

13

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 Development Infrastructure
and Planning** Co Respondent

AFFIDAVIT

Introductory Matters

1. I Warren Bolton of 558 Mooloo Road Mooloo Queensland 4570, under affirmation say the following, in support of the Appellant's Application in Pending Proceeding (AIPP), filed with this affidavit.
2. I am authorised to make this affidavit on behalf of the Applicant and do so from my own knowledge, save where otherwise stated.
3. The purpose of this affidavit is to provide background and context to the Appellant's request for a *preliminary determination* of the law relevant to development conditioning.
4. Conditions imposed by the Respondent, are the subject of the current Notice of Appeal

Background and Procedural History

5. On 6 December 2021 the Appellant lodged, as Applicant, a development application RAL21-0138 (DA21) with the Respondent as *assessment manager* to subdivide Lot 51 MCH567 (Subject Site) into 17 lots. [Ref: <https://tuanqld.site/docs/pdf/1.c-nop.pdf>]

Under the provisions of the relevant *categorising instrument* DA21 is *code assessable* development for *reconfiguring a lot*.

DA21 was referable development to *the chief executive* under the provisions of the *categorising instrument* Planning Regulation 2017 (PR17) Schedule 10 - Parts 17 and 20

6. On 3 September 2024 the Applicant for DA21 amended the application to reduce the subdivision of the subject site to 5 lots. [Ref: <https://tuanqld.site/docs/pdf/slpC.pdf>]
7. On 21 February 2025 the Respondent issued a *decision notice* approving the development with conditions (DP25)

Deponent



8. DP25 imposed:

(a) 27 conditions on behalf of the *assessment manager* and

(b) 9 conditions on behalf of the Concurrent Referral Agency, the State Assessment and Referral Agency (SARA).

[Ref: <https://tuangld.site/docs/pdf/Decision%20Notice.pdf>]

9. On 19 March 2025 the Appellant filed a Notice of Appeal (Appeal) challenging the lawfulness of:

(a) 21 of the Assessment Managers conditions; and

(b) Legitimacy of the use of Assessment Benchmark State Code 8; and

(c) The lawfulness of SARA conditions for 1, 3, 4, 5, 6, 8 and 9(a) and 9(b)¹

[Ref: <https://tuangld.site/docs/pdf/1.c-nop.pdf>]

10. The Appeal sought and order to refer that matter to the Alternate Dispute Resolution (ADR) process.

11. On the same day I published the website <https://tuangld.site> containing all the material relevant to DA21 together with my argument that underpinned the Appeal.

12. The purpose of the website was to assist the parties, so as to expedite the process, by full disclosure of relevant documentation and the Appellants position as to the issues - up front.

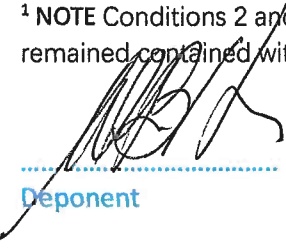
13. Both Respondents were advised of the existence of the website and invited to engage in a discourse to see if the matter could be settled expeditiously and with a minimum of expenditure of resources, by all parties.

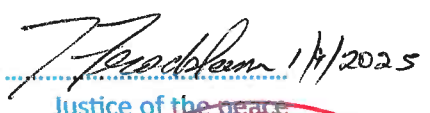
14. On 16 April 2025 following the lack of the Respondents participation in correspondence seeking voluntarily engage in an ADR process, I filed on behalf of the Appellant an AIPP seeking an order to refer the matter to the ADR process.

The AIPP was supported by my [affidavit](#) detailed the extent and content of communications between parties for the period 19 March to 16 April, 2025.

15. The AIPP was set for hearing on 9:30am 16 May 2025

¹ NOTE Conditions 2 and 7 contained within DP25 were deleted prior to the issues of the DP25 but remained contained within the document.


Deponent


Justice of the Peace



16. On 29 April 2025 the Respondents indicated acceptance of voluntary participation in an ADR process scheduled for 20 May 2025. The hearing of the AIPP did not proceed.
17. During the period 19 March 2025 to 20 May 2025 communications were exchanged between the Appellant and Respondents with the purpose of seeing what common ground could be determined and if a resolution of the dispute could be resolved without the need to consume the resources of the legal system.
18. On 20 May 2025 an ADR Mediation Conference was held, involving the Appellant and both Respondents, during which the parties discussed the potential for resolution of the appeal by way of amending or deleting conditions attached to the DP25.

On that day, I signed on behalf of the Appellant, a Mediation Agreement with the Co Respondent.

19. During the period 21 May to 1 August, 2025 various communications were exchanged between the Appellant and Respondents
20. On 1 August 2025 an ADR Mediation Conference was again held, involving the Appellant and Co Respondents during which the parties discussed potential resolution of that portion of the Appeal by way of amended or deleted conditions.

The Respondent saw 'no utility' in participating.

21. I hold the believe that consensus with the Co Respondents for SARA conditions is imminent.
22. On 10 August 2025 the Appellant presented the Respondent with the considered solution to resolve the dispute by accepting the vast majority of the Respondents conditions, provided their text were restructured to address circumstances relevant to DA21.

The Respondent provided no response to the solution provided.

23. Despite my every effort to resolve the matter, the dispute remain outstanding.
24. The Appellant's **Submission** in support of the AIPP is Attachment A


Deponent

Attachment A

Submission

Preamble

This submission is made in good faith, in pursuit of procedural clarity, statutory integrity, and the proper administration of planning law. It seeks a preliminary ruling on the lawful scope of conditioning powers under the Planning Act 2016 (PA16), in the context of **code** assessable development.

The Appellant contends that the conditions under Appeal exceed the statutory limits imposed by sections 45, 60, and 65 of the Act. These provisions, properly construed, establish a framework of assessment that is benchmark-driven, procedurally restrained, and democratically transparent.

The imposition of conditions, on code assessable development, untethered from these benchmarks, risks distorting the legislative scheme and undermining the predictability and fairness that code assessment was designed to ensure.

It seeks to inviting the Court to reaffirm the primacy of legislative intent and the disciplined exercise of delegated power.

The submission proceeds in the following order:

Impasse and Procedural Economy

Two parties have reached a genuine impasse on the legal scope of conditioning powers.

Expected Outcome

Resolution of this issue through declaratory relief will clarify the applicable law and enable **efficient management** of the substantive proceeding without recourse to further expert evidence or contested fact-finding.

BACKGROUND

The introduction of the *Local Government Planning and Environment Act* in 1990 commenced the transitioning process for development assessments away from the existing **prescriptive** regime for almost all of the last century and commenced the movement towards the new **performance-based** assessment, creating as it evolved, its own special set of statutory and processing problems.

These problems could be crystallised by two statements.

1. The growth in the development of the two forms of development assessment- **code** and **impact**; and in 1997,
2. The facility to accommodate more than one development type within a single development application.

Mix with this, the complexity of the introduction of State governments, within the administrative controls of local governments (Councils) legislating for local development by either:

- (a) The simply purposes of formalising the 'advice process'; or
- (b) by forming a full partnership, concurrency assessment, with Councils,

while at the same time, still retaining some the historic role of State government acting as an independent approving agency, in it's own right.

All these complexities have led to a process and legislative nightmare.

Code versus Impact

Code assessment was retained to try and facilitate a continuation of the old existing **prescriptive** regime whereby applicants had the facility of being able to determine, in advance of an application, whether or not their proposal would receive approval before lodging their application.

In order to achieve this outcome these codes had to retain the inflexibility of the **prescriptive** process and couched with objective prescriptive data, preferably mathematical in nature.

Whereas:

Impact assessment was the new era, where a more flexibility performance-based approach was inserted into the development assessment process for a particular development.

But that flexibility needed to be purchased at the price of imposing public and personal opinion into the equation, either on behalf of those responsible for developing the legislation and or those responsible for its administration. Making approvals more fraught with uncertainty.

More complexity was engendered in the development assessment process when a single development application may now contain several development types and assessment benchmark needed to possess the utility of being called up for an **impact** assessment in some circumstances, and a **code** assessment in others, governed in some instances, solely by the criterion of **scale**.

For example, a Reconfiguring a lot development (RAL) moving a property boundary a few centimetres to accommodate an accidental encroachment up to providing for 1000 lots subdivision of existing land requiring supporting, material change of use, operational works, and infrastructure considerations.

Development types are legislatively defined solely by *purpose*. It does not address *scale*

But are then for the purposes of assessment, sorted into three bundles

- prohibited,
- DIY and
- only by permit

and then *assessment benchmarks* are needed to be designed to cope with any conceivable range of **scale** and **type** of assessment (Code or MCU) for single or a **multi** developments application.

Then, if that was not enough, all this needed to be incorporated into a process and documentation that was not to be too, overwhelming, incomprehensible or daunting, in its application.

Finally, mix all of that with a large dollop of public opinion and participation, for things that were not science based and more closely related to the psychology of fashion or aspirational goals – and there you have the IDAS system.

ASSESSMENT BENCHMARKS

Assessment benchmarks are not new but the term is new. History knows them as *codes*.

Prior to the transition away from the pervasive, prescriptive base assessment that existed before the introduction of the *Integrated Planning Act* in 1997, these codes contained objective-based language and often supported by mathematical based data.

A good example of the application of code, is speed signs. These signs clearly prescribe the maximum velocity allowed by law for the transit of vehicles on designated part of a road. Their purpose obviously is 'road safety'. This makes determination of compliance with the purpose exceedingly simple.

However, if performance-based assessment was introduced into the area of vehicle movements and transitioning to a performance-based model with a criterion of 'Road Safety', it would become a nightmare for regulatory authorities in assessing compliance with the code.

This however, is a very poignant example of what happened, when the development assessment industry transitioned away from prescriptive codes and into the arena of performance-based benchmarks.

ISSUES

Assessment benchmarks

1. Statutory Exclusion of Subjective Opinion – Section 43(2)

The Appellant's position is that as **s43(2)(a)** provides that a benchmark is '... not to include a matter of a person's opinion'. This exclusion is pivotal to maintaining the integrity of code assessment.

While the Explanatory Note for the Planning Act 2016 (PA16) it did not directly elaborate on section 43(2), it's broader commentary reveals Parliament's intent was to create a bounded, objective framework for **code** assessment.

The phrase "in the opinion of..." was once a legislative staple, often used to confer broad

discretionary authority to ministers, officers, or assessment managers. Its deliberate omission in PA16 for code assessable development is significant.

This accords with the Act's purpose to establish a system that is "efficient, effective, **transparent**, integrated, coordinated and **accountable**," supporting the inference that Parliament sought to **exclude subjective discretion** from the assessment process for code assessment—by removing "*a matter of a person's opinion*" from its application to **code** assessment benchmarks.

Accordingly, imposed conditions must be demonstrably tethered to objective, identified, relevant and codified standards as **determinative**, not to evaluative or discretionary constructs that depend upon a *person's opinion*.

The Appellant submits that subjective judgment may enter the *assessment benchmark* process via three recognised pathways:

The Appellant submits this exclusion applies to circumstances where:

1. Benchmarks provisions that express opinion-based language (e.g. "sensitively" "responds", "encourage", "efficient" and "adequately") requiring subjective interpretation and designed for performance based assessment; and
2. Evaluative phrases, lacking objective metrics (e.g. "seeks to achieves harmony"); and
3. The application of otherwise evaluative benchmarks is delegated to individual officers, whose determinations, though procedurally authorised, result in the interpretation and expressed outcome, that are the consequence of the exercise of a *person's opinion*.

Parliament's exclusion in s43(2) should be construed **purposively**—to prevent any form of subjective infiltration into the benchmark framework.

Judicial commentary, including *Klinkert* [2018] QPEC 30 and *Ashvan Investments* [2019] QPEC 16, supports a view that **code** assessment is **benchmark-driven**, with **mandatory approval** where compliance is demonstrable or achievable by appropriate development approval conditioning.

The use of personal opinion within this framework risks eroding the statutory purpose and reintroducing discretionary conditioning by proxy.

Outcome Sought

Where, under code assessment, a finding of fact demonstrates the existence of any one of the three above outline circumstances and resulted in the imposition of a development condition, that condition is not lawful.

2. Code Assessment and Conditioning

Under **section 45(3)** of the *Planning Act 2016*, code assessment requires development to be assessed **only against the relevant assessment benchmarks** for the particular development

application.

Section **s43(2)(a)** confirms that such **assessment benchmarks** are to be free personal bias and the strategic aspects, derived under the authority of PA16.

This establishes a **closed assessment framework**, legally bound by the content of those benchmarks.

The legislative design intends to distinguish code assessment **from** impact assessment, eschewing discretionary evaluation in favour of **predictable, benchmark-based decision-making**.

Outcome Sought

Where, under code assessment, a finding of fact demonstrates a development condition is founded in an assessment benchmark, not identified as required by a particular development application, the imposition of that a development condition is unlawful

3. Conditioning Authority Under Section 60, 65

Section **60(2)** is applicable to development requiring **code** assessment.

Section **60(2)(c)** authorises the assessment manager to impose conditions where the development is approved following code assessment.

However, the power to condition under 60(2)(c) must **logically and legally** be **tethered** to the assessment process, which itself is constrained to relevant benchmarks under **s45(3)**.

Section **60(3)** is applicable to development requiring **impact** assessment.

While Section **60(3)(b)** authorises the assessment manager to impose conditions where the development is approved following **impact** assessment, the power to condition developments under 60(2) (Code) and 60(3) (Impact) are identical but individual and must therefore **logically and legally** demonstrate that these two pieces of legislation are simply the head of power or applying conditions to development approvals for either code and impact assessable developments and that is determinant as to the **scope** of application to those conditions.

Therefore, any condition imposed under the authority of **60(2)(c)** should:

- Only originate within the structure of the relevant code assessment benchmark; and
- Serve no purpose beyond achieving compliance with that benchmark, except as expressly contemplated by **section 65(2)**.

.....

Section **65(2)** sets out conditions related to prescribed **administrative matters** such as timing and procedural obligations.

The Appellant contends that Section **65(2)** is not a gateway to other personalized administrative matters.

Outcome Sought

Where, under code assessment, a finding of fact demonstrates a development condition is not founded on an assessment benchmark relevant to a particular development application or for an administrative purpose prescribed by section 65(2) the imposition of that development condition, is not lawful supported by section 60(2)(c)

4. Planning Scheme Interpretation

Part 5 of the *local categorising instrument* Planning Scheme for the Respondent provides the mechanism for determining amongst other things the **assessment benchmark** for *assessable development* within the planning scheme.

Using the facilities of Part 5, the assessment benchmark 9.4.3 – *Reconfiguring a Lot Code* (RALC) is a relevant *assessment benchmark* for the development, the subject of this Appeal.

Section 5.3.3 of Table 5 provides the methodology for "*Determining the requirements for assessment benchmarks and other matters for assessable development*"

Subsection 4 of Section 5.3.3 deals with **code assessable** development

This subsection provides that

(4) 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 of RALC is located in **Table 9.4.3.3.1**:

- under the heading **Site access**; and
- in the **Performance outcomes** column

PO10 prescribes

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

AO10 of RALC is located in **Table 9.4.3.3.1**:

- under the heading **Site access**; and
- in the **Acceptable outcomes** column

PO10 prescribes

"A driveway crossover is provided for lots in accordance with the applicable standard drawing contained in the **Planning scheme policy for development works**."

AO10 provides a standard to which lawful access will supports vehicle traffic, but it does nothing to fulfil the obligations of the performance outcome, which is to provide 'legal access', which is a

different kettle of fish, entirely.

PO10 and **AO10**, are part of the statutory benchmark framework.

Their interpretation must conform to the constraints imposed by **43(2)(a)** — namely that they operate as **objective standards**, not flexible instruments of discretionary assessment.

Outcome Sought

Where, under code assessment, a finding of fact demonstrates the common material of a development application achieves compliance with a **Performance outcome** (PO10), the imposition of a development condition requiring compliance with the **Acceptable outcomes** (AO10) for the Performance outcome is not lawful.
