PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Friends of Buddina Ltd v Sunshine Coast Regional Council & Anor* [2021] QPEC 57
PARTIES:	**FRIENDS OF BUDDINA LTD** **ACN 636 176 764** (Applicant) **v** **SUNSHINE COAST REGIONAL COUNCIL** (First Respondent) and **PACIFIC DIAMOND 88 PTY LTD** **ACN 622 564 425** (Second Respondent)
FILE NO:	D205/2019
DIVISION:	Planning and Environment
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning and Environment Court of Queensland
DELIVERED ON:	22 October 2021
DELIVERED AT:	Maroochydore
HEARING DATE:	26-27 November 2020
JUDGE:	Long SC, DCJ
ORDER:	**The Amended Originating Application is dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – where the Applicant seeks declaratory relief and consequential orders from this Court pursuant to s 11 *Planning and Environment Court Act* 2016 for reconsideration of the assessment process undertaken by the First Respondent in which the First Respondent issued a decision notice, a negotiated decision notice and an approval of a minor change application regarding a development application made by the Second Respondent – where the Applicant contends that there are three identifiable errors in the First Respondent's decision making process – whether the First Respondent failed to consider and construe the assessment benchmark stated in the overall outcome in s 8.2.5.2(2)(i) of the *Coastal Protection Overlay Code* – whether the First Respondent failed to consider and construe the assessment benchmark in PO12 of the *Coastal Protection Overlay Code* – whether the First Respondent failed to consider and construe the assessment

benchmark stated in s 6.2.3.2(2)(f)(iii) of the *High Density Residential Zone Code* – whether any purported errors were material in the sense that they could have resulted in the First Respondent making any different decision

PLANNING AND ENVIRONMENT – APPLICATION – where the Applicant seeks that the Court exercise its jurisdiction to grant declaratory relief pursuant to s 11 of the *Planning and Environment Court Act* 2016 – whether it is in the nature of this Court's jurisdiction to undertake a judicial review of the decisions of the First Respondent – where the Second Respondent seeks to rely on expert reports as evidence of the merits of the First Respondent's decision – whether such evidence may be admissible in proceedings of this nature – where the First Respondent has provided statements of reasons in respect of the original decision, the negotiated decision and the minor change approval – interpretation of the statements of reason reasons provided under ss 63(5) and 83(9) and 231(3) of the *Planning Act* 2016 – whether any discretionary issues arise in respect of the relief sought by the Applicant

LEGISLATION:

Acts Interpretation Act 1954
Integrated Planning Act 1997
Judicial Review Act 1991
Planning Act 2016
Planning and Environment Court Act 2016
Sustainable Planning Act 2016

CASES:

Abeleda v Brisbane City Council [2020] QCA 257
Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPELR 793
Attorney-General (NSW) v Quin (1990) 170 CLR 1
Australian Retailers Association & Ors v Reserve Bank of Australia (2005) 148 FCR 446
Bilalis v Brisbane City Council (2017) QPELR 997
Booth v Bosworth (2001) 114 FCR 39
Brassgrove KB Pty Ltd v Brisbane City Council [2019] QPEC 42
Brisbane City Council v VQ Property Pty Ltd [2020] 48 QLR
Chan v Minister for Immigration & Ethnic Affairs (1989) 169 CLR 379, at 391
Craig v South Australia (1995) 184 CLR 163
Di Carlo v Brisbane City Council [2019] QPELR 548
Di Marco v Brisbane City Council & Ors [2006] QPELR 731
Eschenko v Cummins & Ors [2000] QPELR 386
Ferreyra & Ors v Brisbane City Council & Anor [2016] QPELR 334
Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd [2017] 1 Qd R 13
FTZK v Minister for Immigration and Border Protection (2014) 310 ALR 1

Glastonbury v Townsville City Council [2012] 2 QPELR 216
Gold Coast City Council v Sunland Group Ltd (2019) 1 QR 304
Guiney v Brisbane City Council (2016) QPELR 575
Harta Pty Ltd v Council of the City of Gold Coast [2019] QPEC 37
Holcim (Aust) Pty Ltd v Brisbane City Council & Ors (2012) 190 LGERA 406
Irvine v Brisbane City Council (2020) QPELR 445
Jones v Dunkel (1959) 101 CLR 298
JRD No. 2 Pty Ltd v Brisbane City Council & Ors (2020) QPELR 1023
Kanesamoorthy v Brisbane City Council (2016) QPELR 784
Kirk v Industrial Court (NSW) (2010) 239 CLR 531
Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor (2016) 222 LGERA 122
Glastonbury v Townsville City Council [2012] 2 QPELR 216
Lennium Group Pty Ltd v Brisbane City Council & Ors [2019] QPELR 835
Marriott v Brisbane City Council [2015] QPELR 910
Mees v Kemp (2005) 141 FCR 385
Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259
Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
Minister for Immigration Local Government and Ethnic Affairs v Taveli (1990) 23 FCR 162
Minister for Immigration v Li (2013) 249 CLR 332
Mirvac Queensland Pty Ltd v Ipswich City Council & Anor (2020) QPELR 786
Muin v Refugee Review Tribunal (2002) 190 ALR 601
Notaris v Waverley Council (2007) 161 LGERA
Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage (2006) 232 ALR 510
Perivall Pty Ltd v Rockhampton Regional Council & Ors [2018] QPEC 46
Pfeiffer v Stevens (2001) 209 CLR 57
Plaintiff M64/2015 v Minister for Immigration and Border Protection (2015) 327 ALR 8
R v War Pensions Entitlement Appeal Tribunal; ex-parte Bott (1933) 50 CLR 228
Richards & Ors v Brisbane City Council & Ors [2020] QPEC 26
Shun Pty Ltd v Logan City Council [2020] QPEC 31

Smout v Brisbane City Council [2019] QPELR 684
Tong Town Planning & Development Services Pty Ltd v Brisbane City Council [2017] QPEC 70
United Petroleum Pty Ltd v Gold Coast City Council [2018] QPELR 510
University of Queensland v Brisbane City Council & CBUS Property Brisbane Pty Ltd (2016) QPELR 654
Westfield Management Ltd v Brisbane City Council & Anor [2003] QPELR 520
Wheldon and Armview Pty Ltd v Logan City Council and RG Property Three Pty Ltd as Trustee [2015] QPELR 640
Zappala Family Co Pty Ltd v Brisbane City Council (2014) 201 LGERA 82

COUNSEL: CJ McGrath for the Applicant
JJ Ware for the First Respondent
M Batty for the Second Respondent

SOLICITORS: P&E Law for the Applicant
Sunshine Coast Council Legal Services for the First Respondent
Corrs Chambers Westgarth for the Second Respondent

INDEX

Introduction

[1] By an Amended Originating Application filed on 4 September 2020 ("AOA"),[1] the Applicant seeks declarations and consequential orders from this Court in respect of a decision notice issued by the First Respondent to the Second Respondent, regarding a development approval.[2]

[2] The following declarations and orders are sought, pursuant to s 11 of the *Planning and Environment Court Act* 2016 (*"PECA"*):

> "1. Declaration that the Council's negotiated decision notice issued on 12 September 2019 approving a development application for a code assessable material change of use application for 73 multiple dwelling units and a shop at 2 & 6 Talinga Street, 84 & 85 Pacific Boulevard and 61 and 63 Iluka Avenue, Buddina (**negotiated decision notice)** is invalid, and of no legal effect; and
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> 2. Declaration that the Council's decision notice issued on 30 July 2020 approving the Second Respondent's minor change application to change conditions 54, 63, 69, 70, 73 and Advice Note 23 and include additional Condition 70A for the negotiated decision notice is invalid and of no legal effect; and
>
> 3. Order Council's decisions:
>
> (a) of 30 April ~~2013~~ 2019 and 10 September 2019 approving the development and the Council's decision of 12 September 2019 to issue the negotiated decision notice; and
>
> (b) of 23 July 2020 approving the minor change application and Council's decision of 30 July 2020 to issue a decision notice approving the minor change application for the development,
>
> be set aside and the development application remitted to Council to reconsider according to law."[3]

Background

[3] The background or context to this application may conveniently be summarised as follows:[4]

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1 An Originating Application was filed on 5 November 2019.
2 AOA, at p 1.
3 AOA, at pp 1-2.
4 As conveniently drawn from the written submissions of the Applicant, filed 23/11/20 at [7]-[32] ("Applicant's written submissions"), and of the Second Respondent, filed 23/11/20 at [9]-[22] ("Second Respondent's written submissions").

(a) On 19 July 2018, the Second Respondent lodged a development application for a material change of use with the First Respondent, for 107 multiple dwelling units and a shop (corner store) on the land at 2-6 Talinga Street, 84-86 Pacific Boulevard and 61-65 Iluka Avenue, Buddina and more particularly described as Lot 1 on RP201319 and Lots 280, 281, 282, 310, and 311 on B92911 ("the original application"). That land is currently by residential housing and is separated from the Pacific Ocean by only a road (Pacific Boulevard), a vegetated dune area and Buddina Beach.[5]

(b) On 11 December 2018, the Second Respondent amended the application to reduce the scale and number of the units[6] and subsequently lodged a code assessable material change of use application for 73 dwelling units and a shop (corner store) on the land described as "2 & 6 Talinga Street, 84 & 85 Pacific Boulevard and 61 and 61 and 63 Iluka Avenue, Buddina".[7]

(c) The land is bordered by Pacific Boulevard, Talinga Street and Iluka Avenue and situated at the northern end of the "Buddina Urban Village" as identified in the *Kawana Waters Local Plan Code* under the *Sunshine Coast Planning Scheme* 2014 (the scheme), as in force as at 10 December 2018. The development comprises 3 buildings over the 6 lots (consisting of sixty-six 3-bedroom units, six 4-bedroom units being split level villas facing Pacific Boulevard, six 4-bedroom penthouse units and one 5-bedroom penthouse unit, up to 21m in height (which is noted to be within the height limit in the planning scheme), with two levels of basement carparking for 188 cars.[8]

(d) The land is located within the *Kawana Waters Local Plan* area, within the scheme[9] and is included within the High-Density Residential Zone under

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5 Although the First Respondent contends that the original application was not properly lodged until 10 December 2018, it is properly conceded that this does not affect the issues in dispute, as noted in the First Respondent's Statement of Facts, Matters and Contentions, filed 22/9/20, at [1] and T 1-22.26-28.

6 AOA, at p 2; Second Respondent's written submissions at [11].

7 AOA, at p 2; Applicant's written submissions, at [7]; Second Respondent's written submissions at [9] and [12].

8 Applicant's written submissions at [8] – [13]; Second Respondent's written submissions at [13] – [14].

9 Book of Documents files 18/9/20 ("BD"), Doc 8, at p 103.

the scheme.[10] The material change of use application and the minor change application were code assessable against all applicable codes under Part 5 of the scheme and most relevantly to this application, the High-Density Residential Zone Code and the Coastal Protection Overlay Code.[11]

(e) It is noted in the AOA, apparently as some indication of public or at least local interest in respect of it, that notwithstanding that the development was code assessable, the First Respondent accepted and considered 84 submissions and a petition containing some 1,016 signatures in making its decision.[12] And that concerns raised by submitters included in respect of "environmental impacts to the adjacent Buddina Beach, which is a known turtle nesting beach …. from increased human disturbance, including light spill which may deter turtles or impact on turtle nesting".[13]

(f) On 8 February 2019, a Detailed Assessment Report was completed, setting out what Council officers considered were the relevant assessment benchmarks,[14] recommending approval of the application on the basis that:

> "The proposed development sufficiently complies with the requirements of the Planning Scheme and does not raise any significant issues that cannot be addressed by reasonable and relevant conditions. Section 60 of the Planning Act requires Council to approve a code assessable application where it is capable of complying with the applicable assessment benchmarks, or could be conditioned to comply. The application is therefore recommended for approval."[15]

(g) On 30 April 2019, the First Respondent approved the application pursuant to s 60(2) of the *Planning Act* 2016 (Qld) ("*PA*") subject to conditions

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10 BD Doc 8, at p 105.
11 BD Doc 8, at p 105; AOA, at pp 2-3; Second Respondent's written submissions, at [15].
12 AOA, at [10].
13 AOA, at [10]-[11].
14 BD Doc 2, at pp 19-46; Applicant's written submissions, at [17].
15 BD Doc 2, at p 46.

("the original decision").[16] On 8 May 2019, the First Respondent issued the decision notice for the approval.[17]

(h) On 21 May 2019, a statement of reasons was requested for the original decision (as permitted by s 231(3) of the *PA*) and on 27 June 2019, the First Respondent published a statement of reasons pursuant to s 33(1) of the *Judicial Review Act* 1991 ("*JRA"*), in respect of the original decision, concluding that:

> "Given that code assessment undertaken for the Development Application determined that it either complied with all relevant assessment benchmarks or could otherwise be conditioned to comply, Council was required to approve the Development Application under section 60(2)(a) of the Planning Act and was unable to refuse the Development Application, pursuant to section 60(2)(d) of the Planning Act."[18]

(i) On 6 June 2019, the Second Respondent made representations to the First Respondent pursuant to s 75 *PA*, to change the conditions imposed, including in relation to conditions 68-70 of the original decision with regard to lighting to mitigate impacts on turtles.[19]

(j) On 10 September 2019, the First Respondent approved a change application pursuant to s 76 of the *PA,*[20] noting minor amendments to conditions 68-70 of the original decision ("the negotiated decision"). On 12 September 2019, the First Respondent issued a negotiated decision notice pursuant to s 76 of the *PA* approving the development application for a code assessable material change of use application and which replaced the decision notice for the original decision ("the negotiated decision notice").[21]

(k) Contemporaneously to the negotiated decision notice, the First Respondent published an undated notice on its website pursuant to ss

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16 Applicant's written submissions, at [18]; Written submissions of the First Respondent, filed 26/11/20. at [2] ("First Respondent's written submissions"); Second Respondent's written submissions at [16].

17 BD Doc 3, at pp 47-72; Applicant's written submissions, at [18].

18 Affidavit of C M Spicer, filed 25/11/2020, at CMS-1 p 13; Applicant's written submissions, at [19]

19 Applicant's written submissions, at [20]; Second Respondent's written submissions, at [17].

20 First Respondent's written submissions, at [2b].

21 BD Doc 10, at pp 171-196; Applicant's written submissions at [21]-[22]; Second Respondent's written submissions, at [18].

63(5) and 83(9) of the *PA*, describing assessment benchmarks as to which it stated that it considered the development complied,[22] and then upon further request, provided a statement of reasons pursuant to s 33(1) of the *JRA* on 17 October 2019.[23]

(l) On 5 November 2019, the Applicant filed the Originating Application, directed at both the original decision and the negotiated decision, which included grounds alleging errors "in the conditions for turtle lighting due to the uncertainty of those conditions". [24]

(m) On 8 April 2020 and after the Originating Application had been set down for hearing, the Second Respondent applied to the First Respondent pursuant to s 78 of the *PA* to "… change conditions 54, 63, 70 and 73 and add a new condition 70A to the negotiated decision notice to remedy the errors identified in grounds 25-29 of the Originating Application".[25] On 23 July 2020, the First Respondent approved, pursuant to s 81A of the *PA*, the minor change application to:

(i) change conditions 54, 63, 69, 70, 73 and Advice Notice 23; and

(ii) include an additional condition 70A.[26]

(n) On 30 July 2020, the First Respondent issued a decision notice pursuant to s 83 *PA* for the minor change approval ("decision notice for minor change approval").[27]

(o) On 28 August 2020, the First Respondent provided a statement of reasons for the minor change approval, stating its reasons were 'as per the

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22 BD Doc 4, at pp 73-75; Applicant's written submissions, at [24].

23 BD Doc 11, at pp 197-205; Applicant's written submissions, at [25]; First Respondent's written submissions, at [19].

24 Originating Application, filed 5/11/20, at grounds 25-29; Applicant's written submissions at [22]-[26], with the "turtle lighting conditions" identified at [23] as conditions 62-63 and 68-72 in the negotiated decision notice; Second Respondent's written submissions, at [19].

25 BD Doc 12, at pp 206-219; Applicant's written submissions, at [27]: Second Respondent's written submissions, at [20].

26 BD Doc 15, at p 266; Applicant's written submissions, at [28]; Second Respondent's written submissions, at [21]; First Respondent's written submissions, at [2c].

27 BD Doc 16, at pp 267 - 294; Applicant's written submissions at [29]; Second Respondent's written submissions at [21].

findings" in a report prepared by Council staff which was tabled and approved at the ordinary meeting of the Council on 23 July 2020.[28]

The basis of the application

[4] On 4 September 2020, the Applicant filed an AOA,[29] which it states accepted that the amendments made to conditions 54, 63, 69, 70 and 70A by the decision notice for minor change approval had remedied the errors related to conditions.[30] However, it is summarised that the AOA identified three remaining errors in the decision-making process, being:

> "(a) errors in considering and construing the assessment benchmark stated in the overall outcome in s 8.2.5.2(2)(i) of the CPO Code that 'development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline vegetation';
>
> (b) errors in considering and construing the assessment benchmark in PO12 of the CPO Code that the development 'maintains or enhances coastal ecosystems' including turtling nesting habitat on Buddina Beach; and
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> (c) errors in considering and construing the assessment benchmark stated in s 6.2.3.2(2)(f)(iii) of the HDRZ Code that there is no unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas."[31]

[5] Those contentions are to be considered in the following statutory context:

(a) Chapter 3 of the *PA* provides the framework for the assessment process for the development application, which operates in the context of the objects and process for achieving the objects of the Act, as set out in ss 3 and 4 of the *PA*;

(b) Although the relevant planning scheme was prepared under prior legislation, as is noted in s 1.1, it was amended for alignment with the

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28 BD Doc 17, at p 295; Applicant's written submissions, at [30].
29 Court Doc 17.
30 Applicant's written submissions, at [32].
31 Applicant's written submissions, at [34].

Planning Act 2016 ("the Act") by the Minister's rules under section 293 of the Act on 3 July 2017;[32]

(c) Code assessment is to be carried out in accordance with the provisions of ss 45(3) and (4) of the *PA*:

> "**45 Categories of assessment**
>
> (1) There are 2 categories of assessment for assessable development, namely code and impact assessment.
>
> (2) A categorising instrument states the category of assessment that must be carried out for the development.
>
> (3) A ***code assessment*** is an assessment that must be carried out only—
>
> (a) against the assessment benchmarks in a categorising instrument for the development; and
>
> (b) having regard to any matters prescribed by regulation for this paragraph.
>
> (4) When carrying out code assessment, section 5(1) does not apply to the assessment manager."[33];

(d) Under a transitional provision in s 289(2)(c) of the *PA* and unless "the contrary intention appears", a reference in a document to "a code, or other matter, against which assessable development, … must be assessed" is a reference to "an assessment benchmark";

(e) The process of deciding code assessable development applications is prescribed in s 60(3) of the *PA*:

> "(3) To the extent the application involves development that requires impact assessment, and subject to section 62, the assessment manager, after carrying out the assessment, must decide—
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> (a) to approve all or part of the application; or
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> (b) to approve all or part of the application, but impose development conditions on the approval; or
>
> (c) to refuse the application."

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32 BD Doc 18(a), at p 297.

33 As noted for the Applicant, this process is to be contrasted with that provided in s 45(5) of the PA for "impact assessment" and as has been the subject of particular discussion in *Smout v Brisbane City Council* [2019] QPELR 684, at [54], *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPELR 793, at [67]-[85], *Brisbane City Council v VQ Property Pty Ltd* [2020] 48 QLR, at [62] and *Abeleda v Brisbane City Council* [2020] QCA 257, at [52]-[62].

(f) An assessment manager is required to give a decision notice about the decision to the applicant and other entities as prescribed in s 63(1) and the requirements of the notice are prescribed in s 63(2):

"(2) The notice must be in the approved form and state—

(a) whether the application is approved, approved in part or refused; and

(b) if the application is approved in part—the extent to which the application is approved; and

(c) if the application is approved or approved in part—whether the approval is a preliminary approval, a development permit, or both; and

(d) if section 64(5) applies—that the assessment manager is taken to have approved the application under that subsection; and

(e) if development conditions are imposed—

(i) the conditions; and

(ii) for each condition—whether the condition was imposed directly by the assessment manager or required to be imposed under a referral agency's response; and

(iii) for each condition imposed under a referral agency's response—the referral agency's name; and

(iv) for each condition about infrastructure under chapter 4—the provision of this Act under which the condition was imposed; and

(f) if the application is refused—

(i) whether the assessment manager was directed to refuse the application and, if so, the referral agency directing refusal and whether the refusal was solely because of the direction; and

(ii) for a refusal for a reason other than because of a referral agency's direction—the reasons for the refusal; and

(g) for a variation approval—the variations; and

(h) the name, residential or business address, and electronic address of each principal submitter; and

(i) the day the decision was made."

Further, if the "assessment manager in relation to a development application is … a local government" and "the development application involved … a material change of use … the assessment manager must publish a notice about the decision on [its] website".[34] The requirements of such a notice are relevantly prescribed in s 63(5), as follows:

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[34] s 63(4) *PA*.

"(5) The notice must state—

(a) a description of the development; and

(b) a description of the assessment benchmarks applying for the development; and

(c) to the extent the development required impact assessment—

(i) any relevant matters under section 45(5)(b) that the development was assessed against, or to which regard was had, in the assessment; and

(ii) a description of the matters raised in any submissions; and

(iii) how the assessment manager dealt with the matters described under subparagraph (ii) in reaching a decision; and

(d) the reasons for the assessment manager's decision; and

(e) if the development application was approved, or approved subject to conditions, and the development did not comply with any of the benchmarks—the reasons why the application was approved despite the development not complying with any of the benchmarks; and

(f) any matter prescribed by a regulation."

(g) Division 2 of Chapter 3 of the *PA* provides for changing development approvals. As is noted, without any issue, by the Applicant:

(i) the change representations of the second respondent leading to the negotiated decision notice were assessed under s 76 of the *PA*,[35] which required that the First Respondent:

"**76 Deciding change representations**

(1) The assessment manager must assess the change representations against and having regard to the matters that must be considered when assessing a development application, to the extent those matters are relevant.

(2) The assessment manager must, within 5 business days after deciding the change representations, give a decision notice to—

(a) the applicant; and

(b) if the assessment manager agrees with any of the change representations—

(i) each principal submitter; and

(ii) each referral agency; and

(iii) if the assessment manager is not a local government and the development is in a

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35 Applicant's written submissions, at [50].

local government area—the relevant local government; and

(iv) if the assessment manager is a chosen assessment manager—the prescribed assessment manager; and

(v) another person prescribed by regulation.

(3) A decision notice (a negotiated decision notice) that states the assessment manager agrees with a change representation must—

(a) state the nature of the change agreed to; and

(b) comply with section 63(2) and (3)."

It is also provided, in s 76(4), that "[a] negotiated decision notice replaces the decision notice for the development application" and s 76(5) provides that only one negotiated decision notice may be given; and

(ii) the later application of the Second Respondent, to change conditions 54, 63, 69, 70 and 73 and Advice Notice 23 and to add condition 70A, was made under s 78, assessed by the First Respondent under s 81 and approved pursuant to s 81A of the *PA*, as a minor change to the development approval in the negotiated decision notice.[36] Accordingly and as required by s 81(2):

"(2) In assessing the change application, the responsible entity must consider—

(a) the information the applicant included with the application; and

(b) if the responsible entity is the assessment manager—any properly made submissions about the development application or another change application that was approved; and

(c) any pre-request response notice or response notice given in relation to the change application; and

(d) if the responsible entity is, under section 78A(3), the Minister—all matters the Minister would or may assess against or have regard to, if the change application were a development application called in by the Minister; and

(da) if paragraph (d) does not apply—all matters the responsible entity would or may assess against or have regard to, if the change

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[36] BD, Doc 16, at pp 267-294.

application were a development application; and

(e) another matter that the responsible entity considers relevant."

Further, ss 83 (1) and (2) contain provisions requiring the giving of a decision notice by a responsible entity which decides a change application. Relevantly, the requirements of such a decision notice are prescribed in ss 83(3) and (9), as follows:

"(3) The decision notice must state the day when—

(a) the change application was made; and

(b) the development approval for the development application was decided.

…

(9) The notice must state—

(a) a description of the development; and

(b) a description of any assessment benchmarks, or matters under section 55(2), applying for assessing the change application; and

(c) to the extent the change application required impact assessment—

(i) any relevant matters under section 45(5)(b) that the development was assessed against, or to which regard was had, in the assessment; and

(ii) a description of the matters raised in any submissions; and

(iii) how the assessment manager dealt with the matters described under subparagraph (ii) in reaching a decision; and

(d) the reasons for the responsible entity's decision; and

(e) the reasons why the change application was approved despite the development not complying with any or all of the benchmarks, if—

(i) the responsible entity was the assessment manager; and

(ii) the development did not comply with any or all of the benchmarks; and

(iii) the responsible entity approved the change application, or approved the change application subject to conditions; and

(f) any matter prescribed by a regulation."

Issues in dispute

[6] Although both the Applicant and Second Respondent provided separate lists identifying the issues in dispute and respectively marked for identification as "A" and "B",[37] the Second Respondent ultimately conceded that the Court should proceed on the basis that the issues in dispute between the parties are sufficiently summarised in the Applicant's list.[38] Accordingly, the following questions are identified for the consideration of the Court:

> "1. What is the nature of the Court's jurisdiction in the proceedings?
> 2. Whether evidence on the merits of the Council's decision is admissible?
> 3. How a statement of reasons should be interpreted in the context of documents before the Council, or delegate, when it made its decision?
> 4. Whether the Council made any of the three errors identified in the Amended Originating Application (AOA), which can be summarised as:
> (a) failing to properly consider or misconstruing the assessment benchmarks stated in the overall outcome in s 8.2.5.2(2)(i) of the *Coastal Protection Overlay Code* (**CPO Code**) in the planning scheme that "development adjacent to beachfront areas is located and designed to protect the character of the beach and integrates with the surrounding natural landscape and vegetation." (**the beachfront character errors**).
> (b) failing to proper consider or misconstruing the assessment benchmark stated in the Performance Outcome (**PO**) 12 of the CPO Code of the planning scheme and, in particular, whether the development maintains or enhances coastal ecosystems including turtle nesting habitat on Buddina Beach **(the coastal ecosystem errors).**
> (c) failing to properly consider or misconstruing the assessment benchmark stated in s 6.2.3.2(2)(f)(iii) of the *High Density Residential Zone Code* (**HDRZ Code**) that there is no unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas (**the views and vistas errors**).
> 5. If any of the three errors identified in the AOA are established, could the error/s have materially affected the decision?
> 6. Whether the AOA suffers from "threshold difficulties" of challenging approvals that are no longer extant (the original decision and the negotiated decision) and whether the AOA challenges the current approval (the minor change approval)?

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[37] Counsel for the First Respondent indicated that the First Respondent agreed with the list of issues in dispute provided by the Second Respondent when the matter was heard (see T 1-5.44-45).

[38] T 1-18.17-23.

> 7. If any of the three errors identified in the AOA are established, does the Court have a broader discretion than identified in paragraph 5, to refuse to make the declaration sought and, if so, should the Court decline to grant the relief sought based on those discretionary factors?"[39]

[7] It is relevant to note that the issues identified as 4(a) to 4(c) inclusive in the document titled "Applicant's list of issues in dispute" categorise the errors as "failing to properly consider or misconstruing the assessment benchmark…" Footnote one to this document seeks to clarify that the terminology is used as shorthand for all of the grounds identified in the AOA, "… including jurisdictional error, errors of law, that the procedures that were required by law to be observed were not observed, and failing to take into account a relevant consideration."[40] And as further clarified in the conclusion to the Applicant's written submissions, it seeks relief on the following basis:

> "Reading the Council's supporting reports and reasons as a whole and fairly, it appears that Council failed to ask the right question in relation to these assessment benchmarks and it never properly assessed the application against them, as required by s 60(2). These errors were not corrected, as they might have been, in the subsequent decisions for minor changes under ss76 and 81A of the PA. As a consequence, Council's decision-maker process failed to take into account relevant considerations, was tainted by errors of law and fell into jurisdictional error. These errors could have materially affected the decision and, as such, the decision should be set aside the application remitted to Council to reconsider according to law."**[41]**

The nature of this Court's jurisdiction

[8] As has been noted, this is an application to invoke the jurisdiction of the Court pursuant to s 11 of the *Planning and Environment Court Act* 2016 ("*PECA"*), as follows:

> **"11 General declaratory jurisdiction**
>
> (1) Any person may start a P&E Court proceeding seeking a declaration (a ***declaratory proceeding***) about—

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39 MFI A, at [1]-[7].
40 MFI A, at footnote 1.
41 Applicant's written submissions, at [167].

(a) a matter done, to be done or that should have been done for this Act or the Planning Act; or
(b) the interpretation of this Act or the Planning Act; or
(c) the lawfulness of land use or development under the Planning Act; or
(d) the construction of a land use plan under the *Airport Assets (Restructuring and Disposal) Act 2008* and the interpretation of chapter 3, part 1 of that Act; or
(e) the construction of the Brisbane port LUP under the *Transport Infrastructure Act 1994* .

Note—

Under the *Acts Interpretation Act 1954*, section 7, a reference to an Act in this list of subject matter about which a declaration may be sought includes a reference to the statutory instruments made under the *Act.*

(2) However, a declaratory proceeding for a matter under the Planning Act , chapter 3 , part 6 , division 3 may be started only under section 12 .

(3) Also, a person may not start a declaratory proceeding for a matter under the Planning Act , chapter 3 , part 6 , division 2 .

(4) The P&E Court may also make an order about any declaration it makes.

Note—

For a proceeding under this section in relation to a development approval that was a PDA development approval under the *Economic Development Act 2012* , see also section 51AJ (3) and (4) of that Act."

[9] That section and the heading to it, may be noted to immediately follow the divisional heading: "Division 3 Declaratory jurisdiction". That is a division of "Part 2 Establishment and jurisdiction" and "Division 2 General jurisdiction" includes s 7,[42] as follows:

"**7 Jurisdiction**

(1) The P&E Court has jurisdiction given to it under any Act (each an ***enabling Act***).

Notes—

1 Various Acts give the P&E Court jurisdiction. However, under the Planning Act, chapter 6 and schedule 1 and part 4 of this Act, its main heads of jurisdiction are—

- appeals against decisions under the Planning Act (in this Act, called 'Planning Act appeals')
- appeals against decisions of tribunals established under the Planning Act, section 235.

[42] All such headings may be noted to be part of the Act: ss 14(1) and (2) of the *AIA* and also pursuant to s 35C of the *AIA*, part of "the provision to which it is a heading" and in both ways part of the context for the interpretation of any part of any provision of an Act.

2 For when courts have jurisdiction, see also the *Acts Interpretation Act 1954*, section 49A.

(2) Unless the Supreme Court decides a P&E Court decision or other matter under a relevant enabling Act is affected by jurisdictional error, the decision or matter is non-appealable, other than—
(a) under part 7; or
(b) under the relevant enabling Act.

(3) In this section—
non-appealable, for a P&E Court decision or matter, means the decision or matter—
(a) is final and conclusive; and
(b) may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any way in any court."

[10] It may also be noted that "Division 1 Establishment" contains s 4, which is headed "Continuation" and proceeds to express the continuation in existence of the Planning and Environment Court (as that Court had existed and had been invested with jurisdiction pursuant to the *Sustainable Planning Act* 2016 and before that, pursuant to the *Integrated Planning Act* 1997).

[11] It was a matter of common ground between the parties that this application is appropriate to the jurisdiction and powers of the Court pursuant to s 11 of the *PECA*, and as a challenge to the legality of an administrative decision of a local government, akin to judicial review.[43] For the Applicant, reference was made to a number of prior indications to that effect in decisions of this Court.[44] Particular reference is made to *Ferreyra & Ors v Brisbane City Council & Anor*,[45] where it was observed that:

> "These constraints are aspects of the scope of judicial review of administrative action, which is confined to the legality of the Delegate's decision. In particular, judicial review is concerned with whether the Delegate's decision was one which he was authorised to make; it is not:
>
> > 'an appellate procedure enabling either a general review of the … decision… or a substitution of the … decision which the … court thinks should have been made.'"

As authority for the proposition stated in the first sentence, reference is made to a number of earlier decisions in this Court. The earliest of those is *Eschenko v Cummins*[46], where and in respect of the *IPA*, it was observed:

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43 Such as is dealt with in the *JRA*.
44 Applicant's written submissions, at footnote 57.
45 [2016] QPELR 334, at [5].
46 [2000] QPELR 386, at [20].

> "This proceeding therefore, is one for declarations under s.4.1.21 of the *Integrated Planning Act*, an order cancelling a development approval under s.4.1.22 of that Act, and an order requiring that a dwelling house be demolished. This Court is not in this proceeding hearing an appeal against a decision of the Council by way of hearing anew under s.4.1.52(1) of the *Integrated Planning Act*, in which the onus of proof would fall upon the first respondent. The proceedings with respect to the relief claimed under ss4.1.21 and 4.1.22 are analogous to judicial review proceedings under the *Judicial Review Act* 1991 (see s.5.8.4 of the *Integrated Planning Act*). This Court is not directly concerned with the merits of the approval in question, but rather must consider whether the approval given by the second respondent under s.48 of the *Standard Building Regulation* was validly given. The onus of establishing invalidity falls upon the applicant (*Parramatta City Council v. Hale* (1982) 47 LGRA 319 at 335, 393)."

[12] The references there to s 4.1.21 and 4.1.22 are to what are relevantly and effectively earlier iterations of the provisions in s 11 of the PECA. And the reference to s 5.8.4 was to the following provision:

> **"5.8.4. Application of Judicial Review Act 1991**
> (1) The *Judicial Review Act 1991* does not apply to the following matters under this Act—
> (a) conduct engaged in for the purpose of making a decision;
> (b) other conduct that relates to the making of a decision;
> (c) the making of a decision or the failure to make a decision;
> (d) a decision.
> (2) In particular, but without limiting subsection (1), the Supreme Court does not have jurisdiction to hear and determine applications made to it under the *Judicial Review Act 1991*, part 3, 4 or 5 in relation to matters mentioned in subsection (1)." (citations omitted)

The same legislation governed the approach in two further cited authorities.[47]

[13] Reference is also made to similar approach taken under the *Sustainable Planning Act* 2009,[48] as was the case in *Ferreyra*. It is convenient to note that under the *SPA*, an equivalent provision to that previously reflected in s 4.1.21 and s 4.1.22 of the *IPA* and as now reflected in s 11 of the *PECA*, was to be found in s 456 of the *SPA*, and that s 757 of that Act was effectively a restatement of s 5.8.4 of the *IPA*, with the addition of what appears as s 757(2), as follows:

> "**757 Application of Judicial Review Act 1991**

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47 *Westfield Management Ltd v Brisbane City Council & Anor* [2003] QPELR 520, at [55]-[57] and *Di Marco v Brisbane City Council & Ors* [2006] QPELR 731, at [14].

48 *Wheldon & Another v Logan City Council & Another* [2015] QPELR 640, at [18] and Birkdale Flowers Pty Ltd v Redlands City Council & Anor [2016] QPEC 4, at [47].

> (1) Subject to subsection (2), the *Judicial Review Act 1991* does not apply to the following matters under this Act—
> (a) conduct engaged in for the purpose of making a decision;
> (b) other conduct that relates to the making of a decision;
> (c) the making of a decision or the failure to make a decision;
> (d) a decision.
> (2) A person who, but for subsection (1), could have made an application under that Act in relation to a matter mentioned in subsection (1), may apply under part 4 of that Act for a statement of reasons in relation to the matter.
> (3) In particular, for subsection (1), the Supreme Court does not have jurisdiction to hear and determine applications made to it under the *Judicial Review Act 1991*, part 3 or 5 in relation to matters mentioned in subsection (1)."

[14] The Applicant also refers to other decisions adopting a similar approach under the *SPA*.[49] There is also reference to two decisions which adopt the same approach under the *PA* and the *PECA*: *Perivall Pty Ltd v Rockhampton Regional Council & Ors*[50]and *Mirvac Queensland Pty Ltd v Ipswich City Council & Anor*.[51] The later decision proceeds by simply noting that the application for relief pursuant to s 11 of the *PECA* is "brought upon the basis of administrative law type errors in the Council's decision-making process".[52] Although there is reference to s 231(3) of the *PA*, in the context of noting that there were no reasons given, nor obligation for reasons, in respect of the decision the subject of the application, there is no further reference to that section. The reference to *Perivall*, is simply to the following observation:[53]

> "First, in the absence of a right of appeal, the only basis for challenge is by way of declaratory proceedings. The review is akin to judicial review of the relevant administrative actions."[54]

[15] *Perivall* involved complicated circumstances arising under both the *IPA* and the *SPA* and the transitional provisions in the *PA* and the *PECA*, which had been enacted before the matter was brought before the Court as an appeal, by a submitter to the development application, and was concerned with the determination of what had been identified as preliminary issues in respect of that appeal.[55] In the judgment and in respect of dealing

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49 See Applicant's written submissions at footnote 57.
50 [2018] QPEC 46, at [68].
51 (2019) QPELR 786, at [5] and [9].
52 Ibid, at [5].
53 [2018] QPEC 46, at [68].
54 The cited authorities are *Eschenko v Cummins & Ors* [2000] QPEC 37; [2000] QPELR 386, 389 [20]; *Ferreyra & Ors v Brisbane City Council & Anor* [2016] QPEC 10; [2016] QPELR 334.
55 *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46, at [4]-[5].

with the submission of the Co-Respondent that the appellant was "advancing a collateral challenge to a decision made by Council during the development assessment processes in circumstances where the legislation provides no appeal right with respect to such decisions"[56], it was, after review of some statutory limits of the jurisdiction of the Court in respect of appeals, relevantly observed:

> "[48] By way of contrast, under s 180 of the *Planning Act 2016*, there is open standing to commence a proceeding for an enforcement order. Pursuant to r 8 of the *Planning and Environment Court Rules 2018* (Qld), the party to be named as respondent is the entity directly affected by the relief sought. There is no time limit within which such a proceeding may be commenced.
>
> [49] Similarly, under s 11 of *the Planning and Environment Court Act* 2016, any person may commence a proceeding seeking a declaration about *"a matter done, to be done or that should have been done"* for the *Planning and Environment Court Act 2016* or the *Planning Act 2016*. Pursuant to s 76(4) of the *Planning and Environment Court Act 2016*, the declaratory jurisdiction is expanded to include *"a matter done, to be done or that should have been done"* for the *Sustainable Planning Act 2009*. There is no time limit within which a declaratory proceeding must be commenced."[57] (citations omitted)

Then and after further determination of the limitation of an appeal to the decision against which the appeal was brought and not some other anterior decision,[58] it was further observed:

> "[61] Fourth, the existence of an express declaratory power, under s 11 and s 76(4) of the *Planning and Environment Court Act 2016*, which permits a challenge to matters done, and decisions made, during the development assessment process supports a legislative intention that the court's jurisdiction on appeal does not extend to such matters.
>
> [62] That anterior decisions are to be subject to judicial review, rather than a hearing anew in an appeal, is supported by s 231 of the *Planning Act 2016*. It states:
>
> '**231 Other appeals**
>
> (1) Subject to this chapter, schedule 1 and the P&E Court Act, unless the Supreme Court decides a decision or other matter under this Act is affected by jurisdictional error, the decision or matter is non-appealable.

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56 Ibid, at [31].
57 Ibid, at [48]-[49].
58 *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46, at [59]-[60].

(2) The *Judicial Review Act 1991*, part 5 applies to the decision or matter to the extent it is affected by jurisdictional error.

(3) A person who, but for subsection (1) could have made an application under the *Judicial Review Act 1991* in relation to the decision or matter, may apply under part 4 of that Act for a statement of reasons in relation to the decision or matter.

(4) In this section—

decision includes—

(a) conduct engaged in for the purpose of making a decision; and

(b) other conduct that relates to the making of a decision; and

(c) the making of a decision or the failure to make a decision; and

(d) a purported decision; and

(e) a deemed refusal.

non-appealable, for a decision or matter, means the decision or matter—

(a) is final and conclusive; and

(b) may not be challenged, appealed against, reviewed, quashed, set aside or called into question in any other way under the *Judicial Review Act 1991* or otherwise, whether by the Supreme Court, another court, any tribunal or another entity; and

(c) is not subject to any declaratory, injunctive or other order of the Supreme Court, another court, any tribunal or another entity on any ground.'

[63] The provision contemplates that decisions and conduct under the Act cannot be challenged unless express provision is made for the challenge in the chapter, Schedule 1 of the *Planning Act 2016* or the *Planning and Environment Court Act 2016*. The only express provision made for challenging conduct and decisions during the application process is the declaratory power in s 11 of *the Planning and Environment Court Act 2016*."[59]

It may then be noted that the observations in paragraph [68] are in the context of explanation in rejection of the appellant's invitation to convert or consider the matters sought to be raised, as if they were raised on an originating application, rather than an appeal.

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59 *Perivall Pty Ltd v Rockhampton Regional Council & Ors* [2018] QPEC 46, at [61]-[63].

[16] Whilst the observation in paragraph [63] is strictly obiter dictum, it reflects what has been noted above, as to longstanding practice and recognised jurisdiction of this Court. It is, however, also directed at quite different circumstances.

[17] Whilst the key to relevantly understanding the provisions in s 231 of the *PA* is to note that the exceptions in s 231(1) include the *PECA* and therefore the jurisdiction given to this Court pursuant to s 11, this provision is expressed in markedly different terms to those which have previously influenced what has been noted as the approach of the Court.[60] Clearly, what is now expressly provided, in contrast to the previous position under the *IPA* and the *SPA*, is for jurisdiction of the Supreme Court pursuant to Part 5 of the *JRA*, subject to the establishment of jurisdictional error, and to otherwise oust any other jurisdiction to review and grant relief in respect of any decision (as expansively defined) or other matter under the *PA*.

[18] The purpose of the change introduced in s 231 of the *PA*, by the expressed recognition of the jurisdiction of the Supreme Court, is informed by reference to the explanatory notes for the *Planning Bill* 2015,[61] which states:

> "It is considered necessary to include such an express provision in the Bill given the broad privative clause ousting review under the *Judicial Review Act 1991* and also following the decision of the High Court in *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; [2010] HCA 1."[62]

Whilst it remains unclear as to why such necessity was thought to arise from the clarification of that position, as applicable to the pre-existing state of the law pursuant to s 757(3) of the *SPA*, in the *Kirk* decision, there is also confirmation to be found that the introductory words to s 231 of the *PA* are, as they appear,[63] intended to carve out and to preserve or retain what had been the recognised pre-existent jurisdiction of the Planning and Environment Court, including its declaratory jurisdiction:

> "The Bill provides broad appeal rights for administrative decision making under the development assessment system, and the *Planning and Environment Court Bill 2015* provides comprehensive declaratory

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60 Subsequently to what was noted as the terms of s 231 in *Perivall*, there have been amendments made to add a reference to s 316(2) of the *PA* as an exception to the operation of s 231(1), and by s 123 of the *Economic Development and Other Legislation Amendment Act* No 11 of 2019, the heading to the provision has changed from "Other appeals" to "Non-appealable decisions and matters".

61 The *Planning Bill* 2015 was ultimately enacted from 25 May 2016 as the *Planning Act* 2016.

62 See explanatory notes for the *Planning Bill* 2015, at p 155, under the heading "Other appeals" and in reference to *cl 230*.

63 See *AIA*, s 14B.

> powers in respect of other administrative decisions under the Bill. Both appeals and declaratory proceedings can be brought in the Planning and Environment Court and in the Development Tribunal.
>
> These comprehensive types of appeal and declaratory proceedings are intended to provide a complete alternative to judicial review under the *Judicial Review Act 1991*. The Planning and Environment Court is a specialist jurisdiction with expertise in planning and development assessment matters, and can consequently deal with declaratory proceedings concerning these matters more efficiently than the Supreme Court could deal with them under the *Judicial Review Act 1991*, without sacrificing the quality of decision making.
>
> Section 12 of the *Judicial Review Act 1991* provides that the Supreme Court may dismiss an application for judicial review if another law makes adequate provision for a review of the matter. This clause effectively confirms that this Bill does provide an appropriate alternative avenue of review, thereby removing confusion, and preventing applicants making costly, time consuming and unsuccessful applications under the *Judicial Review Act 1991*. This clause does not curtail the rights of persons to have administrative decisions reviewed judicially. In summary, the declaratory jurisdiction of the Planning and Environment Court allows persons seeking a review of administrative decisions under the Bill to be given greater access to a cost effective, specialist jurisdiction."[64]

Further confirmation of such legislative intent is to be found in the explanatory notes for the *Planning and Environment Court Bill* 2015, which observes in respect of the proposal enacted as s 11 of the *PECA*:

> "The intent of this clause, along with clause 12, is to retain the current declaratory jurisdiction of the Planning and Environment Court, as provided in current section 456 SPA."[65]

[19] Despite the amorphous nature of description that the exercise of the declaratory jurisdiction of this Court in cases of this kind is open "analogous to [or "akin to" or "in the nature of"] proceedings for judicial review", they are not, as such, brought pursuant to or by reference to the *JRA* and therefore must necessarily engage more generally recognised principles of review of administrative decisions.

[20] As has already been noted in reference to the decision in *Ferreyra*,[66] and as properly recognised for the Applicant, the jurisdiction is to be exercised in review of the legitimacy or legality of the decision, having regard to the power reposed in the relevant

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64 See explanatory notes for the *Planning Bill* 2015, at pp 155-156.
65 See explanatory notes for the *Planning and Environment Court Bill* 2015, at p 16.
66 See para [11] above.

council, by the legislature, to make such a decision as the relevant planning body. In *Fraser Coast Regional Council v Walter Elliott Holdings Pty Ltd*,[67] the following observations were made in respect of an exercise of power pursuant to s 456 of the *SPA*:

> "The power given to the primary judge under s 456 was not analogous to an appeal against the Council's fact finding under s 636(1) as to the additional demand placed upon trunk infrastructure that would be generated by the respondent's development. The proceedings for declaratory relief under statutory provisions like s 456 are analogous to judicial review proceedings. They are concerned with whether the impugned decision was validly made; they are not a merits appeal from fact finding. The Planning and Environment Court acting under s 456 is not a planning authority; it is not empowered to simply set aside a decision of the Council and replace it with its own. The question for the court was whether the Council had acted beyond power. As a general rule, the declaratory power is no substitute for the appellate process." (citations omitted)

[21] However, and to any extent to which it might be thought that the jurisdiction of this Court would be, like that preserved for the Supreme Court, limited to review of jurisdictional error, it is necessary to understand that in the *Kirk* decision, the High Court noted a distinction between courts and administrative tribunals (or, as here, administrative decision makers), in the sense that jurisdictional error by the latter is identified:

> "… in the lack of authority of an administrative tribunal (at least in the absence of contrary intent in the statute or other instrument establishing it) 'either to authoritatively determine questions of law or to make an order or decision otherwise than in accordance with the law'..."[68]

Also the earlier approach of that court in *Craig v South Australia*,[69] was endorsed:

> "If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it."

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67 [2017] 1 Qd R 13, at [40].
68 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, at [68].
69 (1995) 184 CLR 163, at 179.

[22] The constraints of such review have been more recently noted in *Plaintiff M64/2015 v Minister for Immigration and Border Protection*:[70]

> "These constraints are aspects of the scope of judicial review of administrative action, which is confined to the legality of the Delegate's decision. In particular, judicial review is concerned with whether the Delegate's decision was one which he was authorised to make; it is not:
>
> > 'an appellate procedure enabling either a general review of the … decision… or a substitution of the … decision which the … court thinks should have been made.'"[71]

Whether evidence on the merits of the Council's decision is admissible?

[23] It follows from the identified focus upon the legitimacy or legality of the decision made by a relevant council, that the concern will be with the decision and the materials upon which the decision was premised and, as discussed further below, any reasons which are provided, particularly in the sense of whether there has been compliance with the requirements of s 60 of the *Planning Act*.

[24] Ordinally, therefore, material which was not before the decision maker, will not be admissible.[72] However, as is noted in the passage approved from the judgment in *Craig*, in limited circumstances the enquiry may be as to whether there has been an erroneous finding or mistaken conclusion. As was observed in *Ferreyra*, where there is a ground asserting legal unreasonableness (which as identified in *Minister for Immigration v Li* [73] is an objectively drawn conclusion or inference, where no particular error of reasoning may be otherwise identifiable, like a conclusion as to an unreasonable or plainly unjust exercise of discretion in accordance with the principles established in *House v The King*[74], and not limited to what is in effect any rational, if not bizarre decision – which is to say one that is so unreasonable that no reasonable person could have arrived at it),

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70 (2015) 327 ALR 8, at [23], per French CJ, Bell, Keane and Gordon JJ.

71 Referring to *Craig v South Australia* (1995) 184 CLR 163, at 175; *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, at 41-42; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36.

72 *Ferreyra v Brisbane City Council & Anor* [2016] QPELR 334, at [7]; citing *Chan v Minister for Immigration & Ethnic Affairs* (1989) 169 CLR 379, at 391 and *Australian Retailers Association & Ors v Reserve Bank of Australia* (2005) 148 FCR 446, at [445]-[446].

73 (2013) 249 CLR 332, at [68].

74 (1936) 55 CLR 499 at 505.

expert evidence may be admissible to assist the court in respect of specialised or technical matters.[75]

[25] Here and notwithstanding that there is no ground of review engaging the concept of legal unreasonableness, the Second Respondent seeks to rely on the following expert reports:

(a) reports provided by experts:

(i) Christopher John Schomburgk in relation to Town Planning matters;[76]

(ii) Paul Anthony King in relation to lighting impacts;[77]

(iii) Lauren Maree Thorburn in relation to turtle ecology.[78]

As far as consideration of the grounds of review which are raised is concerned, the Applicant's objection to the admissibility of these reports is upheld and particularly as contended, upon the misplaced reliance in pre-hearing correspondence upon the above noted observation in *Ferreyra* that such evidence "may be admissible in proceedings of this nature"[79]. But and as is apparent from the written and oral submissions made to the Court for the Second Respondent, the reliance upon this evidence is directed at contentions as to discretionary considerations in respect of the relief sought by the Applicant.[80] To the extent it may be necessary to do so, those considerations are addressed later in these reasons and as they may arise in respect of any finding of relevant error.

[26] However, what may be conveniently noted now is that as acknowledged for the Applicant,[81] relief in terms of setting aside an administrative decision affected by error of law or jurisdictional error, may not follow if the error could not have materially affected the decision. As explained in *Hossain v Minister for Immigration and Border Protection*:[82]

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75 *Ferreyra v Brisbane City Council & Anor* [2016] QPELR 334 at [9]; citing *Australian Retailers Association & Ors v Reserve Bank of Australia* (2005) 148 FCR 446 at [376], [457]-[460] and [471].
76 Court Doc 23, filed 14/10/20.
77 Court Doc 22, filed 14/10/20.
78 Court Doc 24, filed 14/10/20.
79 See Applicant's written submissions, at [100]-[101].
80 See Second Respondent's written submissions at [47].
81 Applicant's written submissions, at [162].
82 (2019) 264 CLR 421 at [29]-[31], per Kiefel CJ, Gageler and Keane JJ (citations omitted).

> "29. That a decision-maker "must proceed by reference to correct legal principles, correctly applied" is an ordinarily (although not universally) implied condition of a statutory conferral of decision-making authority. Ordinarily, a statute which impliedly requires that condition or another condition to be observed in the course of a decision-making process is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition. The statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of noncompliance.
>
> 30. Whilst a statute on its proper construction might set a higher or lower threshold of materiality, the threshold of materiality would not ordinarily be met in the event of a failure to comply with a condition if complying with the condition could have made no difference to the decision that was made in the circumstances in which that decision was made. The threshold would not ordinarily be met, for example, where a failure to afford procedural fairness did not deprive the person who was denied an opportunity to be heard of "the possibility of a successful outcome", or where a decision-maker failed to take into account a mandatory consideration which in all the circumstances was "so insignificant that the failure to take it into account could not have materially affected" the decision that was made (38).
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> 31. Thus, as it was put in *Wei v Minister for Immigration and Border Protection* , "[j]urisdictional error, in the sense relevant to the availability of relief under s 75(v) of the Constitution in the light of s 474 of the *Migration Act*, consists of a material breach of an express or implied condition of the valid exercise of a decision-making power conferred by that Act". Ordinarily, as here, breach of a condition cannot be material unless compliance with the condition could have resulted in the making of a different decision."

It is also convenient to note the following observations in the judgment of Edelman J:[83]

> "73. It is also necessary to distinguish the concept of materiality from the residual discretion to refuse relief, which was also the subject of submissions on this appeal. The concept of materiality, whether it is express or implied, is necessary for a conclusion that (i) a decision is beyond power or (ii) whether or not the decision is beyond power, there is an actionable error of law on the face of the record. In contrast, the residual discretion arises if certiorari would otherwise be available for one of those reasons.
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> 74. There has long been a residual discretion to refuse to issue a writ of certiorari even where a jurisdictional error is established. In *R v*

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[83] (2019) 264 CLR 421 at [73]-[74], per Edelman J (citation omitted), with whom Nettle J substantially agreed at [39]-[43].

> *Commonwealth Court of Conciliation and Arbitration; Ex parte Ozone Theatres (Aust) Ltd*, this Court said that discretion might be exercised to refuse a writ of certiorari "if no useful result could ensue, if the party has been guilty of unwarrantable delay or if there has been bad faith on the part of the applicant, either in the transaction out of which the duty to be enforced arises or towards the court to which the application is made". Reference to the potential exercise of discretion where no useful result could ensue thus looks forward to the utility of another hearing. Although the residual discretion is not confined to being "forward looking", it contrasts with the usual consideration of materiality, discussed above, which looks backwards to whether the error would have made any difference to the result."

[27] The simple position of the Applicant is that given the requirement in s 60(2)(a) of the *PA*, for compliance with all assessment benchmarks, it would necessarily follow that any demonstrated failure to properly have regard to any relevant benchmark, could have affected the decision.

Interpretation of a Statement of Reasons, in the context of the documents before the decision maker

[28] In respect of the requirements that the requisite notices state "the reasons" for the decision, it is to be noted that there is no definition of what is to be contained within the reasons for the decision, in the *PA*. However, reference may be made to s 27B of the *Acts Interpretation Act* 1954 ("*AIA"*), which provides:

> "**27B Content of statement of reasons for decision**
> If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression 'reasons', 'grounds' or another expression is used), the instrument giving the reasons must also—
> (a) set out the findings on material questions of fact; and
> (b) refer to the evidence or other material on which those findings were based."

Further and having regard to what has been noted as the provision in s 231(3) of the *PA*, which notwithstanding the general exclusion of the application of the *JRA*, permits a request for a statement of reasons under Part 4 of that Act and therefore pursuant to ss 32 and 33 and in accordance with s 34, which states that "[t]he statement must contain the reasons for the decision", noting that "reasons" is defined in s 3 as follows:

> ***"reasons***, in relation to a decision, means—
> (a) findings on material questions of fact; and

(b) a reference to the evidence or other material on which the findings were based;

as well as the reasons for the decision."

[29] The Applicant refers to *Gold Coast City Council v Sunland Group Ltd*,[84] for useful exposition of the requirements for "reasons" in respect of a decision to issue an Infrastructure Charges Notice under the *SPA*. It is particularly noted that:

(a) After review of the applicable principles of statutory interpretation and the statutory scheme of the SPA, it was there observed:

> "[63] The review above demonstrates that the SPA is a statutory instrument that regulates all aspects of development applications, assessment, decision-making and appeals in a detailed and prescriptive fashion. An applicant's rights to develop land, and for that purpose to make and pursue a development application, are completely governed by the SPA's provisions. So, too, are the rights and obligations on the assessment manager, to decide the application and notify the result to the applicant. Similarly, the applicant's rights to challenge the decision are fully governed by the SPA.
>
> [64] The object of that legislative approach can be seen from the purpose of the SPA, namely to seek to achieve ecological sustainability by managing the process by which development takes place, including ensuring the process is accountable, effective and efficient. The assessment manager (the Council here) is obliged to perform its functions and exercise its powers in a way that advances that purpose, by ensuring the decision-making processes are accountable and effective.
>
> [65] Further, the SPA draws a distinction between the notification of a decision where all that is required is the mere fact of it having been made, and where an explanation for that decision is required. Into the former category falls decision notices, approvals, or notices stating factual matters. Into the latter are those decisions where the recipient is required to be told why the decision was reached, or explaining the basis for a state of satisfaction, such as a refusal of an application, a conclusion of non-compliance or conflict, a requirement to take action, or an explanation why there was inaction. In the latter category the requirement of explanation is signified by use of phrases such as "reasons **for** the

[84] (2019) 1 QR 304.

> decision" or "reason **why**" something was done."[85] (emphasis as in original)

(b) Similar reasoning is applicable to the *PA*, particularly noting the references to "the reasons why" in s 63(5)(e) and s 83(9)(e), in requiring an explanation for, rather than statement of, the decision; and

(c) Similarly to the conclusion reached there, the absence of any definition of "reasons" in the PA invites the application of s 27B of the *AIA*.[86]

[30] Notwithstanding that the *Sunland Group* decision was concerned with provisions in different legislation and in particular reference to a different type of decision (for which there was a right of appeal) and particularly concerned with the issue as to whether the application of s 27(B) of the *AIA* was excluded by contrary intention,[87] the application of s 27B of the *AIA* to the reasons required by s 63(5)(e) and s 83(9)(e) was not here put in issue. Neither was there any specific issue raised in respect of the engagement of a similar definition of "reasons" in s 3 of the *JRA*, in consequence of the provision in s 231(3) of the *PA* providing a right to seek reasons as provided for under Part 4 of the *JRA*.

[31] For the Applicant, it is stated that there is no issue that the reasons provided under ss 63(5) and 83(9) did not comply with s 27B of the *AIA*, when read together with the reasons provided under Part 4 of the *JRA*.[88] Further, it is stated that the issue raised in demonstration of the purported errors in the AOA, engage consideration of how those reasons should be interpreted, including in having regard to omissions of substance, rather than any challenge to the adequacy of the reasons.[89] It is further noted that given the or constraints or limited nature of available judicial review of the decision in issue here, the statements of reasons are of importance in exposing how the decision was reached and whether the correct decision-making process was followed.[90]

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85 Ibid, at [63]-[65].
86 Ibid at [83]; citing *Pfeiffer v Stevens* (2001) 209 CLR 57, at [25].
87 Having regard to s 4 of the *AIA*; see [2019] 1 Qd R 304, at [72]-[86].
88 Applicant's written submissions, at [114]-[115]. More particularly, it is conceded that any deficiency in statement of the evidence relied upon in the earlier reasons, has been sufficiently remedied by the statement of reasons given under the *JRA*.
89 Ibid, at [116].
90 Ibid, at [117]; citing the cases referred to in *Sunland,* at [99].

[32] In the context of the positive duty placed on a decision maker to comply with the statutory command to state the reasons for a decision,[91] it is otherwise noted that the reasons of an administrative decision maker "are meant to inform and no to be scrutinised by over-zealous judicial review by seeking to discern whether some inadequacy might be gleaned from the way in which the reasons are expressed."[92] It is also of benefit to note what immediately follows the passage to which the Applicant refers:

> "In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision. This has been made clear may times in this Court. For example, it was said by Brennan J in *Attorney-General (NSW) v Quin:*
>
> > 'The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in doing so, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.'" [93] (citations omitted)

The Applicant also refers to the following observations in the same case:

> "When the Full Court referred to "beneficial construction", it sought to adopt an approach mandated by a long series of cases, the best exemplar of which is *Collector of Customs v Pozzolanic*. In that case, a Full Court of the Federal Court (Neaves, French and Cooper JJ) collected authorities for various propositions as to the practical restraints on judicial review. It was said that a court should not be "concerned with looseness in the language ... nor with unhappy phrasing" of the reasons of an administrative decision-maker. The Court continued: "The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error."
>
> These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed…"[94](citations omitted)

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91 See *Minister for Immigration Local Government and Ethnic Affairs v Taveli* (1990) 23 FCR 162, at 179.
92 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, at 272.
93 Ibid.
94 Ibid, at 271-272.

[33] To similar effect are the submissions of each respondent urging recognition that proceedings of this kind are not to be allowed to be in effect or "quasi-merits" review of an approval. Each respondent made reference to *Wheldon and Armview Pty Ltd v Logan City Council and RG Property Three Pty Ltd as Trustee*,[95] where the following was observed in respect of the precursor to s 11 of the *PA*, in s 456 of the *SPA*:

> "[17] The relief sought by the applicants is for a declaration and consequential orders under s. 456 of *SPA*.
>
> [18] Unlike appeal proceedings, the court is not concerned with the merits of the approval as in a hearing anew. Proceedings of this type are analogous to judicial review proceedings having regard to the material before the council.
>
> [19] Of judicial review proceedings, the High Court said in *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*:
>
> *'[114] Regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of findings of fact, a reconsideration of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated has the repository of the decision making power.*'" (citations omitted)

[34] As is apparent from the development of its submissions in reference to the documents or materials which were before the relevant decision-maker, the Applicant does not contest the appropriateness of regard being had to such material.[96] More particularly, the Applicant's submissions as to the purported errors are premised upon contentions that:

(a) identification of statutory misconstruction by inference from a statement of reasons is not novel and often becomes apparent by analysis of the reasoning process and revelation of the legal path undertaken by the decision maker;[97] and

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95 [2015] QPELR 640, at [17]-[19]; First Respondent's written submissions at [3]-[5]; second respondent's written submissions at [27]-[30] and [32]-[33].

96 See also *Holcim (Aust) Pty Ltd v Brisbane City Council & Ors* (2012) 190 LGERA 406, at [16] and the cases there cited.

97 Applicant's written submissions, at [120].

(b) where a decision maker fails to mention a matter in the statement of reasons, it may lead to an inference that it was regarded as irrelevant or that there was failure to consider it.[98] In support, reference is made to *Mees v Kemp*:[99]

> "[54] Sections 13(1) and (2), read together, require a decision-maker who has been requested to give reasons for a decision to provide:
>
> 1. A statement in writing.
> 2. Setting out the findings on material questions of fact.
> 3. Referring to the evidence or other material on which those findings were based.
> 4. Giving the reasons for the decision.
>
> The section requires that reasons be furnished 'which make intelligible the true basis of the decision' — *ARM Constructions Pty Ltd v Commissioner of Taxation* (1986) 10 FCR 197 at 204 (Burchett J). It is remedial and supplies the deficiency of the common law — *Australian Institute of Marine and Power Engineers v Secretary, Department of Transport* (1986) 13 FCR 124 at 130 (Gummow J). It is designed to provide persons affected by a decision with sufficient information to decide whether to accept it or to pursue the matter further with the administrative process or through the Court — *Ansett Transport Industries (Operations) Ltd v Secretary, Department of Aviation* (1987) 73 ALR 193 at 197 (Lockhart J).
>
> [55] The section does not require that the reasons are set out with the degree of precision or detail which might be appropriate to a judicial decision:
>
> > But it demands a statement of the real findings and the real reasons. It is an incident of the obligation that the statement should not omit findings or reasons for the decision which may, in the light of a pending review application, appear to be irrelevant or reflective of some false assumption or pre-judgment — *Minister for Immigration and Ethnic Affairs v Taveli* (1990) 23 FCR 162 at 179 (French J)"

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98 Ibid, at [121].

99 (2005) 141 FCR 385 at [54]-[55]. And also *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, at [5], [37] and [69].

[35] For the Applicant there was also acknowledgment of the recognition, in *Holcim (Aust) Pty Ltd v Brisbane City Council*,[100] of the following observations in *Notaris v Waverley Council*:[101]

> "[63] Further Arden referred to *Notaris v Waverley City Council* where Tobias JA (with whom Mason P and Hodgson JA agreed) said:-
>
> > 'As the primary judge correctly observed…, the Council was at great pains to inform itself before making its decision. As his Honour also noted, there was an intensive and far-reaching investigation over some 13 months which resulted in a "plethora of information available to the Council in order to enable a full and proper assessment of the impact of height, floor space ration, size, overshadowing, solar access, car parking and vehicle access." In my opinion, the evidence comprising the contents of the Council's files on the application provide ample support for this finding.
> >
> > Although it may be true that in the relevant reports there is no numerical reference to the relevant provisions of DCP2 or, for that matter, DCP14, the nature of the control and its detail was clearly referred to in the various reports in terms of the maximum permissible floor space ratio, the overall height of the building, the permissible external wall heights and setbacks. AS Hodgson JA, with whom Ipp JA and Davies AJA agreed, said in *Hill v Woollahra Municipal Council* (2003) 127 LGERA 7 at [53]:
> >
> > > … so long as the body in question does address the question it is required to address, it does not have to refer explicitly to the statute or instrument that poses the question: the body is required to address the substance of the question, not the fact that the question is posed by a particular statute or instrument. Explicit reference to the statute or instrument will help confirm that the body did address the right question, but absence of such reference does not of itself indicate that it did not.
> >
> > Furthermore, as a general proposition, material in the possession of the Council will be treated as being in the possession of the councillors: *Schroders Australia Property Management Ltd v Shoalhaven City Council*

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100 (2012) 190 LGERA 460, at [63].

101 (2007) 161 LGERA 230, at [264]. See also *Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection & Anor* (2016) 222 LGERA 122, at [21(d)], for endorsement of the passage drawn from *Hill v Woollahra Municipal Council.*

> [2001] NSWCA 74 at [67] per Ipp JA, with whom Spigelman CJ and Sheller JA agreed.'" (citations omitted)

[36] Also for the Applicant, it is contended to be noteworthy that the First Respondent has chosen to not supplement its reasons with any affidavits from the decision makers involved.[102] It is then contended the absence of such evidence allows for an inference that the evidence would not have assisted the First Respondent's case, allowing the Court to more confidently draw inferences available to be drawn from the evidence that is before the Court.[103]

[37] Whilst there are the examples, to which reference is made, of instances where in the proceeding for judicial review, the decision maker became a witness, there is no particular explanation of the circumstances seen as therein warranting what may be regarded as an uncommon approach.

[38] The difficulty in the attempt to apply the *Jones v Dunkel* reasoning against a decision maker, was recognised by the High Court in *Muin v Refugee Review Tribunal*[104] as lying in an expectation as to the impartiality and independence of the role performed by the decision maker and therefore a general absence of expectation that a decision maker would give evidence beyond what is set out in published reasons. Whilst the observations in that case were specifically directed at the position of a decision maker who was a member of statutorily established tribunal and with particular regard to the recognised privileges and immunities of such a tribunal, the underlying principle as to the potential challenge to the expectation of impartiality and independence is particularly germane to the position of the First Respondent which under the *PA* is given the primary responsibility for daily making decisions of the kind in issue here.

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102 Reference is made to *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (2006) 232 ALR 510, at [23] and [31]-[38] and *Land Services of Coast and Country Inc v Chief Executive, Department of Environment and Heritage Protection and Anor* (2016) 222 LGERA 122, at [13] and [21(b)] as examples of a decision-maker being permitted to supplement a statement of reasons with further explanation of the matters considered, in a later affidavit.

103 Applicant's written submissions, at [126] citing *Jones v Dunkel* (1959) 101 CLR 298 and *Booth v Bosworth* (2001) 114 FCR 39 at [42(c)].

104 (2002) 190 ALR 601, at [25] per Gleeson CJ and also [118] per McHugh J, [197] per Kirby J and [229]-[230] per Callinan J.

[39] This is particularly so where, as has been noted above, the *PA* has provided for the provision of reasons for such decisions, including for the purposes of proceedings of this kind and as the Applicant has obtained, upon request made pursuant to s 231(3).

[40] Accordingly, it will be necessary to look to what is disclosed in the materials before the Court for any indicia of errors contended by the Applicant.

Threshold difficulties?

[41] Before turning to consideration of the purported errors, it is convenient to note what are characterised by the Second Respondent as threshold difficulties for the Applicant.

[42] It is convenient to commence with what is described, by the Applicant, as the second threshold difficulty,[105] and to note that it relates to what is noted for the Applicant as a fundamental disagreement as to the interpretation of the legislative framework including the Planning Scheme, as to what is required as to consideration of the assessment benchmarks.[106] This issue is discussed below in the context of examination of the purported errors.

[43] The Second Respondent's first contention is that the approach of the Applicant is "unsound at law", in that whilst the AOA does seek that both the negotiated decision notice issued on 12 September 2019 and the notice of approval of the minor change to conditions issued on 30 July 2020 be declared invalid and of no legal effect (with consequential orders setting aside each of the decisions of 30 April 2019 and 10 September 2019 approving the development, the decision of 12 September 2019 to issue the negotiated decision notice and the decisions of 23 July 2020 and 30 July 2020, to, respectively, approve and issue a decision notice approving the minor change application for the development and remitting the matter to council for reconsideration according to law), no specific error is alleged in respect of the minor change decision. Rather, the purported errors are sought to be identified in respect of the earlier decisions, with it being pointed out that "all the applicant says about the minor change approval is that it

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105 Second Respondent's written submissions, at [39]-[43]; See also the First Respondent's written submissions, at [27]-[28].

106 Applicant's written submissions, at [62]-[66].

did not "remedy" errors that it alleges arises on the original decision and negotiated decision".[107]

[44] On the hearing of the application, for the Applicant, particular reference was made to the decision in *Minister for Immigration and Multicultural Affairs v Bhardwaj*,[108] in support of the proposition that a later decision may serve to correct and error in an earlier decision or decision making process. However, the passages to which reference is made relate to respectively expressed views as to the legal effect of an administrative decision afflicted by jurisdictional error and the ability of the decision maker in such circumstances to revisit and remake the decision. For the reasons to follow, that is neither what the Applicant asserts nor what happened in the present case.

[45] As may be accepted and is consistent with the approach of the Applicant in seeking relief in respect of the approval constituted by the decision notice issued upon the decision as to the minor change Applicant, it is that approval which is extant and may be given effect by the Second Respondent. This follows from an understanding that pursuant to the *PA*:

(a) Division 1 of Part 5 deals with the effect of a development approval, which is generally provided (subject to the expressed exceptions, largely concerned with the appeal period) as being from the date the approval is given;

(b) by s 73, while an approval is in effect, it attaches to the premises and binds the owner, the owner's successors in title and any occupier of premises;

(c) by s 49(1), "a development approval" is defined to include a "development permit" which is defined in s 49(3) as "the part of a decision notice for a development application that authorises the carrying out of assessable development to the extent stated in the decision notice." By s 49(6) and in that section,

> "decision notice means –
>
> (a) a decision notice under s 63(1); or
> (b) a decision notice under s 64(6); or
> (c) a negotiated decision notice other than a negotiated decision notice for a change application"

Further, it is noted that by s 49(5), it is provided that

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107 Second Respondent's written submissions, at [35]; Applicant's written submissions, at [167]; and AOA, at [39], [41] and [43].

108 (2002) 209 CLR 597, at [11]-[14], [51]-[54], [67], [147], [155] and [163]-[165]; See also Applicant's written submissions, at [54].

"(5) In this Act, a reference to a development approval—
(a) means the development approval as changed from time to time; and
(b) includes the development conditions imposed on the approval."

And also that "development application" is defined in Schedule 2 as meaning "an application for a development approval";

(d) whilst there is express provision in s 76(4) that a negotiated decision notice replaces the decision notice (as to which the change representations are permitted by s 75(1)) for the development application, it is to be noted that s 75(3) states:

> "A development permit is the part of a decision notice for a development application that authorises the carrying out of the assessable development to the extent stated in the decision notice."; and

(e) there is no such express provision in respect of a change application permitted by s 78. That is, an application to "change a development approval", which as far as it is for a minor change to a development approval, is assessed in accordance with s 81 and determined pursuant to s 81A(2):

"(2) After assessing the change application under section 81, the responsible entity must decide to—
(a) make the change, with or without imposing or amending development conditions in relation to the change; or
(b) refuse to make the change."

Further, the requirement for a decision notice to be given about the decision on a change application pursuant to s 83(1) is to be in accordance with ss 83(3) and (4):

"(3) If there is no affected entity for the change application, the responsible entity must decide the application within 20 business days after receiving the application.
(4) If there is an affected entity for the change application, the responsible entity—
(a) must not decide the application until—
(i) the responsible entity receives a pre-request response notice, or response notice, from the affected entity; or
(ii) the end of 20 business days after receiving the application; but
(b) must decide the application within 25 business days after receiving the application."

[46] Accordingly, it may be seen that there is a nexus or relationship recognised in respect of the existing approvals for which change representations and change application is permitted and requirement that the permitted change be identified in reference to the

approval which is changed. Moreover, there is no requirement that there be reconsideration of the basis upon which the earlier approval was given, except as far as is relevant to the assessment of the requested change:

(a) as far as the position in respect of change representations is concerned, s 76(1) provides:

> "The assessment manager must assess the change representations against and having regard to the matters that must be considered when assessing a development application, to the extent those matters are relevant."; and

(b) in respect of change applications:

(i) for a minor change pursuant to s 81(2)(da), consideration must be given to

> "all matters the responsible entity would or may assess against or have regard to, if the change application were a development application"; and

(ii) otherwise s 82(4) provides:

> "The responsible entity must consider the statutory instrument, or other document, as in effect when the development application for the development approval was properly made."

[47] Therefore, the contention raised for the Second Respondent that the Applicant has not "explained how, at law, it can challenge earlier decisions of the Council that resulted in approvals that are no longer in force, in a way that results in the invalidity of a later decision and development approval, that is extant"[109], is understanding the identified nexus or relationship of the decisions to which reference is made and the Applicant's contention that the purported errors indicate that, in effect, all of the approvals are premised upon a failure of the Council to address the right question in relation to the assessment benchmarks, particularly as such errors have not been corrected in the subsequent change decisions.[110] By way of contrast, there is express acknowledgment that the effect of the changes permitted upon the minor change application did remedy the originally contended errors as uncertainty in conditions in the negotiated decision notice.[111]

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109 Second Respondent's written submissions, at [38].

110 Applicant's written submissions, at [167]. It may be observed that should the Applicant succeed in obtaining the remedy that it seeks, including remission for further consideration according to law, that may be expected to be for assessment of the development application pursuant to s 60 of the *PA*, but upon the basis of inclusion of the materials accompanying the change representations and change application and is necessary, with direction to that effect by this Court.

111 See AOA, at [25]-[29] and Applicant's written submissions, at [32].

[48] For these reasons, it should not be accepted, as contended for the Second Respondent,[112] that absence of contention that "the minor change decision is, of itself, infected with legal error, is a significant discretionary factor that favours the Applicant not being granted the relief it seeks, even if legal error is demonstrated with either the original decision or the negotiated decision".

[49] As far as it may be necessary to do so, any such discretionary considerations in denial of the relief sought by the Applicant will be considered after determination of any purported error which might engage such relief.

The contended errors

[50] As has been noted, the Applicant's contentions are summarised in the issues to be considered as "failing to properly consider or misconstruing" the three particularised benchmarks. More particularly and as contended in the AOA, the contentions are that:

> (a) "31A. The Council's original decision and negotiated decision were affected by jurisdictional error and errors of law, and the procedures that were required by law to be observed in connection with the making of the decisions were not observed by:
>
> (a) failing to take into account a relevant consideration by failing to consider the assessment benchmark stated in the overall outcome in s 8.2.5.2(2)(i) of the *Coastal Protection Overlay Code* of the planning scheme, namely:
>
> "development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline vegetation."
>
> (b) erroneously construing the assessment benchmarks in the *Coastal Protection Overlay Code* and, consequently, the assessment benchmarks for the purposes of ss 60(2) and 76(1) of the PA, as not requiring the development adjacent to beachfront areas to be located and designed to protect the character of the beachfront when viewed from the beach and integrating with the surrounding natural landscape and skyline vegetation."[113];
>
> (b) "24. The Council's original decision and negotiated decision were affected by jurisdictional error and errors of law, and the procedures that were required by law to be observed in connection with the making of the decisions were not observed by:
>
> (a) failing to take into account a relevant consideration by failing

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112 Second Respondent's written submissions, at [36].

113 AOA, at [31A].

to consider the assessment benchmark in P012 of the *Coastal Protection Overlay Code* and, in particular, whether the development maintains or enhances coastal ecosystems including turtle nesting habitat on Buddina Beach;

(b) erroneously construing the assessment benchmarks in the *Coastal Protection Overlay Code* as only involving considerations of coastal hazards such as erosion and storm surge and not considering it to require the development to maintain or enhance coastal ecosystems including the nesting habitat on Buddina Beach; and/or

(c) erroneously construing P012 and, consequently, the assessment benchmarks for the purposes of ss 60(2) and 76(1) of the PA, on the basis that ~~it could approve impacts on turtles due to light from the development by imposing conditions that mitigated these impacts~~ the assessment benchmarks required impacts of the development on coastal ecosystems merely to be reduced and mitigated, rather than, as required by PO12, maintaining or enhancing the coastal ecosystems, including for turtles."[114]

(c) "30. The original decision and the ~~change~~ negotiated decision were affected by an error of law that 'it is also a feature of the zoning of the site that there is no express protection reflected in the relevant use code [the *High Density Residential Zone Code* of views for surrounding properties].'

31. That was an error of law as s 6.2.3.2(2)(f)(iii) of the *High Density Residential Zone Code* required development to ensure that there is no unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas." [115]

[51] The further contentions in respect of these errors are that:

"32 As a consequence of the errors set out in the preceding grounds, the original decision and the ~~change~~ negotiated decision were affected by legal error and jurisdictional error in that;

(a) the procedures that were required by law to be observed in connection with the making of the decisions were not observed;

(b) the making of the decisions involved improper exercises of the power conferred by the enactment in pursuance of which it was purported to be made, ~~including~~ by:

(i) failing to take a relevant consideration into account in the exercise of a power;

(ii) an exercise of a power in such a way that the result of the exercise of the power is uncertain; and/or

(c) the decisions involved an error or errors of law."[116]

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114 AOA, at [24].
115 Ibid, at [30]-[31].
116 Ibid, at [32].

[52] However, the real sense in which the grounds of review were pursued for the Applicant are to be found in the stated references to the following observations as to applicable principles:

(a) as emphasised in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[117] the ground of judicial review as to failure to take into account relevant considerations can only be made out by demonstrated failure to take into account something the decision-maker was bound to take into account in making the decision, as construed from the relevant legislation including its subject matter and purpose. Here the contention is that in each case there has been failure to consider 'the assessment benchmarks' which 'are clearly mandatory considerations under s 60(2) of the PA;[118]

(b) "where an administrative decision-maker is under a duty but misconceives the nature of the duty or has not applied themselves to the question which the law prescribes their decision or action may be set aside";[119] and

(c) in further elucidation of the seminal statement from *Craig v South Australia*,[120]

(i) "… there is said to be a 'constructive failure to exercise jurisdiction' when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies a wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form. A constructive failure to exercise jurisdiction may be disclosed by the Tribunal taking an irrelevant consideration into account. Equally, it may be disclosed by the failure to take a relevant matter into account.

... it may be that the failure of the Tribunal to take a particular matter into account indicates that, in the circumstances, the Tribunal has misunderstood its duty or applied itself to the wrong question and has, on that account, failed to conduct a review as required ...

... the failure of the Tribunal to make findings with respect to a particular matter may, at the same time, reveal failure to exercise jurisdiction, whether actual or constructive, and, also, failure to conduct a review as required by the Act. ..."[121]

(ii) "If the Tribunal identifies a wrong issue, asks itself a wrong question, ignores relevant material or relies on irrelevant

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117 (1986) 162 CLR 24, at 39-40.

118 Applicant's written submissions at [84].

119 Applicant's written submissions at [85]; citing *R v War Pensions Entitlement Appeal Tribunal; ex-parte Bott* (1933) 50 CLR 228, at 242.

120 (1995) 184 CLR 163, at 179; see para [21] above.

121 Applicant's written submissions, at [87]; citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, at [41]-[44] per Gaudron J.

material in such a way as affects the exercise of its powers, that will very often reveal that it has made an error in its understanding of the applicable law or has failed to apply that law correctly to the facts it found. If that is so, the ground [of error of law] is made out." [122]

(iii) "For the reasons which follow, the error of law the appellant identified was a jurisdictional error. The tribunal failed "to apply itself to the real question to be decided or [misunderstood] the nature of the opinion it [was] to form"[123]

(iv) **"**... empowering legislation can show that a tribunal's identification of what it considered to be relevant matters may demonstrate that it asked itself the wrong question, as explained [by Gaudron J at [69]] in *Yusuf*. Equally, it may demonstrate that a tribunal has misconstrued its functions and powers to decide, by taking into account matters which are irrelevant given the language of the empowering provision and the scope and purpose of the whole Act. Either form of error requires the impugned decision to be set aside; [124]

(v) "[24] Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as "involving jurisdictional error" is to describe that decision as having been made outside jurisdiction.

...

[27] Just as identification of the preconditions to and conditions of an exercise of decision-making power conferred by statute turns on the construction of the statute, so too does discernment of the extent of non-compliance which will result in an otherwise compliant decision lacking the characteristics necessary to be given force and effect by the statute turn on the construction of the statute. The question of whether a particular failure to comply with an express or implied statutory condition in purporting to make a particular decision is of a magnitude which has resulted in taking the decision outside the jurisdiction

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122 Applicant's written submissions, at [88]; citing *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, at [84] per McHugh, Gummow and Hayne JJ.

123 Applicant's written submissions, at [89]; citing *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1, at [25] per Hayne J.

124 Applicant's written submissions, at [90]; citing *FTZK v Minister for Immigration and Border Protection* (2014) 310 ALR 1, at 90 per Bell and Crennan JJ.

> conferred by the statute cannot be answered except by reference to the construction of the statute." [125]

As is correctly noted for the Applicant, "… the Court's jurisdiction is limited to determining whether the Council's decision-making process was lawful within the confines of normal judicial review …. [and] does not extend to reviewing the merits …. of the Council's decision". [126] It is also noted that there is no ground raising any question as to the reasonableness of any decision.

[53] The approach to interpretation of a planning scheme, is as set out in *Zappala Family Co Pty Ltd v Brisbane City Council*.[127] The same principles which apply to statutory construction are applicable, with allowance for a common-sense approach in reading the documents in a practical way, as a whole and as intending to achieve a balance between outcomes. Whilst bearing in mind the need to consider context and purpose from the outset, "the correct approach to statutory interpretation must begin and end with the text itself".[128]

[54] As was noted in respect of the Second Respondent's contentions as to "threshold issues", there is disagreement as to a construction issue, which the Applicant seeks to characterise as being "at the heart of both the proponent and Council's case".[129] As noted for the Applicant,[130] the contention in issue is expressed as follows in the Second Respondent's statement of facts, matters and contentions:[131]

> "(a) under the tables of assessment in Part 5 of the Planning Scheme, assessment benchmarks for development are identified by reference to entire codes, not provisions (eg particular OOs or POs) within codes;
> (b) under section 5.3.3(3)(a)(iii) of the Planning Scheme, development will comply with an applicable code if it complies with either:
> (i) the purpose and OOs of the code; or
> (ii) the POs and AOs of the code; and
> (c) accordingly, each individual provision within a code is not an assessment benchmark in its own right, and there is no requirement that development comply with each individual provision within a code."

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125 Applicant's written submissions, at [91]; citing *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, at [24]-[27] per Kiefel CJ, Gageler and Keane JJ.
126 Applicant's written submissions, at [92].
127 (2014) 201 LGERA 82, at [52]-[58].
128 Ibid, at [55].
129 Applicant's written submissions, at [61].
130 Ibid, at [60].
131 Court Doc 18, filed 15/9/20, at [9].

[55] At the outset, it must be said that as demonstrated for the Second Respondent, an approach which particularly engages provisions equivalent to s 5.3.3(3)(a)(iii) of the *Sunshine Coast Planning Scheme* 2014 ("*SCPS* 2014") is to be found in many decisions of this Court.[132]

[56] The references to "OOs", "POs" and "AOs" in the extract above, refer respectively to:

(a) "overall outcomes", as they are typically expressed initially in any code under a planning scheme, under a heading "Purpose and overall outcomes"; and

(b) "performance outcomes" and "acceptable outcomes", as they may be typically expressed in tabular form, in more particular elucidation of the purposes and overall outcomes sought to achieved by a particular code.

[57] It is well-recognised that acceptable outcomes are to be regarded as just that and do not further inform or limit the assessment of a performance outcome to which they are applicable. Further and notwithstanding an acceptable view that the purpose and overall outcome requirements of a code should not be logically regarded as an alternative to satisfaction of relevant performance outcomes,[133] that is not the established position in respect of the provision in the *SCPS* 2014. Section 5.3.3(3)(a) of the *SCPS* 2014 relevantly provides:

> "(3) The following rules apply in determining assessment benchmarks for assessable development –
> (a) assessable development requiring code assessment-
> (i) must be assessed against all of the assessment benchmarks identified in the "assessment benchmarks for assessable development and requirements for accepted development" column;
> …
> (iii) that complies with:
> (A) the purpose and overall outcomes of the code complies with the code;

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132 Reference is made to *Bilalis v Brisbane City Council* (2017) QPELR 997, at [9]-[10], *Guiney v Brisbane City Council* (2016) QPELR 575, at [4] and [44]-[45], *Harta Pty Ltd v Council of the City of Gold Coast* [2019] QPEC 37, at [19], *JRD No. 2 Pty Ltd v Brisbane City Council & Ors* (2020) QPELR 1023, at [160], *Kanesamoorthy v Brisbane City Council* (2016) QPELR 784, at [16]-[17], *Lennium Group Pty Ltd v Brisbane City Council & Ors* [2019] QPELR 835, at [201], *Marriott v Brisbane City Council* [2015] QPELR 910, at [5] and [19], *Shun Pty Ltd v Logan City Council* [2020] QPEC 31, at [54], *Tong Town Planning & Development Services Pty Ltd v Brisbane City Council* [2017] QPEC 70, at [10], *United Petroleum Pty Ltd v Gold Coast City Council* [2018] QPELR 510, at [118] and *University of Queensland v Brisbane City Council & CBUS Property Brisbane Pty Ltd* (2016) QPELR 654, at [42] and [48]-[49].

133 A view reflected in the amended provision, having equivalence to s 5.3.3(3)(a)(iii), of the *SPCS* 2014, in the Brisbane Planning Scheme. See: *Brassgrove KB Pty Ltd v Brisbane City Council* [2019] QPEC 42, at [55], *Di Carlo v Brisbane City Council* [2019] QPELR 548, at [12], *Irvine v Brisbane City Council* (2020) QPELR 445, at [8] and *Richards & Ors v Brisbane City Council & Ors* [2020] QPEC 26, at [13].

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

(iv) is to be assessed against any assessment benchmarks for the development identified in section 26 of the Regulation;"

[58] The contention of the Second Respondent that the "assessment benchmarks for development are identified by reference to entire codes not provisions…within codes", is referenced to the tables in Part 5 of the Scheme which follow s 5.3.3 and which serve to "identify…the category of development, the category of assessment and the assessment benchmarks for assessable development within the planning area".[134]

[59] The Applicant contends that:

> "Properly read in context and as a whole, to carry out the statutory task required by s 60(2) of the PA, the Council was required to determine whether the application 'complies with all of the assessment benchmarks' or 'does not comply with some of the assessment benchmarks'. That statutory task is evaluative. It cannot be performed without considering the *content* of what the assessment benchmarks are. Here, this requires consideration of each relevant, individual assessment benchmark within the codes identified in Table 5.5.3."[135]

Here, there are two such codes identified as providing assessment benchmarks, which remain in contention: the "High density zone code" ("HDRZ Code") and the "Coastal protection overlay code ("CPO Code").

[60] The Applicant's contention is developed as follows, in that:

(a) it flows logically from:

(i) the plain language in s 60(2)(a) of the *PA*, that the application "complies with all of the assessment benchmarks for the development"; and

(ii) a holistic reading of the language in s 5.3.3(3)(a)(i) and (iii) of the *SCPS* 2014;[136]

(b) the opposing contention seeks to substitute:

(i) "some" for the word "all" in s 60(2)(a);

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134 See s 5.1 of the *SCPS* 2014.

135 Applicant's written submissions, at [62] (with citation omitted and emphasis as in original).

136 Applicant's written submissions, at [63]-[64].

(ii) to do similarly in the statement in the HDRZ Code that:

> "all provisions of this Code are assessment benchmarks for applicable assessable development";[137] and

(iii) to do similarly "to the substance of the CPO Code"[138] contending that despite the absence of use of the word "all", "clearly that is the intended effect (i.e. each purpose and overall outcome and each PO and AO is an assessment benchmark)".

(c) In addition, the opposing construction of s 62 and the planning scheme "does not advance and will not 'best achieve' the purposes of the PA or the planning scheme" contrary to s 14A of the *AIA*.[139]

More generally,[140] it is contended that there "is no real benefit" in the opposing construction and that it confuses and conflates:

> "… the initial question of whether the application 'complies with all of the assessment benchmarks' with the subsequent discretion to approve an application even if it does not comply with all of the assessment benchmarks."

In the latter respect, reference is made to s 60(2)(b) of the *PA*, which provides:

> "(2) To the extent the application involves development that requires code assessment, and subject to *section 62*, the assessment manager, after carrying out the assessment—
>
> (b) may decide to approve the application even if the development does not comply with some of the assessment benchmarks; and
>
> *Examples—*
>
> 1 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks.
>
> 2 An assessment manager may approve an application for development that does not comply with some of the benchmarks if the decision resolves a conflict between the benchmarks and a referral agency's response."

[61] This reasoning is then developed in respect of contending for an inference of failure to have regard to specific assessment benchmarks or misconstruction of such a benchmark,

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137 Section 6.2.3.1(2) of the HDRZ Code (BD Doc 18(g), p 325).

138 Applicant's written submissions, at [65] and footnote 47, where reference is made to s 8.2.5.1(3) of the CPO Code (BD Doc 18(k), p 349).

139 Applicant's written submissions, at [66] and footnote 48.

140 Ibid.

by particularly noting that it is clear from the original decision approving the application, that the Council did not act pursuant to s 60(2)(b).[141] However and what these submissions do not expressly engage is the additional considerations of s 60(2)(d), which allows that the assessment manager:

> "(d) may, to the extent the development does not comply with some or all the assessment benchmarks, decide to refuse the application only if compliance can not be achieved by imposing development conditions.
> *Example of a development condition for paragraph (d)—*
>
> a development condition that affects the way the development is carried out, or the management of uses or works that are the natural and ordinary consequence of the development, but does not have the effect of changing the type of development applied for"

And it may be seen that such considerations are expressly engaged in the passages in the reasons, to which specific reference is made:[142]

(a) In the First Respondent's public "Notice about Decision – Statement of Reasons", given in respect of the original decision, pursuant to s 63(5) of the PA,[143] under the heading "Reason for Approval despite Non-Compliance with Assessment Benchmarks", the entry is: "not applicable". However, under the heading "Reasons for the Decision", there is the following:

> "The reasons for this decision are:
>
> Subject to the imposition of the development conditions contained within the Decision Notice, the development is able to comply with applicable Assessment Benchmarks against which the application was required to be assessed."

(b) In the Statement of Reasons provided pursuant to s 33(1) at the *JRA* for the original decision and dated 27 June 2019, it is stated:

> "Given that code assessment undertaken for the Development Application determined that it either complied with all relevant assessment benchmarks or could otherwise be conditioned to comply, Council was required to approve the Development Application under s 60(2)(a) of the *Planning Act* and was unable to refuse

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141 Ibid, at [133]; see: BD Doc 4, p 74.
142 Applicant's written submissions, at [133]-[134].
143 BD Doc 4, at p 74.

> the Development Application pursuant to s 60(2)(d) of the *Planning Act*."[144]

[62] Accordingly, it will be necessary in any determination of the conclusions or inferences which the Applicant pursues, to have regard to the conditions imposed in respect of the First Respondent's decision, in the sense of any indicia of attention being paid to achieving compliance with those aspects of the HDRZ code and the CPO code which are in issue.

[63] Moreover, the construction issue is not to be determined as contended for the Applicant. The difficulty with that contention stems from understanding that the reference to "assessment benchmarks" in s 60(2) of the *PA*, are informed by reference to s 43 of the *PA*, which relevantly provides:

> "**43 Categorising instruments**
>
> (1) A ***categorising instrument*** is a regulation or local categorising instrument that does any or all of the following—
>
> (a) categorises development as prohibited, assessable or accepted development;
>
> (b) specifies the categories of assessment required for different types of assessable development;
>
> (c) sets out the matters (***the assessment benchmarks)*** that an assessment manager must assess assessable development against.
>
> (2) An assessment benchmark does not include—
>
> (a) a matter of a person's opinion; or
>
> (b) a person's circumstances, financial or otherwise; or
>
> (c) for code assessment—a strategic outcome under section 16(1)(a); or
>
> (d) a matter prescribed by regulation.
>
> *Examples of assessment benchmarks—*
>
> a code, a standard, or an expression of the intent for a zone or precinct
>
> (3) A ***local categorising instrument*** is—
>
> (a) a planning scheme…"

It is to be particularly noted that s 43(1)(c) provides that the assessment benchmarks may, (as is only relevantly in issue here) be set out in a planning scheme "as the matters…that an assessment manager must assess assessable development against". Accordingly, it follows that the reference in s 60(2)(a) to compliance with "all of the

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144 See Affidavit of C M Spicer, filed 25/11/20, CMS-1 at p 13, [13].

assessment benchmarks for the development" must necessarily be as to those which the categorising instrument sets out as requiring assessment for such compliance.

[64] The issue is not determined by references to the assessment benchmarks:

(a) as "a code" in the examples to s 43(2);[145] or

(b) in terms of reference to particular codes in the tables in Part 5 of the *SCPS* 2014. Clearly, the codes to which reference is made is a means of identification of the assessment benchmarks and is practically meaningless, except as a means of description, without regard being had to the contents of those codes. Further, and as may be demonstrated by reference to each of the codes which are in issue here, there are specific instructions in each and as to how each is to be applied in the assessment process;

(c) In the HDRZ code it is provided:

> "(1) This code applies to assessable development:-
> ***(a)*** within the High density residential zone as identified on the zoning maps contained within **Schedule 2 (Mapping);**
> ***(b)*** identified as requiring assessment against the High density residential zone code by the tables of assessment in **Part 5 (Tables of assessment)**.
> (2) All provisions in this code are assessment benchmarks for applicable assessable development."[146]

Notably, the HDRZ code then contains only provisions under the heading "purpose and overall outcomes", without any performance or acceptable outcomes being provided; and

(d) In the CPO Code, it is provided:

> "(1) This code applies to accepted development and assessable development:-
> ***(a)*** subject to the coastal protection overlay shown on the overlay maps contained within **Schedule 2 (Mapping);**
> ***(b)*** identified as requiring assessment against the Coastal protection overlay code by the tables of assessment in **Part 5 (Tables of assessment)**.
> (2) The acceptable outcomes in **Table 8.2.5.3.1 (Requirements for accepted development)** are requirements for applicable accepted development.

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145 Pursuant to s 14D of the *AIA*, an example is not exhaustive, does not limit but may extend the meaning of the provision and in the event of any inconsistency, the provision is to prevail.

146 BD Doc 18(g), p 325.

> (3) The following provisions of the code are assessment benchmarks for applicable assessable development:-
> (a) **section 8.2.5.2 (Purpose and overall outcomes);** and
> (b) **Table 8.2.5.3.2 (Performance outcomes and acceptable outcomes for assessable development).”*[147]***
>
> This code does also contain performance and acceptable outcomes.

[65] It is then to be noted that s 5.3.3 is also contained within Part 5 of the *SCPS* 2014, which is introduced by the following:

> “The tables in this part identify the following: -
>
> (a) the category of development, the category of assessment and the assessment benchmarks for assessable development within the planning scheme area…”[148]

Some things may then be noted in respect of the rules stated, in s 5.3.3(3)(a),[149] to “apply in determining assessment benchmarks for assessable development…..requiring code assessment”:

(a) as may (perhaps unnecessarily, in a grammatical sense) be noted from the interpretive provision in s 1.3.3(1),[150] the use of a semi-colon as punctuation with or without the word “and” after each of the sub-paragraphs “is to be considered to be “and”; and

(b) sub-paragraph (i) is to be noted as addressed to the identification of the assessment benchmarks in the particular column of the subsequent tables, where such are identified by reference to the heading of particular codes.

[66] Accordingly and upon a holistic, practical and common-sense approach to these provisions, in the context of the *PA*, it is clear that these rules do inform the assessment process, both as to what assessment benchmarks are to be considered and as to how compliance with those benchmarks in a particular code may be determined. The insistence in sub-paragraph (i) upon “assessment against all of the assessment benchmarks” is clearly referable to assessment against all of the codes to which relevant reference is made in the tables. As to the assessment of the contents of each relevant

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147 BD Doc 18(k), p 349.
148 BD Doc 18(b), p 307.
149 See para [57] above, where this is relevantly set out and BD Doc. 18 (c), p 308.
150 BD Doc 18(a), p 304.

code, there is the separately stated rule in s 5.3.3(3)(a)(iii), which, despite the cumbersome language, clearly has the effect which has been well-recognised in this Court.[151]

[67] Some more pragmatic difficulties may also be noted as to this construction issue, in the circumstances of this case. First, it can have no application or influence in respect of the purported error in respect of the HDRZ Code because of the absence of any performance and acceptable outcomes and the stated requirement for assessment against all of the provisions of that code. Secondly and in respect of the different position under the CPO Code, it is to be noted that there are two separate purported errors, one relating to an overall outcome and the other a performance outcome. Accordingly, there is a prospect that the Applicant may establish both or neither of these errors, as well as one or the other.

[68] Therefore and for all of these reasons, it is necessary to consider each of the purported errors. Each of them is premised upon consideration of the assessment reports prepared for and available for each of the First Respondent's decisions and the reasons given for each decision ("the assessment reports and reasons").[152] In particular:

(a) the detailed assessment report, dated 8 February 2019, before the First Respondent in making the original decision;[153]

(b) the First Respondent's public notice and statement of reasons about the original decision and negotiated decision (undated), prepared in accordance with ss 63(5) and 83(9) of the *PA*;[154]

(c) the First Respondent's statement of reasons dated 27 June 2019, pursuant to s 33(1) of the *JRA* for the original decision;[155]

(d) the First Respondent's statement of reasons for the negotiated decision notice, dated 17 October 2019;[156]

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151 See [55] and footnote 132, above.
152 Applicant's written submissions at [128].
153 BD doc 2, pp 19-46.
154 BD doc 4, pp 73-75.
155 Affidavit of C M Spicer, filed 25/11/20, CMS-1 at pp 2-13.
156 BD doc 11, pp 197-205.

(e) the detailed assessment report, undated, before the First Respondent in approving the minor change application;[157]

(f) the minutes of the meeting on 23 July 2020 in which the minor change application was approved;[158]

(g) the First Respondent's statement of reasons, dated 28 August 2020, for the minor change application.[159]

Assessment of the High density residential zone code

[69] The contended error is in failing to properly consider or misconstruing the benchmark in s 6.2.3.2(2)(f)(iii) of the HDRZ Code. In immediate context that provision is as follows:

> "(1) The purpose of the high density residential zone code is to provide for medium and high density residential activities generally in a medium rise format, predominantly comprising multi-unit residential uses for permanent residents supported by community activities and small-scale services and facilities that cater for local residents
>
> (2) The purpose of the High density residential zone code will be achieved through the following overall outcomes:-
>
> …
>
> (f) development ensures that there is no unreasonable loss of amenity for surrounding premises having regard to:-
>
> (i) microclimate impacts, including the extent and duration of any overshadowing;
>
> (ii) privacy and overlooking impacts;
>
> (iii) impacts upon views and vistas; and
>
> (iv) building massing and scale relative to its surroundings."[160]

[70] In the first instance, the Applicant's contention is that none of the assessment reports and reasons demonstrate that the First Respondent was aware of or properly considered this assessment benchmark. Secondly and in support of the alternative contention of misconception as to this benchmark, attention is drawn to the following extract from the detailed assessment report which was before the First Respondent for the original decision.[161]

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157 BD doc 13, pp 220-250.
158 BD doc 15, pp 259-266.
159 BD doc 17, p 295.
160 BD Doc 18(g), p 325.
161 Applicant's written submissions, at [153]-[155].

> "There are no provisions in the *Multi-unit residential uses code* which specifically protect views for surrounding properties as it is an established planning principle that a landholder has no proprietary right to a view, even though the view may have value. In this instance, it is also a feature of the zoning of the site there is no express protection reflected in the relevant use code. Notwithstanding, the amenity of these properties has been considered and it is recommended that an increase in the southern building setbacks (to a minimum of 4.5m for the entire building facade) is a reasonable outcome which will assist in protecting privacy, retaining views and providing sufficient separation such that the external living areas of the southern neighbours continue to be adequately protected and able to be enjoyed by these residents following construction of the development."[162]

More particularly it is contended that:

(a) this extract contained the expression of an erroneous position in respect of views; with particular reference to the observation: "it is also a feature of the zoning of the site that there is no express protection reflected in the relevant use code;[163]

(b) whilst this assertion was not adopted in any reasons given by the First Respondent, neither was it corrected;[164] and

(c) "the Council staff in the Detailed Assessment Report did not merely fail to refer to the assessment benchmark stated in s 6.2.3.2(2)(f)(iii) of the HDRZ Code that there is no unreasonable loss of amenity for surrounding premises having regard to impacts upon views and vistas, they operated under the error of law that 'a feature of the zoning of the site that there is no express protection reflected in the relevant use code'. The later conclusion that 'a reasonable outcome' had been achieved was tainted by this error."[165]

[71] As is further noted by the Applicant,[166] in the reasons given by the First Respondent pursuant to s 33(1) of the *JRA*, dated 27 June 2019, there was the following:

> "Council determined that subject to the imposition of reasonable and relevant conditions within the decision notice, the Development

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162 BD Doc 2, p 36.
163 Applicant's written submissions at, [154].
164 Ibid, at [156].
165 Ibid, at [161].
166 Ibid, at [159].

> Application was able to comply with the assessment benchmarks of the Applicable Codes. The following points detailed Council's reasoning in respect of each of the Applicable Codes"[167]

Further, the HDRZ Code was identified as containing relevant assessment benchmarks, with the following being observed:

> "(ii) High density residential zone code:
>
> (A) table 6.2.3.2.2 of the Planning Scheme relevantly provides that both the multiple dwelling units and shop (corner store) uses were consistent uses within the High density residential zone; and
>
> (B) the proposal was determined to comply with the Overall Outcomes and Performance Outcomes of the High density residential zone code by, amongst other things, positively contributing to the streetscape so as to avoid any loss of residential amenity, particularly when it is accepted that the loss of certain views is unavoidable in the High density residential zone."[168]

[72] As is pointed out by the Respondents, this contention seeks to unduly single out the issue of impacts on views and vistas. The question to be addressed pursuant to s 6.2.3.2(2)(f) is a broader one. It is concerned with whether there is considered to be "unreasonable loss of amenity for surrounding premises having regard to" a number of considerations, one of which is "impacts on views and vistas".

[73] Further, and as the Second Respondent contends, matters relating to or impacting on surrounding amenity also arose for consideration under other assessment benchmarks and may be seen as reflected in the reasons noted as to compliance with those benchmarks. In particular, the Multi-unit residential uses code[169] and the Height of buildings and structures overlay code.[170] Such positive findings as to the nature and compliance of the development with other criteria touching upon issues of loss of amenity for surrounding premises, tell against any implication that this negatively expressed benchmark was not addressed.

[74] It is difficult to see that the passage noted from the assessment report does assist the Applicant at all. Irrespective of what conclusion is reached about the accuracy of the

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167 Affidavit of C M Spicer, filed 25/11/20, at CMS-1 pp 6-7 [12(c)].
168 Affidavit of C M Spicer, filed 25/11/20, at CMS-1 p 7.
169 Ibid, at CMS-1 pp 7-8.
170 Ibid, at CMS-1 p 9.

statement as to any proprietary rights to views, it is directed at the provisions of a different code: the Multi-unit residential uses code. And that passage proceeds, in any event, to note that amenity issues were given consideration with a recommendation as to a setback issue in respect of the southern building, which was noted as "a reasonable outcome which will assist in protecting privacy, retain views and the setback of the southern building".

[75] More importantly and in the reasons of the First Respondent, when expressly dealing with the HDRZ Code, there is not only the initial general statement as to compliance but also specific notation of there being positive contribution "to the streetscape so as to avoid any loss of residential amenity, particularly when it is accepted that the loss of certain views is unavoidable in the High density residential zone".

[76] These circumstances do not give rise to any implication that the first respondent has not considered this assessment benchmark, nor that there has been any misconception as to what was required as to compliance with it, or any relevant reviewable error in respect of it.

[77] Alternatively, and in the context of what has been noted as to what the First Respondent did note as to its consideration of the potential impact of the development on views, and were it otherwise determined that there had been a failure to specifically or properly have regard to this aspect of the assessment benchmark, it would be appropriate to conclude that any such error was not material in the sense that it could not have resulted in any different decision.

Assessment of the Coastal Protection Overlay Code

Overall Outcomes – beachfront character

[78] In the first instance, the Applicant contends that none of the reasons given by the First Respondent demonstrate that it was aware of or properly considered the assessment benchmark set out as an overall outcome in s 8.2.5.2(2)(i):[171]

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171 Applicant's written submissions, at [129].

> "development adjacent to beachfront areas is located and designed to protect the character of the beachfront when viewed from the beach and integrates with the surrounding natural landscape and skyline vegetation."

[79] Leaving aside any weight which might be given to the broad expressions of position in the First Respondent's reasons, as to consideration of each of the assessment benchmarks in the relevant codes (as has been noted),[172] it is also noted that the specific reference to the CPO Code in the statement of reasons for the original decision, is as follows:

> "Coastal protection overlay code:
> (A) the proposal was determined to effectively protect people and property from coastal hazards in accordance with Overall Outcome 2(a); and
> (B) could otherwise be made to comply with the Coastal protection overlay code through the imposition of reasonable and relevant conditions (see conditions 36 to 37 of the decision notice granted 8 May 2018)."[173]

[80] However and as contended for the Respondents, issues in respect of the design and character of the development and its integration with its surrounds arose in respect of assessing other benchmarks as well, including the Kawana Waters Local Planning Code. As is noted as unchallenged in this matter,[174] the development is assessed as complying with this Code, which allows for higher density residential accommodation where, as this development is to be, located in a local area precinct which allows for such development. It is also correctly noted that as provided in s 7.1(2) of the *SCPS* 2014,[175] "Local Plans organise the planning scheme area at a local level and provide more detailed planning for the zone".

[81] Further, it may be noted that the Council Officers report for the original decision specifically addressed PO1 of the Kawana Waters Local Planning Code as follows:[176]

> "In terms of the overall provisions of the code, PO1 provides that *development provides for buildings, structures and landscaping that are consistent with and reflect and enhance the coastal urban character of the Kawana Waters local plan area.*

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172 See para [61] above

173 Affidavit of C M Spicer, filed 25/11/20, at CMS-1 p 10, [12(x)]. It may also be noted that there is no subsequent reference to the assessment of the CPO Code in any of the later reasons given by the First Respondent.

174 Second Respondent's written submissions, at [75]-[76].

175 BD Doc 18(h), p 327.

176 BD Doc 2, pp 38-39.

> The proposed development represents a high quality architecturally designed building which is appropriate for the coastal context. It incorporates subtropical design and an articulated building façade including sun shading, timber design elements and integrated landscaping. These elements are evident throughout the local plan area and the proposal is considered to be consistent with this element of the local character."

[82] As far as the CPO Code is addressed in that report, it is only specifically addressed, as it is in the reasons noted above, in respect of coastal hazards and its location within "the declared erosion prone area." However, that is to be properly understood in terms of identification matters which were to be considered upon assessment as requiring conditions to be imposed pursuant to s 60(2)(d) of the *PA*, so as to achieve compliance.[177] It was also specifically noted that the building complied with the 21m height limit in the applicable Height of Buildings and Structures Overlay Code.[178]

[83] For the Respondents, attention is also drawn to the conditions imposed in respect of the character of the proposal and to effect integration with existing natural landscapes and vegetation.[179]

[84] Whilst there are these contextual considerations to the assessment conducted as to the benchmarks in the CPO Code, the position in respect of that aspect of the assessment conducted by the First Respondent remains, as has been noted, in only general terms and it must be said without any specific notation of consideration of the perspective "when viewed from the beach".

[85] However and in the circumstances, it should not be accepted, as submitted by the Applicant that:

> "Council could only have reached the conclusion that the 'development is able to comply with the applicable Assessment Benchmarks' if it was unaware of, or did not consider, or misconstrued the assessment benchmark stated in s 8.2.5.2(2)(i) of the CPO Code."[180]

The reasoning towards this conclusion is submitted as follows:

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177 BD Doc 2, at pp 38-39.
178 BD Doc 2, at p 39.
179 BD Doc 3, at pp 49-51 (Conditions 8-16) and pp 56-57 (Conditions 54-55) and p 62 (Condition 73, which was changed in the minor change approval) – See at pp 257 and 284.
180 Applicant's written submissions, at [138].

> "Without descending into the merits, it is objectively clear from the 3D renders of the proposed development viewed from the beach, shown above in Figures 5 and 6, that the proposed development will be very visible above the skyline vegetation when viewed from Buddina Beach. It is a large, box or brick shape that does not reflect the natural skyline vegetation at all. Given this, it cannot be said that the development is 'designed to protect the character of the beachfront when viewed from the beach' or that it 'integrates with the surrounding natural landscape and skyline vegetation.' Nothing in the conditions changes this."[181]

[86] The essential difficulty with the submission is firstly that it does invite descent into the merits of the character and extent of integration of the building with its environs, when so viewed from the beach. For the reasons already noted, this is not an appropriate basis for the grounds of review which are pursued. And secondly and more particularly, the feature which is particularly emphasised is the expected visibility of the higher part of the building from the beach. That must necessarily be a reflection of the permitted height of the building in the location and not as something that so detracts from any sense of protection of the character of the beachfront or in integrating with the surrounding natural landscape and skyline vegetation, that it should be concluded that the First Respondent failed to have regard to, or misconstrued, the assessment benchmark in s 8.2.5.2(2)(i) of the CPO Code, or made any relevant reviewable error in respect of it.

Performance outcome - coastal ecosystems

[87] The other contended error in respect of assessment of the CPO Code is in respect of the PO12 in Table 8.2.5.3.2 of that Code, which provides as follows, under the heading "Protection of Sand Dunes and Coastal Creeks":

> "Development:-
> (a) maintains dune crest heights and minimises and mitigates the risk to development from wave overtopping and storm tide inundation; and
> (b) maintains or enhances coastal ecosystems and natural features such as coastal creeks, mangroves and coastal wetlands, particularly where these features protect or buffer communities and *infrastructure* from sea-level rise and coastal inundation impacts."[182]

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181 Applicant's written submissions, at [130].
182 BD Doc 18(k), at p 353.

[88] This contention also proceeds upon an underlying premise that there is no express reference to this PO in the assessment reports and reasons of the First Respondent, apart from considerations relating to coastal hazards (including erosion and storm surge), as is reflected in PO12(a). Particular emphasis is placed upon the consideration in PO12(b) that "[d]evelopment … maintains or enhances coastal ecosystems." And as was not put in issue on this application and the subject of considerable attention in the entire assessment process through to and including the minor change approval, the ecosystem in point is that relating to or including turtle nesting on Buddina Beach.

[89] The contention here is as to a conclusion as to misconstruction of this benchmark, given the emphasis which is placed upon the use of the words "maintains or enhances".[183] Although there is recognition of material and reasoning dealing with the potential impact of lighting related to the building, upon the turtle nesting, the ultimate submission is that:

> "Reading the Council's statement of reasons fairly, the lack of reference to the standard or benchmark stated in PO12 and the conditions it imposed suggests that Council did not consider the assessment benchmark that the development must maintain or enhance the coastal ecosystem to meet all of the performance outcomes. Rather, Council appears to have proceeded on the basis that it could approve these impacts by imposing conditions that mitigated them, without necessarily maintaining or enhancing the coastal ecosystem."[184]

The Applicant seeks to engage the plain and ordinary meaning of these words. Given the alternate nature of the expression used in the benchmark, it is only necessary to refer to the meaning of "maintain", which for the Applicant is noted to be "cause to continue, keep up, preserve (a state of affairs, an activity, etc)" or "to keep in existence or continuance; preserve; retain".[185]

[90] The contention as to reviewable error is then developed as follows:

> "144. Given that lighting from the development shining toward the beach is acknowledged in the proponent's material as an adverse impact on turtles and responding to this impact must be the reason for the conditions about lighting such as 68-70, it is difficult to see how the conditions can do more than *mitigate* or *reduce* the adverse impacts of the development on the coastal ecosystem, rather than *maintain* or *enhance.* Even after the minor change application was approved, the conditions

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183 Applicant's written submissions, at [143] and [148].

184 Ibid, at [151].

185 Ibid, at [143(a)], respectively in reference to The Australian Oxford Dictionary (Oxford University Press, 1999), p 813 and the Macquarie Dictionary (Revised 3rd Ed, Macquarie Library 2001), p 1154.

> allow the automated opaque blinds to be open until 8pm. Logically (and without entering into the merits) the conditions allow some adverse lighting impacts to the coastal ecosystem to occur. In this sense, the conditions cannot be expected to "maintain or enhance the coastal ecosystem" in comparison to either the existing use of the land (4 single storey and 1 double storey residential houses) or development that was not visible from the beach and the nearby ocean, thereby not introducing a new source of light. The development will not keep the coastal ecosystem of the same quality (i.e. "maintain") or improve (i.e. "enhance) it for turtles. There will necessarily be damage to the coastal ecosystem for turtles, even through this damage will be *reduced* by the conditions imposed by Council.
>
> 145. There is no factual finding by Council in any of its statements of reasons that the development "maintains or enhances coastal ecosystems" and it appears that Council was unaware of or misconstrued this assessment benchmark.
>
> 146. Specifically in relation to the CPO Code, Council's statement of reasons for the original decision, quoted above at [142], treated the CPO Code as concerned only with coastal hazards.
>
> 147. Council's statement of reasons for the negotiated decision notice did not refer to P012 of the CPO Code but stated in relation to changes to condition 68 for turtle lighting that:
>
> Condition 68 - Turtle lighting;
>
> (i) Condition 68 in its original form relates only to minimising the impact of the development on turtle nesting:
>
> (ii) The applicant's representation seeks amend condition 68 such that it also required the development to minimise its impact on turtle's sea finding behaviour and the ocean orientation of hatchlings:
>
> (iii) Council agreed with the applicant's representation on the basis that the proposed amendment effectively imposed more stringent environmental controls upon the development.
>
> 148. The language of Council's reasons suggest it was unaware of the assessment benchmark requiring the application "maintain and enhance the coastal ecosystem". It appears that Council considered there was no such requirement and that the development only had to "minimise its impact" on the coastal environment."[186]

[91] The final contention does not follow from the terms of condition 68, nor from the absence of any express reference to the requirement of PO12(b) in any of the reasons given by the First Respondent. Clearly the issue particularly identified in the Applicant's

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186 Applicant's written submissions, at [144]-[148], (citations omitted, error and emphasis as in original).

submissions, of potential impact of lighting associated with the development upon turtle nesting activity, was considered in the assessment of it. Indeed, it may be noted that:

(a) Condition 68 addresses this issue. It originally provided:

> "To minimise the impact of development of the precinct on turtle nesting sites, the following actions are required to be undertaken during construction of the development:
> (a) construction works are to be restricted to daylight hours during the turtle nesting and hatching season (October-May) in addition to any further restriction imposed as part of the Operational Works approval.
> (b) Flood lighting must not be used from October-May (turtle nesting and hatching season)."[187]

(b) Other conditions are included under the heading "Ecology" and the subheadings "Turtle Lighting", "Land Rehabilitation" and "Fencing to Protected Land", all with particular reference to protection of turtle nesting activity.

(c) All of these conditions were re-considered in the negotiated decision,[188] and conditions 69, 70 and 73 were a subject of the minor change decision, with an additional condition 70A also then included.[189]

It is unnecessary to set these conditions out in full, as they are extensive and clearly directed particularly at the protection of the coastal ecosystem, as it includes turtle nesting activity near the development site. This extends particularly to the potential impact of lighting but also to requirements in respect of fencing and regulation of access to the beach and procedures for the purpose of informing occupants of the building as to the significance of the local ecology involving turtle nesting and the necessity for compliance with the conditions of approval for the purpose of protection of such activity, particularly by mitigation of the impacts of lighting.

[92] Notwithstanding this clear focus upon this issue, the Applicant's contention focuses upon the use of language in these conditions and in the reasons given by the First Respondent, which is in terms of minimising such impacts. The argument is therefore

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187 BD Doc 3, p 60.
188 BD Doc 11, pp 203-205.
189 BD Doc 12(a), p 206 and Doc 16, pp 281-284.

that even if minimised, there remains impact and this is not addressing the requirement in PO12 that the ecosystem be, at least, maintained.

[93] As has been noted, the contention is not to be accepted. The issue as to maintenance of coastal ecosystems in the assessment of a proposal for adjacent development must necessarily be as to the potential impacts of the development upon such ecosystem. Put another way, the requirement in PO12 read fairly and in context, is concerned with the maintenance of the ecosystem and not with the absolute avoidance of any potential impact on that ecosystem. Therefore, the fact that the approach is couched in terms of minimisation of such impacts is not necessarily inconsistent with addressing the maintenance of the ecosystem. And this may be seen here, in terms of how this issue was addressed in the overall assessment process:

(a) In the first instance, the First Respondent's assessment report for the original decision contained a separate section, under the heading "Turtle nesting beach/lighting impacts". After noting the incidence and importance of turtle nesting activity in the Buddina Beach locality and more generally on the Sunshine Coast it was noted:

> "In 2014, the International Convention for Migratory Species (acting under the United Nations Environment Program) endorsed a *Single Species Action Plan for the Loggerhead Turtle* (Southwest pacific genetic stock). Delegates from the signatory state visited the Sunshine Coast during their deliberations on the plan, due to the region's importance as a future refuge for the Loggerhead turtle and made a number of recommendations in relation to lighting on the Sunshine Coast. These recommendations were included within Council's *Sunshine Coast Lighting Master Plan* which was endorsed by Council on 15 September 2016.
>
> The Urban Lighting Master Plan sets the strategic guidance for public lighting. It also provides recommendations applicable to private developments.
>
> Conditions are recommended regarding the positioning and operation of lighting, during construction and for the life of the development, to minimise any impacts on turtle breeding in accordance with the *Sunshine Coast Lighting Master Plan.*
>
> Rehabilitation of the dune system in front of the development site is also recommended, to provide an improved physical light barrier between the development site and the beach.

> These works would be required to be undertaken in accordance with an operational works approval and would include additional planting, weed management and exclusion fencing. Such works would comprise an improvement to the current conditions of spare vegetation and informal access tracks throughout this area.
>
> Conditions are recommended which require the developer to undertake a pre-construction light survey on the beach directly in front of the proposed development. At all times, (including during the construction and operation of the development) it must be ensured that the existing established sky glow conditions (as established in the pre-construction light survey) are maintained. An as-built light survey is also required upon completion to demonstrate that the existing conditions are maintained."[190]

Subsequently in that report and in responding to matters raised in the community concerns which were raised about the development and the following is specifically noted:[191]

Environmental Concerns	Comments
Impacts to a known turtle nesting beach from increased human disturbance, including light spill which may deter turtles or impact on turtle nesting.	Subject to conditions requiring preparation of a lighting management plan, the undertaking of pre/post construction lighting surveys and rehabilitation of the coastal dune system, it is the opinion of Council's specialist environmental staff that the proposed impacts on the turtle nesting beach can be appropriately managed.

(b) Subsequently and accompanying the representations in respect of the negotiated decision sought by the Second Respondent, there was inclusion of a letter under the hand of Mr John Thorogood described as a senior principal ecologist.[192] This was specifically directed to the issue of turtle nesting on the beaches of the Sunshine Coast, including at Buddina beach between November and March. There is notation of the recognised conservation status of the Loggerhead turtle, in particular, "as a driver for impact minimisation and mitigation". There is notation of the recognition of light pollution as a threat and that "the *recovery plan for marine turtles*

190 BD Doc 2, pp 41-42.
191 BD Doc 2, p 44.
192 BD Doc 6, at pp93-98.

in Australia (Commonwealth of Australia 2017) seeks to minimise such threats". The conclusions to that report are expressed as follows:

> "Conditioning approved coastal development to both protect habitat critical to marine turtle nesting and to minimise the impact of development on turtle nesting and hatchling behaviour is justified, particularly noting the conservation status of the Loggerhead turtle.
>
> Whilst the natural dunes and the vegetation they support, together with the set-back and set-down of the proposed development from the dunes and beach, affect a measure of mitigation – by – location, the proposed height of the development could result in light spill to the beach and inshore waters. Without appropriate mitigation, the proposed development could impact turtle nesting behaviour and the behaviour of emerging hatchlings.
>
> Appropriate mitigations include the minimisation of light intensity and the use of appropriate luminaries through design, positioning, technology and operation. Educated residents may also play a role in minimising light spill to the dunes, beach and inshore waters.
>
> The proposed amended conditions prescribe a suite of appropriate mitigation. Based on current understandings of turtle nesting and hatchling behaviour, it is considered highly likely that where the prescribed mitigations are adopted, the development will have no ecologically significant impact on turtle nesting and hatchling behaviour."[193]

(c) In the further assessment report prepared by the First Respondent, specific reference made to the engagement of "Council's ecologist" in consideration of those proposals.[194] And in the reasons for negotiated decision notice, it may be also noted that there is specific reference to the involvement of "an ecologist" as to the acceptability of proposed changes.[195]

(d) Further, and in terms of the subsequent minor change application as far as it related to the conditions addressing the turtle nesting issue, it may be noted that the Second Respondent's submission included a further letter from Mr Thorogood which relevantly indicated that he had reviewed the proposed condition amendments and observed:

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193 Ibid at p 98.
194 BD Doc 8, at p 126-128
195 BD Doc 11, at p 204(r).

> "Further to my letter to you of 16 July 2019 and based on current understandings of turtle nesting and hatchling behaviour, it is considered highly likely that were the prescribed (amended) mitigations are adopted, the development will have no ecologically significant impact on turtle nesting and hatchling behaviour."[196]

In the Second Respondent's assessment report in respect of the change request the following is noted:

> "Revised versions of 54, 63, 69, 70 and 73 (plus the new condition 70A) have been provided by the applicant, in consultation with their lighting and ecology experts. There is no change proposed to any of the other conditions which relate to lighting, and all conditions would continue to operate as a suite to ensure that post development sky glow levels do not exceed pre-development sky glow levels, and that all lighting would be managed to minimise light spill on to the turtle nesting area at adjoining Buddina Beach.
>
> The applicant intends that the revised versions of conditions 54, 63, 69, 70 and 73 would replace the existing set and consider that as a whole, the revised conditions would be more robust and enforceable than the current set."[197]

In terms of the assessment of that request, it is noted that there was agreement in part, with the following observation:

> "The intent of the applicant's proposed changes above is generally supported, particularly in its focus on automation to reduce reliance on human behaviour. Some notable inclusions in the above condition are the automation of the opaque blinds, and the use of motion sensing lighting in all outdoor lighting (including balcony lighting). The applicant has also committed to the use of motion sensing lighting year round (i.e.: not just in turtle nesting/hatching season). These proposed changes introduced new, more rigorous requirements and are considered by Council officers to be a considerable improvement to the original conditions."[198]

[94] The conclusion to which the Court is driven is that the First Respondent did, in this context, address the question which is raised by PO12(b) and that the references to minimising the potential impacts on turtle nesting in the reasons, is reflective of the way

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196 BD Doc 12(b), at p 210.
197 BD Doc 13, at p 222.
198 BD Doc 13, at p 243.

in which the issue of maintenance of the ecosystem was addressed in the supporting materials.

[95] Considered separately, it would not be appropriate to apply any alternative reasoning on the basis of materiality considerations arising in respect of any determined failure to address the question posed by PO12(b). However and in respect of any determination of failure to properly consider the specifically identified overall outcome and given what has been observed as to the obvious influence of the permitted height of the proposed building in the proposed location, it would, alternatively, be appropriate to conclude that any such error was not material in the sense that it could not have resulted in any different decision.

[96] Further and if the position which was then reached was the identification of only an error in respect of PO12(b), the problem confronting the Applicant as to materiality considerations, would be what has been determined to be the operative effect of s 5.3.3(3)(a)(iii) of the *SCPS* 2014.[199] That may be observed to be to such that any error singularly as to consideration of PO12(b) would not be material, in the sense that it could lead to a different decision because of:

(a) the necessary conclusion that absent any error in respect of consideration of overall outcome 8.2.5.2(2)(i), no different conclusion could have been reached as to compliance with purpose and overall outcomes of the CPO code; and

(b) the absence of any contention that the overall outcome 8.2.5.2(2)(h) and as to which PO12 may be seen as an extension, was not appropriately considered. That overall outcome provides:

> "(h) development protects water quality, coastal dunes and creeks, vegetation and biodiversity within coastal areas"[200]

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199 See para [57] above.
200 BD Doc 18(k), p 350.

Discretionary Issues

[97] It is, in these circumstances, unnecessary and largely undesirable to say anything further about the submissions for the Second Respondent as to discretionary considerations for denial of the relief sought by the application in the event that any contended error was established. Save to observe that:

(a) consistently with the availability of s 11 of the *PECA* to "[a]ny person", no objection was taken to the standing of the Applicant in bringing the AOA; and that the Applicant seeks to meet the contention of its unexplained interest,[201] by reference to its constitution, particularly as it includes the object of the pursuit of the:

> "…following charitable purposes
>
> …
>
> 2. To act as a forum for residents, ratepayers and friends of Buddina.
> 3. To encourage discussion and resolution of matters affecting the lifestyle, cultural heritage, amenity of life, livelihood, natural assets and the welfare of residents of the Buddina district.
> 4. Involvement in the maintenance, environmental protection and improvement of the area known as Buddina, in consultation with all levels of government and key stakeholders."[202]; and

(b) the reliance upon the evidence of its experts,[203] to demonstrate the appropriateness of the assessment undertaken by the First Respondent and outcomes achieved by the proposed development,[204] would be, at the very least, a doubtful basis for any such exercise of discretion, even allowing for what might be regarded as the breadth of the available discretion.[205]

Conclusion

[98] Accordingly, the appropriate conclusion is that the Amended Originating Application is to be dismissed.

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201 Second Respondent's written submissions, at [84(c)].
202 Affidavit of C M Spicer, filed 25/11/20, at CMS-4 p 22.
203 As noted at para [25] above.
204 Second Respondent's written submissions, at [84(f)].
205 See: *Glastonbury v Townsville City Council* [2012] 2 QPELR 216, at [128]-[131] and the cases to which reference is there made.