

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Cornerstone Properties Ltd v Caloundra City Council & Anor* [2003] QPEC 042

PARTIES: **CORNERSTONE PROPERTIES LIMITED (Appellant)**
AND
CALOUNDRA CITY COUNCIL (First Respondent)
AND
STATE OF QUEENSLAND (Second Respondent)

FILE NO/S: 17 of 2003

DIVISION:

PROCEEDING: Appeal

ORIGINATING COURT: District Court of Queensland, Maroochydore

DELIVERED ON: 20 August 2003

DELIVERED AT: Maroochydore

HEARING DATE: 30 June 2003, 1 - 4 July 2003

JUDGE: Judge J.M. Robertson

ORDER: **Appeal Allowed.**

CATCHWORDS: LOCAL GOVERNMENT – Town Planning – appeal against conditions imposed on development in local business zone, permitted development in planning scheme, conflict with DCP which provides for “open space” on part of the site; importance of native trees to community amenity in Maleny; flooding issues; traffic, where design does not conform with MRD Design Manual; design features; condition power; onus of proof.

Cases cited:

Cardwell Shire Council v King Ranch Australia Pty Ltd
(1984) 88 ALJR 386
Crane v Brisbane City Council & Anor [2003] QPEC 025
Hymix Industries Pty Ltd & Anor v Alberton Investments Pty Ltd [2002] QPELR 116
Lloyd v Robinson (1962) 107 CLR 142
Norris Clarke v O'Brien Pty Ltd v Brisbane City Council
[1996] QPELR 262
Pacific Seven v City of Sandringham (1982) (1982) VR 157

Proctor v Brisbane City Council [1994] QPELR 309
Stubberfield v Redland Shire Council [1993] QPELR 214
Wise v Maroochy Shire Council (1999) 2 Qd. R 566

Statutes cited:

Integrated Planning Act 1997, ss 3.5.11 (1) (c), 3.5.30,
3.5.32, 4.1.27 (1) (b), 4.1.50 (1), 6.1.29, 6.1.3, 6.1.30 (4),
Local Government (Planning and Environment) Act 1990, s
6.1 (1) (c) (repealed)

COUNSEL: C.L. Hughes SC with S.M. Ure (for the appellant)
P. Lyons QC with J. Houston (for the respondent)

SOLICITORS: MacDonnells (for the appellant)
Corrs Chambers Westgarth (for the respondent)

Contents

	Page
Introduction	4
The relevant planning documents	6
The disputed conditions (on appeal).....	8
Disputed issues resolved	12
The issues outstanding.....	13
(a) Open Space	13
(i) The law	14
(ii) The nature of the conflict	15
(iii) Significant native vegetation/Open space provision	17
(iv) The esplanade policy	19
(v) Ecological links	20
(vi) Conclusions – condition 27	20
(b) Traffic Issues	21
(i) Access and Ingress	21
(ii) Upgrading of Bunya Street	24
(c) Car Park Pathway – condition 13 (d)	25
(d) Flooding	25
(i) Condition 14.....	25
(ii) Conditions 13 (a) and 13 (b).....	26
(e) Design Issues – condition 8	26
Orders.....	27

[1] **INTRODUCTION**

On 21 August 2002, a development application was lodged by the appellant with Caloundra City Council (Council) for a material change of use to establish a “shop” (supermarket), and preliminary approval for building works at 2-4 Bunya Street, Maleny. The property is described as Lots 1 and 2 on RP26375 (the site). Lot 2 is presently developed and used as Boxsell’s Maleny livestock saleyards. Lot 1 contains a detached house towards the rear of the lot. The total area of the site is 6,737m². The site has a frontage of approximately 44.5 metres to the northern side of Bunya Street, which, as it crosses the bridge over Obi Obi creek adjacent to the site, becomes Maple Street. To the east is the Maleny Hotel; to the north and west, the site is bounded by Obi Obi creek for part of the distance where the creek runs through the township of Maleny. On the 10 February 2003, Council approved the application subject to forty-three numbered conditions¹. The appellant appealed against twelve of the conditions, although in respect of condition 13, the appeal was against a number of subparagraphs in that condition relating to engineering matters.

- [2] The proposed development comprises a supermarket, plant room, and loading docks, with a total floor area of 2067m². Woolworths Supermarkets have agreed to a long-term lease (15 years) to occupy the site if it is developed. The supermarket will open onto an open area carpark at the front of the site. It is also proposed that there be a lower level undercover carpark with access via a ramp located at the western end of the ground level carpark. The proposed access to the site is from a single combined ingress/egress driveway adjoining the eastern site boundary. Servicing is to be undertaken at the rear of the building, designed to accommodate the turning movements of a heavy rigid vehicle. An acoustic barrier, which varies in height, is to be erected along parts of the eastern and northern boundaries to attenuate noise generated from loading and unloading activities to an appropriate level in adjoining properties. In particular, there is a caretaker’s residence to the rear of the Maleny Hotel site on the eastern boundary, which is the closest existing residence to the proposed loading bay area. Extensive landscaping of the site is proposed.
- [3] If erected, the development will be the largest commercial development in Maleny. It is acknowledged by the appellant that the development as proposed will necessitate removal of all existing vegetation from the site, including a number of large native trees such as Bunya and Hoop Pine, and Silky Oak.
- [4] The application for development approval was made under Council’s current town planning scheme (“the Planning Scheme”), which is a transitional planning scheme under the *Integrated Planning Act 1997* (“IPA”)².
- [5] The site is in the Local Business zone under the Planning scheme, and under the Table of Development for that zone, a “shop” is permitted development subject to the requirement that the applicant apply for a planning approval (notification of conditions) and comply with conditions imposed by Council (or on appeal, by the Court). Council has no power to refuse the application³.

¹ Exhibit 6, pp 308-330

² Section 6.1.3

³ Section 6.1.30 (4) and 3.5.11 (1) (c) IPA

- [6] One of the central planks of the appellants case on appeal is that at least some of the conditions imposed by Council (for example, Condition 27 relating to Open Space Provision) amount to a de facto refusal, and therefore an unlawful use of the conditions power; although it is not suggested that any of the impugned conditions are inherently unlawful in terms of section 3.5.32 of the IPA. Section 6.1.29 of the IPA is relevant to the assessment of such a development application. It provides (relevantly):

“6.1.29 Assessing applications (other than against the Standard Building Regulation)

(1) This section applies only for the part of the assessing aspects of development applications to which a transitional planning scheme or interim development control provision applies.

(2) Sections 3.5.4 and 3.5.5150 do not apply for assessing the application.

(3) Instead, the following matters, to the extent the matters are relevant to the application, apply for assessing the application--

...

(b) the transitional planning scheme;

...

(d) any planning scheme policy made after the commencement of this section;

...

(i) any other matter to which regard would have been given if the application had been made under the repealed Act.”

- [7] The power to impose conditions is prescribed in section 3.5.30.

“3.5.30 (1) A condition must –
 (a) be relevant to, but not an unreasonable imposition on, the development or use of premises as a consequence of the development; or
 (b) be reasonably required in respect of the development or use of premises as a consequence of the development.

(2) Subsection (1) applies despite the laws that are administered by, and the policies that are reasonably identifiable as policies applied by, an assessment manager or concurrence agency.”

- [8] Under the repealed Act⁴, a condition was unlawful if it was “not relevant or reasonably required in respect of the proposal to which the application relates.” In

⁴ *Local Government (Planning and Environment) Act*, Section 6.1 (1) (c)

Proctor v Brisbane City Council [1994] QPELR 309 at 313 the Court of Appeal held that section 6.1 (1) (c) contained two alternate tests for validity of a condition –

“It may well be that a condition which is in no proper sense of the word “required” by a subdivision is nevertheless relevant...as falling within the proper limits of a local authority’s functions under the Act, as imposed to maintain proper standards in local development or in some other legitimate sense. For example, a condition relating to the layout of the subdivisional roads may not be able to be supported as “required” – reasonably or otherwise – by the subdivision in question, but may be defensible as reasonably imposed in the interests of the rational development of the area in which the subdivision is located.”

This construction was confirmed in *Wise v Maroochy Shire Council* [1999] 2 Qd. R 566.

- [9] These cases refer back to earlier decisions of the High Court, *Lloyd v Robinson* [1962] 107 CLR 142 and *Cardwell Shire Council v King Ranch Australia Pty Ltd* [1984] 88 ALJR 386. In *Cardwell Shire Council* (at page 388) it is said,

“..the local authority, in deciding whether a condition is reasonably required by the subdivision, is entitled to take into account the fact of the subdivision and the changes the subdivision is likely to produce...and to impose such conditions as appear to be reasonably required in those circumstances...”

The test in the IPA makes only a minor change to the test for lawfulness in section 6.1.1 (c) of the LGPEA, and that is the test now imports a requirement that even “relevant” conditions must not be an unreasonable imposition on the development or use of the premises as a consequence of the development. In *Hymix Industries Pty Ltd & Anor v Alberton Investments Pty Ltd* [2002] QPELR 116, the Court of Appeal made it clear that whether or not a condition ought to be imposed is a question of fact, and not of law, unless on the evidence available “only one conclusion is open”, namely that a particular condition should, or should not be, imposed⁵.

[10] **THE RELEVANT PLANNING DOCUMENTS**

- [11] (i) The Planning Scheme

All of the site (i.e. all of each of Lot 1 and Lot 2) is contained within the Local Business Zone where development for a shop (as this development is a stand alone supermarket it is included in the definition of a shop) is a permitted or Column 4 use.

- [12] (ii) The Strategic Plan

Within the Strategic Plan, the site is contained within the preferred dominant land use (“PDLU”) “Maleny and Environs Planning Area⁶”. Objective 12 B (a) of the Strategic Plan is:

⁵ per William J.A at paras [5] and [7]

⁶ See strategic plan map following page 49 of the Strategic Plan

“TO ENSURE THAT SUFFICIENT GUIDANCE IS PROVIDED TO FACILITATE THE APPROPRIATE USE AND DEVELOPMENT OF LAND WITHIN THE MALENY AND ENVIRONS PLANNING AREA.

Implementation

- (a) This objective will be achieved by implementing the strategies, intents, objectives and implementation criteria of the Maleny and Environs Development Control Plan.

Development within this area shall be subject to the provisions of the DCP.”

- [13] (iii) The Development Control Plan (“DCP”)

Within the DCP the subject land is contained in the “Town Centre Precinct” one of several precincts dealt with under the “Business Areas Strategy”. The relevant DCP maps (including map 5.6.1) shows an “Open Space” designation of varying widths along the bank of the Obi Obi creek, including parts of the site. One of the issues on appeal concerns what is said to be conflict or tension between the zoning of the site as Local Business in the planning scheme, and other planning objectives set out in the strategic plan and/or the DCP.

- [14] (iv) Planning Policies

Condition 27 specifically calls up the Council’s Local Planning Policy “Esplanades” PDLPP 6.2/07. As far as I can see, Council does not specifically rely on this policy to support Condition 27 in its final written submission. This may be because (as Mr Perkins observes in his report) section 2 of the policy “Requirement for an Esplanade” states:

“An esplanade contribution will be required in the case of an application for rezoning, subdivisions or consent on land adjacent to:-

...

Obi Obi Creek...”

This application does not involve a rezoning, subdivision or consent; the application is for a permitted development in the local business zone.

- [15] The appeal is made pursuant to section 4.1.27 (1) (b), that is an appeal against a condition imposed. The appellant bears the onus of proof⁷. As the hearing proceeded, a number of conditions were modified by agreement, and some were not pressed by Council.

⁷ section 4.1.50 (1) of the IPA

[16] **THE DISPUTED CONDITIONS (ON APPEAL).**

Condition 2

“2. Parking – On site parking shall be provided in accordance with Council’s Planning Scheme, Section 3.1(2) which require 1 parking space per 20m² Total Use Area up to 500m² thereafter for Shop/Shopping Centre. Parking required is one hundred and seventy-four (174) spaces based on a Total Use Area of 2736m².”

Condition 3

“3. Landscape Strip – The applicant shall, within forty (40) days of the date of the Decision Notice, submit to Council a revised Landscape Concept Plan to the satisfaction of Councils’ authorised officer. The Revised Landscape Concept Plan must provide a landscape strip two (2) metres wide within the site along the full frontage to Bunya Street, save for the access point. The Landscape Concept Plan must form the basis of a future Landscaping Plan to be submitted as part of a development application for Operational Works.”

Condition 6

“6. External Finishes – The applicant must, within forty (40) days of the date of the Decision Notice, submit to the Council details and specifications of the glazing, external materials and finishes/colours to be utilised on the Shopping Centre to the satisfaction of the Council’s authorised officer. Glazing and other materials to be utilised on the building are to be non-reflective so as to minimise glare and ensure maintenance of visual amenity.”

Condition 8

“8. Aesthetic Appearance – The applicant must, within forty (40) days of the date of the Decision Notice, submit to the Council an amended Site Plan and Elevations Plan (for all elevations and including roof areas) to incorporate the requirements of Conditions 13 and 14 of the development approval to the satisfaction of the Council’s authorised officer. In addition, the amended Site Plan and Elevations Plan must demonstrate that the proposed development will retain and improve the amenity of the town centre, ensure that the rural village character is preserved, and minimise the “box-like” nature of the building. The western and northern elevations facing Obi Obi Creek shall present an attractive and articulated façade to the Creek environs and the parapet feature shall be deleted. The acoustic barrier required by Condition 31 (sic) shall also be articulated/staggered and present an attractive appearance to the Creel environs. The parapet feature on the eastern elevations facing the Maleny Hotel shall be deleted. The elevations facing Bunya Street may contain a central parapet feature tapering to the non-parapet walks on the west and east elevations. The amended Site Plan and Elevations Plan must be prepared in accordance with the relevant Implementation Criteria contained within Section 5.15 (1) and Section 5.1.15 (1) of the Maleny and Environs Development Control Plan and the Maleny Main Street Masterplan.”

Condition 13(a)

“13(a) Flooding – the layout of the proposed development must be amended to include the following features:

(a) the proposed building and other development areas to be clear of the area of the land effected by 10 year flooding.”

Condition 13(b)

“13(b) Dedication of land as drainage reserve/park – The layout of the proposed development must be amended to include the following features:

(b) land effected by 10 year flooding in accordance with Queensland Urban Drainage Manual (QUDM) Table 5.08.1 must be dedicated as drainage reserve or park.”

Condition 13 (c)

“13 (c) Staff Car Parking – The layout of the proposed development must be amended to include the following features:

(c) car parking spaces to be provided in accordance with Council’s Planning Scheme. The car parking to the rear of the Shopping Centre (i.e. in the vicinity of the loading bay) must be for the exclusive use of staff and must be suitably marked to signify same.”

Condition 13 (d)

“13 (d) Pedestrian Pathway – The layout of the proposed development must be amended to include the following features:

(d) a central pedestrian pathway through the car parking area. This pathway must also cater for disabled access and be extended to connect to the pathway along the frontage of the site and be integrated with pathways to the west and east of the site.”

Condition 13 (f)

“13 (f) The layout of the proposed development must be amended to include the following features:

(f) Relocation of the two proposed “pram” parking spaces away from the circulation aisle to the main parking module proposed for the development. Any car spaces proposed along a circulation aisle will be considered for approval only where marked for staff parking.”

Condition 13 (g)

“13(g) The layout of the proposed development must be amended to include the following features:-

(g) the two proposed disabled parking spaces must be relocated to be away from the circulation aisle to the main parking module proposed for the development. The ten spaces shown along this strip will be acceptable as staff spaces and must be suitably marked to signify same.”

Condition 13 (h)

“13(h) The layout of the proposed development must be amended to include the following features:-

(h) alteration to enable service and refuse collection vehicles to turn at the proposed service bay. The service vehicle turning area shall accommodate satisfactory turning of the standard articulated vehicle so that the vehicle may enter and exit the service bay area in forward gear.”

Condition 13 (j)

“13(j) Engineering Design – The layout of the proposed development must be amended to include the following features:

(j) any other amendments Council deems necessary for engineering purposes.”

Condition 14

“14. Undercover Car Parking Area – The proposed undercover car parking area must be raised/relocated to provide for the following requirements in accordance with the Queensland Urban Drainage Manual:

- (a) minimum 10 year flood immunity;
- (b) no more than 300mm inundation depth in the 100 year flood; and a depth by flow velocity through any part of the car park in the 100 year flood not greater than 0.4 square metres per second.”

Condition 23

“23. Access to the proposed development site shall be restricted to no more than left turn-in, left turn-out and right turn-out manoeuvres only.”

Condition 24

“24. Traffic Design – The applicant shall upgrade Landsborough Maleny Road (Bunya Street) to the satisfaction of the Council’s authorised officer, with the following works:-

- centre island, linemarking and signage to suit access restriction to the site as required of other conditions of this approval;
- a roundabout west of the Obi Obi Creek bridge to suite U-turns in accordance with the relevant Australian standards;
- alterations to the existing carriageway including, as necessary, the existing Obi Obi Creek bridge, existing kerb and channel and verges to suit adequate vehicular access to the site and general vehicular movement along Bunya Street;
- protected right turn lane into Lawyer Street; and
- retention/re-instatement of any current on street car parking spaces.

The above upgrading is to be designed in accordance with the requirements of Main Roads document, “Road Planning and Design Manual” and shall ensure that current traffic flow along Bunya Street is not worsened.

Prior to commencement of any works within the State controlled road, the applicant must arrange for detailed engineering plans and specifications for the proposed works to be submitted to Main Roads and Council for assessment and approval.

The design must adhere to access and mobility standards required by all relevant State and Federal legislation.

The engineering, design, plans and specifications must be prepared by a consulting engineer pre-qualified to level RDI in Main Road "Register of Pre-qualified Engineering Design Consultants".

It should be noted that further approvals will be required for construction in accordance with the requirements of Section 31 of the *Transport Infrastructure Act* 1994.

In relation to this condition, the applicant is referred to the letter from the Department of Main Roads to Council dated 24 December 2002."

Condition 26

"26. Concrete Ramp – The existing steps to the section of pedestrian footpath fronting the site must be replaced with a concrete ramp."

Condition 27

"27. Esplanade – The applicant must provide an esplanade with an average width of 30 metres and a minimum width of not less than 10 metres, measured from the top of the bank (where definable) along the full property frontage to Obi Obi Creek in accordance with the Caloundra City Council's Local Planning Policy "Esplanades" PDLPP 6.2/07. The design of the esplanade and the identification of "top of the bank" shall be determined in the field by the applicant's consulting surveyor and Council's authorised officer."

Condition 30

"30. Service Vehicles Hours – Access, manoeuvring, and delivery (including loading and unloading) of service vehicles to the loading dock area may only be carried out between the hours of 7am to 6pm Monday to Saturday and must not be carried out on Sundays and public holidays. The body corporate manager/shopping centre manager shall be responsible for ensuring that this condition is adhered to at all times."

Condition 31

"31. Access Restriction Gate – The applicant must construct an access restriction gate at the entrance point to the loading dock and staff parking area as shown on the approved plan. The applicant must ensure that the access restriction gate is kept locked between the hours of 6pm to 7am Monday to Saturday and at all times on Sunday and public holidays to prevent access to the loading dock area by service vehicles. The applicant must undertake and implement the necessary actions and site access measures to ensure that emergency access (e.g. fire truck and other emergency vehicle access) to the loading dock and staff parking area can be readily and easily achieved between the hours of 6pm to 7am Monday to Saturday and on Sundays and public holidays."

[17] **DISPUTED ISSUES RESOLVED.**

- [18] In the lead up to the hearing, the parties continued to negotiate, and a number of issues became uncontentious. In paragraph 16 of Council's written submission, it is said that the appellant has "complied with the requirements" of condition 2 and that it "has accepted the condition...". Condition 2 required 174 car parking spaces; the appellant proposed 122 (124 less two car parking spaces deleted to widen the ramp as set out in Exhibit 2A); and Mr Eppell, who gave expert evidence on behalf of Council on traffic issues, says in his report (Exhibit 14 at page 24) that a parking provision of "no less than 111 would be supported based on the data currently available."

Condition 2 should be amended to reflect the Council's final position.

- [19] It is accepted by Council that the appellant has now complied with Condition 3. Condition 3 should now read,

"The Landscape Concept Plan, being Exhibit 4 in the appeal No 17 of 2003 before the Planning and Environment Court held at Maroochydore must form the basis of a future Landscaping Plan to be submitted as part of a development application for operational works."

- [20] Condition 6 has been largely complied with through the preparation of the coloured elevations and colour board in Exhibit 3. There is some dispute as to the requirements for details and specifications of glazing which do not appear to be set out in the coloured elevations. The condition should be amended to read:

"External materials and finishes/colours to be utilised in the shopping centre are to be in accordance with the coloured elevations and colour board being Exhibit 3 in the Planning and Environment proceedings. Glazing specifications for the centre and specifications of the external and finishes/colours for the acoustic walls to the satisfaction of the Council's authorised officer to be provided within seven (7) days of the date of delivery of the reasons for judgment in Appeal No. 17 of 2003 (or other words as agreed by the parties).

- [21] Condition 8 has been complied with. There should be a general condition to the effect that the development be carried out in accordance with the prepared plans in Exhibit 2 as amended by Exhibit 2A and 3 and 4 ("the general condition").

- [22] Condition 13 (c): As a result of amendment to the plans after the appeal was lodged, this condition has been complied with and the general condition will cover the issue.

- [23] Condition 13 (d): A central pedestrian pathway through the car parking has been provided in the amended plans. The pathway is suitable for disabled access and has been extended to connect with the pathway along the front of the site and is integrated with pathways to the west and east of the site. The general condition will cover this issue.

- [24] Conditions 13 (f) and (g): The amended plans adequately provide for these requirements, and the conditions can be deleted subject to the insertion of the general condition.
- [25] Condition 13 (h): The evidence establishes that Woolworths will be using only vehicles up to a heavy rigid vehicle, and that articulated vehicles will not be used for service purposes. This condition can be deleted, however a new condition should be inserted to provide that it will be unlawful for the site to be serviced by articulated vehicles. The appellant has accepted a condition in these terms.
- [26] Condition 13 (j): At the start of the hearing, Mr Lyons told me that this condition in its present form was not supported by Council. He did reserve the right to make consequential changes depending on the fate of some other conditions and to argue for a reformulated condition 13 (j) which would give it a much more restricted scope. In the final written submission, Council submits (at paragraph 22) for a more restricted wording of the condition. There is no contrary submission in the Applicant's response dated 16 July 2003, although in its primary submission the appellant observed that the condition was not pursued by Council and should be deleted. I invite further submissions on this issue upon delivery of my reasons.
- [27] Condition 26 was abandoned by Council at the start of the hearing and can be deleted.
- [28] Conditions 30 and 31 related to proposed noise control from the site. The parties were able to resolve this issue as the hearing progressed. The conditions in the present form can be deleted and in lieu the following conditions will be substituted:

Condition 30 – "Access, manoeuvring and delivery (including loading and unloading) of service vehicles to the loading dock area may only be carried out between the hours of 6am to 10pm on Monday to Friday, 6am to midnight Saturday and 8am to noon on Sundays and public holidays. Any vehicle refrigeration motors shall be turned off during unloading. (Exhibit 29)

Condition 31 – Absorbent treatment shall be applied to the external façade of the building and to the noise attenuation barriers along the south-eastern boundary and around to the loading dock, as depicted in yellow highlighter on plan "A", to achieve an absorption co-efficient of 0.5 at the 125hz octave band. (Exhibit 30)

[29] **THE ISSUES OUTSTANDING**

This leaves the following disputed conditions:

Conditions 13 (a) and 13 (b) and 14 which deal with flooding issues; Condition 27 (open space); Conditions 23 and 24 (traffic and site access); Condition 13 (d), (the width of the carpark pathway), and Condition 8 (design features).

[30] **(a) Open Space**

There is a conflict between the zoning of the land as local business and the DCP which calls for a significant open space or "esplanade" provision along the banks of

Obi Obi Creek, where it flows through the site. The respondent's case is that Condition 27 appropriately takes into account not only the zoning of the land, but also the relevant provisions of the DCP, the Strategic Plans and relevant Local Planning policies. It argues that the condition appropriately protects an area of "significant vegetation" including large native trees such as Hoop and Bunya Pines along Obi Obi Creek, and also ecological linkages as provided for in the DCP. Council also submits that the large trees on the site (all of which will go if the development proceeds) are an important part of the existing character of Maleny because (to quote Mr Chenoweth) "(of their) contribution....to the townscape of Maleny; the green corridor that divides the town and provides a sense of entry to the main street."

- [31] Council also submits that the condition will provide a more appropriate flood control solution to that proposed by the appellants. This concern has been alleviated somewhat by the condition agreed to by the experts Dr. Johnson (on behalf of the Council) and Mr Collins (on behalf of the appellant), which is Exhibit 28.
- [32] The appellant's case is that this condition is unreasonable and constitutes an unlawful use of the condition power by the Council so as to bring about de facto refusal of a permitted development. In the alternative, it submits that the design features and landscaping provisions set out in Exhibits 2, 2A, 3 and 4 are a reasonable response in town planning terms particularly having regard to the zoning of the site, to the concerns raised by Council.
- [33] **(i) The Law**
- [34] In interpreting a planning scheme, the Court should take a common sense approach; and, the particular document should not be read too narrowly but, rather, broadly (rather than pedantically) and in a way which adopts a sensible, practical approach⁸.
- [35] These statements reflect long settled principle in relation to the judicial approach to planning schemes. In *Pacific Seven v City of Sandringham* (1982) VR 157 at 163 it was said;

"Planning is a difficult exercise with flexibility an essential ingredient. Those entrusted with its implementation should bear in mind that neither individual or community interest is served by recourse to exotic legalism. Whetting the saliva of lawyers with one hand on the guillotine can only frustrate rather than meet the ends of justice, and the expressed intention of the legislature in the field of planning. Whatever be the consequence of legal points which fall to be decided, every endeavour should be made to deal with the substance of an application for permission to use or develop land in a certain way with maximum expedition and fairness."

It is also well established that when there is a conflict between the zoning of a site and the planning objectives and designation in a forward planning document (such as a strategic plan or DCP) it is the zone that ought to prevail as it is the zone (in transitional planning schemes) which determines development rights.

⁸ *ZW Pty Ltd v Hughes & Partners Pty Ltd* (1992) 1 Qd R 352 per Pincus JA at 73 and 75 & McKenzie J at 78.

- [36] In *Stubberfield v Redland Shire Council* [1993] QPELR 214 at 216, Quirk DCJ observed,

“It would appear fairly fundamental that the lands zoning in the Town Planning Scheme as Residential A was a matter of considerable weight and more than capable of amounting to a planning ground sufficient to justify approving the application despite its apparent conflict with the Development Control Plan.

Any such conflict would be overshadowed by an evident conflict between the lands zoning which is depicted in the plan in a very precise fashion and the content of a Development Control Plan which is not, and not intended to be as cadastrally accurate.”

- [37] Essentially, the appellants case is that, given the zoning of the site, the apparent tension between it and the DCP designation “open space” has been reasonably accommodated (in planning terms) by the appellants ultimate development proposal as contained in Exhibits 2, 2A, 3 and 4.

[38] **(ii) The Nature of the Conflict**

The introduction to the DCP contains a number of general “vision” statements, and identifies one of the purposes of the DCP,

“To guide development and assessment of applications.

The DCP will enable the character and qualities which are most valued by the community to be retained for Maleny & Environs.

.....The...DCP is a planning tool....”

- [39] The DCP was prepared as part of a Local Area Plan (LAP), which involved extensive community consultation and is based on a wide ranging planning study. Relevantly, the vision of the DCP is set out at section 3.1:

“...Maleny,,,of the future will be an area:

- in which the unique rural character and desirability as a place to live and visit is effectively retained and enhanced;

...

- where the Maleny township remains a vibrant hinterland service centre, in which a village atmosphere and a sense of community exists
- where the environmental values are protected and enhanced, and the water quality within the catchment is maintained and improved;
- where an integrated pedestrian and vehicular network is expanded; and
- in which adequate access to employment opportunities and commercial, community, cultural and recreational facilities and services is provided.

[40] The “broad” intent of the LAP at 3.2.1 (role and functions) includes:

“The retention and expansion of significant areas of native vegetation and the protection of important ecological linkages will be encouraged”.

This section recognises Maleny as the “business and community focus centre” of the Study area.

[41] The DCP provides for a number of strategies to ensure the achievement of the vision and that “the major issues raised by the community are addressed.” Section 5.6. outlines the business area strategy with the following overriding aim and intent for those areas being applicable:

“Aim: To ensure an adequate amount of land is allocated for commercial purposes to service the projected growth in the area.

Intent: To concentrate the commercial activities within the town centre focusing on Maple, Coral, Myrtle, Bunya Streets and Bi-Centenary Lane. This designation is intended to accommodate a range of retail, commercial and community service activities to meet the requirements of the local resident and tourist population”

[42] The site is included in the Town Centre Precinct (5.6.1 of DCP) which provides (relevantly) as follows:

“Aim: To create a vibrant town centre with a mountain village character which provides a range of commercial, retail and community services to meet the demands of the existing and future residents and tourists in the surrounding area.

Intent: The role of Town Centre precinct is to provide for the basic services for the township and surrounding area. Therefore, adequate land to accommodate a range of commercial, retail, services and community infrastructure functions within the town is required.

This precinct provides sufficient land for the future expansion of commercial and community facilities within the commercial focus of the town.

Maple Street will continue to provide a retail, commercial offices and medical services focus. In addition, Maple Street will provide a tourist and entertainment function (e.g. restaurants, coffee shops and art galleries).

The Coral Street area currently provides for service industry (e.g. mechanical repairs, farm produce supplies and trade supplies) and commercial premise function catering for the needs of the surrounding hinterland, although new service industry in this precinct will be limited to uses ancillary to the retail use of land.

Commercial offices and showrooms will be encouraged to be established in Coral Street.

A local supermarket exists within the town precinct, and with the expected growth is likely to expand in the future. In order to maintain the town’s role

as a village, any new major retail facilities will be required to be located within this precinct.

Implementation Criteria:

- (i) Development within this precinct will be required to:-
- maintain the character of the village, with new development being required to be in accordance with the streetscape design guidelines;
 - ...
- (iv) Development within Maple Street will be required to be in accordance with this provision of section 5.15 – Streetscape Strategy.

[43] Open Space Strategy is contained in section 5.9 of the DCP:-

Open Space Strategy

Aim: To establish a system of open space, which:-

- provides a range of recreational activities (both passive and active recreational activities);
- provides for pedestrian, cycleway and equestrian linkages between nodes;
- preserves and enhances areas of significant native vegetation and ecological linkages;
- ...
- protects water quality; and
- protects native fauna habitats.

Intent: To recognise that the Open Space designation indicates areas of environmental, conservation, recreational and/or scenic significance, as well as flood prone areas, and buffers to agricultural and other rural uses. The open space designation includes land both in private and public ownership.

[44] The respondent's case has concentrated (in respect to Condition 27) on the importance in planning terms, of protection of significant areas of native vegetation, such as the native trees identified on the site by Mr Chenoweth, and the ecological links referred to in the DCP. As well, the respondent contends that Condition 27 is particularly important to the character of the village. In this regard, there was considerable evidence dealing with the visual amenity changes that will undoubtedly occur if the site is completely cleared of all existing large native trees.

[45] **(iii) Significant Native Vegetation/Open Space Provision**

Mr Chenoweth carried out a vegetation survey of the site. He reports (exhibit 12) as follows:

“2.2 Vegetation & Significance

- 2.2.2. The vegetation of the subject land and surrounding areas has been highly modified from the original ecosystems of the Maleny Plateau, but some of the trees remaining along the Obi Obi Creek corridor are representative of the pre-clearing vegetation.
- 2.2.3. A vegetation survey of the subject land (**Appendix A**) identified 51 species of which 11 are trees representative of the original ecosystems of the Maleny Plateau in general, and creek banks in particular, and the remainder are a mixture of native species from other places, exotic species and weeds. Most of the local native trees are associated with the creek corridor and frontage to Bunya Street.
- 2.2.4. The vegetation survey also located 37 trees on the subject land (**Appendix B**). Of these, 14 are large mature specimens (>60cm diameter) which make a significant contribution to the streetscape of Bunya Street and the character of the Maleny township generally.”

His survey indicates that the site is disturbed with little of the structure and diversity of a natural riparian forest community, but that the trees are important and still represent “remnant native vegetation”. A remnant vegetation survey of Council in 1993 classified vegetation according to type and conservation significance (that is before the gazettal of the Planning Scheme on 2 August 1996). ‘Priority 1’ remnant vegetation was recommended for conservation action. The site was mapped in 1996 for the Maleny and Environs Planning Study by botanist Ann Moran and she gave it priority 1 status. I assume this was part of the Planning Study referred to in the DCP. It follows that in formulating the DCP, the Council was aware of this survey. Caloundra’s vegetation was again mapped in 2000, and Mr Chenoweth contributed to this – the site itself was not afforded priority one status; Mr Chenoweth says because of the “broad scale of these studies.”

- [46] His survey on behalf of Council for the appeal identified 18 native plant species and 32 species of exotic plants, 14 of which are environmental weeds. At 2.2.9 of Exhibit 12 he observes

“2.2.9. The vegetation survey identified 18 native plant species and 32 species of exotic plants, 14 of which are environmental weeds. This diversity of introduced plants is consistent with the long history of clearing and town settlement, the presence of a cattle saleyard and the proximity of a major road. It is not surprising that weeds have flourished on the subject land and all but prevented regeneration of any natural vegetation, because the rich alluvial soil and constant moisture along the creek corridor provides ideal growing conditions and Obi Obi Creek carries weed seed from upstream sources. Nevertheless the factors that encourage weeds on creek banks also facilitate rehabilitation of native trees and shrubs.”

At 2.2.10 he opines:

“2.2.10. Notwithstanding the above history of disturbance, the trees and other dense vegetation on the subject land are significant because of:

(a) the large trees, with trunk diameters exceeding 60 cm for 14 on-site specimens, most of which exceed 20 m in height, indicating ages of 40 – 80 years and possibly older for several of the largest species;

- (b) the presence of two large Bunya Pines and two large Hoop Pines, plus 10 other trees representative of the original vegetation of Maleny area and the Obi Obi Creek corridor (see Tree Survey List **Appendix A**);
- (c) the contribution of these large trees and the mass of vegetation near the bridge to the townscape of Maleny, the green corridor that divides the town and provides a sense of entry to the main street;
- (d) the significant potential for rehabilitation of the original riparian community, habitat for native fauna, opportunities for wildlife movement between patches of remnant vegetation; and
- (e) the streambank protection and water quality protection associated with a wide buffer of vegetation along Obi Obi Creek.”

[47] Mr Chenoweth’s figure 8 to Exhibit 12 provides a clear indication of the presence of the surveyed trees by G.P.S. imaging superimposed on an aerial photograph of the site.

[48] The respondents submission is that the appellants plan which calls for the destruction of all these trees will not satisfy the provisions of the DCP relating to the retention and revegetation of the areas of significant vegetation.

[49] The appellants argument is that, when read as a whole, the open space designation for the site relates to flood prone (i.e. below Q100) rather than “significant native vegetation” aspects of the site.

[50] In my opinion, the evidence of Mr Chenoweth to the effect that the site contains trees which fall within the category of significant native vegetation should be accepted. However, despite the drafters of the DCP being aware of the Moran classification of the site in the planning study done in conjunction with the formulation of the DCP (see 5.2.2. of Exhibit 12), there is no reference in the Town Centre Precinct area strategy to significant vegetation on the site, nor is there any reference to contributing land in this precinct towards the provision of an appropriate level of open space or park land. There is no requirement for retention and enhancement of native vegetation along the Obi Obi creek flood plain; in particular where the creek passes through the precinct.

[51] By way of contrast, as Mr Priddle pointed out in his evidence, a number of the other precincts in the DCP specifically include as part of the implementation criteria a requirement for the retention and enhancement of native vegetation, particularly along the Obi Obi creek flood plain, and for a contribution towards the provision of an appropriate level of open space or parkland, e.g. the Erowal Precinct (p22 of the DCP) and the Teak Street Precinct (in relation to open space contribution, at p26).

[52] **(iv) The Esplanade Policy**

[53] Although this policy was called up by Council to support the implementation of Condition 27, it was not really pressed at the appeal. In my opinion, this is because the relevance (if any) of this policy to the Court’s determination of the reasonableness of Condition 27 is marginal. The application does not involve a “rezoning, subdivision or consent”; it is a permitted development in the prevailing zone, and I accept the evidence of Mr Priddle that this conclusion is supported on the basis of good town planning principles because the site is entirely zoned local business, and the DCP itself contemplates a compact town centre and commercial

area, with “any new major retail facility...required to be located within (the Town Centre Precinct)”. As he notes, there are areas in the zoning map in the planning scheme close to the site that are in fact subject to two different zones, i.e. local business and rural. In any event, it is well established that planning policies do not enjoy the same status as town planning provisions: *Norris Clarke v O’Brien Pty Ltd v Brisbane City Council* [1996] QPELR p262 at 264.

[54] Further, there is considerable merit in the argument advanced by the appellant that the open space designation on the site in the DCP is more related to the flood prone nature of the land than it is with the issue of significant native vegetation and ecological linkages. Clearly, this factor is part of the open space strategy intent referred to above, and a comparison of DCP maps 5.6.1. (Town Centre Precinct) and the open space corridor along Obi Obi creek where there depicted, and 5.12.4 (Stormwater Drainage Plan) which depicts the Q-100 flood inundation area; supports this argument.

[55] **(v) Ecological Links**

[56] There is no doubt that section 5.9.3 of the DCP provides for ecological links along Obi Obi creek; and the site is identified as such on DCP map 5.9.3. However, again there is no reference to this issue in the Town Centre Precinct strategy, whereas in relation to other precincts specific reference can be found. I accept Mr Priddle’s evidence that with respect to the relatively short stretch of Obi Obi creek which passes through the Town Centre, there is not other actual open space buffer zone provided, even for the library which is owned by the Council. There is no buffer at all on the western side of Obi Obi creek, opposite the site, over the bridge at the start of Maple Street. This is hardly surprising, as the Riverside development on that site, constructed in 1989 when planning schemes were perhaps less concerned about green issues, is built on the creek itself on a retaining wall with absolutely no landscaping apart from a few exotic palms.

[57] **(vi) Conclusions – Condition 27:**

[58] At the end of the day, the appellant has satisfied me that by taking a commonsense approach, the tension between the open space requirements for the site in the DCP and the zoning is resolved by its final proposals for the development, and in particular the landscape plan Exhibit 4. There is no doubt that the clearing of the site of the large trees will have an immediate impact on the visual amenity of Maleny, and will somewhat diminish its unique “village atmosphere”; however, as against that the large native tree planting proposed by the appellant in its latest plan (exhibit 4) involves an extensive range of native species (Hoop Pine, Flame Tree, Quandong, Lace Bark, Silky Oak) which in time will considerably improve the site’s contribution to the visual amenity of the town. The exotics and environmental weeds will all be removed, which, on inspection, particularly at close quarters do not in any way enhance the character of the town. Mr Chenoweth acknowledges that with the removal of the large trees from the site there will be a new skyline comprising the large trees to the east on the Maleny Hotel site. He fairly acknowledged under cross-examination by Mr Hughes that the extent of landscaping in Exhibit 4 is a satisfactory response to the tension between the zoning of the site and the open space requirements in the DCP. It is common ground that, because of the excellent climatic conditions in Maleny and the position of the site, growth rates for plants and trees will be considerably enhanced.

[59] In relation to growth rates, and visual amenity, Mr Chenoweth in his report opined that the earlier proposals for landscaping would not provide the impact that the appellant suggested. However, he agreed, in the face of the proposals in exhibit 4, his figures 6 and 7 in his report (exhibit 12) were not accurate; and he agreed that Mr Lynch's figures 2 and 3 to his reports (exhibit 8) represented an accurate picture of growth rates and visual effects on the building outline.

[60] It follows that, in my opinion, on the evidence, Condition 27 as proposed by Council would be an unreasonable imposition on the development and should be deleted. The general condition will adequately cover the issue of landscaping provision.

[61] **(b) Traffic Issues**

[62] As with all of the disputed issues, the traffic issue evolved and changed leading up to the hearing of the appeal.

[63] **(i) Access and Ingress**

[64] In relation to access and ingress (condition 23), Mr Viney's (on behalf of the appellant) final design is the last folio in Appendix 3 to Exhibit 9 which provides for a protected right-hand turn into the site from Bunya Street, and a protected right hand turn into Lawyer Street. Mr Viney has always expressed the opinion that there is no need to provide a protected right hand turn into the site; however the appellant's proposal in Appendix 3 is advanced as a compromise. Council's case (based on Mr Eppell's evidence) is that the final Viney proposal (which is similar to Exhibit 9C – referred to in the evidence as “the Ward design” except for the inclusion of the protected right-hand turn into Lawyer Street) is inconsistent with provisions of the DCP and the Strategic Plan relating to the protection and upgrading of State controlled roads. It does not comply with minimum design standards sought to be maintained by the Department of Main Roads (DMR) for the provision of right hand turns and it compromises vehicular and pedestrian safety in the vicinity of the site. It is common ground that Bunya Street is a State controlled road. It serves a number of purposes. It is an arterial road serving the western area of Maleny and environs, and it provides for the movement of traffic of a regional nature between destinations east and west of Maleny. The appellant acknowledges that the Viney proposal does not comply strictly with the Main Roads Design Manual (exhibit 9A), but submits that the proposal is an adequate response, bearing in mind that this Court has, on occasions, adopted a robust approach to traffic issues, recognising that we do not live in a perfect world: per Skoien SDCJ in *Crane v Brisbane City Council & Anor* [2003] QPEC 025. It further submits that the proposal appropriately complies with the relevant provisions of the DCP and the strategic Plan, and that there is no compromise to safety.

[65] In the course of the assessment of the application, Council consulted MRD. MRD's response dated 24 December 2002 is annexed to Exhibit 9 as Appendix 2 and is in these terms:

“Bunya/Maple Street, Maleny has a strong local function compared to its limited regional function and consequently Main Roads considers that its assessment of this development approval should be guided by the planning intentions and views of council. This recognises that council has

undertaken an assessment of many issues, including traffic, relevant to Maleny and developed a plan for Maleny's future.

Main Roads does not seek to impose requirements that are not reflective of council's intentions for the town centre. As a consequence, council's views on the proposed access arrangements were sought. Based on discussions with council staff, it would be appropriate to ensure that the development will cause minimum hindrance to through traffic. The limited road width and the limited separation between the proposed access and Lawyer Street will limit the design.

A condition that would provide a solution acceptable to Main Roads is as follows but council would need to consider it in the context of its planning for Maleny and may modify the condition, or add further requirements for works in Bunya Street, accordingly:

"The applicant is to provide a protected right turn treatment to cater for right turn movements into the proposed development from Landsborough-Maleny Road. This treatment is likely to have an adverse impact on right turn access to Lawyers Street and therefore, a protected right turn treatment to Lawyer Street, is also required.

Both right turn treatments are to be designed in accordance with the requirements of Main Roads document, "Road Planning and Design Manual".

Prior to the commencement of any works within the State-controlled road, the applicant must arrange for detailed engineering plans and specifications for the proposed works to be submitted to Main Roads for assessment and approval.

The engineering design, plans and specifications must be prepared by a consulting engineer pre-qualified to level RDI in Main Roads, "Register of Pre-qualified Engineering Design Consultants".

It should be noted that further approvals will be required for construction in accordance with the requirements of section 31 of the Transport Infrastructure Act 1994"

Council's comments in its letter of 25 November 2002 are noted. The above works are likely to have an impact on parking opportunities in Bunya Street. Council may consider additional requirements to address those impacts."

- [66] Council considered this letter in the assessment process; nevertheless it imposed Condition 23 which denies right hand access to the site.
- [67] In its final submissions, Council tends to concentrate on the failure of Viney's proposal to comply with the MRD design manual, and safety issues, rather than conflicts with planning documents. This is understandable, given the attitude of MRD expressed in its letter above. At the time the letter was written, MRD had the Ward design (Exhibit 9C).
- [68] It does appear that Council's decision to impose Condition 23, as well as being contrary to MRD advice, was also contrary to its own internal expert technical advice. So much appears in a number of internal memos from Council's

Development Engineer Mr Sands to the Planning Officer. Condition 23, and indeed Condition 24 appear to have emanated from the Councillors themselves (see page 296 of Exhibit 6). Mr Eppell relies to some extent on what is said to be contrary advice from the MRD, which came very late (26 June 2003) from RoadTek which is a commercial business arm of MRD. In my opinion, the qualifications to the opinions expressed in that letter are such that it has little weight, particularly when considered against the other evidence to the contrary which I prefer.

- [69] Mr Viney suggests that the MRD design manual does not directly apply here, because it provides geometric standards for design speeds ranging from 60 km/hour to 100 km/hour whereas Bunya Street past the site and into Maple Street through the town centre is signed with a speed limit of 40 km/hour. He acknowledges that neither of the right hand turn slots meets the minimum lengths of the design manual, and the width of the lanes is less than the minimum standards. Despite the wording in the Manual itself, it seems to me that it does apply to all MRD controlled roads. The speed limit is a relevant factor when one is considering the adequacy of a particular design solution. All this has to be viewed in the light of the evidence about peak period traffic counts in the area.
- [70] I am satisfied, even on the basis of Mr Eppell's evidence on peak traffic flows, the estimated turning volumes into the site are quite small. His analysis revealed that at the design horizon of the year 2012, in the peak hour there would only be 58 vehicles, i.e. less than one per minute, attempting to turn right into the site. This would result in a 95th percentile peak hour queue of only one vehicle. Mr Viney's results indicated a similar low level of utilisation of the right turn into the site. Right turns into Lawyer Street were even fewer.
- [71] Mr Rossi from Woolworths estimated that there will be 8 to 10 deliveries per day to the site. Not all will be heavy rigid vehicles: there will be light vehicles as well. Mr Eppell's criticisms about the adequacy of the length of the right hand turn lane were to some extent predicated on the anticipated use of articulated heavy vehicles which will not be the case. Also relevant in my opinion, is Mr Viney's evidence that at present, during cattle sales, heavy articulated vehicles turn into Lot 2; and indeed the evidence suggests, these vehicles actually reverse into the site. On the day of the inspection there was a cattle sale in progress and I was able to observe very large articulated vehicles reversed into the site. There is no evidence that these cause additional traffic congestion, or compromises safety. Mr Viney also includes in his report a photograph of a service vehicle making a night delivery to the present supermarket in Maple Street. The service area is at the front of the supermarket, and the vehicle protrudes out in the street.
- [72] In his evidence, Mr Viney referred me to a number of examples of protected right hand turning lanes which do not comply with the Manual, but which have nevertheless been approved. These included at least one example in Caloundra City. Not surprisingly, the Manual itself recognises that in these matters, it is a question of degree. In the introduction to right hand turn treatments at 13-62, it states (Exhibit 9B):-

"13.8.3 Right Turn Treatments

13.8.3.1 General

Right turn treatments are provided for safety, delay, and capacity reasons. The treatment will vary according to requirements at each site. Treatments can vary from “do nothing” to major channelisation with traffic signal control.

If there are no safety or capacity problems (real or perceived) associated with right turning vehicles, no treatment is required. However, sufficient width should be available for a through vehicles to pass a vehicle waiting to turn right.”

- [73] As regards safety, I think there is considerable merit in Mr Viney’s opinion that rather than compromise pedestrian safety – particularly at peak hours such as school arrivals and collections – the development as a whole is likely to enhance safety. Mr Rossi gave evidence about surveys done by Woolworths relating to shopping patterns in their supermarkets. The primary school is 160 metres to the east of the site, and Mr Eppell’s photographs depict school children walking across the bridge obviously to and from school. At present, there is a no-standing zone at the front of the site and the hotel, and for part of the school frontage, thus parents using vehicles to deliver or collect children have to park somewhere else for that purpose. Exhibit 9D prepared by Mr Viney shows the school parking zones. I think it is highly probable, as Mr Rossi suggests, that parents will use the supermarket parking area as a safe means of parking which can then be combined with shopping. There is no doubt that at peak times, Bunya and Maple Street are prone to congestion, although the evidence suggests that the traffic does continue to move. Mr Eppell acknowledged that, in some part, the congestion is not helped by the Riverside Centre, which has parking right up to the boundary.
- [74] I am satisfied that the final Viney proposal is an appropriate response to the town planning, traffic engineering and safety issues raised by Council ; and that Condition 23 constitutes an unreasonable imposition on the development. It should be deleted and a condition substituted generally in terms that access to the site be provided in accordance with Mr Viney’s drawing VTE 979 SKI (the last folio in Appendix 3 to Exhibit 9.)
- [75] **(ii) Upgrading of Bunya Street**
- [76] Notwithstanding that Condition 24 was imposed by Council in its February approval, it appeared to me that not much thought had been given by Council to the implications of a roundabout at the Carol Street/Maple Street intersection west of the Obi Obi creek bridge prior to the hearing. As I have noted, Conditions 23 and 24 appeared late in the assessment process and did not emanate from any technical advice to Council, all of which was to the contrary.
- [77] Mr Viney was able to make a number of telling criticisms of the original design in Exhibit 14. He pointed out that the design would take a significant portion of Tesch Park which is an important green space in the Town Centre. As Mr Eppell himself notes, the Riverside Centre contributes significantly to traffic entering Maple Street, and yet his original design does not deal with the obvious access issues that would arise if the roundabout was constructed in the position he originally suggested. Mr Viney also points out that the widening of the bridge would be a very expensive proposition, and this would be necessary to cater for large service vehicles turning left into the site after negotiating the roundabout to gain access, There are also possible adverse consequences for access both to the hotel and the adjoining bowls

club east of the site. He also noted that in its original position, the roundabout could require moving a Telstra manhole which is a very expensive proposition indeed. It is obvious that the extensive land resumption, realignments and works associated with such a condition are beyond the control of the appellant.

[78] When Mr Eppell gave evidence, he appeared at least by implication to accept the validity of some of these criticisms by coming up with 2 further design proposals which are described as Options B & C in Exhibit 14A. Option B will effectively remove the Coral Street pedestrian crossing which is a significant link between the main street and the park, and both options will still mean removal of a part of the park. He defended his designs on the basis that they were conceptual only; however council imposed this condition back in February apparently without any technical support, and the works contemplated by condition 24 will (if imposed) involve a very significant financial impact on the appellant, and I think it behoves Council to be ready to assist the Court in considering whether the appellant has satisfied me that such a condition involves an unreasonable imposition on the use.

[79] As a result of my conclusions, in particular in relation to condition 23, I am satisfied that this condition is unreasonable and it should be deleted.

[80] **(c) Car Park Pathway – Condition 13 (d)**

[81] This is a relatively minor issue. The most recent plans (Exhibits 2 and 2A) provide for a central pathway through the carparking area which is 1 metre wide. Mr Eppell's opinion is that the pathway should comply with AUSTLOADS recommended minimum footpath width of 1.8 metres to allow for wheelchairs, prams, or trolleys passing each other. In my opinion, Mr Eppell is being overly prescriptive in this evidence and I prefer the evidence of Mr Viney on this point. As he notes, in reality most trolley traffic from the supermarket is one way – out of the supermarket, and it would be very rare for two wheelchairs to travel down the central path, particularly given the location of the disabled car spaces at the supermarket end of the path. Further, having regard to the speed environment that would pertain in the car park, there would be no problem for people with or without trolleys using parking aisles for pedestrian movement, as occurs everyday in most supermarket car parks in the country. The appellant has satisfied me that this condition constitutes an unreasonable imposition on the development and it should be deleted.

[82] **(d) Flooding**

[83] **(i) Condition 14**

As I have noted, the importance of issues relating to flooding fell away during the course of the hearing, as a result of most productive discussions between Mr Collins (on behalf of the appellant) and Dr Johnson (on behalf of Council). Both agreed that, subject to design detail, the appellant's engineering solution i.e. piercing part of the development above the Q100 flood inundation line, is a satisfactory response to concerns reflected in Condition 14. The only outstanding issue in relation to condition 14 (subject that is to a new condition 28) relates to the issue of debris loading and blockage within undercroft areas in the event of a major flood. Dr Johnson conceded in cross-examination that serious blockages would only be caused by large trees which would be likely to be "caught" by the upstream bridge;

and the fact that the development was on the inside of the bend in the creek (where flows will be slower) militated against large objects being pushed under the building. It is not suggested that any of the relevant planning documents specifically preclude development of any of the subject land which falls below Q100. This can be contrasted with specific wording in the DCP in relation to the Erowal Precinct that development in that precinct will need to be designed “to ensure no development occurs below the Q100 flood level... .” The engineering solution adopted by the appellants is the same solution used by the Council in respect of its library which abuts the creek on its western side upstream from the site.

[84] The appellant has satisfied me that subject to the imposition of the general condition and a condition in terms of Exhibit 28, Condition 14 would constitute an unreasonable imposition on the development.

[85] **(ii) Condition 13 (a) and 13 (b)**

These conditions apply provisions of the Queensland Urban Drainage Manual (QUDUM) to the site. QUDUM is specifically adopted by the planning scheme, There was dispute between Mr Collins and Dr Johnson as to the applicability of QUDUM to creek flooding, and as to whether Council has adopted a Q10 standard for categorisation of “minor flood events” in Maleny. I agree however with the appellants written submission that the debate on these issues is academic because (at T224/20-30) Mr Hughes on behalf of the appellant agreed to condition which:-

- (a) required it to maintain during the currency of the use both the landscaped area and the undercroft area; and
- (b) required the grant of a suitably worded drainage easement in favour of Council for all of the areas below the Q100 floodline.

[86] Subject to conditions in these terms, I am satisfied that Conditions 13 (a) and (b) are unreasonable and should be deleted.

[87] **(e) Design Issues – Condition 8**

Mr Voller (architect) remains very critical of the proposed design which he describes as “a windowless big simple box”. One of his contentions is that the site is at the very “heart” of Maleny. He says:-

“This centrality is physically confirmed by the natural topography of the township which focuses one’s view on to the areas adjacent to the Obi Obi creek on the main street makes them important to one’s experience and memory of Maleny.”

[88] Obviously, this is the view of the site one gets as one travels from or stands west of the site in Maple Street. It is not the view if one comes from Woodford, or from the east. Curiously, the Council in adopting the Maleny Main Street Masterplan (Ex 27) which does not include the site, did not seem to share Mr Voller’s view that the site is at the very ‘heart’ of Maleny. In every respect, the development complies with the standards set out in the planning scheme, which have the express purpose of ensuring that developments in the business zone “are of an appropriate scale...” It goes well beyond those standards in the extensive landscaping proposed, and the plot ratio (even including all of the underground car park) is approximately 54% when the allowable limit for the local business zone is 1.1:1 or 110% i.e. less than half that required in the zone to ensure “an appropriate scale”.

- [89] I am satisfied that Mr Peel (architect) and Mr Lynch (landscape) on behalf of the appellant have made considerable efforts to site the building on the land in such a way that it would not appear dominant, and design features to treat the building (including architectural features from the local vernacular, and extensive landscaping) to “soften” any big box appearance.
- [90] The DCP contemplates a “new major retail” facility within the Town Centre Precinct, and, as Mr Lynch notes, “supermarkets by their nature require a large box-like interior”; and are windowless for reasons of security. I am satisfied that his design adequately responds to the concerns raised by Mt Voller, and represents “a sympathetic solution for the Maleny community at the fringe of a “vibrant Town Centre meeting the retail demands of the existing and future residents and tourists in the surrounding area”.⁹
- [91] Subject to the imposition of the general condition, condition 8 represents an unreasonable imposition on the development, and should be deleted.
- [92] **ORDERS**
- [93] The appeal is allowed. I adjourn the hearing for a period of 7 days to enable the parties to formulate conditions in light of these reasons.

⁹ page 11, Exhibit 7