Submission

The Grounds of Appeal are:

1-Relevant Legislation

A. By the correct interpretation of the Planning Act 2016 (PA16) and the Planning Regulations 2017 (PR17) for DA21, the:

   a. *assessment manager* is: **local government**; and

   b. *referral (concurrent) agency,* is: **chief executive**; and

   c. *category of development,* is **assessable**; and

   d. *category of assessment,* is **code**; and

   e. relevant *assessment benchmarks* assigned are:

For the **chief executive**-

State development assessment provisions: by delegation-

- State code 8: Coastal development and tidal works; and
- State code 9: Great Barrier Reef wetland protection areas; and

For the **local government**-

The *local planning instrument* (Planning Scheme)

- Applicable zone code-Low Density Residential; and
- Reconfiguring a lot code; and
- Transport and parking code; and
- Acid sulfate soils overlay code; and
- Agricultural land overlay code; and
- Biodiversity areas, waterways and wetlands overlay code; and
- Bushfire hazard overlay code; and
- Coastal protection overlay code; and

B. Section 45(3) of PA16 provides that for **code** assessment, the ***assessment*** process required by Section 60 of PA16 to determine a code assessable

development application, must be carried out **only** against the *assessment benchmarks* in a *categorising instrument* for that development and having regard to a matter prescribed by the regulation, that is relevant to a **code** *assessable development*.

C. Section 60(2) of PA16 requires the assessment manager to determine, for a relevant development application, compliance with the relevant assessment benchmarks for the development; and

D. Section 60(2)(d) of PA16 provides that, if a relevant development application does not comply with some or all of the requirements of the *assessment benchmarks,* the assessment manager may impose **only** those development conditions that will achieve compliance with the relevant *assessment benchmarks*.

E. Section 43(2) of PA16 provides that an *assessment benchmark* is **not** to include:

(i.) a matter of the **person's opinion**; and

for **code** assessment:

(ii.) a strategic outcome required by section 16 (1)(a) of PA16 or

(iii.) a matter prescribed by regulation

F. Section 55 of PA16 requires a referral agency to undertake the assessment process of a development application in accordance with the same prescribed processes, as that for an *assessment manager*.

G. Section 63 of PA16 provides the requirements in relation to a *decision notice*. It requires amongst other things; the decision notice include a description of the *assessment benchmarks* applying for the *assessable* development.

ASSESSMENT MANAGER

2-Decision Notice

A. The assessment manger incorrectly and/or inappropriately interpreted provisions of PA16 and the Planning Scheme's relevant *assessment benchmarks,* in undertaking assessment of DA21 and thereby incorrectly and/or inappropriately imposed unreasonable, and/or not reasonably required conditions on the development approval.

Such conditions are:

(i) The Development was for **reconfiguring a lot** only, not any other type of development. Therefore, Conditions Nos 3, 13, 18, 21, 22 and 24 while may be appropriate under assessment benchmarks for other types of assessable developments, are not relevant and therefore not reasonably required for DA21; and

(ii) Conditions 2, 4, 8, 9, 10, 14, 15, 17 and 25 constitute **advice** on matters, with no relationship to the *assessment benchmarks* against which the *assessment manager,* for DA21, was required to undertake assessment against, nor conditions required for compliance with relevant *assessment benchmarks* and therefore are not reasonably required; and

(iii) Conditions 5, 6, and 7 constitute **circumstances** whereby they are already required by existing law, plus are not called up by requirements within relevant *assessment benchmarks,* against which the assessment manager was required for DA21, to undertake assessment against, nor conditions required for compliance and further pose the circumstances for creating exposure to a 'double jeopardy' style situation [Comply with legislation and comply with a statutory development conditions (PA16-Section 164)] without any apparent responsible reason and are therefore unreasonable conditions; and

(iv) Conditions 11, 12, 13, 16, 19 and 20 are **not** the only interpretation of the relevant '*performance outcome'* provided for in the relevant *assessment benchmark* and therefore are unreasonable conditions; and

B. The decision notice issued by the assessment manager, **failed to define**, as required by Section 63 of PA16, the assessment benchmarks, used by the assessment manager to determine compliance for DA21.

REFERRAL AGENCY

3-Decision Notice

A. State Code 9 is titled *Great Barrier Reef wetland protection areas.* The Co-Respondent, as referral (concurrence) agency, (SARA) used this code as an assessment benchmark to assess some aspects of DA21. The wetland against which the assessment was made is not located in the area defined as 'runoff catchment area' of Great Barrier Reef by the Great Barrier Reef Marine Park Authority.

The assessment benchmark is therefore not relevant in assessing DA21; and

B. The Co-Respondent, as referral (concurrence) agency, (SARA) incorrectly and or inappropriately interpreted provisions of the PA16 and relevant *assessment benchmarks,* in undertaking assessment of DA21 and thereby incorrectly and or inappropriately instructed the *Assessment Manager* to include in the *Decision Notice*, the **imposition** of unreasonable conditions, and conditions not reasonably required by the development; and

C. Further, if those conditions are correctly interpreted, then SARA in undertaking assessment of **Code** assessable of DA21, applied the following conditions which are ***unreasonable*** and/or not ***reasonably required*** by the Development:

Because:

(i) The Development was for *reconfiguring a lot* **only**, not any other type of development. Therefore, Conditions Nos 4, 5, 8, 9(b) while may be appropriate to other types of developments are not relevant for DA21; and

(ii) In undertaking a *Code assessment* process for the development application, SARA did not, in accordance with the PA16, carry out the assessment - **solely** against the:

a. the provision of the prescribed *assessment benchmarks*; and/or

b. a matter prescribed by regulation for that development type,

resulting in assigning, for Conditions Nos 4, 5, 8, 9(b), unreasonable impositions, thus making those aspects not reasonably required; and

(iii) Some components of determinations reached in Conditions Nos 1, 3, 4, 5, 6, 8, and 9 could only have been achieved through the application of '***personal opinion'*** and therefore contrary to the requirement for **Code** Assessment under PA16 and therefore are unreasonably imposed; and

(iv) Condition No 9(b) is too **vague**, in order to provide the Applicant with a clear understanding of what is required to be delivered by the development and therefore, is unreasonable; and

(v) Condition Nos 1, 3, and 6 are **contrary** to the lawful facility open to the Development and therefore unreasonable; and

(vi) Condition Nos 1, 3, and 6 **denies** the applicant lawful **choice** in providing a compliance solution, available and therefore is an unreasonable imposition on the development, or the use of premises.

(vii) Condition Nos 1, 5, 6, and 9(a) pose the circumstances for creating exposure to a ' **double jeopardy'** style situation [comply with legislation and comply with a statutory development condition (PA16-Section 164)] without any apparent responsible reason and is therefore an unreasonable condition.

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The Argument

Subdivision of land

The lawful subdivision of land in Australia commenced in 1792 when Governor Arthur Phillip awarded land grants, in the new colony to emancipists, free settlers, and non-commissioned Marine Officers.[1]

This land was granted under English law which can be traced back to first recorded practice of formally subdividing land in England in 604 A.D[2].

However, under common law in 1792, the transfer of ownership of land was required to be recorded with the civil authority, equivalent of our current titles office. Outside of that there were no restrictions or requirements to first seek someone else's approval.

The first Australian legislation requiring **approval to transfer** land was in Western Australia's Transfer of Land Act of 1893[3]

It wasn't until 1919 that the first Australian legislation *Local Government Act 1919* in New South Wales dictated the **size of land** that could be separated from an existing titled parcel[4]. Management of this legislation was placed exclusively within the preserve of local governments.

That system was adopted also by Queensland

The Queensland Subdivision of land Process 2025

Overview

In Queensland, the *Land Title Act 1994* (LTA94) requires that a person wishing to subdivide their freehold land, must lodge with the Registrar of the Land Title Office [Now Queensland Titles -

[1] Museums of History NSW [Ref]
[2] English land law [Ref]
[3] Austlii.edu.au [Ref]
[4] State Library NSW [Ref]

since 2021] a *plan of subdivision* in order to have an independent title issued for each subdivide of the parcel of land[5].

In order to complete the registration, process, the *plan of subdivision* when lodged, must comply with a number of criteria[6]

The relevant requirement for this matter is, that a *plan of subdivision* must be approved by the *relevant planning body*,[7] and in this case that is the local government[8] for the area in which the land is located.

In order to obtain that approval, the applicant seeking lodgement for registration of a *plan of subdivision,* with Queensland Titles, is required under 'the *Planning Act 2016* (PA16) to first lodge with the local government, as *assessment manager*, an application to subdivide their land[9](DA).

This is classified as a '*development'* under PA16, for the purposes of *reconfiguring a lot*[10](RAL)

Local governments, under their *local categorising instrument* (planning schemes), provided for by PA16[11], are required to follow an *assessment* process, of the DA, in accordance with the provision of PA16 - Chapter 3.

When a local government is *satisfied* this process is complete, it will assign their approval to the *plan of subdivision*.[12]

Satisfied entails:

- Compliance with the provisions of PA16.
- Payment of money to the local governments, determined to be relevant in gaining approval.

However, it would be rare that, as a consequence of achieving compliance for a RAL, there were no other requirements, set by *assessment benchmarks* under PA16, to undertake work that is the subject of other *development approvals.*

For example:

- *Operational Works* -required civil construction;
- *Plumbing and Drainage* works- water and sewerage; and in some cases
- *Building Works* – buildings and structures

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[5] LTA94- Section 52
[6] LTA94- Section 50
[7] LTA94- Section 50(h)
[8] LTA94- Section 50(6)
[9] PA16- Section 50
[10] PA16- Schedule 2
[11] PA16- Section 43(3)
[12] PR17- Schedule 18

The practice is that a local authority will reframe from endorsing the *plan of subdivision* until **all other** associated development approvals and local requirements are also complied with.

Prior to the introduction of the *Integrated Planning Act* in 1997 with its IDAS system, it was not possible to have an all-encompassing *development application,* to cover more than one approval process and each development type required its own application, assessment and permitting process.

Since 1997 however, applicants have had the **option** of:

- applying for approval of a single development, one at a time, if desired; or
- amalgamate all required developments into the one single DA.[13]

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Development Assessment

Overview

The overarching legislation for development assessment in Queensland is PA16.

Section 3(1) of PA16 announces the purpose of the Act is to establish, amongst other things, an efficient, effective, transparent, integrated, coordinated, and accountable system of *development assessment* to facilitates the achievement of *ecological sustainability.*

Ecological sustainability is defined in Section 3(2) of PA16 as a balancing act and detailed in Section 3(3) a list all the forces that comprise the components in the balance, including Climate Change.

Section 4 of PA16 details the SYSTEM to achieve *ecological sustainability*

Subsection 4(f) provides that, the development assessment system, [including that provided by the State Assessment and Referral Agency (SARA) and defined in Chapter 3 of PA16], is to be used to make and decide development applications, to establishing rights and responsibilities in relation to development approvals and to promote cost effective provisioning of infrastructure to ensure developments via the hierarchy of *planning instruments*[14] to achieve the overarching requirements of **achieving ecological sustainability.**

Section 5 of PA16 deals with *advancing the purposes of the Act.* Subsection 5(1) makes it mandatory on entities (including *assessment managers*) in 'performing a function under the Act' to perform that function in way that advances *Ecological Sustainability.* Keep this in mind, this is important.

[13] Link to Form 1

[14] PA16- Section 8

Development Assessment System.

Chapter 3 of PA16 (Sections 43 to 109) details the *Development Assessment System.*

Section 43 of Chapter 3 introduces *categorising instrument* and defines their scope of authority and application to: —

(i) categorising **development**; and then

(ii) categorising **types of assessment** for particular development; and then

(iii) prescribing the **processes** for assessment (making, receiving, assessing and deciding) for development applications; PLUS

(iv) establishing

- rights and
- responsibilities

in relation to development approvals.

Section 45 of PA16 provides, amongst other things, that for developments, which are *assessable* under PA16, there are two types (categories) of assessment processes, relevant to assessing a DA. - **CODE** or IMPACT

These two different types of assessment have their own individual scope for the assessment process.[15]

While **IMPACT** assessment of a DA is carried out against

1. the relevant *assessment benchmarks* that are assigned to a particular type of development, under particular circumstances, by a *categorising instrument* (Regulation and or Planning Schemes) PLUS
2. having regard to any matters prescribed by regulation for the DA **AND**
3. may be carried out against, or having regard to **any other** '⁎**relevant matter'** - other than a person's personal circumstances.[16]

⁎A relevant matter has a very wide scope.

CODE assessment however, on the other hand, is a much more constrained process and must be carried out, **ONLY**

1. against an *assessment benchmark;* and

2. having regard for a matter prescribed by regulation, relevant to Code assessment.[17]

[15] PA16- Section 45

[16] PA16- Section 45(5)

[17] PA16- Section 45(3)

And most poignantly, provides that when carrying out CODE assessment, the *assessment manager* is **not** to apply the **purpose** of PA16, called up by 'subsection 5(1) of the Act'[18]. (See above)

Examples of *assessment benchmarks* for Code assessable DA's are—

- a **code**; or
- a **standard**; or
- an **expression of the intent** for
    - a zone or
    - precinct

  within a *local categorising instrument*

Assessment Benchmarks

Assessment benchmarks form the backbone of the assessment process. They provide published performance content, against which the DA is be assessed, to determine achievement, required in order to obtain an approval of a development application.

Inherent in the term "benchmark" is the idea of measurement, which is central to ***performance-based development assessment****. A benchmark is a "ruler", or "gauge" against which proposed development is measured to test its "performance" or compliance.*[19]

Section 43(2) of PA16 provides that an *assessment benchmark* **does not** include

- a person's opinion; or
- a person's circumstances; or

for **CODE** assessment— an *assessment benchmark* is **not** to include:

- a strategic outcome (defined by PA16(1)(a);[20]) or
- a matter prescribed by regulation.

Assessing Development Applications

An *assessment manager* for a DA is selected by the Planning Regulation 2017 (PR17).[21] If PR17 does not identify an *assessment manager* for a particular DA then the Minister may[22]

An *assessment manager* for both CODE and IMPACT assessments is to assess the development application against or having regard to the **relevant**

- statutory instruments; or
- other document within or applied by, a statutory instrument.

[18] PA16- Section 45(4)
[19] Explanatory Notes-Planning Bill 2015 (P5)
[20] PA16 (1)(a)
[21] PA16 Section 48(1)
[22] PA16 Section 48(6)

at the date the development application was *properly made*.

But the assessment manager can, before it is decided the DA, also take into consideration, the appropriateness and relevant, in the circumstances, of the latest version of the statutory instrument or document, or a new statutory instrument, if it has come into effect, before the DA is decided[23].

Referral agency's assessment

A referral agency is selected by regulation or under certain circumstances, the Minister[24]

If a referral agency is selected by the Minister, certain conditions may apply, otherwise, a referral agency must assess a DA as required by the regulation.

The regulation may prescribe the matters for assessment, the selected referral agency:

1. may,
2. must, or
3. must **only**

assess a development application

a. against and
b. have **regard** to[25].

The referral agency **must** assess the development application 'against or having regard to' the prescribed matters, as in effect when the development application was properly made, unless, before the agency delivers it's advice, a change in or a new relevant statutory instrument come into effect, then the referral agency may, in the agency's advice, if appropriate in the circumstances, give weight to this new information.[26]

Deciding development applications

For a properly made application the *assessment manager* for a DA that requires **CODE** assessment, (after- if relevant, receiving advice from a referral agency), carry's out the assessment and

(1) Must, if the development complies with all of the assessment benchmarks, -approve the application; or
(2) May, if the development does not comply with some of the assessment benchmarks, - still approve the application despite the lacking full compliance; or
(3) May, refuse the application, **but only** if compliance cannot be achieved by imposing *development conditions*.

[23] PA16 Section 45(6)
[24] PA16 Section 54(2)
[25] PA16 Section 55(2)
[26] PA16 Section 55(5)

All *development conditions* however must meet the test set by Section 65 of PA16.

By comparison the assessment manager has much more flexibility and scope for a DA that requires **IMPACT** assessment and may decide to—

1. approve the application; with or without conditions;
2. approve part of the application; with or without conditions or
3. refuse the application.
4. give a preliminary approval for all or part of the development application and refuse the part without preliminary approval

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The Subject Development

Development application RAL 21 – 0138 (DA21) is for a development for ***Reconfiguring a Lot*** for the freehold parcel of land described as Lot 51 MCH 567. (Subject Site)

The development, *reconfiguring a lot* (RAL), means, amongst other things, creating new lots by subdividing an existing lot. A process involving a term "*plan of subdivision*" under the *Land Act 1994* and *Land Title Act 1994*;

For DA21, under PR17:

Schedule 8 Table 2:

- 'The local government' is ***assessment manager***; and for

Schedule 10 Part 14:

- Section 21 – is ***assessable*** *development*; and
- Table1- is **Code** *assessable*

The *Subject Site* is partly affected by:

1. An *erosion prone area* located within the *coastal management district* of the *coastal zone* declared under the *Coastal Protection and Management Act 1995*; and
    (a) PR17 Schedule 10 Part 17 Table 5 identified SARA as a ***referral agency*** for DA21; and
        (i) The *assessment benchmark* as - ***State code 8****: Coastal development and tidal works*- and
2. A, *Great Barrier Reef wetland protection area* (wetland protection area – **triggers)** declared under the *Environmental Protection Regulation 2019;* and
    (a) PR17 Schedule 10 Part 20 identified SARA as a **referral agency** for DA21; and
        (i) The *assessment benchmark* as - ***State code 9****: Great Barrier Reef wetland protection areas* -

PR17 **does not** assign any other *assessment benchmarks* for DA21.

Under the Fraser Coast Regional Council's (FCRC) *local categorising instrument,* (Planning Scheme) DA21 is also:

- **assessable** development; and
- **Code** assessable.

Part 5 of the planning scheme determines for DA21 four (**4**) *assessment benchmarks*

1. Applicable local plan code
2. The zone code = **Low Density Residential**
3. The **Reconfiguring** a lot code
4. The **Transport** and **parking** code

There is **no Local Plan** for the Subject Site. - so that code is not in play. and

Provides the following *overlays* are relevant to DA21.

1 OM-001 Acid Sulfate Soils
- At or below 5 metres

2 OM-002 Agriculture Land
- Class B - Limited crop

3 OM-004 (W) Biodiversity Areas
- Local wetland buffer

4 OM-005 Bushfire Hazard
- Bushfire hazard potential impact buffer
- Bushfire prone area
- Medium bushfire hazard area

5 OM-006 Coastal Protection
- Coastal management district
- Erosion prone area
- Medium hazard storm tide

Referral

Development details	
Description:	Development Permit Reconfiguring a Lot – 1 Lot into 5 Lots
SARA role:	Referral Agency
SARA trigger:	Schedule 10, Part 17, Division 3, Table 5, Item 1 (Planning Regulation 2017)- Reconfiguring a lot in a coastal management district - (A) Schedule 10, Part 29, Division 4, Table 2, Item 1 (Planning Regulation 2017) -Reconfiguring a lot in a wetland protection area - (B)

SARA reference:	2112-26497 SRA
Assessment benchmarks:	A. State Code 8: Coastal development and tidal works B. State Code 9: Great Barrier Reef wetland protection areas

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Conditions Commentary

Preamble

For a development application that requires **code** assessment, the assessment manager and *Referral Agencies* must assess the development against **only** the relevant *assessment benchmarks* or part thereof, for that developmental circumstance[27] and must approve the development, even if it does not comply with some or even all of the requirements of an assessment benchmark, if **compliance** with the assessment benchmark can be achieved by imposing a development condition[28], unless refusal is a condition of a referral (concurrence) agency's advice[29]

The sole purpose of a development conditions for code assessment development is to meet compliance with an assessment benchmark for that development.

There is no facility available under the PA16 for an assessment manager or a referral agency when assessing **Code** assessable development to require a condition on a development approval that is not entirely for the purpose of achieving compliance with an assigned assessment benchmark.

Development conditions are legal documents and should be crafted with all the skill and care of legally binding contracts, while at the same time, avoid extraneous material such as, replicating existing lawful obligations and free of the need for explanatory notes in order to assist interpretation of the requirement of particular circumstances.

Advice can always be incorporated into a **special section**, appropriately label to that effect, within the decision notice or as a separate document attached to the decision notice.

Background

6 December 2021 - The Assessment Manager (FCRC) received development application DA21 which included in its 'common material' a planning report (PR21) from the applicant's consultant planner. SARA as referral (concurrence) agency was provided with a copy of DA21

[27] PA16-S45(3)
[28] PA16-S60(2)
[29] PA16 -S56(1)

13 December 2021 - FCRC issued their *Confirmation Notice*.

14 December 2021 - FCRC and the applicant agreed to extend the period of time for FCRC to make an information request to 14 January 2022.

20 December 2021 - SARA issued their *Confirmation Notice*

7 January 2022 - SARA issued an *Information Request.* (SIR)

13 January 2022 - FCRC issued an *Information Request*. (CIR)

20 June 2024 - The applicant's consultant planner, responded to the SIR and CIR by providing material to FCRC - with a copy to SARA.

The material provided, included:

- A report from *Stormwater Consulting*, specialist in stormwater engineering, including hydrology and hydraulic. (SCR24)
- Advice from *International Coastal Management*, specialists in coastal engineering (ICM24)
- Supporting Planning Report from consultant planner Urban Planet (PR24A)

9 July 2024 SARA raise an issue, in an *Advice Notice*, regarding Operational Works, identified in SCR24, related to a stormwater drainage design within the forestry reserve.

3 September 2024 - Applicant **submits** changes to DA21 (DA24)

The material provided, included:

- A report from the Applicant's consultant planner Urban Planet (PR24B) demonstrates the matter relevant to *Advice Notice* no longer relevant.
- Amended layout plan reducing the lot yield from 18 down to 5.

9 September 2024 - FCRC submits changed application to SARA

17 September 2024- Project Manager contact SARA-Re delays

24 September 2024 – SARA responds - Request more storm water material

24 September 2024 – Project Manager responds - Providing Information

29 September 2024 - Project Manager Contact SARA-Re response to Information

1 October 2024 - Project Manager Contact SARA-Re change of officers

3 October 2024 – SARA Responds-Seeking response to *Advice Notice*

4 October 2024 - Project Manager responds -Re confusion

8 October 2024 – Sara Responds to consultant planner - Re *High Impact Earthworks*

10 October 2024 - Project Manager responds- SARA Refuses to negotiate with Project Manager.

17 October 2024 -SARA issues *Referral Agency Response* to *assessment manager* 39

23 October 2024 -Applicant makes 1st representation to SARA

30 October 2024 -SARA responds. -Seeking further information 41

31 October 2024 --Applicant makes 2nd representation to SARA

14 November 2024 -SARA responds with *Draft* - deleting conditions 2, 7 and 9 44

15 November 2024 -Applicant makes 3rd representation to SARA

18 November 2024 -SARA responds. - Deleting conditions 2, 7, reinstate condition 9

21 November 2024 - SARA issues amended *Referral Agency Response* to assessment manager. 45

2 December 2024 -. Project Manager seeks advice re issue of decision notice-FCRC responds advising due is 6 December 2025

6 January 2025 - Project Manager seeks advice re issue of decision notice due 13 December 2025 - FCRC responds decision notice to be issued that week

10 January 2025- FCRF sent draft of *Recommended Condition*

13 January 2025 - Project Manager responds raising issues.

15 January 2025 - Project Manager submits Submission; - Request advice.

28 January 2025 - Project Manager seeks update - FCRC responds – will chase up!

29 January 2025 - Project Manager provides draft of acceptable conditions

3 February 2025 - Project Manager seek update

5 February 2025 - Project Manager seek update- FCRC responds Decision Notice to be issued 13 February 2025

12 February 2025 - Project Manager seek meeting- meeting Arranged for 18 February 2025

17 February 2025 - Project Manager submits material relevant to meeting discussions - FCRC Responds - Executive Manager advising that there is no area for negotiation on the issues raised- Proposes cancelling meeting - Project Manager accepts that suggestion but advises that the matter will end up in court.

21 February 2025 – FCRC issued *Decision Notice* and Infrastructure charges notice number 5138178 47

The Process

The appeal centres on 4 aspects:

1. The **relevancy** of a number of conditions set out in the decision notice; and
2. The **correct application** of relevant condition; and
3. The **correct determination** of relevant *assessment benchmark*
4. The **correct application** of the Local Government Infrastructure Plan [LGIP]

Relevancy of Conditions

The position of the Appellant is that the correct interpretation of Section 60 of PA16, is that an assessment manager may only attach a condition to a development approval in order to achieve **compliance** with the requirement of a designated *assessment benchmarks* and that the correct interpretation of Section 45 of PA16 provides exactly how, for Code assessable DAs, those *assessment benchmarks* are chosen and that the correct interpretation of Section 43 provides the constraints, to which, in the assessment process, an assessment benchmark can be stretched or embellished.

Those conditions that offend that premise cannot be lawfully applied because they are not *reasonably required.*

The issue with the **37** conditions can best be separated as follows

There are:

- **26** that lack support from documentation in an *assessment benchmark* called up for *Reconfiguration of a Lot* - the subject of DA21. As such these 26 merely comprise either:
    - **advice** about matters not the subject of a relevant assessment benchmark; and or
    - **replicate** existing lawful requirements under relevant pieces of legislation for which the development is already required to comply.
- Of the **remaining 11**
    - **2** seek to place condition denying existing lawful rights
    - **2** seem to lack any lawful bases; and
    - **7** are lawful condition which the Appellant seek to challenge their appropriateness

The conditions which the Appellant:

A. claims are not relevant and therefore not reasonably required are
    a. SARA
    Conditions:1, 4 5, 6, and 8
    b. Assessment manager
    Conditions: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15, 17, 18, 21, 23, 24, and 25;

B. claim denying existing law rights and therefore not reasonably required are
    a. SARA
    Conditions:1, and 8

C. wishes to test the veracity of are
   a. SARA
      Conditions:1, 8 and 9(b);

   b. Assessment manager
      Conditions:11, 12, 13, 16, 19, 20, 22, 26 and 27

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Assessment Manager's - Conditions

Condition 1

Carry out the development in accordance with the approved plans unless otherwise approved in writing by the Assessment Manager.

The applicant for the development permit will commit an offence under section 164 of PA16 if the applicant does not *Carry out the development in accordance with* a *development permit* which under Section 49(3) includes the material stated in the decision notice.

This condition does not constitute a 'condition' in terms of Section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory obligations and as such may be provides -but not as a statutory condition of approval and therefore is not *reasonably requires* [PA16-S65(1)(b)].

Condition 2

Meet the costs of all works associated with this development including any necessary alteration or relocation of services, provision of upgrading of roadworks to accommodate all vehicular access works together with all public utility mains and/or installations

PA16 does not require any organisation, including a local government, to provide funding for private development. This condition most probably reflects a fiscal policy of the Fraser Coast Regional Council.

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager possibly in relation affirming FCRC position and as such may be provides -but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 3

All works associated with this development must be accepted by Council as being 'on maintenance' prior to the approval of the subdivision plan unless approved otherwise by Assessment Manager.

The approval of a plan of subdivision is a statutory requirement under the *Land Titles Act 1994* which provides Council with a great deal of power in controlling the process for changing land titles.

Although that power is possibly somewhat constrained down to that prescribed by Schedule 18 of PR17 That Schedule provide the authority that the "…*development must be accepted by Council"*

In fact this advice information is currently incorporated into councils request for approval of plan of subdivision form required to be used when submitting a request for approval under Schedule 18 of PR17 and supported by further information on the process on Council website

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority FCRC may further exercise, -but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 4

Pay any outstanding rates and charges due to Council.

See response - Condition 3

Condition 5

Submit to Council, a plan identifying the locations of all buildings, services, structures, water bodies/dams, effluent disposal areas and other improvements on the land in relation to the proposed new and existing boundaries and the distances there from.

The plan must contain the following certification duly completed by the surveyor:-

The *Surveyors Act 2003* outlines professional conduct and the standards for surveyors, which include ensuring that the information they provide is accurate and reliable. The certification of the accuracy of the plan and the requirement to produce a survey plan that comply with Council's approved conditions align with these professional standards.

Plus, the *Survey and Mapping Infrastructure Act 2003* covers survey standards, guidelines, and the obligations of surveyors, including the placement of permanent survey marks and the provision of accurate site information regarding land boundaries and services even encroachments. The obligation to identify buildings, services, and structures and to certify the accuracy of location is performance that fits within this existing obligations.

Overall, the obligation described in Condition 5 reflect the professional standards and obligations already existing and as outlined in both Acts.

Therefore, this condition does not constitute a 'condition' in terms of section 60 of PA16 it could be accepted as simply gratuitous advice provided by the assessment manager as to regulatory requirement placed on surveyors. Except, as a development condition, it

statutorily makes the Applicant responsibility for the professional performance of a person, a member of a registered profession and seek to require the Applicant, apparently, to supervision performance of registered surveyors including the production of documentation. This is inappropriate as statutory condition development condition and as such is not *reasonably requires* [PA16-S65(1)(b)] and completely inappropriate.

Condition 6

Submit a Subdivision Plan Compliance Report and supporting documentation to Council demonstrating compliance with each condition of this approval.

A search of Council's website for the term "*Subdivision Plan Compliance Report*" returned a nil response

Further on Council's website page **Approval of Plan of Subdivision** which provides guidance in relation to the approval of the plan of subdivision the term is similarly not sighted

However, even if Council had provided information as to what constitutes a "*Subdivision Plan Compliance Report*" It would still would not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to administrative matters and as such may be provides -but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 7

All new lot boundaries must be set out and surveyed by a Cadastral Surveyor and identified by pegs marked with lot numbers as identified on the approved plan

See Response Condition 5

Condition 8

Submit an Operational Works application to Council

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to a process to be undertaken in gaining cascading approvals.

As such, advice like this, maybe thought necessary, if concerned that the Applicant may have failed to read the contents of the decision notice which on the second page under the heading **FURTHER DEVELOPMENT PERMITS** providing the advice that *Operational Works* development permit was required and perhaps the assessment manager may have been of the opinion that the applicant might not know that to get a development permit, one has to lodge a development application to Council.

However -be that as it may, this not a required statutory condition of approval therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 9

Prepare and submit to Council in conjunction with an Operational Works application a Construction and Environmental Management Plan (CEMP) for the development in accordance with the ***Planning Scheme Policy for Development Works SC6.3.***

This condition would constitute a statutory *information request* in terms of Part 3 of the Development Assessment Rules - Version 2.0 (if the Applicant had indicated their responsiveness to accept such a process) and the DA was for *Operational Works*, and assuming the DA did not contained the required documentation.

Outside of the that, this is simply gratuitous advice provided by the assessment manager as to administrative process for a DA for *Operational Works*.

As such FCRC may provide such advice -but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 10

Submit to Council as part of an Operational Works application, a Site-Specific Erosion and Sediment Control Plan.

This Plan must be designed in accordance with ***Planning Scheme Policy for Development Works SC6.3****, and the* ***International Erosion Control Association (Australasia) Best Practice Erosion and Sediment Control Guidelines (Current Edition).***

See Response – Condition 9

Condition 11

Design the stormwater drainage such that no restriction to existing or developed stormwater flow from upstream properties or ponding of stormwater within upstream properties, including road reserves, occurs as a result of the development, as set out in Schedule 6.3 – Planning scheme policy for development works.

Schedule 6.3 – Planning scheme policy for development works provides the following advice

"Although drafted as ***one*** *acceptable solution, the Planning scheme policy for development works also provides flexibility through the application of the relevant standards, policy documents and industry standards. It does not prevent or discourage alternate solutions for individual development sites."*

This reflects the hierarchy in planning codes and restates the important understanding that *acceptable solutions* as **only one** possible solution that would satisfy a *performance outcome, overall outcomes* or *purpose* of a code.

For that reason, it offends the *hierarchy principal* for compliance and therefore is unreasonable and should be removed

Condition 12

Any alterations to existing surface levels on the site shall be undertaken in such a manner as to ensure that no additional surface water is drained onto or impounded on adjoining properties

This condition is also interesting.

A word search was undertaken of all three relevant *assessment benchmarks* for the term "*surface levels*"- The term does not appear in any of those assessment benchmarks.

In order to see if a Council policy may have been referenced in *assessment benchmark* for another type of development, to provide background information to help with the decision-making process for the condition, a search was done Council's SC6.3 Planning scheme policy for development works.

The term appears twice, in relation to:

(a) A newly constructed road and
(a) A plan of finish surface levels provided by licenced surveyor in relation to the Q 100 flood immunity

We have seen in the reasoning and Condition 11, the authority of Schedule 6.3 and unless this condition requires compliance with a requirement of one of the *assessment benchmarks* for DA21 it does not constitute a 'condition' in terms of section 60 of PA16 and therefore, is *not reasonably* [PA16-S65(1)(b)]

Condition 14

Submit to Council as part of an Operational Works application, design details of filling works to provide appropriate flood immunity to proposed Lots 1 and 2 to reach the Storm-Tide Level for this site as to be 2.40m AHD

This condition does not constitute a 'condition' in terms of section 60 of PA16 for *Reconfiguring a Lot* but is simply gratuitous advice provided by the assessment manager as a regulatory authority and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 15

Submit documentation, as part of the Request for Approval of the Subdivision Plan Application from a Registered Professional Engineer of Queensland (RPEQ), which certifies that each completed allotment will achieve flood immunity as per ***Condition 16.***

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority

and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 16

*Construct a sealed **access** driveway to each allotment within the allotment's road frontage, from the edge of the road pavement to the property boundary, in accordance with the **Planning Scheme** and **standard drawing No FC-230-03 – Type A – Invert Crossing.***

*The **access** driveway for proposed Lot 4 is to be located at least 10.0m away from the existing 375mm stormwater pipe and concrete head wall.*

This condition has been extracted from the *Reconfiguring a Lot* code as an *Acceptable Outcome* for the *Performance Outcome* PO10 which states

"All new lots are to have lawful access from the road."

This is *Acceptable Outcome* deals entirely with the **standard** of the access and in no way is designed to achieve the requirements of the performance outcome of delivering "*lawful access"*

Experience in dealing with planning provisions would provide the understanding that it is crucial that parcel of land have *lawful access* to a roadway. This however in no way is achieved by this condition

9.4.3.2 of the *Reconfiguring a Lot* code sets out the *purpose* and *overall outcomes* for the code, which is to ensure that new lots are configured in a manner which:-

(a) is appropriate for their intended use;

(b) is responsive to site constraints;

(c) provides appropriate access; and

(d) supports high quality urban design outcomes

There is scope within the purpose to consider what might be *appropriate access* but a few issues also arise with the use of this condition.

Firstly, it defines that the access requires work to be carried out within a road reserve not on private property.

Some codes require that in extremely hilly country private access be constructed in such a manner that practical access can reasonably at the achieved from the road boundary to residents but this is not the intention of this condition the intention of this condition is to set a standard for a 'crossover' installed on the road reserve

Council already exercises authority in relation to approving crossovers and any person desirous of undertaking work on the road reserve would even in the absence of this

condition require approval of Council and most likely to obtain that approval would have to comply with this design.

Further I have failed to find any authority in any of the assessment benchmarks that delegates to the assessment manager the power to require the applicant to undertake certain work on land outside the scope of the development application (Subject Site)

For those three reasons this condition is considered to be not reasonably required.

Condition 17

Any existing Council infrastructure or private property (including but not limited to, services, concrete structures, pits, channels, pavement, RCP's, RCBC's, etc.) damaged due to the proposed works is to be rectified or replaced at the applicant's expense prior to the issue of a Subdivision Certificate.

The applicant must notify Council Development Engineering Unit immediately of the affected infrastructure.

If damage occurs and is not replaced by the client/contractor, Council has the right to undertake the works and charge the landowner accordingly.

The assessment manager has intimate knowledge of the subject site and would possess the knowledge that none of the items referred to in this condition exists on the subject site.

Further the appellant is unaware of any requirements in any assessment benchmark that relate to obligations of communication and also unaware of what facilities are available at law that would empower the Council to undertake works on private property, without a request or the authority of legislation and recover those costs in those circumstances from a landowner.

And if such legislative authority does exist elsewhere, it would negate the requirement for the application of this condition.

If the position of the Appellant is correct then this condition is *not reasonable.*

Condition 18

Relocate all services and structures as required to ensure that they are not contained within any other allotment unless ownership rights have been granted by way of an easement.

See Condition 17

TO HERE

Condition 19

Enter into an agreement with a licensed telecommunication provider to ensure that a telecommunication connection will be available to each proposed allotment **under standard tariff conditions** and without further capital contributions.

These services are to be positioned wholly within the allotment which they are to serve.

Provide a Telecommunications Infrastructure Provisioning letter as evidence of such an agreement to Council.

While the applicant has no objections to organising for telecommunications services to be provided for the 5 lots subject of the development this condition is inappropriate

Firstly, because discussions with the telecommunication provider (Telstra and their wholly-owned subsidiary NBNCo) reveal that the only services for telecommunications that can be provided in this location are **wireless** and either from **towers** or **satellites**

The applicant is prepared to enter into an agreement with the telecommunication provider to provide the appropriate service at the time when a dwelling is constructed upon one of the 5 lots that is the subject of the reconfiguring a lot application

The applicant is prepared to accept a condition that is couched in those terms.

Condition 20

*Each lot of this approval is to be provided with a **reticulated power connection and supply under standard tariff conditions**.*

In this regard, the developer is to enter into an agreement with an approved electricity provider, prior to the approval of the subdivision plan, to ensure that electricity will be available to each allotment under standard tariff conditions and without further capital contributions.

Evidence of such an agreement must be:
1. Provision of a Certificate of Supply, or
2. Provision of a Certificate of Acceptance, or
3. Provision of a Negotiated Connection Establishment Contract, and evidence of the following;

i. substantial commencement of the internal electrical work, and
ii. evidence of contract with electrical contractor; and
iii. evidence of the ability to fund the contract value of the electrical works.

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 21

Submit as part of a building application, details associated with the on-site collection, storage and treatment of a potable water supply

Condition 22

Each lot must install ***Advanced Secondary Treatment with Nutrient Reduction to Surface*** *irrigation in accordance with the* ***Qld Plumbing and Wastewater Code and relevant Australian Standards***

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 23

Grant the following easement(s), as part of the registration of the survey plan where required:

(i) Easements for stormwater, electricity and telecommunications services as may be required to service the development.

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 24

All existing services shall be relocated as required to ensure that they are not contained within any other allotment unless ownership rights have been granted by way of an easement.

Any alteration of services to provide for the development shall be undertaken at no cost to Council.

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 25

All damage to Council infrastructure (including pavement and drainage damage) as a result of the development works is to be rectified to the satisfaction of Council prior to the issuing of the certificate of practical completion or approval of the plan of survey.

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 26

Include in any Contract of Sale for the lots, a copy of Conditions 21, 22 and 26 of the approval.

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Condition 27

Include in any Contract of Sale for lot 5, a copy of the State Assessment and Referral Agency response, 2212-26497 SRA and dated 21 November 2024

This condition does not constitute a 'condition' in terms of section 60 of PA16 but is simply gratuitous advice provided by the assessment manager as to regulatory authority and may be provides as such-but not as a statutory condition of approval and therefore, is not *reasonably requires* [PA16-S65(1)(b)]

Referral Agency

On **17 September 2024** the applicant contacted SARA seeking to confirm that SARA was now in possession of all the material necessary to issue their *Advice Notice* to the assessment manager.

On **17 October 2024** SARA issued it *Referral Agency Response* to the assessment manager with CC to the Applicant. It included 9 development Conditions to be inserted into the *Decision Notice*. (SRAP24)

On **22 October 2024** the Applicant responded to SARA invitation to response to SRAP24, requesting a review of conditions. The requested changes are set out in the relevant conditions below.

Condition 1

The reconfiguring a lot must be undertaken generally in accordance with the following plans:

Proposed Reconfiguring a Lot Wilkinson Road Tuan prepared by Urban Planet Town Planning Consultants, Reference 21153-02, and dated August 2024 as amended in red by SARA on 17 October 2024.

This condition amendments the planning consultant's plan document, (APD24) resulting in delivering two circumstances.

They are:

1. **Spatially defined** and labelled certain areas of the development site; and
2. Provided "**use conditions**" to be placed upon the labelled areas on the plan.

Putting aside for the moment, the issue of copyright and the authority to amend documents that are copyright protected by another party, where does SARA draw its legislative authority, as part of the assessment process, to draft/modify information that is contained within the 'common material' of an applicant's development application, without approval of the applicant?

Nor is there a clear logical explanation for the necessity of the 'use conditions' detailed within APD24.

Further, putting all that aside for the moment, the important question to be answered is:

Q1 Why was the amendment of the Site Layout plan, necessary to be inserted into the plan in order for ADA24 to achieve the objectives of an assessment benchmarks?

The Queensland government already has provided site specific, spatial mapping, in PDF, email, website page maps, and wetland info in this aspect, relative to ADA24.

Legislative authority already existed to controlled development within the two spatial areas identified on the plan.

Then, the 'use conditions' inserted in the APD24 provided for development restrictions greater than those provided for in the relevant assessment benchmarks for the identified overlays

There are 4 issues with APD24 amendments:

Issue 1 - Wetland Protection Area

The part of the text placed on the APD24 for Lot 5 reads:

"Areas shaded in blue represents the Wetland Protection Area 50m buffer …"

When read in conjunction with Condition 9(a) the significance of the word is further concerning, because Condition 9a requires the development to "*Provide a 50m wide buffer for the purposes of*…."

Acceptable Outcome AO1.1 of State Code9 (SC9) provides

*The *buffer surrounding a **wetland** has a minimum width of:*
1. 200 metres, where the wetland is located outside a prescribed urban area; or
*2. 50 metres, where the **wetland** is located within a prescribed urban area.*

***Buffer** means the transition zone between a **wetland** and any surrounding land use that supports the values and processes of the wetland and **protects** it from external threats.*[30]

The matter of contention is that:

The amended APD24 contain no dimensions. It is assumed from the text of the condition as drafted; the development is required to provide a '50m buffer on lot 5'.

The understanding of the applicant is that the statutory requirement is that a **portion** of lot 5 falls within the 50m buffer zone (From 41m to 0m) from the wetland and the real intention of the condition is a reminder of the statutory obligations, that such a buffer area brings to the use of that portion of lot 5.

The position of the Applicant is that the wording, '*area shaded in blue*' does not '*represent the··· 50m buffer*' it represents a portion of the "buffer" relevant to ADA24 and should so clearly state that position.

On the **31 October 2024** this matter was brought to SARA attention, and a request to a change in wording to:

[30] SC9- Guidelines: - Glossary of terms [p18]

*Areas shaded in blue represents **the portion of Lot 51** impacted by Wetland Protection Area 50m buffer.*

SARA declined to redraft the condition.

Issue 2 - Wetland Protection Area

The remainder of that text placed on the APD24 relevant to lot 5, reads:

"…and is to remain development free for the purposes of protecting the wetland environmental values."

This Condition requires that this defined area must remain "*development free*".

When read in conjunction with Condition 9(b) the significance of the drafting becomes more concerning because Condition 9(b) requires the development to "*Provide buffer elements in the locations shown on…."*

One has to assume that the 'buffer elements' referred to, are to be placed within the wetland buffer area, defined in blue, on APD24

Putting aside for the moment the situation where nowhere in the conditions are the required *buffer elements,* identified or defined, it would be reasonable to assume that, depending what buffer elements are required, it would be most unlikely to be able to carry out the work of installation without constituting a *development* of some type.

If that assumption turns out to be true it would be an offence under PA16 (Condition 1) to comply with that aspect of Condition 9(b) - and we will get to that in due course.

Further

The 52-page report SR24 addressed all the issues associated with both:

(a) overland flow from the adjoining areas above the contour level for the subject site (including the wetlands); and

(b) the stormwater that would fall upon the development.

The findings of the report were that while 'the property is affected by overland flow from a catchment to the west, the flows coming from west of the site, passing through the site and discharges in the north-eastern site corner'. [Maps[31]]

All this overland flow comes from uphill of the site, where the wetland is located and in the absence of any modification of the development, to reverse that flow, there is no possibility that stormwater from the development could ever have any influence at all, on the wetland's water quality.

SR24 confirmed this by advising[32] that:

[31] Stormwater Management Plan J9009 v1.1 Appendix A (P25-29)

[32] Stormwater Management Plan J9009 v1.1 Appendix A (P6)

The proposed development would comply with PO3, PO4 and PO5 of State Code 9

No modification to that circumstance occurred by ADA24

In the Conditions response, the Applicant also brought to the attention of SARA, the existence of a document published by the *Department Environment and Science* in 2022 (Guidelines) that in relation to 'wetland buffers', clearly provided advice, (PO1-Development considerations) to the effect that:

"Whilst development is intended to be located outside the buffer, it is possible for low-impact elements of the development proposal to be located within the buffer…"[33]

And under the *Scope* of the Guideline – 'that mapping for the wetland can be amended'[34]

Condition No 1 as proposed would preclude any of these opportunities for any development in the 'defined area' – in the future, even if it could be delivered in accordance with the requirements of legislation, guidelines or assessment benchmarks.

And, there is no facility under PA16 to amend, in the future, a development permit condition, once a development is complete. Thus, permanently denying any of the above accorded facilities.

Issue 3- Erosion Prone Area

The text placed on the APD24 for Lot 5 reads:

> ***"Area shaded in red represents the Erosion Prone Area and is to remain development free for the purposes of coastal protection.***

The matter of contention again is the prohibition for future development.

On **24 June 2024** IR24 provided advice to SARA, including ICM24 that:

- filling above the required HAT; or
- infrastructure design (Revetments)

could achieve an alternative solution, to remove the land from the *erosion prone area* classification.

Further, one of the conditions of Condition 1 had already provided that solution:

> *Lots 1 and 2 shaded in grey represent the lots that must be filled to a level of Highest Astronomical Tide plus 0.8m vertical elevation to be removed from the Erosion Prone Area.*

The effect of this work, would effectively removes that section of land, from the *erosion prone area* overlay, to allow development to proceed.

[33] SC9 Guidelines [P9]

[34] SC9 Guidelines [P6]

There is no explanation as to why the filling of lots 1 and 2 are an acceptable solution and that filling of lot 5 would not similarly be an acceptable solution.

On the **31 October 2024** this matter was brought to SARA attention and a request to change the wording to:

*Areas shaded in red represents the **portion of Lot 51** within the Erosion Prone Area*

With the remining portion of the condition to be removed and if necessary an **Advice Notes** included with the Development Permit materials

Suggested wording:

Development in the area shaded red in the Plan defined by SARA Condition 1 is restrained to that permitted by State Code 8 while the area is designated as Erosion Prone

Note: The solution, in the information submitted by the applicant's consulting engineer, International Coastal Management dated 25 March 2024, provides a solution that accords with State Code 8

The implementation of the solution required a further Development Permit and will triggers further referral

This request was declined.

On **21 November 2024** SARA in its advice to the assessment manager under *General Advice*, provided this advice:

The following clarification is provided to assist the applicant in interpretation of the SARA approved plan:
- the blue shaded area within proposed Lot 5 on the SARA approved plan indicates the 50-metre buffer from the mapped High Ecological Significance (HES) wetland
- the red shaded area within proposed Lot 5 represents the mapped erosion prone area
- all SARA conditions only relate to the subject site and have no bearing on any adjoining allotments

The applicant remains perplexed as to reason why the suggested amendments were relegated to the **General Advice** section in which they carry no legislative weight.

Issue 4

The text placed on the APD24 reads:

Amended in red by SARA to maintain development free buffers in the Erosion Prone Area and wetland Protection Area and to ensure proposed Lots 1 and 2 are developed outside the Erosion Prone Area.

The inclusion of this condition and it's drafting is confusing, because:

- If one is to assume that the notes on the plan constitute development conditions, then the plan contains 4 Conditions:
    1. refers to the area in blue
    2. refers to the area in red and

3. refers to the areas in grey.

These 3 conditions are self-explanatory.

It is perplexing why this particular condition (4) is included as this is just reiterating the substance of the other three conditions; and as discussed

- under Condition 9(a) the development is required to '**Provide** (and maintain) a 50m wide buffer for the purposes of….' and
- under Condition 9(b) 'to **provide** development elements within this Wetland Protection Area of the site '.

On **13 November 2024** -SARA provided a Draft of changed condition

On **15 November 2024** -The applicant responded to the Draft

On **21 November 2024** SARA in SRAP24 (final advice) to the Assessment Manager shows that it had not only again declined the Applicants request of the 15 November but had also reversed its position of the 13 November 2024.

For all the above reasons, the current Condition No1 presents as an *unreasonable imposition* on the development and *not reasonably required* to ensure the developments achieve the overarching requirements of the assessment benchmark and PA16.

.....

Condition 3

Ensure proposed Lots 1 and 2 are created with a minimum finished surface level of at least the level of Highest Astronomical Tide (HAT) plus 0.8m vertical elevation.

Condition No 3 is technically an addendum to Condition No1-3 in APD24 but dealing precisely as it does with the *erosion prone area* circumstance.

As from the **21 December 2021**, SARA had it it's possession, as referral (concurrence) agency the PR21 for DA21.

PR21 advised, in relation to state mapping, the existence of the *erosion prone areas* within the subject site and on advice of the consultant planner, the site was 'not subject to coastal processes' and further indicated that a section effected by *erosion prone areas* mapping '…*will be required to be filled to levels specified by the assessment manager*'.[35]

This would provide future security for persons and property as a consequence of the development.

[35] Planning Report-Urban Planning-Nov 2021 [p27]

The PR21 also advised that works for filling of the site was to be addressed by a 'future development application' (*Operational work) that would accommodate delivery of the required performance outcome.[36]

*The Planning Regulation 2017 in Schedule 10 Part 17 provides for assessment and referrals for Operational work in coastal management district.

On **7 January 2022** SARA issued an Information Request, (SIR). The material in that request indicated their knowledge that a portion of the site was expected to be inundated by sea level rise by the year 2100 and the heights of the sea was determined to be 800mm above the present-day sea level's HAT.

Funnily enough though the information request also advised that **"***No information had been provided to demonstrate how this coastal hazard would be mitigated for the subject site***".**

This, despite being in possession of the PR21 which had already clearly identified this issue and prescribed a compliance solution.

On **25 January 2022** Fraser Coast Regional Council (Council) issued a Flood Search Report (FSR) for the subject site. The FSR indicated the "Property was within the Storm-Tide Hazard" area and provided a Defined Storm-Tide Level value of RL2.4m AHD for the development.

Council's planning scheme required that land for development, within a Storm-Tide Hazard Area was required to:

(a) be filled to that level; and
(b) the standard using the process defined within Council's development works policies.

The development type for the filling of land, is Operational Works.

On **20 June 2024** the applicant's planning consultant responded to the information request by providing a copy of the material, provided to the assessment manager on that date.

The material provided, included advice from a firm of consulting engineers, *International Coastal Management*, specialists in coastal engineering developments.

The advice identified the exact height that would represent the 2100 sea level rise for that particular parcel of land (RL 2.33 AHD) and advice as to options that were available to meet current requirements to protect land in the development from prescribed, future inundation sea levels.

The assessment benchmarks under Councils planning scheme, for a RAL requires lot filling for land in Storm-Tide Hazard area to RL 2.40 AHD.

That is higher than the RL AHD required for the 2100 sea level rise.

[36] Planning Report-Urban Planning-Nov 2021 [p68;84]

Thus, the requirements under the planning scheme are in excess of those required by Condition 3

Further and more importantly the requirement of Condition 3 is already mandatory under Condition 1. Reproduced as Condition 3 appears as nothing more than a reminder to comply with the lawful requirement of Condition 1.

While the retention of SARA's Conditions 3 could be tolerated, as simply a frustration of the conduct of bureaucracy, if it did not produce other unacceptable circumstance but Section 259 of PA16 makes it an offence not to comply with a development condition.

The retention of Condition 3 creates a circumstance for a double jeopardy style outcome for a single event. [Breach of condition 1 and 3] Plus a development condition run with the land title and I and AI are unaware of any facility to change a permit or a condition once issued and works completed.

For this very reason Condition 3 is unreasonable and should be deleted, even if Condition 1 is retained or modified.

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Condition 4

For the works referenced within Condition No. 3, only use clean materials which are free from prescribed water contaminants.

This condition refers to the 'standard' of a product, (material used for filling) as part of the performance of 'work', required by Condition 3.

This work would constitute a development for Operational Works.

This particular Operational Works would be required to be carried out under the authority of a development permit for Operational Works.

Putting aside for one moment that particular circumstance, the condition refers to a term "*clean material'* and defines that term as being, material "*free from prescribed water contaminants".*

No reference is made to the assessment benchmark, (State Code 8), which requires this to be considered as part of the Code assessment process for ADA24 or reference to documents called up under the authority of the assessment benchmark to provide the scope for materials that are *prescribed water contaminants*, to be avoided in fill material, within residential development and their quantitative values.

One could of course, speculate that circumstance is the interpretation of an assessing officer in SARA of Performance Outcome PO4 of the assessment benchmark.

However, there are a number of complications

1. Surely it is not the function of the Applicant to determine the nature and extent of a requirement under a statutory condition of an assessing authority; and
2. It would be reasonable that conditions contain sufficient information for an applicant to be easily arrive at a position where the applicant know precisely what is required; and
3. Even if 1 and 2 were satisfied the use of the term 'unacceptable' in PO4, is not defined within the assessment benchmark; PR17 Schedule 24; PA16 Schedule 2.

As well as that anomaly, ADA24 is for *Reconfiguring a Lot* (RAL), and not *Operational Works.*

No works are approved by DA for a RAL.

Operational Works for ADA24 will be required to be carried out under a separate development approval, in order for this development be completed.

*The Planning Regulation 2017 in Schedule 10 Part 17 provides for assessment and referrals for Operational work in coastal management district.

Further, under the provisioning of titling legislation in Queensland, local governments are required to approve the *Plan of Subdivision* for RAL's.

If there is other associated development work, outside the RAL, that is required to be completed, local governments will not authorise the documentation, necessary for lodgement to the titles office, until all development are finished in accordance with their approval conditions.

The activity described in Condition 4 does not form part of ADA24. It will however invariably form part of the performance of work under any future Operational Work development application

Therefore Condition 4 is not relevant to the ADA24 and therefore is *not reasonably required* and should be removed.

.....

Condition 5

Development must prevent the release of sediment to tidal waters by installing and maintaining erosion and sediment control measures in accordance with the Best Practice Erosion and Sediment Control (BPESC) guidelines for Australia (International Erosion Control Association).

This condition presents the same circumstances as outlined above, in Condition 4, and accordingly therefore Condition 5 is not relevant either, to the ADA24 and therefore is *not reasonably required* and should be removed.

.....

Condition 6

This condition is an exact copy of Condition 1.

When referral agencies act as an assessing authority for a development, often there will be a number of assessments benchmarks they are required to assess against. There is no requirement in the assessment process to replicate a condition that delivers the same compliance outcome applicable for multiple assessments benchmarks.

There are no reasonable grounds for it to be replicated and therefore is *not reasonably required* and should be removed.

.....

Condition 8

Erosion and sediment control measures which are in accordance with the Best Practice Erosion and Sediment Control (BPESC) guidelines for Australia (International Erosion Control Association) are to be installed and maintained to prevent the release of sediment to the wetland.

This condition presents the same circumstances as outlined above, in Condition 4 and Condition 5 and accordingly therefore is not relevant to ADA24 and therefore is *not reasonably required* and should be removed.

.....

Condition 9

(a)

Provide a 50-metre-wide buffer for the purpose of maintained and protecting the wetland environmental values as shown on Proposed Reconfiguring a Lot Wilkinson Road Tuan prepared by Urban Planet Town Planning Consultants, Reference 21153-02, and dated August 2024 as amended in red by SARA on 17 October 2024 21 November 2024.

The wording "*Provide a 50-metre-wide buffer*" is not accurate. The buffer has already been 'provided' by legislation. It is held by the Applicant that the intention of this Condition 9(b) is to reiterate and remind the applicant of their obligation under legislation "*of maintained and protecting the wetland environmental values*" within the defined buffer that fall within an area of lot 5 of ADP24

This condition is superfluous and if not superfluous, does, at its best, replicate the objectives defined in Condition 1 and Condition 3 and existing legislative requirements an serve no apparent useful purpose in ensuring the development meets the objectives set within the provisions of the assessment benchmark under PA16 and therefore *not reasonably required* and should be removed.

(b)

*Provide **buffer elements** in the locations shown on Proposed Reconfiguring a Lot Wilkinson Road Tuan prepared by Urban Planet Town Planning Consultants, Reference 21153-02, and dated August 2024 as amended in red by SARA on 17 October 2024 21 November 2024 to achieve the **purposes** set out in the Queensland Wetland Buffer Planning Guideline 2011*

There are a number of elements to this condition

Element 1

Firstly, this condition buildings upon the conditions outlined in Condition 1 and Conditions 3 by now requiring that the provision of 'buffer elements' within the area shown on the ADP24 and presents as a condition, 'to assure the development achieves the "purposes" set out in the Queensland Wetland Buffer Planning Guideline 2011."

The Condition contained no information as to:

(a) **what** might constitute a required 'buffer element'? or
(b) **which** buffer elements are required? or
(c) **why** are those particular 'buffer elements', required? or
(d) **how** one might place a 'buffer element', (if the doing of which constitute a 'development'), in an area where 'development has just been prohibited' by Condition 1.

So, one has to assume that the answer to those questions can be found in the cited documentation- *Queensland Wetland Buffer Planning Guideline 2011*. (QWBP11 Guidelines)

The relevant assessment benchmark for this component of ADA24 is State Code 9. (SC9)

SC9 in the section "*Using This Code*", provides advice that 'this code includes a glossary of terms for definitions in the code and reference documents "including the *guideline State Development Assessment Provisions State Code 9: Great Barrier Reef wetland protection areas*" (SC9-Guidelines)

Firstly, SC9 Guidelines are not statutory assessment benchmarks.

Guidelines are provided to help clarify requirements or provide general, not mandatory, advice. The Guideline reinforce this position on Page 4 -" *This guideline is not a statutory document*."

It would appear the QWBP11 Guidelines cited in Condition 9(b) are called up via the SC9 Guideline –

Which in *Part 4.0 Information requirements,* state (dot point 2)

'…….

If proposing a reduced buffer or wetland area, an ecological values assessment demonstrating compliance with the Queensland Wetland Buffer Planning Guideline.

and provides a hyperlink to a copy of the QWBP11 Guidelines.

Nowhere in ADA24, is it proposed to develop a "wetland area", nor is the development seeking a 'reduced buffer', for which guidance of the QWBP11 Guidelines may then need to be referenced.

Next, nowhere in the QWPB11 Guideline is there information that clearly identified the "purpose" of the Guidelines. However, using Section 2 of QWPB11 Guideline headed 'Purpose and Scope', a purpose can be extrapolated/deduced from within the opening paragraph.

The QWPB11 Guideline primarily functions to support a ***Buffer Design Method*** which is intended to evolve from fundamental concepts and using a systematic approach in the design.

Its purpose, it would seem, is to assist those involved with wetland development planning, by providing a series of steps and considerations associated with 'designing a wetland' and also provide some support to those involved in the 'management of wetlands', though it is not abundantly clear in what form that support takes.

And then the statement in the QWPB11 Guideline:

Wetland buffers also need to be distinguished from wetland ***trigger*** *areas under legislation.*

'Trigger areas are those areas which **trigger an assessment** of the impacts for a development — the resulting buffer may be significantly narrower than the *trigger area* depending on the nature of the development'

Some evidence exists within the online mapping that the area interpreted as a *buffer* area is actually in fact the *trigger* area.

If one looks at the online mapping this is reinforced by the area in the map for lot 51 it has a different colour hue, within the so called 'buffer area' of lot 51 than the buffer area **outside** of it.

Then QWPB11 Guideline is not a CODE assessment benchmark; as it clearly is IMPACT based and requires the application of a 'personal opinion' and nor is it called up in an assessment benchmark - relevant to ADA24.

Finally, putting aside for one moment the fact that the documentation referenced (QWBP11) is not cited in the assessment benchmark, the 66 page document cannot clearly answer the questions posed above.

The buffer area estimated (as scaled by reference to APD24), is somewhere in the vicinity of 1500 m² total, or 3.75% the 40,000 m² that comprises lot 5 of ADA24

It is impossible for the applicant to know what, of all the material in the cited document, is lawfully required, and the expected process to comply with the requirements of Condition 9(b) -relevant to ADA24.

.....

(c)

Written evidence from an appropriately qualified person(s) that (*Condition 9 *a) and (*Condition 9 *b) have been fulfilled is to be provided to palm@des.qld.gov.au or mailed to:*

Places a requirement on the production, by an undefined but 'appropriately qualified person', of documentation, that it is assumed, would contain evidence of, what is termed:

- The 50 m wide buffer as identified in Conditions 1; 6; and 9(a) are still in existence; and
- The provision of undefined buffer elements in undefined locations, has occurred,

at some stage, prior to when the local government, in accordance with the requirements of the subdivision of land titling laws, issues their approval to the titles office to approve the plan of subdivision documentation.

One has to assume that if this condition remains in place, the condition would expire on compliance with 9(c) (On sealing of the survey plan- is the time frame) and one would have to ask the question,

" In what way does this ensure ongoing maintenance of the buffer area, into the future, and ensure the compliance with the 'purposes' set out in the document called up by Condition 9".

Lot 5 of the proposed ADA24, which is the subject of the prohibitions placed by Conditions 1, 6, and 9 has ample space to accommodate future development, in accordance with both the zoning and the planning scheme assessment benchmarks and state assessment codes.

The inclusion of conditions to prohibit future development in the areas identified on the ADP24, no matter how much the development can be supported would, because of the lawful nature of development conditions, be a permanent block to any further development considerations, even if such developments were to demonstrate that future development in those area can be accommodated within both legislative and guideline documentation.

For these reasons Condition 9 is *unreasonable* and should be deleted.

.....

Conclusion

Assessment process

While the process of assessing development applications since IPA (1997) has been a performance-based process, the situation in relation to CODE assessment ended up delivering in reality, a hybrid, comprising an overarching component of the former **prescriptive-based** system, that existed prior to IPA, nestled in **performance-based** jacket.

A performance-based system, as we know rely on providing ***qualitative*** statements (global wish-list) while the prescriptive-based system provided ***quantitative*** values (medical scripts).

The Government provided a hybrid system, for Code assessment, since IPA where *assessment benchmarks* contained an overarching *qualitative* performance requirement (**Purpose**) plus incorporated within the document was what was intended to be quantitative values (**Acceptable Outcome**) that acted as a reliable (but not intended to be sole) mechanism for achieving compliance with the qualitative value.

Unfortunately, many of these, so called, *Acceptable Outcomes* were also couched in very loose *qualitative* terms.

The intention, no doubt, was to provide flexibility for applicants to meet compliance within a development application.

Further, there undoubtedly exist, for code assessment, incompatibility in the application of the system and also in the legislation, as code assessment is not to include a component of a "*persons opinion*". Because, once you move to compliance with a *qualitative* statement it **can only** be achieved, based on the '*opinion* of a person/s' be that the 'applicant' or 'assessment manager'.

In theory a competent assessor will seek out the opinions formed by a group of professional in that field related to a compliance requirement of an assessment benchmark, rather than an forming an individual position.

But in reality, assessment for anything, but a large development, is undertaken by a single individual, delegated under the legislation, the power to act as sole *assessment manager*

So therefore, even when an applicant provides solutions that the applicant believes satisfies the prescriptive *qualitative* requirement, the assessment manager in that case can form another view and often that view is, the proposal doesn't satisfy the supposedly prescriptive *Acceptable Outcome*.

This is an element that never existed in the system of quantative criteria.

As pointed out by a number of professionals published papers on the matter, this is also one of the reasons why some appeals and up in the planning environment court.

An example is where an objector to development approval, under code assessment, has read the *Acceptable Outcome* criteria within the relevant assessment benchmark and when approval has been at issued which or contrary to the *Acceptable Outcome*, they hold the view the assessment manager was required to refused the application - solely on that bases.

It could be reasonably speculated that this comes from a prior era, where all thing were all ***prescriptive***.

For example, the assessment benchmark for subdivision, requires a zoned parcel of land to be an area of 600m², 599m2 won't necessarily cut the mustard, even when the purpose of assessment benchmark is to produce parcels of land, adequate for the use of the land in that zone.

Another good example is speed limits

If speed limits, which hopeful are set under a performance-based system are derived from process involving a wide spectrum of criteria and after which are inevitably an estimated guess of the '**safe** speed' for vehicle to travel on a particular section of road, then speeding fines issued on the basis that a driver 'failed to drive in a safe manner' would require enormous effort to prosecute.

This is because the predicated criteria contain variables which themselves have considerable margins for application.

For example, they rely upon the

- state of the road
- state of the vehicle
- state of the weather
- competency of the driver
- density of other vehicles in that area
- density and type of individuals operating in that spatial area and

to mention but a few.

Therefore, we have retained a speeding control system wholly based on the ***prescriptive*** system because an accurate and intelligent assessment of all those criteria at any particular point in time will deliver a large margin in which the required **safe speed** would sit.

The application of that principle does not apply to assessment of development applications

Assessment benchmark

The assessment process is not the only quagmire one wanders into for code assessable developments.

Except for building work, there are no *assessment benchmarks* that are exclusively developed towards a type or a category of development assessment.

The assessment benchmark for a particular development is chosen like the speed limit, from a number of criteria and because they do not address the specifics, relevant to any particular development application, they are couched with very wide margins almost to the extent of being a one size fits all.

And not just in relation to the particular development, but can be used one day for **code** and another day for **impact** - assessable developments.

And depending upon the experience and competence of a particular assessment manager there exists a potential to deal with code assessable developments as if they were impact assessable.

And if that's not enough difficulty, since the introduction of IDAS where several development types can be the subject of the one development application. The assessment manager could be required to assess some application or parts of those applications as code assessable and others as impact assessable this certainly has the potential to deliver a situation where the confines required for code assessable are forgotten.

And then of course there's the circumstances where an experienced assessment manager understanding the global project to which a particular assessment relates, may find it hard to concentrate on the compartmentalisation that the specific development application represents.

Conditioning Process

There has been a trend over the last 20 years for local governments to accept more and more responsibility for the communities in which they function. Unlike the original concept where local governments had very descripting areas of responsibility now local governments are seen as being responsible for any aspect within their community on a performance-based style.

It has been this trend which has seen the conditioning of developments morph into more than just that which is prescribed by the legislation but into an information service with an obligation to assist others, possibly with the intent of hopefully preventing members of their community from wandering uninformed into problems. caused by ignorance.

ZONE Code Hierarchy

Code Title	**1**
Code Name	**1.2**
Application	**1.3**
Purpose	**1.4**
Overall Outcomes	**1.4.1**
Assessment benchmarks	**1.5**
Table	**1.6.**
Performance outcomes	**1.6.1**
Acceptable outcomes	**1.6.2**

Table [1.6]			
Performance outcomes		**Acceptable outcomes**	
Section Heading			
PO1	**Description** [1.6.1]	**AO1**	**One way to achieve the PO** [1.6.2]

PLANNING SCHEME
Part 5 Tables of assessment

5.3.3 Determining the requirements for assessment benchmarks and other matters for assessable development [Page 5-4]

(3) The following rules apply in determining *assessment benchmarks* for each category of development and assessment.

(4) Code assessable development: -

(a) is to be assessed against *__all__ of the *assessment benchmarks* identified in the "*assessment benchmarks for assessable development and requirements for accepted development*" column; - [*Contrary to PR17- Section 26(3)]

(b) that occurs as a result of development becoming code assessable pursuant to subsection 5.3.3(2), must:

(i) be assessed against the *assessment benchmarks* for the development application, limited to the subject matter of the required *acceptable outcomes* that

- were not complied with or
- were not capable of being complied

with under sub-section 5.3.3(2);

(ii) comply with all required *acceptable outcomes* identified in subsection 5.3.3(1), other than those mentioned in sub-section 5.3.3(2);

(c) that complies with:

(i) the **purpose** and ****overall outcomes*** of the code, complies with the code;

(ii) the **performance outcomes** or **acceptable outcomes** complies with the **purpose** and ***overall outcomes*** of the code;

(d) is to be assessed against any *assessment benchmarks* for the development identified in section 26 of the Regulation.

Editor's note — Section 27 of the Regulation also identifies the matters that code assessment must have regard to.

*The term "***overall outcomes"** not defined in Part 5