PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Grundy & Anor v Fraser Coast Regional Council* [2024] QPEC 17
PARTIES:	**BARRY NEALE GRUNDY & MAREE CARMEL GRUNDY** (appellants) **V** **FRASER COAST REGIONAL COUNCIL** (respondent)
FILE NO/S:	78/2021
DIVISION:	Planning and Environment
PROCEEDING:	Appeal against the refusal of a development permit for a material change of use
DELIVERED ON:	12 April 2024
DELIVERED AT:	Maroochydore
HEARING DATE:	20 November 2023 (site inspection), 21 November 2023, 22 November 2023, 1 March 2024 (application in pending proceeding), 22 March 2024 (further written submissions)
JUDGE:	Cash DCJ
ORDERS:	**The decision of the respondent to refuse the development permit is confirmed and the appeal is dismissed.**
CATCHWORDS:	ENVIRONMENT AND PLANNING — DEVELOPMENT CONTROL – APPEAL AGAINST REFUSAL – where the appellants own land in a rural zone at Takura – where the appellants wish to establish an open-warehouse facility to temporarily store cars and car bodies as part of a towing and transport business – where the appellants had been using the land as a warehouse – where such use is a type of urban and industrial use – where the appellants applied for a material change of use – where the proposed changed of use is subject to impact assessment before approval by the respondent council – where the appellants' proposal sought approval for an existing unlawful use of the land – where the respondent council refused the appellants' application – whether the development conflicts with important parts of the planning scheme – whether the proposed development is incompatible with, and unacceptable in, a rural zone pursuant to the planning scheme – whether the proposed use has minimal effect on visual and acoustic amenity of surrounding land

uses.

LEGISLATION:	*Planning Act 2016* (Qld), s 45, s 46, s 60 *Planning and Environment Court Act 2016* (Qld), s 43, s 45, s 46, s 47
CASES:	*Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257; (2020) 6 QR 441, [54]–[58]
	Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16; [2019] QPELR 793, [51]
	Brisbane City Council v YQ Property Pty Ltd [2020] QCA 253; [2020] 48 QLR, [59]
	Jakel Pty Ltd v Brisbane City Council & Anor [2018] QPEC 21; (2018) 231 LGERA 253; [2018] QPELR 763, [93]
	Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor [2019] QPEC 46; [2020] QPELR 328, [22]
APPEARANCES:	D D Purcell for the appellants M J Batty with N A Batty for the respondent
SOLICITORS:	The Firm on the Avenue for the appellants Connor O'Meara Solicitors for the respondent

Introduction

[1] The appellants own 10 hectares of land in a rural zone at Takura, near Hervey Bay. They want to establish an open-air warehouse facility of 2,500m^2 to temporarily store cars and car bodies as part of a towing and transport business. This would be a type of industrial use that is not usually found in rural zones in the local government area. What the appellants propose finds no support in the relevant planning scheme. Indeed, as I will explain, the scheme discourages industrial use of this kind, scale, and intensity in a rural zone. As well, uncertainty about how the appellants would operate the warehouse if permission were granted gives rise to real concerns about unacceptable effects on visual amenity in the locality. The result is that the development conflicts with important parts of the planning scheme and there is little or nothing to commend what is proposed by the appellants in this location. The decision of the respondent to refuse the application for a development permit for a material change of use must be confirmed and the appeal dismissed.

The land and its locality

[2] The land is at 674 Torbanlea Pialba Road at Takura.[1] It is a triangular-shaped corner allotment with frontages to Torbanlea Pialba Road on the southern boundary and Dublin Road on the eastern boundary. Dublin Road is a gazetted but barely formed road and there is mature vegetation separating it from the land. The southern part of the land adjacent to Torbanlea Pialba Road is improved with a single dwelling and

[1] It is formally described as Lot 201 on MCH4202.

associated outbuildings, including a large shed. The lower half of the land is largely clear of vegetation but there are numerous shipping containers, car bodies, and pieces of machinery spread around the site.

[3] The land is in the 'Rural Area' for the purposes of the settlement pattern provisions contained in the Strategic Framework of the *Fraser Coast Planning Scheme 2014* ('**the planning scheme**').[2] It is also in the rural zone pursuant to the planning scheme and is subject to the Rural Zone Code. The land contains Class A and Class B agricultural land and is subject to several other overlays, though none are of relevance to this appeal.

[4] Takura is a rural locality in the Fraser Coast region. The area surrounding the land has a predominantly low intensity rural amenity and character. Rural pursuits such as cropping dominate, but there are some other non-rural uses. Across Torbanlea Pialba Road to the south there is a disused single classroom building, once the Takura State School, and a vacant produce store.

The appellants' application for a material change of use

[5] The evidence indicates the appellants became the registered owners of the land in August 2017. The town planning report accompanying their application described the appellants as operating a towing and tilt tray business in the region, part of which involves the transportation and temporary storage of vehicles. No doubt this explains the presence of at least some of the cars and machinery on the land. The result, as is apparent from the application, is that the appellants had been using the land as a 'warehouse'.[3] Development of this kind could not be carried out as-of-right on the land, and the proposed change of use required impact assessment before it could be approved.

[6] The appellants' proposal was for a 50 metre by 50 metre (2,500m^2) storage yard on the south-western part of the land for the collection and temporary storage of vehicles. The storage area was to be screened from Torbanlea Pialba Road by vegetation and shipping containers. The appellants' proposal disavowed any proposed use for wrecking or salvaging cars or carrying out other mechanical works. As put by the town planners, the application was 'seeking to regularise an existing unlawful use' of the land. The application was considered by the respondent who, on 30 April 2021, advised that the application was refused, essentially as being fundamentally incompatible with the Rural Zone Code. It is this decision which is the subject of the appeal.

[7] At the beginning of the hearing of the appeal the appellants sought, and were granted, orders changing the proposed development in a minor way. The principal effect of the changes is to locate the development further north, so it is not situated on agricultural land. As well, the changes seek to address some of the issues concerning acoustics and visual amenity by introducing an acoustic barrier and landscape buffer. This appeal is to be considered based on the changed plans.

The nature of the appeal

[8] This appeal is by way of a hearing anew,[4] and it is for the appellants to establish the appeal should succeed.[5] Section 45 of the *Planning Act 2016* (Qld) ('**PA**') applies as

---

2 The relevant version of the planning scheme being Version 11, in effect since September 2019.
3 According to the definition in the planning scheme.
4 *Planning and Environment Court Act 2016* (Qld) ('PECA'), section 43.

if the court were the assessment manager for the development application.[6] The result is that I am required to conduct my own assessment of the development application as if I were 'standing in the shoes of the assessment manager'.[7] Pursuant to section 45(5) of the PA this assessment must be carried out against the applicable assessment benchmarks and may be carried out against, or having regard to, other relevant matters.

[9] In determining the appeal, I must confirm the decision to refuse the application, change it (including by imposing conditions), replace it with my own decision, or set it aside and return the application to the original decision maker with such directions as I consider appropriate.[8] Section 47 of PECA and section 60 of the PA require me to exercise a broad, evaluative judgment.[9] A development application may be approved even where there is inconsistency with an applicable assessment benchmark.[10] The exercise of deciding a planning act appeal has been described as one providing 'flexibility … to approve an application in the face of non-compliance with a planning document'.[11] That is not to say the assessment benchmarks contained in a categorising instrument or planning document are unimportant. The relevant instruments or documents are part of the expression of the 'community interest' in regulating development and are always a relevant consideration.[12] The extent to which a proposed development complies with, or departs from, an applicable assessment benchmark is a relevant matter to be given appropriate weight according to the circumstances,[13] which will include the importance of the benchmarks as may be discerned from the terms of the planning provisions.[14]

The proposed development

[10] As changed, the proposal is for a warehouse facility to temporarily store cars and car bodies prior to their transportation outside of the local government area. Such a use is an industrial activity under the planning scheme. The area the subject of the development would be 2,500m^2, with the storage area being about 1,300m^2. It would be located adjacent to the western boundary of the land, 100 to 150 metres to the north of Torbanlea Pialba Road. The appellants propose that the southern side of the storage area would be screened by a 100-metre-long row of shipping containers, painted in a dark colour. A two-metre-high noise barrier would line the southern and western sides of the area. Finally, an eight-metre-wide vegetation buffer would run along half of the southern boundary of the land to the south-western corner and from there along the western boundary to meet the row of shipping containers at the storage area.

---

5 PECA, section 45(1).
6 PECA, section 46(2).
7 *Jakel Pty Ltd v Brisbane City Council & Anor* [2018] QPEC 21; (2018) 231 LGERA 253; [2018] QPELR 763, [93].
8 PECA, section 47.
9 *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253; [2020] 48 QLR, [59].
10 Ibid, [62].
11 *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16; [2019] QPELR 793, [51] ('*Ashvan*'), cited with approval in *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257; (2020) 6 QR 441, [54]–[58] ('*Abeleda*').
12 *Abeleda* (n 11), [54] (citing *Ashvan* at [53]).
13 *Abeleda* (n 11), [42].
14 *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46; [2020] QPELR 328, [22].

[11] Inherent in the appellants' proposal is the use of trucks and other machinery to load, unload, and move car bodies. There is no evidence from the appellants as to exactly how the warehouse would be operated if their proposal is approved.

The issues in dispute

[12] The issues in dispute are narrow.[15] The first issue concerns the proposed use of the land, and whether it is incompatible with, and unacceptable in, the rural area and zone. The second issue concerns whether the proposed development will have unacceptable effects on visual and acoustic amenity in the surrounding area. Each issue requires consideration of provisions in the planning scheme identified by the parties.

[13] An issue concerning the potential alienation of good quality agricultural land was raised in the pleadings. This fell away to an extent, though it was not abandoned by the respondent, when the proposed development was changed so that it would no longer be situated directly within the mapped area of good quality agricultural land. To the extent that this issue remained relevant, it is also discussed below.

[14] There was also a development after the hearing of the appeal. Immediately before this appeal was heard, the respondent made a separate application for enforcement orders concerning the appellants' use of the balance of the land not the subject of the development application. On 25 January 2024, Judge Long SC made orders, effectively by consent, indicating the court's satisfaction that the appellants had carried out assessable development without a permit and requiring them to cease the unlawful use of the land. On 28 February 2024, the respondent applied in the appeal proceeding for leave to adduce evidence of the order made by Judge Long, and to make further written submissions. That application came before me on 1 March 2024, and I made orders, by consent, granting leave to the respondent adduce the evidence and for both sides to advance further written submissions. The order of Judge Long resolved an issue that had been raised in the proceeding before me – whether the appellants' use of the balance of the land was unlawful. And, as explained below, the acceptance by the appellants that it was not a lawful use of the land effects the evidence adduced by the appellants concerning visual and acoustic amenity.

[15] To resolve the issues in dispute in the appeal it is helpful to begin with the intent of the planning scheme for land in the rural area or rural zone.

What does the planning scheme intend for the rural zone?

[16] The strategic framework of the planning scheme sets out to describe the basis for appropriate development. It does so, in part, through provisions contained in six separate themes which together outline the policy of the planning scheme. The first theme deals with the intended settlement pattern for the region. Within this theme, strategic outcomes provide that urban areas are to be compact, with clearly defined boundaries, and that urban development is to be predominantly focused in the major regional population centres of Maryborough and Hervey Bay.[16] These goals are supported by specific outcomes encouraging urban development within identified

---

15 Exhibit 4.

16 Planning Scheme, 3.3.1(b) and (c) (see Exhibit 8, p. 13).

urban areas and in a manner which contributes to the form and structures of the areas.[17]

[17] In my view these provisions are an indication that development of an urban character would usually be in designated urban areas. Expressed another way, development of an urban character in non-urban areas (such as rural areas) is discouraged by the planning scheme.

[18] Support for this conclusion may be found in the treatment of rural land under the second theme, 'Economic resources and development'. This provides, as a strategic outcome, that '[t]he region's rural areas are managed to maximise their contributions to the local economy, rural industries, regional environmental quality and the regional landscape'.[18] Elements and specific outcomes contained in this theme discourage incompatible development and encourage the preservation of rural land in the rural zone.[19]

[19] The detailed provisions of the Rural Zone Code are also consistent with this conclusion. The expressed purpose of the code is to:[20]

> (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 resources and activities by protecting and managing significant natural resources and processes.

[20] The Rural Zone Code does contemplate some non-rural uses, but only those 'that are compatible with a rural setting and support rural enterprise or tourism … where they complement or provide a service to rural areas and do not compromise the use of the land for rural activities'.[21] The point is reinforced in the assessment benchmarks which provide for some non-rural uses that are 'located, designed and operated to minimise conflicts with existing and future rural uses and activities on the surrounding rural lands.'[22]

[21] As may be discerned from the above, the planning scheme expresses a strong preference for development of an urban character to be confined to urban areas, and only contemplates non-rural uses in rural zones in limited circumstances.

Is the proposed development incompatible with, and unacceptable in, the rural zone?

[22] The evidence of the town planners called for each party is critical to the resolution of this issue. Mr Chris Buckley was retained by the respondent to offer his opinions about the planning consequences of the proposed development. Mr Ward Veitch was retained by the appellants for the same purpose. A joint expert report was prepared, though there was little of substance upon which the planners agreed.

---

17 Planning Scheme, 3.3.2.1(a) and (b) (see Exhibit 8, p. 14).
18 Planning Scheme, 3.4.1(e) (see Exhibit 8, p. 28).
19 Planning Scheme, 3.4.2.5 (see Exhibit 8, p. 32).
20 Planning Scheme, 6.2.19.2 (see Exhibit 8, p. 124).
21 Planning Scheme, 6.2.19.2(2)(d) (see Exhibit 8, p. 124).
22 Planning Scheme, Table 6.2.19.3.1 PO3 (see Exhibit 8, p. 125).

[23] Mr Buckley emphasised his opinion that the intent of the planning scheme was to discourage inappropriate urban or industrial uses in the rural zone.[23] I largely agree with Mr Buckley's assessment of the planning scheme for the reasons set out above.[24] When the proposed development is assessed against the planning scheme, Mr Buckley considered it significantly departed from important provisions. In particular, the development was not compatible with, and would not complement, rural areas and there was nothing else to commend approval of the proposed development in the rural zone. Mr Buckley thought that the use proposed by the appellants, being urban and industrial, had no connection with expected rural uses or activities and found no support in the planning scheme, especially the strategic framework.

[24] In cross-examination, Mr Buckley accepted that the provisions of the strategic framework were necessarily broad and did not deny the possibility of non-urban uses in the rural zone. He agreed that modern planning schemes were rarely expressed in absolute terms, but he considered the intent of the planning scheme in discouraging such uses in the rural zone to be clear. Mr Buckley characterised the proposed use as an industrial use of an urban character. He said it was a use that would not be expected in a rural zone, and that was it was not compatible with or complementary to rural uses. The effect of Mr Buckley's evidence was that the most that could be said in favour of the appellants' proposal is that it was not specifically forbidden by the planning scheme.

[25] In coming to a contrary conclusion, Mr Veitch seemed to place considerable weight upon the absence of an explicit prohibition. He noted that the planning scheme contemplated some non-rural uses in the rural zone. Mr Veitch also referred to examples of other non-rural uses already existing in rural zones, such as a caravan storage facility on the Maryborough Hervey Bay Road, a transport depot at Susan River, and some low-impact industrial use (wood chipping) elsewhere on Torbanlea Pialba Road. This, together with sheds and machinery associated with traditional rural uses, meant that the operation of a warehouse facility by the appellants would be of little significance. Essentially, it was Mr Veitch's opinion that the proposed development did not depart from the planning scheme because it was not inherently incompatible and would have an insignificant effect on the local rural character.

[26] In cross-examination, Mr Veitch accepted that an outcome sought by the planning scheme was for industrial activities not to be found in rural localities and, consequently, it would not be usual to establish such forms of industry in a rural area. He agreed that this planning intent was 'entrenched in the strategic outcomes right down to the balance of the scheme and the codes…'[25]

[27] Mr Veitch was asked about matters which favoured approval of the development. It quickly emerged that a significant factor in his assessment was the private economic benefit the appellants would derive from being able to operate this use at their principal place of residence. A portion of cross-examination is illustrative.[26]

---

23 Joint expert report, exhibit 5, p. 13 [46].

24 The principal area where I do not accept Mr Buckley's opinions concerns whether the development would alienate good quality agricultural land, calling for a consideration of whether there is an overriding need for the development and no other suitable location for it.

25 T.1-87.35-39.

26 T.1-88.1-27

MR M. BATTY: Okay. Let's keep going in terms of what you've relied on in this paragraph:

Economic considerations are key.

Do you see that?---To the applicant. Yes.

Yes. And they're matters of effectively private economics, aren't they?---Correct.

You acknowledge, quite rightly, that they're not entirely planning based and you say economic development … parameters are a valid consideration, and then it's that security consideration in the last sentence that again you raise on the basis of what you've been told by the applicant?---Correct.

And again, that's really personal to their own business?---Absolutely.

And you go on to say:

The location of the use on an industrial allotment is not economic or operationally viable.

?---Correct.

And again, that's the basis on what you've been told by the appellant?---It is. That is correct.

And it's personal to their situation?---Correct.

[28] It is apparent from this passage, and what Mr Veitch wrote in the development application,[27] that he placed significant weight on his belief, based on what he had been told by the appellants, that the proposed use was only economically viable if conducted on this land. Whether this is true or not, it is matter of private economics which would not usually be a relevant consideration from a town planning perspective. Mr Veitch's reliance upon this as an important consideration diminishes the weight to be placed on his opinions.

[29] Mr Veitch accepted that on a 'strict reading' of the strategic framework, the proposed development did not comply as it represented urban development outside of the urban area. But he considered the word 'predominantly' in the strategic framework of the planning scheme signalled that urban or industrial use in the rural zone was not foreclosed.[28] He said, 'A planning scheme can't anticipate every derivative of an industry and every location, and, therefore, there's a little door left open in all of their strategic comments for those types of activities.'[29] I accept what Mr Veitch said is correct. Planning schemes must be flexible and will sometimes permit incompatible uses in zones. But an appreciation of the characteristics of the zone where the use is to be located, and of the scale and intensity of the proposed use, is critical.

[30] The nature of this locality is described above. While it may not properly be described as bucolic, it is not characterised by urban or industrial development. There are examples of non-rural uses in the rural zone, including in this locality, as described by Mr Veitch. There is also the presence of sheds and machinery as part of normal rural pursuits. But this does not assist the appellants. While these uses exist in rural zones in the respondent's local government area, there is no evidence any of

---

27 Exhibit 1, p. 18.
28 Planning Scheme, 3.4.2.5(a) (see Exhibit 8, p. 32).
29 T.1-98.35-38.

those in the locality of the appellants' land are of the scale and intensity contemplated by this proposed development. The locality, outside of the appellants' land, remains 'predominantly' rural. There is a lack of detail about what is proposed by the appellants and how it will be operated, as discussed below when dealing with amenity issues. What is known is that the use will involve the storage of cars and car bodies in an open-air warehouse of about 1,300m^2. It will involve large trucks used for transport traversing the land, and forklifts unloading and loading the cars and car bodies. It is not a 'low key and small scale' use as suggested by Mr Veitch. If approved, the proposed development would diminish the predominantly rural character of the locality to an unacceptable degree.

[31] This leads me to conclude that the proposed development would not satisfy the performance outcome of the Rural Zone Code that the use be 'located, designed and operated to minimise conflicts with existing and future rural uses and activities on the surrounding rural lands.'[30] This conclusion is significant for two reasons. First, it means the proposed development departs from an important provision of the planning scheme. Secondly, it means that an argument advanced by the appellants concerning what might be called 'deemed compliance' with the Rural Zone Code cannot be sustained.

[32] The argument proceeded on the basis that the appellants could demonstrate compliance with the Rural Zone Code even if some specific benchmarks were not satisfied. They submitted that if the proposed development complied with the performance or acceptable outcomes of the Rural Zone Code it would be deemed to comply with the purpose and overall outcomes of the code. In turn, this would result in assumed compliance with the Rural Zone Code itself. There is an express provision to this effect in the planning scheme for code assessable development,[31] and there is authority in this court to the effect that the same approach should be taken to in relation to impact assessable development.[32] The appellants sought to attach significant weight to what they say is this deemed compliance with the Rural Zone Code. But the argument was predicated on the assumption that the proposed development satisfied performance outcomes of the Rural Zone Code. As I have just explained, I am not satisfied the proposed development complies with the performance outcome that the use is 'located, designed and operated to minimise conflicts with existing and future rural uses and activities on the surrounding rural lands.' The consequence is that performance outcomes have not been satisfied, and there can be no deemed compliance with the Rural Zone Code.

[33] If I am wrong about that, and there is deemed compliance, it would provide the appellants with little assistance. The criteria against which the proposed development must be assessed include those in the strategic framework. In this regard, it is important to note that the provisions of the strategic framework are higher order provisions which prevail over other parts of the planning scheme in the event of inconsistency.[33] In this case, the importance of the provisions of the strategic framework, and the extent to which the proposed development departs from

---

30 Planning Scheme, Table 6.2.19.3.1 PO3 (see Exhibit 8, p. 125).

31 Planning Scheme, 5.3.3(4)(c).

32 Eg. *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 8; [2018] QPELR 510, [118]; *Lennium Group Pty Ltd v Brisbane City Council & Ors* [2019] QPEC 17; [2019] QPELR 835, [201].

33 Planning Scheme, 1.5(a).

those provisions, would carry more weight than any deemed compliance with the Rural Zone Code.[34]

[34] In relation to the planning issues, I prefer the evidence of Mr Buckley. The proposed development concerns a use that is urban and industrial in nature. The planning scheme discourages such uses in a rural zone other than in limited circumstances. The proposed development does not satisfy the criteria for acceptable non-rural uses in the rural zone. There is no evidence that moving and storing cars and car bodies is a use that is compatible with and supports rural enterprise, much less provides a service to rural areas.[35] That is especially so when on the available material the intention of the appellants is to store cars and car bodies temporarily while they are being transported to and from locations outside the local government area.[36] I am also not persuaded that the proposed development will be 'located, designed and operated to minimise conflicts with existing and future rural uses and activities on the surrounding rural lands'.[37]

[35] These departures from important provisions in the planning scheme are significant and amount to a strong indication that the proposed development ought not be approved.

Planning scheme provisions concerning visual and acoustic amenity

[36] The relevant provisions concerning visual and scenic amenity begin with the broad goal set by the strategic framework that '[a]dequate buffers are provided between incompatible land uses to protect resources, existing uses and the amenity of residents.'[38] Specific outcomes set by the strategic framework reinforce this goal.[39] More targeted controls are found in the Rural Zone Code and Industry Uses Code. The former seeks to maintain the predominantly rural character of the zone and protect its landscape values,[40] while the latter seeks to ensure the scale and intensity of an industrial use is compatible with its location and setting, is visually attractive, and avoids adverse impacts on the amenity of nearby non-industrial uses.[41]

[37] These provisions indicate that any permitted industrial use in a rural zone is to have minimal effect on visual and acoustic amenity of surrounding land uses. To explain why I am not satisfied the appellants have shown the proposed development would achieve the goals relating to visual amenity it is necessary to refer to the evidence on each topic.

Visual amenity

[38] Dr Nicholas McGowan gave evidence for the respondent and Mr Russell Olsson for the appellants. They had prepared a joint expert report.[42] One difficulty noted by

---

34 Cf. *United Petroleum Pty Ltd v Gold Coast City Council & Anor* [2018] QPEC 8; [2018] QPELR 510, [119] and [126].
35 Planning Scheme, 6.2.19.2(2)(d) (see Exhibit 8, p. 124).
36 Exhibit 1, p. 18.
37 Planning Scheme, Table 6.2.19.3.1 (PO3) (see Exhibit 8, p. 125).
38 Planning Scheme, 3.3.1(f) (see Exhibit 8, p. 13).
39 Planning Scheme, 3.3.2.6(a) and (b) (see Exhibit 8, p. 19).
40 Planning Scheme, 6.2.19.2(2)(g) and Table 6.2.19.3.1 (PO8) (see Exhibit 8, p. 124 and 125).
41 Planning Scheme, 9.3.8.2(2)(a), (b) and (g) with associated benchmarks in the following tables (see Exhibit 8, pp. 127 to 132).
42 Exhibit 6.

these witnesses was the vagueness of the appellants' proposal, as illustrated in a passage from their report concerning the unamended proposal.[43]

> 24. The experts understand that the warehouse facility … comprises an open, unroofed, fenced area. There is no information on the type or height of fencing proposed.
>
> 25. The experts note that the plans also show a row of shipping containers along the southern side of this fenced area and continuing on the same alignment towards the western property boundary. No information is provided on this aspect of the proposal and the experts assume that it is a single row of shipping containers proposed (i.e. no stacking of containers). The experts note that the typical height of a standard shipping container is in the order of 2.6 metres.
>
> 26. It is not clear to the experts why the row of shipping containers continues beyond the edges of the proposed open storage area. If the sole purpose of the containers is to provide screening, a more effective solution might have been to continue the containers along the southern and western edges of the open storage area. Regardless, the experts have considered the impacts based on the arrangement of container[s] proposed on the drawings.
>
> 27. The plans appear to show some of the existing trees on the property. There is no indication that any existing vegetation will be removed. There is no indication that additional landscaping will be provided.
>
> 28. … the site is currently littered with machinery and other materials. Historical aerial imagery indicates that this open storage of machinery and materials has continues since September 2018. It is unclear if the proposed development would result in the 'tidying up' of any, or part, or all of this machinery and materials, or, if by making the storage area available for storage, the proposal might actually exacerbate the littering of machinery and materials over the remainder of the site by displacing the materials currently in that part of the site.

[39] The experts also noted a lack of information about the intended parking arrangements for the trucks to be used to operate the warehouse. This uncertainty persisted even after the proposal was changed.[44]

[40] Against this background, Dr McGowan thought the local area, except for the appellants' land, presented as a relatively attractive rural setting. He thought the existing housing and sheds associated with usual rural pursuits were compatible with the local area. In contrast, Dr McGowan thought that the open storage of cars in a disorderly manner on the appellants' land was 'eye-catching and inconsistent with the rural character of the area'.[45] Other aspects of the proposed development which concerned Dr McGowan were the row of shipping containers and the movement and parking of trucks. On the information available at the time of the report, Dr McGowan thought the proposed development could not satisfy the benchmarks summarised above.[46] Even with further screening, he remained concerned the open storage would still not satisfy the benchmarks.

[41] While Mr Olsson was less pessimistic, he could only say that the proposal as assessed had 'the potential to satisfy the planning provisions'.[47] This might have

---

43 Ibid, p. 25.
44 T.1-65-T.1-67.
45 Exhibit 6, p.38.
46 Ibid p. 41.
47 Ibid, p. 37.

been achieved through the imposition of extensive conditions. Thus, the experts agreed that the proposal, as assessed by them before being changed, did not satisfy the relevant benchmarks, but agreed that 'additional landscape screening could be effective at mitigating potential visual impacts'.[48]

[42] Mr Olsson agreed with Dr McGowan that the screening presently provided by vegetation along the road verge was insufficient, and as it was not controlled by the appellants there could be no guarantee of its maintenance. But Mr Olsson thought the visual impact of the development could be mitigated by the proposed eight-metre-wide vegetation buffer on the appellants' land. When questioned about the bulk and scale of the proposed row of shipping containers, which would be 100 metres long and 2.6 metres high, Mr Olsson said, faintly I think, that it would be visually acceptable. He said:[49]

> I think it's - I think it's hard to say whether it would be - well, certainly, I think it's acceptable, visually acceptable, because it's, you know, as I said, the existing fence is only about ha - it's about half - half that length and that isn't disturbing, so I think, when assessed in visual terms, I think it's an acceptable element in the landscape. Although I agree with you, that you don't see that length of shipping containers in a rural landscape.

[43] In cross-examination, Mr Olsson acknowledged that his assessment of the effect of the proposed development on visual amenity began with the state of the land as it was being used. That is, he assessed the effect of the proposed development against the existing clutter and visual distraction caused by the storage of car bodies and machinery on part of the land not the subject of the development application. In this regard, Mr Olsson accepted, with reference to the aerial photograph at page nine of the joint expert report, that current use of the land was visually unattractive and not what a person would expect to see in a rural area. The effect of Mr Olsson's opinion was that the scattering of cars and machinery outside of the proposed development made the land visually unappealing, and the proposed development would not add much visual clutter to an already disrupted vista. The subsequent acceptance by the appellants that the use of the balance of the land represented unauthorised development undermines Mr Olsson's opinion as to the effect of the proposed development. He approached the assessment having regard to the existing 'unlawful' use of the land rather than the land as it should be: free of the clutter of car bodies and machinery.

[44] The result is that I do not accept Mr Olsson's optimism that the obvious effect on visual amenity resulting from the temporary storage of cars and car bodies can be ameliorated to the point that it protects landscapes values, is compatible with its location and setting, and is visually attractive. The proposed development would not comply with important provisions of the planning scheme concerning visual amenity, and I am not satisfied that conditions can be imposed to ensure compliance. While the changed application responded to some of the concerns raised in the joint expert report, there remains considerable uncertainty about issues such as the movement and parking of trucks, and the extent and maintenance of vegetative screening. Absent further clarity about these issues, it is not possible to be satisfied conditions can be designed to address the visual amenity concerns. This is another matter which favours refusal of the application.

---

48 Ibid, p. 42.

49 T.1-64.10-17.

Acoustic amenity

[45] The appellants employed Mr Sasho Temelkoski to provide an opinion about acoustic amenity. The respondent relied upon Mr Paul King. Each are suitably qualified engineers with relevant expertise in acoustics. It was Mr Temelkoski who supervised an acoustic assessment at the site and developed a noise management plan. To some degree, the acoustic assessment was affected by the same difficulty as Mr Olsson's assessment of visual amenity: it was based on the existing 'unlawful' use of the site. But unlike visual amenity, there is no evidence that the existing use contributed such background noise as to invalidate or significantly diminish the results of the acoustic assessment.[50] This is not a reason to reject the opinions of Mr Temelkoski.

[46] Mr Temelkoski and Mr King largely agreed in their opinions. Importantly, they agreed that the warehouse could be operated in a way that did not diminish the acoustic amenity of the nearby area to an unacceptable degree. An issue in dispute at the time of the preparation of the joint expert report fell away when the appellants indicated a condition should be imposed to limit the operation of trucks to the hours between 7am and 6pm. Mr King accepted in cross-examination that acoustic concerns can be addressed by imposing further limitations on the operation of machinery. This would include restricting truck movements to three per hour, forklift operation to five minutes per hour, and limiting their use to the warehouse area which, according to the changed plan, has been moved further to the north.

[47] Mr King's real concern seemed to be the effect on acoustic amenity if the assumptions about the operation of the warehouse, or conditions to that effect, were not given effect. While the respondent raised an issue about whether the appellants would comply with conditions,[51] it is unnecessary to resolve this matter. That is because the findings I have set out above concerning the location of the proposed development in the rural zone and visual amenity are more significant than compliance with the planning scheme provisions concerning acoustic amenity. Even if the proposed development complies, or could be conditioned to comply, with the provisions concerning acoustic amenity, the otherwise substantial departure from important parts of the planning scheme indicates that the application should be refused.

Is the alienation of agricultural land an issue?

[48] As first proposed, the development was partly situated on land mapped as good quality agricultural land. If such land was alienated because of the development, it would have been necessary to consider whether there was an 'overriding need in terms of public benefit' for the development and whether there was no suitable alternative site.[52] There may be a nice question of whether the original proposed use would have resulted in the agricultural land no longer being protected and remaining 'available for productive and sustainable agriculture and rural pursuits'. There was no evidence, for example, that if the warehouse use stopped in the future the land would be unsuitable for agricultural production. But whether this meant the land was

---

50 The affidavit of Mr Lynch, discussed below, complains of regular loud noise coming from the appellants' land. Without gainsaying Mr Lynch's opinion, it is subjective and does not provide a basis for me to conclude the assessment of Mr Temelkoski was methodologically flawed.

51 Cf. *Seabridge Pty Ltd t/as Clutha Creek Sand v Council of the Shire of Beaudesert* [2001] QPELR 191, [18] and *Harris v Scenic Rim Regional Council* (2014) 201 LGERA 12, [244].

52 Planning Scheme, 3.4.2.5(b) (see Exhibit 8, p. 32).

not 'available' need not be decided. That is because the changed proposal would avoid locating the warehouse on the mapped land.

[49] The respondent suggested that the changed use would still require trucks to drive over the mapped land, and attempted to argue that this would result in a loss of the agricultural land. I am not prepared to conclude, on the evidence before me, that this would be the result. It is unclear to me whether the traversal of vehicles across agricultural land would result in its loss, engaging the provisions of the planning scheme intended to preserve such land. The appellants may bear the onus of satisfying the court that the proposed development should be approved. But that does not mean they have to disprove every matter raised against them by the respondent. In this instance, the suggestion of the respondent about the loss of agricultural land is speculative and not grounded in evidence. I do not think the relevant provision of the planning scheme is engaged.

Remaining evidence

[50] The remaining evidence to consider is that of Mr Patrick Lynch, a neighbour across the road from the appellants' land. Mr Lynch provided an affidavit and was not required for cross-examination. He has strong views about the proposed development and the existing use of the appellants' land. While Mr Lynch intended to make a submission to be assessed by the respondent, he did not do so in time. Mr Lynch has concerns about the effect of the existing use and proposed development on local amenity. He complains of noise from trucks, machinery and the movement of car bodies, and the dust which also results. He also describes the land as unsightly and a blight on the local area.

[51] These things might all be true, but they are of little relevance to the present appeal. It would be wrong to treat Mr Lynch's opinions as being indicative of general community expectations for the use of land in the rural zone. I would also exercise caution in acting on his evidence of visual and acoustic disturbance. It is the unscientific evidence of one person, and it is not easy to distinguish what might be attributable to operations in the location of the proposed development and what to other parts of the land. Mr Lynch's evidence would likely have been important in the enforcement proceeding but should be given little weight in this appeal.

[52] I do not think Mr Lynch's evidence is a matter which favours refusal of this application. But I also think that does not matter. Absent other evidence, such as properly made submissions, the reasonable expectation of the community is to be discerned from the planning scheme. As I have set out above, the planning scheme discourages industrial use of an urban kind of this scale and character in the rural zone. That is a significant matter which tells against approval of the application.

Conclusion

[53] The appellants propose an industrial use in a rural area where the planning scheme strongly discourages such uses, at least of the scale and intensity of this proposal. The proposal departs from important provisions of the planning scheme. The fact that acoustic amenity may be able to be managed does not commend the approval of the development in the face of its departure from other scheme provisions. There is nothing to support the proposed development in this location, apart from the private benefit that may be derived by the appellants. In these circumstances, the application for approval of the proposed development should be refused.

[54] The decision of the respondent to refuse the development application is confirmed and the appeal is dismissed.