

**CAIRNSPLAN 2016 PROVIDES WELCOME FLEXIBILITY IN THE  
CENTRES STRATEGY**

**by JUDGE W.G. EVERSON**

- [1] In the current planning scheme for the Cairns Regional Council, *CairnsPlan 2016*, there is provision in the centres strategy for the establishment of new centres. The flexibility afforded by this provision was recently the subject of decisions of both the Planning and Environment Court of Queensland and the Queensland Court of Appeal in the context of a development application for a Shopping Centre, medical centre, Child Care Centre and a Service Station adjacent to the Captain Cook Highway in the vicinity of the Trinity Beach roundabout, approximately 15 kilometres north of the Cairns CBD.
- [2] In *CairnsPlan 2016* the Strategic framework includes the Settlement pattern theme which in turn includes the strategic outcome that the region grows and evolves in a way that maintains the hierarchy of centres.<sup>1</sup> Thereafter, in s 3.3.2 an orthodox hierarchy of centres is established with the principal centre being the Cairns city centre. Major centres are then identified at Earlville, Edmonton and Smithfield. Thereafter, District centres are identified at Babinda, Gordonvale, Manoora, Manunda, Mt Sheridan, Redlynch and Westcourt. Local centres and Neighbourhood centres are then specified but not identified. In each instance there is a requirement that centres do not compromise the role and successful function of higher order centres.
- [3] Interestingly, s 3.3.2.1(10) provides:
- New centres are only established where it is demonstrated that:
- (a) there is a need for the development;
  - (b) the development is of a scale that is required to service the surrounding catchment;
  - (c) the development is highly accessible within the catchment it serves and not located on the periphery;
  - (d) the development does not compromise the character and amenity of adjoining premises and surrounding areas.

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<sup>1</sup> Section 3.3.1(1)(d).

- [4] In s 1.5 of *CairnsPlan 2016*, the hierarchy of assessment criteria states that where there is inconsistency between provisions within the planning scheme, the Strategic framework prevails over all other components to the extent of the inconsistency.<sup>2</sup>
- [5] In *Fabcot Pty Ltd v Cairns Regional Council*,<sup>3</sup> the Planning and Environment Court accepted the evidence of the economic experts who gave evidence at the hearing of the appeal, that the proposed development identified a Primary Trade Area (“PTA”) which encompassed the suburbs of Trinity Beach and Kewarra Beach.<sup>4</sup> Further, it was agreed by each of the economists that the proposed development, if approved, would constitute a new Local centre in the hierarchy of centres.<sup>5</sup>
- [6] The site of the proposed development is in the Low-medium density residential zone. Accordingly, the provisions of the Low-medium density residential zone code (“LMDR Zone Code”) were applicable assessment benchmarks. As the proposed development was impact assessable, s 45 of the *Planning Act 2016* (“PA”) provided that the assessment may be carried out having regard to any other relevant matter, other than a person’s personal circumstances, financial or otherwise.<sup>6</sup> It is also relevant that the Court in determining the appeal was conferred a wide discretion pursuant to s 60 of the PA, as has been confirmed in a number of decisions including *Abeleda & Anor v Brisbane City Council & Anor*.<sup>7</sup>
- [7] In allowing the proposed development to proceed the Planning and Environment Court noted non-compliance with the LMDR Zone Code with respect to the proposed development not being small-scale. Thereafter the Court stated:

A new centre is going to be established in circumstances where I find that it complies with s 3.3.2.1(10) of the Strategic framework. There is a need for each of the components, it is of a scale required to serve the surrounding catchment it will serve, it will be centrally located and it will not compromise the character and amenity of adjoining premises. Where such a development complies with the Strategic framework this prevails over all other components of the Planning Scheme in the event of inconsistency pursuant to s 1.5(1)(a). This is unsurprising, where, in the circumstances before me, it is difficult to see how a new centre could be established of an appropriate size in

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<sup>2</sup> Ibid, s 1.5(1)(a).

<sup>3</sup> [2021] QPELR 40, [2020] QPEC 17.

<sup>4</sup> Ibid at 55, [35].

<sup>5</sup> Ibid at 59, [48].

<sup>6</sup> *Planning Act 2016* s 45(5)(b).

<sup>7</sup> [2020] QCA 257.

this suitable location in response to a clear need for each of its components in the local area if it had to be small-scale. In any event, given the flexible approach to the exercise of the court's discretion in deciding an appeal, the fact that the proposed development is not small-scale does not warrant refusal of it.<sup>8</sup>

- [8] The decision of the Planning and Environment Court was subject to an appeal.<sup>9</sup> The appeal was ultimately successful on one ground, namely that the primary judge had erred in the meaning to be attributed to the term "local community" in the LMDR Zone Code in assessing non-compliances with assessment benchmarks in this regard. It was remitted for hearing by him on this limited ground.<sup>10</sup> Significantly, the approach taken by the Planning and Environment Court at first instance to the paramountcy of s 3.3.2.1(10) of *CairnsPlan 2016* was endorsed. In this regard Brown J observed:

The provision as to new Centres in combination with Local Centres is not confined to small scale development. Nor is the local community limited by the development only being small scale. There is an inconsistency between the LMDR Zone Code and the Strategic Framework in the scale of development permitted for Local Centres which is permitted under CP2016 given the inclusion of s 3.3.2.1(10). That was the apparent basis of his Honour considering s 1.5 could apply and was not in error.<sup>11</sup>

- [9] The Planning and Environment Court heard the remitted appeal and the decision is *Fabcot Pty Ltd v Cairns Regional Council (No. 3)*.<sup>12</sup> The scope of the remitted appeal was summarised by the primary judge in the following terms:

I need to re-exercise my discretion pursuant to s 60 of the PA having regard to the fact that the proposed development is not only not 'small scale' as I have already found, but also that it will serve residents of the Northern Beaches beyond what could be regarded as serving 'local residents' or 'the local community' which is contrary to the purpose and PO3 and PO4 of the LMDR Zone Code.<sup>13</sup>

- [10] Unsurprisingly, the result was the same as before, the proposed development was again approved by the Planning and Environment Court.

<sup>8</sup> *Fabcot Pty Ltd v Cairns Regional Council* [2021] QPELR 40 at 60 – 61, [53].

<sup>9</sup> *Trinity Park Investments Pty Ltd v Cairns Regional Council* [2022] QPELR 309, [2021] QCA 95.

<sup>10</sup> *Ibid* at 347, [118] and [119].

<sup>11</sup> *Ibid* at 353, [144].

<sup>12</sup> [2023] QPELR 734, [2022] QPEC 12.

<sup>13</sup> *Ibid* at 745, [43].

- [11] Although for an impact assessable development the assessment manager is able to take into account a number of considerations within the concept of relevant matters and is further conferred an extremely broad discretion pursuant to s 60 of the PA, the express provision for the establishment of new centres pursuant to s 3.3.2.1(10) of *CairnsPlan 2016* offers considerable utility in ensuring that the region grows and evolves in a way that maintains the hierarchy of centres. It is a mandatory assessment benchmark. This means that an appropriately located site has good prospects, pursuant to the Strategic framework, of becoming a new centre even if there are inconsistencies with lower order planning provisions. Expressing this as part of the planning strategy is endorsing a flexible approach to the sound regulation of growth in the region in a more focused way than by resorting to broad permissible considerations for the assessment manager such as relevant matters pursuant to s 45 and the exercise of the discretion pursuant to s 60 of the PA.