPSPRP); and

(f) the Coastal Protection State Planning Regulators Provision – April 2013 (CPSPRP)

Further, the Council has published a draft new planning scheme, to which regard may be had pursuant to the Coty principle[20]. The State has also published a draft State Planning Policy.

Documents in force when the application was made

1997 Transitional Planning Scheme

[48] The Transitional Planning Scheme was prepared under the now repealed PEA and adopted on 19 December 1997. This development application was made towards the end of its life.

[49] The RS2 land was included in the Rural Zone under the Transitional Planning Scheme. The intent of that zone relevantly provides (emphasis added):

> "This zone is intended to conserve areas of agricultural, open space and scenic significance and to allow for the conduct of a broad range of rural activities. It is also intended to preserve some land for future urban, rural residential or other purposes designated in the Strategic Plan or a Development Control Plan. In such cases, favourable consideration will only be given to applications for development or subdivision which do not compromise the use of the designated area for its intended purpose."

[50] It has already been observed that the uses for which preliminary approval is sought include those which were prohibited in the Rural Zone. The Statement of Intent however, acknowledges that, for some land, the Rural Zone was used as, in effect, a "holding zone" (pending eventual rezoning) for future urban or other purposes designated in (relevantly) the Strategic Plan. Accordingly, it is the Strategic Plan to

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20 *Coty (England) Pty Ltd v Sydney City Council (*1957) 2 LGRA 117.

which reference must be directed to determine whether the proposal is consistent with the Transitional Planning Scheme.

[51] The Strategic Plan recognises that "the Cooloola Coast comprises nationally significant environments and tourist attractions". The goals of the Strategic Plan are:

- "To provide throughout the Shire, a broad range of interesting, safe and comfortable environments for living, working and visiting;
- To enhance the economic, cultural and social wellbeing of the Shire;
- To provide for orderly and efficient development of the Shire and promote public and developer confidence in Council's development intentions;
- To ensure that development respects the principles of ecologically sustainable development."

[52] Insofar as the achievement of those goals is concerned, the Strategic Plan provides:

> "The goals are to be achieved by dividing the Shire into Preferred Dominant Land Use designations, setting objectives for development in each, managing development in accordance with implementation criteria developed to satisfy the objectives and implementing the provisions of the Planning Scheme. Preferred Dominant Land Uses embody the preferred development strategy for the Shire. They guide the Council and its decisions on land use matters, but do not confer land use rights in themselves."

[53] The Strategic Plan includes an "Urban" PDLU designation which:

> "Comprises the Shire's substantial established urban areas and indicates the preferred direction and extent of their growth during and beyond the life of this planning scheme."

The RS2 site is not within the urban PDLU.

[54] The Strategic Plan also includes a Tourism PDLU designation, but elements of that designation are not identified on the Strategic Plan Map. The Statement of Intent for the Tourism PDLU acknowledges the significance of Rainbow Beach:

> "because it is the principal entry point to Fraser Island, the Great Sandy National Park and Inskip Point and a coastal resort in its own right."

[55] As Mr Summers (the town planner called by the fourth to eighth respondents by election) pointed out, 'Rainbow Beach' is there discussed as distinct from Inskip Point, to which it is an entry point. That does not mean that tourist development is not to occur on Inskip Peninsula. At least that part of the Inskip Peninsula which is

developed as RS1 contributes to the tourism role of Rainbow Beach, while other provisions of the Planning Scheme (discussed below) envisage that some form of ecotourism/residential development might be appropriate on RS2.

[56] The objectives and implementation criteria for the Tourism PDLU envisage that the tourist role of Rainbow Beach will be enhanced. Section 1.13.3.2 provides:

> "Rainbow Beach is a small modern coastal resort town. It does not portray any definite character other than a consistent low rise form in its built environment and obvious visual links and convenient access to the beach. Its continuing tourist role will be enhanced by fostering development of low rise but higher than the existing shopping centre and by encouraging modern light and airy themes in the architecture which emphasises its holiday environment. In assessing applications for motel or holiday accommodation within the tourist accommodation precinct, Council will endeavour to ensure these aims are met."

[57] The RS2 site is within the "Environmentally Significant Areas" PDLU designation on the Strategic Plan Map and has an "Opportunity Area" overlay. The statement of general strategy for the Environmentally Significant Areas PDLU includes the following:

> "The Environmentally Significant Areas Strategy aims to identify, manage and protect valued habitats and stands of remnant vegetation significant to the Shire's ecological sustainability, areas representing the intrinsic character of a locality and/or landscape elements of outstanding significance."

[58] The first of the objectives for such areas is as follows:

> "1.10.3.1 **To protect, manage and enhance the Shire's important natural environments.**
>
> The protection of fauna and flora habitats and corridors is essential to the maintenance of the Shire's biodiversity and the aesthetic appeal of its natural environments. Much can be achieved through education and sound ecological management, however the field in which the Strategic Plan is influential relates to managing the impacts of development on land comprising or neighbouring designated Environmentally Significant Areas."

[59] The second objective relates to the beach and foreshore. It provides as follows:

> "1.10.3.2 **To preserve the beach and foreshores as a major public recreational resources and natural open space area of visual significance and to ensure inappropriate development does not occur in areas subject to natural coastal processes**
>
> Council recognises the value of the Shire, and particularly to the tourism industry, of retaining high quality beaches supported by beach protection buffer zones with reasonable access.

> To preserve and enhance the natural character and features of the Cooloola Coast as a recreational setting, Council in conjunction with the beach protection authority and other relevant government departments aims to prevent development that would detract from the natural character, and to impose suitable planning controls on land use and development to ensure the natural attributes are protected."

[60] The implementation criteria include that, in considering applications for development, Council will seek, amongst other things, to require the dedication or maintenance of beach protection buffer zones, which are adequately sized, on ocean beaches.

[61] The Strategic Plan goes on, in the provisions dealing with the Opportunity Area, to acknowledge that the RS2 site is the subject of a development lease and has some development potential as well as environmental sensitivity. It seeks to ensure that any development is compatible with the environmental values and character of the area and that it occurs in accordance with the principles of ecologically sustainable development. In that regard, s 1.10.3.3 provides (emphasis added):

> "1.10.3.3 **To retain the unique features of Inskip Peninsula and surrounding areas and ensure that any development is compatible with the environmental values and character of the area, and occurs in accordance with the principles of ecological sustainable development.**
>
> An opportunity area has been mapped on land designated as an environmentally significant area at Inskip Peninsula. While detailed planning for this area shall be addressed through the Cooloola Coast Development Control and possibly a local area plan, Council recognises both the site's potential for development considering existing development leases and its environmental sensitivity. While the site presents substantial development opportunities, because of its favourable location, opportunities are constrained in a number of ways including, uncertainty as to future availability of water resources for reticulation, the requirements of the Great Sandy Region Management Plan, the erosion prone areas and the need to conserve natural values.
>
> Any application for development over this site may be considered to be premature prior to the gazettal/adoption of the Development Control Plan/Local Area Plan, however, Council envisages that a low density, low key, low rise, style of eco tourism resort/residential development(s) with significant retention of private and public open spaces may be appropriate for the site, providing appropriate planning and environmental management strategies and practices are devised, and community and planning need can be demonstrated."

[62] The implementation criteria for that provision are as follows:

> "In considering development applications in this area Council will:

- have regard and take into account the recommendations of the Great Sandy Management Plan, and any subsequent Development Control Plan and/or Local Area Plan;

- ensure that the provisions and requirements of ss 1.10.3.1 and 1.10.3.2 are followed and implemented;

- liaise with other statutory authorities to ensure their interests are considered and protected as appropriate;

- require the applicant to demonstrate the proposed development areas will not experience unacceptable impacts from natural hazards including cyclones, storm surges, long term changes in water levels, ground water discharge and other natural events of concern in coastal eco systems;

- require urban design principals to be incorporated which seek to ensure the scale, bulk, design and character the development reflects and is sympathetic to the existing amenity and where possible enhances the natural beauty of the area;

- require that development is designed to maintain a "sense of place" through limiting the intensity of development to within the environmental carrying capacity of the area, attention to the retention of visual focal points and buffers, incorporates design themes which draw from the natural characteristics of the area, including strict controls on the bulk, scale and height of any structure and the retention of significant portions of the site in open space areas;

- require the submission of an environmental assessment report or such other environmental analysis and management planning as is considered appropriate which identifies existing environmental attributes, systems and current trends in natural processes, the potential impacts of the proposed development and any alternative options which could be considered, and measures proposed to minimise or ameliorate these impacts during the construction and ongoing use of the site;

- ensure public access to the beach and foreshore is provided at appropriate locations and provisions for public facilities (eg car parking, public toilets, emergency services, recreational facilities and parks) are made;

- Encourage the incorporation of best management practices in the service reticulation and waste management systems installed in conjunction with, or as a result of, the development."

[63] The Great Sandy Region Management Plan (1994-2010), to which reference is made, contained a bullish statement about future potential growth as follows:

> "The future land use on Inskip Peninsula will have a major influence on the future management of the Region. The population of Rainbow Beach/Inskip Peninsula is expected to grow to between 5 000 and 8 000 making the centre a substantial holiday destination and the southern gateway to Fraser Island."

In relation to the land the subject of development leases, it also states:

> "Proposals for resort and residential development cover substantial areas of the Peninsula under development leases. These leases were granted in compensation for surrendered sand minding interests on Fraser Island, Moreton Island, Cooloola and on the central Queensland coast.
>
> Reservations have been expressed about the extent and type of development proposed for Inskip Peninsula. Key areas of concern relate to the supply of water, disposal of sewage and waste, traffic management issues and the impacts of the projected population and proposed development on the values of the Region particularly in relation to the area's fisheries."

As discussed later, nothing like that extent of growth has occurred, or is likely to occur in the near future.

[64] Whilst the stated objective recognises that the RS2 site has development potential it also recognises its environmental sensitivity and that the development opportunities of the site are constrained. It does not provide any specific support for the extent of development for which the appellant seeks a preliminary approval.

[65] The Objective contemplates that greater guidance would be given by creation of a Development Control Plan or a Local Area Plan. That did not eventuate during the life of the 1997 Plan. The reference to development applications potentially being premature prior to the gazettal or adoption of such a plan should not, in the circumstances, stand in the way of a consideration of the subject proposal.

[66] It was submitted that serious conflict with s 1.10.3.3 arises by reason of the proposal being beyond the "low density, low key, low rise, style of eco tourism/residential development/(s)" description of what council "envisages" may be appropriate. The expressions "low density", "low key" and "low rise" are relative notions. Whether the subject proposal fits those descriptions should be judged in the context of the planning scheme in which those terms appear and the site and area to which they apply.

[67] The proposal is obviously large, particularly in the context of Rainbow Beach. I acknowledge, as the appellant pointed out, that the site over which the proposal is spread is also large and that the POD contains a number of provisions which aim to ensure that development "fits" with its context, including by limiting the height of

buildings in the various precincts to prevent visual dominance of the landscape setting[21].

[68] It was also pointed out that the provisions make reference to the Great Sandy Region Management Plan which, amongst other things, seeks to direct new tourist and commercial development towards Hervey Bay, Maryborough and Rainbow Beach and away from Fraser Island itself.

[69] Notwithstanding those observations, there are, quite apart from the quantum of development for which preliminary approval is sought, components of the proposal which make it difficult to describe what is envisaged, in its entirety, as simply a low density, low key and low rise eco-tourism resort/residential development. I note, for example, that the POD makes provision, in sub-precinct H4 of the Housing Precinct, for what it accurately refers to as "high density apartment style housing". The resort precinct contemplates the possibility of multi-residential development to six storeys, subject to impact assessment. Substantial (particularly in the context of Rainbow Beach) commercial development is provided for. There is also significant opportunity for education, health and community services in the community precinct.

[70] I have not approached the matter on the basis that the strategic plan necessarily sets its face against any proposal which, in any way, departs from the description of what the "Council envisages … may be appropriate" in the absence of the anticipated Development Control Plan or Local Area Plan. Had conformity with that description been intended to be mandatory, then stronger language would have been expected. Further, I note that the expression was not carried forward into the 2005 Planning Scheme, to which substantial weight should be afforded in this case. I accept that departure from what the Council "envisages … may be appropriate for the site" does not itself establish conflict and is, in this case, far from determinative.

[71] Mr Summers was of the opinion that the proposal does not exhibit an appropriate relationship with the Rainbow Beach township and does not represent orderly planning. He regarded both the 1997 Planning Scheme and the 2005 Planning

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21 See, for example, S0-2 of the Mixed Use Precinct; exhibit 11C p.21-22.

Scheme (discussed later) as establishing a relationship or hierarchy which the proposal offends. In the joint report[22] he said:

> "**Mr Summers** concludes that there is a clear order within the Strategic Plan in the 1997 Transitional Planning Scheme, where Rainbow Beach is centre and staging point for journeys to Fraser Island, the Great Sandy National Park and Inskip Peninsula, where the Inskip Peninsula because of its wilderness feel is a recreational resource and character area and Lot 22 has some capacity to support development; however the extent and intensity of that development:
>
> (a) Is of a scale that does not warrant an Urban Area PDLU, as applied to Rainbow Beach and Rainbow Shores 1; and
>
> (b) Should be subservient to Rainbow Beach."

[72] That reads a little too much into the Planning Scheme. The decision not to apply an Urban Area PDLU to RS2 is unsurprising, given the unresolved constraints to achieving development. In the absence of a Development Control Plan/Local Area Plan, the provisions of the scheme do not qualify the extent of development potential of RS2 in either absolute or relative (relative to Rainbow Beach township) terms, beyond the unspecific description of what "Council envisages … may be appropriate".

[73] Ultimately, the consistency or otherwise of the proposal with the Transitional Planning Scheme turns on whether it is consistent with the provisions dealing with the Opportunity Area overlay in the context of the underlying Environmentally Significant Areas PDLU and having regard to the intent for tourism in Rainbow Beach. That raises issues which are considered later.

The State Coastal Management Plan (August 2001)

[74] The co-respondent, as a concurrence agency, assessed the development application against the State Coastal Management Plan, which was a statutory instrument created under the *Coastal Protection and Management Act 1995*. The reasons for refusal of the subject application, as directed by the co-respondent, related to three policies within the SCMP namely policies 2.1.2, 2.8.1 and 2.8.3.

[75] Policy 2.1.2 seeks, amongst other things, to ensure that:

> "To the extent practicable, the coast is conserved in its natural or non-urban state outside of existing urban areas. Land allocation for the development of

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22 Exhibit 5 tab 15 para 163.

> new urban land uses is limited to existing urban areas and urban growth is managed to protect coastal resources and their values by minimising adverse impacts."

RS2 is not in an existing urban area.

[76] Policy 2.12 also provides, in part, that:

> "Urban growth is managed to protect coastal resources and their values by minimising adverse impacts"

Whether the site has coastal resources worthy of protection and whether the proposal minimises adverse impacts is discussed later.

[77] Policy 2.1.2 also states, in part, that:

> "Growth of urban settlements should not occur on or within erosion prone areas, … sites containing significant coastal resources of … ecological value, or areas identified as having or the potential to have unacceptable risk from coastal hazards."

As discussed later, RS2 has significant ecological value and, in part, is subject to potential erosion and storm surge.

[78] Policy 2.8.1 relates to areas of State significance (natural resources). Areas of State significance include areas comprising "significant coastal dunal systems". That is a defined term. The relevant policy states, in part:

> "Land identified to be developed in the future for urban … uses in regional plans, planning schemes … is to be located outside of 'areas of state significance (natural resources)'. Existing urban … uses within 'areas of State significance (natural resources)' will not expand in these areas unless it can be demonstrated that there will be no adverse impacts on coastal resources and their values. If a use or activity that has adverse effects is to occur within 'areas of State significance (natural resources)', it must have a demonstrated benefit for the State as a whole …"

[79] Four "areas of state significance" (natural resources) are identified in policy 2.8.1 of which the relevant one is "significant coastal dune systems". Whether the RS2 site is part of a "significant coastal dunal system" and, if so, whether it would have adverse impacts and, if so, whether it has been demonstrated that there would be a net benefit for the State as a whole from it proceeding are matters discussed later.

[80] Section 2.8.3 seeks to safeguard biodiversity on the coast "through conserving and appropriately managing the diverse range of habitats including … dune systems …". It states that the following matters are to be addressed to achieve the conservation and management of Queensland's coastal biodiversity:

> "(a) the maintenance and re-establishment of the connectivity of ecosystems, particularly remnant ecosystems;
>
> (b) ensuring viable populations of native species continue to exist throughout their range, by maintaining opportunities for long-term survival, genetic diversity and the potential for continuing evolutionary adaption …
>
> (c) the retention of native vegetation wherever practicable
>
> …"

The proposal involves substantial destruction of native vegetation on RS2. The impact of the proposal on biodiversity is discussed later.

[81] While the State Coastal Management Plan was a relevant document for assessment of the application, its significance, particularly as a 'stand alone' planning document, has been overtaken. First, the relevant Minister identified the State Coastal Management Plan as having been appropriately reflected in the 2005 Planning Scheme. It is the provisions of that planning scheme, as they relate to the subject application, to which weight should be attached in the assessment of the application. Weight should not be given to the State Coastal Management Plan in a way which departs from the manner in which it was reflected in the 2005 Planning Scheme[23]. Secondly, and more recently, the Coastal Management Plan was superseded when State Planning Policy 3/11 (discussed later) came into effect.

Subsequent statutory planning documents

2005 IPA Planning Scheme

[82] The current Planning Scheme took effect on 31 March 2005, some seven months after the Development Application was made. It has been in effect for eight years and, indeed, is near the end of its life. It was uncontroversial that, as between the

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23 *Celledoni v Johnstone Shire Council* [2008] QPEC 104.

1997 Planning Scheme and the 2005 Planning Scheme, it would be unrealistic to deny the latter primary weight. The 2005 Planning Scheme did not, however, take a radically different approach to the subject site.

[83] The Desired Environmental Outcomes for the Cooloola Shire include:

> "(4) the role of Rainbow Beach as a major coastal tourist destination in the shire is reinforced;
>
> …
>
> (7) the amenity, cultural heritage, ecological and recreational values of significant natural features including the Great Sandy National Park, Inskip Point and other coastal areas… are protected and enhanced;
>
> …
>
> (9) adverse effects on the natural environment are minimised with respect to the loss of biodiversity and significant natural vegetation, soil degradation, interference with natural coastal processes and water pollution due to erosion, chemical contamination, acidification, salinity, effluent disposal and the like."

[84] The 2005 Planning Scheme includes a Strategic Framework, the provisions of which are not intended to provide a basis for development assessment, but are a guide for development related decisions of Council, developers and the community generally. Section 1.2.3 of the Strategic Framework identifies relevant outcomes for residential development. The preferred settlement pattern is said to be indicated by the "Urban" nodes on, relevantly, Strategic Map SM2, Cooloola Coast. The RS2 site is outside the Urban designation on that map.

[85] Section 1.2.6 of the Strategic Framework identifies that the following outcome is sought by the Planning Scheme for tourist orientated development:

> "Rainbow Beach and Tin Can Bay are the major tourist centres on the Cooloola Coast. Tourist orientated development including accommodation, of an appropriate scale, retailing and services are appropriate within the identified tourist service areas of both towns. Mixed use development is encouraged particularly commercial and service uses on ground level and accommodation above or to the rear."

The RS2 site is not included within an identified tourist service area.

[86] Section 1.2.10 of the Strategic Framework identifies the following outcome which is sought by the Planning Scheme for environmental protection:

> "The Planning Scheme identifies some areas having environmental significance because of existing values and actual or potential land degradation, including salinity, erosion and acid sulphite soils. Some of these areas are shown on … Strategic Map SM2, Cooloola Coast, and others are shown on overlay maps, and actual hazard maps or advisory maps. Development within or near some of these areas is subject to specific codes to protect the Shire's natural features and resources."

The vast majority of the RS2 site is mapped as being of regional ecosystem value on Overlay Map OM4 and the proposed development is therefore subject to the relevant applicable code. The Scheme provides that, to the extent of any inconsistency, a provision in an overlay code prevails over a provision in any other code[24].

[87] The Planning Scheme area is divided into three parts. The RS2 site falls within the Cooloola Coast Planning Area. That area is, in turn, divided into zones. The RS2 site is included in the Rural zone.

[88] Division 5.4 of the Planning Scheme contains a Cooloola Coast Planning Area (excluding Rainbow Shores Precinct) Code. The Overall Outcomes for the Code include that significant environmental areas are conserved and protected from adverse effects of development[25]. Specific reference is made to the RS2 site as follows:

> "Lot 2, MCH 803497 remains an undeveloped urban development lease area until conflicting issues about:
>
> (A) The environmental significance of the site;
>
> (B) Water availability and supply for Cooloola Coast;
>
> (C) The site's susceptibility to natural hazards;
>
> (D) The potential for development of the site whilst maintaining its natural values;
>
> (E) The need for further urban development at the Cooloola Coast to service projected population; and,
>
> (F) Other State interests
>
> are resolved, allowing Council to consider the sensitive development of the site, in accordance with sound town planning and urban design principles, and best management practices for water and sewerage

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24 Cooloola Shire Council Planning Scheme 2005 s 2.7(2).

25 2005 Planning Scheme s 5.4.3(2)(b).

> reticulation, water conservation, waste disposal and construction methods."

[89] The Planning Scheme envisages that the RS2 site is to remain undeveloped until those conflicting issues are resolved. Those issues include the environmental significance of the site, its susceptibility to natural hazards and the need for further urban development. The implied acknowledgment that the land might be suitable for some form of urban development, if and when the conflicting issues are resolved, suggests that, as was the case with the earlier Planning Scheme, the Rural zone is potentially performing something akin to a holding zone function with respect to the RS2 site. The provisions however, do not provide any specific support for development of the scale and intensity proposed.

[90] Table 5:13 of the 2005 Planning Scheme sets out the specific outcomes and probable solutions for the Cooloola Coast Planning Area (excluding Rainbow Shores Precinct)[26]. Specific Outcome SO1 identifies commercial premises, multi-residential and shop uses as inconsistent uses in the Rural Zone. As with the 1997 Planning Scheme, the minimum lot area for sub-division is 100 hectares. Those provisions however, need to be read in the context of the role which the Rural Zone plays with respect to the RS2 site. They should not be seen as an insurmountable hurdle to development of an appropriate kind, provided the conflicting issues referred to in the Overall Outcomes are resolved.

[91] The RS2 site is also subject to the Conservation Significant Areas Code. The Overall Outcomes for the Code include an intention that "areas identified as having conservation significance are protected from development or the effects of development that may cause degradation of those areas" by, amongst others, "loss of ecosystems, habitat or connectivity value".

[92] Further, an Overall Outcome for the Conservation Significant Areas includes that:

> "(b) Sensitive design maximises the retention, protection and enhancement of:
>
> (i) Vegetated remnants and minimises their edge to edge perimeter ratios to enhance the potential for the long term survival of significant fauna and flora species;

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[26] The Rainbow Shores Precinct covers RS1, but does not extend to RS2.

(ii) Connectivity value areas to maximise the general genetic dispersal of significant flora and fauna species; and

…"

[93] Two specific Outcomes for the Conservation Significant Areas provide, in part:

> "SO1 development within State or Regional Ecosystem Value Areas is avoided.
>
> …
>
> SO14 development within Endangered, Vulnerable or Rare Flora or Fauna species Habitat Value Areas is avoided."

The RS2 site is mapped as having regional ecosystem values across the vast majority of the site[27] and EVR[28] habitat values at the north-western end[29].

[94] It was submitted, for the appellant, that the specific outcomes of the Conservation Significant Areas Code should be read in conjunction with other provisions of the Planning Scheme and, in particular, the provisions of the Cooloola Coast Planning Area (excluding Rainbow Shore Precinct) Code, which contemplate that the RS2 site might be capable of urban development in the event that conflicting issues are resolved. It was submitted that:

> "In context, if the criteria listed in s.5.4.3(2)(q)(ii) are satisfied, so too will be the requirements of SO-1 and SO-14. Were it otherwise, the fact that the RS2 site is mapped as "Regional Ecosystem Value Area" on Overlay Map 4 sheet 2 would, together with SO-1 and SO-14, deny s.5.4.3(2)(q)(iii) any operation. Further, it would confer on SO-1 and SO-14 an operation prohibiting development in the circumstances to which they apply. Plainly, that could not have been intended."

[95] As was submitted on behalf of the co-respondent however, not only does the Scheme give primacy to the Conservation Significant Areas Code (as an overlay code) in the event of any conflict with the provisions of any other code, but those two parts of the Planning Scheme are, in any event, not necessarily inconsistent. The probable solutions for SO1 and SO14 envisage that development may be appropriate either where development does not occur within the mapped areas or where, following on-site investigations, that part which is to be developed is found not to have the relevant values.

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27 2005 Planning Scheme OM4/1 sheet 2.

28 Endangered, Vulnerable or Rare Fauna or Flora Species.

29 2005 Planning Scheme OM4/2 sheet 2.

[96] There is a small proportion of the site (in the formerly mined area) which is not within the mapped regional ecosystem area, but the proposed development extends more generally across the site. Substantial on-site investigations of values have been performed for the purposes of this case. Those are discussed later. The proposal envisages substantial development within parts of the site which are not only mapped as having regional ecosystem value but which, following the onsite investigations, have been established as supporting vegetation of regional ecosystem value. There is conflict with the Code. The proposal also envisages substantial development in parts of the site which have been demonstrated to provide habitat for rare or vulnerable fauna and near threatened flora.

Wide Bay Burnett Regional Plan

[97] The Wide Bay Burnett Regional Plan (WBBRP) is the pre-eminent planning document for the region[30]. It took effect on 29 September 2011 under the SPA. The regulatory provisions however, in Part E, have ceased to operate in consequence of Parliament's failure to ratify them. Further, the 2012 DCPSPRP and its successor, the CPSPRP, suspended the operation of Part 2.2 of the Regional Plan. The provisions of the Regional Plan otherwise however, are provisions to which the Court may give such weight as it thinks fit.

[98] Part B of the Regional Plan describes the regional framework. This includes three components: a strategic direction; regional settlement patterns; and sub-regional narratives. The relevant sub-regional narrative applying to Rainbow Beach acknowledges that nature-based tourist hospitality is a locally relevant industry in Rainbow Beach. Further diversification of local employment and economic activity will be supported where appropriate. The narrative also notes the "limited opportunities" for broad hectare residential growth within residential towns and that "the expansion of urban activity, particularly residential development beyond existing urban areas, is severely limited".

[99] Part C of the Regional Plan states the Desired Regional Outcomes for the plan area. The RS2 site is included in the Regional Landscape and Rural Production Area and

30 To allege that does not mean that it must be given decisive weight in relation to the application.

is also mapped as being of High Ecological Significance[31]. The intent of the Regional Landscape and Rural Production Area is set out in Part D as follows:-

> "Regional Landscape and Rural Production Area:
>
> Intent – the RLRPA identifies land with regional landscape, rural production or other non-urban values. It protects this land from inappropriate development, particularly urban or rural residential development.
>
> These areas support the lifestyle and wellbeing of the regional population, primarily located in the Urban Footprint.
>
> **Description**
>
> The RLRPA includes land with one or more of these values.
>
> - Significant biodiversity.
> - Regional eco systems that are endangered or of concern.
> - National parks, conservation parks, resources, reserves or other conservation areas.
> - Significant fauna habitats."

[100] The intent and description of the Regional Landscape and Rural Production Area stand in stark contrast to the intent for the Urban Footprint, which is said to identify land that can meet the region's projected urban development needs to at least 2031. The Regional Plan gives no support to development of the extent proposed on the RS2 site.

[101] The inclusion of the site within the Regional Landscape and Rural Production Area remained in the final version of the document notwithstanding a submission, made by Mr Humphreys (the appellant's town planning consultant), on behalf of the appellant, that the then 2010 draft Regional Plan should be amended so as to include RS2 in the Urban Footprint.

[102] It was submitted, on behalf of the appellant, that it would be unfair to give the document much weight having regard to the fact that it was not made until approximately seven years after the application was made and indeed, when preparation for the appeal was at an advanced stage.

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[31] Map 4 – which is said to "indicatively" show areas of ecological significance across the region (see pg 58)

[103] As with the current Planning Scheme, the designation which is applied to the RS2 site in the Regional Plan recognises its values. The transitional, current planning schemes and draft new planning schemes contemplate that the site is to remain undeveloped unless and until development can be shown to be justified having regard to, amongst other things, its ecological significance. An apparent difference is that the prospect of issues being resolved so as to permit urban development of RS2 is not recognised in the Regional Plan. In the circumstances, I would not give determinative weight to that, if the conflicting issues referred to in the planning scheme were indeed resolved. Further, I note, as is observed later, that the Minister has identified the WBBRP as being reflected in the Council's draft planning scheme, the site specific provisions of which (added by amendment) mirror those of the current planning scheme.

Draft Gympie Regional Council Planning Scheme

[104] On or about 13 October 2012, the respondent, Gympie Regional Council, gave public notice of a draft new planning scheme. Submissions received in response to the public notification were considered. The Council has made some amendment to the draft. The Minister has advised that the respondent may now adopt the new scheme, in its amended form. The Council is due to meet at noon on 12 June for that purpose.

[105] The Minister has also advised of the extent to which the draft planning scheme appropriately reflects state planning instruments. Those identified as reflected appropriately include the WBBRP and Temporary State Planning Policy 2/12 (discussed later). The Coastal Protection State Regulatory Provision (discussed later) is not identified as appropriately reflected and would continue to apply for development assessment purposes.

[106] Under the draft planning scheme:

(i) The RS2 site is designated Rural on the Strategic Plan Map;

(ii) The whole of the RS2 site is in the Environmental Management and Conservation Zone[32];

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[32] Gympie Regional Council Planning Scheme Draft, Zoning Plan Map 9.

(iii) The RS2 site is in:

(a) A Conservation Significant Area on Conservation Significant Area Overlay Map 4; and

(b) Bushfire Hazard (Medium Risk) Area in the Bushfire Hazard Overlay Map 5;

(iv) Consistently with the Regional Plan, GQAL Overlay Map 5 shows the RS2 site as outside the urban footprint.

(v) Of the 'Rainbow Shores' land, only RS1 is included in the Tourist Accommodation Zone;

(vi) There are zone codes for each zone; s.6.2.4(2) of the Tourist Accommodation Zone Code provides:

> "The local government purpose is to facilitate the on-going development of Rainbow Shores in accordance with historic approvals issued over the land."

The reference to 'Rainbow Shores' is a reference to RS1 and the reference to "historic approvals" is a reference to the approvals referred to in acceptable outcome AO1.1 in Table 6.4, which refers to the rezoning approval of 8 May 1990, POD No 1/90 and the rezoning deed of 28 June 1990 in relation to the RS1 site. Specific reference is made to the maximum resident population for RS1 of 4,100 persons that was the subject of that 1990 approval;

(vii) Tables dealing with growth projections up to 2026 and beyond (to "ultimate development") deal with "the assumed scale of development" that "has been determined to reflect the realistic level (scale and intensity) of development having regard to the land use planning provisions of the planning scheme, site constraints and development trends" (s.4.2.6(1) – see also s.4.2.6(4)). These refer to-

- an "ultimate development" population for Rainbow Beach of only 4,417, with a projection of 3713 by 2026;
- a total net development area for dwellings at Rainbow Beach at the ultimate development stage of 72.4 hectares; and
- a total net development area for non-residential uses at Rainbow Beach at the ultimate development stage of only 8.7 hectares.

At first blush those figures do not sit well with an expectation of development at RS2 of anything like what is proposed. As Gibson QC

pointed out however, those figures are derived from tables in the part of the Draft Scheme dealing with the priority infrastructure plan. RS2 sits outside the priority infrastructure area boundary. Further, insofar as infrastructure planning is concerned, the proposal will provide for its infrastructure.

(viii) Strategic Plan Map 1 shows two "New Urban Areas" within the locality, neither of which are within RS2.

(ix) Map CS-DT-6 shows the planning assumptions for housing at Rainbow Beach. It extends beyond the priority infrastructure boundary. It anticipates further housing towards the southern end of RS1 in the period 2016-2026 and at the northern end of RS1 beyond 2026. It shows nothing north of RS1;

(x) the strategic framework (which is the dominant provision in the planning scheme[33]), in dealing with the "settlement pattern" for "coastal settlements", notes that tourist activity at Rainbow Beach is relatively "low key", with the "vast majority of visitors" choosing to camp, and goes on to provide:

> "There are no current influences suggesting any change to current growth trends... It is significant that Rainbow Beach's growth is moderately constrained by surrounding National Park, State land and coastal hazards."

(xi) The Zone Code that applies to the RS2 site provides:

> "6.2.17 Environmental Management and Conservation Zone Code
> (1) The purpose of the zone is to provide for areas identified as supporting significant biological diversity and ecological integrity.
> (2) The local government purpose is to provide areas of land for the permanent preservation and protection of areas of environmental and cultural values, including national parks, environmental parks and beach protection buffer areas from development that degrades its natural state or adversely affects its landscape, cultural heritage, or conservation values.
> (3) The purpose of the code will be achieved through the following overall outcomes:
> (a) Areas identified as having significant values for biological diversity, water catchment, ecological functioning, beach protection or coastal management, and historical or cultural values are protected from development.
> (b) Low intensity development based on appreciation of the significant values of the area may be facilitated where a demonstrated community need exists and is consistent with a management plan for the area.
> (c) Uses which do not compromise the significant values of the area, such as ecotourism and outdoor recreation, may be supported where a demonstrated community need exists and the use does not detrimentally affect the environmental values of the area.

[33] Draft Planning Scheme p.4 s.1.5(5)(a).

(d) Natural features such as creeks, gullies, waterways, wetlands and native vegetation are protected and appropriate buffers are established.
(e) Adverse impacts on ecological features and processes are avoided.
(f) Structures that are not designed to be relocated or sacrificed if threatened by natural hazards are inappropriate."

(xii) Table 6.17 identifies the following general performance and acceptable outcomes for the Zone Code:

"PO1 Development does not result in any loss or damage to the environmental values of the area."	AO1.1 Development is for environmental management or conservation purposes."

(xiii) The site is mapped as a "Conservation Significant Area" on the Conservation Significant Areas Overlay Maps, and the performance outcomes and acceptable outcomes within the Zone Code for such areas are as follows:

Conservation Significant Areas	
PO9 Development avoids or minimises adverse impacts on areas of conservation significance.	AO9.1 Development occurs outside the overlay area or AO9.2 Development is compatible with the values of the conservation significant area. or AO9.3 Where development within a conservation significant area is unavoidable, measures are incorporated to protect and retain the ecological values and underlying ecosystem processes within or adjacent to the development site to the greatest extent practicable. and AO9.4 Buffer areas are to be maintained or where possible rehabilitated."

(xiv) The same outcomes are contained in Table 9.3 in the Reconfiguring a Lot Code, in section 3 "for all subdivisions affected by an overlay".

[107] The draft planning scheme joins the list of documents which have identified the RS2 site as within an area having ecological significance. While the draft scheme contemplates that some low-intensity development might occur in the Environmental Management and Conservation Zone, there is no positive support,

within the draft scheme, for a proposal on the RS2 site of the extent and intensity contemplated by the subject application, with its consequent removal of a substantial proportion of the on-site vegetation.

[108] As publically notified, the draft planning scheme did not carry forward those provisions of the existing or the superseded planning schemes which recognised the development lease on RS2 or that RS2 might have some development potential. RS2 was treated the same as any other parcel of land within the Environmental Management and Conservation Zone.

[109] In November 2012 submissions were made in this case about the draft planning scheme, as notified. Those opposed to the subject application placed a deal of weight on the decision not to carry forward the previous acknowledgments of development potential for RS2. It was submitted that the proposal would 'cut across' the draft planning scheme in a significant way.

[110] The provisions of the draft planning scheme may be afforded weight, on the basis of the *Coty* principle. That principle, and its effect on the decision making process, was summarised by Fitzgerald P in *Yu Feng Pty Ltd v Maroochy Shire Council* as follows[34]:

> "*Coty* establishes no more than that, when determining whether to approve or refuse a planning application, it is permissible, in appropriate cases, to take account of any provisions affecting the site which are included in a general planning scheme which is in the course of preparation; the weight to be accorded to either consistency or inconsistency between the draft planning scheme and the application will depend on the circumstances, including the stage to which the draft planning scheme has progressed, and usually will be only one of the factors to be considered, although in a particular case it might be decisive."

[111] In response to the reliance placed on the failure to carry forward the earlier provisions specific to RS2, attention was drawn to the fact that the draft planning scheme was formulated in the shadow of the hearing of this approval. It was submitted by counsel for the respondent that the court could "draw the inference that the Council didn't want to pre-empt in any way a decision of this Court in this

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[34] (1996) 92 LGERA 41 at 62.

appeal…"[35]. The difficulty with that however, is that the draft planning scheme did not just maintain the 'status quo' in relation to the provisions of the current planning scheme, pending a determination of this appeal. Rather, the planning provisions removed the previous reference to the development lease and the development potential of the site.

[112] When that was put to Counsel for the respondent, he said[36]:

> "MR URE: Well, that's by the - I think one of the instances, that was the omission with reference to the lease, matters such as that, well it's not surprising that that was taken out, given the role that Mr Gore's client is playing in the appeal.
>
> HIS HONOUR: Sorry, I don't understand that.
>
> MR URE: Well it may well be that the Council was of the view that if the - with any support expressed for the development here it would be unlikely to survive the consideration by the State. That's a matter which your Honour could legitimately take into account."

[113] The public notification attracted a number of submissions concerning different parts of the draft scheme. A substantial proportion of those submissions dealt with the treatment of RS2. Most of those supported the position in the draft, as notified. That is unusual, because, as Mr Hartley, the respondent's Director of Planning and Development, subsequently acknowledged in testimony, it is more usual for submissions to be directed to requested changes, rather than to expressions of support for the notified draft. Notwithstanding this, the Council resolved to amend the draft planning scheme to insert the same words, in relation to RS2, which appeared in s 5.4.3(2)(q)(iii) of the 1995 Planning Scheme. No other provision relevant to RS2 was changed.

[114] This change, following submissions in this case made in reliance on the position in the draft scheme as notified, raised suspicion about the Council's motive for the amendment. It was contended by those opposed to the subject application, that the decision to amend the draft to include the passage from the 1995 Planning Scheme was 'colourable', in the sense that it was not for a proper planning purpose, but rather was designed to nullify the submissions that were made in this case.

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35 T39-48, lines 39-41.

36 T39-48 to 49.

[115] Mr Hartley gave evidence on this issue by affidavit and was cross-examined. He was not the most articulate of witnesses and his responses were not always very convincing, but I did not form the impression that he was being dishonest.

[116] The effect of Mr Hartley's evidence is that nothing specific about the RS2 site was written into the draft planning scheme because it was then thought that, by the time the submissions were considered, there would have been a decision in this case which would then have been considered in deciding what, if anything, would be specifically said in relation to RS2. It is regrettable that I was not given this explanation when I heard submissions about the draft in November. I am not however, inclined to reject Mr Hartley's testimony.

[117] Mr Hartley's evidence was to the effect that when it was realised that the scheme might be progressed without the benefit of a judgment in this matter, it was thought prudent to say something about RS2 in the new planning scheme. The intention was not to affect the outcome of this case, but to provide guidance with respect to any future applications which might be received. In this regard Mr Hartley was conscious that there was still an extant development lease, so he considered that there was a continuing prospect of another development application even if the subject proposal did not proceed. Having decided to include something, he regarded the carrying forward of the 2005 provision as a reasonable middle course.

[118] It should be noted that the Council did not just receive submissions which supported the position in the draft scheme. It also received submissions from the appellant and from the third respondent by election. Those submissions sought more major amendments, to include RS2 in the Tourist Accommodation Zone. The Council did not accede to those requests. I do not regard the Council's decision to amend its draft planning scheme as colourable.

[119] The draft scheme has now progressed to the cusp of adoption and where it is deserving of weight, but the specific provisions about RS2, added by amendment, are the same as those in the 2005 Planning Scheme and its provisions otherwise, as they relate to RS2, do not reveal a planning approach which departs in any radical way, from the 2005 Planning Scheme. Ultimately a consideration of the draft

planning scheme, as amended, does not alter the conclusion to which I have otherwise arrived.

Coastal Planning

[120] A new coastal plan took effect on 3 February 2012, during the hearing of the appeal. It was in two parts, namely the State Policy for Coastal Management ('Management Policy') and State Planning Policy 3/11: Coastal Protection ('SPP 3/11'). The Management Policy applied only to management planning, activities, decisions and works that are not assessable development. Upon coming into effect, the SPP 3/11 became a statutory instrument for the purposes of the SPA[37].

[121] The overall policy outcome for SPP 3/11 is stated, in part, as follows:

> "C.1 Development in the coastal zone is planned, located, designed, constructed and operated to:
>
> …
>
> (b) Manage the coast to protect, conserve and rehabilitate coastal resources and biological diversity …"

The RS2 site is included in a coastal zone for the purposes of C.1.

[122] The policy outcomes identified in C.1 will be achieved when development is consistent with policy outcomes stated in part C, ss 1-7 of the policy. Part C, s 3 deals with nature conservation. A specific policy outcome is that:

> "Areas of high ecological significance are protected and areas of general ecological significance on land and other ecological values are conserved."

[123] The RS2 site is mapped as being of high ecological significance. The expression "Area of High Ecological Significance" is defined as follows:

> "(a) an area shown as an area of high ecological significance on maps 1–8 at Annex 1 other than an area for which an ecological assessment undertaken by a qualified person demonstrates to the satisfaction of an assessment manager or concurrence agency that the attributed values are not present within the area. The location and extent of the mapped area is available in digital electronic form at <www.derm.qld.gov.au>; or

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37 SPA s 41.

> (b) an area identified in a planning instrument as an area of high ecological significance other than an area for which an ecological assessment undertaken by a qualified person demonstrates to the satisfaction of an assessment manager or concurrence agency that the attributed values are not present within the area."

The relevant map does not identify the "attributed values". That is not a particularly satisfactory aspect of the document. As discussed later however, the on-site investigations, undertaken for this case, demonstrate that the site has significant ecological value.

[124] The first policy in support of that outcome is that development be located outside of, and not have impact on, areas of high ecological significance unless the development is for one of a specified number of purposes. The proposed development does not fall within the specified exceptions.

[125] The policy also deals with coastal hazard areas in section 2. This is a storm-tide inundation area or an erosion prone area. The coastal hazard areas are identified by a methodology which takes account of the projected impacts of climate change to the year 2100. This is done by factoring in area-level use of 0.8m and a 10% increase in the maximum cyclone intensity[38]. The eastern part of the site is in an erosion prone area[39]. That part affected is 30.88 hectares[40]. PO1 of the development assessment code provides that:

> "Development within the coastal management district that is not specified development is to be located outside the part that is the erosion prone area".

The development proposed is not for a form of "specified development".

[126] Part D of SPP 3/11 provided for circumstances where it may be acceptable not to achieve the overall policy outcomes sought: namely, where there is an overriding need in the public interest, the proposed development is a development commitment or is for a public benefit asset. The proposal does not fit within the definition of a development commitment or a public benefit asset. To establish an overriding need in the public interest annexure 5 states that the applicant must establish, amongst

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38 See SPP 3/11 s 2.1.1.

39 Exhibit 120 – maps.

other things, that the development could not be located elsewhere to avoid conflict. Uses with relatively few locational requirements, interests in or options over a site or a sites availability or ownership are not matters which establish an overriding need in the public interest. Need is dealt with later in these reasons. I do not consider there is an overriding need for the proposal.

[127] It was initially submitted, on behalf of the appellant, that the coastal plan should be given no weight because:

(i) It would be unfair to do so given that it came into effect so late in the proceedings.

(ii) The plan commenced operation "under the shadow" of the then imminent state election which saw the election of a new government of a different political persuasion.

(iii) The policy of the new government is to review that instrument and the evidence suggested that some preliminary steps had been taken towards that.

(iv) The failure of the document to identify the "attributed values" which attracted the "Area of High Ecological Significance" description.

[128] On 8 October 2012 (subsequently to the initial hearing and submissions), the 2012 DCPSPRP came into effect. It was intended to remain in effect for 12 months. The 2012 DCPSPRP suspended the operation of SPP 3/11 pending a full review of the Queensland Coastal Plan. The document provided the following explanation of the circumstances of its creation:

> "State Planning Policy 3/11: Coastal Protection (the SPP) was introduced to establish the state's policies in relation to matters of state interest relating to coastal protection.
>
> The state has become aware that the application of the SPP policies is not sufficiently supportive of the Government's commitment to grow the four pillars of Queensland's economy.
>
> The state is undertaking a full review of the Queensland Coastal Plan including the SPP. In the interim, it has been determined that it is necessary to suspend the operation of the SPP.
>
> The situation for applications is as follows:

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[40] Exhibit 234, para 3.

> The SPRP will apply to the assessment of development applications and master plan applications that are properly made when this Coastal Protection Draft State Planning Regulatory Provision (the Draft SPRP) commences.
>
> The provisions set out in this draft SPRP are based on the state coastal management plan policies that were in place before the introduction of the SPP. This draft SPRP will apply while the full review of the Queensland Coastal Plan is undertaken."

[129] With the advent of the 2012 DCPSPRP, it became inappropriate to give weight to SPP 3/11, the operation of which was suspended. The question became what weight, if any, should be afforded to the provisions of the 2012 DCPSPRP.

[130] As the 'explanation' states, the 2012 DCPSPRP's provisions were based upon SPP 3/11, although there were some differences. Like SPP 3/11, the 2012 document dealt with areas of "high ecological significance" which expression was defined by reference to maps "published by" the Department.

[131] No new maps were prepared by the Department for the purposes of the 2012 DCPSPRP. The maps used for the purposes of SPP3/11 were treated by the co-respondent as of continuing application. The appellant took issue with that, given the suspension of SPP 3/11.

[132] The co-respondent relied upon section 23A(2) of the *Statutory Instruments Act 1992* to submit that suspension of the operation of SPP 3/11 did not prevent the maps, referred to in that policy, from being those referred to in the 2012 DCPSPRP. More specifically it did not prevent the Department, in its new name, from continuing to publish that mapping as mapping of areas of ecological significance, nor prevent the 2012 DCPSPRP from making provision, in relation to land, by reference to the published maps. That would appear to be correct, although, the debate has been rendered obsolete, because the 2012 DCPSPRP has since been superceded.

[133] The policy for areas of ecological significance, in the 2012 DCPSPRP remained that development and infrastructure has to be located outside of, and not have a

significant[41] impact on, such an area unless the development, or development infrastructure, is for one or other of a limited range of specified purposes. Those purposes however were broadened to include "development for tourism purposes".

[134] The development proposal in this case includes a tourism component, but is, by no means, just for that purpose. As was submitted on behalf of the co-respondent:

> "(a) the dominant precinct (size-wise) is housing sub-precinct H1, which is intended for detached housing;
>
> (b) in the precinct descriptions in the POD, only the mixed use precinct and the resort precinct make mention of tourists, and these are (size-wise) the smallest areas to be cleared for development;
>
> (c) as Mr Norling fairly acknowledged-
>
> (i) there is nothing in the POD or elsewhere which limits the extent to which the proposed dwelling units can be permanently occupied, such that there is potential for permanent occupation well in excess of the percentage which he had assumed;
>
> (ii) the proposal is basically an urban development, with a significant component that has nothing to do with tourism;
>
> (d) the proposed development is of a very large scale, where the dominant physical components are of a conventional residential and commercial nature."

To that may be added a reference to the area set aside for community facilities. Further, as is discussed later, the need for the more tourist-focused elements of the proposal is unlikely to mature for a very long time, if at all, such that, at least in the short to medium term, the development is likely to be composed of other elements, mainly detached housing, an indeterminate proportion of which might be used for holiday letting. I do not consider that the proposal wholly fits within the description of "development for tourism purposes".

[135] Insofar as nature conservation is concerned, the 2012 DCPSPRP provided that "biodiversity of the coast is to be safeguarded through conserving and appropriately managing the diverse range of habitats including … dune systems". The matters to be addressed to achieve conservation and management of Queensland's coastal

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[41] The word 'significant' did not appear in the corresponding provision of SPP 3/11, but that qualification has little bearing on the consideration of this case.

biodiversity included the maintenance and re-establishment of the connectivity of ecosystems and the retention of native vegetation wherever practicable.

[136] The 2012 DCPSPRP also dealt with erosion prone areas and relevantly provided that, to the extent practicable, erosion prone areas were to remain undeveloped (apart from some irrelevant exceptions). It is common ground that part of the site is within an erosion prone area.

[137] Recently, on 26 April 2013, the Coastal Protection State Planning Regulatory Provision – Protecting the coastal environment (CPSPRP) came into effect. It superseded the 2012 DCPSPRP and continued the suspension of SPP 3/11 and Part 2 of the WBBRP. With the advent of the CPSPRP, the 2012 DCPSPRP becomes of historical interest only. The question becomes what weight, if any, to afford to the new document.

[138] As might be expected, the CPSPRP is similar in content to the 2012 DCPSPRP. One relevant difference is that it overcomes any debate about the mapping of areas of high ecological significance. That term is now defined as:

> "**Area of high ecological significance** means an area shown as an area of high ecological significance on a map of areas of ecological significance published by the Department of Environment and Heritage Protection, available at:
>
> http://www.ehp.qld.gov.au/land/natural-resource/ecological-significance-mapping.php"

[139] The RS2 site continues to be mapped as within an area of high ecological significance. The development assessment provisions in relation to such areas continue to require development and development infrastructure to be located outside of, and not to have a significant impact on, an area of high ecological significance in any coastal management district, unless it is for one or more of a number of specified purposes. The range of specified purposes include those in the 2012 DCPSPRP and add two more, which are irrelevant for present purposes.

[140] The proposal is for substantial development and development infrastructure to be located within an area of high ecological significance. For the reasons previously

discussed, while the proposal is, in part, for tourism, it cannot wholly be justified by reference to the specified purposes.

[141] Part of the RS2 site is mapped as subject to "erosion due to storm impact and long-term trends of sediment loss and channel migration" on the erosion-prone area map. Consequently, that part falls within the definition of a "high risk area" under the CPSPRP. Consequently, s 3.2.1 applies. It provides as follows:

> "**3.2.1 Coastal hazards**
>
> (1) Development on land in the coastal zone and identified as a high risk area is carefully considered and wherever possible the land remains undeveloped.
>
> (2) Where land vulnerable to storm tide inundation is developed, or has a development commitment, further development of the land considers:
>
> (a) its vulnerability to sea level rise and storm tide inundation; and
>
> (b) proposed access to and protection of evacuation routes.
>
> (3) In such areas, local government may have in place counter-disaster plans to address these coastal hazards."

[142] As it was pointed out for the appellant, the erosion-prone area map carries a note which states, in part, that:

> "The areas on this map are indicative of the extent of erosion and permanent inundation defined by erosion-prone plans declared under the *Coastal Protection and Management Act* 1995. Only the declared erosion-prone area plans should be used for development assessment …"

[143] The extent of intrusion of the declared erosion-prone area into the RS2 site is illustrated in Exhibit 149. The issue is dealt with later in these reasons. The provisions of the CPSPRP in relation to development in erosion-prone areas are, for present purposes, insignificantly different to those of the 2012 DCPSPRP.

[144] The provisions in relation to nature conservation are also substantially the same as for the 2012 DCPSPRP.

[145] The co-respondent sought to make something of Part 2 of the CPSPRP, but that part deals with making planning instruments. Part 3 contains the provisions, referred to above, relating to development assessment.

[146] The co-respondent submitted that considerable weight should be given to the CPSPRP and the extent of conflict between it and the proposal. Particular emphasis was placed upon the proposal for relatively substantial development of a site mapped as within an area of high ecological significance. It was submitted that the proposal should be assessed against the most up-to-date assessment criteria, given its large scale, lengthy potential development period (discussed later) and environmental significance.

[147] It was further submitted, for the co-respondent, that a document such as the CPSPRP sits at the top of a hierarchy of planning of planning instruments. It was contended that it should prevail over the interpretation of the planning schemes contended for by the appellant.

[148] If there is an inconsistency between a State Planning Regulatory Provision (SPRP) and another planning instrument, the SPRP prevails to the extent of that inconsistency[42]. An SPRP must be taken into account in the assessment of impact assessable development applications under the SPA. Because the CPSPRP was not in effect when the subject application was made however, it is simply a document to which the court may afford weight[43].

[149] It has already been observed that the planning scheme provisions are not indifferent to matters of ecological significance. The environmental sensitivity of the site is recognised in s 1.10.3.3 of the 1997 Planning Scheme. The environmental significance of the site was one of the matters referred to in the site specific provisions of both the existing and draft new planning schemes and is reflected in related mapping.

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42 SPA s 19(1).
43 IPA s 4.1.52(2).

[150] In this context, and given the late stage at which the CPSPRP (and its predecessors) has been introduced relative to the assessment of this application in this appeal, I would not be inclined to dismiss the appeal on the basis of the provisions of the CPSPRP requiring development to be located outside areas mapped as of high ecological significance, if the proposal were otherwise judged to be acceptable. The CPSPRP is, however, yet another document which recognises the importance of appropriately dealing with areas recognised for their ecological significance which, by reference to the mapping, includes the RS2 site. This is a topic which the appellant must confront in any event if it is to demonstrate that its application should be approved having regard to the provisions of the planning schemes.

[151] The co-respondent also relied on the nature conservation provisions in relation to the impact of the proposal on the dune, of which the RS2 site forms a part. That is also dealt with later.

[152] The appellant submitted that another reason for affording the CPSPRP little, if any, weight is the prospect that it may be superseded by a new State Planning Policy, a draft of which was released for public consultation on 15 April 2013. That document is discussed later. It deals with matters of State interest including natural hazards (including coastal hazards, biodiversity and the coastal environment) but does not deal specifically that the concept of "area of high ecological significance".

[153] The draft State Planning Policy is incomplete. It envisages an interactive mapping system which is not available. Further, a number of "guidance materials", including an SPP guideline on coastal environment and an SPP guideline on biodiversity, are described as "under development". It is, as yet, only a draft for public consultation.

[154] The appellant points to a "fact sheet", printed from the website of the Department of State Development, Infrastructure and Planning, which states, in relation to the CPSPRP, that it:

> "… is intended to be in effect until the single State Planning Policy comes into effect later in 2013."

The CPSPRP is, however, a very recent document. The same fact sheet identifies it as "an up-to-date consistent and comprehensive coastal protection policy".

[155] In the circumstances, while there is a prospect that the CPSPRP will be subsumed, in the future, by a single comprehensive State Planning Policy, I would not, for this reason, be inclined to ignore the CPSPRP, as a comprehensive and up-to-date document dealing with coastal protection, if I was otherwise persuaded to give it some weight. As I have already indicated however, I have not approached the matter on the basis that the development application should be refused simply because it proposes substantial development within an area mapped as of high ecological significance in the maps referenced in the CPSPRP.

Temporary State Planning Policy 2/12 – Planning for Prosperity

[156] Temporary State Planning Policy 2/12 ('TSPP') took effect on 24 August 2012. The purpose of the policy is to ensure that economic growth:

- Is facilitated by local and State plans, and
- Is not adversely impacted by planning processes.

The specified State interests in growth include:

> "promoting tourism by:
>
> a. protecting Queensland's tourism attractions and significant natural assets, for the benefit and sustainability of the tourism industry;
> b. facilitating tourism projects that complement local conditions; and
> c. removing hurdles and locational limitations for appropriate tourism development.
>
> Development for tourism is distinct from other development owing to the diversity of its type, size, location and impact. Tourism supports local and regional economies in urban and non-urban areas – providing opportunities for growth and employment.
>
> Tourism provides resilience and diversity in local economies that may otherwise be dependent on a narrow economic base. Growth of the tourism industry will complement and balance rural pursuits and nature conservation activities."

[157] The policies about matters of State interest include:

> "*Remove regulatory barriers which impede development*
>
> 1. remove regulatory barriers which impede the development of the following in appropriately zoned or suitable locations:-
>
> …
>
> b. tourism projects;

…

d. residential, commercial and industrial activities;

…

Tourism

5. protect existing and appropriate tourism development;

6. identify opportunities for the expansion of existing tourism development;

7. identify localities or areas appropriate for tourism development, and protect these areas from incompatible development;

8. provide for the infrastructure and services necessary to support both existing tourism and identified tourism opportunities;"

The TSPP also contains policies in relation to agriculture, mining and extractive industries, construction and planning system reform.

[158] The TSPP recognises, in part 2, that the application of the various policies may involve resolution of competing or conflicting outcomes, which are best resolved when making or amending local planning instruments, making regional plans and deciding whether to designate land for community infrastructure. Consistently with that, clause 1.4 states that the policies will be applied in the making or amending of regional plans. The TSPP is a document identified by the Minister as having been appropriately reflected in Council's draft planning scheme, which also might be subsumed into a new single state planning policy in the future.

[159] Insofar as development assessment is concerned, the TSPP at clause 1.3 provides as follows (emphasis added):

"1.3 The following Policies apply to the range of circumstances set out in the Sustainable Planning Act 2009, including a referral agency's assessment of a development application, however <u>the policies do not apply</u> to:

1.3.1 an assessment manager's assessment of a development application, or

1.3.2 the assessment of a master plan application,

as the application of the policies may involve the resolution of competing or conflicting outcomes between the various policies. Any

> conflicts are to be resolved as set out in part 2 below and not in the assessment of a master plan or a development application (by an assessment manager and referral agency)."

While the stated policies do not apply to an assessment manager's assessment of a development application, the purpose of the policy is said to be of relevance to the decision making stage. Part 2 of the policy provides that:

> "At the decision making stage on a development application, the purpose of this policy will be achieved by a balancing of competing or conflicting outcomes that gives additional weight to:
>
> a. agricultural uses in areas zoned for agricultural uses;
> b. urban uses in areas zoned for urban uses;
> c. tourist development which can be shown to be complementary to an area's environmental, scenic and cultural values; and
> d. mineral and extractive resources development which can be shown to be complementary to an area's primary intended land use."

[160] The co-respondent's submissions took issue with the purpose being relevant to the decision-making stage rather than the assessment stage. It was submitted:

> "… the weight to be given to a relevant matter is an issue that arises at the assessment stage, not at the decision stage.
>
> This is appropriately reflected in *SPA*, which deals with the "assessment process" in division 2 of part 5 chapter 6, and with the "decision" in division 3. It is in the context of the assessment process that (amongst other things) *SPA* expressly recognises that the assessment manager may give the "weight" it is satisfied to a later planning instrument (s.317), including a later policy such as TSPP 2/12, and where a state planning policy is identified as one of the matters to which the assessment manager must have regard with an impact assessable development (s.314(2)(d); see also s.313(2)(d), s.316(4)(c)(iii)). Similar provision was made in *IPA* (division 2 part 5 chapter 3 dealt with the "Assessment process", and division 3 dealt with the "Decision").
>
> Pursuant to the transitional provisions for *IPA*, the present application is partly governed by provisions of the *P&E Act*, but the provisions again distinguished between "assessing applications" (*IPA s.61.29*) and "deciding applications" (*IPA s.6.1.30*), with state planning policies being a matter for assessment (s.6.1.29(3)(e)), along with a range of other conventional assessment considerations to which weight would be given (*P&E Act s.4.4(3)*, made applicable by *IPA s.6.1.29(3)(h)(i)*).
>
> This statutory structure is consistent with the common law principle that the weight to be given to a matter is for the assessment of the initial decision-maker and is not open to review by a Court in an administrative action – ie the decision cannot be challenged on this ground.
>
> Further, the notion that a decision maker is required to give "additional weight" to a particular matter, irrespective of the nature or extent of the range of "competing or conflicting outcomes" otherwise present is a very unwise notion to propound in any decision making circumstances, and not one that any Court would readily embrace, except in the face of language that was clear and logical, and which covered all

> legitimate outcomes. So, in a case where development conflicted with environmental values of the site, it is impossible to carry out a balancing exercise without knowing how significant the environmental values are, and what impact on them the development will have. And once it is known that these considerations are significant, it is difficult to see how a command "in a vacuum" that additional weight should be given to some other matter (such as that the development is for tourist development) could be particularly meaningful."

[161] It would have been better if the policy had referred to the assessment stage, rather than the decision stage, but the intent is relatively clear. In balancing relevant considerations, the decision-maker should, at the appropriate stage, give some additional weight to the matters referred to. The additional weight is a matter left to the decision-maker and its influence, in each case, will likely differ depending upon the range and gravity of other issues of relevance.

[162] The proposal includes urban uses, but is not in an area zoned for those. In terms of what (if any) additional weight should be placed on the tourist aspects of the subject proposal, it is relevant that:

(i) The provision speaks of giving additional weight only to tourist development "which can be shown to be complementary to the area's environmental … values". Whether the proposal sufficiently respects environmental values is discussed later;

(ii) The proposal includes a tourism component, but goes beyond simply being a tourist development; and

(iii) The need for the more tourist-focused elements of the proposal would not mature for many years, if at all.

The policy does not alter the ultimate conclusion at which I have arrived in this case.

Draft SPP

[163] On 15 April the Minister made a draft State Planning Policy (draft SPP) available for public consultation until 12 June 2013. If made, the SPP would prevail over any local planning instrument, to the extent of any inconsistency[44].

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[44] *SPA* s 43.

[164] Part A of the draft SPP identifies one of its objectives as to:

> "express the state's interests in planning and development in a single place in a complete and concise format"

[165] The intention appears to be to collect, in the one document, diverse considerations including considerations in diverse existing state planning policies.

[166] Insofar as development assessment is concerned, the SPP is to apply to a development application of the type mentioned in Part C, but only to the extent the SPP has not been identified as appropriately reflected the planning scheme or a regional plan.

[167] Part C deals with five State interests, being:

- Housing and liveable communities
- Economic growth
- Environment and heritage
- Hazards and safety
- Transport and infrastructure

[168] The provisions of Part C of potential interest are:

1. Environment and heritage:
    - Biodiversity
    - Coastal environment
    - Healthy waters
2. Hazards and safety:
    - Natural hazards

[169] The hazard mapping is still being developed, although the SPP mandatory requirement documents for bushfire hazard and coastal hazard are available to the public. As was acknowledged in submissions for the co-respondent and agreed in the reply submissions of the appellant, the various aspects of the draft SPP in relation to natural hazards are expressed in rather general terms and, save for confirming the importance of appropriately addressing such issues, are of little particular assistance beyond the specific evidence given in 2012. I note, however, that the draft mandatory requirements with respect to coastal hazard are directed, in

part, to adapting to climate change, including projected sea level rise. The figures of 0.8m by 2100 and a 10% increase in the maximum potential cyclone intensity are referenced.

[170] The co-respondent did not suggest that the provisions in relation to "healthy waters", which are also relatively general, add much in the present context.

[171] The co-respondent placed reliance on the provisions relating to "coastal environment" in relation to the likely impact of the proposal on the coastal dune of which the RS2 site forms a part. That issue is dealt with later.

[172] The biodiversity provisions include the following:

> "These provisions apply to development applications as follows:
>
> …
>
> (2) where the development application relates to land affected by a matter of state environmental significance, and involves:
>
> (a) operational work, or
>
> (b) a material change of use, other than for a dwelling house, or
>
> (c) reconfiguring a lot that results in more than six lots or where any of the resulting lots are less than five hectares.
>
> The development application is to be assessed against the following requirements:
>
> (1) any potential adverse environmental impacts are identified and considered, and
>
> (2) the development avoids adverse environmental impacts, or where this is not reasonably possible, impacts are minimised and residual impacts are offset."

[173] The expression "matters of state environmental significance" (MSES) is defined to mean:

> "… the following natural values and areas protected under state environmental legislation:
>
> …
>
> - threatened species (including plants, animals and animal breeding places) under the *Nature Conservation Act* 1992
> - regulated vegetation under the *Vegetation Management Act 2009* including:

> - regional ecosystems identified as 'endangered', 'of concern', 'connectivity areas', 'critically limited', 'threshold', 'wetland'"

[174] Those provisions are triggered in relation to RS2 because:

(a) The site is used by the black breasted button quail which is classified as "vulnerable" under the NCA and therefore is threatened wildlife[45];

(b) The site featured vegetation which is regulated under the VMA, including RE 12.2.5, which is of a "threshold" kind.

[175] The appellant concedes that RS2 falls within (a). Insofar as (b) is concerned, it disputes that RE 12.2.5 is of a "threshold" kind. It was pointed out that the expression is not defined in the draft SPP or the VMA. The co-respondent pointed to the Regional Vegetation Management Code for South-East Queensland Bioregion, which is approved under the Vegetation Management Regulation. It lists RE 12.2.5 is listed as an RE type at risk of falling below 30% of its pre-clearing extent, or having a remnant extent of less than 10,000 hectares. It does not, in terms, refer to it as a "threshold" RE. The proportion and area referred to in that Code do, however, represent the threshold between "least concern" and "of concern" REs.

[176] While it would be better if the final version of the document were to make the position clearer, the category of those vegetation types at risk of falling below the threshold between "of concern" and "least concern" comfortably fits with the description of "threshold" as used in the draft SPP. The appellant did not point to any other type of vegetation, regulated under the VMA, to which the description "threshold" could be referring.

[177] The definition of MSES requires that the vegetation is "regulated vegetation" under the VMA. What follows is an inclusive list of such vegetation types. The expression "regulated vegetation" is also undefined but, as the appellant's submissions acknowledged:

> "To the extent that s 3 (purpose of the Act) of the VMA, says purpose of the VMA is to 'regulate the clearing of vegetation', it might be assumed that identification of RE 12.2.5 as 'least concern regional ecosystem' is

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45 See definition of "threatened wildlife" in the Schedule to the NCA.

> sufficient to bring it with the general description of 'regulated vegetation' under the VMA."

[178] Returning to the development requirements against which the application is to be assessed, from a biodiversity perspective:

(1) The potential adverse environmental impacts have been identified and considered in this case.

(2) The proposal would not avoid adverse environmental impacts. There was debate about whether the impacts would be minimised, but residual impacts are not proposed to be offset.

[179] It was submitted that not only is the proposal inconsistent with the "avoid if reasonable possible or minimise and offset" approach of the draft SPP but that the proposal would not meet the description of "overriding need in the public interest" which is referred to in Part A as potentially being a sufficient ground to depart from a particular provision expressed in Part C. The description of "overriding need in the public interest" is described as follows:

> "For the purposes of the SPP, there could be an overriding need in the public interest if:
>
> (1) the overall social, economic or environmental benefits of the development or decision outweigh:
>
> (a) any overall detrimental effect upon the social, economic or environmental values of the land and adjacent areas, and
>
> (b) the development or decision advances the purpose of SPA and the principles outlined in Table 1 of the SPP, and
>
> (2) the development cannot reasonably be located elsewhere so as to avoid conflict.
>
> The following do not establish an overriding need in the public interest:
> (1) development with relatively few location-based requirements, or
>
> (2) interests in or options over land, or
>
> (3) availability or ownership of land, or
>
> (4) the personal circumstances of an applicant, owner or interested third party."

[180] That description refers, in several places, to the "development" which suggests that it is intended to be applied to particular development applications. As was pointed

out on behalf of the appellant however, the context is somewhat confusing because the concept is referred to as being "in addition to" three other objectives which are to be used as a guide to manage competing interests and priorities including any conflict arising between interests. They are said to be objectives which will be considered in the Minister's determination of whether the State interests have been appropriately reflected in a local planning instrument.

[181] While the proposal may not be consistent with the "avoid if reasonably possible or minimise and offset" approach under the draft SPP, and may not satisfy the description of overriding need in the public interest (assuming, without deciding, it to be relevant to development applications), but I would not give that substantial weight. While the draft SPP supports the conclusion that the matters dealt with are of State interest, the document is an incomplete draft (the interactive mapping system is unavailable and some of the guidance material is described as "under development"), has only just been released for public consultation and appears very late in the process of the development application being considered on appeal to this court.

Summary of planning documents

[182] A survey of the relevant planning documents reveals that whilst the 1997, 2005 and draft planning schemes acknowledge that the RS2 site is subject to a development lease and may have development potential:

(i) The site is also recognised as subject to issues including issues about its environmental sensitivity;

(ii) The site is not included in any zone or designation which has committed the site to development. While Mr Humphreys referred to the site as "committed for urban purposes, albeit conditionally"[46], as Mr Summers pointed out, the extent of any commitment or any future urban development has not been resolved in the planning schemes[47];

(iii) Any development potential has not been quantified or timetabled;

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46 Ex 5 tab 15 p.40 para 102.

47 Ex 5 tab 15 p.42 para 104.

(iv) The realisation of any development potential is subject to the resolution of a range of issues; and

(v) In the circumstances, the contention that the site is 'planned' or 'committed' for urban development is too strong, unless it is read in light of the above.

[183] Other documents have also recognised that the site falls within an area of ecological significance, without specifically acknowledging RS2's development potential. In the circumstances however, that would not cause me to refuse the development application if the relevant provisions of the planning scheme were appropriately addressed.

[184] While there was much debate about the planning instruments which have come into effect since the appeal was instituted and, indeed, since the hearing commenced, my ultimate conclusion (leaving to one side the erosion/storm surge/climate change issues) is not dependant on the weight (if any) given to the WBBRP, SPP 3/11, 2012 DCPSPRP, CPSPRP, TSPP 2/12 or the draft SPP.

Need and benefit

[185] Need relevantly concerns whether there is an objectively established public or community need for the proposal, the subject of the application, and a planning need to grant the approval sought at this stage to facilitate its future provision. Economic demand does not necessarily equate to need, but may assist in establishing a public or community need.

[186] The demonstration of a foreseeable public or community need for facilities to be provided at some future time is not necessarily sufficient. For example, there might be no planning need to grant the requested approval at the relevant time, either because the planning scheme otherwise facilitates the timely satisfaction of the existing or anticipated need or because the public or community need for the proposed facilities is too remote in time to conclude that there is a planning need to grant what would be a premature approval.

[187] Need, in the relevant sense, does not relate to the particular requirements of the applicant for approval. The evidence of Mr Andreas Krauchi, a director of the appellant, is that the appellant has a commercial requirement for an approval over the RS2 site in order for it to decide how it proceeds to develop the remainder of the RS1 site. That is understandable, but does not constitute need in the relevant sense. Similarly, the appellant would no doubt wish to have an approval over RS2 before deciding whether to seek an extension or renewal of its development lease, but that too does not establish need in the relevant sense.

[188] The relevance of need as a consideration is not in dispute. It has long been accepted as of relevance. It is expressly made relevant by s 4.4(3)(b) of the PEA. Section 15.10.6 of the 1997 Transitional Planning Scheme expressly made need a relevant consideration in rezoning applications. It is also referred to in the provisions of the 1997 Transitional Planning Scheme, the 2005 IPA planning scheme and the draft planning scheme, set out above, in relation to potential development of the subject site. It is also referred to in the overall outcomes for the Environmental Conservation Zone code in the draft planning scheme. While some of the documents, dealt with earlier, speak of expressions like "overriding need in the public interest", I have not approached this issue on the basis that the appellant must establish such a need. I have dealt with need in its more traditional sense.

[189] Generally speaking, the weight to be given to the issue, in assessing the merits of an application, is not fixed. It is a relative concept which is given greater or lesser weight depending upon the circumstances[48]. The absence of need is not necessarily fatal[49], but it may, where the circumstances of the case warrant, be afforded decisive weight.

[190] It was submitted, on behalf of the co-respondent, that, in this case, a failure to demonstrate need creates a conflict with the planning scheme, by virtue of the references to need in the provisions of the existing and superseded planning schemes relating to the circumstances in which RS2 may be developed. It is unnecessary for me to reach a concluded view about that because, for the reasons

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48 *Intrafield Pty Ltd v Redland Shire Council* (2001) 116 LGERA 350 at 354.

that follow, I would, in any event, give a failure to demonstrate sufficient need determinative weight in the circumstances of this case.

[191] The appellant contends that there is a public or community need for the proposal the subject of the application. It has already been observed that the proposal contains a number of elements including:

(a) a housing precinct;

(b) a resort precinct;

(c) a mixed use precinct; and

(d) a community precinct.

[192] The community precinct contains two sub-precincts. Sub-precinct 1 provides for community facilities. There was no attempt to establish a public or community need to grant an approval to facilitate the future development of any particular community facilities at any particular time on the land. Indeed, Mr Humphreys attempted to count that sub-precinct as land which would be retained in its vegetated state[50]. The 'need' to set aside land for these purposes is a requirement of the applicant to fulfil lease conditions. That may be a legal/commercial imperative for the applicant, but is not the demonstration of a public or community need in the relevant sense.

[193] The need for the retail and commercial components of the application are related to the need for the tourist and residential development which would be served by those facilities.

[194] The master plan forming part of the application[51], provides for 715 standard residential lots, 318 duplexes, 124 townhouses, 1,013 apartments, 362 holiday bungalows and 700 resort rooms. Such development would provide accommodation for both tourists and permanent residents. The exact proportion is unknown, but the economists assumed that it could be 75 per cent for tourists.

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49 *Palmwoods Residents & Ratepayers Association Inc v Maroochy Shire Council & Anor* (1997) QPELR 331 at 335.

50 Exhibit 5 tab 16; exhibit 104; T14-12, line 25.

51 And which indicates one possible way of implementing the Plan of Development.

Need for tourist facilities

[195] The appellant's case, in relation to need for tourist facilities, placed substantial weight on a number of reports and plans which, amongst other things, recognises that:

(a) Australia's natural assets, including, relevantly, world heritage areas, are an important but presently not adequately exploited tourism resource;

(b) Fraser Island is an internationally recognised/renowned world heritage natural asset;

(c) the tourism potential of the Sunshine Coast region and the Fraser Coast region is well-short of being realised;

(d) in those areas, with particular reference to Inskip Peninsula/Rainbow Beach, there is a need for a broader range and variety of tourist facilities to cater for segments of the tourism market not presently adequately met; and

(e) the provision of a broader range of tourist facilities is needed to address the peaks and troughs that currently characterise the seasonal nature of the tourist industry at Rainbow Beach, and to achieve year-round continuity of tourist activity.

[196] The following documents were referred to in support of those propositions:

(a) The UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage 1972;

(b) Cooloola Tourism Investment Opportunities Study 1989;

(c) The Great Sandy Region Management Plan 1994-2010;

(d) Queensland Tourism Strategy – A 10-Year Vision for Sustainable Tourism (November 2006);

(e) Destination Management Plan for Tourism in the Fraser Coast 2007-2010;

(f) Sunshine Coast Destination Management Plan (August 2004);

(g) Sunshine Coast Regional Tourism Investment and Infrastructure Plan 2008-2018;

(h) The Jackson Report – On behalf of the Steering Committee: Informing the National Long-Term Tourism Strategy; and

(i) Sunshine Coast Tourism Opportunity Plan 2009-2017.

[197] It was submitted, consistently with Mr Norling's evidence, that the tourism component of RS2 would meet a public or community need in that it would:

(a) provide a range of accommodation facilities;

(b) provide additional capacity, choice and a variety of tourist accommodation;

(c) provide a wider range of accommodation opportunities for tourists to base themselves at a location readily accessible to the natural assets of Fraser Island and the Cooloola Coast;

(d) provide a significant contribution to the tourism sector;

(e) broaden the tourism base of the Cooloola Coast;

(f) reinforce Rainbow Beach and Inskip Point as a major coastal tourist destination;

(g) remove development pressure from Fraser Island by providing tourism development on the mainland;

(h) contribute towards discharging Australia's obligations under the UNESCO Convention by expanding tourism infrastructure on the Cooloola Coast to enhance the presentation of the world heritage area to as many visitors as possible;

(i) provide an ecotourism or nature-based, resort development;

(j) contribute toward the achievement of a sustainable and prosperous tourism industry on the Cooloola Coast by enhancing viability, innovation, efficiency and market awareness;

(k) broaden the base of the tourism industry at Cooloola Cove beyond its traditional retiree and family-based domestic tourism;

(l) contribute to the reinforcement of Rainbow Beach and Inskip Point as the southern gateway to Fraser Island; and

(m) satisfy the criteria for one of the 10 catalyst projects (Rainbow Beach Eco Resort) identified in the Sunshine Coast Regional Tourism Investment and Infrastructure Plan 2008-2018 and the Sunshine

> Coast Tourism Opportunity Plan 2009-2017 (i.e. an ecotourism resort) referred to above.

[198] There was debate about a number of those things, including whether there is any development pressure on Fraser Island which needs removal and whether any component of the proposal could truly be said to be an ecotourism resort. Leaving such debates to one side however, similar claims could be made in support of further tourist development, albeit at a lesser scale, elsewhere within Rainbow Beach, particularly within the undeveloped parts of RS1. The asserted need for further tourist facilities in the area is not site-specific to the RS2 land or development specific, to the particular proposal presented by the appellant.

[199] Further, to assert that there is a need for further tourist facilities in the Rainbow Beach area begs questions as to the scale of facilities required, when any such facilities will be required and whether there is already adequate appropriately zoned land to meet projected needs over a reasonable timeframe.

[200] The proposal envisages a scale of development which is very large in the context of Rainbow Beach. It falls for consideration at a time when the tourism industry is in troubled times and it cannot be said, with confidence, how long that will persist. The economists agreed that, similar to the experience elsewhere in Queensland, there has been little to no tourism growth in the Fraser Coast and the Sunshine Coast over the past decade although, as Mr Norling pointed out in his report, the supply in Rainbow Beach has increased by 129 units due to development in RS1 as well as 35 units at the Plantation Resort and 13 at the Rainbow Sea Resort. There is underutilisation of the existing stock of accommodation and room occupancy rates have been in decline.

[201] Tourism Queensland is projecting moderate future growth rates for international visitation (3.6 per cent per annum) and only a slight increase in domestic tourism (0.6 per cent per annum) but, as the experts agree[52]:

> "The tourism industry is subject to fluctuating fashions and holidaying preferences, as well as economic and other external factors, thus rendering forecasting difficult. The impacts of recent global and domestic events

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52 Exhibit 5 tab 1 p.18 para 68.

> have increased the uncertainty and difficulty in projecting the direction of the tourism industry. Specifically, recent events include the outbreak of SARS, the global financial crisis, the 2009 swine flu pandemic and the changing value of the Australian dollar."

[202] It may be noted, as Mr Krauchi himself attested, that the apartments and townhouses within RS1 sold more slowly than the residential lots. The evidence otherwise suggests that rental returns on the apartments in RS1 have been in decline and that a number of units have been put on the market for resale and that prices have dropped. For example, the owner of one attested that he and his wife have subsequently delisted their unit, but only because of a lack of inquiry in response to the listing[53].

[203] This is not unique to Rainbow Beach. As Mr Norling attested, tourist destinations up and down the coast of Queensland currently have many more properties for sale than would typically be expected (and at lower prices), due to the prevailing economic circumstances[54]. Mr Norling testified that[55]:

> "Any tourism application case at this point in time in Queensland is supported by weak data because Queensland in total, total visitation in Queensland, has remained stagnant over the last decade. That is a fact, and, in my view, is a sad indictment on Queensland's inability to release a new quality tourism product on to the market, but also a reflection of the series of economic shocks to the tourism industry in this decade, and a sad reflection of the impact, or the combined impact – and they are related – of the rising Australian dollar in the latter part of this decade, and the global financial crisis that exists at the present time."

[204] The most recent product offered within RS1, the "Blue Water" lodges, has been something of a sales disaster to date. On or about 1 November 2010 SP230913 was registered for 37 lodges. Mr Krauchi said that the development density was lower than would have been permitted but that was done "to meet prevailing market conditions". Subsequently only 10 lodges have been completed. Only two of those have been sold to "other parties" (one to a "spec" builder and one to a business associate of Mr Krauchis). The other eight are owned by the Krauchi family. Further, as discussed later, there is also significant, as yet untapped, development potential within RS1.

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53 Statements of Ball, exhibit 35.
54 T9-61.
55 T9-88, lines 25-36.

[205] In the circumstances, Professor Hundloe understandably concluded that development on the very large scale envisaged at RS2 in the subject application would simply lead to an oversupply. Over the course of the expert meetings, he had called upon Mr Norling to produce a "business plan" to assess how the proposal would be achieved in a way which was responsive to demand. Mr Norling responded by pointing out that all that was sought was a preliminary approval, that the timing of development of specific elements was unknown and that staging had not been identified.

[206] Whilst I am conscious that the application only seeks a preliminary approval, it is nevertheless appropriate to consider whether a need has been established, within a reasonable planning horizon, for the general scale of development envisaged by the preliminary approval and which would be facilitated by it, over time, subject to development permits for particular components or stages. While I take Mr Norling's point that a full business plan may be unnecessary in order to address the issue of public or community need, the question of what scale of development could reasonably be said to be needed within a reasonable planning horizon should be confronted.

[207] In the joint economic report Mr Norling expressed the opinion that the development of RS2 was likely to be achieved over a period of 10 to 20 years. That might, depending on the circumstances, be within the outer limits of a reasonable planning horizon for a development that is intended to be achieved in stages, over time, under the auspices of a preliminary approval and pursuant to subsequent development permits. No detailed justification was given for that prediction and it was abandoned by him under cross-examination.

[208] Having been cross-examined on this issue, Mr Norling gave some further thought to the matter over a weekend break in the hearing. Having acknowledged that he had become a little more pessimistic, he settled on a predicted development period for tourist facilities of 40-45 years. That is a major change from the previous 10-20 year prediction.

[209] In support of that assessment he produced some handwritten notes which he had made over the intervening weekend (exhibit 81). An examination of those notes reveals the following reasoning process:

(i) he assumed potential for another 700 units to be developed in RS1;

(ii) there is potential for 3,232 dwellings/units/resort rooms in RS2, if approved;

(iii) the combined potential development, across RS1 and RS2 was assumed to be 3,932 dwellings/units/resort rooms;

(iv) it was assumed that 850 of those would be used for permanent residents, leaving 3,082 for tourists;

(v) it was assumed that the 3,082 for tourists would be made up of 700 resort rooms and 2,382 investment/holiday units referred to, in exhibit 81, as "units";

(vi) it was assumed that the 700 resort rooms would be developed in stages at a rate of one per decade over four decades, with only 200 being developed within a quarter of a century;

(vii) sales of units for tourists would commence at 20 per year and increase steadily to 80 per year, resulting in the units being absorbed by the market over a 45 year period.

[210] This forecast was done somewhat "on the run" and was not the subject of consideration during the joint meeting and report process. Professor Hundloe described it as "the first jottings of what might have been the start of the process"[56] which did not tell him a great deal. Its production did not satisfy him that there is a sufficient need.

[211] While I accept that Mr Norling's belated work was done earnestly, I am not prepared to rely upon the unit product being "absorbed" by the market over even a 45 year development cycle or the resort elements being "absorbed" over even a 40 year period. As has already been noted, the tourism market is hardly buoyant at the moment and its future direction is subject to variables which render forecasting uncertain and difficult, particularly over such a long period as four decades or more.

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56 T11-39, lines 25-26.

[212] Mr Norling acknowledged that 20 years was commonly the maximum period for forward projections[57]. Mr Norling also readily acknowledged that the market for units and resort rooms is not mature and would not mature until development otherwise in RS1 and RS2 reached a "critical mass". Initial development in RS2, if it were to proceed, would likely be focussed on residential allotments.

[213] There is an insufficient basis to support Mr Norling's assumption of unit sales commencing at 20 dwelling units per annum and quadrupling to 80 dwelling units per annum over time, noting that this involves assumptions as to market conditions four decades into the future Similarly, there is an insufficient basis to support the prediction of resort elements being successfully completed each decade over the next 40 years, noting that the forecast looks forward nearly three decades and more for 500 of the 700 resort rooms predicted by Mr Norling[58].

[214] Even if accepted, the 40-45 year timeframe for the more tourist-oriented components of the development is well beyond a reasonable planning horizon for the demonstration of need in this case. While I accept that a preliminary approval, to provide the framework for the realisation, in stages, of a large project needs to look beyond the usual life of a development permit, the timeframe here is undue in its context. To put it in some perspective, it may be compared to the 10 year horizon within which the *SPA* requires local governments to review their planning schemes, or the 20 year life of the Regional Plan.

[215] Such a forecast suggests that there is an absence of sufficient market demand for the intended product or sufficient public or community need for a development approval to be granted, at this stage, which envisages development of RS2 for anything approaching the scale of the proposal. Further, given my absence of confidence in even the projected timeframes, the scale of tourist facilities contemplated for RS2 by the plan of development appears, on the evidence, to be more of an entrepreneurial "vision" for a possible future than a response to an identified and established need. I do not mean to imply any disrespect for entrepreneurial skill. There are examples of successful developments for which

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57 T9-85, line 41.

there was little support in historical market data. The issue of need however, must be resolved by the court on the basis of the evidence. On the evidence I am satisfied that the intended scale of development for tourists would be unlikely to be needed for a very long time, if at all.

[216] There is sufficient land, already appropriately zoned, within the undeveloped parts of RS1 to facilitate further development for tourists to meet any need which is likely to exist within a reasonable planning horizon. The economists, in their joint report, calculated that some 1,177 additional dwelling units are able to be developed in RS1. For the purposes of exhibit 81, Mr Norling assumed only 700, but that was because of the applicant's stated intention to develop the remainder of RS1 at a lower density[59]. RS1 is available for development to its potential. It is capable of absorbing the future demand for tourist accommodation[60] for many years, even on Mr Norling's forecasts in exhibit 81[61].

[217] I am not satisfied that the appellant has established sufficient need to support an approval, at the present, to provide for the future provision of tourist facilities at the RS2 site as proposed.

Need to accommodate residents

[218] The proposal envisages a very substantial increase in the permanent resident population at Rainbow Beach. The population of the Cooloola Coast in 2010 was 5,490 persons represented by:

- Cooloola Cove, 2,400 persons;
- Tin Can Bay, 2,000 persons; and
- Rainbow Beach, 1,090 persons.

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58 Exhibit 81 shows 50 resort rooms in 2021, another 150 in 2031, with the remainder arriving in 2041 and 2051.

59 T9-75.

60 It should also be noted that part of the RS1 site is included in the Commercial Zone under the 2005 Planning Scheme.

61 Exhibit 81 predicts that it would take 24 years for an additional 980 units and 200 resort rooms to be absorbed.

[219] Residential development in Rainbow Beach as a whole has grown at a rate of about 14 to 16 dwellings per annum since sand mining ceased in 1976[62]. Mr Norling, in exhibit 81, forecasts that there will be 850 additional dwelling units to accommodate 1,950 additional residents. He assumed that they would be provided by the 715 resident lots provided for in the POD for RS2 together with 135 units[63]. Mr Norling appears to have arrived at that figure by taking the forecast, in paragraph 33 of the joint report, of 2,100 residents to be accommodated across RS1 and RS2 and then deducting 150, being an estimate (at 2.3 persons per dwelling) of the number of people residing in the 66 dwellings in RS1 which, it was estimated, are currently used by permanent residents[64]. Accordingly, Mr Norling projects future growth for Rainbow Shores which approximately triples the existing resident population of Rainbow Beach and which would represent many multiples of the number of persons who have chosen to take up residence in RS1 to date.

[220] The Cooloola Coast as a whole grew at a rate of 67 dwellings per annum in the period from 2000 to 2006. This suggests that, historically, Rainbow Beach has been attracting a little less than 25 per cent of the growth in dwellings in the Cooloola Coast. Mr Norling considered that, from commencement, of the development, RS2 could be expected to attract approximately 30 per cent of growth within the Cooloola Coast or 21 additional dwellings per annum. That is a higher proportion of the Cooloola Coast market than has historically been captured by the whole of Rainbow Beach. In this respect it may be noted that the vacant land stock at Rainbow Beach, excluding RS1 (which is discussed later), is capable of accommodating an additional 50 resident households. The 21 lots per annum which Mr Norling predicts from the outset appears to be in addition to the sale of any existing vacant land stock within Rainbow Beach otherwise.

[221] It was pointed out, on behalf of the co-respondent, that the RS1 site has been subject to development for some 20 years, is yet to be completed, and that while 161 residential allotments have been developed, only 127 have been built upon, with a large proportion available for rental to visitors. Many houses are not occupied by permanent residents.

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62 See exhibit 81.

63 T10-5, line 40-45, corrected at T10-6, 35-40.

64 Exhibit 5 tab 1 p.6 para 19.

[222] The appellant pointed to the evidence of Mr Krauchi that there were constraints and difficulties which occurred during the development period which adversely impacted upon the rate of delivery of developed stock in RS1. It was submitted that the 161 residential lots were in fact developed over a 10 year period between February 1992 and September 2002 while the Baden apartments were developed over a 10 year period from September 1996 to November 2006. Even so, the resulting average of 16 allotments per year for the residential lots, if replicated in RS2 (and if, contrary to the experience in RS1, they were taken up by residents), would mean that the 715 residential lots considered by Mr Norling would be absorbed by the market over about 45 years.

[223] If one looks at the 66 dwellings expected to be occupied by residents in RS1 and assumes only a 10 year period for their take up, then the resultant average rate per year suggests (even allowing for some further properties purchased for later residence but currently vacant) that Mr Norling's projection of 21 dwellings per year from the outset for residents of RS2 is optimistic[65].

[224] It was pointed out that product was not continuously offered to the market for the whole of the 10 year period. Mr Simmons, a former real estate agent, gave evidence of the prompt uptake of allotments in a previous release[66], but that does not establish that there would have been a sustained prompt uptake had there been continuous releases over a shorter period.

[225] The overall history of RS1 does not give confidence about Mr Norling's prediction for RS2. As Gibson QC frankly conceded "the rate of sales and development has been very slow"[67].

[226] Even accepting Mr Norling's predictions that the Cooloola Coast's share of the Gympie regional market continues and that the RS2 site itself would be able to attract 30 per cent of the Cooloola Coast market from the outset, it would take

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65 The 66 dwellings occupied by residents is an estimate of the economists. I note that Vyvian Dobkins (exhibit 35), a resident, puts the number of houses occupied by permanent residents at only 34. The difference is not critical to the conclusion. In either case, the historical take up rate in RS1 by permanent residents makes Mr Norling's projections appear optimistic.

66 Exhibit 39, para 10.

67 T37-72, lines 51-52.

something in the order of four decades for 850 dwellings to be taken up at a constant rate of 21 per annum. That is beyond a reasonable planning horizon in this context.

[227] Mr Norling's evidence was that it would "only" take approximately 21 years for 850 sales to intending residents and 24 years before full occupation (assuming that 15% of the allotments were vacant once the 850 sales were made). He acknowledged that his forecast relies on a take up rate which exceeds historical take up rates, but emphasised his view that[68]:

(i) "there has been a constrained supply of similar development within Rainbow Beach, since no further residential allotments had been released at RS1 for some time;

(ii) there would be supply-led demand, given the quality of the intended product and its market differentiation from what is otherwise on offer within Rainbow Beach and within the wider Cooloola Coast, and

(iii) other areas of the Cooloola Coast will experience constraints for the supply of land in the future;

(iv) the current economic difficulties will pass;

(v) there will be an ability to attract greater interest from members of the public as "the product matures and its critical mass increases."

[228] In reaching that forecast, he assumed continuing growth in Cooloola and that the proportion of the Cooloola Coast resident market captured by the RS2 site itself would increase, over time, from an initial 30 per cent to a dominant 80 per cent. He also assumed no further development for permanent residents within RS1.

[229] Historical data is not always a reliable guide to future take-up rates[69] and the potential of new, different and high quality product to induce some supply-led demand (over and above historical take up rates for inferior product) to satisfy a latent unsatisfied need and the potential for an increase in sales rates as a development achieves a critical mass may be accepted in general terms, but:

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68 Norling T10-66, 68, 73, 88, T11-14,18.

69 See eg *Palmwoods Residents and Ratepayers Association Inc v Maroochy Shire Council & Anor* [1997] QPELR 331 at 334-5.

(a) The residential product to be offered in RS2, while different to much of what exists in the Rainbow Beach township and the wider Cooloola area, is similar to what was historically on offer in RS1, albeit that RS1 has not yet realised much of its potential for other types of product.

(b) There is some tension between Mr Norling's reliance upon the difference in the product offered in RS2 and his assumption that, as supply becomes more constrained in other parts of the Cooloola Coast, a substantial part of the market for those estates will be captured by RS2.

[230] Mr Norling's assumptions that the growth in resident population within the Cooloola Coast more generally will continue is not unreasonable, despite Professor Hundloe's reservations, but, as Mr Norling acknowledged, there is some risk in projecting percentage growth rates forward when the base, to which the percentage growth rate applies, is as low as it is for the Cooloola Coast[70].

[231] It was pointed out that the recently published Regional Plan states that there is a sufficient stock of land within the region to accommodate growth during the life of the plan. As Mr Norling pointed out however, the part of the permanent resident market which would likely be attracted to RS2, is unlikely to be attracted to non-coastal residential estates.

[232] I accept that the opportunity for future development within Rainbow Beach to accommodate permanent residents is constrained, although it is not quite as constrained as Mr Norling assumed. It has already been noted that there are some allotments available in the Rainbow Beach township, although, as Mr Norling pointed out, the situation and amenity of the RS2 product would be different.

[233] It was pointed out by Professor Hundloe that there is some land on the periphery of the developed parts of the Rainbow Beach township that could potentially be considered for future urban expansion. Neither the superseded nor the current planning scheme however, designates or zones those lands for those purposes. I

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70 T9-81.

have not placed weight upon the theoretical possibility of those lands being developed at some future time in determining, at this stage, whether there is a public or community need for additional land to be made available to accommodate permanent residents within a reasonable planning horizon. The same point made by Mr Norling about the differences between the situation and amenity offered at RS2 also applies in relation to that land.

[234] While further subdivision for residential allotments is not currently planned within RS1:

(a) Permanent resident accommodation is not necessarily confined to single detached dwelling houses. There is capacity for future attached housing development within RS1 to be used, at least in part, for residential (as opposed to tourist) accommodation. Mr Norling conceded that, theoretically, the non-tourist capacity of RS1 was sufficient to accommodate something of the order of 1500 further residents[71]. I take his point that it is likely that there would be a higher proportion of tourists occupying that style of development, however it does have the capacity to take up at least some of the future permanent resident demand.

(b) The existing planning scheme also admits of the prospect of some further development for dwelling houses within the undeveloped parts of RS1. There are four Housing Zone sub-precincts for RS1 (A1, B, C and D). Save for sub-precinct C, the balance, in so far as it remains undeveloped, is capable of being developed for a mix of housing which potentially could include some detached housing[72].

[235] Notwithstanding those observations, I accept that there would be a market demand, within a reasonable planning horizon, for some development, of the kind envisaged within RS2, to accommodate permanent residents. I do not accept however, that the appellant has demonstrated need, within a reasonable planning horizon, for the extent of development proposed. The projections resulting from Mr Norling's belated work predicts a take-up period extending beyond two decades. In my view,

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71 T9-80, lines 25-30.
72 Ex 243 p.10.

those projections are on the optimistic side and the take-up of development within RS2 for permanent residents would likely take a longer period, although not as long as the take-up rate for tourist development.

Economic, community and social benefit

[236] In Mr Norling's opinion the subject development would bring significant economic, community and social benefits. In order to calculate the economic benefit, Mr Norling used value-added multipliers. This is a widely used measure of economic activity, but, as Professor Hundloe pointed out, can overestimate benefits and must be used with caution. Mr Norling attested that he only used them to get an "order of magnitude" gauge of the likely economic benefits.

[237] Subject to that qualification, Mr Norling estimated the benefits as follows[73]:

(a) Total construction costs of $1.2b over the construction period;

(b) Total value added economic contribution to the Cooloola region of $0.8b and to the state of $1.4b during the construction period;

(c) Directly employ 5,200 full time equivalent (FTE) person years on-site during the construction period;

(d) Generate total employment in the Cooloola region of 7,800 FTE person years and in the State of 11,500 FTE person years during the construction period;

(e) Generate annual revenues of $140m once fully operational;

(f) Contribute $125m to the Cooloola region's economy and $170m to the state's economy annually once fully operational;

(g) Directly employ 1,100 FTE workers on-site once fully operational, in comparison to the 1,700 Cooloola Coast residents presently employed;

(h) Generate total employment in the Cooloola region of 1,600 FTE workers and in the State of 2,300 FTE workers once fully operational; and

(i) Generate direct revenue to the State Government over the development period in the order of $60m (current dollar values)

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73 Exhibit 5, tab 1, para 108.

pursuant to the Development Lease, which provides that the State Government receives 17.5% of all land sales by the Lessee as a free-holding payment. (This amount has been estimated by the appellant and represents an average land value of just over $100,000 per dwelling unit). It is noted that, whilst this is a direct benefit to the State Government, it is not a benefit to the State, as it represents a transfer payment from one sector of the State to another sector.

[238] Mr Norling saw the economic benefits (including employment) and additional facilities proposed as particularly beneficial given that the existing population is small, isolated from major centres and services, aged, with few job opportunities and low income levels. Whilst Professor Hundloe did not concede that the population was particularly disadvantaged, given that it is a small coastal community, I accept that development, of the scale proposed would, if achieved, bring benefits which would be welcomed. In this regard, the evidence of those called by the third respondent by election (Elms, Modin, Simmons and Brosnan) attested to the desire to see growth, both in tourists and permanent residents, to, amongst other things, support businesses, attract further infrastructure, even out the peaks and troughs throughout the year and assist Rainbow Beach to reach a critical mass.

[239] On the other hand, however:

(a) Mr Norling's estimates assume full development and, at the time of the calculation, assumed that benefits would flow within 20 years. That timetable is insupportable and has been abandoned.

(b) There are elements of the proposal (such as the community facility precinct) for which no need case was mounted. I have otherwise found that there is insufficient need to support the completion of the proposal within a reasonable planning horizon.

(c) Assuming that development occurred at a rate commensurate with demand (so as to prevent an unproductive and undesirable oversupply of unsold or underutilised product) the benefits of the proposal, if approved, would, at best, be spread over a much longer

timeframe and would not be fully realised for a very long time, if at all (i.e. achievement of full development is not certain).

(d) Failure to approve the RS2 proposal would not stifle economic activity in Rainbow Beach. The appellant's intention, should RS2 be refused, is to develop RS1 to its potential. There is sufficient capacity within RS1 to support the construction of as much tourist development as might be justified within the next two decades or more. The development might also be used, at least in part, by residents.

[240] Professor Hundloe was critical of Mr Norling for putting a dollar value on the economic benefits which would accrue from development without also putting a dollar value on the negative effects on the environment. Economists now sometimes seek to put a dollar value on the environment, and my attention was drawn to a guideline[74], published by the co-respondent, as to how one might go about such an exercise.

[241] Methods used for valuing the environment include calculating its contribution to a commercial industry (which is inapplicable here) or conducting a survey as to how much people would be prepared to pay to support the preservation of a site or area. The people surveyed apparently do not have to possess any particular expertise or be particularly well-informed about the values of what they are being asked about[75].

[242] Such an exercise has significant inherent limitations. I do not consider that a cost/benefit analysis necessarily has to be reduced to numbers. In a case such as this, where the environmental values have been examined in some detail by appropriately qualified experts, I agree with Mr Norling that it should be left to the court to carry out, in an evaluative way, the balancing of economic, social and community benefits with any deleterious impact on the environment.

[243] The environmental impacts are dealt with later and are, for the reasons discussed, undue. Even putting those to one side however, the significance of the benefits

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74 Exhibit 80 – Environmental Economic Valuation – An introductory guide for policy-makers and practitioners.

upon which Mr Norling relies as flowing from RS2 are overstated when regard is had to a reasonable planning horizon and to what could be achieved by development within RS1 in that period. Such benefits do not persuade me that an approval ought be granted in the face of deficiencies in the appellant's need case otherwise.

The weight to be attributed to the failure to demonstrate a sufficient public or community need.

[244] The appellant has failed to demonstrate public or community need to grant an approval to facilitate the development of tourist facilities on RS2 within a reasonable planning horizon and has failed to demonstrate that there is a sufficient need within such a horizon for the extent of residential development proposed. Its failure also extends to the associated retail and commercial components, as well as the community facilities.

[245] It has already been noted that the failure to establish a sufficient public or community need is a relevant matter which may be given greater or lesser weight in the circumstances of a particular case. In this case I give it determinative weight.

[246] The approval of significant development in the absence of a sufficient public or community need has the potential to prove problematic. I was reminded of what I said in *Family Assets Pty Ltd v Gold Coast City Council & Anor*[76] concerning an application for a shopping centre in advance of an established need as follows[77]:

> "As was submitted for the respondent, the grant of inappropriately premature approvals can have implications and create uncertainties. One cannot say that all things will remain unaltered or that assumptions made at this stage will necessarily be borne out. Circumstances can change. Development intentions and proposals can alter over time by reason of, for example, changes of ownership, potential key tenants or other circumstances. Uncertainties can subsequently arise as to whether a proposal, approved years in advance of an intended opening, will proceed or proceed in its approved form. Other changes can also occur in relation to population growth and distribution and market needs and trends, to name but a few variables. These can reflect on the appropriateness of a development prematurely approved years earlier. Approvals, although prematurely given and not yet acted upon, are prone to weigh on the planning authority, in considering the appropriate planning strategy to

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75 T11-30, 31.
76 (2008) 161 LGERA 43.
77 Para [38].

> adopt as part of a planning scheme review and in considering other applications on the subject site or on other sites. They can become a practical impediment or at least a hurdle to competing proposals which might otherwise have been brought forward."

[247] Similar observations apply in this case, although the range of uncertainties referred to in the above extract are, in some instances, more specifically referable to the shopping centre proposal there under consideration. The range of uncertainties in this case is somewhat different but no less telling, particularly given the extent to which any need in this case lies in the future.

[248] It has already been observed that the development period, even on the projections of Mr Norling, extends over 45 years. While Mr Humphrey's was of the opinion that it would not be a bad planning outcome if "in 40 years time they were still developing in accordance with that plan"[78], it is, in my view, impracticable to "crystal ball gaze" in order to grant a preliminary approval which sets an appropriate planning regime for development of RS2 over such a lengthy period of time. During such a period the relevant planning schemes and other statutory documents would be expected to be subject to multiple reviews. Other relevant changes of circumstance could obviously occur. Without attempting to be exhaustive, those changes could be in relation to population growth and distribution, market needs and trends, the condition and conservation significance status of the flora and fauna on site and scientific knowledge in relation to matters including the extent of likely coastal hazards. Indeed, there have already been changes in some of these respects during the assessment of the subject application and subsequent appeal to this Court.

[249] I appreciate that, whenever a development approval is granted, there is always some prospect that subsequent changes of circumstance may, in hindsight, cast a shadow over the wisdom of the decision. The mere possibility of future changes of circumstance cannot properly distract the planning authority or, on appeal, this Court, from approving appropriate, timely and needed development in accordance with the relevant planning strategies and the facts and circumstances applying at the time.

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78 T13-56, lines 6-8.

[250] In this case however, the Court is asked to give a preliminary approval which will, in effect, set the planning parameters for development at a scale for which there is currently an insufficient public or community need and which, were it to take place, would occur over a development period in excess of (and potentially significantly in excess of) four decades. It would do so in respect of what would easily be the largest and most significant development proposal within the Rainbow Beach locality. Further, in a case where the planning documents call for a resolution of competing considerations of development potential and environmental value, the appellant invites the court to strike an enduring balance at this time and to conclude that the consequent destruction of a substantial proportion of the on-site vegetation to make way for development is justified, in circumstances where it has failed to establish a public or community need for the extent of development for which that vegetation would make way.

[251] Mr Humphreys saw a need, in a planning sense, for an approval in order to "set up a framework wherein certain things can occur". For example, he said that an approval would permit the developer to consider some form of resort in the near future[79]. It would also, he thought, be a "legitimate mechanism" by which a planning entitlement to development could be conferred which may then act as a catalyst for amendment of the planning documents to recognise the approval[80]. Those matters might be more cogent if there was a demonstrable need for development for which the planning document did not adequately provide. That is not the case here given the extent to which the proposal is, at best, premature. I am not satisfied that there is, at this time, a sufficient planning need to give an approval so as to provide a "framework" or to provoke planning scheme amendments.

[252] The extent to which the proposal is premature in terms of any established public or community need, its consequent elongated development period to completion (if it was ever completed) together with its scale and significance persuade me to give decisive weight to the failure to demonstrate sufficient public or community need within a reasonable planning horizon.

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79 T13-43, lines 18-40.

80 T13-44 to T13-45, line 28.

Fauna, flora and biodiversity

[253] The Transitional Planning Scheme, 2005 Planning Scheme and draft new scheme recognise that the realisation of any development potential on RS2 is subject to addressing a number of constraints including environmental values. That calls for an examination of the values and the way in which they are proposed to be addressed by the subject proposal.

[254] The relevant contemporary mapping suggests that the RS2 site is environmentally significant. In that respect:

(i) The site is within an environmentally significant area PDLU on the strategic plan map in the Transitional Planning Scheme.

(ii) The vast majority of the site (excluding a strip generally coincident with the areas previously mined) falls within a "Conservation Significant Area" designation under the Strategic Framework Map of the current planning scheme.

(iii) The vast majority of the site is mapped as a "Regional Eco-system Value Area" in the Conservation Significant Areas Overlay Map in the current planning scheme.

(iv) The vast majority of the site is mapped as remnant vegetation for the purposes of the *Vegetation Management Act 1999* ('VMA').

(v) The site is included within an area of the Inskip Peninsula which is mapped as "Areas of High Ecological Significance" under the Regional Plan.

(vi) The co-respondent's mapping, referred to in the CPSPRP, includes the site within "Areas of High Ecological Significance".

(vii) The site is within a "Conservation Significant Area" on the relevant Overlay Map in the draft planning scheme.

[255] The flora values of the site were examined, in greater detail, by Dr Olsen (who was called by the appellant) and Dr Daniel (who was called by the co-respondent). The fauna values were examined by Dr Watson (who was called by the appellant) and Mr Caneris (who was called by the co-respondent).

[256] The evidence ultimately established that:

(a) There are three relevant landscape elements across the site. Those elements, and the median tree heights in each of those elements are as follows:

(i) remnant uncleared vegetation – 14.6 metres,

(ii) cleared, but unmined vegetation – 12.1 metres,

(iii) cleared and mined vegetation – 9.1 metres.

(b) The vast majority of the site (about 86 per cent) is covered by the remnant uncleared vegetation landscape element.

(c) The areas that were previously mined are located within a matrix of cleared but unmined areas which are not easily identified and mapped out. As the appellant submitted, it is reasonable to conclude that the total area disturbed is 27.3 hectares and the area actually mined is somewhat less.

(d) The extent of non-remnant vegetation, based on the regional eco-system map is only 18.05 hectares, or approximately 9 per cent of the site.

(e) Outside of the mined area, the quality of the vegetation is very good, generally being comparable to "best on offer" benchmarks for the relevant regional ecosystem types.

(f) Even within the previously mined areas, there is endemic native vegetation with good canopy cover (similar in structure to a pre-clearing ecosystem), low levels of weed invasion, deep and extensive litter layers and fallen woody material offering some opportunity for biodiversity support and connectivity[81].

(g) Whilst a detailed tree survey across the site has not been undertaken, the site bears many thousands of mature trees with a trunk diameter at breast height of 30cm or more together with many (more than 100) old growth hollow bearing trees.

(h) The site supports a near threatened flora specie, glycine argyrea.

(i) The site also supports species of rare or vulnerable fauna, namely:

(i) The black breasted button quail[82], the status of which is vulnerable.

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81 T25-69 to 70.

82 The platelets discovered on the site could be those of a different species, but it was conservatively and appropriately assumed that they related to the black-breasted button-quail.

(ii) The Cooloola snake-skink, the status of which is rare.

(iii) The Cooloola blind snake, the status of which is rare.

(j) The site sits within a context of surrounding vegetated areas.

[257] As Dr Daniel pointed out, the salient ecological values of the site include that it is a large predominantly intact patch of remnant vegetation in very good ecological condition, well connected to surrounding natural areas, that provides for ecological connectivity within the landscape, core habitat areas and habitat for flora and fauna species of conservation significance. I accept that the site has significant ecological values.

[258] The proposed pattern of development across the site shows no sign of having been conceived by reference to any particular environmental attributes or values. Development is proposed to be spread across the site in what was described as a 'cookie cutter' approach. In justifying the impact which the proposal would have on the values of the site, it was pointed out that the vegetation across the site is broadly consistent and emphasis was placed, at least initially, on the likely retention of approximately half the vegetation across the site, the inclusion of "green fingers" and provisions of the POD which seek to minimise vegetation loss, subject to the imperative of achieving the intended development.

[259] The proportion of vegetation which would be retained was calculated by Mr Humphreys. His calculation was that about 48.8 per cent of the land would be kept, in one form or another, for vegetation conservation. That calculation was later revised to 49.6 per cent in accordance with "Modified Table G2"[83] as follows:

Precinct	**Sub-total within Green fingers etc (ha)**	**Subtotal Protected within lot (ha)**	**Sub-total within Road reserve (ha)**	**Total for Precinct (ha)**
H1	19.3	20.7	1.2	41.2
H2	0.8	7.3	0.15	8.2
H3	3.5	2.85	0.16	6.5
H4	0.8	3.85	0.04	4.7
Housing (total)	24.4	34.7	1.55	60.6
Resort	0.8	1.8	0	2.6
Mixed Use	0.08	3.6	0.16	3.8

[83] Exhibit 104.

Community & Major Circulation	30.6	0	1.2	31.8
Total for site (ha)	55.9	40.1	2.91	99.0
Total for site (%)	28.0	20.1	1.5	49.6

[260] This was described as "a likely scenario of conservation of vegetation areas under the revised POD". Further, it was said that[84]:

> "The analysis is based on advice from Dr Olsen and Dr Watson that the most important trees on the site are larger trees of 300 mm minimum diameter, that the development process will optimise the retention of these trees and other "valuable" vegetation …"

[261] The reports of both Dr Olsen and Dr Watson referred to trees of greater than 300 millimetre diameter at breast height ('DBH') as being part of the survey which would guide the VMP's under the POD. In his report[85] Dr Olsen said that development in accordance with the POD "will maximise the retention of significant flora values and vegetation of the land. He noted that "Relevant to my area of expertise, the Plan of Development provides for…(i) … the preparation of a VMP (subsequent to a survey for such valuable vegetation that includes, but is not limited to all trees with a diameter, of more than 30 centimetres at a height of 1.3 metres above ground level)…". Further, he said that certainly less than 100 hectares of RE 12.2.5 would be cleared[86] and that greater than 90 hectares of extant vegetation cover would be retained[87].

[262] In carrying out his calculations Mr Humphreys had assumed that the Community Precinct would be retained in its vegetated state. While I appreciate that the inclusion of this precinct was not to facilitate any particular proposal by the appellant (but rather to comply with lease obligations to make land available for possible future State Government development) the development application nevertheless seeks approval, in accordance with a POD which would facilitate future development requiring the destruction of vegetation within that precinct. The acceptability of that is relevant. As Gibson QC conceded, it should not be presumed

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84 Exhibit 5, tab 15, p.21, para 34.
85 Exhibit 29, para 52.
86 Exhibit 29, p.29, para 87.
87 Exhibit 29, para 89.

to be an area to be preserved in perpetuity[88]. Table 3.2 in the joint town planning report proceeds on the basis that 20 hectares of the community precinct may be developed. That represents 10 per cent of the site and reduces the calculation of the proportion of the site to be retained from approximately 50 per cent to approximately 40 per cent.

[263] Further, the areas proposed for retention include areas where modification of the landscape is envisaged. Modified Table G2 calculates that around 40 hectares of vegetation will be "protected" within lots. The vast majority of that (34.7 hectares) is within the Housing Precinct, with the greatest proportion of that to be "protected" within lots in the H1 sub-precinct.

[264] Reference to the POD reveals an intention that lots within the Housing Precinct have development envelopes. The maximum average proportion of proposed lots occupied by development envelopes is 60 per cent in the case of dwelling houses and 70 per cent in the case of multi-residential development and accommodation premises. An illustration of how this is intended to be achieved is provided in Figures 2-4 and 2-5 in the POD, which are annexures 3 and 4 to these reasons. Those figures show that the area for "vegetation protection and fire breaks" in standard developed units consist of:

(i) a development envelope setback of six metres from the boundary of the adjoining "green finger";

(ii) relatively small areas and strips around the curtilage of the development envelope otherwise.

[265] The Plan of Development Code for the Housing Precinct contains the following Specific Outcome and Probable Solution:

SO10 Vegetation Clearing The physical characteristics of sites are enhanced through vegetation retention.	PS-10 Vegetation Clearing No vegetation clearing occurs outside of the development envelope except as provided for in a VMP.

[88] T30-23, line 19.

[266] Even if one puts to one side that the probable solution is not mandatory, the "no vegetation clearing outside of the development envelope" provision is subject to the qualification that clearing may occur as provided for in a VMP. The parameters for a VMP, set out in section 4.2.3 of the POD, include:

> - "a VMP is prepared after a survey of the vegetation of the site of the lot configuration (which is attached to the VMP and which shows all existing trees with a diameter of more than 30 centimetres at a height of 1.3 metres about ground level);
> - a VMP optimises the protection of vegetation that is valuable for habitat purposes and other reasons, having regard to the development outcomes required for the site of the proposed lot configuration;
>
> …
>
> - all areas outside of development envelopes that are intended to be managed for fire protection are identified on the VMP tiered with measures for that management."

[267] A VMP is not required to protect all vegetation or even all vegetation that is valuable for habitat purposes. Whilst it would be wrong to assume that the entire area of the allotments outside of the building envelopes would be denuded, it would similarly be unrealistic to assume that those areas would not be subject to some clearing of trees and some modification of the ground-level conditions which are of value for fauna. The evidence satisfies me that modification, including some clearing, is likely to occur for a number of reasons, including safety and bushfire management if not also for the management of those areas in conjunction with the proposed effluent disposal strategy. Insofar as bushfire management in the six metre zone separating the building envelope from the green finger, Mr Friend's evidence was to the effect that any canopy trees would need to be separated from the canopy of any tree within the green finger and the understory would need to be managed as grass or less flammable plant species[89]. Accordingly, approximately half of the 40 per cent previously referred to is likely to be the subject of modification, including some clearing.

[268] Even those areas intended to be preserved within the "green fingers" are not to be entirely untouched having regard to:

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89 T12-92, lines 28-48; T13-31, lines 35-45.

(i) the intention for pedestrian pathways and emergency access tracks through the fingers;

(ii) the potential for vegetation modification towards the edges of the green fingers for bushfire control; and

(iii) the likely occurrence of "edge effects".

[269] The likely position under the POD therefore is as follows:

(i) there will be clearing of all of vegetation for up to 60 per cent of the site;

(ii) there will be a partial loss of vegetation (to an indeterminate extent) over a further area of approximately 20 per cent of the site; and

(iii) vegetation will be largely protected in the remaining 20 per cent of the site subject to:

(i) irrigation requirements in the approximately 10 hectares which may be preserved within the Community and Major Circulation precinct; and

(ii) the impact of pathways, emergency access, bushfire control and edge effects for the approximately 12.5 per cent of the site to be preserved within green fingers.

This puts a different complexion on the extent of retention across the site.

[270] The analysis means that:

(a) up to 120 hectares of land would be cleared and some vegetation would also be lost over much of the remaining area;

(b) an unknown number of mature trees of 30 centimetre DBH would be destroyed including an unknown number of "very large" old growth hollow-bearing trees;

(c) an unknown number of the near threatened glycine agryea would be dislocated. Dr Olsen suggested transplanting, where necessary, although he acknowledged that it would be preferable if they were undisturbed; and

(d) there would be a reduction of habitat for the four species of native flora and fauna of conservation significance and the likely death of some individual members of fauna species (particularly the snake and skink).

[271] It emerged from the testimony of Dr Olsen that he had:

(a) taken Mr Humphreys' calculations at face value;

(b) erroneously assumed that the near 50 per cent calculation of vegetation protection was a "worst case" scenario; and

(c) wrongly thought that the extent of protection calculated by Mr Humphreys assumed complete clearing within the lots outside of the building envelopes.

[272] From this point, the appellant's case with respect to the importance of vegetation retention across the site appeared to shift. Indeed, by the time submissions were made, Gibson QC submitted that the site does not have flora values worthy of conservation[90].

[273] When cross-examined about these matters, Dr Olsen appeared to become flummoxed and his evidence somewhat confused. For example:

(a) he seemed unwilling or unable, at first, to readily acknowledge that Mr Humphreys' calculations were inconsistent with his assumed worst case scenario[91];

(b) even after admitting to an error, he later sought to justify the "confusion" by reference to semantics[92] or to "the mixed metaphors of conservation, preservation, protection"[93] in a way which was unconvincing;

(c) he gave unconvincing evidence about whether the colours on the plan he was looking at led to any mistake[94]; and

(d) he made unconvincing attempts to regain ground by reliance upon other figures, not relevant to the point which was being made[95].

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90 T35-7.
91 T24-70 to T24-72.
92 T25-11.
93 T24-72.

[274] His assumption as to the extent of vegetation to be retained having been undermined on day 24 of the hearing, Dr Olsen then proceeded, on day 25, to say that the only valuable vegetation on the site is the glycine argyrea and, to some extent, the old growth "very large trees" with hollows. Asked whether, as a consequence, he was unconcerned about the proportion of mature trees (of at least 30 centimetre DBH) retained across the site, he confirmed that was so but, confusingly, also said that "it would concern me if more than 53 per cent of the vegetation was lost."[96]

[275] Dr Olsen's somewhat flummoxed and confused testimony gave me cause for concern about his evidence in this respect and indeed more generally. Dr Olsen is an experienced witness, whose evidence has assisted the Court on other occasions, but, as Gibson QC acknowledged in submissions, "Dr Olsen did not have a good day at the office when he gave his evidence in cross-examination"[97]. The timing of his suggestion that the remnant vegetation across the site was not "valuable vegetation", served to heighten my concern.

[276] I generally prefer the evidence of Dr Daniel to that of Dr Olsen. Dr Daniel's evidence also featured some errors (discussed later), but he did not shrink from accepting errors, where they were made. He presented as a sincere and knowledgeable witness.

[277] The remnant vegetation across the site falls within regional ecosystem types which are of the "least concern" category under the VMA. That does not mean, however, that the vegetation is bereft of importance. Indeed, the VMA was amended to change the name of this category from "not of concern" to "least concern" to overcome any misconception. Unauthorised clearing of such vegetation is an offence. Further, RE type 12.2.5, which is the most prevalent across the site, is close to the threshold between the "least concern" category and the "of concern" category.

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94 T24-70, T24-75, T25-11.
95 T24-70, 71, 74 and 75.
96 T25-30 line 25 to T25-34 line 15.
97 T37-17.

[278] It is thought that there was originally around 16,075 hectares of RE 12.2.5 pre-settlement. At one point it was thought that less than 10,000 hectares remained, such that it was within the "of concern" category under the VMA. Mapping of some areas at a finer scale, however, revealed that there were some 10,694 hectares remaining as of 2007. This is within 694 hectares of the threshold. There is currently approximately 4000 hectares which is not in a protected estate (such as a national park). A loss of just seven per cent of the RE type from its 2007 levels would cause it to again be placed in the "of concern" category. The extent of loss on this site likely under the plan of development would not itself lead to a change of categorisation but would push this RE type closer to that threshold.

[279] It should be noted that RE 12.2.5 is listed, in table 2 in the Regional Vegetation Management Code for South East Queensland Bioregion, as one of a limited number of RE types that are at risk of falling below 30% of its pre-clearing extent, or less than 10,000 hectares. Performance requirement 9 of that Code requires maintenance of the current extent of this regional ecosystem. The "maintain the current extent" provision is also a feature of the performance requirement which applies to 'endangered' and 'of concern' regional ecosystems[98]. The acceptable solution to performance criterion is that clearing in such an ecosystem is less than 10 metres wide or two hectares in extent.

[280] The purpose of drawing attention to those provisions is not to prejudge any VMA application, but to demonstrate that this category of vegetation, whilst of "least concern", is not unimportant. The provisions of the Code reinforce the conclusion that the remnant vegetation, particularly 12.2.5, on the subject site is of some significance. Further, the superseded, current and draft planning schemes do not indicate that this category of remnant vegetation is unimportant. In particular, SO-1 of the Conservation Significant Areas Code of the 2005 Planning Scheme seeks to avoid development within state or regional ecosystem value areas, without discriminating between the various categories. It is difficult to justify the extent of clearing of remnant vegetation contemplated under the POD.

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[98] Exhibit 178, p.13-14, PR P.7.

[281] The evidence of Dr Daniel satisfies me that RE 12.2.11 also exists on the site. This attracted attention because, on 1 June 2011, Tim Ryan (the principal botanist at the Queensland Herbarium) had advised Dr Olsen that the difference between 12.2.11 and 12.2.5 was largely geographical with Inskip Peninsula being the broad overlap between the two. Dr Olsen was concerned about losing a substantial proportion of the vegetation if the site was in this overlap zone. Dr Olsen denied the existence of 12.2.11 because he had not found the differentiating species, livistona decora, on the site. That prompted Dr Daniel to check photographs which he had taken of his biocondition sites, and he found a photograph of the species, which was confirmed by the Herbarium. To his credit, Dr Daniel did not attempt to overplay the significance of RE 12.2.11 also being on the site. He said:

> "I think it certainly elevates the importance of the vegetation on the site. I certainly as a botanist don't see this as being a major issue with vegetation on the site. I view the quality of the vegetation on the site itself and its role in the landscape, so its size and its connectivity, to be more important as far as the retention of vegetation on the site. I certainly wouldn't see the typing of 12.2.11 on the site as a conservation area to be particularly important but it certainly does elevate the importance of the site slightly."

[282] The VMA and the relevant Code focus upon the spatial extent of the relevant RE and how that compares to its spatial extent pre-clearing. The extent to which remnant vegetation on the site contributes to the spatial extent of the RE type, however, is not its only significance.

[283] It has already been observed that the remnant vegetation onsite is of good quality. Dr Daniel carried out a "biocondition" analysis. The term "biocondition" refers to condition as the degree to which the attributes of a patch of vegetation differs from the attributes of the same vegetation in its reference state. The Herbarium provided "best on offer" reference sites for RE 12.2.15 with which to compare the vegetation on the subject site.

[284] To his embarrassment, Dr Daniel made a number of errors in his assessment. In summary:

(a) Dr Daniel set out the results of his November 2010 Bio Condition Assessment in Tables 3.1 and 3.2 of his first court report;

(b) for a variety of reasons, including confusion as to which Bio Condition Methodology (2006 or 2010) he had used, Dr Daniel's

difficulty in understanding the data on his own spreadsheets, and admitted but unspecified errors, Dr Daniel had Ms Kelly recalculate Table 3.1 and Table 3.2, resulting in Table 3 in Dr Daniel's second report and Dr Daniel informed the Court that Ms Kelly's calculation should be relied upon;

(c) upon discovering the errors in the data he supplied to Ms Kelly, Dr Daniel purported to recalculate Ms Kelly's figures;

(d) Ms Kelly was not available to address the data errors identified by Dr Daniel.

[285] It is unnecessary to pause on that however, because, as has already been noted, the appellant properly conceded, as the evidence ultimately demonstrated, that, at least outside of the previously mined areas, the quality of the on-site vegetation is generally comparable to the "best on offer" reference benchmark. The case is evidently not so in respect of all of the balance of the RE type elsewhere.

[286] The quality of the remaining areas of RE 12.2.5 was considered by a panel of experts appointed by the co-respondent, for reasons unconnected with this appeal. Their finding was that at least 70 per cent of the remaining RE 12.2.5 is at least moderately degraded by factors other than clearing, thereby impairing its biodiversity value. Consequently, this RE type is considered to be "of concern" in terms of its biodiversity status. Whilst that biodiversity status has no particular statutory consequence, Dr Daniel supported the process and its conclusions[99] from an ecological perspective.

[287] Accordingly, the POD contemplates not only removal of a significant quantity of remnant vegetation of a "threshold" type but also of some of the better quality vegetation of its type, comparable to the best on offer. The evidence of Dr Daniel persuades me that the site has flora values worthy of conservation, at least to a greater extent than is contemplated by the subject application.

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99 See Exhibit 32, para 4.7.17.

[288] I was reminded that, in *Metroplex Management Pty Ltd v Brisbane City Council & Ors*[100], I was prepared to accept the clearing of some remnant vegetation of an endangered RE type, subject to environmental offsets. The context, including the planning context, in that case was different. The site was exempt from the operation of the provisions of the VMA[101]. From a planning perspective, the site was within an industrial location and planned for industrial purposes, subject to the preservation of a green space corridor traversing the site along Bullockhead Creek (which was to be preserved as part of the application). Apart from that corridor, the site was not mapped as within the Brisbane Green Space System or as having green space value. At para 167 I said:

> "At a strategic level, the role which the subject site is to play, in balancing the three components of ecological sustainability, is primarily related to providing suitable land for industrial development, subject to the need to respect the green space corridor through the site, along Bullockhead Creek. The proposal is consistent with that."

[289] The planning context in this case is different. Under the current planning scheme, for example, the RS2 site is within the rural zone and is mapped as being of regional ecosystem value on the relevant Overlay Map. The potential development of the site for urban purposes is made subject to the resolution of issues including as to environmental values. There is no commitment, in the relevant planning documents, for the site to be developed for urban purposes subject only to the preservation of a particular area of the site, as was the case in *Metroplex*.

[290] Mr Humphreys stated that the site is not of such ecological significance "that it overwhelms the commitment to development" of RS2. For the reasons already discussed however, that over-estimates the level of development commitment in the planning documents.

[291] It was common ground between the fauna experts that:

(a) the land and surrounding landscape has high habitat value for the Cooloola blind snake and snake-skink[102] which are classified as rare for the purposes of the *Nature Conservation Act 1992*;

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100 [2009] QPEC 110; [2010] QPELR 270.

101 Because of the issue of a PMAV over the site.

102 Exhibit 5, tab 10, p.12.

(b) the land provides habitat for the black-breasted button-quail[103] which is classified as vulnerable or near-threatened;

(c) the land provides habitat which is suitable for breeding of black-breasted button-quail[104];

(d) the habitat on the land is suitable not only for species of conservation significance, but also common taxa and priority taxa[105] which adds to the value of the land in ecological terms[106];

(e) the habitat on the land is suitable for several species of migratory birds[107]; and

(f) the proposed development will, as a consequence of clearing activities, remove valuable habitat[108] for species of conservation significance, including the removal of habitat which is suitable for breeding purposes[109].

[292] In assessing the acceptability of the likely adverse impact of development, Dr Watson did not rely so much upon the proportion of vegetation retained across the site, but more on the proportion to be "retained in its current form" particularly within the green fingers, including the retention of a proportion of the very old hollow bearing trees. He made a number of recommendations in relation to the management of the green fingers.

[293] Reliance on the green fingers is somewhat problematic. Their location and design is not driven by any environmental consideration. Further, the retention of vegetation in long, narrow strips serves to increase the extent to which retained vegetation is located at or about the edge of urban development, leading to the potential for increased edge effects. It was common ground that this is not in accordance with the principles of ecologically sustainable design. Indeed, in cross-examination, Dr Watson, in response to a suggestion that the green fingers are, in their shape, a

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103 Exhibit 5, tab 10, p.11.
104 Exhibit 5, tab 10, p.11 and T31-14, line 45.
105 T30-46, 47-54 and Exhibit 33, p.31, para 5.28-5.29 and T31-17 & 18.
106 T31-18, lines 17-19.
107 Exhibit 33, p.30, para 5.27 and T31-17.
108 It should be noted that habitat is not limited to the mature trees but, includes the ground level vegetation and leaf matter, particularly for the ground level species.
109 T31-12, 10-59 & T31-14, 45-58.

textbook example of what not to do, said "I could accept that, yes"[110]. Mr Caneris described the design as "unfavourable to contemporary bushland and fauna habitat management approaches"[111], with the highest concern being the failure to retain any notable habitat nodes (core habitat areas)[112]. He did not consider the POD to "represent anywhere near the basic principles of an ecological sustainable development"[113].

[294] Edge effects are already evident in the green fingers within RS1, which, as Mr Caneris pointed out, are relatively few in number and still not of a great age in ecological terms. Both Dr Watson and Mr Caneris were critical of the management of the green fingers within RS1 (which are wider than those proposed within RS2). Dr Watson recommended greater management in RS2. In the third joint report of the fauna experts, he said that it was 'essential' to the conservation of inherent values that the green fingers and immediately adjacent areas be strictly controlled/managed. In the fourth joint report he said:

> "I agree with AC that a significant increase in effort is required to ensure habitat, biodiversity and general fauna values are protected and maintained within the proposed development. A greater level of commitment to that of Rainbow Shores Stage 1 is required to ensure the protection of these values."

[295] The appellant submitted that developments in the law (such as the availability of environmental covenants) will facilitate greater management in RS2. The vastly greater number of green fingers (and allotments) in RS2 however, means that there would be significant potential for edge effects over time. There are obvious risks in reliance on the ongoing strict control and management of a significant number of relatively small retained bushland strips to ensure the performance of a flawed design. Mr Caneris also had residual concerns about the proximity of development and people to fauna, even assuming management was in place[114].

[296] Mr Caneris also had other criticisms. As he pointed out, while the vegetation, across the site is broadly similar, there are some differences. For example, there are some areas where the large hollow bearing trees (which provide habitat for a number of

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110 T30-72, lines 31-32.
111 Exhibit 33, p.33, para 5.47.
112 Exhibit 33, p.29, para 5.9.
113 Exhibit 5, tab 11, p.4.
114 T33-35.

species as well as canopy cover and ground level habitat – from what falls to the ground – for the species of conservation significance) occur in clumps and where the understorey is more dense than in other places. Without the benefit of a greater survey effort, it cannot be known how the green fingers fall in terms of the values and, for example, what proportion of the hollow bearing trees will be preserved. The design of the proposal has not followed a constraints mapping exercise of the kind described in Mr Caneris' testimony[115]. That is not to suggest that the 'green fingers' are worthless, but they are insufficient to demonstrate appropriate respect for the values of the site or the adoption of an ecologically sustainable approach.

[297] Ultimately Dr Watson said that he would not be concerned even if all vegetation was lost from the site. That is not a proposition which featured in any of his reports, but emerged during his testimony. In the fourth joint report of the fauna experts, Dr Watson had said that "it is agreed that the success of the retention of habitat values for common and threatened fauna within and surrounding the subject site will be dependent on the appropriate implementation of the POD". He supported a number of management measures, including retention of some suitable habitat, the incorporation of woodland habitat patches within the development layout, the incorporation of corridor/connectivity opportunities and protection/conservation of leaf litter/ground level vegetation and low level shrubs[116].

[298] The proposition that all vegetation could acceptably be lost, was on the basis that the site represents only a very small proportion of available habitat and there is sufficient habitat elsewhere, including nearby, to ensure that the fauna species of conservation significance would continue to survive both within Inskip Peninsula and elsewhere. While the habitat on RS2 may be essential habitat it is not, in Dr Watson's view, critical. The appellant's written submissions summarised the point as follows:

> "In summary, there is no habitat on the RS2 site that is not also present elsewhere on Inskip Peninsula and, in the case of the three (fauna) species of conservation significance, not present elsewhere throughout a substantial proportion of the 220,000 hectares in the adjacent Great Sandy National Park".

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115 T31-84.

116 Exhibit 5, tab 11 p.3.

In his oral submissions Gibson QC said that the politically incorrect 'harsh reality' is that even if the development were not environmentally responsible, the consequences, in the broader perspective, would be immaterial[117].

[299] As Gore QC submitted, Dr Watson's testimony suggested a degree of discomfort. When asked by me whether he was saying that it would be acceptable if all the vegetation was lost he said[118]:

> "… given those proportions I would say yes it could be considered acceptable".

but added[119]:

> "being an ecologist I would like to see the areas proposed for retention in accordance with Mr Humphrey's calculations…"

[300] Asked in cross-examination, whether his oral evidence was the first time he had expressed the opinion that clearing all vegetation could be acceptable, he answered[120]:

> "it may well be, yes"

[301] Having confirmed that, in the joint expert report, the experts agreed that one of the issues to be dealt with was:

> "significant environmental values of the area should be conserved and principles of ecological sustainable development should be implemented"

He agreed that the notion of clearing all vegetation is quite inconsistent with the notion of conserving the values of the site[121]. Further, when it was put to him that clearing at least 100 hectares of vegetation was the antithesis of achieving ecological sustainable development he responded "you could put it that way, yes"[122].

[302] In relation to the impact of the development on habitat suitable for button-quail breeding Dr Watson gave the following answers to the following questions[123]:

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117 T36-94, lines 43-55.
118 T31-9, lines 42-43.
119 T31-9, lines 43-45.
120 T31-10, line 4.
121 T31-10, lines 18-20.
122 T31-12, line 8.
123 T31-14, lines 46-56.

> "And that habitat is suitable for breeding, whether or not it occurs now or it might occur in the future?-- In that sense, it could be regarded as suitable.
>
> And if it is suitable, it is correct to say that it should be protected from detrimental impacts such as development, correct?-- Yes.
>
> And am I correct in saying the proposed development of the hundred hectares to be cleared or more, that would involve clearing of habitat which is potentially suitable for breeding of button-quail?-- Yeah, if you put it like that, yes."

[303] The proposition that the likely impact of the proposal would be acceptable even if all vegetation was lost was rejected by Mr Caneris. He pointed out that while other areas had habitat of a suitable kind, it did not follow that all of that was being used by the species of significance. RS2 not only has habitat of a suitable kind, but ground-truthing has confirmed its use by species of significance.

[304] While Mr Caneris had concerns about the long term persistence of the species of significance within RS2 if developed as proposed[124], he acknowledged that the snake and the skink would persist on the Peninsular. He held reservations about the black-breasted button-quail if the development proceeded and the northern end of the Peninsula was ultimately subject to inundation as a consequence of climate change[125]. He did not, in any event, regard the existence of habitat elsewhere as justifying the removal of habitat on RS2 known to be used by species of conservation significance[126]. He saw no reason why the proposal ought not to have made a better or more appropriate response to maintaining suitable habitat values for those species[127].

[305] The destruction of habitat on the subject site is not, in my view, justified by pointing to habitat elsewhere which will provide for the survival of the species. The planning documents do not suggest that the vegetation on the subject site is expendable having regard to what exists within the broader area. Generally speaking, the planning documents require development of RS2 to be cognisant of environmental values and to occur in a sensitive way. As Mr Caneris pointed out, development which relies upon the balance of existing habitat elsewhere to justify the destruction of the majority of valuable on-site habitat, without offsets (and with

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124 T32-23, T33-6, T33-18 to 20.
125 Exhibit 148, fig 4.
126 T32-39.

reliance on vegetation retained in relatively narrow strips with a large perimeter-to-area ratios), for a site recognised in the planning documents as of environmental value, is not development which has been designed in an ecologically sustainable way.

[306] I accept that it is relevant to have regard to the context within which the site sits. The parties sought to take different things from that context.

[307] The RS2 site is bounded by vegetation on three sides (to the north, south and east) and by a road which physically separates it from vegetation communities to the west. I accept that the road does not prevent some ecological connection between the subject site and the vegetation to the west and that the site is connected to vegetation communities in the broader area. I accept Mr Caneris' evidence to the effect that the broader area (including RS2) has significant biodiversity and habitat values.

[308] The co-respondents' experts regarded that context as elevating the significance of the site, given the contribution which it makes as an integral part of a larger tract of native bushlands of value[128]. They did not see the value of the broader area as rendering the on-site vegetation superfluous or expendable. The appellant, on the other hand, tended to emphasise that the corridor, as identified in the 2005 Planning Scheme, lies generally to the west of the site[129] and that the value and function of the broader area would be maintained even with the loss of vegetation on RS2. Other features of the broader area, including, for example, the buffer between RS1 and RS2 and the vegetated erosion buffer to the east of the subject site were referred to.

[309] The co-respondents' witnesses countered by pointing out that the area to the east is in an erosion prone area and that the contribution of the subject site in the context of Inskip Peninsula might become more significant in the future, because current

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127 T33-21, lines 5-10.

128 See eg Exhibit 33, p.21, para 4.11.

129 Exhibit 18, OM4/3 Sheet 2. showing a Regional Connectivity Area which appears to traverse only the north western tip of RS2.

predictions of future sea level rise by reason of climate change suggest that the 'hook' at Inskip Point may in time, become subject to inundation.

[310] It was pointed out by the co-respondent that the site is located within an area recognised as being of State level biodiversity significance and a State level significant corridor under the co-respondents' Biodiversity Planning Assessment (BPA) system. That system is the result of the Biocondition Assessment Methodology Manual (BAMM) for assessing biodiversity values by reference to the following criteria:

Table 1 Biodiversity Significance Criteria.

Diagnostic Criteria For analysis of uniformly available data	**Other Essential Criteria** Assessed by expert panel using non-uniform data
A: Habitat for EVR Taxa **B:** Ecosystem Value: at three scales • B1: State; • B2: Regional; and • B3: Local **C:** Tract Size **D:** Relative Size of Regional Ecosystem: at three scales • D1: State; • D2: Regional; and • D3: Local **E:** Condition **F:** Ecosystem Diversity **G:** Context & Connection (relationship to water, endangered ecosystems and physical connection between contiguous Remnant Units)	**H:** Essential and General Habitat for Priority Taxa **I:** Special Biodiversity Values **J:** Corridors **K:** Threatening Process (Condition)

[311] A "filtering system" is used to determine whether one or more of the values, as determined by various diagnostic criteria, qualify a remnant unit as being of State, regional or local biodiversity significance.

[312] Under the BAMM, if criterion A attracts a "very high" rating, state significance is afforded to the remnant unit. That rating will be attracted where:

> "the area within the remnant unit has precise record/s less than or equal to 500 metres of core habitat for one or more endangered taxa or two or more vulnerable or rare taxa"

[313] Under the BPA assessment, there were 10 high precision species records for three species (which included the black breasted button quail and the Cooloola snake and skink); core habitat was also identified through habitat suitability models. Under the BAMM, the EVR taxa are both flora and fauna. That the criteria under the BAMM for State significance is met is confirmed by the evidence of the experts in this case who established the presence of two or more vulnerable or rare taxa.

[314] Biodiversity significance of "other essential criteria" is assessed by an expert panel. The site falls within an area of State significance for special biodiversity values and corridor value according to the determination of the expert panel. The expert panel's decisions with respect to criteria I and J are not necessary for the State rating, but reinforce it.

[315] The "State significance" rating was used to support the proposition that the clearing which would be involved with the subject proposal could conflict with policy 2.8.3 of the State Coastal Management Plan 2001, although for the reasons already given, attention should instead focus on the 2005 Planning Scheme provisions.

[316] The BAMM methodology and resultant BPAs are, as the introduction to the BAMM methodology states, policy within the meaning s 3.3.15(1)(a) of the IPA[130]. As a methodology, the BAMM is traced back to work done in 1999 by Chenowith Environmental Planning and Landscape Architecture, and then in 2000 by the EPA. Since its release, the methodology has been applied across a number of bioregions in Queensland. BPAs for 75 per cent of Queensland have been completed and are publicly available.

[317] The methodology has been applied by the EPA (through the relevant Department) as the primary tool for ecological value assessments since 2001. It is used for a range of internal and external purposes. One of the internal purposes is

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130 Although they are not, as the appellant pointed out, planning policies of the kind created under that Act.

"identification of significant ecological values when assessing development applications".

[318] I accept Dr Daniel's evidence that the BAMM methodology and resultant BPAs are based on sound ecological theory and on criteria scientifically proven to affect biodiversity. That does not mean however, that they can be taken at face value. As Dr Daniel acknowledged, on-ground ecological assessments are required to confirm or refute the actual presence of the ecological values. As the appellant submitted, in a case such as this, it is the detailed investigations carried out by the experts which provide the best evidence of the extant values. The BAMM however, provides guidance as to the combination of values which the relevant agency considers significant at different levels. Further, the assessment was supported by Dr Daniel and Mr Caneris, whose evidence I generally preferred to that of Dr Olsen and Dr Watson. Ultimately, however, the BAMM methodology and resultant BPA assessment are not critical to the conclusion which I have reached.

[319] I accept that the vegetation on RS2 contributes to the values of the broader area. I accept that the vegetation in the broader area would continue to have significant value even with the level of destruction which might occur in RS2 if the proposal was to proceed. I do not, however, regard that as a complete answer to the environmental issues. Given the way the site is treated in the planning documents, the question in relation to vegetation destruction is not whether "you could get by without it" but whether the proposed development is sufficiently sensitive to the established environmental values.

[320] The evidence satisfies me that the site has significant value which should be respected. That is not what the subject proposal does. Rather, the proposal:

(a) takes a "cookie cutter" approach to spreading development across the site without any regard for areas or features of greater or lesser environmental significance;

(b) would permit most of the vegetation on site to be destroyed including:

(i) many hectares of threshold regional ecosystem 12.2.5 of a quality comparable to best on offer;

(ii) habitat for species of conservation significance;

(c) distributes the areas of retained vegetation across the site in a way which exposes a substantial proportion to potential edge effects, contrary to accepted principles of ESD;

(d) does not live up to the claim of the POD of incorporating "state of the art ESD principles"; and

(e) ultimately relies more on the value of what lies about the site and elsewhere, than on the sensitivity of its approach to the values of the site.

[321] The proposed conflicts with the Conservation Significant Areas Code of the current planning scheme and with the objectives and provisions of the Transitional Planning Scheme, the current planning scheme and the draft scheme discussed earlier, with respect to its impact on environmental values.

[322] I would give my finding on the ecological issues determinative weight in the circumstances of this case.

Landscape Character and Natural Amenity

[323] Mr Summers was of the opinion that[131]:

> "the proposed development will have a very significant effect on the landscape character and natural amenity of Lot 22 and the role performed by the Inskip Peninsula. The resultant development will irrevocably change the character of Lot 22 and because of its linear nature and extent, the Inskip Peninsula. These changes will be brought about by the intensity and height of unit and resort development."

[324] I am satisfied however, that the visibility of the built form will be substantially reduced, so that its impact on character and amenity will be much less than might be imagined when viewed in plan form. The proposal will be buffered from the beach by the vegetated erosion buffer. A vegetated buffer will also screen the development from Inskip Peninsula, for most of the site's length. While the extent and configuration of the retained vegetation is, I have found, insufficient to appropriately respect the environmental qualities of the site, it would nevertheless

131 Exhibit 5, tab 15, p.51, para 138.

afford a 'bushy' feel or amenity to the development and assist in screening the built form. I was assisted in my understanding of this by an inspection of RS1, from within the development and from points around Rainbow Beach and Inskip Peninsula. The visual impact of that development is slight, even when viewed from an elevated position on the hill within Rainbow Beach.

[325] I appreciate that the proposal is much more extensive than RS1, will have some impact on landscape character and natural amenity and contemplates the prospect of some buildings up to six storeys, subject to impact assessment. The development would not be invisible but, as Mr Humphreys said, visual 'cues' are not inappropriate. I am satisfied that, subject to the implementation of the POD, the proposal would not degrade the perceived landscape character and amenity of the area to an unacceptable degree.

Geology and Geomorphology

[326] It was submitted on behalf of the co-respondent, that the proposed development would result in adverse impact on a coastal dune system worthy of protection. In particular, it was contended that the site possesses features of geomorphological and geological value, is part of a "significant coastal dune system" and, consequently an "area of state significance (natural resources)" for the purposes of the State Coastal Management Plan. It was submitted that the dune should be preserved from development with such impact unless the appellant could demonstrate a net benefit for the State as a whole. I am not satisfied that the appellant has shown a net benefit to the State.

[327] It was also contended that the dune system, of which the site forms part, has value as a rare and well-preserved example of a Holocene-aged barrier. That led to a deal of evidence about the extent to which the dune is composed of Holocene and/or Pleistocene deposits. That debate, however, proved to be academic, since the experts agreed that the outcome would not diminish the geosciences interest of the barrier.

[328] In their joint report, the expert geomorphologists agreed that the relevant dune for consideration is Inskip Peninsula and that:

> "- Inskip Peninsula contains morphological and geological features of considerable interest to geosciences.
>
> - In part this interest is derived from the fact that this beach-ridge barrier is at the northern end of the Australian east coast longshore sand transport belt. Sand in this belt moves progressively north from Victoria to Fraser Island before being transported over the edge of the continental shelf. As such, the Queensland east coast can be divided into two categories on the basis of sand provenance and conditions governing coastal formations: ***i.*** an open-ocean, exposed coastline between Coolangatta and Fraser Island, and ***ii.*** a protected coastline from Hervey Bay to Cape York.
>
> - Inskip Peninsula is the best surviving beach-ridge barrier representative of this former Queensland coastline type, and the most northerly barrier of this Australian east coast longshore transport belt.
>
> - Elsewhere in southern Queensland on Holocene/Pleistocene splits in the open-ocean exposed coastline, other land uses (especially urban development) have significantly compromised opportunities for revealing many features of interest to geosciences."

[329] Retaining the beach-ridge barrier would enable investigatory work to be carried out to study the barrier for many generations to come. This benefit would accrue in circumstances where it is agreed between Dr Stock and Dr Graham that the dune was a good example and, indeed, a very good example.

[330] The proposed development would disturb the dune and materially diminish the opportunity to carry out investigatory work over a significant area. It would not necessarily remove all opportunities for investigation. Dr Stock pointed out that investigations (which have not been done to date) could be carried out prior to development. There would likely be a significant period of time within which to do so, given the elongated period over which development would likely be achieved. As Dr Graham pointed out however, that is an inferior option, from a geosciences perspective[132]. Dr Stock did not disagree with that[133]. He did not deny that, from a

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132 T8-45 to 46.

133 T2-65, line 18.

geosciences perspective, it would be better if the dune was protected from the proposed development, although he did not see it as absolutely necessary[134].

[331] While there was agreement that the dune is of considerable interest to geosciences and that development, as proposed, would adversely impact upon that, there was disagreement about whether the dune meets the following definition for the purposes of the State Coastal Management Plan:

> "**significant coastal dune system** (includes swales and beach ridges) a system or landform identified, listed or mapped in a regional coastal plan or, in the absence of a regional coastal plan, is a system or landform that has a high degree of ecological integrity and biodiversity conservation values, and satisfies all of the following criteria:
>
> (a) it is a good example of a coastal dune system;
>
> (b) access to it is limited, and has not compromised its significant ecological values (including level of integrity); and
>
> (c) it is undeveloped, or relatively undeveloped and any works or structures have not compromised its significant ecological values;
>
> and one or more of the following criteria:
>
> (d) it is a system that is in dynamic equilibrium, and contains intact representations of the (i) various dunal zones and (ii) various dunal types naturally occurring in that region;
>
> (e) for a coastal dune system, the various dunal zones are intact (i.e. the zones have not lost more than 5-10 percent of the original existing vegetation cover), particularly in the foredune and in the exposed seaward slope and crests of secondary and hind dunes;
>
> (f) it supports native plants or animals or natural communities that have been identified as being, or are considered to be, endangered or vulnerable at the bioregional level;
>
> (g) it supports a significant number of the bioregional population of any native plant or animal;
>
> (h) it is important as habitat for animals at a vulnerable stage in their life cycles (e.g. migratory species at breeding or nesting stages); and
>
> (i) it is of cultural significance."

[332] If the dune in question falls within the introductory paragraph then it must meet all of criteria (a) to (c) but only one of criteria (d) to (i). There was some debate about

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134 T2-65, lines 5-15.

criteria (d), but, as the appellant conceded, it is unnecessary to resolve that, since it is common ground that criteria (f) is satisfied in any event.

[333] The Inskip Peninsula coastal system is not listed or mapped as a "significant coastal dune system" in a Regional Coastal Plan. The balance of the introductory paragraph falls within the domain of the ecologists. I have already dealt with their evidence. I prefer the evidence of Dr Daniel and Mr Caneris. I am satisfied that this part of the introductory paragraph is met.

[334] It was common ground that subparagraph (a) is satisfied. The dispute, in relation to the sub-paragraphs, was as to (b) and (c). Those sub-paragraphs call for findings about matters of fact and degree, such as whether access to the dune is "limited" and whether the dune is "undeveloped or relatively undeveloped" as well as whether the significant ecological values of the dune have been compromised.

[335] In addressing those subparagraphs it is fundamental to identify that which is being tested against the criteria. In its Assessment Report (Delzoppo 2009) and its Concurrence Agency Report, the co-respondent identified the coastal dune system as extending from Inskip Point to Noosa Heads. It has already been noted, however, that the geomorphological experts who were called to give evidence agreed that the relevant dune is the Inskip Peninsula.

[336] In 2007 Dr Graham, together with two other colleagues, assessed the "significant coastal dune" issue for the EPA. The objective of their review was stated to be (emphasis added)

> "to evaluate <u>the site</u> in accordance with the definition of a 'significant coastal dune system'."

They approached sub-paragraphs (b) and (c) by asking not whether the dune fulfilled the criteria, but whether the site did. They asked, for example, whether the RS2 site had limited access and whether it was undeveloped. As Dr Stock pointed out, that was an erroneous approach.

[337] The dune has been the subject of development and is accessible. Insofar as development is concerned, some 593 hectares have been disturbed by development

activities, including mining. The dune currently is home to the, as yet incomplete, RS1 development, the Council's sewerage treatment plant, the Rainbow Beach airstrip and various camping grounds and associated facilities.

[338] Access to the dune is available to the public. An access road extends from Rainbow Beach (Clarkson Drive and Karoonda Road), at Inskip Avenue and Inskip Point Road, to the end of Inskip Point. It links to the road network for RS1. There are also access roads to the sewerage treatment plant, the airstrip, Bullock Point Road and access to the various publically available camping grounds on Inskip Point. Access to the beach (including, by vehicle along the beach) and to Inskip Point (including for the purpose of accessing Fraser Island) also exists.

[339] The development of the dune has affected its ecological values, including from a geosciences perspective. The area dug up by mining activities has substantially lost its value to geosciences. The dune as a whole, however, retains significant ecological values.

[340] It was pointed out, on behalf of the co-respondent, that the definition does not require a dune to be inaccessible, just that access must be "limited". It was also pointed out that the subject dune has not been developed nearly as much as the other two examples of its kind (at Noosa and Surfers Paradise). I do not accept however, that the definition is necessarily met if the other two similar dunes have been developed to a greater extent. The expression "relatively undeveloped", is, in my view, more generic than that.

[341] I accept the evidence of both experts that sub-paragraph (a) is met. I also accept that while the significant ecological values of the dune have been adversely affected to a degree, particularly in the mined areas, the values of the dune, considered a whole, have not been 'compromised' in the sense of being imperilled. This conclusion however, is insufficient to say that the other sub-paragraphs have been satisfied. The definition also requires access to the dune to be limited and for the dune to be undeveloped or relatively undeveloped.

[342] The expressions "access to it is limited" and "it is undeveloped or relatively undeveloped" are matters of fact and degree. This is perhaps a marginal case, in relation to whether the dune is "relatively undeveloped" but I am satisfied that the dune fails the definition, at least on the basis that access to the dune is not limited.

[343] Even if I were satisfied that the dune met the definition, that would not be determinative.

[344] The State Coastal Management Plan is now superseded and the concept of a 'significant coastal dune system' does not appear in SPP 3/11, the 2012 DCPSPRP or the CPSPRP. The co-respondent relied upon s 3.2.3(1) of the CPSPRP, which speaks of safeguarding biodiversity through conserving and appropriately managing habitats, including dune systems. That is not a new provision. A provision to like effect appeared in s 2.8.3 of the State Coastal Management Plan. Section 3.2.3(1) of the CPSPRP is not a successor to the provisions about a "significant coastal dune system".

[345] Reliance was also placed on the 'coastal environment' provisions of the draft SPP which require development to avoid or minimise adverse impacts upon "coastal resources" and their values. The expression "coastal resources" is defined by reference to s 12 of the *Coastal Protection and Management Act 1995* (CPMA), which defines "coastal resources" as meaning "the natural and cultural resources of the coastal zone". The CPMA dictionary defines "natural resources" of the coastal zone, as the natural and physical processes of the zone, including wildlife, soil, water, minerals and air. This does not pick up the concept of "a significant coastal dune system". The co-respondent's submissions mount an argument based on, amongst other things, the State Coastal Management Plan and the CPSPRP, that this includes dune systems. The appellant's reply submissions took issue with that. Even if it does relate to dune systems, I would not give that substantial weight, given that the draft SPP is a draft, for public consideration, released very late in the process for assessing this application.

[346] The State Coastal Management Plan was only a policy. Further, as noted earlier, it was identified as a policy which has been appropriately reflected in the current

planning scheme. That planning scheme anticipates further development of the dune, at least for the balance of RS1. It also admits of the prospect of some development on RS2, subject to the resolution of diverse issues. The planning scheme does not state that the dune should be free from any and all future development, because of its supposed status as a significant coastal dune system or the need otherwise to preserve the dune.

[347] I do not suggest that the dune has no value. The likely adverse impact on the value of the dune to the geosciences is an aspect of the environmental impact of the proposal, but I have not treated that as being determinative or of great weight in the context of this case.

Erosion

[348] This part of the coastline is subject to erosion and accretion over time. There is a need for any development to be sufficiently set back, so as to provide adequate protection from future erosion. There is a band of land to the east of the subject site which has been set aside for such purposes since 1999. The question is whether that would need to be augmented by further setting back development within the RS2 site itself.

[349] During the course of the first part of the hearing, on 26 January 2012, the erosion prone area, set under the *Coastal Protection and Management Act 1995* was amended[135], so as to be set at 175 metres[136] from the seaward toe of the frontal dune, for the relevant part of the coastline in which RS2 falls. The consequence is that the erosion prone area now extends significantly into the site, affecting an area of some 30.33 hectares. Unsurprisingly, the Queensland Coastal Plan, the DCPSPRP and the CPSPRP, reflect the common sense proposition that, save for some understandable exceptions, erosion prone areas should remain undeveloped, at least so far as is practicable[137].

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135 The erosion prone area may be amended pursuant to s 71.

136 Mr Lawler thought that it should be greater, but I am not persuaded that his contention should be preferred to the 175 metres set pursuant to the statutory provision.

137 Exhibit 117, p.70; exhibit 268, p.9; exhibit 275, s 3.2.2.

[350] Not only has the set back distance, from the toe of the frontal dune, been altered, but the natural processes also may affect the location of the toe itself over time. For that reason, the extent of intrusion into the site might vary from time to time. It was submitted, on behalf of the appellant, that if a set back of 175 metres is now to be met, the set back for the current proposal should be measured from the toe of the frontal dune as shown on the 1990 plan MCH 803497, "as this represents registration of a survey plan which recognised a 150 metre wide buffer zone/erosion prone area applicable at the time and it remains the registered plan applicable to the RS2 site".

[351] I appreciate the frustration which the appellant must feel at the movement of the proverbial goalposts at a late stage, but the erosion-prone area is not, in my view, determined by reference to the position as it might have been shown on a 1990 plan. The erosion-prone area definition speaks of the position of the toe of the dune being approximated by the seaward extent of terrestrial vegetation or, if that cannot be determined, the level of the present-day highest astronomical tide. Dr Johnson's analysis, which results in the erosion-prone area intruding 30.33 hectares into the site, was measured from the current seaward extent of the terrestrial vegetation, which, in my view, is in accordance with the erosion prone area definition. He also described that approach as involving the least risk[138].

[352] The sense of unfairness to the appellant, by reason of this late change to the erosion prone area must be balanced with broader considerations, particularly the need to provide appropriate protection, in the future, against the effects of erosion. This is not an issue on which I consider that a 'middle ground' compromise should be accepted. On balance, I consider that it would be inappropriate to grant a preliminary approval which would set the planning context for future applications for development permits, so as to facilitate the realisation of a large development over a long period of time, by reference to an out-of-date identification of the erosion-prone area. The consequence is that the POD is inadequate in its current form.

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138 T22-11.

Storm surge/climate change/sea level rise

[353] The extent to which the proposed development would potentially be subject to storm surge, including having regard to potential sea level rise consequent upon climate change, was in issue. This was examined, for the appellants, by Dr Johnson. No corresponding expert was called by other parties.

[354] In his trial report Dr Johnson relied upon an earlier report of BMT WBM, to the effect that the minimum level of the coastal dune, on the ocean side, is 6.0 metres AHD. That would provide adequate protection from a one-in-a-hundred year storm surge of 5.05 metres AHD.

[355] In the course of cross-examining Dr Johnson, Mr Lawler was able to establish that Dr Johnson's reliance on the BMT WBM report was flawed, because the site examined in that report was not coincident with the subject site. In particular, there is a section of the RS2 site, at its north eastern end, which did not form part of the land the subject of the earlier report. The dune, at that location, is only at about 3.5 to 4.0 metres AHD, such that it is potentially subject to being overtopped by storm surge.

[356] Dr Johnson accepted that development should be excluded from an area of the RS2 site, of approximately 3.3 hectares, unless alternative arrangements could be made to protect that area from storm surge[139]. Options included raising the level of the dune, raising the level of the site at the relevant boundary or constructing a rock wall or other hard structure.

[357] The 5.05 metre AHD level does not make allowance for the potential effects of future sea level rise by reason of climate change. Dr Johnson pointed out that the potential sea level rise has not yet occurred and its ultimate extent is uncertain. It is prudent however, for decision making to take account of current projections.

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139 See exhibit 158.

[358] The concept of climate change adaptation is not new[140]. SPP 3/11 referred to projections of sea level rise of 0.8 metres and an increase in the maximum cyclone intensity by 10% by 2100[141]. This was carried forward in the mapping of coastal hazard areas in the DCPSPRP[142]. While the CPSPRP does not specifically reference the projected issues, it does refer to sea level rise in the context of coastal hazards. It has already been noted that the draft mandatory requirements for coastal hazard referenced in the draft SPP references the 0.8 metre and 10% figures. Taking account of these projections of the effects of climate change would lead to the conclusion that a greater part of the RS2 site (approximately 17 hectares) is potentially susceptible to storm surge inundation, unless protected by measures such as dune enhancement, boundary level enhancement or rock walls, as discussed by Dr Johnson[143].

[359] It was submitted, on behalf of the appellant, that the recent policy of taking account of potential sea level rise of that magnitude should not be foisted upon it. Whilst again, I understand the basis for that submission, including issues of fairness to the appellant arising by reason of the creation of documents long after the application was made, such considerations must be balanced with broader considerations.

[360] It would, in my view, be unwise to grant a preliminary approval, which is to set the framework for substantial development over a long period of time in this locality, without ensuring that the future development is protected from potential inundation. The appellant impliedly accepts that general proposition, since it accepts that its proposal should make allowance for the 100 year ocean surge level. Once that is accepted, it is difficult to justify ignoring the current predictions of sea level rise which affect the identification of that proportion of the site which is potentially susceptible. The POD is inadequate in its current form.

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140 I note that it was referred to in the State Coastal Management Plan, although that part of the SCMP was not notified as an issue by the co-respondent.

141 Exhibit 232, s 2.1.

142 See the definition of coastal hazard area.

Consequences of erosion and storm surge issues

[361] For the reasons stated, the POD is inadequate in dealing with potential erosion and storm surge issues. It was submitted for the appellant that the extended erosion prone area can nevertheless be accommodated within the RS2 site, subject to some modification of the POD, and with limited use, if required and appropriate, of the extended areas, for such things as bushfire management, cycleways and irrigation. Similarly, the storm surge issue could be addressed in one of the number of ways suggested by Dr Johnson.

[362] Accommodating those issues, particularly the erosion issue, would require modifications to the POD. No alternative design was advanced during the hearing. It was however, pointed out that modification to address these issues would likely lead to a reduction in the extent of the proposed development and an increase in the retention of vegetation. It was suggested that this might, in turn, have consequences for the assessment of other issues, including the issues of need and environmental impact. For that reason, it was suggested that I should give the appellant the opportunity to amend its proposal before dismissing the appeal on those grounds.

[363] My attention was drawn to *Metroplex v Brisbane City Council* [144] where I indicated that, had I been otherwise satisfied with the proposal, I would have adjourned the hearing to permit the parties to attempt to resolve the traffic issues. The resolution of those issues would have been affected by my findings otherwise. The Court of Appeal held that such a course was open[145]. Whether that course is adopted in a particular case is however, a matter of discretion, the exercise of which will depend upon the circumstances of the case.

[364] This is not a case where it is proposed to permit the appellant an opportunity, after delivery of reasons, to resolve a discrete issue which is dependent upon my findings on others. The course suggested would involve a redesign of the proposal followed by a consideration of its merits from a number of different perspectives, presumably

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143 Exhibit 149.
144 [2010] QPELR 270.
145 [2011] QPELR 181.

following the hearing of yet more evidence, in a number of fields. I am not inclined to permit that.

[365] It is, in any event, unlikely that a responsive downscaling of the proposal would alter the ultimate conclusion, given my findings otherwise, including with respect to the lack of need for the tourist-oriented aspects of the proposal. If the appellant wishes to pursue a different proposal then it would be more appropriate, in this instance, for that to be done by way of a fresh development application, rather than by a redesign and a further hearing following the delivering of reasons with respect to the proposal in its current form.

Wastewater reuse and groundwater

[366] It is proposed to dispose of sewage by treatment, to an appropriate standard, at the Council's treatment plant (which would be upgraded with contributions from the appellant), followed by irrigation about the RS2 site. It is also proposed, subject to a further approval, to use the irrigation areas over the RS2 site to dispose of the treated wastewater from Rainbow Beach more generally. That would provide a community benefit, because the current method of disposal, by irrigation about the Council's treatment works, is problematic.

[367] The pursuit of issues about the adequacy of the proposal and its likely impacts, including on the groundwater issue, was a somewhat sorry tale which consumed much time and expense. Initially, the only experts addressing these issues were Mr Bristow (both effluent and groundwater) for the appellant and Mr Fredman (effluent disposal only) for the respondent.

[368] In circumstances explained in my earlier reasons[146] the parties were given leave to notify further or other experts at a late stage. The Council was given leave to call Mr Hamlyn-Harris in relation to effluent disposal and Mr Hair in relation to groundwater. The co-respondent was given leave to nominate Mr Gardner in relation to effluent disposal and Mr Leach in relation to groundwater. The appellant was given leave to nominate Mr Sutherland in relation to groundwater.

[369] On 29 August 2011, a joint meeting was held between Mr Bristow, Mr Gardner and Mr Hamlyn-Harris (with the nominated groundwater experts, Mr Sutherland, Mr Hair and Mr Leach as observers) to agree on issues and identify methodologies, resulting in a joint report ('JER5'). Modelling results and other relevant material were subsequently addressed by the effluent disposal experts (again with the groundwater experts, and others, as observers) at meetings held on 10, 17 and 25 November 2011, resulting in a joint report dated 30 November 2011 ('JER6'). There were no points of disagreement recorded in JER6.

[370] JER6 included a Draft Irrigation Management Plan dated November 2011. Under the heading, "Conclusions/Summary of Our Advice" in JER6, it was recorded:

> "1. We agree on the following:
>
> …
>
> g. we are satisfied that the concept design is satisfactory, but it must be effectively translated into a detailed design that reflects the design intent and is supported by an effective management plan.
>
> h. we are satisfied that the draft irrigation management plan presents a credible preliminary plan for the operation, maintenance, monitoring and reporting on the proposed scheme for the irrigation of surplus recycled water from the development and the Inskip Peninsula community as a whole."

[371] Subsequently, the nominated groundwater experts completed a joint report dated 16 December 2011 ("First Joint Report of the Groundwater Experts") which recorded their agreement that there would be no adverse impacts on groundwater as a result of the proposed development. Those agreements appeared to resolve the issues.

[372] Notwithstanding those agreements, Mr Bristow was still required for cross-examination, including in relation to the consequences the irrigation strategy might have for vegetation retention and management. In the course of the first part of the hearing an issue arose about the areas for irrigation. In the course of discussion about that I said:

> "Presumably on Monday when Mr Bristow is giving evidence the other experts will be here. As of Monday if there's some dispute about that, they might be able to have a further meeting for 10 minutes or 15 minutes to see if they can sort it out."

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146 [2011] QPEC 126.

[373] On 23 January 2012, the effluent disposal experts provided a further joint report, dated 23 January 2012 ('JER7'), in which Mr Gardner went beyond the confined issue sought to be clarified, in order to express opinions different from those he had expressed, jointly, in JER6.

[374] On 25 January 2012, for the reasons which are published[147] and subject to costs consequences, the Court gave leave for Mr Gardner to depart from or qualify opinions he expressed in JER6 (in respects identified by him in Exhibit 57), and made directions for further modelling and reporting. A series of reports, further materials and errata followed.

[375] The nominated experts in groundwater were directed by this Court to review the additional modelling and reporting by the effluent disposal experts and to consider whether it had any implication for the analysis and conclusions in the First Joint Report of the Groundwater Experts. The groundwater experts were also directed to consider any implications arising from the Queensland Coastal Plan.

[376] The groundwater experts prepared a further joint report dated 2 May 2012 ("Second Joint Report of the Groundwater Experts") in which they concluded:

> "100. On the basis of the information available and all the additional modelling and simulation results, there are still no unacceptable groundwater impacts resulting from the proposal."

There were no points of disagreement.

[377] One would have been excused for thinking that this finally put an end to the residual concerns about the proposed irrigation strategy's potential effect on groundwater, but not so. When the hearing resumed on 21 May 2012, Gore QC gave notice that, although the groundwater experts had agreed there would be no unacceptable impacts on groundwater, Mr Gardner did not accept a number of the assumptions in the groundwater joint expert report and would be giving evidence contradicting the conclusions of Mr Leach (the co-respondent's groundwater expert) in the joint report of the groundwater experts. Surprisingly, Mr Gardner's contentions had not been put to Mr Leach.

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147 [2012] QPEC 6.

[378] On the morning of 22 May 2012, some discussion ensued as to whether the proposed challenge, by the co-respondent, to the groundwater evidence was to come from Mr Gardner and Dr Cook or just Dr Cook (who had not previously been nominated as an expert, although he had been involved in assisting Mr Gardner with some modelling).

[379] On the morning of 23 May 2012, Gore QC informed the court that no application would be made for leave to lead evidence from Dr Cook and that Mr Gardner was having discussions with Mr Leach which might assist in addressing Mr Gardner's concerns, in which case Mr Gardner would only maintain a position that "it's a case for applying the precautionary principle in simple terms in view of the reliance upon modelling for both the effluent disposal aspects and modelling for the ground water and the low criteria that is involved". At that time I reminded Gore QC that the effluent disposal system would be the subject of another application at another time and I questioned whether matters had got to a point where the proposal was no longer said to be clearly unacceptable and its pursuit not a clear futility[148].

[380] Subsequently, on 28 May 2012, the co-respondent abandoned the effluent disposal and groundwater issues, save with respect to potential impact on native vegetation (a matter dealt with by the flora experts). Neither Mr Gardner nor Dr Cook was called to give evidence. The change of position was explained in Exhibit 142 as follows:

> "You will note from the **attached** Agreed List of Issues that our client no longer contends that the matters related to effluent disposal and groundwater warrant refusal of your client's development application.
>
> This change reflects that our client has considered and responded to the invitation made by the Court on 23 May 2012 to consider whether the appeal had reached a point where the Court did not need to be further troubled by the effluent disposal evidence, that point being where it could be accepted that there had not been enough work done to say that the effluent disposal strategy was one which may, not must, be seen as acceptable (bearing in mind that (a) the Court is not the ultimate approving authority for that effluent disposal strategy, and (b) as a further application is required, the present development application ought not be refused, unless the application is a clear futility)."

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148 See *Walker v Noosa Shire Council* [1983] 2 Qd R 86.

[381] Ultimately, it was only Mr Lawler who maintained that the effluent disposal and groundwater issues had not been adequately met by the appellant. He did not call any expert evidence to contradict that of Mr Bristow and Mr Sutherland, but attempted to make his points in the course of cross-examination and in submissions. Mr Lawler's contentions included that:

(i) the quantity of effluent had been under-estimated;

(ii) the modelling, used by Mr Bristow is deficient for a number of reasons, including its assumptions as to vegetation harvesting;

(iii) the regime for the disposal of wastewater would be difficult to set up and would likely fail;

(iv) existing water quality would not be maintained and the regime agreed by the experts for tolerance from baseline conditions (25 per cent) is too large and arbitrary;

(v) the height of the groundwater may be substantially changed as may the flow pattern;

(vi) Mr Sutherland is wrong to say that practically all groundwater drains to the east;

(vii) Mr Sutherland's assertions that nutrient figures will be acceptable, vegetation will not be adversely affected by rises in groundwater and that groundwater will not break the surface were not supported by "concrete evidence";

(viii) the groundwater experts were wrong to adopt the toe of the frontal dune as the appropriate point of discharge to test the effects of the development upon the quality of the groundwater; and

(ix) the scheme has not been shown to be practical from a groundwater perspective.

[382] As was pointed out on behalf of the appellant, Mr Lawler's submissions are based on challenging findings of the experts and require assessments (and consequent contradictions) by him in respect of matters in which he has no expertise. Mr Lawler put his points to Mr Bristow and Mr Sutherland in cross-examination. He did not cause them to depart from their conclusions. Their evidence appropriately countered his suggestions. I accept their evidence. Further, as noted earlier, the effluent disposal system would be the subject of another application.

Nothing which Mr Lawler raised persuades me that such an application would be futile.

[383] I accept that the system would require ongoing management. As was submitted on behalf of the appellants however:

> "To the extent particular standards are required to be maintained by, or particular arrangements are to be made with, individual owners, these matters are capable of being addressed by, for example, body corporate structures, building covenants and/or easements.
>
> Nothing identified by Mr Lawler is so complicated that it cannot be addressed by conditions and the implementation of effective management."

[384] I am satisfied that the effluent disposal and groundwater issues have been appropriately addressed at this stage and do not provide a basis for refusal of the application for a preliminary approval.

Access to the beach

[385] Mr Lawler submitted that the proposal is inappropriate because it does not maintain or enhance public access to the beach. He points to a number of documents which reflect that objective, namely, the State Coastal Management Plan[149], the Regional Plan[150], the Queensland Coastal Plan[151] (see now the CPSPRP)[152] and the draft SPP[153]. Further, as noted earlier, the implementation provisions in s 1.10.3.3 of the Transitional Planning Scheme, in relation to the opportunity area which is RS2, state that, in considering development application, Council will ensure appropriate public access to the beach.

[386] Mr Lawler's primary concerns appear to be:

(a) beach access for vehicles may be curtailed; and

(b) inadequate access for members of the public, from within RS2 to the beach.

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149 Exhibit 23, p.30, policy 2.3.
150 Exhibit 79, p.61, policy 2.2.3.
151 Exhibit 117, Principle 6 and policies 6.2 and 6.3.
152 Exhibit, 275, s 3.2.5.
153 Exhibit 274, pg 27.

[387] I understand Mr Lawler's fear that the accommodation of a significant population on RS2 might make the authorities somewhat more likely to review vehicle access along that part of the beach, but the development application itself does not propose any restriction of vehicular access on the beach in front of the RS2 site. The question of whether or not, at some time in the future, access along the beach is restricted is not a matter to be determined as part of this application and is not something that I am prepared to speculate about.

[388] The present level of access to the beach otherwise is via Pacific Boulevard (to the south of the RS2 site) and from Inskip Point Road (immediately to the north of the RS2 site). There is presently no public access to the beach from the RS2 site itself. The subject proposal would provide public access via RS2 for the first time. In particular, if RS2 were developed as proposed, members of the public, in addition to residents and visitors in accommodation within RS2, would be able to access the public road network within RS2 and gain access to the beach via the greenfingers. Mr Lawler would like to see the design of the development to be even more accommodating of members of the public, but the proposal is, I am satisfied, acceptable from this perspective.

[389] The proposal would not conflict with the provisions upon which Mr Lawler relies.

Bushfire management

[390] Bushfire management was not formally identified as an issue, but was referred to in joint expert reports of the town planners (Mr Humphreys and Mr Summers) and the flora experts (Dr Olsen and Dr Daniel).

[391] The appellant appointed Mr Friend of Rob Friend & Associates Pty Ltd as its expert on fire management issues. His recommendations include the establishment of fuel reduced zones within setbacks within lots abutting vegetated areas including:

(a) the unallocated State land to the east of the RS2 site;

(b) the "greenbelt" to the south of the RS2 site; and

(c) the proposed greenfingers.

[392] This has the potential to result in some loss or modification of vegetation as has been discussed in the context of the flora, fauna and biodiversity issues.

Sufficient planning grounds or grounds

[393] It was submitted, on behalf of the appellant, that in the event conflict is found with either the 1997 or 2005 planning schemes, there are "sufficient planning grounds" or "sufficient grounds" to justify approval despite the conflict. The expression "sufficient planning grounds" is that used in s 4.4(5A) of the PEA, which applies by reason of s 6.1.30 of the IPA. It is the test with respect to judging approval notwithstanding conflict with the applicable planning scheme which, in this case, is the 1997 scheme.

[394] The expression "sufficient grounds" is that which would apply by reason of provision of the IPA or the SPA, had the application been made after 2006. Since the 2005 Planning Scheme is a matter of weight only, the requirement to refuse the application in the event of conflict does not apply, with the consequence that the "sufficient grounds" test is not engaged. Nevertheless, the matters put forward by the appellant potentially affects the weight which should be placed on any conflict with the 2005 scheme.

[395] The grounds relied upon by Mr Humphreys, at para 201 of the joint town planning report, may be summarised as follows:

(a) the site is subject to a development lease that expressly requires the site to be developed for the proposed purposes;

(b) the lease was recognised in the 1991 Commission of Inquiry Report and its purpose approved as desirable;

(c) the appellant has to the extent practicable satisfied its obligations under the development lease;

(d) as the planning processes intended to resolve the issues related to the final scale and form of development have not progressed, the development application was the only course of action available to the applicant;

(e) there is a demonstrated planning need; and

(f) any adverse impacts can be effectively ameliorated or minimised within acceptable limits.

[396] It was conceded on behalf of the appellant that, of those, only subparagraph (e) was capable of being a sufficient ground. It should be noted however, as I have already observed, that subparagraph (d) is a sufficient reason to overcome any suggestion that the application is premature by reason of the absence of a Development Control Plan or Local Area Plan of the kind contemplated by s 1.10.33 of the 1997 Planning Scheme. As to subparagraph (e), I have found that no sufficient planning need has been demonstrated.

[397] It was pointed out, in the appellant's submissions, that the grounds relied on go further than those referred to by Mr Humphreys in the joint report. The grounds are fully set out in paragraphs 6 to 13 of the "amended grounds for approval"[154] and may be summarised as follows:

(i) Consistency with the development lease, which was granted in exchange for relinquishment of mining leases, thereby enabling preservation of areas of environmental significance;

(ii) The provision of residential and tourism development adjacent to Fraser Island, removing development presence from that Island and contributing to Australia's discharge of its obligations under the UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage;

(iii) Realisation of "the only significant opportunity" for urban expansion for Rainbow Beach;

(iv) A strong and demonstrated economic, community and planning need for the proposed development;

(v) Likely community benefit in terms of access to services and facilities, the provision of economic activity, employment and services, and substantial monetary contributions in freeholding payments (to the State);

(vi) Providing for the master planned, sensitive and integrated development of the site;

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154 Exhibit 242.

(vii) Provision of additional housing choice;

(viii) Provision of additional capacity, choice and variety of tourist accommodation

(ix) Advancement of the objectives of various tourism studies and documents;

(x) Provision of retail and commercial development affording greater choice and variety, reducing travel time and cost for trade area residents (including reducing the need to travel to Cooloola Cove, Tin Can Bay and Gympie for higher order services), promoting competition in price and service and creating local employment opportunities;

(xi) Generation of employment during construction;

(xii) Adoption of environmental best practice for water supply, sewage treatment and water sensitive urban design;

(xiii) Contribution to the upgrade of Council's sewage treatment plant;

(xiv) Environmental and community benefits from implementing all or a substantial part of the 'whole of community' option for disposal of effluent for Rainbow Beach; and

(xv) Achievement of ecologically sustainable development.

[398] I do not consider that those matters, considered individually or collectively, warrant approval in this case. In that regard:

- The development lease, and the circumstances of its grant, do not lead to the conclusion that the application ought be approved, for the reasons previously given. The appellants submissions did not press that ground.
- While, in theory, there are a number of benefits which might flow from significant urban residential, tourism, retail and commercial development in the Rainbow Beach locality, I have found that there is no sufficient economic, community or planning need for the extent of development now proposed on RS2. If approved, it would be unlikely to be realised, in full, for a very long time, if at all. In the meantime, opportunities for further development exist within the undeveloped part of RS1.
- I am not satisfied that the proposal would have a significant effect in terms of relieving development pressure on Fraser Island (there is little evidence of such

pressure at present) or in enabling the nation to meet its UNESCO obligations. That is particularly so given that it is unlikely that the more tourist-oriented parts of the development would be developed in the short to medium term.

- For the reasons already discussed, the proposal, while incorporating some aspects of best practice, is not sufficiently sensitive and is not ecologically sustainable.
- The benefits from the sewerage upgrade and 'whole of community' disposal option are considered below.

[399] Particular matters of benefit relied upon by the appellant as justifying approval, in the face of any conflict, are those to be had by reason of the appellant's preparedness to contribute to upgrading the Council's sewage treatment works and its commitment in relation to disposal, by way of irrigation on RS2, of the treated sewage not only generated by the RS2 development but also that generated by the whole Rainbow Beach community, or at least as much as is possible. That would provide a significant community benefit, given the difficulties, from an environmental perspective, which exist with the Council's current treatment and disposal of effluent.

[400] The Council's existing treatment plant lies on the western side of the peninsula, adjacent to the environmentally significant Tin Can Bay. The irrigation area about it is low-lying (only approximately 10 hectares is above 2.0 metres AHD) and the water table is close to the surface. In their sixth joint report, the effluent disposal experts recognised that:

> "Council's irrigation area is constrained and suffers from waterlogging across its area, particularly in wet season summer months."

Mr Fredman's evidence is that the Council's current treatment plant only has a limited life before Council starts running into licence problems with respect to the discharge.

[401] In this context, the proposal, to dispose of effluent, treated to an upgraded A+ standard, from the whole of community onto land in the RS2 development has

obvious attractions for the Council and at least substantially explains its support for the proposal. The Council's formal position is as follows:

> "'The respondent supports an approval of the proposed development which, in respect of effluent disposal, involved the disposal, on the Rainbow Shores 2 site, of the maximum quantity of whole of the community effluent that can be appropriately disposed of on the Rainbow Shores 2 site. The respondent's support is subject to conditions, including appropriate conditions already agreed to by the experts and conditions based upon commitments made by the appellant and accepted by the respondent, as referenced below.'
>
> The commitments referred to therein include:
>
> (i) 'Because the upgrade requirements are significant and the developers demand on the public water and sewerage infrastructure will require significant upgrades to this infrastructure, it would be appropriate for the infrastructure upgrades to be funded by the applicant through infrastructure charges and direct contributions under an infrastructure agreement. This would include any investigation, approval, design, construction and commissioning costs. This would be a matter of conditioning any development approval.'
>
> (ii) 'The cost of constructing, maintaining or operating the sewerage scheme will not impact adversely on the sewerage rate in the existing approved township area of Rainbow Beach'.
>
> (iii) The full capital and ongoing operating costs of the upgrades will be met by the Rainbow Shores Stage 2 development, such that there will be no adverse impact on the rate payers outside of the Rainbow Shores Stage 2 development area over and above the rating levels which would otherwise have applied if the proposed development had not proceeded.
>
> (iv) 'Our client is prepared to enter into an infrastructure agreement with your client in relation to services provided by the Council, including sewerage and associated effluent disposal. The proposed sewerage infrastructure agreement would require our client to:
>
> (a) provide a works contribution for the following non-trunk sewerage infrastructure necessary to service the proposed development:
>
> (i) a sewer main to transport effluent from the proposed development to the Council's sewage treatment plant;
>
> (ii) a sewer main to transport treated effluent from the Council's sewage treatment plant for use in dual reticulation within the development and for land based disposal;

(iii) dual reticulation and a land based disposal system within areas consistent with any development approval for the proposed development;

(b) provide a works contribution or a financial contribution to meet the costs of providing trunk sewerage infrastructure to upgrade the Council's sewage treatment plant necessary to service the proposed development;

(c) provide a financial contribution to meet the costs of providing any trunk sewerage infrastructure as determined by Council that:

(i) manages the effects of sewerage from the proposed development taking into account relevant social, environmental as well as economic factors;

(ii) is necessary to service the proposed development; and

(iii) is the most efficient and cost-effective solution for servicing the proposed development.

If the proposed development is approved by the Court, our client would accept a condition of approval which requires compliance with the sewerage infrastructure agreement.'"

[402] It was pointed out that RS2 has qualities which make it particularly suitable to provide an irrigation area. In particular, the sub-surface conditions provide, in effect, a substantial natural sand filter, draining east to the ocean. As Mr Sutherland pointed out (emphasis added):

"… this land form, this sand dune is effectively a sand filter, it is a joint sand filter, and sand filters now for many thousands of years have been used for this particular purpose, to treat water prior to drinking, but also to treat effluent as well. The reason that it is so good is that it responds rapidly to shock loads. So if suddenly it has effluent and it hasn't had effluent for a while, the bacteria that perform this denutrification function and perform this treatment function suddenly explode in population and they use nitrate to do so and they use carbon and nitrate N allows them to perform this miracle of cleaning the water up. It just so happens that we have a land form here that, if we disperse the irrigated recycled water adequately, we have this diffuse discharge of very low concentration water. So a more ideal land form for the disposal of Rainbow Beach's effluent you could not wish for."

[403] There is no other area on the Inskip Peninsula which is the equal of this site, in terms of its desirability from a groundwater perspective, because the easterly flow to the ocean separates the areas to the west of the Inskip Peninsula road. There is a buffer in the groundwater where there is treatment because of the extra soil depth

east of the divide[155]. It should be noted however, that the evidence did not go so far as to establish that irrigation on the RS2 site is the only possible viable way in which the Council may acceptably deal with sewerage disposal into the future.

[404] The offer to use the RS2 land for this purpose is obviously only made on the basis that the proposed development proceeds. The co-respondent submits that the offer to dispose of effluent beyond that generated by RS2 should be disregarded as irrelevant on the basis that it is akin to the matters considered by the Full Court in *R v Brisbane City Council; ex parte Read*[156].

[405] *Read's case* involved a decision, pursuant to the *City of Brisbane (Town Planning) Act* ('CBTPA'), to propose to approve a re-zoning application, made by D, to facilitate the expansion of a quarry on land at Ferny Grove. The Full Court held that the Council's decision had been influenced by irrelevant considerations.

[406] Prior to the re-zoning application, part of D's land had been resumed by the Council, as the intended site of a water reservoir. There was an extant unresolved claim for compensation with respect to the resumption. By its application, D sought to re-zone the existing reservoir lands (which had been resumed), to "Extractive Industry" so as to carry out quarrying operations. The proposed reservoir would be relocated to another area of D's land. D executed a re-zoning deed with the Council by which D would, in the event of the Governor-in-Council ultimately approving the re-zoning, abandon its claim for compensation in respect of the earlier resumed land and transfer to the Council, free of cost, the new proposed reservoir lands ('the land swap agreement').

[407] At the same time, the Council was dealing with companies associated with D in respect of unattractive gravel plants which had been operating on the south bank of the Brisbane River near the William Jolly Bridge. Agreement was reached for closure of the existing treatment plants, to permit the extension of the South Side Riverside Drive and Beautification Scheme ('the plant closure agreement').

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155 T21-73, lines 1-15

156 [1986] 2 Qd R 22.

[408] The plant closure agreement, and the land swap agreement were finalised concurrently as part of a "package deal". de Jersey J (as he then was), with whom McPherson J agreed, was not prepared to infer, from the land swap agreement, that the Council had been substantially influenced by irrelevant considerations, but reached a contrary view with respect to the concurrent finalisation of the agreement for closure of the plants near the William Jolly Bridge as part of a "package deal". He concluded that:

> "It does in my view emerge clearly from the material before us that in proposing to approve the Ferny Grove re-zoning, the Council was substantially influenced by the prospect of securing by agreement the closure of the William Jolly Bridge Gravel Plants. Desirable as that object might generally be with regard to the interests of the rate payers of Brisbane, it must patently have been irrelevant to the question whether or not the Ferny Grove lands should be re-zoned to "Extractive Industry". Section 8(5) of the *City of Brisbane (Town Planning) Act* sets out some of the factors to be taken into consideration by the Council in dealing with a re-zoning application, factors which may broadly be described as relating to town planning matters. Those factors of course have to be considered by reference to the land the subject of the application. It could not sensibly be suggested that in this case the re-zoning of the Ferny Grove land necessitated or made desirable the cessation of the William Jolly Bridge gravel operations; there is obviously no relevant relationship between the two. A requirement of the latter could not be imposed as a condition of the former… I therefore conclude that in proposing to approve the re-zoning application, the Council were substantially influenced by an extraneous consideration…"

[409] There are obvious factual differences between this case and those in *Read*. It was submitted for the co-respondent however, that the situation is analogous. That cannot be the position in relation to the upgrading of the Council treatment works, because that is required to deal with the additional load associated with the RS2 development and the need to have that wastewater treated appropriately. There is also an obvious and relevant connection between the proposed development and the construction of infrastructure, on RS2, capable of disposing of treated effluent.

[410] It was submitted however that, to the extent the appellant agrees to make the irrigation infrastructure, on RS2, available to dispose of the treated effluent for the whole of the community, thereby assuming the Council's responsibility for disposing of the effluent produced by those beyond RS2, (and solving an existing problem of the broader community), the benefit is extraneous and cannot properly be considered. It is not, it was submitted, something which has a relevant nexus,

which could support a condition of approval (it is proposed to be the subject of an infrastructure agreement).

[411] It should be remembered that the touchstone for the scope of relevant considerations is the relevant statute. de Jersey J (as he then was) in *Read* determined the scope of relevant considerations by reference to those set out in the CBTPA, which he broadly described as relating to town planning matters.

[412] It has already been observed that the material change of use component of this application must be assessed having regard to the considerations which applied under the now repealed PEA and be decided under the relevant provisions of that Act. Reference to the provisions of the PEA does not lead to a materially different conclusion in relation to the range of relevant considerations. The range of matters to be considered under s 4.4(3) is comparable to (although extended upon) that under the CBTPA. The "grounds" which may justify approval are expressed as sufficient "planning" grounds.

[413] The situation might arguably be different for decisions to which 3.5.14 of the IPA or ss 326 or 329 of the SPA apply. What must now be demonstrated are not "planning grounds" but simply "grounds". Grounds are, in turn, defined as "matters of public interest", an expression which arguably broadens the range of relevant considerations to include matters of public benefit which might once have been thought to be extraneous.

[414] There is a closer connection between the proposed development of RS2 and the "whole of community" disposal option than between the proposed Ferny Grove quarry and the South Brisbane plant closure in *Read's case*. The appellant proposes to solve the Council's existing problem not in a way which is unconnected with the RS2 development but rather by using the treated wastewater (for toilet flushing, washing cars and other external use) and irrigating parts of the RS2 site which are to remain vegetated, by use of infrastructure which is required to dispose of treated effluent generated by the RS2 development, in any event.

[415] On the other hand the evidence does not justify a conclusion that the "whole of community" effluent is needed to supply sufficient water for the development to proceed. It was submitted, for the co-respondent, that the acceptance of the additional wastewater is, in reality, more of a liability which the appellant is prepared to assume, than some sort of benefit to, or requirement of, the development.

[416] Ultimately it is unnecessary for me to reach a concluded view about whether this is a relevant consideration. Even assuming its relevance, it would not, on balance, cause me to alter the conclusion at which I have otherwise arrived. That is not an opinion which I have reached lightly. I recognise the magnitude of the problems confronting the Council in dealing with sewage treatment and disposal and I can understand the attractiveness to the Council of the appellant's offer, but I remain of the view that it is, nevertheless, on balance, undesirable to grant an approval of the subject application.

Conclusion

[417] For the reasons given I have concluded that:

(a) there are no bushfire management, beach access, wastewater reuse or groundwater issues which warrant refusal; and

(b) the proposal would not have an unacceptable impact on landscape character and natural amenity; and

(c) the impact of the proposal on the value of the site to geosciences is part of its likely adverse environmental impact, but not determinative; but

(d) the proposal

(i) would adversely impact on the flora, fauna and biodiversity values to an unwarranted extent;

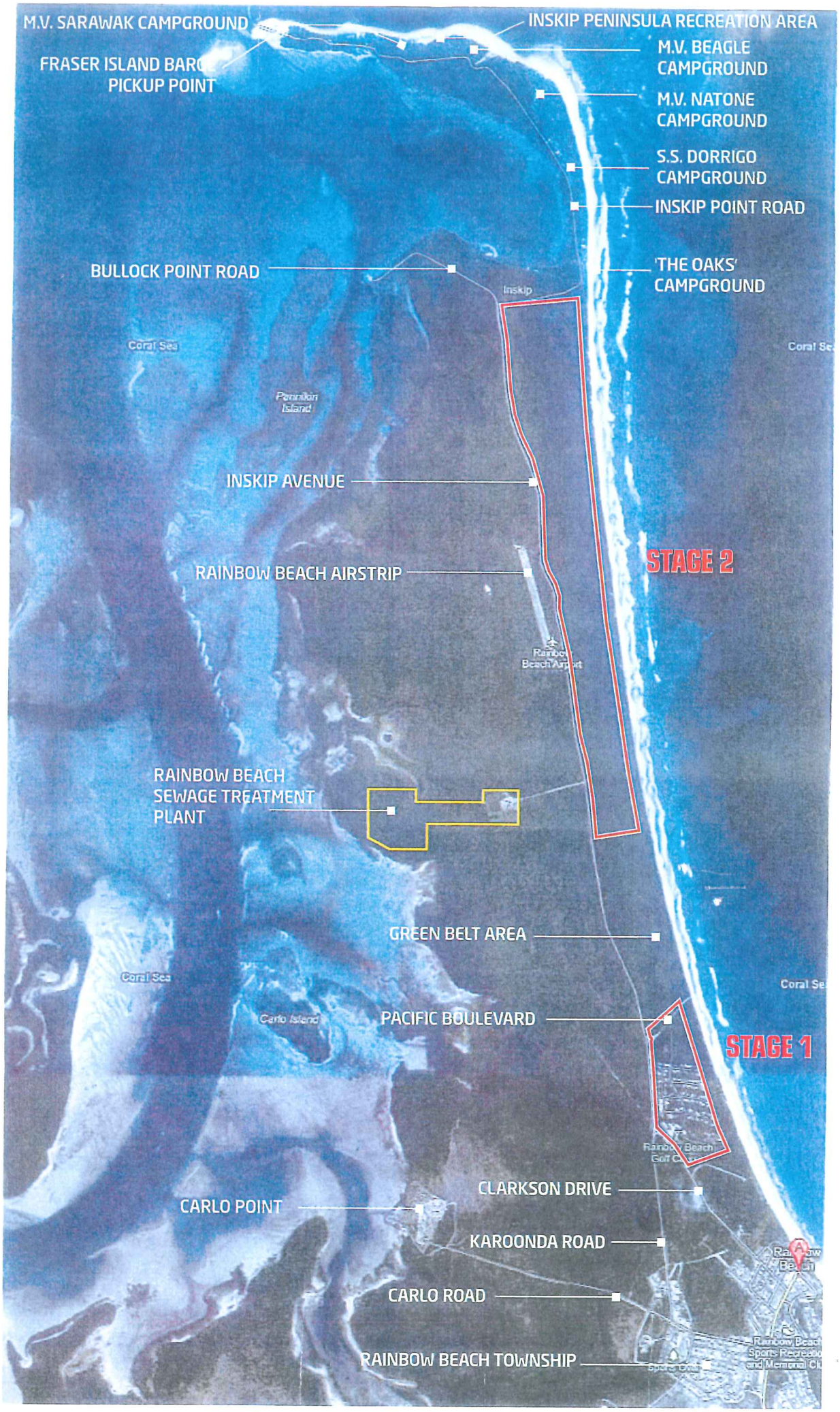
(ii) would consequently conflict with the provisions of various planning documents, including the superseded, existing and draft planning schemes; and

(iii) is not supported by sufficient economic, community or planning need; and

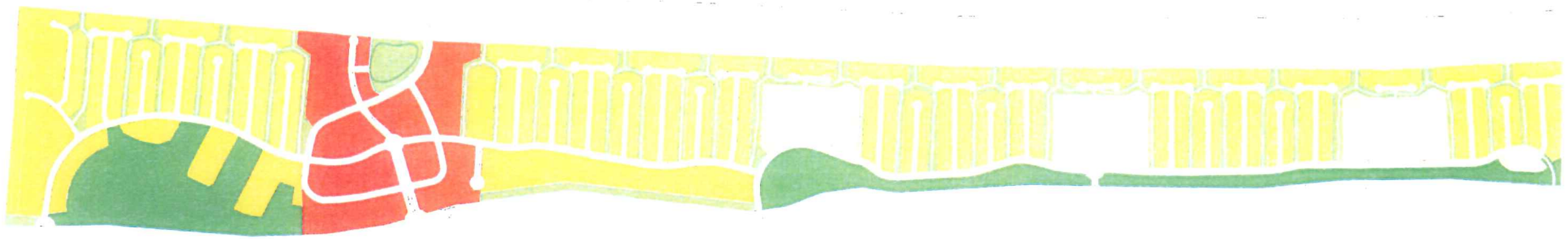
(e) the matters relied upon by the appellant are not sufficient to warrant approval otherwise.

[418] The appellant has not discharged its onus. The appeal is dismissed.

ANNEXURE 1


M.V. SARAWAK CAMPGROUND
INSKIP PENINSULA RECREATION AREA
FRASER ISLAND BARG
PICKUP POINT
M.V. BEAGLE
CAMPGROUND
M.V. NATONE
CAMPGROUND
S.S. DORRIGO
CAMPGROUND
INSKIP POINT ROAD
BULLOCK POINT ROAD
'THE OAKS'
CAMPGROUND
Inskip
Coral Sea
Coral Sea
Pennikon
Island
INSKIP AVENUE
STAGE 2
RAINBOW BEACH AIRSTRIP
Rainbow
Beach Airport
RAINBOW BEACH
SEWAGE TREATMENT
PLANT
GREEN BELT AREA
Coral Sea
Coral Sea
Carlo Island
PACIFIC BOULEVARD
STAGE 1
Rainbow Beach
Golf C
CLARKSON DRIVE
CARLO POINT
KAROONDA ROAD
CARLO ROAD
RAINBOW BEACH TOWNSHIP
Rainbow Beach
Sports Recreation
and Memorial Cl

ANNEXURE 2



LEGEND

- SINGLE LOT RESIDENTIAL
- MULTI-UNIT RESIDENTIAL
- RESORT CENTRE
- TOWN CENTRE
- COMMUNITY FACILITIES PRECINCT
- OPEN SPACE

RAINBOW SHORES STAGE 2 - COURT APPEAL
JOINT PLANNING EXPERTS REPORT

RAINBOW SHORES MASTER PLAN (OCTOBER 2006)

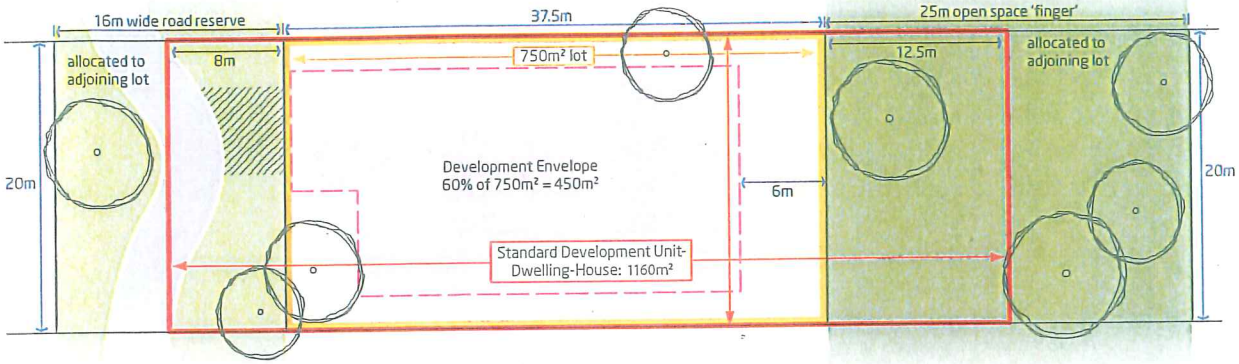
Indicative Land Use Plan

0 125 250 375 500 metres

1:12,500

FILENAME >	ATTACHMENT D3	DATE >	2 DECEMBER 2011
JOB NO. >	086006	AMENDED >	N/A
SCALE >	1:12,500	VERSION >	1.0

FIGURE 2-4



Area of Vegetation Protection and Fire Breaks in a Standard Development Unit

Open space corridor	= 250m²
Lot 750m² - 450m² development envelope	= 300m²
Road reserve (say 10%)	= 16m²
	566m²

(49% of Standard Development Unit Area)

0 5.0 10.0 15.0 20.0 metres

1:500

Legend

- Standard Development Unit Boundary
- Lot Boundary
- Development Envelope
- Public Open Space
- Road Reserve
- Surveyed Tree to be Retained
- Access Driveway Zone (shown on VMP)

Standard Lot Development- Dwelling House

FILENAME>	SLD DWELLING HOUSE	DATE>	05 NOVEMBER 2010
JOB NO. >	086006	AMENDED>	29 NOVEMBER 2010
		VERSION>	3.0

FIGURE 2-4

Area of Vegetation Protection and Fire Breaks in a Standard Development Unit

Open space corridor	=	375m²
Lot 1200m² - 840m² development envelope	=	360m²
Road reserve (say 10%)	=	24m²
		759m²

(42% of Standard Development Unit Area)

0 5.0 10.0 15.0 20.0 metres
1:500

Legend

- Standard Development Unit Boundary
- Lot Boundary
- Development Envelope
- Public Open Space
- Road Reserve
- Surveyed Tree to be Retained
- Access Driveway Zone (shown on VMP)

Standard Lot Development- Multi-Residential

FILENAME >	SLD MULTI-RESIDENTIAL	DATE >	05 NOVEMBER 2010
JOB NO. >	086006	AMENDED >	30 NOVEMBER 2010
		VERSION >	3.0

FIGURE 2-5