

# PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Suddaby & Ors v Johnstone Shire Council & Ors*

PARTIES: **FRANK SUDDABY, LINDA SUDDABY, HELEN JONAS, IAN MORRISON and JANET MORRISON**  
(First Appellants)  
**COMMUNITY FOR COASTAL AND CASSOWARY CONSERVATION INC**  
(Second Appellant)  
v  
**JOHNSTONE SHIRE COUNCIL**  
(Respondent)  
**JOHN CAVANAH, LEE-ANN CAVANAH and WELLACIA PTY LTD (ACN 067 609 198)**  
(Co-Respondents)  
**THE STATE OF QUEENSLAND**  
(Co-Respondent by Election)

FILE NO/S: 232 of 2005, 234 of 2005

DIVISION: Planning and Environment Court

PROCEEDING: Submitter appeal

ORIGINATING COURT: Planning and Environment Court Cairns

DELIVERED ON:

DELIVERED AT: Cairns

HEARING DATE: 3 – 6 April 2006

JUDGE: White DCJ

ORDER:

CATCHWORDS:

COUNSEL: Mr J Hayden, with him Ms T Fantin for the first appellants  
Mr C McGrath for the second appellant  
Ms P Djohan for the respondent  
Mr G Gibson QC, with him Mr B Job for the co-respondents  
Ms J Brien for the respondent by election

SOLICITORS: P & E Law for the first appellants  
Environmental Defenders' Office North Queensland for the second appellant  
MacDonnells Solicitors for the respondent  
Deakins Solicitors for the co-respondent

## Crown Law for the respondent by election

- [1] The subject land is described at Lot 2 on RP 732173 Parish of Hull and comprises a total area of 42.584 hectares. It is irregularly shaped. Its shape is best illustrated by drawing No. 30705-19 of exhibit 2. On that exhibit the boundary of the subject land is marked out by yellow lines. The western two thirds of the subject land is rectangular in shape. To the north east its boundary follows the western bank of Mackness Creek. That littoral boundary is interrupted by a separate allotment, Lot 2 on RP 725393 which is owned by the appellants, Mr and Mrs Suddaby. Once that allotment is skirted the boundary of the subject land resumes along the bank of Mackness Creek to where the creek reaches Alexandra Drive. The boundary follows Alexandra Drive to the south until it reaches the boundary of four allotments having notional frontage to Alexandra Drive, namely Lots 1, 2 and 3 on RP 722782 and Lot 1 on RP 718846. Having skirted those allotments the southern boundary of the subject land then heads in a straight line west along its boundary with Lot 4 on RP 724724.
- [2] The development site consists of 12.819 hectares which coincides with that part of the subject land which is presently cleared. The proposal is for a large allotment subdivision into 20 allotments ranging in size from approximately 4,000 square metres up to approximately 5,700 square metres with an additional lot at the western end of the subject site having an area of 2.424 hectares. The proposed subdivision makes provision for an internal road ending in a cul-de-sac. There is also an area set aside for a landscaped park to the south of Lot 2 on RP 725393.
- [3] The subject land is in the locality of Narragon Beach in the Mission Beach area. The main commercial and business centre of Mission Beach is approximately 3 kms to the south of the subject land. Alexandra Drive runs from the Mission Beach business centre along the coast to the settlement of Bingil Bay which is to the north of the subject land. The cleared area of the subject land was previously used as a banana farm. However, I accept that that use had been discontinued and the farm fallen into disrepair when it was purchased in November 2003 by the co-respondents. Since then the co-respondents have carried out extensive clean up work so that at present the development site is generally covered in reasonably well kept grass. The development site slopes upwards to the west but it is not steep. In my view if the development proposal were to proceed it would yield a number of extremely attractive, desirable, and conveniently developed large or Rural Residential sized allotments.
- [4] The co-respondents propose to surrender the balance of the subject land outside the development site, namely approximately 32.187 hectares to the State of Queensland for future inclusion into the Clump Mountain National Park which presently adjoins the subject land along its western boundary and approximately the western half of its northern boundary.
- [5] At the time the original application was made by the co-respondents to the respondent Council, the Planning Scheme which was then in force was a Transitional Planning Scheme pursuant to the provisions of the Integrated Planning Act 1997 as amended. Therefore, s 6.1.30 of the *Integrated Planning Act* applies. The application is to be determined pursuant to subsection 4.2(5A) of the *Local Government (Planning and Environment) Act* 1990 which relevantly provides as follows:-

“The local government must refuse to approve the application if –

- (a) The application conflicts with any relevant Strategic Plan or Development Control Plan.
- (b) There are not sufficient planning grounds to justify approving the application despite the conflict.”

- [6] On 26 May 2005 a new Planning Scheme prepared pursuant to the provisions of IPA came into force. It is therefore entitled to considerable weight in dealing with this appeal.
- [7] The appellants submit that there are conflicts with the Strategic Plan and a relevant Development Control Plan which form part of the Transitional Planning Scheme. Before turning to consider these alleged conflicts in detail I wish to make it clear that I absolutely reject the very clear submission made by Mr Hayden and the perhaps less definite submission made by Mr McGrath that this is a re-zoning application. This is not a re-zoning application. Since the introduction of the IPA 1997 there is no such thing as a re-zoning application. The fact that there might be issues which are relevant to whether or not this application should be approved which might have been relevant on a re-zoning application under the repealed Act, does not alter that situation.
- [8] I will consider firstly the submission made by the appellants that there is a conflict between the proposed development and the Strategic Plan. At this stage it is necessary to note that under the Strategic Plan the whole of the subject land is designated “CONSERVATION” as the Preferred Dominant Land Use. This must be understood against a background in which there are only four Preferred Dominant Land Uses provided for, namely Urban, Rural, Conservation and Economic Development. It is also relevant that the subject land is contained within the Rural Conservation Zone on the zoning map under the Transitional Planning Scheme.
- [9] The appellants argue that there is a conflict between the proposed development and the Strategic Plan. In order to assess whether this is so it is necessary to set out a significant part of the Strategic Plan where it deals with the Conservation Preferred Dominant Land Use. To understand my approach to the construction of the Strategic Plan I should say at this stage that I am satisfied that that part of the subject land which forms the development site is not cassowary habitat. I am also satisfied that the balance of the subject land outside the development site is cassowary habitat. Giving due weight to the provisions of the Strategic Plan referred to by Counsel for the parties, I consider that the following is relevant:-

#### **5.1.1. CONSERVATION PREFERRED DOMINANT LAND USE**

Significant areas of habitat have no formal protection from destruction and if lost, would harm the well-being of the Shire’s and the Region’s remaining habitat system. Freshwater wetlands, lowland forest and cassowary habitat are the most vulnerable habitats. Council recognises the importance of these resources to community identity and economic development, and relies upon

commitment by the community, industry and government at all levels to assist in their responsible management.

The land within which habitat conservation is intended to be achieved is identified on the Strategic Plan Map as the *Preferred Dominant Land Use – Conservation*. This land represents a desired habitat system for the Shire and includes:

- (i) significant cassowary habitat (on the basis that this habitat carried with it the habitat of a diverse range of other species);
- ...
- (v) land zoned Conservation and Rural Conservation on the zoning maps except for portions of Rural Conservation zoned lots which do not have significant habitat value.

#### **5.1.1.1.Objectives**

1. To maintain and enhance wildlife species representation and diversity by retaining a viable and integrated wildlife system in the Shire, including land based and water based habitat.
2. To ensure that development within conservation areas identified on the Strategic Plan Map is consistent with the maintenance of the habitat function of that particular area, and the integrity of the habitat system as a whole.

#### **5.1.1.2. Statutory Implementation Strategies**

##### **(1) Conservation Zones**

- (a) The Planning Scheme will recognise two types of conservation areas. Those which are formally protected for conservation purposes (eg World Heritage Area, Conservation Parks and freehold or leasehold lands subject to conservation agreements) – these areas are identified as the Conservation Zone on the Planning Scheme maps. The second type of conservation areas are those not formally protected – these areas are identified as the Rural Conservation Zone on the Planning Scheme Maps. This zone is created to provide a framework for the ongoing development of incentives to encourage land owners to retain habitat on their land.
- ...
- (c) Land included in the Rural Conservation Zone includes the whole of the parcel of land that has relevance to habitat significance, although it is not the intention of the Planning Scheme that habitat necessarily be retained or restored over the whole of that parcel.

## (2) Conservation Incentives Framework

- (a) The Planning Scheme is structured to encourage land owners to re-zone land from the *Rural Conservation Zone* into the *Conservation Zone* in exchange for land use or other benefits provided by Council and/or other agencies.
- (b) Bonus development rights (i.e. rights which exceed basic use rights allowed in the *Rural Conservation Zone*) may be considered in priority areas where land is rezoned from *Rural Conservation* to *Conservation*, in exchange for the conservation of the balance area of land, provided that the additional development is compatible with the substantial value of habitat in that area (as described in the Johnstone Shire Planning Scheme – Planning Study). Development in these cases must be able to satisfy the servicing and planning standards promoted in the Planning Scheme. Priority areas are identified in Regulatory Map R5 – Potential Bonus Development Right Areas.
- (c) Council will retain the flexibility to expand the range of incentives available to land owners, and will require the relevant land to be rezoned to the *Conservation Zone* in exchange for the receipt of these benefits.

## (3) Development Within zones

- (b) Council may use its discretion to allow bonus development rights on both land use and subdivision lot sizes, where land is rezoned to the *Conservation Zone*, provided that the development proposal is consistent with maintaining the substantial habitat value of the land and provided that there is a gain to the community by way of a significant balance area of land being retained for conservation purposes. This discretion is based on the recognition that where higher density development is sensitively designed and sited, and where behavioural activity on a site can be effectively managed, a development may have a lesser impact on the habitat value than one which is dispersed through the site at lower densities and where behavioural activity on the site cannot be effectively managed. Where bonus development rights are given, it is reasonable that other use rights over the site should be extinguished, hence the requirement for land which benefits from bonus development rights to be rezoned to the *Conservation Zone*. Rezoning will be subject to a condition requiring the maintenance of the habitat function of the site subject to the conservation agreement.
- (b) Once land is in the *Conservation Zone*, development other than that specifically applied for, is not generally intended. Exception may be allowed where additional development on a

site would result in a net gain in habitat and where the proposed activity is compatible with the habitat function of the area. A change of land use would be allowed where the proposed use would not increase or would reduce the level of impact of activity on site on the habitat function of that area.”

The Zone section of the Transitional Planning Scheme contains the following:-

### **3.3. RURAL CONSERVATION ZONE**

#### **3.3.1. STATEMENT OF INTENT**

- A. This zone identifies lots where part or all of the lot contains land suitable for conservation as identified on the Strategic Plan Map (Preferred Dominant Land Use Conservation). It includes land that may require revegetation. The zone is intended to control the impact of development on land that forms part of the preferred habitat system. It achieves this by allowing continuation of use rights which attached to the land immediately before the appointed day and, as in other zones, providing for control of alternative land uses as stated in the Table of Zones. Maintaining low density development in this zone is crucial to containing the impact of development activity on habitat.
- B. Together with the Conservation Zone, this zone implements the Strategic Intent in Part C, 5.1.1. conservation areas. Council may use its discretion to relax limitations on development, or issue other benefits, as an incentive to landowners to retain the relevant portion of their land for habitat conservation purposes, in accordance with the special provisions set out in Section 3.4, Special Provisions: Conservation and rural Conservation Zones.
- C. To facilitate the application of incentives for habitat conservation, the zone generally includes the whole of the lot where the preferred habitat system (identified in the Preferred Dominant Land Use Conservation) lies within the boundaries of a lot.

### **3.4 SPECIAL PROVISIONS: CONSERVATION AND RURAL CONSERVATION ZONES**

#### **3.4.1. EXPLANATION**

- A. The Planning Scheme is structured to allow land to be rezoned from the Rural Conservation Zone and into the Conservation Zone, upon which re-zoning a mutual benefit is achieved whereby:
  - (i) an applicant is granted Bonus Development Rights, entitling a premises to be developed to a greater extent than could otherwise be achieved in the Rural Conservation Zone (i.e. Council exercises its discretion on land use and subdivision provision); and

- (ii) portion of the site is formally protected for conservation purposes.

B. Council may exercise its discretion to grant bonus development rights in accordance with 3.4.2. below.

C. To exercise that discretion, that portion of the site subject to proposed development and referred to in clause A (i) above, and that portion of the site intended to be protected and referred to in clause A (ii) above, will be required to be re-zoned to the Conservation Zone, which provides for such discretion to be exercised. If a balance portion of the site remains in addition to that referred to in clauses A(i) and (ii) above, Council may use its discretion for that land to be retained in the rural Conservation Zone or re-zoned to another appropriate zone.

### **3.4.2. DETERMINATION OF BONUS DEVELOPMENT RIGHTS**

A. The issuing of Bonus Development Rights may be considered in relation to land where it is:

- (i) not already protected for conservation purposes.

B. The type and extent of bonus development rights issued, including land use, the size of lots and/or lots and the site density, will be based on:

- (i) the capacity of the habitat system affected by the development to withstand the likely impacts of the proposed development and maintain its integrity, in accordance with the General Provisions, 4.6, Habitat management; and
- (ii) the potential for the proposed development to enhance and protect the preferred habitat system identified in the Preferred Dominant Land use conservation as indicated on the Strategic Plan Map; and
- (iii) the ability of the proposed development to satisfy the balance of requirements of the Planning Scheme,
- (iv) good quality agricultural land is not adversely affected by the proposed use.

Provided that Council will not approve a subdivision which results in exceeding a density of 1 dwelling unit or concessional lot per 5 ha of site lot area subject to a maximum of 4 bonus lots or dwelling units per site lot (subject to the fulfilment of the other requirements of the Planning Scheme), unless it can be demonstrated that a higher density of development is compatible with maintaining the substantial habitat function of the area. Where Council is of the opinion that the habitat system affected by a proposal has a high sensitivity, it may determine that for a particular site, that these densities be reduced.

Bonus concessional lots granted under this provision shall not exceed an area of 1 ha each.

- [10] The regulatory map R5 is entitled “Potential Bonus Development Right Areas Regulatory Map”. The subject land is not included in any of the areas shaded in accordance with the legend. In spite of this the appellants submit not only that the provisions of s 3.4.2 apply to the subject land for the purposes of determining “Bonus Development Rights”, but that the Strategic Plan intends that only Bonus Development Rights granted in accordance with s 3.4.2 are available in relation to the subject land. It must follow, so the submissions goes, that there is a substantial conflict with the Strategic Plan. I reject the submission. The term “Bonus Development Rights” is used with considerable precision in s 5.1.1.2(2)(b) of the Strategic Plan, s 5.1.1.2(3)(b) of the Strategic Plan and s 3.4 Special Provisions: Conservation and Rural Conservation Zones. Further, Bonus Development Rights are specifically described in s 5.1.1.2(2)(b) of the Strategic Plan as follows:-

“Rights which exceed basic use rights allowed in the Rural Conservation Zone.”

- [11] Whilst it is obvious that the Bonus Development Rights which might be available in the specific areas identified as priority areas are conditional on the whole of the land being re-zoned to the Conservation Zone and involve a degree of discretion, they are intended to be additional use and/or development rights over and above those which prima facie apply to land within the Rural Conservation Zone. However in my view, this is only one specific strategy designed to provide an incentive to the owners of specifically identified parcels of land to give more secure protection to important areas of habitat on the land. In my view the ordinary words of the Strategic Plan cannot be tortured into meaning that this is the only incentive which the Council might offer to a land holder in order to better secure the preservation of important areas of habitat. This is particularly so in the cases of parcels of land where only part of the land contains important areas of habitat. In my view paragraph 5.1.1.2(2)(c) makes it obvious that the Strategic Plan intended that other forms of incentive might be offered in order to better secure the preservation of important areas of habitat. It provides as follows:-

“Council will retain the flexibility to expand the range of incentives available to landowners, and will require the relevant land to be re-zoned to the Conservation Zone in exchange for the receipt of these benefits.”

The underlined passage in 5.1.1.2(3)(b) also points to this construction. This, in my view, is quite inconsistent with a statutory intention that only the Bonus Development Rights foreshadowed in paragraph 5.1.1.2(2)(b) and articulated in s 3.4 Special Provisions: Conservation and Rural Conservation Zones are intended to be the only method whereby important cassowary habitat is more securely protected. The underlined passage in 3.4.2 B also supports this view.

- [12] In my view the respondent Council has resorted to the flexibility referred to above in this very case. It approved the proposed development and use rights applied for



on the development site in order to more securely preserve the important cassowary habitat on the balance of the subject land.

- [13] This does not mean that the approval of the application was approached by the respondent or should be approached by this Court purely by a consideration of the matters expressly referred to in s 3.4 Special Provisions. The test of whether or not the application should be approved is wider and more stringent than that provided for in s 3.4 Special Provisions. The point is, however, in my view the proposed development which includes the dedication of the balance of the subject land as National park does not in any way conflict with any of the provisions of s 5.1.1 of the Strategic Plan. Rather, provided the proposed development on the subject site meets all of the relevant criteria it is entirely consistent with that section.
- [14] The appellants also submit that the proposal is in conflict with s 5.2.11 of the Strategic Plan. So far as is relevant it provides as follows:-

#### **5.2.11. RURAL RESIDENTIAL USE**

It is the intent of the Planning Scheme to provide opportunities for people who wish to live in a rural setting to do so. However, at the time of preparing the Planning Scheme there was sufficient land already zoned for rural residential use to meet the need beyond that expected during the life of the Planning Scheme so no areas are shown on the Strategic Plan Map as *Preferred Dominant Land Use – Rural Residential*. In the Planning Scheme the *Rural Residential Zone* shows land zoned for rural residential purposes.

Land included in this zone is:

- (i) land zoned *Rural Residential* in the planning scheme current immediately prior to the appointed day; and
- (ii) land included as a result of rationalising boundaries around previously zoned areas and which is suitable for rural residential use.

Beyond this land supply, any land required to satisfy need for residential use in a rural setting should be met by lots achieved as tradeoffs in association with the habitat conservation, refer 5.1.1. Conservation Preferred Dominant Land Use.

- [15] In my view the above can in no way be interpreted as indicating an absolute intention not to provide any more Rural Residential land within the Shire. In fact there is an express statement of intent of the Planning Scheme “to provide opportunities for people who wish to live in a rural setting to do so”. The provision simply states that at the time the Scheme was introduced the respondent did not anticipate or expect that there would be any need to provide more Rural Residential type land to provide such opportunities, other than that already zoned for Rural Residential use. However, the final paragraph does anticipate the possibility that, although unexpected, the need might arise. In fact, it makes express provision for the source of such land should such unexpected need arise, namely –

“By lots achieved as trade-offs in association with the habitat conservation, refer 5.1.1, Conservation Preferred Dominant Land Use.”

Therefore provided the need is appropriately demonstrated the proposed development fits precisely the description of the source of land from which the need is intended to be satisfied. I will consider the issue of need in more detail later but in my view if such a need is demonstrated the proposed development on the development site rather than being in conflict with s 5.2.11 of the Strategic Plan is actually supported by it. In my view therefore the proposed development does not conflict in any way with the Strategic Plan.

- [16] The subject land is included in the area covered by the Mission Beach Coastal Area Development Control Plan. It is contained within Precinct MB 1- Rural, the provisions in relation to this precinct are brief and are as follows:-

“1. INTENT

The primary role for this precinct is for agricultural purposes with retention of land on the steeper slopes for habitat conservation.

2. DEVELOPMENT ASSESSMENT

All matters in relation to the development and use of land should be determined in accordance with the requirements of Part D of the Planning Scheme for that zone except that permanent buildings or structures or other development that would conflict with the future development of the Mission Beach Bypass (indicated on map MBCA2 Structure Map) should not occur.

3. CONSERVATION

Maintenance of the habitat corridor is crucial in this precinct. A 50 m wide habitat corridor measured from the high bank shall be provided on each side of Wongaling Creek as indicated on map MBCA 4- Mission Beach Precincts. This area shall be dedicated as public esplanade at no cost to Council and the area so dedicated which is in excess of the 20 m wide esplanade requirement along natural watercourses elsewhere in the Shire will be off-set against park/recreation area requirement associated with any development proposals. The development should not interfere with the function of this corridor and dogs should be contained within a fenced area.”

- [17] Agriculture might be the primary role for the precinct but that cannot possibly mean that it is the only role. In my view the proposed development will not, in any way, undermine the primary role of the precinct. There are already a number of properties in the precinct upon which agriculture is not carried on in any meaningful way. Section 2 Development Assessment must be read down to some extent in light of the fact that re-zoning applications are no longer provided for pursuant to IPA. However to the extent that the requirements of Part D of the Planning Scheme for the Rural Conservation Zone are relevant to the proposed development, in my view there is no conflict. In particular, the statement of intent which is already set out above. As to s 3 Conservation the subject land does not impact upon the habitat corridor on the banks of Wongaling Creek. If there is a need to provide a 20 m wide public esplanade along the bank of Mackness or James Creek around Lot 1 of the proposed subdivision, then that can easily be dealt with by a minor adjustment

to the subdivisional plan and the imposition of an appropriate condition. In my view it does not give rise to any conflict with the Development Control Plan.

- [18] Counsel for the first appellant rely on further provisions of the Mission Beach Coastal Development Control Plan as follows to argue that the proposed development is in conflict with it:-

#### **2.4.1 DEVELOPMENT AND URBAN FORM**

##### **2.4.1.1. OBJECTIVES**

1. To consolidate the existing urban development pattern around four separate and strongly identifiable coastal villages of Bingil Bay, Mission Beach, Wongaling Beach and South Mission Beach, separated by Rural Conservation and other nature based land uses.
2. To ensure that urban development occurs in a pattern that is economic and orderly, that does not further extend fragmentation of urban nodes and that allows for the efficient provision of infrastructure and services.

##### **2.4.1.2. IMPLEMENTATION STRATEGIES**

###### **1. Development Pattern**

- (a) The separation of villages will be achieved by limiting the boundaries of urban areas, by retaining Crown land for primarily conservation purposes, in accordance with the Crown Land Management Strategy (refer to the Mission Beach Coastal Area Development Control Plan Planning Study), further retention of agricultural land, and through low density development set back from the major road network, in accordance with the development pattern indicated in map MBCA 2-Structure Plan.

- [19] The submission might have some force except for what in my view is a fundamental flaw. The proposed development could in no way be described as urban development. It is not urban development within the ordinary meaning of that word. I have been unable to find any definition of the term "urban" in the Planning Scheme. However, in relation to the Table of Zones the proposed development would fit neatly and appropriately in the Rural Residential Zone. Given that there is a separate urban zone it is tolerably clear that at least so far as zoning is concerned, the Planning Scheme distinguishes between a Rural Residential use and an Urban use. Similarly, with the Strategic Plan map. There are areas designated as Urban as the Preferred Dominant Land Use. None of the land zoned Rural Residential at the time of the introduction of the scheme is included in that Urban designation and nor are any parcels of land which since the introduction of the scheme were zoned Rural Residential included in that Urban designation.
- [20] In my view the proposed development and subdivision on the development site will in no way undermine or detract from the objectives of the Development Control Plan. In fact the development pattern required in paragraph 2.4.1.2(1)(a) to achieve the separation of villages includes "through low density development set back from the major road network". In my view this proposed development and subdivision

fits that description precisely. There is no conflict with the Development Control Plan.

- [21] Finally, I turn to what are asserted to be conflicts with the IPA plan which came into force on 20 June 2005. Conflicts with this plan are not fatal. There is no requirement that the application be refused if it conflicts with the IPA plan. I accept however that the IPA plan, since it is now in force, should be given considerable weight.
- [22] Under the IPA scheme the subject land is contained within the Rural Zone (Rural Conservation Precinct). The introduction to the provisions concerning the rural Zone is as follows:-

#### 4.2 INTRODUCTION

The Rural Zone covers most of the land in the Shire outside Innisfail and other residential areas (Map 1 (a) – 1 (j)) and is split into two precincts;

Rural Use Precinct: is predominantly cleared land and includes good quality agricultural land suitable for agricultural use including growing fruit, vegetable and sugar cane crops and improved pastures as well as more marginal rural land suited to grazing and agro forestry;

Rural Conservation Precinct: includes land that has whole or part of the lot containing land suitable for conservation. It includes areas of significant conservation value and also includes land that may require re-vegetation. Council may exercise its discretion to allow for development at a higher density in exchange for permanent protection of habitat. Part of lots in the Rural Conservation Precinct may include good quality agricultural land suitable for agricultural use.

In relation to the second last sentence above there is a footnote referring to the Planning Scheme Policy for – Protection of Habitat Values. It contains the following relevant provisions:-

##### **\*1. Higher Density of Development**

This section identifies when Council may favourably consider development applications resulting in a higher density of development than provided for in the Planning Scheme.

Part of the purpose of the Rural Zone as stated in Part 4 Division 2, 4.2.2 is “protect the eco-system and function of existing habitat by promoting the protection from removal and destruction in rural Conservation Precinct”.

Lots within the Rural Conservation Precinct have all or part of the lot containing areas of significant habitat which the Council wants to protect from removal and destruction.

Council may consider a higher density development than that provided for in the Planning Scheme in the following circumstances:

- (a) The habitat is not already protected from removal or destruction and could be made subject to a more secure level of protection through a conservation covenant.
- (b) The capacity of the habitat system on the lot affected by the development and adjacent lots is able to withstand the likely impacts of the proposed development and maintain habitat integrity in the long term; and
- (c) The proposed development does not alienate good quality agricultural land.

## **2. Appropriate Density Of Development**

When determining the appropriate density of development the following is a guide to ensure the integrity of the habitat to be protected:

Thereafter is provided what might be described as some performance standards. It is common ground that the proposed development provides for what might be described as a higher density of development than those performance standards allow. However it is important to note that those performance standards are described as a guide only. There is nothing in Planning Scheme Policy 4 that prevents the Council from considering and approving a higher density of development than that provided for in the Planning Scheme or in the guide. In my view such flexibility is sensible. If, for example, the whole of a parcel of subject land contained important cassowary habitat the council might well be justified in permitting no higher density of development than provided for in the guide or perhaps even restricting the density of development to something less than the guide permits. However, the policy is also intended to apply to lots in which the areas of significant habitat form only part of the land. In my view the Council could envisage circumstances in which a higher density of development than provided for in the guide could be permitted on that part of the land not containing the area of significant habitat, in return for the part of the land containing the significant habitat being conserved undisturbed without any development at all and in return for its conservation being more securely protected. Such a concession or incentive might be even more justified if there were positive planning reasons for approving the higher density of development on that part of the land not containing significant habitat if good planning reasons can be demonstrated for doing so. Such a scenario arises in this very case. There is no conflict with the respondent's IPA scheme.

- [23] The appellants raise an issue that the proposed development of the development site for Rural Residential type purposes is contrary to State Planning Policy 1/92 Development and the Conservation of Agricultural Land. There is a simple answer to this. I am satisfied that the development site is not good quality agricultural land. The most obvious evidence leading to this conclusion is that the development site fell into disuse as agricultural land before it was ever purchased by the co-respondents. In the absence of any evidence to the contrary the most obvious inference is that it was not viable as agricultural land. Such an inference is confirmed in my view by the evidence of Mr Hine and Mr Barnes. Although Ms McAvoy seems to be of the opinion that the development site is good quality

agricultural land, her reasons for saying so serve only to confirm my view that it is not good quality agricultural land.

- [24] Firstly, the fact that there are other people carrying out farming on farms of similar size does not mean that any farm of such size is viable. Without examining the economic returns of farms of such size the distinct possibility that such farmers continue to farm such land for reasons other than profitability cannot be ignored. For instance some farmers continue to farm unviable properties for lifestyle reasons, because of an inability to transfer skills to some other income earning occupation, etc. The matter which influences me most is Ms McAvoy's resort to farming by organic and/or biodynamic methods to viably farm the development site really confirms how marginal the development site is as farming land. It is practically impossible to amalgamate the development site with a neighbouring farm. It would always have to be operated as a farm in isolation from any other farm in the same ownership. This would lead to obvious inefficiencies and an inability to fully exploit the benefits of economies of scale. Whilst organic and biodynamic farming is a commendable method of doing so and may in some instances, when a particular farmer has particular skills in relation to such methods of farming, be able to be carried out profitably such farming methods are still relatively rare in the total farming community. In my view it would be quite irrational to adopt an approach to planning in the very speculative hope that some person might be prepared to invest in a relatively unusual farming method in the hope and expectation of turning this particular parcel of land into a viable farm. There is nothing in the State Planning Policy or any associated document which requires the preservation of agricultural land in the hope of such a speculative and remote outcome.
- [25] I turn to the question of amenity. I have no doubt that the Suddabys, the Hunters, other people living adjacent to the development site enjoy a very high standard of amenity. That is no doubt substantially contributed to by the fact that the development site, although cleared, is otherwise undeveloped and unused. It must also be of some comfort to them that they are able to enjoy that amenity whilst the burden of the costs of the ownership, rates and other government charges are borne by the co-respondents. It is perfectly understandable that they would not want the development site to change or at least change very much. However, in my view such expectations are entirely unreasonable. Any reasonable person in the position of the Suddabys, knowing themselves the particularly high level of amenity which they enjoy, should have realised that other people might like to enjoy a similar benefit. They should have reasonably expected that at some stage somebody might want to provide the opportunity for others to enjoy what they enjoy. This is all the more so in light of the provisions of the Transitional Planning Scheme which I have discussed in detail above. What is proposed here is to introduce a number of allotments to be used for residential purposes as the Suddabys use their allotment and of a size not particularly dissimilar to the area of the Suddaby property. There is, of course, the potential effect of traffic upon the access road into the proposed subdivision running fairly close to the Suddaby property. Part of the difficulty arises because the Suddaby's home is so close to the southern boundary of their land. The co-respondents have made provision for that by allocating an area for a landscaped park to buffer the Suddaby home from any noise arising out of traffic using the access road. I am satisfied that whilst there will be a significant increase in traffic passing near to the Suddaby property (there is none at present) it may fairly be described as being at a low level. In my view the proposed development

will not unreasonably interfere with the amenity of the Suddabys or the owners of the properties to the east of the development site.

- [26] The Hunter property is in something of a different category. That is partly because of its unusual shape as a large battleaxe block. However on the evidence the Hunters, at the time of the hearing of this appeal, were in the process of constructing a new and substantial home in a very elevated position towards the west of their property. Their home will be therefore quite remote from the proposed development and in my view their residential amenity will not in anyway be affected by the proposed development. The other matter raised is that Mrs Hunter stables and trains racehorses on the property. I am quite unconvinced that the presence of seven Rural Residential allotments abutting the northern boundary of the Hunter property at its southern end will in any way interfere with Mrs Hunter's ability to train her racehorses. Given the size of the allotments, those who purchase and build upon them will have no difficulty siting their homes a reasonable distance from their rear boundary. The notion that the sound of a galloping horse in the early morning will interfere with the amenity of the owners of such allotments to the extent that they will raise objection, in my view, is fanciful. I am satisfied that the proposed development will not in any way unreasonably adversely affect the amenity of surrounding residents.
- [27] I turn to the issue of need. Firstly, I give no weight at all to the fact that there might be some people who own land which might be suitable for Rural Residential type subdivision and who might be contemplating making an application for such subdivision. There is no logical way that such speculative developments can be given any weight as contributing towards any present need. As I have already indicated the Strategic Plan intends to provide opportunities for people to purchase Rural Residential sized allotments should the need arise. In my view need is a relative thing. A local authority should sensibly provide for the demand for rural Residential allotments, not just by reason of their size but by reason of their type and locality. There is evidence of land of appropriate size being available on very elevated heavily forested blocks with steep topography. The evidence suggests that such allotments are very expensive. There is evidence of some appropriately sized allotments being available on fairly low lying flat land. Given that it is land of that type it may well be that there is not a high level demand for it. The rural Residential sized allotments which will result from the proposed development do not fall into either of the above categories. They will be somewhere in between. They will be particularly attractive Rural Residential sized allotments. The topography of the development site is such, in particular the upward slope to the west, that most if not all people who purchase who build upon those allotments will enjoy some sea views. The elevation of the land will also provide the benefit of sea breezes. The fairly gentle slope of the land will mean that purchasers will be able to build homes upon the land without having to resort to expensive engineering solutions which might be required on highly elevated steeply sloping allotments. I accept the evidence of Mr Carr that there has been a steady population growth in Mission Beach. I accept that there has been a rapid escalation in prices for properties at Mission Beach, especially for properties located on or near the beach front. I accept that there has been a decline in the sales of Rural Residential allotments which may be appropriately attributed to the approach of the exhaustion of developers' stock. I accept his evidence that there has been strong demand for residential allotments. There may be Rural Residential land available in more remote areas of the Shire but that in my view is not relevant to the need for Rural

Residential land to become available in the Mission Beach area. I consider that Mr Carr's evidence is supported by that of Mr Wiltshire and Mr Dalton. I am therefore satisfied that there is a need for the proposed development and subdivision in the relevant sense.

- [28] In summary, the development site is suitable, even desirable, for rural Residential sized allotments. It is relatively convenient to the Mission Beach urban centre. Most, if not all, appropriate urban services can be conveniently connected to the allotments, it does not create any undue traffic noise or congestion. On the whole the development site is ideally suited for the proposed development.
- [29] In my view it should not be overlooked that the approval of the proposed development brings with it a substantial benefit which is expressly sought by the Transitional Planning Scheme and also the recently introduced IPA Scheme, namely the securing of an important area of cassowary habitat. On the evidence the balance of the subject land outside the development site is particularly important cassowary habitat. It is a substantial area of land. It is also contiguous with the Clump Mountain National Park which is an important area of cassowary habitat. Not only will the balance of the subject land be secured for conservation purposes it will be secured without any development whatsoever taking place upon it. Even if it could be rationally argued that there is some conflict appearing somewhere between the proposed development and the Strategic Plan and/or the Development Control Plan, in my view the securing of the balance of the subject land for conservation purposes would provide an overwhelming planning reason for approving the proposed development in spite of any such conflict. However, as I have indicated in my view the proposed development is not in any way in conflict with the Strategic Plan and Development Control Plan. Rather, in my view, the proposed development on the development site coupled with the securing of the balance of the subject land for conservation purposes is entirely compatible with and supported by the provisions of the Strategic Plan and the Development Control Plan.
- [30] I am also satisfied that the erection of an appropriate fence will provide a sufficient buffer or barrier between the cassowary habitat area and the development site. In my view the evidence of the cassowary experts supports this view. I say this acknowledging that there is some wavering on the part of one of the experts. It seems appropriate that I should give some guidance as to my views concerning the specifications of the fence and the length of it. As to the specifications of the fence I am satisfied that a chainmesh fence 1500 mm in height with a white sight wire set 100 mm above the chainmesh would be sufficient to exclude cassowaries from the development site. This is important because the proposed subdivision and construction of residences on the allotments will introduce a significant increase in human activity including motor vehicles. There is also the possibility that some residents may want to own dogs. I am not unsympathetic to the position taken on behalf of the co-respondents that the fence which is to be constructed should end where the area of cassowary habitat ends at the southern boundary of the proposed Lot 11. However, there is ample evidence that cassowaries from time to time wander out of their habitat areas into adjacent areas. This can sometimes be fatal to the individual bird's survival. What concerns me is that if a bird should wander out of the habitat area around the end of the fence which the co-respondents propose, a bird might well have difficulty finding its way out again given that in that situation it may well have to confront a fence which will block its attempt to return to the habitat area. In my view, therefore, it would be a reasonable and relevant condition



to require the barrier fence to be constructed to the point at the south eastern corner of proposed Lot 4 of the subdivision.

- [31] It has been suggested that whilst a fence of the specifications referred to above will be sufficient to keep cassowaries out of the subdivision, it will not be sufficient to protect the habitat from, for instance, dogs getting into the habitat area from the proposed subdivision and residents of the proposed subdivision dumping rubbish into the habitat area over the fence. I accept that there is some risk of such things happening but in my view the risks are slight. First of all a 1500 mm chainmesh fence will provide a sufficient barrier to most dogs. It is not as if cassowaries living in the Mission Beach area are presently under no threat at all from marauding dogs. I have no doubt at all that there are many residents of Mission Beach who own dogs. Most I expect are responsible dog owners who properly restrain their dogs. There will of course be others who don't. And I also accept that there is always the possibility of a domestic dog going wild. The point is that given the requirement of the co-respondents to construct the 1500 mm chainmesh fence in my view the potential threat to the safety of cassowaries from any dogs which might be brought into the proposed subdivision and escape therefrom will be extremely slight. I am also satisfied that there is no need for any condition or covenant dealing with pet ownership.
- [32] In relation to the risk of residents throwing rubbish over the fence, in my view, such a risk is also very slight. In my view, the Rural Residential allotments which will result from the proposed development will be very desirable. Given the evidence of need I expect that the cost of purchasing any of these allotments will be substantial. I therefore expect that overwhelmingly, residential development on the allotments will be of a very high standard. In my experience of life people who own and reside in such properties take particular pride and care in looking after their properties. Disposing of rubbish over the back fence which will result in an ever increasing pile of rubbish is in my experience quite out of character. In my view it would be unreasonable to require the co-respondents to construct a fence of any higher standard and therefore greater cost than the 1500 mm chainmesh with the sight line attached.
- [33] In summary, subject to conditions consistent with these reasons being finalised I propose to dismiss the appeals.