PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Danma Property Pty Ltd v Western Downs Regional Council* [2023] QPEC 41
PARTIES:	**DANMA PROPERTY PTY LTD** **(ACN 120 235 681)** (appellant) **v** **WESTERN DOWNS REGIONAL COUNCIL** (respondent)
FILE NO:	215/2020
DIVISION:	Planning and Environment Court
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court
DELIVERED ON:	20 October 2023
DELIVERED AT:	Maroochydore
HEARING DATE:	13 and 14 June 2022
JUDGE:	Long SC DCJ
ORDER:	**The respondent's refusal, by notice dated 25 November 2020, of the development application dated 13 August 2020, is confirmed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT COURT – APPEAL – Where the appellant has applied for the reconfiguration of a lot – Where the development application is impact assessable – Where the subject land is relevantly identified as rural land, or, more particularly, agricultural land – Whether the proposed development complies with the assessment benchmarks – Whether the proposed development would result in fragmentation and/or alienation of rural land – Whether the development satisfies a community need – Whether there are relevant matters that would support the approval of the development application.
LEGISLATION:	*Body Corporate and Community Management Act 1997* s 60 *Land Title Act 1994* (Qld) s 48A, 48B, 48C, 48D *Planning Act 2016* (Qld) ss 45, 59, 60, 62 *Planning and Environment Act 2016* (Qld) s 43, 45, 46, *Planning Regulation 2017* (Qld) ss 16, 21, 31
CASES:	*Abeleda v Brisbane City Council* [2020] QCA 257 *Brisbane City Council v YQ Property Pty Ltd* [2021] QPELR 987

Fabcot Pty Ltd v Cairns Regional Council & Ors [2020] QPEC 17
Mirani Solar Farm Pty Ltd v Mackay Regional Council [2018] QPELR 1158
Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd and Ors [2022] QPELR 309
Wason v Gympie Regional Council [2017] QPELR 798
Westfield Management Ltd v Pine Rivers Shire Council [2004] QPELR 337
Zappala Family Co Pty Ltd v Brisbane City Council [2014] QPELR 686

COUNSEL: K Wylie for the Appellant
S Hedge for the Respondent

SOLICITORS: P&E Law for the Appellant
King & Company for the Respondent

Introduction

[1] By notice of appeal filed 17 December 2020, the appellant appeals against the refusal by the respondent, notified by decision notice dated 25 November 2020, of its development application dated 13 August 2020, for a development permit to reconfigure a lot.

[2] The Lot is 17.644 hectares in area and located at 215 Red Hill Road, Red Hill (3.5km northeast of Chinchilla) and prior to 25 July 2012, was more particularly referred to as Lot 1 on RP14928. On that date, a community management statement was registered describing the Lot as comprising the common property of Leigh Haven Park – Chinchilla Community Titles Scheme and Lots 1 to 2 on SP249067. Each of the two mentioned Lots were provided with equal lot entitlements in the contribution schedule, as being:

(a) Lot 1, comprised of four buildings (being a residence and three sheds) situated in the more southerly portion of the land; and

(b) Lot 2, comprised of two buildings (being a residence and a shed) situated in the more northerly portion of the land.

Otherwise, the land was designated as common property, with specific provision for exclusive use of parts of that common property, respectively to each of the Lot owners, so that attached to Lot 1 was the exclusive use of the more southerly portion of the land, an area of approximately 7.369 hectares and attached to Lot 2 was the exclusive use of the more northerly portion of the land, in an area of approximately 10.2 hectares.

[3] The development application is to allow for the reconfiguring of the land so as to convert it from the existing Community Title Scheme into two freehold lots. The proposal is said to be that the sub-division would replicate the existing division on the basis of exclusive use of the common property, so that:

(a) The more southerly portion of proposed Lot 10 would be as to 7.41 hectares; and

(b) The proposed Lot 11 in relation to the more northerly situated Lot would be in the order of 10.234 hectares.

[4] It is common ground that the development application was properly made on 13 August 2020, did not require referral to any referral agency and is impact assessable. That is because of the proposed lot sizes being less than 1000ha and location in the Rural Zone under the Planning Scheme,[1] but not being in the R10 or R100 precincts (which have acceptable outcomes of minimum lot sizes respectively of 10ha and 100ha). Public notification was undertaken and there were no properly made submissions in respect of the development. Some further generally uncontroversial observations are that:

(a) The land is generally cleared with a few scattered trees and otherwise identified in the Town Planning Joint Expert Report *("JER")* as used for low key grazing or horse agistment, with no productive cropping occurring;[2]

(b) There are a mix of rural lot sizes in the surrounding area, where there is general use for grazing and some evidence of cropping in an area about 1.5km to the south, closer to Charleys Creek; [3]

(c) Imagery of the land depicts rural land with fences dividing paddocks and a gravel driveway to each of the dwelling houses;[4] and

(d) The northern part of the land has two large farm dams.[5]

Applicable principles

[5] This appeal is required to be conducted by hearing anew,[6] with the appellant bearing the onus of proof,[7] in respect of the exercise of discretion permitted by s 60(3) of the *Planning Act 2016* ("*PA*"). In this respect, this Court is required to apply s 45 of the *PA* as if it were the assessment manager for the development application.[8] Further and as required by s 59(3) of the *PA*, that decision must be based upon the assessment carried out under the statute.[9]

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1 The *Western Downs Planning Scheme 2017 incorporating Amendment 1*, April 2019 (Ex. 9 at p 186, Reconfiguring a Lot Code, Table 9.4.4.2; Ex. 5, Town Planning Joint Expert Report ("*Town Planning JER*"), at [21].
2 Ex. 5, *Town Planning JER* at [13].
3 Ibid at [14] and [17].
4 See: Ex. 11, Affidavit of K Swepson at Exs. KES-1 – KES-3.
5 Ex. 5, *Town Planning JER* at [9].
6 *Planning and Environment Act 2016* ("*PECA*"), s 43.
7 Ibid at s 45(1)(a).
8 Ibid at 46(2)(a).
9 Here there is no engagement of s 62, in that there is no referral agency response.

[6] As the development application in issue here requires impact assessment, that must, as prescribed by s 45(5) of the *PA*, be as follows:

> "(5) An ***impact assessment*** is an assessment that—
>
> (a) must be carried out—
>
> (i) against the assessment benchmarks in a categorising instrument for the development; and
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> (ii) having regard to any matters prescribed by regulation for this subparagraph; and
>
> (b) may be carried out against, or having regard to, any other relevant matter, other than a person's personal circumstances, financial or otherwise.
>
> *Examples of another relevant matter—*
>
> • a planning need
>
> • the current relevance of the assessment benchmarks in the light of changed circumstances
>
> • whether assessment benchmarks or other prescribed matters were based on material errors
>
> *Note—*
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> See section 277 for the matters the chief executive must have regard to when the chief executive, acting as an assessment manager, carries out a code assessment or impact assessment in relation to a State heritage place."

In this instance, there is nothing which is identified as relevantly prescribed by regulation and the relevant categorising instrument, at the time the development application was properly made,[10] is the Western Downs Planning Scheme 2017 incorporating Amendment 1.[11]

[7] For the parties, various references are made to observations made in this Court and the Court of Appeal, as to and in confirmation of the effect of these provisions and the principles to be applied. In *Brisbane City Council v YQ Property Pty Ltd*,[12] the nature of a decision on an impact assessment pursuant to s 45(5) and s 60(3) of the *PA* is described as a "broad evaluative judgment". It suffices to only note the

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10 Section 45(7) of the *PA*.
11 Ex. 5; *Town Planning JER* at [24].
12 [2021] QPELR 987.

following observations of the Court of Appeal, in particular refence to an earlier decision and decisions in this Court. In *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd and Ors*,[13] it was observed, under the heading: "Consideration of the Public Interest":

> "[173] Dexus and TPI particularly rely on the cases which are referred to as the "trilogy," namely *Bell v Brisbane City Council, Gold Coast City Council v K & K (GC) Pty Ltd,* and *Redland City Council v King of Gifts (Qld) Pty Ltd.*
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> [174] TPI contends that the trilogy of cases held that, prima facie, CP 2016 must be accepted as a comprehensive expression of what will constitute the appropriate development of land in the public interest. It submitted that if the placement of a development in a particular location would conflict with a planning scheme, then it must be accepted that it is the intent of the scheme, that subject to there being a matter of public interest that overrides the public interest in maintaining a scheme, the need should be met by a development on the site that does not give rise to the conflict. It further submits that merely to prove the existence of a need is insufficient. It submits that unless there is a matter of public interest that overrides the public interest in maintaining a planning scheme, the need for a development should be met by a development on a site that does not give rise to a conflict. TPI referred to the statement by Sofronoff P in *Gold Coast City Council v K & K (GC) Pty Ltd*:
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> > "If the placement of a development in a particular location would conflict with a Planning Scheme, then it must be accepted that it is the intent of the Scheme that, subject to there being a matter of public interest that overrides the public interest in maintaining a Scheme, the need should met by a development on a site that does not give rise to a conflict."
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> [175] TPI also directed the Court to the statements in *Redland City Council v King of Gifts*, where the Court of Appeal emphasised that it was necessary to demonstrate that there is a need for the particular development on the particular location that the relevant planning scheme provided that it should not occur, as distinct from more generally in the area or part of the area governed by the planning scheme.
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> [176] It was submitted by TPI that, contrary to the position stated by the primary judge that the trilogy of cases were given in the context of the requirements of s 326(1)(b) of the Sustainable Planning Act 2009 (Qld) whereas the current legislative scheme under the Planning Act provided for an assessment

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13 [2022] QPELR 309 at [173]-[183], with citations omitted.

process to be undertaken by the Court that is far less restrictive, the Planning Act does not legislate a departure from principles stated in the trilogy of cases, which are said to have a long history in planning law jurisprudence.

[177] Fabcot, however, contends that his Honour correctly considered that a planning scheme is accepted as expression of public interest, but s 45 and s 60 of the *Planning Act* changed the previous regime. In that regard, it particularly relied upon the approach outlined in the decision of *Ashvan Investments Unit Trust v Brisbane City Council*.

[178] The decision of *Ashvan Investments Unit Trust v Brisbane City Council*, the trilogy and the approach to be adopted in light of s 60 of the *Planning Act* was recently considered by this Court in the decision of *Abeleda v Brisbane City Council*. Mullins JA provided the leading judgment. While the approach set out in the trilogy of cases still has relevance under the *Planning Act* particularly the fact, as stated by McMurdo JA, that "a planning scheme must be accepted as a comprehensive expression of what will constitute in the public interest the appropriate development of land," in other respects the approach now to be adopted is quite different. As her Honour carefully set out in her judgment, s 60(3) of the *Planning Act* no longer incorporates what was described as the two step test and it is no longer appropriate to refer in terms of one aspect of the public interest "overriding" another aspect of the public interest before a development application that is non-compliant with the assessment benchmarks can be approved.

[179] For the reasons set out by Mullins JA set out in *Abeleda*, the statements of Sofronoff P, Philippides JA and McMurdo JA and in the trilogy of cases referred to in paragraphs 20 and 21 of the submissions of TPI that it is necessary to demonstrate that it is in the public interest it is necessary to override the scheme as it applies to the land, no longer represent the approach to be adopted under s 45 and s 60 of the *Planning Act*. As her Honour at [42] stated:

> '…..The decision-maker under s 60(3) of the Act is still required to carry out the impact assessment against the assessment benchmarks in the relevant planning scheme and can take into account any other relevant matter under s 45(5)(b). The starting point must generally be that compliance with the planning scheme is accorded the weight that is appropriate in the particular circumstances by virtue of it being the reflection of the public interest (and the extent of any noncompliance is also weighted according to the circumstances), in order to be considered and balanced by the decision-maker with any other relevant factors.'

[180] At [43], her Honour noted that in view of the fact that s 60(3) of the *Planning Act* reflects a deliberate departure on the part of the legislature from the two part test under s 326(1)(b) of the *Sustainable Planning Act 2009* (Qld), it is no longer appropriate to refer in terms of one aspect of the public interest "overriding" another aspect of the public interest before a development application that is non-compliant with the assessment benchmarks can be approved. The process adopted by a decision-maker may now be one which involves balancing a number of factors to which consideration was permitted under s 45(5) of the *Planning Act* in making a decision under s 60(3) of the *Planning Act* where the factors in favour of approval have to be balanced with the factors in favour of refusal of the application. The weight that is given to each factor is a matter for the decision-maker.

…

[182] In analysing the decision of *Ashvan*, her Honour stated that, subject to the recognition that status of the *Planning Act* has not changed as the embodiment of the community interest, her Honour agreed with the observations of Williamson QC DCJ at [53]-[54] as to the approach with respect to non-compliance with a planning scheme in the exercise of planning discretion. Having referred to the observations of McMurdo JA in *Bell v Brisbane City Council* in relation to a planning scheme being the embodiment of community interest, her Honour agreed with the observations of Williamson QC DCJ at [53] subject to the caveat to which I have referred. That passage was referred to by the primary judge in his Honour's reasons.

[183] The primary judge's approach as now provided for under s 45 and s 60 of the *Planning Act*, set out at [16]- [18] of his Honour's reasons, was not in error. In particular, the fact that there are non-compliances with CP 2016 in relation to the proposed development does not exclude it from being a matter that a decision-maker may determine should be approved, notwithstanding the points of departure in the exercise of discretion."

[8] In the passage approved in paragraph [183] of the Court of Appeal decision, the primary judge, in *Fabcot Pty Ltd v Cairns Regional Council & Ors*,[14] had observed:

"[16] In undertaking this task it is important to have regard to the observations of McMurdo JA *in Bell v Brisbane City Council & Ors* that:

> "…a planning scheme must be accepted as a comprehensive expression of what will constitute, in the public interest, the appropriate development of land."

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14 [2020] QPEC 17 at [16]-[18].

[17] However, as Williamson QC DCJ recently observed in *Ashvan Investments Unit Trust v Brisbane City Council & Ors*:

> "An application must be assessed against the applicable assessment benchmarks, which will invariably include a planning scheme for appeals before this Court. That assessment will inform whether an approval would be consistent, or otherwise, with adopted statutory planning controls. The existence of a non-compliance with such a document will be a relevant 'fact and circumstance' in the exercise of the planning discretion under s 60(3) of PA. Whether that fact and circumstance warrants refusal of an application, or is determinative one way or another, is a separate and distinct question… It will be a matter for the assessment manager (or this Court on appeal) to determine how, and in what way, non-compliance with an adopted statutory planning control informs the exercise of the discretion conferred by s 60(3) of the PA. It should not be assumed that noncompliance with an assessment benchmark automatically warrants refusal. This must be established, just as the non-compliance must itself be established."[15]

[18] The proper approach to non-compliance with the planning scheme in the decision making process was recently explained by Kefford DCJ in *Murphy v Moreton Bay Regional Council & Anor* in the following terms:

> "Under the *Planning Act* 2016, the discretion is to be exercised based on the assessment carried out under s 45. Its exercise is not a matter of mere caprice. The decision must withstand scrutiny against the background of the planning scheme and proper planning practice. Not every non-compliance will warrant refusal. It will be necessary to examine the verbiage of the planning scheme to ascertain the planning policy or purpose of relevant provisions and the degree of importance the planning scheme attaches to them. The extent to which a flexible approach will prevail in the face of any given non-compliance with a planning scheme (or other assessment benchmark) will turn on the facts and circumstances of each case."

[9] The *Trinity Park* decision also provides a recent affirmation of the principles to be applied in the construction or interpretation of a Planning Scheme, such as is in contention here, as follows:

> "[77] In *Zappala Family Co Pty Ltd v Brisbane City Council*, Morrison JA, with whom McMurdo P and Douglas J agreed, stated that the same principles which apply to statutory

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15 This is a direct reference to the decision in *Ashvan* at [53].

construction applied to the construction of planning documents. In particular, his Honour referred to the principles set out by the majority in *Project Blue Sky Inc v Australian Broadcasting Authority*, in the following terms:

> "The same principles which apply to statutory construction apply to the construction of planning documents. The High Court in *Project Blue Sky Inc v Australian Broadcasting Authority* said:
>
> [69] The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
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> [70] A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
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> [71] Furthermore, a court construing a statutory provision must strive to give meaning to every word of the provision. In *The Commonwealth v Baume*, Griffith CJ cited *R v Berchet* to support the proposition that it was "a known rule in the

> interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction they may all be made useful and pertinent.
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> …
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> [78] However, the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning …" (underlining added)
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> [78] Morrison JA in *Zappala Family Co Pty Ltd v Brisbane City Council* also referred to the decision of *AAD Design Pty Ltd v Brisbane City Council*, where Chesterman JA stated in relation to planning schemes, they can "often lack clarity, contain ambiguities and sometimes appear contradictory," and noted that the Court should adopt a common-sense approach and endeavour to give words meaning. Justice Morrison stated that the approach should start and end with the text, seen in its context in the way suggested by *Project Blue Sky*. His Honour also referred to High Court decision often cited as setting out the modern approach to statutory interpretation*, CIC Insurance Ltd v Bankstown Football Club Ltd*, where the majority stated that the modern approach to statutory interpretation insists that the context be considered in the first instance, and context is to be used in its widest sense.
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> [79] In the context of a planning scheme, such as CP 2016, the hierarchy of provisions is a matter of particular relevance in determining the correct construction, particularly where terms are not always consistently used throughout the planning scheme."

The issues

[10] The issues to which all of these principles are to be applied are identified in Exhibit 1, the parties summary of issues in dispute. They are:

> "1. Whether the proposed development would result in fragmentation and/or alienation of rural land, having regard to the following provisions within the Western Downs Planning Scheme 2017 Amendment 1 (**the Scheme)**:

(a) Strategic Plan part 3.5 Economic Growth and, in particular, Strategic outcome 3.5.1(4), Element 3.5.3(1), Specific Outcome 3.5.3.1(1);

(b) Rural zone code overall outcome (2);

(c) Natural resources overlay code Overall outcome (2)(d) and Performance outcome PO6; and

(d) Reconfiguring a lot code Purpose (1), Overall outcome (2)(b) and Performance outcome PO1.

2. Whether the development satisfies a community need, having regard to the Scheme Reconfiguring a lot code Overall Outcome 2(j) and Performance outcome PO14.

3. Whether there are relevant matters that would support the approval of the development application, those matters potentially comprising:

(a) the absence of any material negative impacts associated with the proposed development;

(b) approval of the proposed development would not result in any meaningful or material change to the use of the subject land;

(c) approval of the proposed development would not affect or decrease the capacity or likelihood of the land being put to rural or agricultural purposes;

(d) undertaking the proposed development (if approved) would not be appreciable or noticeable to the Respondent, any third parties, or the broader community; and

(e) approval of the proposed development would result in the more efficient operation and utilisation of the land the subject of the application."

[11] It is convenient to examine each of the three identified topics in turn.

Fragmentation or alienation of rural land

[12] It is common ground that the subject land is relevantly identified as rural land, or, more particularly, agricultural land, on Strategic Plan Map 4—Economic Development and Natural Resources.[16] Also, it may be accepted that no issue as to alienation of such agricultural land arises.[17]

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16 Ex. 9, p241.

17 This was conceded from a planning perspective by Mr Ovenden: T1-84.40-43. The concept of alienation may be considered more apt in application to the commencement of uses which may preclude availability for agricultural uses into the future, e.g. see: *Mirani Solar Farm Pty Ltd v Mackay Regional Council* [2018] QPELR 1158.

[13] The Respondent relies on non-compliance with the following assessment benchmarks and contextual provisions of the Planning Scheme, regarding the prevention and avoidance of fragmentation of rural land:

Part/Code	Provision
Part 3 Strategic plan, 3.5 Economic Growth, 3.5.1 Strategic outcomes	(4) Rural production and supporting industries remain the predominant economic sector in the Western Downs through the protection and enhancement of ALC Class A and B land that is critical to the sustainability of the sector.
Part 3 Strategic plan, 3.5 Economic Growth, 3.5.3 Element – Agriculture	(1) The long-term sustainability of the rural economy is based on the protection of productive rural lands from fragmentation, encroachment and alienation by incompatible development or diminished productivity.
Part 3 Strategic plan, 3.5 Economic Growth, 3.5.3 Element – Agriculture, 3.5.3.1 Specific Outcomes	(1) ALC Class A and B land identified on **Strategic plan Map 4—Economic Development and Natural Resources** is protected and its integrity, viability and productivity is protected and maintained for cropping and intensive horticulture, animal husbandry and other appropriate rural uses.
Part 6.2.10 Rural Zone Code, 6.2.10.2 Purpose	**OO(2)** All rural land is protected from alienation and fragmentation. A lack of viability for existing farming operations and small holdings does not provide suitable and sufficient planning justification for further subdivision or uses for non-rural purposes.
Part 9.4.4 Reconfiguring a Lot Code, 9.4.4.2 Purpose	(1) The purpose of the Reconfiguring a Lot Code is to ensure that reconfiguring a lot results in development that is consistent with the purpose and overall outcomes of the zone or precinct in which the land is located.
Part 9.4.4 Reconfiguring a Lot Code, 9.4.4.2 Purpose	**OO(2)(b)** lots are of a suitable size and shape for the intended or probable use having regard to the relevant zone. …. **(j)** reconfiguring a lot satisfies a community need.
Part 9.4.4 Reconfiguring a Lot Code, 9.4.4.3 Assessment benchmarks, Table 9.4.4.1	**PO 1** The layout and design of the lot enable: (a) density of land uses to be consistent with the intended character and amenity of the neighbourhood, as expressed through the relevant zone.

	….. **PO 14** The reconfiguring a lot satisfies a community need.
Part 8.2.7 Natural Resources Overlay Code, 8.2.7.2 Purpose	(2)(d) The alienation, loss or fragmentation of ALC Class A and B land is avoided, except where an overriding need exists for the development in terms of public benefit, where no suitable alternative site exists, and the loss or fragmentation of ALC Class A and B land is minimised.
Part 8.2.7 Natural Resources Overlay Code, 8.2.7.3 Assessment benchmarks, Table 8.2.7.1	**PO6** Loss or fragmentation of ALC Class A and B Land is avoided unless: (b) An overriding need exists for the development in terms of public benefit; (c) No suitable alternative site exists; (d) Loss or fragmentation is minimised to the extent possible. Note: Where for a performance-based solution, an assessment to determine the impact of the development on agricultural land including loss or fragmentation be prepared by a suitably qualified person, such as a Certified Practicing Agriculturist (CPAg).

[14] The respondent points to the common theme in these provisions, that such agricultural land is to be protected from fragmentation and the agreement of the town planning experts that such protection of such land reflects appropriate and common town planning principle.[18] The respondent contends that the evidently high importance placed on this principle in the Western Downs Planning Scheme is particularly to be discerned from:

(a) The statements in acknowledgement of the principle in the higher order provisions in the strategic framework;

(b) The strength of wording, in reference to fragmentation being "avoided" in Overall Outcome 2(d) and Performance Outcome 6 of the Natural Resources Overlay Code; and

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18 Ex. 5, *Town Planning JER*, [35].

(c) the narrow identification of circumstances allowing for exception to the avoidance of fragmentation:

(i) in OO2(d) being "except where an overriding need exists for the development in terms of public benefit, where no suitable alternative site exists"; and

(ii) in PO6: in terms of the same circumstances and as well that "loss of fragmentation is minimised to the extent possible".

Some particular emphasis is also placed on the statement in Overall Outcome (2) in the Rural Zone Code that:

> "A lack of viability for existing farming operations and small holdings does not provide suitable and sufficient planning justification for further sub-division or uses for non-rural purposes."

[15] The respondent also relies upon the evidence of its town planner, Mr Ovenden, as to the importance placed on the agricultural sector and role of the Planning Scheme in protection of the natural resources underpinning that sector.[19] It suffices to note, as some context to the more specific provisions tabulated above, the reference made to the following further provisions in the Strategic Plan:

> "3.2.1(7) … to this day, the productive lands at the Western Downs provide the foundation for the region's character and economic prosperity by facilitating growth within the grazing, intensive animal industries, extractive industries, cereal crops and forestry activities.
>
> ….
>
> 3.2.4 (Economic Resilience)
>
> ….
>
> (2) Agricultural, forestry and fishing represents approximately 25 per cent of the Western Downs economy and therefore the protection this sector from competing impacts and alienation and fragmentation is necessary to maintain a healthy long-term economy."

[16] The submissions for the appellant particularly accepted that a principal benchmark relevant to the issue of fragmentation is that expressed in the Rural Zone Code at Overall Outcome (2) and contended that (leaving aside the benchmarks requiring satisfaction of community need) the other relevant benchmarks were merely

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19 Ex. 10, Statement of G Ovenden at [4.18].

repetitive of that stated outcome.[20] In this context, it is appropriate to note that this overall outcome is expressed in the intended implementation of the following statement of purpose of the Rural Zone Code:

> "**6.2.10.2 Purpose**
>
> The purpose of the rural zone is to:
>
> (a) Provide for rural uses and activities; and
>
> (b) Provide for other uses and activities that are compatible with –
>
> (i) existing and future rural uses and activities; and
>
> (ii) the character and environmental features of the zone; and
>
> (c) Maintain the capacity of land for rural uses and activities by protecting and managing significant natural resources and processes."[21]

In the first place, the appellant's contention is that there is no relevant conflict with the planning scheme, in that "the proposed development would not result in any meaningful or practical fragmentation of rural land."[22]

[17] The town planner called for the appellant, Mr Schomburgk, agreed that the Planning Scheme speaks strongly in terms of "preserving and protecting and maintaining agricultural land", as found in many schemes applicable to rural areas.[23] Further, it was the agreed position of these town planners that the proposed development would permanently fragment the land.[24] The point of departure, as further developed for the appellant, lies in Mr Schomburgk's expression of view that, having regard to the separation of exclusive uses of each component of the Lot, under the Community Title Scheme ("CTS"), the land is already "in every practical sense" fragmented. Mr Schomburgk, whilst accepting that the proposal would permanently fragment the land, opines that it would continue to nevertheless be available for the same low key grazing and horse agistment uses to which it is presently put and that

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20 Appellant's written submissions, filed 14/6/22, at [30].

21 Ex. 9, p 172, at 6.2.10.2.

22 Appellant's written submissions, filed 14/6/22, at [60]. Reference is also earlier made to a concession in the evidence of Mr Ovenden's evidence to the effect that if the Court found that the land was already relevantly fragmented, there were no other material town planning reasons for refusal of the application: T1-84.44 – 1-85.2.

23 T1-48.18-22.

24 Ex. 5, *Town Planning JER* [36].

the proposed subdivision would not alter the productivity potential of the land (referring to the strategic framework at 3.5.3(1)). He further opines that:

> "42. The proposed subdivision complies with the purpose of the Rural Zone in that:
>
> (i) in that the land is still available 'for rural uses and activities' – s 6.2.10.2(a);
>
> (ii) the proposed subdivision is 'compatible with existing and future rural uses and activities' (in that it does not change) – s 6.2.10.2(b)(i)
>
> (iii) the proposed subdivision is compatible with 'the character and environmental features of the zone' (again, because there is no practical change to the character or environmental features) – s 6.2.10.2(b)(ii);
>
> (iv) the proposed subdivision will 'maintain the (current) capacity of the land for rural uses and activities' – s 6.2.10.2(c).
>
> 43. Further, the subject land as a whole is currently only 17.644 ha, which is substantially less than the preferred 1,000 ha for this part of the Rural Zone. Indeed, from my observation, there is not a single parcel in the vicinity of the subject land that complies with this minimum area. While that is not, of itself, justification for approval of this application, it is relevant in that it gives an indication of the existing character and amenity of the locality. Given that there are already two houses on the property and that there are, by virtue of the Exclusive Use provisions of the CTS, already operating as two separate farms, nothing will change in relation to the character and amenity of the locality if this appeal is upheld. Conversely, there is no adverse (or indeed, any) impact on character or amenity by allowing the appeal."

[18] In this sense, the appellant relies upon the effect of not just the CTS scheme and Community Management Statement ("CMS") in relation to the land, but also the existence of approval for multiple dwellings on the subject land, permitting and facilitating the use of the land in accordance with the separate legal interests created by the CTS. That approval was originally granted in April 2012 and changed in December 2012.[25]

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25 Ex. 2: Book of Application Documents, pp 26 – 40.

[19] The appellant refers to the notation of the Mayor, on behalf of the respondent to the registered CMS for this CTS, as "approval" by the respondent.[26] However and as the respondent points out, whilst the notation of "each relevant planning body" for a CTS, is required for the registration of a CMS,[27] there is only limited exception to the mandate that such planning body "must endorse a community management statement notation on the proposed community management statement".[28] Further it is specifically provided that:

> "In a community management statement notation the relevant planning body for a community title scheme states only that it has noted the community management statement."[29]

[20] Otherwise, it is noted for the appellant that:

(a) some contextual considerations may be drawn from:

(i) the acceptable outcome expressed as to lot size, in Table 9.4.4.2 of the Reconfiguration of a Lot Code, for rural zone land at 1,000ha;[30] and

(ii) acceptable outcome 6.2 of the Natural Resources Overlay Code, in identification that reconfiguration of ALC Class A or B land should not result in lots of less than 500ha;[31]

with the further observation that the subject land, at an area of 17.62ha, represents less than 2% of the minimum lot size area for the Rural Zone Code and approximately 3% of the minimum lot size for reconfiguration pursuant to the Natural Resources Overlay Code;

(b) the land is currently used consistently as intended in the rural zone:

(i) by the current tenant of the owner of Lot 1 for the agistment of three or four horses on the property; and

(ii) by the owner of Lot 2 in keeping four cattle on the property;

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26 Appellant's written submissions, filed 14/6/22, at [6] and see: Ex. 5, *Town Planning JER* at p 21.
27 *Body Corporate and Community Management Act 1997*, s 60(1).
28 Ibid at s 60(3) and (4).
29 Ibid at s 60(2).
30 Ex. 9, Planning Scheme Extracts, p 186.
31 Ibid at p. 180.

and that, approval of this application would not affect any such ongoing consistent uses;

(c) the concession by Mr Ovenden that the economically significant rural activities to which the planning scheme speaks and seeks to protect are particularly broadacre activities and not the small scale rural activities which may be conducted on such small lots;[32] and

(d) Mr Schomburgk's expressed views that:

(i) "the proposed subdivision does not alter the productivity potential of the land" (addressing the Strategic Plan at 3.5.3(1));[33] and

(ii) because of the absence of any practical change to the character and environmental features of this land, there is compliance with the purpose of the Rural Zone Code,[34] stated at 6.2.10.2, to be:

"the purpose of the rural zone is to:

(a) Provide for rural uses and activities; and

(b) Provide for other uses and activities that are compatible with—

(i) existing in future rural uses and activities; and

(ii) the character and environmental features of the zone; and

(c) maintain the capacity of land for rural uses and activities by protecting and managing significant natural resources and processes."[35]

[21] The appellant then seeks to develop its contention that there is no further than the existent and practically effective fragmentation of the land, by reference to the approach taken in *Wason v Gympie Regional Council* [2017] QPELR 798. In that case, a sub-division of land was allowed so that the land in question was divided into two lots (the southern part having an area of 37.66ha and the northern part having an area of 10.8ha). Similarly, each portion contained a dwelling house and outbuildings and was divided by a road. Particular reference is made to the following reasoning, as adopted in the circumstances of that case:

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32 T1 – 90, 5 – 17.
33 Ex. 5: *Town Planning JER*, at [41].
34 Ex. 5: *Town Planning JER*, at [42].
35 Ex. 9: Planning Scheme Extracts, at p 172.

"[20] Turning to whether there has been compliance with the planning scheme requirements to preserve GQAL, it is worth noting that, pursuant to s 1.5(3)(d), development which complies with acceptable outcomes is deemed to comply with the applicable performance outcomes, code overall outcomes and the purpose of the code. The relevant acceptable outcome in both the Rural Zone Code33 and the Reconfiguring of a Lot Code34 is expressed in the following identical terms: "[d]evelopment does not result in the loss of good quality agricultural land through alienation, fragmentation or inappropriate land use". There is no suggestion that the continued use of the land for grazing results in an inappropriate land use. The term "alienation" is not defined in the planning scheme. In the Macquarie Concise Dictionary35 the term alienate is defined as, inter alia, "to make indifferent or averse; estrange." The evidence before me does not suggest that the proposed reconfiguration will of itself alienate GQAL. It remains available for irrigation and cropping for a crop such as tomatoes should the owner of either portion so desire. The term "fragmentation" is also not defined in the planning scheme. In the Macquarie Concise Dictionary36 fragment is defined as "to break into fragments". On the evidence before me the already fragmented GQAL on the land is further fragmented by the presence of Cullinane Road. The proposed reconfiguration will not of itself further fragment the GQAL. Accordingly, I find the acceptable outcomes AO1.1 of the Rural Zone code and AO17.1 of the Reconfiguring a Lot Code are complied with.

[21] Applying s 1.5(3) there is therefore no conflict with the planning scheme in this respect. It is unnecessary for me to go further. However for the sake of completeness, I also conclude that there is no conflict with the relevant provisions of the strategic framework of the planning scheme identified by the respondent for the same reasons.

Preservation of land for primary production

[22] No change of use is proposed for any of the land. It remains available for primary production. However, the utility of the land for primary production in its current form is already seriously compromised. It is already too small for a commercial grazing enterprise and any potential utility it has for cropping is seriously limited by the constraints which already exist. Significantly it will still be viable, on the evidence I accept, for small scale cropping for a crop such as tomatoes regardless of the proposed reconfiguration. The fact that one of the intended lots may go into different ownership does not change these facts. Any prospective incompatible land use would require an application for a material change of use. The proposed reconfiguration will

> result in lots consistent in size and dimensions with other lots in the vicinity of the land."[36]

[22] The appellant contends that the evidence of existing fragmentation of the land in the subject instance, is more significant due to the existing separate legal titles and exclusive use areas in respect of the land. Further, the position of the respondent is criticised as being unduly dismissive of the rights and interests separately enduring pursuant to the CTS. For example, in Mr Ovenden's description that the current arrangement is not as matter of approval by the respondent but rather a matter of choice of, and remaining at, the discretion of the owners of the land, and that:

> "… the CTS represents a superficial or even artificial fragmentation that can easily be reversed. In some respects, the existing fragmentation represents a private agreement or treaty between owners (no different to multiple owners of a property being tenants in common, with the challenges that go with that) It is about how the common property is utilised. In that regard from a town planning perspective, the CTS 'fragmentation' is not formalised in any real property or cadastral sense."[37]

Otherwise, it is noted that the arrangements and noted uses of the land under the CTS have been in existence for more than a decade and have been supported by an associated development permit for multiple dwellings, each self-contained and with separate driveway access.[38]

[23] Accordingly, the contention is that it would not be found that the proposed development would involve any meaningful or practical fragmentation of rural land, such as to engage any inconsistency with the planning scheme, as contended by the respondent. That contention being particularly made in reference to the observations in *Zappala*, that:

> "The fact that planning documents are to be construed precisely in the same way as statutes still allows for the expressed view that such documents need to be read in a way which is practical, and read as a whole and as intending to achieve balance between outcomes."[39]

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36 *Wason v Gympie Regional Council* [2017] QPEC 34 at [20]-[22]; [2017] QPELR 798.
37 Ex. 5, *Town Planning JER* at [55].
38 Ex. 5, *Town Planning JER* at [12], [16] and [20].
39 *Zappala Family Co Pty Ltd v Brisbane City Council* [2014] QPELR 686, at [58], with particular reference to *Westfield Management Ltd v Pine Rivers Shire Council* [2004] QPELR 337, at 342, in respect of a practical approach.

[24] Whilst it may be accepted that, in the respondent's position and particularly as influenced by the evidence of Mr Ovenden, there may be discerned a tendency to downplay the nature and value of the rights created under the CTS, including those in respect of exclusive use of common property, it is neither necessary nor useful to dwell upon the various submissions as to any ability for unravelling of such an arrangement or those rights,[40] or indeed to compare that situation, in terms of being in any sense temporary or otherwise, with any position in respect of the prospect of amalgamation of lots. As the respective arguments demonstrate, each situation is capable of being altered in the way postulated, in each case dependent upon prevailing economic and personal motivation to do so.

[25] The issue involves construction of the Planning Scheme and particularly as to what is contemplated as "fragmentation", as that concept is engaged in these provisions. Further and whilst it may be accepted this undefined concept involves an ordinary meaning of breaking or detachment into separate parts and that such a result might be the result of actions and circumstances other than by formal reconfiguration of a lot, this application is for such reconfiguration, as that concept may be seen to be specifically contemplated as a form of potential fragmentation of agricultural land under the Planning Scheme. It therefore becomes a question as to whether the existing arrangements under the CTS are, in practical effect, comparable to the reconfiguration which is now sought.

[26] What is particularly germane, as the respondent contends, is that the *PA* and related legislation engaging the planning controls administered by the respondent, may be discerned to treat such a CTS differently to what is proposed here as a subdivision of land into separate freehold lots. It is only necessary to consider the respective treatment in the *PA*, in order to understand how the development which is proposed is differentiated from the existing legal arrangements in respect of the land.

[27] Central to the application of the *PA* is the definition of "development" in Schedule 2 to that Act. That concept is there defined to include the concept of "reconfiguring a lot", which itself is defined as follows:

> "***reconfiguring a lot*** means—
>
> (a) creating lots by subdividing another lot; or

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40 Respondent's written submissions at [26] – [27].

(b) amalgamating 2 or more lots; or

(c) rearranging the boundaries of a lot by registering a plan of subdivision under the Land Act or Land Title Act; or

(d) dividing land into parts by agreement rendering different parts of a lot immediately available for separate disposition or separate occupation, other than by an agreement that is—

(i) a lease for a term, including renewal options, not exceeding 10 years; or

(ii) an agreement for the exclusive use of part of the common property for a community titles scheme under the *Body Corporate and Community Management Act 1997*; or

(e) creating an easement giving access to a lot from a constructed road."

[28] By s 44 of the *PA*, three categories of development are recognised, namely:

(a) "prohibited development", being that for which a development application may not be made;

(b) "assessable development", being that for which a development approval is required; and

(c) "accepted development", being that for which a development approval is not required.

By s 44(5), it is provided that a categorising instrument (which by s 43 may include a planning scheme) may categorise development. However and pursuant to s 43(6), such a local categorising instrument has no effect to the extent to which it does not comply with s 43(5), which provides:

"A local categorising instrument—

(a) may state that development is prohibited development only if a regulation allows the local categorising instrument to do so; and

(b) may not state that development is assessable development if a regulation prohibits the local categorising instrument from doing so; and

(c) may not, in its effect, be inconsistent with the effect of a specified assessment benchmark, or a specified part of an assessment benchmark, identified in a regulation made for this paragraph.

Note—
Assessment benchmarks are given effect through the rules for assessing and deciding development applications under section 45, 59 or 60."

[29] Relevantly here, it is s 43(5)(b) which may be of concern, necessitating regard to s 16 of the *Planning Regulation 2017* ("*PR*") and in turn Schedule 6 of the *PR,* in terms of identification of types of development which are prohibited from being categorised as assessable development. Part 4 of that Schedule is directed at and headed "Reconfiguring a lot" and relevantly provides, in s 21:

> "**21 Particular reconfigurations**
>
> (1) Reconfiguring a lot other than a lot as defined under the Land Title Act.
>
> (2) Reconfiguring a lot as defined under the Land Title Act, if the reconfiguration—
>
> (a) requires a building format plan of subdivision under the Land Title Act and the plan does not subdivide land on or below the surface of the land; or
>
> (b) is for the amalgamation of 2 or more lots; or
>
> (c) is for the incorporation, under the *Body Corporate and Community Management Act 1997*, section 41, of a lot with common property for a community titles scheme; or
>
> (d) is for the conversion, under the *Body Corporate and Community Management Act 1997*, section 43, of lessee common property within the meaning of that Act to a lot in a community titles scheme; or
>
> …"

The definition of "lot" in the *Land Title Act 1994* is:

> "***lot*** means a separate, distinct parcel of land created on—
> (a) the registration of a plan of subdivision; or
> (b) the recording of particulars of an instrument;
> and includes a lot under the *Building Units and Group Titles Act 1980*."

[30] The evidence here is that the CTS was registered as Building Format Plan No SP249067, in 2012.[41] It is to be further noted that the types of plans recognised under the *Land Title Act 1994* are "standard, building or volumetric format".[42] It is

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41 Ex. 2, Book of Application Documents, p 20.
42 Section 48A(1), *Land Title Act 1994*.

further provided that "the format to be used in the plan depends on how the plan is to define the land to which it relates".[43] It is also provided that:

(a) "a ***standard format*** plan defines land using a horizontal plane and references to marks on the ground;"[44]

(b) "a ***building format*** plan of survey defines land using the structural elements of a building, including, for example, floors, walls and ceilings,[45] with the further definition "***structural elements***, of a building includes projections of, and references to, structural elements of the building" (with examples of projections as structural elements of a building provided as including "a balcony, courtyard, roof garden or other area not bounded, or completely bounded by a floor, walls and a ceiling");[46] and

(c) "a ***volumetric format*** plan of survey defines land using three dimensionally located points to identify the position, shape and dimensions of each bounding surface".[47]

[31] As the respondent contended, the effect of the building format plan adopted in the CTS here, is that the individual title in each lot exists only in respect of the separately identified buildings. Otherwise, the land is not in any sense, practically or otherwise, divided. It is common property and pursuant to s 41BA of the *Land Title Act 1994*, owned by the lot owners as tenants in common, in proportionate shares in accordance with their respective lot entitlements. Therefore, there is under the CTS, no division or separation of the land, in any legal or practical sense. Indeed so much may be regarded as self-evidently arising from what is to be discerned as an underlying motivation for this proposal lying in the particular restrictions in improving any of the land to which the exclusive use provisions are applicable and in seeking to achieve "better titling".[48]

[32] It may also be seen that the adoption of a CTS scheme involving a building format plan is, under the current legislative scheme, placed outside of the planning controls

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43 Ibid, at s 48A(2).
44 Ibid, at s 48B.
45 Ibid, at s 48C(1).
46 Ibid, at s 48C(2).
47 Ibid, at s 48D.
48 This is discussed in some more detail below, at [57]

which the respondent administers pursuant to the *PA*. More particularly, such an arrangement is legislatively distinguished from the concept of reconfiguring a lot, which is the concept which here potentially engages the issue of fragmentation of the land under those planning controls. Whilst as the appellant points out, under the assessment benchmarks expressed in the Reconfiguration of a Lot Code ("RoL Code"), as a representation of those planning controls, there is no reference to the concept of fragmentation of land (as opposed to there being minimum lot sizes as acceptable outcomes, which are not achievable here), although not originally identified as one of the relevant provisions supporting inconsistency with the planning scheme, the respondent does draw attention to the following statement of Purpose of the RoL Code:

> "(f) reconfiguring of lots does not result in the fragmentation of ALC Class A and B Land, create uneconomical rural lot sizes or compromise ongoing rural production of a lot."

There are also other benchmarks, as have been identified, which do engage the concept of fragmentation of land, in the context of the higher order statements of policy against allowance of such occurrence, including in the statement of Purpose for the Rural Zone Code, as that is specifically referred to in the purpose of the RoL Code, at 9.4.2, in terms of ensuring that reconfiguring a lot "results in development that is consistent with the purpose and overall outcomes of the zone or precinct in which the land is located". Further, the Natural Resources Overlay Code at 8.2.7.1, is stated to apply to assessing "reconfiguring a lot development applications" within identified natural resource areas.

[33] Further, the analogy sought to be made with the approach adopted in *Wason v Gympie Regional Council*, lacks any comparison in respect of any physical characteristics of this land, being such as to make it in any sense already practically fragmented.

[34] It is accordingly not appropriate to accept the contention of absence of further practical fragmentation, solely upon the basis of such practical fragmentation being present upon the basis of the legal separation of rights pursuant to the CTS and more particularly that these considerations serve to achieve any sense of compliance with the provisions of the Planning Scheme, in terms of avoiding or not allowing fragmentation of this land. In other words, it is appropriate to conclude that in the

context in which it appears, the concept of fragmentation of this land is engaged by the proposed division of the land by way of reconfiguration of a lot. Further this means that, as acknowledged, there is non-compliance or inconsistency with provisions of the Planning Scheme which present as being strongly against such fragmentation, as that concept is within those planning controls.

[35] Accordingly, it should be concluded that the proposed development here is, in the ways which have been acknowledged and noted, not compliant with the assessment benchmarks and that the acknowledged strength of the evident policy against such fragmentation of this land, means that this inconsistency is significant and to be afforded substantial weight in the assessment and ultimate exercise of discretion by this Court.

[36] Whilst it remains necessary to consider these conclusions in the context of all of the relevant circumstances in order to complete the exercise of discretion permitted under s 60(3) of the *PA* and therefore the remaining identified issues, it is necessary to note that this conclusion, in the context of the undisputed reflection of appropriate planning policy in provisions with which these is conflict, neither allows for an approach based upon any sense of merely technical non-compliance with assessment benchmarks. Neither, in these circumstances, is such conflict restricted to those requirements, to be further discussed, for satisfaction of community need in respect of approval of a reconfiguration.

Community need and public benefit

[37] As has been noted, each of the benchmarks in the form of the RoL Code and the Natural Resources Overlay Code contains statements of requirement in satisfaction of community need. At each of (2)(d) of the stated purpose and PO6 of the Natural Resources Overlay Code, the requirement is stated in terms of "avoidance" of fragmentation, except where there is "an over-riding need for the development in terms of public benefit" and "no suitable alternative site exists" and "the fragmentation…is minimised to the extent possible".

[38] It is convenient to also note some contextual interrelationship. The purpose of the RoL Code is stated to be "to ensure that reconfiguring a lot results in development that is consistent with the purpose and overall outcomes of the zone or precinct in

which the land is located."[49] The particularly relevant overall outcome sought for the Rural Zone Code is noted as follows:

> "(2) All rural land is protected from alienation and fragmentation. The lack of viability for existing farming operations and small holdings does not provide suitable and sufficient planning justification for further subdivision or uses for non-rural purposes."

Notably the purpose of the rural zone is stated to be to:

> "(a) to provide for rural uses and activities; and
>
> ….
>
> (c) maintain the capacity of land for rural uses and activities by protecting and managing significant natural resources and processes."

That latter statement of purpose has resonance in engagement of the Natural Resources Overlay Code in respect of the subject land, with the particularly stated purpose and performance outcome which has been noted in reinforcing and expanding upon the requirement for "over-riding need for the development in terms of public benefit" in order to overcome the blunt statement that fragmentation of ALC Class A and B land is to be avoided.

[39] As was a common position of the town planners,[50] there is an absence of identified community need for this proposed sub-division. However, the position of Mr Schomburgk, including as further explained in his individual statement,[51] is that given the absence of any adverse community impact, this single inconsistency with the RoL Code ought not be a sufficient basis for a refusal of the application. In that individual statement, he comments upon the unusual nature of the requirement in PO14 of the RoL Code, particularly in its application therefore across all zones and types of reconfiguration. He is critical of it, in terms of having unclear utility,[52] and as difficult to be seen as a reasonable or appropriate test for what may be regarded as the majority of sub-division applications and particularly where all other requirements of this Code and the appropriate Zone Code are met.[53]

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49 Ex. 9, Western Down Planning Scheme, 9.4.4.2(1), p 182.
50 Ex. 5: *Town Planning JER*, at [44] and [50].
51 Ex. 6: Statement of C Schomburgk at [11] – [14].
52 Ibid at [11].
53 Ibid at [12].

[40] As is correctly noted for the respondent, the applicable principles as to construction of planning schemes do not permit a replacement of the test provided in the scheme with any other test that a town planner might consider more reasonable or appropriate.[54] As has been noted, in any event, the position here in terms of the engagement also of the Rural Zone Code and the Natural Resources Overlay Code, indicate that the position here is not one of the sense of simplicity postulated by Mr Schomburgk.

[41] The respondent does seek to rely upon what are suggested by Mr Ovenden,[55] as to particular implications of allowance of this sub-division or fragmentation and identified as adverse impacts reflective of the policy underlying the scheme benchmarks and approach to the preservation of land for potential rural uses.

[42] It is unnecessary to examine all of the postulated implications, nor the competing views expressed by Mr Schomburgk. It suffices to note that whatever view may be open, in different circumstances, this subdivision or fragmentation of land in the Rural Zone would, as the respondent contends, logically tend to make the smaller lots more attractive to purchase and use for lifestyle rural residential occupancy and in that way, constitute an adverse impact in displacement of the scheme policy in seeking to preserve such land for respective rural use.

[43] Also in this respect, it should be understood that the views expressed by Mr Schomburgk must be viewed in an understanding that his reasoning is fundamentally premised in the unacceptable underlying assumptions that:

(a) there is, in a practical sense, no fragmentation, or at least further fragmentation, of the land proposed and therefore no adverse impact in terms of undermining the scheme policy as a town planning consequence; and

(b) there is then particular relevance and importance from a town planning perspective in the absence of any adverse town planning consequence as might flow from such non-compliance with this single performance criteria in the RoL Code.

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54 Respondent's written submissions, filed 14/6/22, at [46].
55 Ex. 10, Statement of G Ovenden, at [39].

As has been noted, this requirement as to the satisfaction of community need is not to be seen as an isolated requirement and, as the respondent points out,[56] (notwithstanding this not being initially included as an aspect of non-compliance with the Planning Scheme), in the overall outcomes stated for achievement of the purpose of the RoL Code, at (2)(f), it is stated that "reconfiguring of lots does not result in the fragmentation of ALC Class A and B land."

[44] Moreover and to the extent that any such inclusion of requirement of satisfaction of community need in the RoL Code may be regarded as unusual or uncommon, it may, as the context otherwise supports here, serve to emphasise rather than diminish the importance of the requirement.[57] It may be observed that the position, particularly in terms of ascribing weight to be attached to any such inconsistency, might differ when that inconsistency is not otherwise reflected in the Relevant Zone Code and other related codes and having regard to the noted purpose of the RoL Code in achieving consistency with the purpose and overall outcomes of such Zone Code.

[45] In these circumstances, these further aspects of inconsistency with relevant benchmarks only serves to call for greater weight to be placed upon the extent of inconsistency with the objectives of the Planning Scheme.

Relevant matters

[46] Accordingly and what remains, in the context of what is demonstrated as such inconsistency of the proposed sub-division with the Planning Scheme, is the identification of any other relevant matters to which regard may be had in the assessment required by s 45(5) of the *PA* and the exercise of discretion permitted by s 60(3) of the *PA*.

[47] In the documents setting out the agreed issues in dispute,[58] five such relevant matters are identified. As they were ultimately pursued, it was under the three rubrics, as considered below.

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56 Respondent's written submissions at [49].

57 Cf: *Engwirda (ATF Engwirda Superannuation Fund) v Mackay City Council* [2009] QPELR 237 at [15].

58 Ex. 1.

[48] First and as required by s 45(5)(a)(ii) of the *PA* and s 31(1)(f) of the *PR*, regard is to be had to any development approval for and any lawful use of the premises. Accordingly, it is contended that the existing approval for material change of use for multiple dwellings, given by the respondent in 2012, is a relevant matter favouring approval of the proposed subdivision, as being consistent with and strengthening the historic use of the land for two separate household units.

[49] However and as the respondent points out, any material change of use of the land would require an approval upon development application. Moreover, it is necessary to understand that the existent approval necessarily relates to the land in its undivided form and if the proposed subdivision were to be allowed, the questions as to use and material change of use would also be separated in respect of each separately subdivided parcel. It may well be expected that the existing and separated uses of the land would remain as lawfully recognised but the point is that it would not be on the basis of any approval of multiple dwellings, as that approval attaches to the land in its presently undivided state.

[50] Secondly and in effective amalgamation of some matters stated to be relevant matters in Exhibit 1, the appellant contends that "the absence of any adverse impacts associated with the proposed development should be accepted as a relevant matter supporting its approval. In particular, it is contended that such consideration lies in understanding not just the absence of any material negative impacts associated with the proposed development but also that:

(a) approval of the proposed development would not result in any meaningful or material change to the use of the subject land;

(b) approval of the proposed development would not affect or decrease the capacity or likelihood of the land being put to rural or agricultural purposes; and

(c) undertaking the proposed development (if approved) would not be appreciable or noticeable to the respondent, any third parties, or the broader community.

[51] As contended, there is support for the potential appropriateness of regard to any identified absence of adverse impact or detrimental effect as a relevant consideration, in the decision in *Abeleda v Brisbane City Council*, as follows:

> "The Council submits a relevant matter for the purpose of s 45(5)(b) of the Act that is not included as an example may be the absence of any negative impact from, or detrimental effect of a proposed development, in reliance on the observation of Holmes JA (as her Honour then was) in *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 302 at [25]. *Westlink* concerned a development application made when legislation that preceded the SPA was in force, but there was a similar provision in that legislation to s 326(1)(b) of the SPA. It was accepted by Holmes JA at [25] consistent with previous authority "that the mere absence of adverse effects will not amount to sufficient grounds to outweigh a conflict with the planning scheme; but it does not follow that the absence of a negative impact or detrimental effect is not a relevant consideration". The terms of s 45(5)(b) of the Act are wide enough in an appropriate case for the absence of a negative impact or detrimental effect to be taken into account as a relevant matter on an impact assessment." [59]

[52] The appellant acknowledges that the subject site is "unorthodox" in terms of being already subject to separate legal ownership and approved for multiple dwellings involving separate occupation and use of parts of it. It is further contended that the proposed development by subdivision would not result in any meaningful change to the nature or use of the subject land. The later noted proposition is criticised for the respondent as being fixed in a short rather than longer term view. Also, the appellant's contentions against the respondents contention that the assertions as to absence of adverse effect in terms of the agricultural capacity of the land, lacks any support from an appropriate agronomical expert, depend essentially upon an understanding of the current uses of each part of the land under the CTS and the contention as to the practical effect of fragmentation.[60] Further and in the context of the respondent's position as to the application being contrary to the policy underlying the benchmarks with which it conflicts, the respondent points to the prospective implications noted by Mr Ovenden:

(a) First, as may be accepted, are his general observations as to the decreasing utility of land for all agricultural purposes as lot sizes decrease, including in respect of the increased difficulty of prospective re-amalgamation of larger areas of land. And it also points to an

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59 [2020] QCA 257 at [61].

60 Appellant's written submissions, filed 14/6/22, at [61]-[64].

outcome of two lots smaller than those surrounding them and with only one of them presently with the benefit of a dam;

(b) Secondly, and in the context of the appellant's reliance upon what is described as the advantages of "better titled lots",[61] it may be accepted that there would be an increased prospect of acquisition of the smaller lots by the purchasers more interested in a rural residential lifestyle and potentially with less tolerance for agricultural activities on the land and in the environs.

[53] It may be observed that the evidence of Mr Schomburgk, in terms of providing any basis for the contention of absence of adverse impacts or detrimental effect of the proposal, was only as to there being no such impact or effect by "change in relation to the character and amenity of the locality". As has already been noted, Mr Schomburgk's position proceeded upon assumption that there was no practical inconsistency by way of further fragmentation of the land[62] and therefore proceeded without direct consideration of any adverse impact in terms of compromise of the policy underpinning the Planning Scheme and ongoing ability to achieve the planned and encouraged uses of their land. Such consideration may be noted to be specifically engaged by the Statement of Purpose in the Rural Zone Code, in terms of being to "maintain the capacity of land for rural uses and activities by protecting and managing significant natural resources and processes".

[54] Related to this issue are some other validly raised criticisms of the contentions of Mr Schomburgk in the Town Planning JER as follows:

> "Further, the subject land as a whole is currently only 17.644ha which is substantially less than the preferred 1,000ha for this part of the rural zone. Indeed, from my observation, there is not a single parcel in the vicinity of the subject land that complies with this minimum area. While that is not, of itself, justification for approval of this application, it is relevant in that it gives an indication of the existing character and amenity of the locality. Given that there are already two houses on the property and that they are, by virtue of the Exclusive Use provisions of the CTS, already operating as two

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61 See below at [57].

62 As noted above (at [17]), That approach allowed his conclusion that the proposal, other than as to the preferred lot size and the requirement for satisfaction of community need, complied with the purpose of the Reconfiguration of a Lot Code, including the statement in 9.4.4.2(2)(f) of the overall outcomes to be achieved by that Code, that the reconfiguration does not result in fragmentation of ALC Class A and B land.

> separate farms, nothing will change in relation to the character and amenity of the locality if this appeal is upheld. Conversely, there is no adverse (or indeed any) impact on character or amenity by allowing the appeal."[63]

To the extent that reliance is placed on the fact that the current lot size being already substantially less than the preferred lot size for the rural zone, it is correctly contended for the respondent that the statement in Overall Outcome (2) makes clear that the fact that this is a "small holding does not provide suitable and sufficient planning justification for further subdivision". Further and whilst there was reference to the character and amenity of the locality having the feature of absence of lots of the preferred or minimum size, the simple point demonstrated by the evidence of Mr Ovenden, is that the proposal would introduce inconsistency with that proposition, in that there are no other lots of the proposed sizes in the vicinity,[64] with other comparability sized lots being located, as described as historically found, closer to towns and their services.[65]

[55] Finally, there is what is contended to be an outcome of "improved utilisation of the land". There is obvious difficulty in this contention. As it was also relied upon in respect of compliance with requirements of satisfaction of community need, it was in terms of providing "(albeit low) improvement in community wellbeing".[66]

[56] For the present purpose and in being expressly conscious of the criticism of the respondent that there is reliance upon "personal circumstances, financial or otherwise" of the owners and occupiers of the land, as proscribed to be impermissible as a relevant matter, by s 45(5)(b) of the *PA*, the appellant ascribes that the:

> "…principal benefit is the fact that the buildings and structures and other agricultural improvements such as dams and bores could be constructed and extended without the requirement for consent of the other lot owner, which would result in benefits to the use of the land for rural purposes".[67]

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63 Ex. 5, *Town Planning JER* at [43].
64 Ex. 10: Statement of G Ovenden, Appendix B.
65 Ibid, at [3.6].
66 Appellant's written submissions at [83].
67 Ibid, at [98], where reference is also made to the evidence of Mr Schomburgk at T1 – 63.23 – T1 – 64.8 and T1 – 81.1-29.

It is to be noted that earlier in those submissions,[68] reference is made to what is noted to be a difference between the existing property rights under the CTS and those attaching to freehold ownership as would be achieved by the proposed subdivision and lying in the present requirement of consent of the other lot owner and absence of ownership of any consented to improvements in the respective exclusive areas of the land, at least without modification of the existing scheme.

[57] Otherwise, it is only contended that:

> "…The subject land would be more efficiently and effectively utilised, in that:
>
> (a) mundane functions such as power bills and insurance would not need to be co-ordinated across both lots; and
>
> (b) provision of better – quality utility infrastructure, such as electrical services, could be provided to each lot owner."

Conclusion

[58] It may, therefore, be seen that there is an absence of any relevant matter deserving of any substantial weight against what has otherwise been found to be significant conflict or non-compliance with clearly requirements of the Planning Scheme, in the assessment of this development application. Further such non-compliance is with provisions which strongly encapsulate and state, as a comprehensive expression of what will constitute in the public interest the appropriate development of land, under that scheme, what is an undisputed matter of appropriate planning policy in seeking to preserve and protect the availability of land appropriate for agricultural uses, having regard to the undoubted local interests vested in such industry and therefore in fulfilment of the purpose of the *PA*.

[59] In these circumstances, it is to be concluded that the appellant has not discharged the obligation of demonstrating that its development application should be approved and accordingly, the appropriate order is that the respondent's refusal, by notice dated 25 November 2020, of the development application dated 13 August 2020, is confirmed.

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68 Appellant's written submissions at [11] – [15] and [83].