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In the Planning and Environment Court -

No D29/25

Held at: MAROOCHYDORE

Between: **Mark and Julianne Grunske** Appellant

And: **Fraser Coast Regional Council** Respondent

And: **Chief Executive Department of State** Co Respondent
development infrastructure and planning

APPLICATION IN PENDING PROCEEDING

Filed on 2 September 2025
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APPLICATION FOR PRELIMINARY RULING

The Appellant applies to the Planning and Environment Court at Maroochydore for a preliminary ruling concerning the proper interpretation and application of specified *Statutory Provisions* as they relate to conditioning code assessable development.

The Appellant respectfully requests that the matter be determined on the papers, pursuant to the Court's discretion under the Planning and Environment Court Rules 2018, on the basis that the issues raised are declaratory in nature and do not require oral evidence or cross-examination.

Statutory Provisions

The *Planning Act 2016*: (PA16)

- s43(2);
- ss45(3) and 45(4);
- ss60(2)(c) and (d);
- s65(2).

And

The Local Planning Instrument - Fraser Coast Regional Council (Council) - Planning Scheme (Scheme)

- 9.4.3 Reconfiguring a lot code
 - PO10 and AO10.



APPLICATION IN PENDING PROCEEDING
Filed on behalf of Mark and Julianne Grunske
Form PEC-3

Planning Act 2016

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The grounds relied on are:

An impasse has arisen between the Appellant and the Respondent regarding the correct interpretation and application of the cited *Statutory Provisions* in conditioning the development permit for code assessable development application RAL21- 0138. (DA21)

The **Appellant** contends that under PA16, for code assessable development, assessment must be undertaken **solely** against relevant assessment benchmarks, and that:

Conditions imposed on a development permit that ensues as a consequence of that assessment must, under PA16:

- (a) **sections 60(2)(c) and 60(2)(d)**, be **solely** for the purposes of achieve **compliance** with those relevant assessment benchmarks; and
- (b) **section 65(2)**, be **exclusively** confined to **administrative matters** prescribed by the subsection; and

not extend to matters for general planning or other administrative developments matters.

The **alternate** position is that **section 60(2)(c)** authorises the imposition of **any development condition**, including other **planning** or **administrative** outcomes, outside those relevant assessment benchmarks or **65(2)**, provided the condition survive the general reasonability test in **section 65(1)**.

Determination of these legal questions will materially assist in resolving the issues in the Appeal, enabling efficient management of the proceeding and avoiding further litigation.

OUTLINE OF ARGUMENT

1. Jurisdictional Basis

This application is brought under **section 11(1)(b)** of the *Planning and Environment Court Act 2016*.

The questions raised are matters of statutory construction, suitable for determination as preliminary legal issues.

2. Scope of Code Assessment for development applications [s43 - s45]

Chapter 3's function, is the mechanism, under the Planning Act 2016 (PA16), by which a development can be approved by a regulating authority.

Section 44 details the 3 circumstances under which developments are regulated.

There are developments:

- (a) for which a development approval will not be issued;
- (b) for which development approval will not be required;
- (c) which are require to be assessed before undertaken.

Section 45(1) provides, for those requiring assessment, only two options exist.

They are by **Code** or Impact

Section 45(3&2) provides that **code** assessment is benchmark-driven and restricted to **only** relevant assessment benchmarks¹, prescribed by a *categorising instrument*.

Section **45(4)** confirms that a regulator, performing **code** assessment is not required, in that process, to have regard to advancing the purpose of PA16.

Section 43(2) provides the circumstances for what cannot reside within an *assessment benchmark* with paragraph (c) providing special consideration for assessment benchmarks use for **code** assessment.

This legislative design, and the relevant explanatory notes, mandates for **code** assessment, a **closed assessment framework**², with no discretionary for extraneous overlay.

Judicial commentary in *Klinkert* [2018]³ *Sincere* [2018]⁴ and *Ashvan Investments* [2019]⁵ affirms that **code** assessment is benchmark-driven and as benchmark dictate approval, and supported conditioning, they need to be codified based and non-subjective in context and content; and

The presence of subjective judgment in the assessment process and conditioning for code assessable development, undermines the statutory architecture and risks reintroducing discretionary conditioning powers that Parliament has deliberately excluded.

The Appellant submits that:

1. The legislative intent of s43(2) and s45(2)(3) and (4) is to exclude all forms of subjective or non-benchmark-based intrusion into the scope of lawful assessment and thereby it's conditioning; and
2. These exclusions should be construed purposively, to uphold the statutory commitment to an objective and 'bounded assessment' for Code assessable developments⁶ ;

¹ Planning Bill 2015 Explanatory Notes (p73) - 'Code assessment'

² Planning Bill 2015 Explanatory Notes (p53) – 'Other relevant matters'- First para

³ *Klinkert v Brisbane City Council* [2018] QPEC 30:- *Brisbane City Council v Klinkert* [2019] QCA 40

⁴ *Sincere International Group Pty Ltd v Council of the City of Gold Coast* [2018] QPEC 53- @[(8)(20-22)(28(b))]

⁵ *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16

⁶ Planning Bill 2015 Explanatory Notes (p74) 'Code assessment under the Bill...."

3. Exclusion of Subjective Opinion –[s43(2)]

Section **43(2)(a)** excludes "a matter of a person's opinion" from forming part of assessment benchmarks.⁷

Section **43(2)(c)** excludes application of the **strategic outcomes** in the *local categorising instrument*⁸ - Council's Planning Scheme codes forms part of an assessment benchmarks for code assessable development.

The Appellant submits that for **code** assessable development:

1. The legislative intent of s43(2)(a) and s43(2)(c) is to exclude all forms of subjective or strategic content from intrusion, either:
 - (a) within the application of content into a statutory instrument used as assessment benchmark; and or
 - (b) the assessment decision-making process, including the facility of development approval conditioning.
-

4. Conditioning Authority – [s60]

Section **60(2)** of PA16 deals with **code** assessable development. Section **60(3)** deals with **impact** assessable development.

Paragraph (c) of s60(2) empowers assessment managers to impose conditions upon development approval for **code** assessable development. However, that power to condition must be logically and legally tethered to the assessment process, which itself is constrained to benchmarks under s45(3).

Paragraph (d) of s60(2) requires the application of **Paragraph (c)** to non-compliant development applications, where possible.

The Appellant submits that **60(2)(c)** is not global authority for the application of any condition so long as the condition could satisfy Section **65(1)**

5. Limits on Conditioning – [s65]

Section **65(1)** of PA16 provides the general authority as to *relevance* and *reasonableness* of development conditions.

The Appellant submits that for **code** assessable development;

⁷ The term "person's opinion" appears only once in the Planning Bill 2015 Explanatory Notes (p57) and then in the discussion on clause 46, to assist explanation of the 'application of objective terms'. The term appears once in PA 16 [s43(2)(a)] and is not defined in Chapter 2- dictionary.

⁸ PA16 S16(1)(a)-' A planning scheme must identify strategic outcomes for the local government area to which the planning scheme applies'

1. The general test of s65(1) is not as a gateway to any **merit-based** conditioning and that to attract the attention of s65(1) the condition must first survive the relevant constraints imposed by s43, a45 and s60, and must be read **conjunctively** with those sections and punctuations only as a quality filter for those otherwise lawful conditions.
-

Section **65(2)** prescribes the scope of the circumstances for applying the particularised **administrative** conditions, to a development permit.

The Appellant submits for **code** assessable development:

s65(2), does not provide the authority for expanding:

2. **s60(2)(c)** conditioning powers; or
3. the prescribed administrative based circumstances under **s65(2)**.

6. Planning Scheme Interpretation

Assessment Benchmark **9.4.3 – Reconfiguring a Lot Code** at:

Part 5 - **Tables of assessment**

5.3.3 (4) provides:

Code assessable development: -

(c) that complies with:

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

PO10 provides: -

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

AO10 provides: -

The standards for construction of that *lawful access*

The Appellant submits for **code** assessable development:

1. Assessment benchmark **9.4.3's** framework and must be construed in light of ss43, s45, and s60 of PA16 namely that relevant assessment benchmarks must operate as an **objective standard**, not as flexible instruments of discretionary assessment.
2. Where an assessment benchmark adopts a hierarchical system for compliance, compliance with a higher order requirement, satisfies requirement for the assessment benchmark.

In simpler terms where a development complies with the *Performance Outcome*

it is not required to comply with its subordinate *Acceptable Outcome*

3. The lawful application of the hierarchical system for compliance is that a subordinate compliance provision (*Acceptable Outcome*) must be for the sole purpose of providing a compliance solution for the dominant provision (*Performance Outcome*). Not for a purpose outside of that relationship.
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7. Impasse and Efficiency

There exists a genuine and unresolved disagreement between the parties, as to whether conditions must be benchmark and prescription bound or may reflect broader planning considerations.

Declaratory relief will clarify the lawful scope of development conditions, thereby promote **procedural efficiency** and streamline the remainder of the proceeding without resort to expert evidence or factual contests.

Conclusion

This matter invites the Court to clarify the lawful boundaries of conditioning powers under the Planning Act and the Respondents Planning Scheme in the context of code assessable development. The Applicant does not seek to challenge planning discretion in general, but to illuminate a specific statutory misalignment that risks undermining procedural integrity and the rule of law.

The conditions under appeal, if upheld without scrutiny, would permit an assessment manager to impose obligations untethered from the benchmarks that define the scope of assessment. Such a practice not only exceeds the statutory framework but erodes the transparency and predictability that code assessment is designed to ensure.

This application is made in good faith, in the interest of procedural clarity, statutory integrity, and the proper administration of planning law. The Applicant respectfully submits that this case presents an opportunity for the Court to reaffirm the primacy of legislative intent, the limits of delegated power, and the democratic safeguards embedded in the Planning Act 2016.

Prayer for Relief

Orders Sought

1. General Conditioning Powers

In the context of **code** assessable development:

- (a) The power conferred on an assessment manager under section **60(2)(c)**, following assessment, pursuant to sections **45(3)** and **(4)**, is limited to imposing conditions that:

- (i.) are exclusively derived from the relevant **assessment benchmarks**, and to serve the sole purpose of achieving **compliance** with those benchmarks; **and or**
 - (ii.) for administrative purposes, only those prescribed by **section 65(2)**; and then
 - (iii.) survive **section 65(1)**
-

2. Planning Scheme Interpretation

The proper interpretation and application of Assessment Benchmark **9.4.3 – Reconfiguring a Lot Code** of Fraser Coast Regional Council Planning Scheme is for:

- **Performance Outcome PO10**; and
- **Acceptable Outcome AO10**

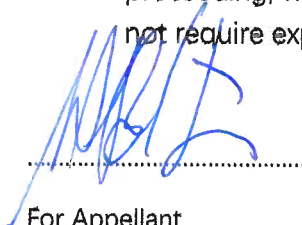
that in insofar as those provisions bear upon the lawful conditioning of **code** assessable development, that:

Compliance with:

the *performance outcomes* is sufficient to achieve compliance with the *purpose* and *overall outcomes* of the assessment benchmark and the conditioning of the requirement to comply with AO10 is not lawful.

3. Procedural Directions

Any further directions the Court considers appropriate for the efficient conduct of the proceeding, noting that the issues raised are matters of statutory construction and do not require expert evidence or factual dispute resolution.


For Appellant
Warren Bolton



12 September ✓

This application is to be heard by the Court at **Maroochydore** on Friday, ~~24 October~~ 2025 at time - 9:30am.

THE APPLICANT ESTIMATES THE HEARING WILL TAKE (20) Minutes.

If you wish to oppose the application or to argue that any different order should be made, you must appear before the court in person or by your lawyer or agent and you shall be heard.

If you do not appear at the hearing the orders sought may be made without further notice to you.