

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Titanium Enterprises Pty Ltd v Caloundra City Council & Anor* [2006] QPEC 106

PARTIES: **TITANIUM ENTERPRISES PTY LTD**
Appellant
V
CALOUNDRA CITY COUNCIL
Respondent
And
ENVIRONMENTAL PROTECTION AGENCY
Co-Respondent

FILE NO/S: D423/2005

DIVISION: Planning & Environment

PROCEEDING: Appeal

ORIGINATING COURT: Planning and Environment Court, Maroochydore

DELIVERED ON: 10 October 2006

DELIVERED AT: Brisbane

HEARING DATE: Inspection 19 June 2006; hearing 21, 22, 23, 26, 27 and 28 June and 3, 4, 5, and 6 July 2006; written submissions received up to and including 10 August 2006;

JUDGE: **Alan Wilson SC, DCJ**

ORDER: **Appeal dismissed**

CATCHWORDS: PLANNING – PLANNING AND ENVIRONMENT –
CONFLICT WITH PLANNING SCHEMES – proposed
residential development in environmentally sensitive area –
whether in conflict with former or current planning schemes
– whether sufficient planning grounds to surmount conflict
Coastal Protection and Management Act 1995
Integrated Planning Act 1997
Local Government (Planning and Environment) Act 1990

Cases

Baptist Union of Queensland v Brisbane (2002) QPELR 523
Fitzgibbons Hotel v Logan [1997] QPELR 208
Forges v Kangaroo Point Residents Association & Ors
 [2002] QPELR 151
Kentbrock Pty Ltd v Gold Coast City Council [2003] QPELR 587
Kotku Education and Welfare Society v Brisbane [2004] QPELR 267
Norris Clarke & O'Brien v Brisbane [1996] QPELR 262
Palyarus v Gold Coast City Council [2004] QPELR 162
Project Blue Sky v ABA (1998) 194 CLR 355
Ryan v Brisbane [2005] QPEC 017
Telstra Corporation v Caloundra [2005] QPELR 412
Vadale Pty Ltd v Landsborough Shire Council [1985] QPLR 338
Weightman v Gold Coast City Council [2002] 121 LGERA 161
Woolworths Limited v Maryborough City Council (2005) QPELR 423

COUNSEL: C Hughes SC and S Keim SC for the appellant
 P Lyons QC and B Job for the respondent
 A Skoien for the co-respondent

SOLICITORS: P&E Law for the appellant
 Corrs Chambers Westgarth for the respondent
 EPA for the co-respondent

- [1] Titanium has detailed plans to develop land in Pelican Waters, south of Caloundra township and west of Golden Beach, for residential purposes¹. The parcel contains 44ha and is, essentially, vacant². It lies to the west of the existing Club Pelican 18 hole golf course and was in the past the subject of plans for an additional nine holes. Work on that started in the late 1990s and some 30,000m² of soil was brought in, but nothing else was done and Titanium now has no wish to develop the extra fairways. Council rejected Titanium's applications for preliminary approval and development permits, and is now supported in that stance by the Environmental Protection Agency (EPA).
- [2] Save for a machinery shed and its surrounds, the land is unused bush. It is the nature of that bushland and its environmental value which enlivened the hearing. On the west and south the land is bordered by Bells Creek and one of its tributaries, which are tidal and flow in to nearby Pumicestone Passage. Much of the evidence focussed on the risks associated with development near those waterways, on land

¹ In September 2004 Titanium applied for preliminary and development approvals for a material changes of use, and for associated reconfiguration of lots

² The parcel is part of Lot 65 on SP 166661, County of Canning, Parish of Bribie; its address is 40 Mahogany Drive, Pelican Waters

which may support endangered fauna and avian life like the Wallum Froglet, and the Glossy Black Cockatoo. A number of ecologists, hydrologists, and soil, fauna and flora experts debated whether the land is or is not a 'wetland' and how its plants and animals would be affected by the proposed development.

- [3] A lengthy inspection on foot and by vehicle of the parcel and the Pelican Waters area revealed all of the land is low-lying and, while some parts of the site appear to be in a natural state, a noticeable area is affected by the large amounts of fill brought in for the proposed golf course (although the passage of time has reduced those effects, and the mounds are revegetating). The general impression is one of remoteness from developed areas, particularly in the wilder, largely unspoilt country around Bells Creek to the west and south; but there is a distinct 'built-up' feel in the east, where the outlook is dominated by the existing golf course, the tall Ramada hotel, and lower level multi-unit buildings and houses.

- [4] Bells Creek is not, it should be noted, pristine; its southern banks are occupied by turf farms which, as aerial photographs taken over time reveal, have steadily encroached on the natural vegetation to a point on, or very close to, the waterway itself.

- [5] The land to the north is also undeveloped bushland although it may be significantly affected in the future by proposed rail/arterial road infrastructure. The surrounding Pelican Waters³ development to the east and south of the golf course is comprised of modern houses in an attractive setting. It can readily be seen how a development of the kind pictured in the very detailed application documents could complement each of these aspects and, at the same time, provide a transition between them and the more unspoilt country to south and west of the site, abutting Bells Creek.

- [6] Titanium's proposal involves a 'masterplanned' community with 227 residential units comprised of both detached (164) and multiple-unit (39) dwellings and a small 'apartment' hotel with 15 units, spread over the site in 5 discrete precincts, separated by constructed lakes and ponds and laid out in a way which, it is claimed, best maintains and preserves the environmental values of the land. It was accompanied by detailed designs showing the retention of tracts of natural or repaired bushland, special treatments for dwellings involving buffers of natural vegetation both outside and within each allotment, and continuing 'management plans' designed to ensure the future protection of the remaining bush and nearby waterways and associated flora and fauna.

- [7] The residential development would occupy about 12 hectares; lakes about 7.8ha; roads 1.88ha; and cleared areas near the residential development 8.68ha. Around 30ha or 60% in all would, then, be disturbed⁴. If the lake and cleared 'buffer' areas are seen as, ultimately, 'natural' elements – a submission which strains the meaning of the word - the final area which will suffer significant permanent alteration (houses and roads) is only about 30%. On any view, the works associated with the proposal would involve extensive 'cut and fill' to create flood free lots and roads, and new lakes.

³ Pelican Waters is an extensive canal residential development which has been constructed progressively west of Golden Beach; the subject land lies at its western extremity

- [8] The developed areas are intended to be confined to the eastern section, nearest the existing golf course, so as to provide minimal change near Bells Creek, and three sections would be rehabilitated and replanted: one in the north, to provide habitat and a conservation area for the Wallum Froglet; the second in the central and central west section, to protect the creek and associated wetland areas; and the third, in the south and south west, for the same reason.
- [9] The applicant made some late changes to the layout, ostensibly to enhance the protection of the Wallum Froglet, and on the first hearing day a question arose whether the appeal could proceed despite those alterations. Neither respondent opposed that course, and I was satisfied they were minor changes, permitted under the *Integrated Planning Act* 1997 (IPA), s 4.1.52(2)(b)⁵.
- [10] The primary planning issues concern alleged conflict between the proposal and Caloundra's previous and current planning schemes, their Development Control Plans (DCPs) and Desired Environmental Outcomes (DEOs), and other legislation including the State Coastal Management Plan (SCMP) and various statutory codes or 'overlays' in the new scheme – those relating to Habitat and Diversity, Natural Waterways and Wetlands, and Biting Insects. The appellant acknowledges some conflicts exist but says they are only minor, and overcome by planning grounds which strongly support the proposal.
- [11] Other issues initially raised by the respondents involve alleged adverse impacts on the site's 'environmental values'; a risk of increased flood and run-off levels; potential traffic problems; a failure to properly address water supply and sewerage disposal matters; and, a failure to satisfy the precautionary principle or establish that the proposal advances the purposes of IPA.
- [12] In August 2004, when Titanium made the relevant application to Council, Caloundra's planning was governed by its 1996 scheme which under IPA is designated 'transitional', i.e., it would eventually be replaced by an IPA-compliant one. The new IPA scheme, *Caloundra City Plan 2004*, commenced very shortly thereafter, in September 2004. Nevertheless, IPA ss 6.1.29 and 6.1.30 have the effect that Council was required to assess and decide the application under the legislation preceding IPA, the *Local Government (Planning and Environment) Act* 1990 (PEA), as though it was a rezoning application and, therefore, in light of PEA provisions 4.4(3), (5) and (5A). This Court must determine the appeal on the same basis: IPA, s 6.1.30(3)⁶.
- [13] Those PEA provisions include a requirement for assessment of the application against a number of matters which were the subject of expert evidence, and on the basis that:

4.4(5A)

The local government must refuse to approve the application if –

- (a) the application conflicts with any relevant strategic plan or development control plan; and

⁵ *Baptist Union of Queensland v Brisbane* (2002) QPELR 523, per Brabazon QC, DCJ at 526; *Woolworths Limited v Maryborough City Council* (2005) QPELR 423 per Robertson DCJ; *Ryan v Brisbane* [2005] QPEC 017

⁶ The fact the application includes an application for preliminary approval to override the planning scheme does not appear to give rise to any additional or particular issues in the appeal: see IPA, s 3.1.6

- (b) there are not sufficient planning grounds to justify approving the application despite the conflict.

- [14] The new planning scheme may be considered in this appeal: IPA, s 4.1.52(2)(a)⁷. The very short interval between the development application and the introduction of the new scheme means it will attract considerable weight⁸ and, in tacit acceptance of that principle, all of the parties addressed its provisions in detail.
- [15] This parcel was rezoned, as part of a larger rezoning and subdivision application involving over 400ha, in 1996. Four 'Special Facilities' zones were introduced with this land included in the area of the 27 hole golf course, and designated for '*...golf course, licensed club, meeting rooms, restaurant, night practice range, gymnasium, tennis courts and practice range*'. While uses of that kind do not immediately appear consonant with the conservation of environmental values on the land, the evidence showed parts of the larger, general area had previously been cleared and the preservation of what remained was a subject of interest and concern to both the local authority and the State Department of Environment; and, as Council submitted, it presented an opportunity to prevent further destruction of vegetation, and protect what remained through conditions of approval – avenues which were not available while the land carried its previous zoning.
- [16] The application for rezoning was actively sought by the developer at the time, in terms which plainly acknowledged these factors. It was accompanied by an Environmental Impact Statement which emphasised that the golf course zone would create a buffer between residential development and Bells Creek, and 70% of the land would be retained in its natural state.
- [17] The conditions of approval included a requirement for the preparation and later approval of an Environmental Management Plan and a Golf Course Management Plan. Those conditions pay obvious obeisance to the values of the natural landscape:

General Conditions:

12. no clearing of native vegetation is to occur on the subject development site without the prior written approval of Council's Environmental Branch. It will be necessary for the applicant and any subsequent owners to make formal application (including plan) outlining reasons for clearing and identifying the impacts of such clearing;
13. all artificial wetlands are to be designed, vegetated and maintained in consultation with and to the satisfaction of Council's Environmental Branch and Drainage Engineer. The intent is to include islands and some shoreline fencing where appropriate to protect nesting waterfowl;
14. any proposed form of physical, biological or chemical mosquito control within the Pumicestone Passage Fish Habitat Area (015-006A) or physical control that disturbs marine plants outside such an area, shall first be referred, but (sic) the applicant/owner to Department of Primary Industries (Fisheries) for approval. No 'fogging' or spray drift is to occur on any land under the control of Council (e.g. esplanade, parkland etc.)

⁷ And by the original assessment manager: s 3.5.6

⁸ *Telstra Corporation v Caloundra* [2005] QPELR 412

18. no clearance of any vegetation below the Highest Astronomical Tide (HAT) line without prior written approval from Queensland Department of Primary Industries;

Special Conditions:

10. a Golf Course Management Plan is to be submitted and approved by Council's Environment Branch prior to the commencement of the Golf Course development. The Plan is to include:
 - methods of retaining low health and wildflowers throughout the Golf Course;
 - methods of retaining the "roughs" in their natural state;
 - methods of retaining and allowing native grasses, shrubs, groundcover and sedges to revegetate;
 - revegetation specifications for the mix of local native species proposed to be planted;
 - specifications for weed control to incorporate methods other than chemical;
 - demonstration that no fertiliser will enter the natural areas to be retained or into Council controlled lands (excluding access easements);
 - demonstration that recreational activity on the Golf Course would not adversely impact upon the natural areas to be retained;
12. the final Golf Course design shall incorporate:-
 - the provision of an esplanade being 30 metres in width measured from the top bank of Bells Creek (such being required in accordance with Council's Esplanade Policy) and such additional areas shown as "HAT Areas" on Plan No. DB0297-00/140 drawn by Keilar Fox and McGhie Pty Ltd and dated 18 November 1996;
 - where required, additional riparian buffer lands in accordance with Section 41 of the Beach Protection Act 1968 and the Coastal Protection and Management Act 1995;
 - maximum retention of natural vegetation adjacent to tidal areas;

[18] Under the Strategic Plan in the 1996 Transitional Scheme the land is located in the Urban PDLU (Preferred Dominant Land Use), indicating it is considered suitable for predominantly urban purposes, but subject to the greater detail shown in relevant DCPs and, here, *DCP No 2 – Golden Beach*⁹. That intended deference to the DCP is confirmed by the Objectives and Implementation Criteria for land in the Urban designation, which says that forward planning for specific areas will be achieved by implementing the intent, and provisions, of those DCPs.

[19] DCP 2 has a map¹⁰ identifying various uses within its boundaries showing this parcel within a group of Open Space designations and expressly recording its inclusion in a 27 hole golf course. The DCP also includes the land in a Special Design Precinct (SDP 5) the intent for which, so far as it touches this parcel, is to the same general effect:

... the intent of this Precinct is to allow the high amenity, low density residential development and development of a major open space facility namely a 27 hole

⁹ Inclusion of the parcel in DCP 2 occurred with the rezoning and included provisions which accorded with the conditions attached to it – a process which meant the land attracted the mandatory effect of the conflicts test in PEA s 4.4(5A).

¹⁰ Exhibit 52

golf course. The residential component of this precinct is to be located **generally** in the eastern portion and includes two areas of medium density accommodation development in the northern portion as well as the preschool/primary school site. The open space component of this precinct is located **generally** in the western portion and provides for a 27 hole golf course, clubhouse and facilities. **The facility is to be designed to so as to protect the environmental integrity of Bells Creek and to not adversely affect flooding and drainage of the area.** The establishment of a resort accommodation complex including hotel facilities may be appropriate to the Precinct adjacent to the golf course. *(emphasis added)*

- [20] Titanium batters on the use of the word “generally” for the proposition that designations under the DCP should be applied flexibly, and that those designations do not reflect any deep-seated intention about the allotted uses and are far from absolute, or immutable. It is said, by way of example, that if at the time of the zoning approval (and the contemporaneous preparation of the DCP) there were acknowledged, significant planning reasons for a designation requiring nine golf holes on this site (and nothing else), Council could have included the entire golf course in its own separate precinct (as happened elsewhere, with a new grammar school).
- [21] Support for the notion that the designation is not antithetical to this proposal can be found, it was also said, in a decision of Skoien SJDC in *Fitzgibbons Hotel v Logan* [1997] QPELR 208 in which his Honour suggested that when a strategic plan merely gives a general direction about the type of development appropriate for a particular parcel, other uses might be permitted so long as they are not incompatible. That case was dealing, however, with a strategic plan setting out broad desired objectives and not, as here, the more precise parameters of a DCP.
- [22] While it is true the DCP can be read as promoting a combination of a golf course and residential development in the very large area it covers, the mapping and the intent for this particular precinct plainly identify a non-residential use on this parcel (in contrast with other elements which do suggest a degree of flexibility, concerning the location of waterways, shopping facilities and the like). There is an express identification of the 27 hole golf course, as open space, in the western part of the precinct in both the precinct intent, and the DCP map. While accepting Titanium’s submission that this inclusion was ‘developer driven’ in the sense the DCP and the rezoning reflected the developer’s wishes at the time, it remains the case that this categorisation was not without an obvious foundation in a perceptible and understandable planning intention: subject to the constraints of private ownership, doing as much as possible to preserve and maintain natural elements on the land.
- [23] Other aspects of the DCP confirm the conclusion that the uses to which this parcel might be put were intended to be carefully confined: it identifies a residential component, and a golf course component, in SDP 5; the residential land is identified by its Special Residential zoning, correlating with areas on the DCP map; the golf course land, with its distinct Special Facilities zoning, is also clearly delineated; and, the DCP identifies a range of residential uses and includes a Table of Development providing for them – while making no provision for any form of residential development in the Special Facilities zoned golf course land. On any view, DCP 2 clearly distinguishes the golf course, and residential areas.
- [24] If further confirmation was needed, it appears in other provisions of DCP 2 under which it is clearly intended that remaining unique natural features, particularly

forest and wetland habitats, are protected and maintained, and that significant areas of remnant vegetation of high conservation significance 'located generally in the western area' of SDP 5 also be preserved.

- [25] Council's refusal of this application was said by Titanium to be unrealistic in light of what has occurred on this land since 1996, including a bulk earthworks approval in 1998 allowing the importation of large amounts of fill for the new golf fairways, and associated drainage. Titanium also pointed to events touching other parcels within the DCP involving departures, by Council, from its original provisions suggesting, it was said, a 'flexible' approach to its construction. These include changes in the design of roads and the configuration of waterways, the location of shopping and community facilities and a high school and, in particular, approval of a grammar school on land shown in the original SDP map as part of an environmental buffer area.
- [26] None of these is, however, inconsistent with the degree of flexibility commonly found during the long-term application of a planning document like the DCP. The approval of the grammar school occurred in circumstances which do not suggest any protest from, or conflict with, State Government agencies interested in preservation of environmental areas (including the EPA) which were consulted. Permission to import the fill followed not long after the rezoning and the introduction of the DCP is hardly surprising. These variations are not, then, persuasive that the DCP is so malleable as to readily allow residential subdivision on land designated for quite different purposes, and with a high degree of emphasis on environmental values.
- [27] Titanium also suggests this readiness by Council to accept variations is consonant with a general, underlying theme of the DCP that where land is no longer required for a designated purpose it is given over to the 'dominant' purpose, i.e. residential uses; but, again, the alterations to which it points did not involve provisions of the kind found here, which attach a particularly strong context to the plain intention that there should not be residential development in the Special Facilities zone¹¹:

It is not intended that this zone be utilised to facilitate incongruous development in a locality such as a higher density of residential development than would otherwise be possible.

- [28] Under Council's more recent IPA scheme the land lies within the Open Space – Sport and Recreation Precinct of the Caloundra South Planning Area and, relevantly, outside the parameters of either the existing developed community or the Emerging Community Area. The Precinct envisages uses for indoor and outdoor sport, recreation and entertainment which, Titanium submits, would attract undesirable impacts in the nature of buildings, car parks and the like.
- [29] The Precinct is subject to various 'overlays', with codes which indicate it is wetland, and a part of Caloundra with ecosystems and biological diversity which should be protected. The Natural Waterways and Wetlands Code seeks to preserve natural waterways and wetlands, and retain the existing hydrological regime to protect significant vegetation and habitats. The Habitat and Biodiversity Code aims for an 'Outcome' which protects vegetation to '*...ensure its survival and ongoing contribution to Caloundra City's biological diversity*' and '*...significant vegetation*

¹¹ Special Facilities Zone, *intent*: Ex 24, para 13.4.1, p 64

associated with waterways and wetlands is not adversely impacted by changes to the hydrological regime'. Titanium's proposal does not sit comfortably with the goals set up in these Codes; while its proposal tries to minimise impacts, it can never be said to attract a beneficial environmental outcome, and it only involves rehabilitation in a context which would necessarily follow the extensive clearing and destruction of vegetation and habitat; and, for reasons which follow, it would have adverse effects on wetlands.

- [30] Unsurprisingly this very low-lying land is also subject to the Flood Management Code. Expert hydraulics engineers, Mr Collins and Dr Connor, were still considering the question of potential flood impacts when the hearing ended and submitted a further post-trial joint report about the Code's requirement that development not produce a loss of flood storage capacity. While their conclusions remained different it is inescapable that the loss, whatever its actual measure, would be significant. Titanium advanced arguments to reduce any impacts, and a stratagem to compensate: the excavation of the driving range on the existing golf course to a significant depth to the point, if necessary, where it became what is called a 'wet' driving range. It was ultimately clear that, whatever Titanium might do there would be a net deficit albeit, perhaps, not one which by itself would be sufficient to amount to conflict sufficient to refuse approval.
- [31] The inclusion of the land in the Sport and Recreation precinct does not at first blush sit entirely comfortably with the 'environmental' goals of the Codes. It appears, again, to be the product of a planning regimen which must strike a balance between private ownership and the desirable environmental properties of this land. It is not, in any event, something which immediately avails Titanium whose proposal for residential development remains inconsistent with the uses envisaged for the precinct, which classify that kind of development as 'undesirable'.
- [32] The IPA scheme also contains Desired Environmental Outcomes. DEOs nos 2, 4, 5 and 6 are obviously directed towards maintaining and strengthening urban growth boundaries, and DEO 3 looks to the sustainable management of Caloundra's natural resources, to be achieved by the protection of ecosystems including waterways and land uses from incompatible development and the minimisation of impacts from new development on local, State and regionally significant ecosystems, vegetation and wildlife.
- [33] While instances of actual compromise of DEOs under IPA are not often found¹², this is a large parcel on the edge of the city, in an environmentally sensitive area. Even if it cannot be said that the proposal is on a scale which actually compromises the DEO provisions, they form part of the statutory regime to be considered in weighing this proposal. Certainly they do not support the notion, advanced by Titanium, that there is tacit approval of the proposal by reason of the inclusion of the land within indicative urban areas; reference to land like the riparian fringes of Bells Creek, environmentally sensitive areas to the north, and even parts of Pumicestone Passage which are obviously unsuited to urban development mean the inclusion is illusory.

¹² *Kotku Education and Welfare Society v Brisbane* [2004] QPELR 267, at paras [25]-[26]; *Woolworths Limited v Maryborough* [2005] QPELR 423

- [34] The transitional provisions of IPA and s 4.4(3A) of the PEA require that State planning policies be considered in the assessment of development applications. The State Coastal Management Plan, promulgated under the *Coastal Protection and Management Act 1995* is a policy of that kind and has the force of law as a statutory instrument. The draft South East Queensland Regional Coastal Management Plan, founded on the planning intent of the SCMP and expected to come in to effect later this year, describes this land as coastal wetland; and the document upon which the SEQRCMP is based identifies Bells Creek as wetlands of State significance¹³.
- [35] Titanium and the EPA locked horns about the question whether this land fell within the definition of ‘coastal wetlands’ in the SCMP but the cases show the debate takes place within confined parameters in that, at the highest, these coastal Plans are considered in the same light as State planning policies¹⁴, and those policies are to be applied with a degree of flexibility, affected by identifying their objectives and ensuring, so far as possible, that they are achieved¹⁵.
- [36] Nevertheless, the statutory definition of ‘coastal wetlands’ is one which can fairly be said to apply here – including, as this land does ‘...*tidal wetlands, salt marshes, melaleuca swamps (and any other coastal swamps)... whether they are of saline, freshwater or brackish nature*’. The evidence of several witnesses¹⁶, some rainfall records, and inspection of the site was persuasive this area neighbours the coast and tidal streams; is subject to regular inundation and not infrequent flooding; is wet and marshy in many areas; and, that it contains creatures (the Wallum Froglet) and flora (*melaleucas*, or paperbark trees) consonant with a predominantly wetland environment. The presence of the Froglet has the effect of making it a ‘significant’ coastal wetland.
- [37] SCMP Policy 2.8.1 looks to the preservation of natural wildlife in significant coastal wetland, and 2.8.2 seeks to maintain areas around wetlands sufficient to safeguard their functions. Policy 2.8.3 similarly looks to preserve the biodiversity of these wetlands and ensure the continuance of viable populations of native species. This proposal is in conflict with all of these goals.
- [38] Whatever weight is given to the SCMP it is inescapable that it, and the former and current planning schemes, direct attention toward environmental matters. Most of the evidence, then, involved reports from and debate between experts from diverse fields in the ecological spectrum, with special attention to the nature of the land and its flora, and the protection of certain fauna. A good deal of evidence was devoted, in particular, to the question whether or not this parcel or some parts of it are true “wetlands” and the issue was widely debated in the context of yet another definition, adopted by the EPA. Critical elements include, as with the SCMP, the presence of *melaleuca* trees and Wallum Froglets but the argument went further, into areas like soil types.
- [39] It was not in dispute that wetlands are important. They are productive, manifest high levels of biological diversity, and support a large range and number of plants, birds, mammals, reptiles, amphibians, fish and invertebrates. Titanium’s experts

¹³ Report Ms Bailey, Ex 27

¹⁴ *Coastal Protection Act 1995*, s 50

¹⁵ *Vadale Pty Ltd v Landsborough Shire Council* [1985] QPLR 338, at 341; and, see the remarks of Quirk DCJ in *Norris Clarke & O’Brien v Brisbane* [1996] QPELR 262, at 264

¹⁶ Messrs Hines, Ryan and Wilson

included Mr Sutherland who expressed the view that a true wetland contains not just appropriate flora but, also, hydrophytes in the soils reflecting regular inundation – which, he said, were not present here. Stands of melaleuca trees were said by other experts (including Dr Olsen, Mr Wilson and Mr Ryan) to be a telling and ultimately determinative indicator (regardless of soil types) but still another, Ms Conacher, disagreed and claimed that she had identified melaleucas growing outside any acknowledged wetlands. The evidence was complex, and sometimes highly contentious. As Ms Conacher said, fairly and helpfully, there is no universally recognised definition, ‘... *with most studies and jurisdictions creating their own to suit the purpose and situation at hand*’¹⁷.

- [40] Ultimately, three things were persuasive that this land or, on any view, the greater part of it is properly categorised as a form of wetland. The first arose simply from inspection of it: to the layperson it presents as very low lying, rising only slightly above the surface of Bells Creek; muddy and wet in many parts, with reeds and grasses commonly seen to grow in water or wet soil; and with an abundance of melaleuca trees. The second reason springs from the symmetry between the SCMP and EPA criteria and, as previously discussed, the satisfaction of the former on grounds which feature the same important, accepted elements – the presence of the Wallum Froglet, and paperbark trees.
- [41] The third arose from the evidence of Dr Olsen, (whose views were generally in accord with those of Mr Ryan) that whether by field determination, or technical research or by reference of the statutory definitions, the land is “dominated” by wetlands – and, as other evidence plainly showed, it features native frogs including the Wallum Froglet which, as all the scientists agreed, are usually associated with wetlands. As Ms Conacher appeared to eventually accept, it can be said at the very least that the land contains a large expanse of wetlands within a spectrum of wetland types (from wet through to dry); and, even on the more conservative of the various approaches, this development would involve the loss of about 6ha of ‘wetland community’¹⁸.
- [42] A joint report from fauna experts Mr Warren, Dr White and Mr Agnew confirmed that the proposal would involve removal of some habitat for all rare, threatened or migratory fauna species recorded on the land; and, the loss of habitat trees. The evidence had a particular, unsurprising focus on the Wallum Froglet which is typically associated with permanent and ephemeral wetlands, and is a vulnerable species under the *Nature Conservation (Wildlife) Regulation* 1994. Mr Agnew, Dr Meyer and Mr Hines detected a wide distribution of the froglet on the land but Dr White, called for the appellant, was less convinced of its widespread presence. While he is an acknowledged expert, cross-examination revealed some inconsistency in his identification of this creature’s “core habitat” and his opinion that the inevitable reduction caused by large scale residential development could be compensated by the creation of a special frog habitat area at the north of land was unique to him.
- [43] While acknowledging Dr White’s expertise, Dr Meyer advanced detailed and ultimately persuasive reasons why compensatory habitat areas were unlikely to provide for the long term needs of the species, and might not replace existing

¹⁷ Ex 8, para 116

¹⁸ Ex 8, p 48

habitat. Even if those views are discounted, the weight of evidence nevertheless pointed to the conclusion that significant habitat of this endangered species will be destroyed, and the proposed compensatory habitat faces the hurdle of being an untested novelty.

- [44] It was also agreed that the Glossy Black Cockatoo is a vulnerable species present in the area and, the evidence indicated, a likely inhabitant of it. Mr Agnew obtained convincing evidence of feeding and, ultimately, Mr Warren agreed it was about. There was extensive debate whether or not the development could or might involve the retention of trees likely to be used by these birds, and Mr Agnew claimed to have identified a significant number which might be saved. The evidence is not, however, persuasive this could occur: a number of these trees appeared to be in areas proposed for roads and residential allotments, or the mosquito buffer zone.
- [45] The expert evidence also traversed many other elements of the native flora and fauna¹⁹. It is inescapable that a development on this scale will involve significant upset to and ultimate loss of a substantial part of the land upon which, presently, 173 flora species in five remnant wetland vegetation communities have been identified, together with 168 vertebrate fauna species including 23 mammals, nine reptiles, 14 frogs and 122 types of bird. As Mr Agnew acknowledged, further survey work might yet discover greater variety and wealth among these species particularly during more favourable seasonal conditions and, in his words, “... *the species richness data for the subject site is considered notable within a city wide context*”²⁰. Of those already identified, 14 fauna species have conservation significance attached to them (as the joint report of Warren, White and Agnew confirmed²¹). Mr Warren’s confidence that damage and impacts would be ameliorated by the preservation of parts of the land is belied by the size of the areas which will be strongly affected during the initial development, and permanently thereafter: the lakes, road, setbacks and the ‘vegetation corridor’ where it is adjacent to roads or forms part of areas cleared, and kept clear, to assist mosquito control.
- [46] Planning schemes and their constituent parts are to be construed, generally, according to the tenets described by the High Court in *Project Blue Sky v ABA*²²:

[69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined “by reference to the language of the instrument viewed as a whole”. In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that “the context, the general purpose and policy of a provision and its consistency and fairness and surer guides to its meaning than the logic with which it is constructed”. Thus, the process of construction must always begin by examining the context of the provision that is being construed.

[70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions

¹⁹ A useful history of the research over the last two decades touching this area and Pumicestone Passage appears in the report of Dr Olsen, Ex 19, paras 60 and 61

²⁰ Exhibit 18, p 6

²¹ Grey-headed Flying Fox; Latham’s Snipe; Rainbow Bee-eater; Osprey; Grey Goshawk; Lewin’s Rail; Dollar Bird; Marsh Sandpiper, and Great Egret.

²² (1998) 194 CLR 355 at 381-2 per McHugh, Gummow, Kirby and Hayne JJ

to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions ...

[47] These schemes often adopt non-legal, aspirational language. In light of the large areas and populations to which they can apply, the myriad ends to which they are directed, and their intention – to regulate an extremely wide variety of human activity – a want of certainty is hardly surprising. When, as here, a particular parcel is subject to a variety of provisions at different levels of the scheme the construction of those diverse provisions can be a challenging exercise.

[48] This Court has attempted to meet these difficulties by adopting particular principles, usefully summarised by Brabazon QC, DCJ in *Forges v Kangaroo Point Residents Association & Ors* [2002] QPELR 151, at 162:

[32] These town planning documents are largely the work of town planners. They are not the work of parliamentary counsel who have to consider a piece of legislation. If there are any ambiguities or inconsistencies, it is necessary to read the documents as a whole to discover their planning intent. They should be read and applied in a practical commonsense way, rather than in an overly technical way. They should be interpreted in a way which would best achieve their evident purpose.

[49] The application of these principles here makes it impossible to conclude other than that the planning documents turn their face against residential development on this parcel. The Urban PDLU of the land under the Strategic Plan indicates development was only intended to occur in accordance with the detailed planning guidance provided under DCP 2, which clearly identifies the site as part of the golf course and distinguishes between that land, and other land appropriate for residential development. Further descent into the scheme shows that SDP 5 defines areas expressly intended for residential development, with a Table of development containing a range of uses which do not apply to this land. The rezoning of the site, carrying conditions obviously designed to protect native flora and fauna, can only reasonably be construed as also reflecting, in context, an underlying but clear intent that the land not be used for residential development. The use of the word “generally” in DCP 2 occurs in a context which does not demonstrate that residential development is within contemplation on the Special Facilities zoned golf course land.

[50] This means the proposal is in conflict with the DCP’s requirement that the land be maintained as part of a major open space facility; that significant areas of remnant vegetation located generally in the western area (of the precinct, not just this parcel) should be preserved; that the development on the site should be for a golf course; and, that residential development should occur in the eastern part of SDP 5, and not the west.

[51] There is also identifiable conflict with the plain intention, under the Strategic Plan, to conserve environmentally significant areas which have been designated as open space; not to approve development on open space areas along major creek systems feeding into Pumicestone Passage, where the development would detrimentally affect a functioning value of areas of conservation or ecological significance; to protect and preserve areas of significant vegetation; not to develop areas of environmental or conservation significance protected by zones; and, to ensure that urban development takes place in accordance with sound hydrological and hydraulic

management principles in a way which does not result in a loss of flood storage capacity.

- [52] There is also a measurable risk that the proposal would cut across the implementation of the IPA scheme, *Caloundra City Plan 2004*. The land lies within a Precinct plainly intended for quite different uses and, so far as IPA planning schemes can go towards prohibition, strongly turns its face against residential development. The proposed large scale residential development would involve the destruction of wetlands and the loss of significant vegetation and wildlife habitat; is in conflict with the apparent intent to protect significant vegetation to the west of Pelican Waters; does not accord with the apparent intent of the Caloundra South planning area to keep urban residential development within the boundaries of established and emerging communities; would result in the destruction of a large area of natural fauna habitat with adverse effects on ecosystems, ecological processes and biological diversity, contrary to the Habitat and Biodiversity Code; would involve the destruction of a substantial area of wetland, contrary to the Natural Waterways and Wetlands Code; requires filling and excavation which would adversely impact on areas of nature conservation significance, contrary to the Filling and Excavation Code; and, is in conflict with the Flood Management Code.

- [53] The possibility of further conflict with the Biting Insect Code was the subject of interesting evidence from Mr McGinn, and Professor Kay. They agreed this is an area heavily infested with mosquitos, at times up to levels generally categorised as pest and, occasionally, plague proportions. On any view there is a serious mosquito problem. Mr McGinn thought it was manageable although some of his suggested techniques raised questions whether they would adversely affect water quality management. Professor Kay, rather surprisingly, thought the problem was insoluble, at least in the immediate future; a conclusion which does not sit comfortably with the extensive nearby residential development and the apparent popularity of the golf course. The subject land is close to the source of the problem and it has to be accepted that, on a technical basis, the Code is breached. Nevertheless, I found Mr McGinn's evidence to the effect that the use of buffers around the residential areas and programs involving the application of insecticide persuasive that the presence of mosquitoes would not deter future residents or make their lives intolerable. In short, conflict is present but not to a degree which would compel rejection of the application.

- [54] Some issues originally raised were not pursued, or were abandoned during the hearing. Access to the development would involve an extension of Mahogany Drive in a manner which, the traffic engineers agreed, did not meet Queensland standards but Council accepted the issue was not of sufficient magnitude to warrant refusal. Stormwater and sewerage questions, and issues to do with water quality and acid sulfate soils, were either not pursued by Council or were the subject of a consensus that, if the appeal is allowed, they might satisfactorily be dealt with by the imposition of appropriate conditions.

- [55] Titanium pointed to the South-East Queensland Regional Plan, which includes this land in the urban footprint, as supportive of the proposal by reason of the definition of "infill development", but it is clear this relates merely to potential suitability for urban uses and is subject to the proviso that it occur within established urban areas – something which is not apposite here.

- [56] Council argued that ss 1.2.2(1) and 1.2.3 of IPA reflect a legislative intent that ecological sustainability be achieved by a balance between the wellbeing of people in communities, and the protection of ecological processes and natural systems, and that Council's decision here reflects that intent. That submission is appropriate: as Council contended, a balance which integrated the relevant considerations was struck by the decision which led to the Special Facilities rezoning and the subsequent amendment of DCP 2; and, that balance was between economic development which provides for the community's wellbeing (through appropriate residential development, generally in the eastern part of SDP 5) and the protection of areas of high conservation significance in the western part of that precinct.
- [57] A number of the identified conflicts with the Strategic Plan, the DCP and the IPA scheme are the apparent antithesis of their plain intent, and must be categorised as serious. The proposal would involve extensive residential development in an area designated for open space with inevitable wide-spread damage to the very environmental values which the specific controls contained in the DCP seek to protect. While intensive and creditable efforts have been made by Titanium to ameliorate this damage the proposal, simply, extends urban development beyond its intended and acceptable boundaries; and, attempts to do so on a scale which magnifies the level of conflict.
- [58] These serious conflicts may, however, be overcome if sufficient planning grounds exist to justify that course. Under the test in *Weightman*²³ it is necessary to examine the nature and extent of the conflict; identify whether there are any planning grounds relevant to the part of the application from which conflict arises; and, then, decide whether those planning grounds favourable to the application are, on balance, sufficient to justify approval in the face of the conflict.
- [59] While the term "planning grounds" is not defined in the legislation, some assistance can be gleaned from the definition of "town planning" which focuses upon matters necessary or expedient to secure the improvement, orderly development, helpfulness, amenity, embellishment, convenience, conversational or commercial advancement of an area or part of it²⁴. Elsewhere, it has been suggested that the term connotes grounds which would establish positive betterment in terms of planning outcomes which would not otherwise be achievable through the existing planning scheme, and justify departure from it²⁵.
- [60] Titanium relies upon various matters, advanced as planning grounds of that kind:
- (a) the lack of need or utility for the 9 holes of golf course generally intended for this land results in a planning need to find a suitable alternative use. This proposal is just such a use in terms of the relevant planning documents and the need to respect the environment, generally, and Bells Creek, in particular;
 - (b) the care with which ecological concerns (including those expressed in the DCP) have been addressed in the amended proposal will result in rehabilitation and maintenance of the environmental values of this land and Bells Creek consistent with a balance between those issues and the development of privately owned urban land;

²³ *Weightman v Gold Coast City Council* [2002] 121 LGERA 161

²⁴ *Kentbrock Pty Ltd v Gold Coast City Council* [2003] QPELR 587

²⁵ *Palyarus v Gold Coast City Council* [2004] QPELR 162

(c) the dependence of the DCP on the then intentions of the proponent for the master planned development and the flexibility that one would normally expect in the implementation of a master planned community;

(d) the demonstrated willingness of the respondent to depart from planning intentions, purportedly, enshrined in the DCP, even at the cost of land reserved for environmental park and public dedication;

(e) the consistency with the intention of SDP 5 in that the uses proposed in this amended proposal comprise precisely the type of 'high amenity, low density housing' promoted as one of the two dominant land uses in this SDP and for which much of the SDP area has already been developed;

(f) in so far as the planning documents refer to 27 holes of golf, they have simply been overtaken by time and events which itself justifies any necessary departure from the planning documents (see *Playfaire v MSC* [1991] QPLR 87 at page 88; see also *Grosser v Gold Coast* [2001] QCA 423).

- [61] The first and last focus on a comparison of this proposal with the previously proposed use of the land as a golf course. The evidence showed that in 1998 an engineering approval was granted, but that is not a continuing approval for the purposes of IPA²⁶. The conditions associated with the Greg Norman Golf Course required a plan of development to be presented and, also, a further development application. In the result, the only legitimate comparison is with a golf course design which complies fully with either the transitional scheme provisions, or IPA. The former would require a development permit from Council for operational work, and the latter for both a material change of use, and operational work. The debate becomes arid, of course, in light of evidence that the additional nine hole golf course on the land would not, now, be financially viable.
- [62] While some of the evidence did touch upon this original use and the current proposal in comparative terms, it cannot be said that the appellant called evidence which conclusively showed how the Greg Norman Golf Course would be designed and constructed, or its precise impacts. It is simply impossible to make a conclusive finding whether or not this proposal, involving a significant intrusion into the flora and fauna values of the land, results in a better outcome than a golf course which might ultimately comply with all of those conditions. Again, the exercise becomes academic if there is no likelihood the extra nine holes will be developed.
- [63] The contention that the proposed residential community and associated attempts to minimise habitat disturbance leads to a better planning outcome than development which is consistent with either planning scheme is unsupported by those schemes, or the evidence. When planning documents clearly intend that there be only limited development on private land so as to protect and preserve natural features, and the kinds of development they count as acceptable cannot, on any view, be stretched to include residential subdivision, a large residential development simply cannot be described as 'better', on any test.
- [64] Finally, the altered desires of the current owner from those which prevailed when the land was rezoned cannot logically be raised up as a planning ground of substance. It is apparent this historical rezoning suited the owner at the time, who was able to persuade the local authority it was appropriate. That reflects nothing

²⁶ Section 6.1.23

more than accepted planning intentions at the time. The change in the underlying desires is a practical matter, not without materiality, but incapable of being categorised as a planning ground according to the appropriate criteria.

- [65] Titanium also contended that the proposal was one which satisfied an existing need, and would bring economic benefit to Caloundra. Expert witnesses in this field, Messrs McCracken and Ball, agreed the potential contribution to future population and growth would be positive but, ultimately, “... *too small to be of consequence with respect to community or economic need*” which could be met elsewhere in existing and future residential areas. Mr Ball did refer to it as a unique opportunity to create a first class golfing, residential community which might not easily be replicated elsewhere but did not go so far as to suggest that opportunity represented need. Mr Warren argued that the proposal would represent a better outcome than no development at all, in reliance upon and with reference to the risk that the land might be subject to illegal dumping, weed invasion or recreational uses like trail biking. There was little or no evidence of activities of that kind on inspection.
- [66] Conflicts with the planning documents are major, and substantial. None of these grounds, jointly or severally, are sufficient to overcome that conflict in a case in which the court is asked, in essence, to substitute what is alleged to be a preferable planning strategy for that which all of the schemes consistently envisage. That is not the court’s function, and the appeal must be refused.