

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Stockland v Sunshine Coast Regional Council & Ors* [2013]
QPEC 79

PARTIES: **STOCKLAND DEVELOPMENT PTY LTD**
(appellant)

v

SUNSHINE COAST REGIONAL COUNCIL
(respondent)

and

**CHIEF EXECUTIVE, DEPARTMENT OF
TRANSPORT AND MAIN ROADS**
(first co-respondent)

and

**CHIEF EXECUTIVE, DEPARTMENT OF
ENVIRONMENT AND RESOURCE MANAGEMENT**
(second co-respondent)

and

MARK PERISSINOTTO
(third co-respondent)

and

THERESE LUCAS
(fourth co-respondent)

and

DEVELOPMENT WATCH INC
(fifth co-respondent)

and

TWIN WATERS RESIDENTS ASSOCIATION INC
(sixth co-respondent)

FILE NO/S: 2282/09

DIVISION: Planning and Environment

PROCEEDING: Appeal

ORIGINATING COURT: Brisbane

DELIVERED ON: 13 December 2013

DELIVERED AT: Brisbane

HEARING DATE: 11 February 2013 to 6 March 2013, further evidence received on 28 November 2013 and on 11 December 2013 and further submissions received on 11 December 2013

JUDGE: Rackemann DCJ

ORDER: **The appeal is dismissed**

CATCHWORDS: Planning and Environment – Applicant appeal – Application for preliminary approval overriding the planning scheme – Proposed urban residential development for approximately 950 lots on disused sugarcane farming land – Where site within the urban footprint pursuant to the regional plan but not planned for urban expansion under either the existing or draft planning schemes – Whether planning scheme overtaken by events – Flooding – Good quality agricultural land – Visual amenity and character – Town planning and community need – Public benefit – Sufficiency or otherwise of grounds to approve notwithstanding conflict

COUNSEL: DR Gore QC, BD Job and JG Lyons for the appellant
CL Hughes SC and MA Williamson for the respondent

SOLICITORS: Clayton Utz for the appellant
Sunshine Coast Regional Council Legal Services for the respondent

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The parties

- [1] The appellant is the owner of ten contiguous allotments, with an area of approximately 103ha, located north of the Maroochy River and east of the Sunshine Motorway. Its appeal is against the respondent's refusal of its development application for a preliminary approval overriding the planning scheme. If granted, the approval would facilitate the development of the site for urban residential purposes.
- [2] The first and second co-respondents by election were among the relevant referral agencies. Neither took an active part in the hearing. Indeed proposed conditions of any approval have been agreed to the satisfaction of all referral agencies. The other co-respondents were adverse submitters in respect of the development application, but also took no active part in the hearing.

The site and locality

- [3] The site is a mostly cleared and entirely disused former sugar cane farm. There are areas of remnant vegetation towards its centre and at its south-eastern corner. The land has not been cultivated since approximately 2003, when the Moreton Sugar Mill closed. For the past five years the land has been maintained by Stockland.
- [4] To the north, residential development, comprising the suburb of Pacific Paradise (mostly single detached low-density dwellings on standard residential allotments) is separated from the subject land by the David Low Way, at the northern boundary of the site.
- [5] East of the subject land is the Twin Waters Residential Community – a planned community of detached houses on standard residential lots. This community comprises a range of established residential houses, being mostly single detached dwellings on lots with an average lot size in the order of 700m². Medium density dwellings and a golf course are also located within this residential community. The

interface between the subject land and the Twin Waters Residential Community comprises a 25 metre wide vegetated buffer, which is to be preserved.

- [6] The Maroochy River lies to the south of the site.
- [7] The subject land's western boundary is formed by the Sunshine Motorway and planned CAMCOS corridor. West of the Sunshine Motorway lies a much larger area previously used for sugar cane farming. The majority of that land is not longer used for that purpose. The Council has approved the development of a golf course over part of it.

The proposal

- [8] As already noted, the development application was for a preliminary approval overriding the planning scheme. That is necessary, in order to facilitate the development, as the site lies in an area which is not planned for urban development pursuant to the planning scheme.
- [9] The proposed preliminary approval envisages a range of residential uses with a substantial proportion of the land within a conservation area or open space area, in accordance with the proposed Twin Waters West Preliminary Approval Document ("the PAD"). The PAD includes a master plan and accompanying table of development. Approximately 950 allotments are envisaged, ranging in size from 200m² to 640(+)m² with an expected average lot size of 400m².
- [10] The PAD divides the land into five precincts. Precincts 1 to 4 are for forms of residential development including detached houses, community uses and a range of supporting activities. Precinct 5, which is the largest of the precincts at 43.7ha, is for conservation purposes and would retain all existing remnant vegetation on the subject site and provide for the rehabilitation of almost 35 hectares of regional ecosystem. Vehicular access is to be via Ocean Drive and Stillwater Drive.

- [11] Matters of intended character, density, built form and assessment levels vary from precinct to precinct. Future development that is compliant with the relevant provisions of the PAD would be self assessable or code assessable.
- [12] The proposed site density is in order of 15.5 dwellings per hectare. The planners noted that is marginally higher than the “minimum” 15 dwellings per hectare referred to in the South East Queensland Regional Plan (SEQRP) for new urban development sites.

The public submissions

- [13] Public notification of the development application attracted 948 properly made submissions. 888 of those objected to the proposal, with the majority being by way of 3 different pro-forma’s organised by residents’ associations. Sixty submissions were received in support of the proposal.
- [14] The grounds of the submissions were summarised in the council officer’s report on the application as follows:

“Most submissions raised the issue that the application was contrary to the planning scheme because it is a designated cane lands precinct and also because it is designated flood plain. ...

Secondary issues ... were associated with lot sizes (seen as too small) and dissatisfaction with the reference “Twin Waters West” as the proposal would not result in a like development to the existing community....

Other issues related to privacy concerns for residents on the boundary with the subject and general amenity concerns related to the visibility of the site from the Motorway...

60 submissions were received in support of the proposal. Generally these submissions identified support based on creation of jobs and needed additional housing, that the proposal was an improvement to an existing vacant and “useless” or “unattractive” field, that it provided good environmental outcomes, improved accessibility and the opportunity to secure much needed community facilities or land for such facilities. Some comments were also received that the proposal would result in an improvement to the David Low Way/Ocean Drive intersection at the developer’s expense.”

The issues

- [15] The issues in dispute were helpfully summarised in Exhibit 2A. They require consideration of the following:
- (a) conflict with the Planning Scheme (and the Draft Planning Scheme);
 - (b) flood issues;
 - (c) good quality agricultural land;
 - (d) visual amenity and character;
 - (e) town planning and community need;
 - (f) the sufficiency of grounds to approve notwithstanding conflict.

The assessment criteria

- [16] The development application was lodged with the Council in August 2007, when the *Integrated Planning Act 1997* (IPA) was in force. On 21 July 2009, the Council resolved to refuse the development application. On 18 August 2009, the appellant commenced proceedings in this Court against the Council's refusal. The *Sustainable Planning Act 2009* (SPA) commenced on 17 December 2009.
- [17] Because the application was made under the IPA but not decided before the SPA commenced, IPA applies for deciding the application. The appeal must be heard and decided under the now repealed IPA as if SPA had not commenced.
- [18] The part of the application that states the way in which the applicant seeks the approval to vary the effect of the planning scheme, ss.3.5.5A and 3.5.14A apply. For that part of the application seeking preliminary approval for a material change of use, ss.3.5.5 and 3.5.14 apply and the decision must not compromise the achievement of DEO's for the Scheme area, or conflict with the Scheme, unless there are sufficient grounds to justify the decision despite the conflict. However,
- (a) under both ss.3.5.14(4)(c) and 3.5.14A(2)(c), prohibition on a decision compromising the achievement of a DEO does not apply if such compromise is necessary to further the outcomes of the Regional Plan;

- (b) the Assessment Manager (and the referral agencies) must have regard to the SEQRP where (as here) it is not identified as being appropriately reflected in the Planning Scheme;
- (c) the sub-regional narratives in Part C, and the Regional Policies in Part D of the SEQRP are relevant to the assessment of development applications; and
- (d) s.2.5A.21(3) of the IPA provides:

“For this Act, to the extent there is an inconsistency between a regional plan and any other plan, policy or code under an Act of a planning nature, including any other planning instrument, the regional plan prevails.”

[19] Although each component of the application must be assessed separately, each does not exist in a vacuum, so that:

- on the one hand, the gravity of conflict between an application of a material change of use and the existing scheme cannot be put at nought simply because the applicant applies to vary the effect of the planning scheme so as to obviate the conflicts; but
- on the other hand, the request for variations may inform the identification of the material change of use which is sought.

[20] Further, in respect of the assessment of the proposed variation:

- (a) s3.5.5A(2)(d) requires assessment of the consistency of the proposed variations with aspects of the planning scheme, other than those sought to be varied;
- (b) s3.5.5A(2)(c) requires assessment of the effect of the proposed variations on submitter rights for future applications;
- (c) s3.5.5A(2)(b) requires the decision maker to have regard to the assessment under s3.5.5 of the material change of use component; and
- (d) to the extent that any part of the material change of use application is refused, s.3.5.14A(2)(a) requires the decision maker also to refuse the relevant part of the variation application.

The debate in this case centred on the material change of use component of the application.

- [21] Pursuant to s4.1.52(2)(a) the appeal is to be decided based upon the laws and policies in force at the time the application was made, but may give weight to any news laws and policies it considers appropriate.
- [22] The appellant bears the onus in the appeal.

The planning documents

(i) Maroochy Plan 2000

- [23] MP2000 took effect on 1 June 2000. It has been amended on 25 occasions, with amendments being made regularly from August 2000 up to and including 24 October 2011. The parties worked on extracts from the current version of the Scheme. No relevant amendments were identified.
- [24] The MP2000 comprises four (4) components in 4 volumes, namely:
- Administrative and assessment requirements (Volume 1);
 - a Strategic Plan (Volume 2) including DEO's, "Key Issues" and strategies by which the key issues are proposed to be addressed; PDLUs shown on the Strategic Plan Map; and objectives and implementation criteria measures;
 - Planning Areas, Precincts and Precinct Class provisions (Volume 3);
 - Codes (Volume 4).

It also includes Structure Plans and Maps.

- [25] The Structure Plan Map includes the majority of the site within the "Agricultural Protection" Preferred Dominant Land Use (PDLU) designation. Part of the site is included in the "Rural or Valued Habitat" PDLU, however that part is to be protected in the proposal. The principal intention for the Agricultural Protection PDLU is to retain the land for agricultural purposes and consequently protect the future viability of agriculture.

[26] The Agricultural Protection PDLU provisions are part of section 6 of the Strategic Plan Provisions dealing with Rural Activities. The key issues dictating the planning strategy for Rural Activities include:

“

- the fact that primary production is an essential component of Maroochy Shire’s economy;
- the need to preserve a sufficient stock of agricultural and other productive land to support each rural sector;
- the State Government Planning Policy regarding development and conservation of good quality agricultural land, where possible, including where the potential is not currently being realised;
- the realisation that an area of less than 24% of the Shire has been identified as good quality agricultural land for horticulture and sugar cane, which is being decreased by the pressure of an expanding population and the impact of non-rural development;
- the acceptance that some good quality agricultural land will be lost to urban activities because of the impracticality in many cases of urban areas skirting around contiguous productive land;
- the need to identify potential urban areas and to limit development and lot fragmentation in the shorter term;

...

- the contribution of the broad-acre rural character of much of Maroochy Shire to its tourist image and the recognition that some areas may never be used for more intensive rural activity nor are likely to be suitable for closer settlement, yet such areas make a considerable contribution to the visual amenity of an area as low intensity grazing land;

...”

[27] The Rural Strategy, to address those key issues is as follows (emphasis added):

“6.3.1 Central to the principal strategy is the protection of all good quality agricultural and other productive rural land where it is not required for, or committed to, urban development. The Strategic Plan nominates Agricultural Protection areas to preserve important agricultural land for that purpose. Nominated land is good quality agricultural land in terms of the State Government Planning Policy apart from land determined to be required for other purposes and land which contains vegetation worthy of preservation.

6.3.2 Also of importance is the reasonable protection of land suitable for less intensive agriculture and pastoral pursuits. Such land is appropriate under the ‘Rural or Valued Habitat’ designation and it is accepted that, unlike land in the previous category, interests competing for the use of some of this land may be more important to the Shire than its farming role and provision is made for uses of that type. However, any proposed development should have to demonstrate its suitability to the location and

that it will not cause detrimental effects on the environment, the amenity of the locality, the rural landscape or the productivity of a viable farming unit.

6.3.3 It is important that consideration be given to the effect that proposals may have on the character of the Shire's rural areas. This is an issue which should be taken into account with all applications."

[28] The Planning Scheme recognises however, that the mapping might not prove to be accurate. Accordingly it states:

"The boundaries of the Agricultural Protection areas are based on defining good quality agricultural land and consequently the location may vary to that shown in line with more detailed assessments undertaken in accordance with the State Government Planning Policy guidelines for the Identification of Good Quality Agricultural Land."

[29] Volume 3 of MP2000 breaks the Planning Scheme area into 30 planning areas which, in turn, are divided into over 300 precincts, in 18 precinct classes. The site falls within Planning Area No 23- Maroochy River Plains. The intention for the area is to provide for:

- "
- the protection of good quality agricultural land as identified on the Strategic Plan map,
 - the protection of the area's significant environmental values including those of the Bli Bli Wetland Sanctuary, and the Bli Bli State Forest,
 - on-going ecologically sustainable rural residential development and use at appropriate locations, and
 - general rural activities elsewhere in the area."

[30] The vision statement for the area includes:

"(1) It is intended that:
the Maroochy River floodplain continue to be used predominantly for cane growing, with continued management and use of State Forest land for forestry and associated purposes, and consolidation of the existing area of rural residential development.

- (2) This will be achieved by:
- (a) generally preventing the fragmentation or other alienation of good quality lands;
 - ...

[31] Key character elements include the rural landscape. In that regard, it is stated that:

"This Planning Area is intended to retain its key rural and open space characteristics supporting sustainable cane growing and other rural activities."

[32] Insofar as the settlement pattern is concerned, it is expressly provided that:

“Development for urban purposes is not intended in this Planning Area”.

- [33] Within the Maroochy River Plains planning area, the site falls within the “East Maroochy Cane Lands” precinct, being one of the sustainable canelands precincts.

The description of this precinct includes

“This Precinct contains the lowlands within the floodplain of the Maroochy River on the eastern (Marcoola) side of the river. These lowlands are predominantly under sugar cane production. Much of the area has been identified as having “good quality agricultural land” which is indicated on the Strategic Plan map”.

- [34] The intent for this precinct includes:

“The land in this Precinct is intended to be used predominantly for cane and other agricultural production. While the existing small residential areas along the David Low Way, Cooks Road and at the southern end of Godfreys Road are recognised, they are not intended to be expanded nor supplied with urban services. Generally no further significant fragmentation of land holdings is intended in this Precinct.

Any development of premises within the vicinity of the Sunshine Motorway and the David Low Way should set any buildings and structures well back from the road and maintain the roads generally rural setting. No direct property access should be obtained from the Motorway.”

- [35] The statement of preferred and acceptable uses includes:

“Neither urban nor rural residential uses are considered consistent with the intent and desired character of this Precinct outside the established settled areas at the eastern end of the David Low Way and the southern end of Godfreys Road.”

- [36] State Planning Policy 1/92: Development and the Conservation of Agricultural Land is identified as being appropriately reflected in the Planning Scheme.

- [37] Other provisions of MP2000 are dealt with later in the reasons when dealing with particular issues.

- [38] The provisions relevant to the site’s inclusion within the:

- (i) Agricultural protection PDLU
- (ii) Maroochy River Plains planning area; and
- (iii) East Maroochy Cane Lands precinct

mean that the proposal is in substantial conflict with MP2000, which intends this land, within the rural floodplain, to generally remain as rural land and not be developed for urban purposes.

[39] It was submitted, on behalf of the appellant, that the provisions of MP2000 have been overtaken by events particularly by:

- The SEQRP, and
- The ‘demise’ of a viable cane industry in the area, consequent upon the Mill closing.

Mr Schomburgk, the town planner called by the appellant, identified the overtaking of the Planning Scheme as “one of the fundamental grounds upon which I rely to justify this approval”.

(ii) The SEQRP

[40] The South East Queensland Regional Plan 2005-2026 commenced after the Planning Scheme, but before the development application was made. That version of the SEQRP was superseded by the 2009-2031 version, which commenced on 28 July 2009. Having been in operation for four years, the current version deserves significant weight. Its treatment of the subject site is similar to that contained in the earlier version.

[41] The SEQRP includes a Regional Vision and Strategic Directions, a Regional Land Use Pattern and Regional Policies relating to a range of planning issues. The statement of purpose for the Regional Land Use Pattern is as follows:

“The regional land use pattern defines the spatial framework for the region to achieve the desired regional outcomes. It identifies:

- regional land use categories
- land that can accommodate urban development to 2031
- land that is protected from further urban development
- sub-regional narratives.

It also helps to align regional infrastructure and transport systems with urban and economic activity areas.”

[42] The Regional Land Use Pattern allocates land into one of three Regional Land Use Categories, namely:

- Regional Landscape and Rural Production Area (RLRPA)
- Urban Footprint
- Rural Living Area

[43] The intent for the RLRPA is as follows:

“The Regional Landscape and Rural Production Area (RLRPA) identifies land with regional landscape, rural production and 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. The RLRPA’s natural assets require management to improve the capacity to provide ecosystem services, increase the region’s resilience and support the population.”

[44] The RLRPA is said to include land with one or more stated values, the list of which includes:

- good quality agricultural land and other productive rural areas
- land that forms strategic and regionally significant inter-urban breaks.

[45] The intent of the Urban Footprint, on the other hand, is as follows:

“The Urban Footprint identifies land that can meet the region’s urban development needs to 2031 in a more compact form.”

[46] The site lies within a swathe of land east of the Motorway which is in the Urban Footprint. The largely disused former cane land to the west of the motorway lies in the RLRPA. The appellant contends that the inclusion of the site within the Urban Footprint is an overtaking event in relation to the Planning Scheme provisions, bearing in mind that the Regional Plan prevails to the extent of any inconsistency.

[47] The inclusion of the site within the Urban Footprint means that the SEQRP does not require it to be preserved from urban development over the nominated planning horizon. That is so even where land is good quality agricultural land. In that regard, the Regional Plan provides:

“Within the Urban Footprint, SPP 1/92 does not preclude the conversion of good quality agricultural land to urban uses during the life of the plan.”

[48] The inclusion of the site within the urban footprint also means that the site forms part of the land identified in the regional plan as having the potential to meet the

region's urban development needs to 2031 in a more compact form. As was pointed out for the appellant, the SEQRP also states that:

“The Urban Footprint sets the context to achieving a pattern of development that is consistent with the strategic directions and regional policies set out in the regional plan.”

- [49] At first blush it might appear that the ‘Urban Footprint’ designation of the site under the SEQRP creates a point of inconsistency with the Planning Scheme but, as the respondent pointed out, the SEQRP does not go so far as to warrant that all land within the Urban Footprint will be suitable for, or given over to, urban development or will be so developed at any particular point within the planning horizon of the Regional Plan. Such matters are left to the planning scheme. In that respect, the SEQRP states (emphasis added):

The Urban Footprint does not imply that all included land can be developed for urban purposes. For example, national parks and state forests will continue to be protected and managed under state legislation such as the *Nature Conservation Act 1994* and the *Forestry Act 1959*, and remnant vegetation will continue to be protected under the *Vegetation Management Act 1999*.

Land in the Urban Footprint may be unsuitable for urban development for other reasons, including constraints such as flooding, land slope, scenic amenity, and the need to protect significant biodiversity values.

Local government planning schemes are the main instrument that will establish and refine the desired use of land and the preferred timing of development within the Urban Footprint.”

- [50] Accordingly, the determination of which parts of the Urban Footprint are developable and which are not and when to provide for the urbanisation of developable land is mainly done through the Planning Scheme.
- [51] While the Regional Plan leaves development timing to the local government, it encourages the development of GQAL land to be deferred as long as possible. In that regard it states, in relation to the potential conversion of GQAL within the Urban Footprint to urban uses that “decisions on development sequencing should seek to retain these lands in production for as long as possible”¹. Whilst the subject site is not currently in production, it is part of a broader area in which some cane farming persists. As was submitted for the respondent, the provision should not be

¹ Notes to s 4.2.

read so strictly as to render it negatory simply because the owner of a particular site for the time being chooses to take it out of production.

- [52] Accordingly, while the inclusion of the land in the Urban Footprint in the SEQRP is a relevant consideration it does not, of itself, necessarily establish a point of inconsistency between the Planning Scheme and the SEQRP or establish that the land is necessarily suitable for urban development or that provision should be made for its development to occur at this time. That is not to say that the Urban Footprint designation is meaningless or that the SEQRP is, as a planning document, subservient to the Planning Scheme. Rather, it simply acknowledges the limitations on the significance of the urban footprint designation, as provided for in the SEQRP itself.

(iii) The Draft Planning Scheme

- [53] In late August 2012, the Council resolved to publicly notify its Draft Planning Scheme. The public notification period ended on 14 December 2012. Following the decision to de-amalgamate the Sunshine Coast Local Government Area, Council resolved not to proceed with that part of the Draft Planning Scheme that relates to the new Noosa Council. The Council is reviewing the submissions received in relation to the balance of the Sunshine Coast area. It is anticipated that the Council will submit the Draft Planning Scheme (with any amendments) to the Minister soon, for finalising around January 2014². The draft has substantially progressed and is deserving of weight.

- [54] Unlike the existing Planning Scheme, the draft has been prepared with knowledge of the SEQRP and the site's inclusion in the Urban Footprint under that plan. Notwithstanding that, the Draft Planning Scheme does not encourage urban development of the subject site at this time. As the town planning experts agreed, the Draft Planning Scheme "retains and reinforces the policy position with respect to the subject land – that is, that it remain as rural land and that the site is subject to various constraints".

² Exhibit 79.

- [55] The Draft Planning Scheme includes a Strategic Framework and a map (Map 1) and Land Use Elements of that framework. The site falls within the “Rural” rather than the “Urban Area” land use element.
- [56] A “key concept” of the “settlement pattern and affordable living” provisions is that:
“Urban and rural residential development that is contained within defined local growth management boundaries.”
- [57] Section 3.3.3.1(b), in dealing with the growth management boundaries and land use categories, states the following specific outcome:
“Urban development is limited to land within the urban growth management boundary as identified on Strategic Framework Map SFM 1 (Land use elements) and in further detail on the zoning maps.”
- [58] Consistently with its “Rural” land use category, the subject site falls outside of the urban growth management boundary (which skirts around its northern and eastern boundaries) on SFM 1. Further, it is included in the Rural Zone on the relevant zoning map.
- [59] The containment of urban development within the defined boundaries is said to be so as to:
“(i) avoid biophysical constraints and natural hazards, including an allowance for the predicted impacts of climate change that may worsen these constraints and hazards;
(ii) protect good quality agricultural land, strategic cropping land (SCL) and potential SCL and other rural land;
(iii) maintain the largest possible area of land for rural, landscape and environmental protection purposes into the future;
(iv) protect the discrete identities of individual places and communities;
and
(v) maximise opportunities for the efficient delivery of infrastructure and services and the provision of infrastructure prior to or in conjunction with development.”
- [60] The Draft Planning Scheme also maps:
(a) the southern portion of the site as within a “high scenic value area” on SFM 6, but only the vegetated parts within the “high scenic area” designation on overlay map OVM 39M;

- (b) the whole of the site as within a “rural setting” landscape character and community identity element (SFM 6);
- (c) the whole of the site within an area of good quality agricultural land (SFM 7), and
- (d) the whole of the site within a flooding and inundation area (OVM 39H).

[61] The evident planning strategy in the Draft Planning Scheme, notwithstanding the inclusion of the site within the Urban Footprint pursuant to the SEQRP, makes it difficult to conclude that the SEQRP designation is an event which has overtaken the Council’s planning strategy that this site not be developed at this time.

[62] While accepting that it has long been the traditional view that a draft planning instrument is entitled to weight once it has been placed upon public notice, the appellant contended that the approval of its proposal would not “cut across” the implementation of the Draft Planning Scheme. Five submissions were made in support of that contention.

[63] First, it was submitted that the Draft Planning Scheme effectively preserves the status quo in terms of the planning strategy for the subject site and so should not lead to a different outcome, if the appellant is able to demonstrate sufficient grounds to approve its application notwithstanding the provisions of the current Planning Scheme. Whilst the Draft Scheme may carry forward a similar planning strategy for the subject site, it is significant that it does so notwithstanding the intervening publication of the SEQRP. The site’s inclusion within the Urban Footprint under the regional plan does not appear to have overtaken the planning strategy of the Council, as the local planning authority, to retain the subject site as rural land.

[64] Secondly, it was pointed out that the site’s location at the eastern extremity of the Rural Zoned land and its separation from the balance, by the Motorway, means that approval would not cut across the draft planning strategy to the same extent as might be the case if it were a large development in the middle of an area planned for other purposes. That observation may have some validity, but cannot be taken too far. For example, the extent that the proposal cuts across the planning strategy for

flooding reasons might not be any less by reason of its location east (rather than west) of the Motorway.

[65] Thirdly, it was submitted that the urban growth management boundary should not prevent approval if indeed there is a need for further land in this particular locality for the particular type of residential development proposed. The question of need is discussed later.

[66] Fourthly, reference was made to the 2008 Sunshine Coast Growth Management Position Paper³, to which the draft planning scheme makes historic reference⁴. That paper identified flooding constraints as the primary reason for the land being not intended for urban development, notwithstanding its former designation as an urban growth area under Council's draft LGMS and notwithstanding the Regional Plan's "Urban Footprint" designation. It was suggested that the urban growth management boundary therefore should not be an insurmountable barrier if the flooding constraint can be dealt with. Flooding issues are discussed later. However, it should be noted that, notwithstanding the contents of the Growth Management Position Paper, the Draft Planning Scheme does not state that flooding is the only relevant constraint or consideration underlying the treatment of the subject site.

[67] Finally it was submitted that little weight can be given to the future residential growth strategies in the draft scheme in view of the Minister's determination that Desired Regional Outcome 8 – Compact settlement of the SEQRRP is not appropriately reflected in the draft planning scheme⁵. If the scheme becomes law with the same qualification, regard would need to be had to DRO 8 of the SEQRP in determining future applications⁶.

[68] DRO 8 is expressed in the following terms:

“A compact urban structure of well-planned communities, supported by a network of accessible and convenient centres and transit corridors linking residential areas to employment locations establishes the context for achieving a consolidated urban settlement pattern.”

³ Exhibit 75.

⁴ Exhibit 25C p 36.

⁵ Exhibit 71.

⁶ See SPA s 314(2)(b).

[69] That DRO is supported by principles, policies and programs with respect to a number of aspects. The Minister's determination does not permit identification of the respect or respects in which it is said that the draft scheme fails to appropriately reflect DRO 8 and, in particular, does not permit a conclusion that approval of urban development on the subject site is required to appropriately reflect that DRO.

[70] It was not contended that the Draft Scheme's treatment of the subject site was colourable, but there was some attempt by Mr Schomburgk to view the failure of the Draft Scheme to adopt a different approach through the prism of the Council's decision to defend this appeal. This site's treatment however, is broadly similar to that given to other caneland or former caneland within the floodplain (putting the golf course to one side). That area is generally mapped within the:

- Rural Land Zone element,
- Rural Settings Landscape Character and Community Identity element;
- GQAL Natural Resource element;
- Flooding and Inundation Area;
- Rural Zone.

[71] I am minded to place significant weight on the Draft Planning Scheme.

(iii) State Planning Policies

[72] A number of state planning policies were admitted into evidence and/or referred to at the hearing. They relate to issues which are dealt with later. Very recently, on 2 December 2013, the existing state planning policies were repealed and a new single state planning policy came into force.

[73] The new SPP is a statutory instrument for the purposes of the *Statutory Instruments Act* 1992. It comprises both statutory and non-statutory components.

[74] The new SPP identifies the State interests that local governments must take into account when preparing or amending planning schemes and in some cases assessing development applications. The development assessment requirements (being those

in Part E of the new SPP) only apply if the relevant planning scheme has not yet appropriately integrated the new SPP.

[75] The State interests identified in the new SPP are:

- (a) liveable communities;
- (b) housing supply and diversity;
- (c) agriculture;
- (d) development and construction;
- (e) mining and extractive resources;
- (f) tourism;
- (g) biodiversity;
- (h) coastal environment;
- (i) cultural heritage;
- (j) water quality;
- (k) emissions and hazardous activities;
- (l) natural hazards;
- (m) energy and water supply;
- (n) state transport infrastructure; and
- (o) strategic airports and aviation facilities.

[76] For each of the identified State interests the new SPP identifies the matters to be considered and integrated when making or amending a planning scheme.

[77] To assist with determining matters of State interest the supporting material for the new SPP includes mapping known as the SPP Interactive Mapping System. Pursuant to the SPP Interactive Mapping System the subject site is:

- (a) predominantly mapped as comprising “Agricultural Land Classification – Class A and Class B (as is land to the west of the Motorway);
- (b) partially mapped (along the western part of the subject site) as comprising “Important agricultural areas (as is land to the west of the Motorway);
- (c) completely mapped as within a Coastal zone;
- (d) partially mapped (at the southern most extremity) as within a “Coastal Management District;”
- (e) predominantly mapped as comprising “Coastal hazard – erosion prone area;

- (f) partially mapped as comprising “Coastal hazard – high storm tide inundation area;”
- (g) predominantly mapped as comprising “Coastal hazard – medium storm tide inundation area.”

[78] Part E of the new SPP sets out the interim development assessment requirements to ensure that certain matters of State interest are appropriately considered by local governments when assessing development applications where the planning scheme has not yet appropriately integrated the State interests as set out in the new SPP.

[79] The above mapping ties into Part E of the new SPP and would trigger consideration of certain matters if a development application for the use the subject of the appeal were made today (as the Council’s planning scheme does not integrate the matters set out in the new SPP). The above mapping also relates to matters not associated with Part E that would be required to be considered when the Council makes or amends its planning scheme.

[80] Interim development assessment requirements for consideration by local governments have been prepared for the following State interests:

- (a) mining and extractive resources;
- (b) biodiversity;
- (c) coastal environment;
- (d) water quality;
- (e) natural hazards;
- (f) emissions and hazardous activities;
- (g) state transport infrastructure; and
- (h) strategic airports and aviation facilities.

Interestingly, no interim development assessment requirements have been prepared for the identified State interest of agriculture.

[81] The reference, in these reasons, to now repealed State planning policies should be read as subject to the acknowledgment that they have been superseded by the new SPP. It was common ground however (and I accept), that the court should not give determinative weight to the new SPP having regard to:

- (i) the passage of time between the development application and commencement of the new SPP;
- (ii) the fact that the new SPP does not fundamentally change the types of matters to be considered in deciding whether to approve or refuse the development application the subject of the appeal, and
- (iii) the fact that matters now the subject of the new SPP were, in any event, the subject of detailed consideration during the appeal by the parties respective experts.

[82] As was pointed out on behalf of the respondent however, the new SPP and, in particular its mapping, is yet another acknowledgment of the various values / constraints applicable to the site, including its agricultural land significance.

Flooding

[83] The site is within a floodplain, is mapped as ‘flood prone’ under the existing Planning Scheme and within a ‘Flooding and Inundation Area’ in the Draft Planning Scheme.

[84] The current Planning Scheme defines flood prone land as that which has a reasonable probability of inundation during a 100 year AR1 flood event. The subject site is not only mapped as flood prone, but also satisfies the definition.

[85] As one would expect, the current Planning Scheme requires consideration of flooding impacts, for both the proposed use and for adjoining and downstream areas, where development is proposed on flood prone land⁷. In particular, the Planning Scheme includes a code for Integrated Water Management, the statement of purpose for which includes:

“(g) Adverse impacts, including cumulative impacts, as a result of flooding are minimised and unacceptable risk to people and property is not created”

[86] Relevant performance criteria and acceptable measures are as follows:

“(3) Flooding

⁷ See s 16.2 and 16.4.1 of the strategic plan.

PERFORMANCE CRITERIA	ACCEPTABLE MEASURES
<p>P1 Development does not result in:</p> <ul style="list-style-type: none"> • adverse impacts on flood conveyance capacity; • unacceptable risk to people’s safety; and • adverse impacts on the capacity to use land within the floodplain. 	<p>A1.1 In areas identified on Regulatory Map 1.5 – Flood Prone and Drainage Constraint Areas Special Management Area:</p> <p>(a) works do not involve:</p> <ul style="list-style-type: none"> (i) any physical alteration to a waterway or floodway including vegetation clearing; or (ii) net filling exceeding 50m³; <p>OR</p>
<p>P1 continued</p>	<p>(b) any reductions of on site flood storage capacity is avoided and any changes to depth, duration and velocity of floodwaters of all floods up to and including the 100year ARI are contained within the site;</p> <p>OR</p> <p>(c) there is no change in the flood characteristics of the 100year ARI outside the subject site in ways that result in</p> <ul style="list-style-type: none"> (i) loss of flood storage; or (ii) loss of/changes to flow paths; or (iii) acceleration or retardation of flows; or (iv) any reduction of warning times elsewhere on the floodplain. <p>A1.2 Stormwater peak discharges and levels are equivalent to the pre-developed condition.</p> <p>A1.3 Where a “regulation line” has been set by Council to define the limit to which development may encroach onto a floodplain development is undertaken outside such “regulation line”.</p>
<p>P2 For all floods up to and including the 100 year ARI:</p> <ul style="list-style-type: none"> • the safety of people on the site is maintained; • potential damage to property on the site is minimised; and • the functioning of essential services is maintained. 	<p>A2.1</p> <p>(a) Development is sited on land that would not be subject to flooding during the 100 year ARI flood event.</p> <p>OR</p> <p>(b) There is no increase in the number of people living or working on the site, except where the premises are occupied on a short-term or intermittent basis (e.g. by construction /maintenance workers, certain agricultural and forestry workers).</p> <p>OR</p> <p>(c) Development complies with the standards for flood immunity set out in <i>Planning Scheme Policy No. 5 – Operational Works</i>.</p> <p>A2.2 Any components of infrastructure that are likely to fail to function or may result in contamination when inundated by flood water (e.g. electrical switchgear and motors, water supply pipeline air valves) are:</p> <ul style="list-style-type: none"> (a) located in accordance with the standards for flood immunity set out in <i>Planning Scheme</i>

	<p><i>Policy No. 5 – Operational Works;</i></p> <p>OR</p> <p>(b) designed and constructed to exclude floodwater intrusion/infiltration.</p> <p>A2.3 Infrastructure is designed and constructed to resist hydrostatic and hydrodynamic forces as a result of inundation by the 100 year ARI flood event.</p>
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- [87] State Planning Policy 1/03: Mitigating the Adverse Impacts of Flood, Bushfire and Landslide is identified as having been appropriately reflected in the Planning Scheme.
- [88] The appellant proposes to carry out works to address those provisions by mitigating the flood risk for the referenced flood event. In particular, it is proposed to fill the site, so that it would be immune from flood to at least the ARI 100 year event, even allowing for potential sea level rise from future climate change⁸. As far as consequential flooding impacts off-site, Mr Collins (the expert called by the Council) ultimately accepted that the level of afflux caused by the proposal is acceptable, as is the loss of flood plain storage.
- [89] While the current Planning Scheme does not contain any express requirement in relation to flood free access routes external to the site⁹, the appellant also proposes to reconstruct the David Low Way, immediately east of the Motorway to achieve a flood immunity at the 50 year ARI level, which would see it remain trafficable, albeit inundated to some extent, to the 100 year ARI event under current conditions. In the event of sea level rise, it would not¹⁰. Mr Collins said that the immunity, in that circumstance would be less than an ARI 10 year event¹¹.
- [90] The appellants' approach would achieve compliance with the requirements of the current Planning Scheme for events up to a 100 year ARI event under current conditions being the event referred to in the above provisions of the Planning Scheme and would bring a benefit, in terms of upgrading the immunity of part of

⁸ The existing planning scheme does not adopt requirements for climate change scenarios, but it was common ground between the flooding engineers that the effect of sea level rise by the year 2100 should be considered.

⁹ Compare *Arora Constructions v Gold Coast City Council* [2012] QPEC 52.

¹⁰ Johnson at T8-37.

¹¹ Collins at T9-28.

the David Low Way. It would result in a development with significantly greater flood immunity than the Twin Waters Residential Estate, although the precarious position of that development should not necessarily be the benchmark for future approvals.

[91] The respondent accepted that the appellants could engineer the site to create allotments above most flood levels and to mitigate the external flooding impacts of the proposal. It maintained however, that to approve the proposed development in the floodplain would represent poor planning, particularly having regard to the potential for the site population to become isolated, including in more extreme flood events.

[92] It was also pointed out that the level of immunity proposed for the site can only be achieved by introducing a large volume of fill, contrary to that part of the Operational Works Code under the current Planning Scheme, which seeks maintenance of the natural landform as far as possible. Senior counsel for the respondent acknowledged however, that was not a reason which, of itself, would warrant refusal¹². As was submitted for the appellant it is relevant, in considering the acceptability of filling the subject site, that it is wedged between the embankment of the Motorway to the west and the filling for the existing Twin Waters development to the east. I would not refuse the development application by reason of the proposed filling.

[93] The Council also raised a concern that future drainage of the site may involve an inappropriate pumping system which is ultimately to be maintained at the Council's expense. This issue only arises in the event of sea level rises of the order of 0.8 metres. In that event, it will be a situation which the Council will face across many areas. The Council has already accepted pumped water quality and drainage control measures elsewhere; there is the ability for the Council to impose rate charges by way of a benefitted area scheme under the Local Government Act; infrastructure agreement represents another option. I would not refuse the application on this basis.

¹² T3-6.

- [94] It was common ground among the flooding experts, that:
- access to and from the site could be cut by floodwaters in extreme events
 - accordingly, the site may become isolated in a major flood
 - warning times do not allow for complete evacuation in advance of isolation
 - accordingly, a major flood event might result in an isolated community on an isolated site, surrounded by floodwater.
- [95] It was submitted, for the respondent, that this is unacceptable given that:
- (a) the site is not planned for urban residential development in the planning documents
 - (b) the site population (in the order of 2000 people) is significant
 - (c) the period of potential isolation, at in excess of 32 hours, is substantial
 - (d) the distance from safe refuge, at 4 km's, is also substantial
 - (e) the evacuation route, for anyone trying to escape, is potentially dangerous. Even with the proposed upgrading, the David Low Way will have water across it in a 100 year event (with no climate change) and progressively greater depths in less frequent events. It would not be trafficable at the 100 year event with projected sea level rise. This leads to the Sunshine Motorway which, in an ARI 100 year event and taking the predicted effects of climate change into account, would potentially have its northbound lanes inundated to in excess of 200 mm and its southbound lane inundated to in excess of 300 mm¹³. It would, of course, also be surrounded by flood water.
 - (f) The development would potentially place an additional burden on those bodies charged with responding to a flood disaster.
- [96] To address this, the appellant proposes an evacuation and a 'shelter in place' strategy. This includes filling part of the site to achieve probable maximum flood (PMF) immunity, thereby providing an area to which isolated residents could resort to seek refuge, on site, until the flood waters recede. Devising and managing an appropriate shelter-in-place strategy is more difficult than in *Arora Constructions v*

¹³ Exhibit 23, pg 55.

*Gold Coast City Council*¹⁴. Unlike in *Arora*, this is not a proposal for exclusively medium density development, under the control of a body corporate, on a platform, the entity of which is raised and which would permit residents to shelter in their own units. What is proposed is, in the main, a more conventional suburban subdivision of land to be held in individual ownerships. Much of the development site would potentially be inundated, with the result that isolated residents would not necessarily be able to shelter in their own homes.

- [97] The details of the appellants' draft management plan for such events were criticised. An obvious example is the absence of community facilities for use during such events and the consequent reliance on individual residents being afforded access to bathrooms in those houses, owned by others, above the PMF. As the respondent contended, an adequate plan has not yet been formulated. There was a debate about whether it was acceptable to leave that to the conditions stage. Even assuming that an acceptable management plan could be finalised and conditioned on any approval however, the question remains as to whether such an approach represents appropriate planning in the circumstances.
- [98] The approach of risk mitigation was held to be acceptable in *Arora Construction Pty Ltd v Gold Coast City Council*¹⁵ in the context of a planning scheme which encouraged development within the relevant floodplain, including on part of the site in question¹⁶. Further, Mr Collins was not opposed to dealing with the situation by an appropriate plan. As was pointed out for the respondent however, neither the existing or draft planning schemes support residential development of this site. The Council's position is that, in this case, the risks should be avoided, by not permitting the development in the floodplain, rather than mitigated by filling the site and adopting an emergency management plan.
- [99] The Council's position has some support in the Draft Planning Scheme. In particular, s.3.10.2.1(c) provides the following Specific Outcome in relation to flooding (emphasis added):

¹⁴ Although it was submitted, for the appellant, that a community facility, on the land above the PMF, could be proposed on land which could become common property under a Community Management Strategy (another option of using the Stockland sales office was also referred to).

¹⁵ [2012] QPEC 52.

- “c) Urban and rural residential development or other development involving the erection of a building or significant earthworks is located on land that is not subject to flooding in the defined flood event or defined storm tide event except in the following circumstances and only where the impacts of flooding on the development can be effectively mitigated such that there is no foreseeable risk to life or property:-
- (i) the development is for a single dwelling house or associated structure on a lot existing prior to the commencement of the planning scheme;
 - (ii) the development is on land that is already committed to urban or rural residential development by an approval granted prior to the commencement of the planning scheme;
 - (iii) the development is on land identified in a structure plan as an area intended for urban development;
 - (iv) the development is infill development within an existing developed area and is consistent with the intent of the applicable zone in terms of nature, scale and intensity of development;
 - (v) an overriding community need in the public interest has been demonstrated that warrants approval of the development despite its occurrence within an area subject to flooding; or
 - (vi) the development is for the infrastructure identified on the planning scheme maps.”

[100] The site is subject to flooding in the defined flood event. Given that no other exception is applicable, overriding community need in the public interest would have to be established if urban development of the subject site is to meet that specific intent, even assuming adequate mitigation measures by filling and by adoption of an emergency management plan. The issue of need is discussed later. That ‘avoid if practicable but mitigate if not’ approach is conservative, but understandable and worthy of some respect.

GOAL, the Mill closure, agricultural utility otherwise and proximity to residential development

[101] It has already been noted that, under the current Planning Scheme, the site falls within an Agricultural Protection area, which identifies important agricultural land and, more particularly, falls within a Sustainable Canelands precinct. The site is also mapped as Good Quality Agricultural Land (GQAL) in the Draft Planning Scheme. It is also within a cropping / horticulture area in the map of Rural Production and Natural Resources (Map 8) in the SEQRP. It has also been mapped

¹⁶ See [6]. [11]-[13].

under the new SPP as predominantly within an Agricultural Land Class A and Class B description and partly within an important agricultural area.

[102] The appellant contends that the site is wrongly identified as GQAL. That expression is defined as land which is capable of sustainable use for agriculture, with a reasonable level of inputs, and without causing degradation of land or other natural resources¹⁷. It has previously been noted that the current Planning Scheme acknowledges that the Agricultural Protection area identifies land on the basis of defining GQAL and that the location may vary from that shown. The dispute in this case however, has nothing to do with any lack of precision.

[103] The subject site has, in the past, been used for sugarcane farming for many years until 2004. It is common ground that in excess of 80% of the land remains suitable for sugarcane farming. The land could be returned to that use with reasonable inputs. The dispute is not in relation to the potential of the land sustainably to grow that crop. Mr Thompson (the expert called by the appellant) conceded that, in terms of a technical assessment, the land is GQAL for cane¹⁸. He contends however, that land suitable for that purpose should no longer be regarded as GQAL in this locality because, with the closure of the local mill, sugarcane, he contends, has ceased to be a crop of local significance.

[104] The scale of sugarcane production has reduced since the Mill's closure. When the local mill was operational it processed between 350,000 and 650,000 tonnes of cane. The Council's Rural Futures Background Study (Rural Futures) states:

“Sugar cane growing started in the Sunshine Coast in the late 1800s, and the Moreton Sugar Mill located in Nambour began operations in 1896. In the last decade that the Mill was in operation, approximately 10,000 hectares of land were allocated for cane production, although the actual harvested area was only approximately 7,000 hectares (mainly in the Maroochy River floodplain). During this time, the sugarcane tonnages received by the Mill ranged between 350,000 and 650,000 tonnes per year, with an average of about 500,000 tonnes.”

[105] Since the Mill's closure, sugarcane farming has ceased on much of the area previously under cultivation, but has not entirely disappeared from the area. About 20,000 to 30,000 tonnes per annum is now transported to the mill in Maryborough,

¹⁷ Exhibit 12, section 2.

¹⁸ T6-34.

but that is from only approximately 200 to 300 hectares of farmland. Some cane has also been sold for mulch, rather than crushing¹⁹. Mr Thompson's impression is that about 15% to 20% of what might be described as the Maroochy Floodplain Canelands is still used for commercial cane crops²⁰.

[106] There is nothing on the immediate horizon which would give great confidence of an imminent return to the scale of sugar cane farming which existed prior to the Mill's closure. There was a recent proposal for a 'cow candy' project, which would have processed sugarcane into fodder for export, but that project would only have processed another 30,000 tonnes annually, and, in any event, its proprietor has gone into receivership.

[107] Mr Sutherland (who was called by the respondent) pointed to a pilot project in the Burdekin Region where a prototype portable mill was used to crush local cane. That perhaps illustrates how technology could potentially be used, but there are difficulties in the use of that technology, as Mr Thompson pointed out and there is no basis to conclude that such technology is about to lead to an imminent broader revival of the sugarcane industry in this area.

[108] It was pointed out that the dramatic effect of the Mill's closure is acknowledged in the Council's Rural Futures study as follows:

“The Moreton Sugar Mill closed in 2003, which removed the market for sugar cane produced on the Sunshine Coast. The decision to close by the Mill owners was made after nearly two decades of uncertainty in the ability of the mill to remain economically viable. Sugar cane is generally the only traditional crop that can be grown on the majority of cane lands, so alternate uses for cane are being widely researched, with the most promising being feedstock (BioCane). The world sugar price is also currently high, so transportation of raw material to the Maryborough Sugar factory may also be a short term option for cane farmers.”

[109] It should be noted that, while acknowledging the serious effect of the mill closure, the study does not consign productive use of cane land to history. It speaks of transporting raw product to Maryborough (as currently happens on a modest scale) as a 'short term option' while alternate uses for cane are widely researched.

¹⁹ T6-28.

²⁰ T6-33; 7-14.

[110] It was submitted for the appellant that:

“Since the Mill closed, the classification of the land for GQAL is no longer soundly based or logically conceived. The classification has been overtaken by events not foreseen when the Planning Scheme was drafted.”

[111] It is true that the closure of the Mill, and its immediate consequences, was not foreseen by MP2000. Its effect means that some of the words in the Planning Scheme, particularly those that describe this floodplain as being used “predominantly for cane growing” have been overtaken by events. It is also true however that, whilst the current Planning Scheme has been amended on many occasions since, the planning strategy for the subject site (and other cane land within the same precinct) has not been altered. Further, the Draft Planning Scheme, which has been prepared in full knowledge of the mill closure, and the cessation of cane farming on much of the area previously cultivated (including the subject site) does not refer specifically to cane farming on the floodplain but continues to map the land as GQAL and to seek to preserve it from urban development at this time. The land is also shown as GQAL on the mapping associate with the new SPP.

[112] Mr Sutherland acknowledged that, prior to 2007, he would have taken a similar view to Mr Thompson about the consequences of the Mill’s closure, but, in more recent years he has given greater weight to the quality of the resource, rather than the apparent difficulties in profitably exploiting the resource at the minute. He is, in that regard, more conscious of the possibility of changing circumstances. He referred, in particular, to evidence of some optimism about the future for sugarcane demand and prices and the potential for increased foreign investment in the industry.

[113] It was pointed out by Mr Sutherland, that factors affecting the current economics of farming do not affect the classification of land as GQAL. For example, s 4.4 of SP 1/92 states:

“4.4 Although the demand for agricultural products fluctuates, once land is built on or subdivided, its return to agriculture is seldom practicable. Therefore, a decline in the market for a particular crop should not justify development on land traditionally used for growing that crop. Markets change and the land could be cultivated for other purposes.”

[114] In this case, the key to the decline in sugar cane farming in the locality is related not to a fluctuation in the market for sugar generally, but the absence of local infrastructure for processing the raw product. Mr Sutherland pointed out however, that it is at least possible that future increases in sugar prices might mitigate, to a greater extent, the loss of that infrastructure by making it more attractive for more farmers to transport their produce to Maryborough for crushing and by also potentially making the pursuit of alternatives more attractive.

[115] It was submitted, for the respondent, that whether the closure of the mill went so far as to render sugar cane no longer a locally significant crop, for the purpose of identifying GQAL, is a matter which the court ought not determine upon the consideration of an individual development application. It was pointed out that s 2.5 and 2.6 of the Planning Guidelines for the identification of GQAL state (emphasis added):

“2.5 The definition of what constitutes *good quality agricultural land* within a local government area is a DPI responsibility, although local agricultural industries, local authorities and other relevant groups will be consulted.

3.6 In the future, circumstances may arise where the definition of what constitutes *good quality agricultural land* in a region may need to be reviewed. Changes in agricultural land suitability as a result of new technology, environmental change or loss of infrastructure important to an agricultural industry may justify a review. A change in definition would be a DPI decision following consultation as described in the preceding paragraph.”

[116] The appellant countered by pointing out that, despite those provisions, the DPI had never carried out a review. Its counsel called in aid the words of Skoien JDC in *Bundaberg City Council v Burnett*²¹ where a strategic plan’s emphasis on the protection of rural land was likened to King Canute’s attempts to prevail over reality.

[117] The evidence in this case suggests that the prospects for broad scale sugarcane farming in this area are, judged at this particular point in time, and having regard to prevailing conditions, relatively poor. On the other hand, the industry has a long history in the area and subsists (although at a reduced scale) to this day notwithstanding the closure of the Mill. Ways of keeping the industry alive locally have been under active consideration in recent times and the industry is subject to

market and investment fluctuations over time. It seems to me that the decision as to whether the give up on sugarcane as a crop of local significance for the area generally is a strategic one. It would appear that the DPI and the Council, as the local planning authority, continue to regard the canelands in this floodplain as GQAL, which is consistent with the mapping under the new SPP. That might be a conservative approach at this time and a review might be thought to be justifiable, but the continued recognition of the resource, at this time, is at least understandable.

[118] Whilst cane might be the most obvious potential crop for this land, it is not the only possibility. It was pointed out that the site could be used for grazing, (subject to some drainage). Mr Thompson acknowledged that quite a bit of the former cane land, to the west of Coolum particularly, is presently under grazing and improvements, such as dams, have been made to properties for that purpose²². As Mr Sutherland accepted however, land which is suitable only for grazing is not GQAL²³.

[119] The land could also potentially be used for horticultural crops, although there was a debate about whether the quality of the soils and, in particular, their wetness were such as to justify it being regarded as GQAL for that purpose. Horticulture is locally significant, although the prevalence of different types of crop varies.

[120] A Horticultural Land Suitability study for the Sunshine Coast was conducted by Capelin in 1987. That study is referenced, in the guidelines to the SPP, for Maroochy. Capelin's work looked at the depth to the seasonal water table as the sole criteria for wetness. On that basis the subject site is not unsuitable. For the reasons explained by Mr Thompson however, that is an inadequate and outdated approach, at least if it is used as the only criteria for wetness. The better approach is to consider how long the soils stay wet and their drainage characteristics.

[121] The experts were agreed that the soil profile is one of denser, clayey soils overlying a sandy profile. Accordingly, while the sand profile is free draining, water moves slowly through the higher profile. There was some debate about whether the higher

²¹ [2004] QPELR 455.

²² T7-12.

profile becomes waterlogged, but even Mr Sutherland conceded that, in a practical sense, the profile would create a problem for horticultural crops in the absence of management. Water management and drainage (and/or mounding) would be required to address that issue²⁴. Further, the soils in the upper profile are generally acidic and so not conducive to horticulture without the addition of lime.

[122] Mr Sutherland considered the necessary water management, drainage and application of lime and fertilizer to be within the limits of reasonable inputs. He pointed out that a drainage system had operated on the site in conjunction with previous sugarcane farming, but had not been maintained.

[123] Mr Thompson, on the other hand, concluded that the soil characteristics were such as to disqualify the site from being GQAL for horticultural crops. He saw this conclusion as consistent with the recent approaches. In particular he observed²⁵:

“If soils similar to the soils of this particular subject land occurred in Rocky Point Mill area, and the Rocky Point framework would have them as unsuited for horticulture full stop. If the same soils occurred in the Capricorn Coast area, then the same – those soils would be rated unsuited for horticulture full stop. CSIRO used a framework almost identical to the Rocky Point framework and to the Capricorn Coast framework, and their conclusion, if I can quote it off my head, was that none of the 26 horticultural crops that they put through this framework were suited to what they called thehumic podzols of the coastal Maroochy flood plain.”

[124] While this is a matter upon which reasonable minds can (and did) differ, I prefer the conclusion of Mr Thompson. I am comforted in that preference by Mr Sutherland’s acknowledgment that, in fact, there are not many horticultural crops grown in similar soils elsewhere²⁶.

[125] The characteristics of the soil are not the only potential difficulty for using the subject site for agriculture. The site is close to urban development to the east and an effective buffer would be required to prevent undue land use conflicts. Adoption of the “minimum default distance” from the planning guidelines for separating agricultural and residential land uses would effectively preclude use of the site

²³ T7-55.

²⁴ T7-22.

²⁵ T6-19.

²⁶ T7-23.

although, as Mr Sutherland pointed out, the guidelines refer to much smaller “minimum design distance with buffer elements”.

[126] The evidence does not permit a specific conclusion about what would be reasonably required for a particular crop, but Mr Sutherland expressed the view that adequate buffering to sensitive receptors would be readily achievable and Mr Thompson described a properly constructed buffer of 60m as follows: “my gut feeling is where you’d end up here”²⁷. I note that, insofar as sugarcane is concerned, the crop was still being grown on the site when the Twin Waters residential estate was planned and commenced construction. That estate was developed from the late 1990’s subsequent to the rezoning approval. At the time the current Planning Scheme was adapted, the adjacent residential area was included in Planning Area No 15 – Twin Waters Residential (Master Planned Community). Certainly the existence of the residential area is not an ‘overtaking event’ in relation to the Planning Scheme’s strategy for the subject site. I am not satisfied that the site is unsuitable for agriculture or that its use for agriculture is impracticable by reason of its proximity to existing residential development.

[127] The appellant argued against giving weight to any agricultural value of the land, given the inclusion of the site in the urban footprint in the SEQRP. The effect of the SEQRP designation, including with respect to the GQAL land within the Urban Footprint, has been dealt with earlier in these reasons.

[128] I am satisfied that the GQAL status of the land relates only to its suitability for growing sugarcane, although the land could also potentially be put to some forms of horticulture (if an operator was prepared to bear the cost of inputs) or used for grazing.

Visual Amenity and Landscape Character

²⁷ T6-24.

[129] Although visual amenity was not a stated ground for refusal of the application by the Council, it was notified as an issue in the appeal. In particular, it was alleged that:

“The proposed development will unacceptably impact on the character and scenic value of the area as it will remove from the landscape a green inter-urban break along the Sunshine Motorway view corridor and replace that inter-urban break with unplanned urban development.”

It was contended that there are consequential conflicts with various provisions of the Planning Scheme.

[130] At trial, the Council summarised its position with respect to visual issues in Exhibit 2A as follows:

“Approval of the development of the land, which is clearly seen from the Sunshine Coast Motorway and other vantage points, for intense residential purposes involves unacceptable visual impacts in conflict with numerous provisions of MP2000, and in particular:

- (i) the proposed development will unacceptably obliterate a significant part of an important intra-urban green break which consists of open rural landscape with vegetation in the background;
- (ii) the proposed development will destroy rural landscape, in circumstances where the planning scheme identifies in numerous provisions (both general and specific to this locality) that the rural landscape makes a significant contribution to the character and visual amenity of this locality and the shire generally;
- (iii) the proposed development will replace an attractive open rural setting with a prominent vegetated screen which necessarily deprives the landscape of its openness for the sole purpose of providing a visual and acoustic screen (to unplanned residential development) along the entire length of the subject land”

[131] The MP2000 places a relatively high degree of emphasis on visual amenity and character, including the amenity afforded by rural landscapes. There was some debate about the applicability of some of the Scheme’s DEO’s, but I will not pause on that, because greater guidance is to be found in the more detailed provisions.

[132] The Strategic Plan’s Urban Strategy includes:

“3.3.1 The principal element of the strategy is the allocation of Urban areas and Permissible Areas for Rural Residential which recognise the broadly different residential categories containing urban communities and providing separation between communities with characteristic rural and natural landscapes and protecting good quality agricultural land and significant natural and scenic resources from urban expansion.

3.3.6 The spread of urban areas is contained in the interest of preserving the identity of individual communities, maximising the efficiency of urban infrastructure and minimising the loss of good quality agricultural and rural land and land possessing high habitat or scenic values. Containment strategies, such as urban renewal and infill techniques, are facilitated.”

[133] It has already been noted that one of the “key issues” for rural activities is as follows (emphasis added):

“the contribution of the broad-acre rural character of much of Maroochy Shire to its tourist image and the recognition that some areas may never be used for more intensive rural activity nor are likely to be suitable for closer settlement, yet such areas make a considerable contribution to the visual amenity of an area as low intensity grazing land.”

[134] The Rural Strategy includes:

“6.3.3 It is important that consideration be given to the effect that proposals may have on the character of the Shire’s rural areas. This is an issue which should be taken into account with all applications.

6.3.4 Relevant Planning Area, Precinct and code provisions (in Volumes 3 and 4 of the Planning Scheme) reflect these elements of Council’s rural lands strategy.”

[135] Section 6.5.2 of Strategic Plan, in dealing with activities which may be suitable in rural areas provides that, in deciding applications for non-farming uses on land in Rural or Values Habitat areas, Council will take into account, amongst other things:

“the likely impact of the proposal, or of any development, on the locality’s character and on the Shire’s image having regard to its visibility from important arterial routes, tourist drives or tourist attractions and the importance of the site and its locality in projecting that character or image.”

[136] Further, in s 6.5.4 the Strategic Plan expressly seeks the maintenance and preservation of the amenity and character of Rural areas as follows:

“The retention of many of the agricultural activities, including the growing of sugar cane and horticultural crops, grazing as well as the retention of bushland, make a significant and positive contribution to the amenity of the Shire. Such components should be maintained for their contribution to the character, ecological well-being and the tourist industry of the Sunshine Coast region.”

[137] The implementation provisions to that include:

“Implementation

(1) In considering applications for development on land in designated Rural or Valued Habitat areas, the Council will have regard to:

...

- the benefit of dedicating buffers between the proposed development site and roads, rail networks, parks, lookouts, urban areas and other areas frequented by residents, tourists or travellers;

...”

[138] Section 7 of the Strategic Plan is dedicated to visual amenity. The key issues acknowledge the importance of the visual experience from major roads, including the Sunshine Motorways as follows:

“the importance of major roads, particularly the Sunshine Motorway, Bruce Highway and the David Low Way, which offer ever changing experiences of the diverse range of landscapes evident in the Shire, in conveying a Shire image to residents and tourists.”

[139] Managing development along and visible from the major roads so as to project an attractive scenic image to motorists is dealt with in more detail in s 7.4.3 as follows:

“The Shire’s major roads, particularly the Bruce Highway, Sunshine Motorway and David Low Way, display to residents and visitors the Shire’s natural and built environment. They consequently have an influence on people’s perception of the Shire as a place to live or visit.

Implementation

- (1) Council may request that it be demonstrated how a proposal on sites abutting the Bruce Highway, Sunshine Motorway and David Low Way and other major roads as identified by Council, or on sites close to and visible from these roads, is to project an attractive image to motorists travelling along the relevant road.
- (2) Council may not support or may require modifications to proposals which may compromise the character of a rural, natural or otherwise intrinsically attractive scene. Unless the proposal is considered unacceptably intrusive, modifications may relate to elements such as buffering, landscaping, building setbacks and lot reconfiguration design.
- (3) Council will seek to implement landscape works in the Shire’s major road reserves. Where a development site abuts a State controlled road, such landscaping is to be provided as part of the buffering for visual amenity and for traffic noise, emissions and dust attenuation.”

[140] Section 10.2 gives recognition to the diversity of natural landscapes, including “the vegetated and open, rural character of much of the Shire”.

[141] It may be noted that s 13 of the Strategic Plan, dealing with transport, expresses a concern for the visual impact of roads and an intention to manage the aesthetic character of the road corridor and development along “gateway” arterial roads.

[142] The ‘Rural Landscape’ is described in the key character elements for Planning Area 23 as follows (emphasis added)²⁸:

²⁸ S.3.23.3(a).

“This Planning Area is intended to retain its key rural and open space characteristics supporting sustainable cane growing and other rural activities.”

[143] The visual amenity strategy states, amongst other things, that visual amenity has been considered in formulating the planning area and precinct provisions. The provisions for Planning Area 23 have already been traversed. They disclose an intent to retain the ‘key rural and open space characteristics’ and to preclude urban development. The intent for the East Maroochy Canelands includes that:

“Any development of premises within the vicinity of the Sunshine Motorway and the David Low Way should set any buildings and structures well back from the road and maintain the road’s generally rural setting. No direct property access should be obtained from the Motorway.”

[144] That should be seen in light of the provision that:

“Neither urban nor rural residential uses are considered consistent with the intent and desired character of this Precinct outside the established settled areas at the eastern end of the David Low Way and the southern end of Godfreys Road.”

[145] The submissions for the appellant sought to make something of the lack of a more specific reference²⁹ to visual amenity and landscape treatment in relation to the East Maroochy Canelands Precinct and the failure to specifically reference potentially unacceptable impacts on landscape values and visual amenity as reasons for considering uses to be inconsistent with the intent and desired character of the precinct. I do not consider that the absence of something more specific means that visual character and amenity is unimportant in the subject precinct or uninfluential in the provision which states that neither urban nor rural residential uses are consistent with the intent and desired character of this precinct, although it perhaps leaves an assessment of that character and amenity more open to debate.

[146] The Planning Scheme also contains a code for landscaping design.

[147] The Council’s concern for visual amenity is also reflected in the Draft Planning Scheme. For example, section 3.3.2 dealing with character, lifestyle and environment, seeks to protect, amongst other things, “undeveloped rural...landscapes”. The Draft Scheme makes particular provision for particular landscape elements and features. These include regional gateways and scenic

routes. The Strategic Framework Map 6 – Landscape Character and Community Identity Elements – shows the motorway as a scenic route, the southern point of the site as within a high value scenic area and the whole of the site within a rural setting. No regional or sub-regional inter-urban break is shown in the vicinity of the subject site. Overlay Map OVM39M also shows the motorway as a scenic route and the vegetated parts of the site as being a high scenic area. The Draft Scheme includes a Scenic Amenity Overlay Code.

[148] As was submitted for the appellant, the provisions distinguish between land with particular ‘scenic value’ and rural land with rural character. Leaving to one side the value of the existing vegetation, which is to be preserved and enhanced. Dr Hassall (the visual expert called by the appellant) expressed the opinion that, for the most part, caneland and other similar broad-scale cropping land does not display a high degree of scenic value when viewed at the same level compared with say, the Maroochy River or the backdrop of Mount Coolum³⁰. Mr Chenoweth (the visual amenity expert called by the respondent) acknowledged that an open grassy field might not score highly in a rating of scenic features, but thought it very important to the local visual character of this area³¹.

[149] The visual context of the site, and the contribution which the site currently makes within that context was described in the following extracts from the points of agreement in the joint report of the visual amenity experts (emphasis added):

“...the area of rural land on either side of the Sunshine Motorway is, together with the Maroochy River, an intra-urban green break between Maroochydore and urban areas to the north (Pacific Paradise and Mudjimba / Twin Waters).

...

The subject land is alongside and visible from the motorway, especially as viewed from elevated parts of the Maroochy River bridge when travelling north. From this viewpoint, the landscape visible to the north of the river is largely rural in character (including both natural and agricultural components) with small amounts of residential development, although the latter is perceived more clearly to the east as one moves northward from the bridge. The existing canelands and natural vegetation along the Maroochy River to the west of the motorway contribute to the distinctive patterns of rural floodplain landscape which form part of the character of the Sunshine Coast generally. The cleared vacant land on the eastern side of the motorway (the subject land) also contributes to this rural character, with its patches of remnant vegetation, although no longer used for sugar cane. Where the motorway crosses the flat plain, views of the subject land from the motorway are

²⁹ A comparison was drawn with the provisions for the Kirra Road Precinct.

³⁰ Exhibit 5, para 4.3.

³¹ T3-61.

partly obscured by existing roadside trees, but between these trees the open grassed parts of the subject land are visible from the motorway and contribute to the impression of driving through a largely rural area."

It is of note that, whilst the land does not have the same appearance as when it was in active sugarcane production, the visual amenity experts agree (and I accept) that it continues to contribute to the rural character of the area.

[150] It was pointed out that, whilst largely rural in character, the land north of the river has some urban components. The largest of these, the Twin Waters Residential Community is, however, well set back from the Motorway (from which it is separated by the subject site) and visually screened by vegetation. I accept that visible urban components are present, but the character remains largely rural. It is unsurprising that the subject site and the land to the west of the Motorway fall within the 'rural setting' landscape character and community identity element in FM6 in the Draft Planning Scheme.

[151] It was also pointed out (and acknowledged by Mr Chenoweth³²) that, with the growth of vegetation in and around the Motorway, the view from the flat plain to the open grassland, on both sides of the road, would likely be obscured to a greater degree in the future even without the development³³.

[152] The proposed conversion of the site from predominantly open grass land to urban residential development has the potential negatively to impact on the site's contribution to the visual amenity and character of the area. The appellant proposes to address this by screening. In particular, it proposes to sit the development back from the Motorway frontage, so as to incorporate a vegetated buffer. The proposal also includes vegetated bands within the development itself. There would be a band along the southern boundary and another towards the northern point of the subject land.

³² T3-75.

³³ But see exhibit 30.

- [153] The proposed landscape treatment would substantially reduce the visibility of the development. It was common ground that little if any of the proposed development would be visible from those points of the Motorway which traverse the flat plain.
- [154] The proposed screening would obviously be less effective for views from elevated positions. There would be some views of development from the bridge over the river and from the David Low Way overpass to the north, although the view from the overpass would become glimpses once the landscaping reached maturity in about 15 years time³⁴.
- [155] The proposed development would also be visible in the background from existing houses and roads in North Buderim (such as Jones Road), where elevated parts of the Buderim escarpment overlook the Maroochy River and canelands (or former canelands) to the north. From there the roofs of some houses would be apparent from between bands of vegetation. Those views are however, from more than 3.5 kms away. From there, the land forms only a very small part of a wide panorama and the development would have only a minor impact. I would not refuse the application on the basis of that impact.
- [156] It was not suggested that the vegetated buffer would itself be unsightly or unattractive. Mr Chenoweth acknowledged that it would be attractive in its own right, would present an attractive image to motorists and is the kind of treatment encouraged by the Planning Scheme where development adjoins a major road³⁵. It would however, be of a markedly different appearance to the more open landscape character which the site presently exhibits. The acceptability of that was a matter of considerable debate.
- [157] The critical visual issue is the likely impact of the development on the prevailing character. The central dispute between the experts was as to the importance, in the present context, of preservation of views into the open parts of the site. The joint report records³⁶:

³⁴ T4-5.

³⁵ T3-74.

³⁶ Para 2.1.9.

“In situations where urban development is approved in otherwise rural areas, landscape and buffer conditions can satisfy the Code by providing a visual screen and vegetated interface which is compatible with rural character. However where longer views into caneland or open areas are regarded as being important to rural character, these elements cannot be replicated by landscape screening. The experts disagree on the importance for local rural character of longer views into open parts of the subject land.”

- [158] The elevated views from parts of the Motorway (including over the bridge) are of significance. They are the ones least affected by existing and future vegetation along the Motorway and the proposed landscape treatment. They are the views Mr Chenoweth was most concerned about. Whilst such views might be relatively brief, Mr Chenoweth correctly identified them as being of significance in the perception of character. As one travels north over the bridge, the view marks the beginning of a change in character from urban to rural and the view across the open grassland (disused cane farms) on either side of the road serves to, as Mr Chenoweth said, set the scene³⁷.
- [159] It was pointed out, on behalf of the appellant that, as one travels north over the bridge the scenic focal point is Mt Coolum while, as one heads south, it is the river and the backdrop of Buderim. Mr Chenoweth acknowledged that³⁸, but it does not overcome his point about the importance of the view into the site in relation to visual character.
- [160] Dr Hassall saw this area, to the north of Maroochydore and as viewed from the Motorway, as involving a combination of views of indigenous forest vegetation and sugarcane paddocks. He saw the proposed change for the subject site, from views into an abandoned sugarcane paddock to views of the screening forest vegetation as in keeping with the existing character, viewed broadly.
- [161] Mr Chenoweth took a different stance in relation to the importance of views into the open part of the site, rather than into a long landscape screen. He did not see the proposed 1.7km long wall of dense vegetation as offering an equivalent amenity to the existing situation³⁹.

³⁷ T4-6.

³⁸ T3-69.

³⁹ Exhibit 21, para 18.

[162] Mr Chenoweth acknowledged that most of the driving experience along the Sunshine Motorway is past bush of some kind and that the proposed landscape treatment is similar to what can be found elsewhere. He did not see the proposal as out of character with the Motorway experience viewed overall, but pointed out that there are not a lot of opportunities to experience views of open grassland (or caneland paddocks)⁴⁰, as one can in this locality. Whilst the existing Twin Waters development to the east is screened by vegetation, that is set well back from the Motorway with the open landscape character of most of the subject site between it and the Motorway. He regarded the open, non-urban, non-forested areas visible from the Motorway as a valuable part of the diversity of the experience⁴¹.

[163] Whilst he also acknowledged that there are patches of trees which result in the open view over the grassland not being continuous, he pointed out⁴²:

“If I am driving through a rural landscape where there’s patches of trees and, in between those patches of trees, I become aware of a big open paddock behind it, that forms the impression to me of a continuous grassy open paddock that would be lost if it was a continuous visual screen.”

and

“This would convert one side of (the) road which is predominantly open landscape to predominantly trees beside the road.”

and

“This is, in fact part of a wider green landscape and I think that’s the issue here that people driving past at the moment, even though there are some trees and some glimpses and some open views over this grassy open landscape, it certainly conveys the character that you are driving through country side, whereas, I don’t think the driving through a continuous or past a continuous visual barrier of trees creates the same impression of driving through country side.

[164] As Mr Chenoweth pointed out, rural character may vary from locality to locality. He did not regard the proposed treatment as compatible with the subject rural character, because that rural character is more open than forested⁴³. That is hardly surprising, given that the subject site forms part of a canelands (or former canelands) area within a rural floodplain. The loss of views to the open parts of the subject site would not result in the complete loss of this more open character, at

⁴⁰ T3-61, exhibit 30.

⁴¹ T3-76.

⁴² T3-70, 3-71.

⁴³ T3-73.

least for so long as the area to the west remains largely open, but it would represent an erosion of the character as described by Mr Chenoweth.

- [165] It was pointed out, on behalf of the appellant, that unlike the area to the west of the Motorway, the subject site was not included in the RLRPA in the Regional Plan. The RLRPA identifies and seeks to protect land with regional landscape, rural production or other non-urban values. The Regional Plan does not however, require the local government, through its planning scheme, to ignore visual amenity or character issues (including shire wide or local level issues) with respect to land within the Urban Footprint or to ignore such issues in assessing a development application over such land.
- [166] Whilst the planning documents do not acknowledge this area as an inter-urban break (as the visual amenity experts do) it is clearly an area where, as one heads north across the bridge, there is a distinct change of character. The character is not only 'rural', but rural with a substantial 'open' component, reflecting its past use as an active sugarcane farming area within a rural floodplain. While sugarcane production has substantially declined, the open component of the landscape is significant. While the view of the open parts of the subject site are not continuous, the amenity afforded by this more open landscape cannot be replicated by a 1.7km long 'wall' of screen vegetation.
- [167] I accept that the proposed landscape treatment is not without some merit. Such treatments find reference in the planning documents and are found elsewhere along the Motorway. It would be the kind of response which would be required by a condition in the event of an approval. Visual impact is not however, only ever a matter of conditions to screen out, as far as practical, the proposed development. In this case the development, even with the proposed landscape treatment, would erode the particular, more open, rural character of this locality which, I accept, has value.
- [168] For the above reasons I generally prefer the opinions of Mr Chenoweth to those of Dr Hassall.

Need

[169] The evidence unsurprisingly establishes that the Sunshine Coast will experience ongoing growth, which will require the construction of a very substantial number of new dwellings over time. The crux of the need issue is the strength of any need to provide for that by the development proposed on the subject site.

[170] Considered on a Sunshine Coast wide basis, there is little need for the provision of additional land for residential development at this time. Under both the existing and draft planning schemes, the Council has identified specific locations for the accommodation of urban residential growth, whilst leaving the subject site as rural. The economists (Mr Leyshon, who was called by the appellant and Mr Norling, who was called by the respondent) agreed that there is sufficient approved and/or designated land (under both the existing and draft planning schemes⁴⁴) to accommodate residential growth on the Sunshine Coast to 2030. That is an appropriate forward planning horizon. Land of that order being provided at the commencement of the new Planning Scheme, should ensure an adequate overall supply, given that there will be at least one more planning scheme review before 2030⁴⁵. I do not accept that there is any significant need to add further additional land supply now on the basis of protecting the 15-20 year ‘buffer’ from erosion⁴⁶.

[171] Mr Leyshon did not put the need for additional residential land as immediate or critical. In his testimony he said:

“I wouldn’t use the word critical at all in relation to this application. If I was asked, I think it is more there is in my opinion an identifiable need and I think that it is a prudent thing for the council to do provided it can resolve all the other issues to which you have referred about infrastructure and environmental issues etc.”

I prefer Mr Norling’s view that the need is low⁴⁷ and residential development of the subject land is not required at this time⁴⁸.

[172] As Mr Leyshon pointed out, the Sunshine Coast, which extends over a significant distance north/south, is not one homogenous market. He pointed out that one should have regard to relevant ‘sub-markets’ – a concept with which Mr Norling did

⁴⁴ The capacity under both is similar – T4-80.

⁴⁵ See s 91 of SPA – and, of course, there might be amendments in the meantime.

⁴⁶ See Norling T4-70.

⁴⁷ Exhibit 6, tab 26, para 10.2.1.

⁴⁸ Exhibit 6, tab 26, para 5.3.5.

not take issue. As Mr Norling demonstrated in his individual report⁴⁹ however, there are considerable areas available for future residential development in what he referred to as the central part of the Sunshine Coast (ie from Peregrin Springs in the north to Mountain Creek and Palmview in the south). A significant proportion of that is towards the south, but it is not unknown for future growth areas not to be evenly distributed across a city or region.

[173] Mr Leyshon placed particular emphasis on the locational attributes of the site, in particular, its proximity (8 kms by road) to the Maroochy Primary Activity Centre (PRAC). As the joint expert report noted however, there are three major residential developments located either closer to or a similar distance from the Maroochy PRAC, namely:

- Maroochy PRAC redevelopment with its Draft Structure Plan providing for an additional 4,000 dwelling units within the PRAC;
- Sunshine Cove ultimately will contain some 2,500 residential units (including 600 individual dwelling lots);
- Stockland's Brightwater Estate at Mountain Creek is expected to provide approximately 1,119 dwelling lots plus 1,411 attached dwellings. As at the hearing it was approximately 56% sold⁵⁰.

[174] The Sunshine Coast will need not only more dwellings to be built, but will need a greater proportion of them to be at the affordable end of the market. As the Sunshine Coast housing needs assessment⁵¹ found:

“There is a considerable mismatch between housing needs and the current housing provision across the Sunshine Coast region. This housing mismatch on the Sunshine Coast is indicated in the disparity between:

- Dwelling type and household size;
- Income and housing costs; and
- Urban form and sustainability aspirations.

Increasing the diversity of dwelling types in terms of size, type, density and cost will better meet demographic household types, affordability, and sustainability aspirations...”

⁴⁹ Exhibit 20, Map 1.

⁵⁰ Exhibit 18, para 11.

⁵¹ Exhibit 31, pg 75.

The report recommended a reduction in the proportion of detached houses and an increase in the proportion of semi-detached and attached dwellings⁵². This issue is acknowledged in the Draft Planning Scheme. The ‘Background and Context’ section of the Draft Plan states:

“In summary, existing housing on the Sunshine Coast is not well matched to the needs of an increasing proportion of the community in terms of diversity, affordability and adaptability. As the demographics of the Sunshine Coast change, with a higher proportion of aged people and reduced socio-economic conditions, housing needs are also changing.”

and

“Council’s housing needs assessment has indicated a shortfall in the diversity of housing across the Sunshine Coast and a mismatch between housing supply and the needs of a large proportion of household types. In short, there are not enough small to medium size dwellings in accessible and well serviced locations.”

[175] More specifically, s 3.3.5.1 of the Draft Planning Scheme sets out specific outcomes in relation to affordable housing. They include:

- “a) Housing is located and designed to offer a wide choice and mix of living options that promote affordability and adaptability.
- b) The delivery of affordable living is primarily focussed on:-
 - (i) the Maroochydore and Palmview declared master planned areas where the targets for affordable and adaptable housing specified in an applicable structure plan are met (see Maroochydore PRAC Structure Plan and Palmview Structure Plan in **Part 10 (Planning Partnerships)**); and
 - (ii) defined urban consolidation areas in existing urban areas.”

As Mr Norling attested⁵³ there are sound economic reasons for directing affordable housing to Maroochydore and Palmview and also to Caloundra south⁵⁴. The subject site does not lie within the areas where the delivery of affordable housing is to be primarily focussed under the Draft Planning Scheme.

[176] Despite the clear strategy for addressing the affordability issue principally by the Master Planned Areas within Maroochydore and Palmview, Mr Leyshon maintained that here is a need for the subject development, because of its form and location. In that regard:

⁵² Exhibit 31, pg 77.

⁵³ T 5-17.

⁵⁴ Which is subject to the ULDA process.

- as Mr Norling conceded, the Maroochydore PRAC development is, given the relevant development parameters, likely to be focussed on multiple dwellings, rather than detached houses, and
- the Sunshine Cove development is also dominated by units and is at a higher price point.

[177] Accordingly, once Stockland's Broadwater Estate is completed (in perhaps three years time, around the time the proposal would be expected to come onto the market) there will be a relative dearth of land close to the Maroochydore PRAC which is available for significant additional smaller lot detached housing development of the kind proposed.

[178] Mr Leyshon saw the subject site as providing a unique opportunity to fill this gap in a way which would provide land, at the more affordable end of the market, to those who would wish to avail themselves of the locational advantages of being close to the Maroochydore PRAC, but who prefer detached housing and are looking for new product, rather than buying an existing house. The appellant's State manager for planning and approvals gave evidence that such people include first home buyers, young families, mature families and empty nesters. Mr Leyshon also saw the proposal as attractive to the investor market.

[179] Mr Leyshon clarified his view in the follow exchange:

“His Honour: Yes. Do I understand correctly that your approach to that ultimately has been to say that although there may be an adequate supply of broadacre developable land in the Sunshine Coast area in general for the next 20 years, at some point there is going to be a need to be additions to the stock to keep up with future demand, and when you look at where that might sensibly be taken up, if you look at the subject site it has locational advantages to be a candidate, and the style of development that they're proposing here would materially add to the diversity of stock, and for that reason it would be a prudent, and to use your term, measure to convert this to residential development. Is that a fair summary ----?—Essentially, yes.

----- of what you're saying? -- Yes.

There's nothing pressing, but given your view that there'll need to be a conversion of some land to residential, you think this has advantages for the community in doing so?—yes, that's right, your Honour, and the only thing I'd add to that is, as I've said in my trial report, I think that the stock of detaching housing in some of the major developments surrounding this such as Brightwater and at Bli Bli and Forest Glen will start to run down by 2016/2017, and this presents itself as a major site

controlled by one developer capable of adding to that stock in the central part of Maroochydore – the central part of the Sunshine Coast, rather.”

- [180] I do not doubt that the run down of nearby detached dwelling developments would make development of the subject site an advantageous market opportunity and that the development, were it to proceed, would sell. I do not consider however, that that establishes a strong planning need.
- [181] Against the background of the housing needs assessment, it is unsurprising that the Council’s strategy on housing affordability focuses on master planned projects which will offer a greater number of non-detached dwellings. The consequence of the existing and future development (excluding the subject site) within proximity of the Maroochydore PRAC will be the provision of substantially greater number and wider choice of dwellings.
- [182] Whilst it is true that, at some point, substantial new detached dwelling development may have to be directed to locations more remote from the Maroochydore PRAC, this is a consequence of the Council’s exercise of its statutory planning responsibilities in determining how the affordable housing objective ought to be met and in directing where new detached housing development, to accommodate growth within its area, should occur. As Mr Norling attested⁵⁵, while it is relevant to consider the sub-catchment analysis, the total capacity to manage growth, across the greater area should not be ignored. Ultimately, in managing future growth, the Council does not necessarily have to provide for all sub-markets to be continuously developed for every kind of dwelling for which there might be some market demand.
- [183] Whilst I accept that there is some level of need for the proposal, the need is, I am satisfied, not strong. I prefer the conclusions of Mr Norling to those of Mr Leyshon.
- [184] Both the existing and Draft Planning Schemes refer to the concept of overriding need. The current Planning Scheme states⁵⁶:

⁵⁵ T4-69.

⁵⁶ 6.5.2.

“(1) Council will not support any applications for non-agricultural activities on land in nominated Agricultural Protection areas unless it can be demonstrated that there is an overriding need for the proposal in terms of community benefit that outweighs the need to preserve the land for purely agricultural purposes.”

[185] The overall outcomes of the Rural Zone Code in the Draft Planning Scheme include:

“(h) development does not alienate or fragment good quality agricultural land (GQAL), strategic cropping land (SCL) or potential SCL unless:-

- (i) there is an overriding need for the development in terms of public benefit; and
- (ii) no other site is suitable for the particular purpose”

[186] Further, as has already been observed, the Draft Planning Scheme provides that demonstration of an “overriding need in the public interest” is one of the circumstances in which development, with mitigation measures, might be permitted in the floodplain.

[187] It was submitted that the overriding need test is met with respect to GQAL even on the respondent’s evidence. Senior counsel for the appellant emphasised Mr Norling’s concession that, given present day economic conditions, the economic utility of the land for residential purposes is greater than the present economic utility of using it for agriculture. It should be noted that the concession relates only to the present economic position. Part of the strategy of protecting GQAL relates to its enduring quality notwithstanding fluctuating economic circumstances. Further, it should be seen in light of the evidence that there is plenty of other land to accommodate urban residential development, with its consequent economic benefits. In this respect, the second limb of the test in the Draft Planning Scheme is not met, even taking the court’s traditionally practical approach to tests of this kind⁵⁷.

[188] I do not consider that the appellant has established a strong planning need for the development, far less an overriding need. That is so even taking into account the matters of benefit discussed below.

⁵⁷ See *Logan v Burnett Shire Council* [1997] QPELR 18 at 20.

Benefit

- [189] There are benefits which would accrue from the development, were it to proceed. In particular, it is proposed to remediate and rehabilitate the remnant vegetation and the ecosystem towards the centre of the site and to provide vegetation and drainage corridors in its south, north and west sectors.
- [190] Almost one half of the site would be subject to vegetation protecting retention or rehabilitation. This would, as Dr Hassall reported⁵⁸, improve the sustainable protection and buffering of existing ecological values and provide connectivity of the isolated patch of on-site vegetation to the Maroochy River corridor. Conversion of this site to urban development would obviate potential environmental impacts including nutrient export, which would be associated with sugarcane production or horticultural crops. Dr Watson also confirmed⁵⁹ that there would be a benefit for terrestrial fauna that are resident on the site and also those species which migrate (or are transient) through the landscape and would improve the long-term viability of the ecosystem.
- [191] It was pointed out, on behalf of the respondent, that the land to be given over to conservation or rehabilitation was not vulnerable (because it could not be developed, in any event, having regard to environmental, flooding and drainage requirements) and appears to be thriving. There was no evidence that the ecological improvements were critical. I note that other than the vegetated parts, the site otherwise is not mapped in the Draft Planning Scheme as an ecologically important area and no area is mapped as an existing or future ecological linkage⁶⁰. The improvements proposed and their beneficial effect are however, relevant.
- [192] The development would result in the raising of the David Low Way and the creation of a flood refuge in an area prone to flooding but, on the other hand, would locate an additional residential population, of approximately 2000 people, into the

⁵⁸ Exhibit 5, vol 1, pg 20.

⁵⁹ Exhibit 17, para 5.5.

⁶⁰ See SFM 5.

floodplain, thereby potentially putting more people at risk and potentially adding to the burden on local and state emergency responses in times of disaster.

[193] The development would bring some economic benefit, but so too would a residential development on appropriately designated sites.

[194] Development at this site would also, as the economists agreed, support the range of employment and other services (existing and proposed) at the Maroochydore PRAC, but, as has been observed, the Maroochydore PRAC will not be devoid of support from residential development. It was also suggested that the proposal could add to the viability of the North Shore Local Centre, but the economists did not regard that as an important matter⁶¹.

[195] The provision of lots of a size which are likely to fall towards the more affordable end of the market would further assist in meeting the need for more affordable housing, but as has also been observed, the Council has substantial strategies to address that issue otherwise.

[196] The appellant's written submissions drew attention to some other matters of benefit including in terms of urban consolidation and infrastructure efficiency and also to the extent of compliance with the Planning Scheme in respects which were uncontroversial.

[197] The Council's Planning Officer's report⁶² referred to, amongst other things, the following:

- it was generally considered that the proposed development might be able to provide sufficient demand to generate an improved public transport service to the locality, including Twin Waters (p.1130);
- the proposed development provided for an alternative safe route from the Maroochy River Bridge through the Land to Ocean Drive to facilitate the Sunshine Coast Pathway project (p.1130);

⁶¹ Section 7 of Joint Report.

⁶² See particularly para 220(j).

- public transport routes, and pedestrian and cycle paths, proposed through the Land would provide safe and more efficient access for the wider North Shore community to the Maroochydoore Principal Activity Centre as there was currently no practical commuter route from the North Shore community to the pedestrian pathway incorporated into the Maroochy River Bridge for that purpose (p.1132);
- the proposed open space, road and pathway network would generally improve public access to the existing natural assets in the locality, including external access to the North Shore beaches and Maroochy River as well as local access (p.1132);
- consolidation of the residential area in the location would make most efficient use of the significant infrastructure investment spent on recently delivered projects such as the Maroochy River Bridge duplication, Sunshine Boulevard, Sunshine Motorway duplication, and the Sunshine Motorway Airport Interchange and connection road. In that respect the proposed development contributed to sustainability objectives (p.1132)

[198] I have taken the matters of benefit into account.

Sufficiency of Grounds

[199] The foregoing sets the scene for a discussion of the determinative issue in the appeal, which is the sufficiency of grounds to warrant approval notwithstanding the acknowledged conflict with the planning scheme. That is a difficult issue in this case and has given me pause for thought.

[200] Approached on a ‘first principles’ basis, ignoring the planning documents, the proposal has a deal of attraction. It would:

- put a disused site to a productive and economic use;
- provide residential development in a growth area;

- provide a type of product which is likely to be marketed at the affordable end of the market, which has not been so well served in this area in the past;
- deliver that development on a site which is conveniently located proximate to the Maroochydore PRAC, the airport and significant infrastructure;
- expand residential development onto a site which is adjacent to existing residential development (to which there is a buffer) and separated from other rural land to the west by the Motorway (although the subject site is connected by road to the wider locality west of the Motorway by an underpass);
- utilise a site which can be physically developed for the use without undue external impacts (leaving visual impact to one side);
- incorporate mitigation measures to address the site's flood prone status
- incorporate screening to address the visual impact of development;
- provide benefits as discussed earlier.

[201] On the other hand, the development would consume GQAL, erode to some extent, the open rural landscape character of this area and place a substantial new residential community into a floodplain, with the attendant risk of a substantial number of persons becoming isolated in times of major natural disaster.

[202] It was pointed out, on behalf of the appellant, that Mr Brown (the respondent's town planning witness) conceded that there was not one individual issue which necessarily lead to a conclusion that the application should be refused.

[203] The balancing exercise cannot be carried out without regard for the Planning Scheme and the nature and extent of the conflict between it and the proposal. In this case the conflict, discussed earlier, is both clear and substantial. While it was pointed out that the site occupies only some 8.5% of the Sunshine Canelands Precinct Class and about 3% of the Canelands Precinct Class, I do not regard the site as unimportant or the extent of the conflict minor.

[204] In seeking to justify approval notwithstanding conflict it was contended that the Planning Scheme has been overtaken by events, particularly by the:

- SEQRP; and
- Mill closure and consequent diminution in active cane farming in the area

[205] For the reasons discussed earlier, the SEQRP's inclusion of the site within the urban footprint does not determine that the land ought be used for urban development or that it ought be given over to such development at this time. It is a relevant matter, but does not overtake the planning strategy of excluding use of site from urban development at this time under the current Planning Scheme or the Draft Planning Scheme.

[206] The closure of the Mill has had a significant negative effect upon the cane farming industry in the area, but has not yet led to its demise. While the consequences have overtaken the description of the relevant planning area, in the current Planning Scheme, as one which "continues to be used predominantly for cane growing" it has not led to a strategic review of the GQAL status of land suitable for that purpose. Further, the suitability of the land for agriculture is not the only consideration relevant to the planning strategy for this site.

[207] The Mill closure has not led to a change to the Council's planning strategy in the current Planning Scheme, despite that scheme being otherwise amended from time to time. The strategy of retaining the subject site as rural floodplain land at this time is carried forward in the Draft Planning Scheme.

[208] The planning strategy of the Council, under both the current and existing schemes, to retain this site as rural land at this time, is clear. It might be thought to be conservative, but it is understandable, in the context of land of some agricultural quality in this open rural floodplain in circumstances where sufficient residential development opportunities can be and are provided elsewhere at this point. The strategy deserves appropriate respect.

[209] As was submitted on behalf of the appellant, conflict, even significant conflict is not necessarily fatal. There is the opportunity to obtain a preliminary approval overriding the Planning Scheme where sufficient grounds are demonstrated. In this case it is, I consider, important not only that the conflict is clear and significant (not minor) but that the planning strategy, with which the proposal conflicts, is also reflected in the Draft Planning Scheme and that the planning need case to depart from the Council's strategy is not strong. Whilst I have also had regard to the matters which otherwise weigh in favour of the proposal (including the matters of benefit discussed earlier) I am, on balance, unpersuaded that those warrant a departure from the Council's clear strategy in the context of a need case which is not strong. My conclusion may have been different had the need been substantially stronger.

Conclusion

[210] The appellant has failed to discharge its onus.

[211] The appeal is dismissed.