PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor* [2019] QPEC 12
PARTIES:	**COUNCIL OF THE CITY OF GOLD COAST** (applicant) **v** **ASHTRAIL PTY LTD** **(ACN 057 404 074)** (first respondent) **and** **TALRANCH PTY LTD** **(ACN 077 382 453)** (second respondent)
FILE NO/S:	87/2018
DIVISION:	Planning and Environment Court of Queensland
PROCEEDING:	Application for declaratory relief and consequential orders
ORIGINATING COURT:	Planning and Environment Court, at Brisbane
DELIVERED ON:	29 March 2019
DELIVERED AT:	Brisbane
HEARING DATES:	10, 11, 12, 13 and 14 September 2018. 29, 30 and 31 January 2019 and 14 March 2019.
JUDGE:	R S Jones DCJ
ORDERS:	

Pursuant to section 11 of the *Planning and Environment Court Act* 2016 (Qld) it is declared that:

1. On or about 15 February 2010, a development permit for a material change of use – Service Industry Type B (driver instructing and commercial equipment hire), Motor Vehicle Repair Station and Environmentally Relevant Activity (ERA28 – Motor Vehicle Workshop) for the Land (**Development Approval**), took effect;
2. That Development Approval has not lapsed;
3. Conditions 5, 6, 10, 12 and 16 of the Development Approval have not been complied with; and
4. The Respondents' contravention of the

Development Approval constitutes a development offence pursuant to section 164 of the *Planning Act* 2016 (Qld).

Further, it is ordered pursuant to s 180 of the *Planning Act* 2016 (Qld) that:

1. The respondents' are required to comply with conditions 5, 6, 10, 12 and 16 of the Development Approval;
2. It is further ordered that the parties be heard if necessary to establish a timetable for compliance with conditions 5 and 6; and
3. I will hear further from the parties as to the final form of consequential orders including as to costs.

CATCHWORDS: ENFORCEMENT PROCEEDINGS – where applicant is the relevant local authority – where first respondent conducts various uses on the subject land – where second respondent is the owner of the land – where first respondent at the benefit of a negotiated decision notice approving certain uses on the land – where among other conditions of approval included substantial financial contributions for infrastructure (the infrastructure charges) – where respondents have failed to meet various conditions imposed including the infrastructure charges – where the local authority seeks enforcement of the conditions imposed including the infrastructure charges.

WHETHER DEVELOPMENT APPROVAL REQUIRED – where first respondent alleged that the subject development approval was not required because the relevant use being conducted on the land was an existing lawful use protected by legislation – where Environmental Relevant Activity approval was not required because any workshop activities being conducted on the land were ancillary to the existing lawful use and were otherwise of a *de-minimis* nature.

WHERE FIRST RESPONDENT SAYS THE USE THE SUBJECT OF THE DEVELOPMENT APPLICATION HAD NEVER COMMENCED.

WHERE RESPONDENTS ALLEGE RELIEF SOUGHT NOT OTHERWISE AVAILABLE – where respondents assert the local authority was not entitled to relief sought because of defences under the *Act's Interpretation Act* 1954 as a consequence of the local authority not prosecuting the proceeding as soon as possible – where respondents assert that the proceeding ought properly be characterised as an action for the recovery of debt which is statute-barred pursuant to s 10 of the *Limitation of Actions Act* 1974.

WHETHER THERE HAD BEEN A MATERIAL CHANGE IN USE OF THE LAND – where local authority asserts that there had been a material change of use as a consequence of

the intensification of one of the uses being made on land.

DISCRETION – where respondents assert that in the event that the local authority was otherwise entitled to the relief sought there were strong discretionary grounds for refusing that relief being – delay on the part of the local authority in prosecuting the proceeding – where prejudice to the community resulting from non-compliance had not been demonstrated – where it was not demonstrated that the infrastructure charges were relevant and/or reasonable – where enforcement would cause the respondents into insolvency thereby causing material detrimental impacts of a public nature.

Acts Interpretation Act 1954

Integrated Planning Act 1997

Limitation of Actions Act 1974

Sustainable Planning Act 2009

Planning Act 2017

Letang v Cooper [1965] 1 QB 232

Spread Trustee Co Ltd [2007] 1 WLR 2004

Brisbane City Council v Amos [2016] QSC 131

City of the Gold Coast v Ashtrail Pty Ltd & Anor [2018] QPEC 29

Pad-Mac v Hotel Wickham Investments [1995] 88 LGERA 157

Coal Cliff Community Association Inc v Minister for Urban Affairs and Planning & Ors (1999) 106 LGERA 243

Sunshine Coast Regional Council v Recora Pty Ltd & Anor [2012] QPEC 8

Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335

Mudie v Gainriver Pty Ltd & Ors [2001] QCA 382

Whitsunday Regional Council v Branbid Pty Ltd [2017] QPEC 3

COUNSEL: Mr R Bain QC with Mr D Purcell for the applicants
Mr R Litster QC with Mr K Wylie for the respondents

SOLICITORS: McInness Wilson Lawyers for the applicant
Synkronos Legal for the respondents

[1] This proceeding is concerned with an application brought by the Council of the City of Gold Coast (the Council) against Ashtrail Pty Ltd and Talranch Pty Ltd (the

respondents) for declaratory relief and consequential orders. For the reasons set out below the orders of the court are:

Pursuant to section 11 of the *Planning and Environment Court Act* 2016 (Qld) it is declared that:

1. On or about 15 February 2010, a development permit for a material change of use – Service Industry Type B (driver instructing and commercial equipment hire), Motor Vehicle Repair Station and Environmentally Relevant Activity (ERA28 – Motor Vehicle Workshop) for the Land (**Development Approval**), took effect;
2. That Development Approval has not lapsed;
3. Conditions 5, 6, 10, 12 and 16 of the Development Approval have not been complied with; and
4. The Respondents' contravention of the Development Approval constitutes a development offence pursuant to section 164 of the *Planning Act* 2016 (Qld).

Further, it is ordered pursuant to s 180 of the *Planning Act* 2016 (Qld) that:

1. The respondents' are required to comply with conditions 5, 6, 10, 12 and 16 of the Development Approval;
2. It is further ordered that the parties be heard if necessary to establish a timetable for compliance with conditions 5 and 6; and
3. I will hear further from the parties as to the final form of consequential orders including as to costs.

Background

[2] The subject land is located at 38 Prairie Road, Ormeau and is more particularly described as lot 36 on RP142704. The second respondent, Talranch Pty Ltd, is the registered proprietor of the land from which the first respondent, Ashtrail Pty Ltd, conducts various business uses. Details of those uses are discussed in more detail below. For the sake of completeness, the uses being conducted on the land are under the name of Major Operator and Driver Training Services and Major Training Group, and the second respondent is a corporate trustee. Although formally being described as being located in Ormeau, the subject land is more often described as being located at Yatala.

[3] The application by the Council is for declaratory relief and consequential enforcement orders in respect of alleged non-compliance with certain conditions of a development approval for a material change of use in respect of the land. In particular, conditions 5 and 6 requiring the payment of water supply network and sewerage network infrastructure contributions, and conditions 10, 12 and 16 requiring the design and construction of roadworks, footpaths and bikeways and land dedication.

[4] The full terms and effect of these conditions are discussed in more detail below.

[5] On 26 February 2007, the Council issued to the respondents a Show Cause Notice requiring them to show cause as to why an enforcement notice should not be issued on the basis that:[1]

> "…
>
> 2. Following receipt of a complaint, a … Development Compliance officer inspected the premises on 14 February 2007 and ascertained that the Premises are being used for the purpose of Service Industry – Group B (Driving, Instructing and Commercial Equipment Hire).
>
> 3. Pursuant to the planning scheme in the Yatala Enterprises Area Local Area Plan, General Impact Business and Industry Precinct, the use Service Industry – Group B (Driving Instructing and Commercial Equipment Hire) is code assessable development, which requires a development approval.
>
> 4. A search of Council records indicates that no development application has been submitted or development approval given for the premises to be used for (those purposes) …"

[6] Among other things, the notice required the respondents to remedy the situation by ceasing the alleged unlawful use of the land and to carry out certain remedial works. In the alternative, they were invited to make a development application to regularise the use of the land.

[7] On or about 28 March 2007, the first respondent engaged Gassman Development Perspectives (Gassman) to address issues raised in the notice including the preparation of a development application for a material change of use of the land.[2]

[8] On or about 4 October 2007, the first respondent, through Gassman, lodged a development application. That application lapsed on 16 February 2008 for reasons it is not necessary to go into.

---

1 Exhibit 6, Volume 3, attachment 19, p 724.
2 Exhibit 6, Volume 3, attachment 20, pp 731, 735.

[9] Subsequently, on 29 October 2008, the first respondent, under the trading name of Major Operator and Driver Training Services, lodged another development application relevantly seeking development permits for a material change of use of the land as recommended by Gassman, being:[3]

(a) Service Industry Type B (Driver Instructing);

(b) Motor Vehicle Repair Station; and

(c) Environmentally Relevant Activity (ERA #28 Motor Vehicle Workshop).

[10] The current uses of the land were described as being "*Driver Training-Plant Machinery*". The proposed use was described as "*Driver Training Workshop and Training area. Vehicle Repairs for Vehicles Used on Site*".[4]

[11] While the 2008 application was made under the *Integrated Planning Act* 1997 (*IPA*), approval took effect as a development approval under the *Sustainable Planning Act* 2009 (*SPA*).

[12] Under the *SPA*, pursuant to s 10(1) a material change of use was defined to mean –

(a) Generally –

(i) the start of a new use of the premises; or

(ii) the re-establishment on the premises of a use that has been abandoned; or

(iii) a material increase in the intensity or scale of the use or premises or

(b) for administering IDAS in relation to an environmentally relevant activity, …

[13] The Council relies on the third line of the definition. Namely, the intensification of the driver training use.

---

3 Exhibit 6, Volume 2, attachment 5, p 252.

4 Exhibit 6, Volume 2, attachment 5, p 258.

[14] Under the Council's then planning scheme (the 2003 scheme), a Service Industry was defined as:

> "Any premises used or intended to be used, for conducting industrial activities, provided that any off-site effects do not cause any detriment to the amenity of the area. In particular, the noise levels generated, any dust fumes odour or other omissions produced from the site, the appearance of the site and any traffic generated by the activities on the first site must be managed so as not to cause detriment to adjoining sites."

[15] Motor vehicle repairs were relevantly described as:

> "Any premises used, or intended to be used, for the purpose of carrying out repairs to motor vehicles, including panel beating and spray painting, where such activities are conducted solely within a building. This term also includes the temporary storage of vehicles awaiting repair and the fitting of accessories to motor vehicles."

[16] On or about 17 November 2009, the Council gave a Decision Notice approving the application subject to conditions. On or about 27 January 2010, the Council received written representations in respect of that notice and, on 15 February 2010, by a Negotiated Decision Notice, the Council issued a development approval, subject to conditions including those in issue in this proceeding. That development approval effectively granted permission for a material change of use of the land for Service Industry Type B (Driver Instructing and Commercial Equipment Hire), Motor Vehicle Repairs and Environmentally Relevant Activity (ERA 28 Motor Vehicle Workshop) (The 2010 approval). No appeals were commenced with respect to the approval and/or any of the conditions attached to that approval.

[17] The contest between the parties is conveniently set out in their written submissions.[5] Adopting the description given by counsel for the respondents, it said that the Council contends that:

> (a) the relevant conditions have been contravened as a consequence of the commencement of the uses of the land as approved by the 2010 approval;
>
> (b) the Development Approval had not lapsed because the first change of use under the 2010 approval happened during the relevant operational period of the approval;
>
> (c) there should be declarations as to the 2010 approval seeking in effect declarations that the 2010 approval had not lapsed, that the

---

5 Applicant's written submissions, paras 2-4; Respondent's written submissions, paras 11-12.

conditions in issue have not been complied with and that that contravention constitutes a development offence, and

(d) there should be orders requiring compliance.

The respondent's defences to the relief sought are:

"(a) None of the use is purported to be approved under the 2010 Approval started before the approval lapsed under *SPA*, in circumstances where:

(i) the use for the purpose of driving instruction (i.e. Service Industry) was and remains lawful;

(ii) use for the purpose of maintenance and storage of vehicle, plant and machinery (i.e. Light Industry and/or ancillary to Service Industry) was and remains lawful;

(iii) with respect to the development permit purportedly given for commercial equipment hire

(1) use for the purpose of hire of plant and machinery was lawful.

(2) that development permit was not applied for; and, in any event,

(3) hire of plant and machinery from lot 36 had ceased prior to 15 February 2010.

(b) The 2010 approval lapsed on 17 February 2014:

(i) because the conditions were required to be fulfilled, performed or otherwise complied with prior to the commencement of the development under the 2010 approval but were not;

(ii) because the particular use of the 2010 approval had not been carried out generally in accordance with the 2010 approval plans;

(c) Council cannot enforce conditions 5 and 6 of the 2010 approval having regard to s (10)(1)(d) of the *Limitations of Actions Act* 1974;

(d) Council cannot enforce the conditions having regard to s 38(4) of the *Acts Interpretation Act* 1954." (footnotes deleted)

[18] The respondents also rely on discretionary reasons as to why the relief sought ought not be granted. That issue is also discussed below.

[19] At the heart of this proceeding are the following disputed issues:[6]

"1. Whether the uses of the Land approved under the 2010 Approval were lawful existing uses;

2. If not, whether the 2010 Approval lapsed on 17 February 2014, because:

(a) conditions 5, 6, 10, 12 and 16 of the 2010 Approval were essential to the commencement of the use of the Land

[6] Exhibit 2.

under the approval and none of those conditions were fulfilled, performed or otherwise complied with on or before that date;

(b) the use under the development approval did not occur prior to that date because the use was not carried out in accordance with the approved plans and drawings;

3. If the 2010 Approval has not lapsed:

(a) where conditions 5 and 6 of the 2010 Approval can be enforced having regard to section 10(1)(d) of the *Limitations of Actions Act 1974* (Qld); or

(b) whether conditions 5, 6, 10, 12 and 16 of the 2010 Approval can be enforced having regard to section 38(4) of the *Acts Interpretation Act 1954* (Qld);

4. If a development offence has been committed, whether the Court should exercise its discretion to make the declarations and consequential orders sought in the Originating Application."

[20] I propose to deal with each of the issues raised but not necessarily in the order identified above.

The Acts Interpretation Act point

[21] As identified above, it is contended that the Council cannot enforce the development conditions in issue because of the operation of s 38(4) of the *Acts Interpretation Act* 1954 (AIA). It provides:

"**38 Reckoning of time**

…

(4) If no time is provided or allowed for doing anything, the thing is to be done as soon as possible, and as often as the relevant occasion happens."

[22] It is then submitted:[7]

"Council has not commenced the subject proceeding '*as soon as possible*'. Indeed the documents relevantly show that, following issue of the 2010 approval on 15 February 2018:

(a) Three years had passed when, on 19 February 2013, Council gave show Cause Notices to Ashtrail and Talranch, alleging non-compliance with conditions 5 and 6 of the 2010 approval. No mention was made of any other conditions of the 2010 approval.

(b) In 2013 and 2014 there ensued correspondence between Council and Mr George Sarikas, an infrastructure consultant then retained by Ashtrail, regarding the quantum of interest structure charges, but such matters were not resolved in such correspondence only considered conditions 5 and 6.

---

7 Respondent's written submissions, para 246.

(c) There was further correspondence (from October 2014 to November 2015) between Council and the solicitors for the respondent regarding infrastructure charges associated with the 2010 approval.

(d) Council did not respond to the respondent's solicitor's correspondence of 20 November 2015 until 6 January 2017.

(e) On 25 January 2017, Council issued further Show Cause Notices to Talranch and Ashtrail alleging that, following Council inspections on 14 February 2013, 16 November 2016 and 13 January 2017, its position was that there has been non-compliance with conditions 5, 6, 10, 12, 14 and 16 the position agitated by Council in this proceeding.

(f) On 10 March 2017, solicitors for the Respondents responded to Council's 2017 Show Cause Notices, and explained why those notices were misconceived.

(g) No response was received to the above correspondence, and on 12 December 2017 solicitors for the respondents wrote to Council and further invited a response to the 10 March 2017 correspondence.

(h) No other response was made to the Respondent's letter of 10 March 2017 prior to the commencement of the subject proceedings on 12 January 2018." (footnotes omitted)

[23] After identifying that all but one month shy of eight years had elapsed from the issuing of the 2010 approval in circumstances where it is alleged the offences occurred and continued to occur from that date, and, that no explanation had been given by the Council in respect of that delay, it was then submitted:[8]

> "… the right to commence enforcement proceedings, being the exercise of a statutory right or entitlement, is subject to s 38(4), and that failure to exercise the right as soon as possible should sound in the dismissal of this proceeding."

[24] I am unable to accept that the operation of s 38(4) of the AIA brings into force some form of a de facto limitation of actions defence. In this context, I agree with the submission made on behalf of the Council that as a matter of both construction and intent, the construction of s 38(4) does not create any legal limitation or bar to a proceeding of the type under consideration. In this context, it is also quite clear that the respondents are relying on s 38(4) as a defence for the "*recovery of money*".[9] In my view, in circumstances where s 10 of the *Limitation of Actions Act* 1974 specifically deals with "*an action [in (contact or tort) for the recovery of a sum recoverable…*" there is no scope for the operation of s 38(4) of the AIA as contended for. As was submitted on behalf of the Council, insofar as proceedings

---

8 Respondent's written submissions, para 247.

9 Respondent's written submissions, p 54.

of that nature are concerned, s 10 of the *Statute of Limitations Act* 1974 "*covers the field*".

[25] In support of their submissions on this point, the respondents placed reliance on three authorities.[10] None are of assistance. All were concerned with circumstances where it could readily be appreciated that the party having to defend itself would be or could be materially prejudiced by the passage of time. For the reasons set out in more detail below, I do not consider that is the situation in this case. The passage of time, particularly involving material delay, will almost always be a relevant consideration in the exercise of discretion. However, in this case it has not caused the respondents such prejudice as to warrant precluding the Council from seeking appropriate relief.

The Limitations of Actions point

[26] As was the case concerning the applicability of s 38(4) of the AIA, the operation of s 10 of the *Limitations of Actions Act* (1974) (LOA Act) would only come into play in the event that I were to find that, save for the operation of these statutory provisions and discretionary matters, the Council was entitled to the relief sought. Notwithstanding that, I consider it convenient to deal with this aspect of the proceeding now. Section 10 of the LOA Act provides:

> "**10 Actions of contract and tort and certain other actions**
>
> (1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose –
>
> …
>
> (d) an action to recover a sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of a penalty or forfeiture
>
> …
>
> (3) An action upon a speciality shall not be brought after the expiration of 12 years from the date on which the cause of action accrued.
>
> (3A) *Subsection (3)* does not affect an action in respect of which a shorter period of limitation is prescribed by any other provision of this Act.
>
> …
>
> (5) An action to recover a penalty or forfeiture or sum by way of a penalty or forfeiture shall not be brought after the expiration of 2 years from the date on which the cause of action accrued."

---

10 *Re Conset Investments Pty Ltd* [1993] 2 Qd R 244; *Attorney-General v Tichy* (1982) 30 SASR 84; *Bolton v Council of the City of Rockhampton* [1997] QPELR 90.

[27] An "*action*" for the purposes of the Act is defined in s 5(1) as including "*any proceeding in a court of law*".

[28] In *Letang v Cooper*[11] Diplock LJ observed that:

> "*A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person.*"

After referring to *Letang v Cooper*, Arden LJ in *Hill v Spread Trustee Co Ltd*[12] said:

> "*A cause of action is complete when all the facts which it would be necessary to prove, if traversed, in support of the right to a judgment of the court, can be pleaded.*"[13]

[29] Adopting the language used by Arden LJ, I am prepared to proceed on the basis that the submission made on behalf of the respondents is correct. That is, insofar as it may properly be described as a cause of action, that was complete on or about 15 February 2010, being the date the development approval came into effect, including the operation of the conditions 5 and 6 requiring payment of the sums of money identified therein, as that was when those conditions were said to be required to be met.

[30] In their written submissions, it is candidly stated on behalf of the respondents, that there is no Queensland authority, or at least none known of, that has specifically considered the applicability of this act to the enforcement of development conditions requiring the payment of money.[14] That said, it is submitted that the circumstances of this case are; "*Analogous to BCC v Amos*."

[31] In *Amos v Brisbane City Council,*[15] the Court of Appeal was required to consider an application for the recovery with interest of overdue and unpaid rates levied upon rateable land by various rate notices. It was not in contest that the rates, charges and interest being sought were "*a sum recoverable by virtue of an enactment*" for the purposes of s 10(1)(d) of the LOA Act. That then required the proceedings to be brought before the expiration of six years from the date of which the cause of action was complete. That is, from the date the rates became overdue.

---

11 [1965] 1 QB 232, 243.

12 [2007] 1 WLR 2404.

13 Ibid, 2434 at [120].

14 Respondent's written submissions, para 232.

15 [2018] QCA 11.

[32] It was submitted on behalf of the Council, that *Amos* was clearly distinguishable from the subject proceeding, being premised on an entirely different factual and regulatory matrix. I agree. In this context, I also agree with the observations made by Kefford J in *City of Gold Coast v Ashtrail Pty Ltd & Anor*.[16] Her Honour said:

> "There is no identifiable sum that is recoverable. This case can be distinguished from the case of *Brisbane City Council v Amos* … . In that case the provision in question, s 96 of the *City of Brisbane Act 2010*, obliged Brisbane City Council to levy general rates on all rateable land and empowered Brisbane City Council to levy other types of rates. Section 97 of that Act confirmed that overdue rates and charges operated as a charge on the rateable land.
>
> This case is distinguishable from *Brisbane City Council v Amos*. The nature of the proceedings is markedly different to that which applied in that case. **The type of enforcement orders that can be imposed to remedy the effect of a development offence may be many and varied.** Insofar as the offence is a continuing offence, it may well, for example be remedied by an order requiring the immediate cessation of the use. Council's originating application seeks orders requiring compliance with the conditions and such further or other orders as the court considers appropriate. ..." (emphasis added)

[33] I also agree with the submission made on behalf of the Council that an action to enforce a condition of an approval with respect to unpaid and overdue infrastructure contributions is properly characterised as an enforcement proceeding concerning alleged non-compliance. It is not an action to recover a sum recoverable by virtue of an enactment regardless of the practical consequence of compliance.

[34] According to Mr Litster QC, or at least as far as I understand the submission, s 10 of the LOA Act applied because the Council is relying on various sections of the *Planning and Environment Court Act 2016* and the *Planning Act 2016* to require the respondents to comply with the conditions "*they (sic) are seeking to recover a sum under an enactment*".

[35] With respect, that is too simplistic an analysis. True it is that the Council is availing itself of acts of Parliament for relief. However, the submission fails to recognise that the Council is not suing for the recovery of money. It is seeking compliance with conditions through enforcement proceedings in circumstances where the conditions are not personal only to the respondent, but attach to the land and can bind the respondent's successors in title.[17]

---

16 [2018] QPEC 29 at [67]-[69].

17 *Sustainable Planning Act 2009* (Qld) s 245.

In accordance with approved plans point

[36] Condition 1 of the 2010 approval relevantly provided:

> "**1. Development is to be generally in accordance with specified plans/drawings**
>
> The development must be carried out generally in accordance with the approved plan/drawings listed below, stamped and returned to the applicant with this decision notice."

[37] Thereafter a table of drawings prepared by Gassman is set out.

[38] Mr Matthew Tenkate in his evidence said, among other things:[18]

> "(a) Two of the three buildings highlighted on the plan at page 528 as 'existing buildings' did not exist and have never been built. The only building that was constructed is the building at the north-east corner of lot 36, which was constructed at the same time as the Trade Centre.
>
> (b) The plan of development for lot 36 at page 528 displays an access road and designated training areas which did not exist at the time, and were never intended. At no stage has there ever been, on site, an access road and training areas in the manner depicted in that drawing. The cul-de-sac in the western part of 'training area 3' does not make sense. The drawing is simply wrong.
>
> (c) The plan of development for lot 36 at page 528 does not display the house or old stables at the southern part of lot 36, and which were never intended to be demolished or removed.
>
> (d) The plan of development for lot 36 at page 528 incorrectly displays two access point onto Prairie Road. The southern one is inaccurately located, the actual point being further north, and it was always the case that the three access points existing on the site would remain unchanged. These three access points remain there to this day, except the middle access point which has moved slightly to the north (perhaps 10m) …"

[39] It can be accepted that this evidence reflects departures from the approved form of development that are, to use the terminology adopted by the respondent's lawyers, "*not a minor departure …*".[19] Following that observation, reference is then made to the judgment of de Jersey CJ (with Margaret Wilson J agreeing) in *McDonald v Douglas Shire Council*.[20] After acknowledging differences in the language used in the *Local Government* (*Planning and Environment) Act* and the relevant provisions

---

[18] Exhibit 24, para 65.
[19] Respondent's written submissions, para 218.
[20] (2003) 126 LGERA 96.

of the *Sustainable Planning Act* 2009 (*SPA*), it is then submitted, based on the reasoning in *McDonald*:[21]

> "To determine whether a use has lawfully commenced under a permit so as to prevent its lapsing, one must consider the **particular** use envisaged by that permit; and ask if that **particular** has commenced.
>
> Having regard to the matters described by Mr Matthew Tenkate, the court could not be satisfied that the activities undertaken on lot 36 have given effect to the **particular** use envisaged by the 2010 Approval, such that uses under it have started. Rather, the court would be satisfied that [sic] approval has lapsed."

[40] In my view, on its own, the departures from the specified plans and/or drawings are in no way determinative. By that I mean, if the use to which the land is being put is that contended for by the Council, it could not be sensibly argued that while those uses existed, departure from the approved plans and/or drawings would warrant a conclusion that the approval no longer had any force or effect.

The alleged pre-commencement conditions

[41] In paragraph 178 of their written submissions the respondents accept that:

> "(a) conditions 5 and 6 have never been complied with (i.e. no money has been paid to Council for water supply and sewerage networks);
>
> (b) conditions 10 and 12 have never been complied with (i.e. the relevant part of Prairie Road has not been constructed to the specification required in condition 10, and the footpath required by condition 12 has never been constructed); and
>
> (c.) condition 16 has never been complied with (i.e. no land has been dedicated to Council)." (footnotes deleted)

[42] Following a discussion involving a number of provisions of the *SPA*, the terms of the development conditions and case law, it is then submitted:[22]

> "… . In circumstances where the 2010 approval contain conditions that required compliance 'prior to the commencement of use'; and those conditions were never complied with, none of the MCU's authorised by the 2010 approval lawfully started
>
> In consequence the 2010 approval lapsed and cannot now be relied on"

[43] Condition 5 of the development approval relevantly states:

> "**5. Water Supply Network infrastructure contributions**
>
> The applicant must pay to the Council contributions toward Water Supply Network infrastructure in accordance with Planning Scheme

---

21 Respondent's written submissions, paras 221-222.

22 Respondent's written submissions, paras 211-212.

> Policy 3A … **at the rate current at the due date for payment. Payment must be made prior to the earliest of the following events;** the endorsement of survey plans, the issue of a certificate of classification for building work, the carrying out of final plumbing inspection, **or the commencement of use of the premises.** …
>
> **The contribution amount payable at the due date for payment will be calculated at rates current under the Policy …**" (emphasis added).

[44] Condition 6 states:

> "**6. Sewerage Network infrastructure contributions**
>
> The applicant must pay to Council contributions towards Sewerage Network infrastructure in accordance with Planning Scheme Policy 3B … at the rate current at the due date for payment. **The payment must be made prior to the earliest of the following events;** the endorsement or survey plans, the issue of a certificate of classification for building work, the carrying out of final plumbing inspection, **or the commencement of the use of the premises …**
>
> The contribution amount payable at the due date for payment **will be calculated at rates current under the Policy …**" (emphasis added)

[45] Condition 10 states:

> "**10. Roadworks – classification, design and construction**
>
> The following roadworks (including associated stormwater drainage) must be designed and constructed to the satisfaction of the Chief Executive Officer at no cost to the Council **prior to the earlier of Council's endorsement or survey plans or the commencement of the use in accordance with Planning Scheme Policy 11 …**" (emphasis added).

[46] Condition 16 states:

> "**16. Land dedication for road widening**
>
> A 1.5 metre strip along the full frontage of the site to Prairie Road … must be dedicated to Council for road widening purposes. The land dedication must be completed, at no cost to Council and to the satisfaction of the Chief Executive Officer prior to the earlier of endorsement or survey plans or commencement of the use." (emphasis added)

[47] For the disposal of this point it is unnecessary to deal with condition 12 concerned with footpaths and bikeways design and construction.

[48] It is uncontroversial that the uses contemplated under the development approval could lawfully start from 15 February 2010. Accordingly, according to the respondents, "*a central issue is whether the non-compliance with the Pre-*

Commencement Conditions means that the 2010 approval has lapsed."[23] The respondents contend that that question must be answered in the affirmative. In reaching that conclusion particular reliance is placed on the decision of the Court of Appeal in *Pad-Mac v Hotel Wickham Investments Pty Ltd*.[24]

[49] *Pad-Mac* was an appeal concerned with whether a bottle shop was being operated lawfully. The relevant permit was subject to a number of conditions and, in particular, Category D Conditions and Category E Conditions. The former were required to be undertaken "*prior to commencement of use*" and the latter "*prior to the commencement of use and thereafter maintained at all times that the development remains in existence*." Both the Category D and E Conditions had been only partially met.

[50] McPherson & Pincus JJA relevantly said:

> "The point depends on the construction of the permit. …
>
> Had the respondent been sued for an injunction to restrain the use referred to in the permit (immediately after the relevant date), the permit would not have constituted a defence; the Court then must in our view have held that the permit did not yet operate to make the use lawful and that it remained prohibited. The natural meaning of the permit is to this effect:
>
> > 'We give you consent to use the premises as this permit specifies, but on the basis that your use under the permit may commence only when you have fulfilled certain conditions.'
>
> It is not easy to understand how the permit can be read as giving consent to any use being made of the premises before fulfilment of the condition in Categories D and E.

[51] Fitzgerald P said:

> "That argument starts from the premise, which is in my opinion correct, that the consent … had immediate effect. However, it does not automatically follow that the consent – in the sense of the Council decision operated as a consent to the immediate use of the premises as a shop. Its effect … has to be determined by the construction of its terms. In my opinion the effect of the consent – or Council decision - … what was to suspend the lawful use of the premises as a shop until at least some of the conditions were performed or otherwise complied with; in other words, the consent … gave consent to the use of the premises as a shop at such future time as the material conditions were satisfied."

[52] In New South Wales, the Court of Appeal of that state in *Coalcliff Community Association Inc. v Minister for Urban Affairs and Planning & Ors*[25] was concerned

---

23 Respondent's written submissions, para 186.
24 (1995) 88 LGERA 157.
25 (1999) 106 LGERA 243.

with a condition that also stated that it had to be complied with "*prior to the commencement of any work on the land in relation to the proposed development*." Stein JA (with Meagher JA and Hodgson CJ in agreement) said:[26]

> "In my opinion, this issue is a relatively simple one. Condition 9 was required to be completed with 'prior to the commencement of any work on the land in relation to the proposed development'. It was a precondition to work commencing on the site. It is common ground that the deed of agreement specified in the condition was not entered into prior to July 1984 when the fourth respondent commenced the use. Indeed as Talbot J found, such a deed has never been entered into …
>
> Conditions 9 and 13 need to be construed. In my opinion, condition 9 is plain and its ordinary meaning apparent. 'Prior to the commencement on the land' must mean what it says. There is no room for any alternative construction since there is no ambiguity in the language."

[53] The conditions under consideration by the New South Wales Court of Appeal can be immediately distinguished from those in issue here. While conditions 5 and 6 envisage certain monies being paid and/or other steps being taken prior to a number of events including the use of the land, they are not couched in terms which expressly state that no work on the land or use of the land can occur or is otherwise suspended until those conditions have been met. That is, in my view, they do not constitute a '*precondition*' that had to be met before any work on or use of the land could commence.

[54] Returning then to the judgment of the Court of Appeal in *Pad-Mac*, that case is, with respect, of little assistance. It was, as was the case in the New South Wales judgment of *Coalcliff Community Association*, concerned with conditions that were required to be undertaken "*prior to the commencement of use*". Clearly, the subject conditions required payment "*prior to*" a number of events including the use of the premises. However, that obligation is quite distinct from an obligation to meet those obligations as a pre-requisite or pre-condition to commencing the use of the land under the relevant legislative regime. In this context, I respectfully adopt the observations of Kefford DCJ in the summary judgment proceedings where Her Honour observed in respect of *Pad Mac*:

> "*… the question in that case was not whether the use was a use commenced under an approval; rather, it was whether the use was a lawful use at a particular point in time.*"[27]

---

26 Ibid, 256 at [62]-[63]

27 *Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor* [2018] QPEC 29 at [40].

[55] Pursuant to s 339 of the *SPA*, the 2010 approval took effect from 15 February 2010. Section 340 of that Act provides:

> "**340 When development may start**
>
> (1) Development may start -
>
> (a) when a development permit for the development approval takes effect …"

[56] As the respondents themselves acknowledge, the development permit took effect on and from 15 February 2010. This was clearly a point of distinction between the legislative scheme under consideration in *Pad-Mac* and that applicable in this case.[28]

[57] In *Sunshine Coast Regional Council v Recora Pty Ltd & Anor,*[29] His Honour Robertson DCJ was concerned with a number of infrastructure payment conditions and, of particular relevance, a condition dealing with sewerage headworks.[30] That condition required the applicant to pay a monetary contribution towards sewerage headworks in accordance with the Planning Scheme Policy and that the contribution "*must be paid prior to the commencement of use…*". While there was no issue raised about whether or not the failure to meet that condition or the other conditions might have caused the approval to have lapsed, His Honour went on to observe, correctly in my respectful opinion, that "*the failure to pay in a timely way does not discharge the responsibility to pay the contribution nor does it sever the condition from the approval.*"[31]

[58] It was submitted on behalf of the respondents to the effect that little weight should be accorded to the decision in *Recora* because reference was not made in the judgment (nor apparently during argument) to *Pad-Mac*. I reject that contention as, for the reasons set out above, having regard to the wording of the conditions in issue, it was unnecessary to consider that case.

[59] For the reasons given, the failure to comply with the subject conditions does not result in the lapsing of the relevant approval. The failure to comply with the

---

[28] *Council of the City of Gold Coast v Ashtrail Pty Ltd & Anor* [2018] QPEC 29 at [54]-[61].

[29] [2012] QPEC 8; See also *Montrose Creek Pty Ltd v Brisbane City Council* [2012] QPEC 65.

[30] *Sunshine Coast Regional Council v Recora Pty Ltd & Anor* [2012] QPEC 8 at [3]: His Honour considered the balance of the relevant conditions to be "relevantly in the same terms".

[31] Ibid, at [11].

conditions instead constitutes a development offence capable of being remedied by proceedings such as this.

An Overview of the Respondent's case

[60] During his opening, Mr Litster outlined the respondents' case insofar as it was concerned with the motor vehicle workshop, ERA 28 and existing lawful uses at various stages. The respondents "*...primary position of course, is that the driving instructing use, driving trucks, was already undertaken lawfully...*".[32] Insofar as the motor vehicle workshop was concerned, the respondents' case was that use never commenced, as its purpose was "*...instead as a simulated training workshop and, in any event, the site benefited from pre-existing lawful use rights*".[33]

[61] According to the respondents, the use to which the land was and is being put was for driving and other educational uses.[34] The latter use being by far the more dominant use. Insofar as the driving instruction component of the land use was concerned, it commenced in 1997/1998.[35] In respect of other educational uses, they were and still are unlawful, a matter that is in the process of being rectified.[36]

[62] There has, save for this proceeding, been no challenge to the lawfulness of the conditions now in issue. Also, it is uncontroversial that the respondents have not paid their infrastructure obligations under the development approval. In such circumstances, Mr Litster accepted that his clients bore the onus (to the ordinary civil standard) of convincing me that there were no legal obligations to meet those conditions.[37] In my opinion, the respondents also bear the onus of satisfying me that there are sufficient discretionary grounds to excuse payment.

[63] Insofar as the driving instruction issue of this proceeding is concerned, during his opening Mr Litster said:[38]

> "Fundamental to the respondent's case is that they never relied – or Ashtrail never relied on the driving instructing aspect of the 2010 approval because it did not need to do so. It had an ongoing lawful use – right to undertake that activity on the site since it commenced in 1998. Alex's

32 T4-59 ll 16-18.
33 T4-59 ll 24-25; Respondent's written submissions, paras 129-130; T4-61 l 12-34.
34 T4-53 ll 37-45.
35 T4-54 l 41.
36 T4-56 ll 20-27.
37 T9-11 ll 3-10.
38 T4-47 ll 34-47.

> evidence is that he commenced providing truck driving training very early in 1998. That involved providing training for licence endorsements that were recognised by Queensland Transport. **Within a few years, between five to seven trucks from lot 36, which comprised one or two smaller trucks and three to five larger trucks, including prime mover or movers and there were around at that point in time four trailers.**
>
> The training was conducted for what are described as medium rigid, heavy rigid, heavy combination and multi-combination qualifications. It is the respondent's case that this part of the business was undertaken lawfully …" (emphasis added)

[64] As has already been identified, the development application arose as a consequence of the Council issuing to the respondents a show cause notice. Prior to the lodgement of the first development application and the one now under consideration, on 23 March 2007 following an on-site meeting, Gassman wrote to the first respondent setting out a fee proposal for its consultancy service and, among other things, advised:[39]

> "…from our site meeting the other day, we believe it may be necessary to apply for extra MCU components to cover the motor vehicle repairs being conducted from the sheds on the site. On that basis, we believe an application to Council would need to include the following minimum components of development.
>
> - Development Permit for a Material of Use for a Service Industry (driver training, etc)
> - Development Permit for a Material Change of Use for a Motor Vehicle Repair Station and;
> - Development Permit for a Material Change of Use for an Environmentally Relevant Activity…"

[65] A planning assessment report accompanied the development application. It, among other things, identified a number of matters including:[40]

- That the report had been prepared on behalf of Major Operator and Driver Training Services in response to the show cause notice received from the Council;
- That the development application was to "*rectify the unlawful use of the land*";
- That development was to proceed in three stages with stage one reflecting the then current use of the land;
- Identifying the current use of the land as;

---

[39] Exhibit 32C, document 29, p 313.
[40] Exhibit 6, Volume 2, attachment 5, p 276.

(a) First, driver training services and a machinery workshop;

(b) Second, driver training for planned operations, heavy vehicle licences and truck qualifications;

(c) Third, driver training and instruction for plant equipment, heavy machinery and large vehicles.

[66] It was then said:

> "The Applicant Major Operator and Driver Training Services is a notable company within the Yatala and wider South East Queensland Regional (sic) that contributes to Queensland growth by licensing and training in excess of 5,000 students per year in machinery and heavy vehicle operations. Major Operator and Driver Training Services **has grown from a fledgling driver training school consisting of one truck, a HRF 12 Volvo in 1998 to what it is today; one of the most modern and well maintained plant and truck training fleets in Australia**." (Emphasis added)[41]

[67] Then, as has already been identified, following the issuing of a decision notice by the Council, there were negotiations which resulted in the issuing of the negotiated decision notice. According to the respondents, all of that was unnecessary and as a consequence of being poorly advised by Gassman. According to the respondents, they were "*failed by Gassman in the way in which the application ultimately got lodged*". According to Mr Litster, Gassman failed to properly investigate and appreciate what was actually occurring on the land.[42]

[68] During final addresses, Gassman was attacked for using the promotional documents provided by the respondents. It was said in effect that first, they clearly were substantially concerned with the educational courses provided by the first respondent and not driver training. And second, the use of those documents revealed that no proper attention was given to either the actual use of the land or the development application.[43]

[69] With all due respect, that submission has no merit. Not only were these documents provided by the respondents to assist Gassman,[44] they also, when viewed

---

41 Applicant's written submissions, para 16; Exhibit 6, Volume 2, attachment 5, p 276.
42 T4-57 ll 29-35.
43 T9-14 ll 11-47; T9-15 ll 1-16.
44 A matter accepted by Mr Litster; T9-18 L17-22.

objectively, are concerned with promoting courses in driving instruction, be it in trucks, bobcats, forklifts or other plant and equipment.[45]

[70] It may be that Gassman did not appreciate every detail and nuance of what was occurring on the land, but it seems to me highly improbable that he could have got it so wrong in the preparation of his report accompanying the development application. And, in the event that he was so wrong, it seems unlikely that those errors would not have been rectified by either or both Alex Tenkate and Matthew Tenkate, both of whom gave evidence. This is particularly so when regard is had to the fact that the promotional material included in the planning report in support of the development application must have been provided to Gassman by either Matthew or Alex Tenkate. Or at least provided on their behalf and with their knowledge.

[71] As the respondents' case relies very heavily on the evidence of Alex Tenkate and his son Matthew, it is necessary to consider their evidence in some detail. Particularly that of Matthew Tenkate.

[72] In respect of Alex Tenkate, at the time Gassman was retained, he was still actively involved in the management of the company including the decision to retain Gassman to prepare the subject development application.[46] He was also actively involved in having information provided to that consultant in the preparation of the development application.[47]

[73] Overall though, I have found his evidence to be unpersuasive insofar it was concerned with the nature and the extent of the uses being made of the land by the first respondent in the period leading up to and following the making of the development application.

[74] On his own admission, he has a very poor memory that "*comes and goes*".[48] In addition to being unable to answer questions on a number of occasions due to a lack of memory, on numerous other occasions he deflected answering questions because that aspect of the business of the first respondent being explored was not, according to him, a matter he has knowledge about as it fell within the responsibility of others

45 Exhibit 6, Volume 2, attachment 5, pp 329-337.
46 Exhibits 35 and 36.
47 Exhibits 39 and 41.
48 T6-17 l 34.

and, in particular, his son Matthew. At one stage he went so far as to describe his involvement in the affairs of the first respondent as being "*I'm just a hands on person that gets out there and cleans up the machines and clean - sweeps up*".[49] Notwithstanding Matthew Tenkate becoming the general manager of the first respondent in April 2013, I have found that description implausible.

[75] It also seemed that Alex Tenkate's inability to answer a question for whatever reason coincided with questioning about matters contradictory to the case being advanced on behalf of the respondents.

[76] Finally on the evidence of Alex Tenkate, while I can readily accept that his attention and involvement with the operation of the first respondent would have been distracted during his wife's illness and following her tragic death, I am unable to accept that it provides any genuine basis for a conclusion that his involvement with the business affairs of the first respondent was as limited as he would have had me accept.

[77] For these reasons, I have concluded that I am unable to accept Alex Tenkate's evidence as being reliable, other than when supported by other independent objective evidence.

[78] Turning then to the evidence of Matthew Tenkate, early in his evidence in chief he was asked a question by Mr Litster which was clearly designed to distance him from a document concerned with apprenticeship training.[50] This attempt focused on the manner in which his surname was spelt. On the first page of that document there is a quote attributed to Matthew "Ten Kate" (two words) who was described as the operations manager. The quote was:

> "*Apprenticeships are a great opportunity to combine training with on the job experience, and suit anyone looking for a career in the construction, mining or transport industry… students receive the benefits of theory-based education in a classroom environment, as well as a practical, on-the-job practical training to ensure they are as prepared as they can for a career in their chosen trade.*"

[79] In respect of that document Mr Litster asked:[51]

> "**Q.** When you incorporate your name in a document do you split your surname in that fashion?

49 T6-58 ll 8-9.
50 T7-10 ll 40-45.
51 T7-10 ll 41-42.

A. No."

[80] That answer struck me as being disingenuous. In the email sent by his father on 14 September 2009 he is referred to as Matthew "Ten Kate". Of more significance though is that when he responded to his father's direction concerning traffic movements, his own email header reads "*from: Matthew Ten Kate (mailed to: MatthewT@major.com.au).*" According to him, that his surname appeared in that form was "*probably more an IT error,*"[52] and that it had been fixed.[53] In that document he is also described as Matthew "Ten Kate", Manager ITC of the Major Group.[54]

[81] Following his evidence, the following exchange took place between myself and the witness:[55]

> **Q**. Yes but –so it does – it seems to me that – to be the case that KenTate (sic), one word, and Ken Tate (sic) two separate words, are used interchangeably and the fact that Ken Tate (sic), two separate words is contained in one document is not indicative of there being any error at all. It is just one example of where the two words are used, instead of the one word?
>
> **A.** Correct.

[82] That Matthew Tenkate sought to distance himself from the new apprenticeship training program publication is understandable because of the reference to there being a "*custom built"* training workshop. That part of the document relevantly states:[56]

> "Major's Apprenticeship Training Program will combine on-the-job training with the apprentices' employer and training partner with classroom and self-placed learning through workbooks and online exercises. **Major have custom-built a training workshop to work alongside their fully functioning workshop that supports and services their current plant and equipment.** This facility will give apprentices additional training in a real workshop outside their host employer." (emphasis added)

[83] It will be recalled that the development application sought, in addition to the driving instructing component, involved approval for motor vehicle repair uses and an Environmentally Relevant Activity, being "ERA28; Motor Vehicle Workshop". However, it is the respondent's case that there is only one motor vehicle workshop

---

52 T7-39 ll 23-25.
53 T7-40 l 10.
54 Exhibit 41, p 2.
55 T7-41 ll 5-9.
56 Exhibit 37, p 3.

use being made on the subject land and that it is a use ancillary to the truck driving instruction use and is of a "*de minimis*" nature.[57]

[84] When being cross-examined about the reference to the custom-built workshop working alongside the existing fully functioning workshop, Matthew Tenkate was asked if there was one or two workshops on the land and replied that there was just the one. Thereafter the following exchange took place:[58]

> "**Q**. Well, then, what's the custom-built one?
>
> **A.** Well, it's a – **it's a phrase of words**. But I mean, at the end of the day, I don't know – would TAFE refer to their workshop as a custom-built workshop? It was – it's an area in our shed that has tools that were old tools that were used from the days of the plant-hire business and new things that we bought and had to be used for parts of the – componentry of training. So – and that was right across a variety of different things. You know, you've got punching tools and all sorts of things. I'm not technically across every single tool that's in there either.
>
> **Q.** But does that mean if someone said, 'we want to see your custom-built workshop' you would have said, 'oh, sorry. Look, that's an error. We haven't actually got a custom-built workshop. It's just integrated with all our other workshops'?
>
> **A.** **No we would just say, 'this is the training workshop'. This is how – that's how we would refer to it**. We refer to it, technically, as our trade centre. Because in that trade centre we've got carpentry componentry. We've got electrical. We've got a variety of different things." (emphasis added)

[85] It might well be the case that the training workshop and the so called "*fully functioning workshop*" operate under the same roof and operate side by side. That said, the promotional material makes it sufficiently clear that there would be in fact two separate workshops; one for the training of apprentices and the other to be used to service the respondent's plant and equipment, including trucks and other plant and equipment. That there was a separate and existing maintenance workshop also corresponds and is consistent with the wording used in the development application, where it was described as the existing "*machinery workshop*" and that "*the use of the motor vehicle repairs* ***is provided solely to service machinery and vehicles associated with the driver training*** *and should not be considered as a stand-alone facility*"[59] (emphasis added).

---

57 Respondent's written submissions, paras 129-130.

58 T7-53 ll 10-25.

59 Exhibit 6, Volume 2, attachment 5, p 295.

[86] In 2010, under the heading “*Major.com.au operation and driver training service*” another document was published which, among other things, identified “*major news*”. That news included:[60]

> “**With our continued growth over the past decade, major has made its primary focus on training the transport and construction industries**. We feel the time is right to diversity and expand our scope of training delivery into all facets of business course. With the right training team in place, with the necessary experience to share knowledge and lessons from life and the best training resources we feel highly confident that our business training team and program will deliver a training product surpassing industry expectations.” (Emphasis added)

[87] The reference to continued growth over the past decade and the primary focus being on training the transport and construction industries, on the face of it, is indicative of an increase in the intensity of the driver training component of the use being made of the land by the first respondent. However, according to Matthew Tenkate those were neither the words of the company or his own.[61] According to him it was merely a “*promotional piece that came out*”.[62]

[88] It may be accepted that the wording of the promotional publication was not the actual work of either Matthew Tenkate or his father. That said, at the time of its publication, Matthew Tenkate was either the training or operations manager of the first respondent. He was also familiar with all, and responsible for some, of the core aspects of that business, including marketing.[63] In such circumstances, I consider it improbable that such material would have been placed in the public domain without any knowledge on his part.

[89] Some two to three years later, in late 2012 or early 2013, under the heading “*Major Australia’s (indistinguishable) force*”, a capability statement was published.[64] At page 3 of that document it was said: [65]

> “Major was established in 1988…as a transport and civil hire company serving the Queensland construction and transport industries. Ten years later in 1998, in recognition of the growing demand for properly skilled and ticketed drivers and operators, major operator and driver training service was launched and started delivering heavy industry courses to clients locally, regionally, nationally and internationally.

---

60 Exhibit 34, p 1.
61 T7-61 ll 35-45; T7-62 ll 1-5.
62 T7-61 l 1.
63 Exhibit 24, para 14.
64 T7-27 l 15; Exhibit 40.
65 Exhibit 40, p 3.

> **By 2009 Major had expanded its product range with the establishment of an industry specific labour hire and recruitment service with a defined difference. Capitalising on the extensive resources in the training division, including plant and equipment, simulated worksites and industry experienced trainers/assessors, major was able to deliver a unique service by providing reduced cost and time to hire expenses by pre-assessing operators before starting on site."** (emphasis added)

[90] At page 4 it was then identified that over 10,000 individuals per year were trained by Major and at page 5 it was said:

> "Major is committed to ensuring all plant and equipment that is used for training purposes is to be the highest standard and remains industry current. To ensure this we regularly service **and maintain our fleet in our own workshop at Yatala**." (emphasis added)

[91] At page 6 it was said that Major operates a modern fleet of trucks, plant and equiptment including:

- Over 22 trucks;
- 18 trailer combinations;
- 32 support vehicles;
- Over 65 pieces of machinery;
- Traffic control vehicles…. (emphasis added)

[92] When taken to the first respondent's capability statement during cross-examination, while Alex Tenkate expressed concern about there being "*over 65 pieces of machinery*" he did not express such concern about the reference to 22 trucks, trailers etc.

[93] The potential significance of the references to the workshop located at Yatala and the number of vehicles was not lost on Matthew Tenkate. During his evidence in chief, notwithstanding the fact that he was then the operational manager and soon to be the general manager, he said he had never seen that document before.[66] According to him, it was probably the product of a young woman who was one of the business development managers (BD's). He was asked:[67]

> "**Q.** Right. And in terms of capability statements, is there any particular person or persons within your organisation who are vested with the task of preparing capability statements?

---

[66] T7-19 l 5.
[67] T7-21 ll 37-46.

A. We have a – as I refer to before, we had – everybody had a bit of a go at it, but we had – we tried to improve that by using this girl Amelia for a period of time and that – yeah – somewhat was ok, but, you know, she was not a full time solution and we ended up bringing it in house to try and control it better. But, yeah we didn't have a person sitting there waiting for a tender to come up and, yeah, the BD's were tasked with putting information together and submitting that on various things."

[94] Cross-examination about the Yatala workshop continued:[68]

"Q. All right. Anything else on that page that would like to make a comment about?

A. It talks about our own workshop at Yatala. We regularly service – maintain our equiptment. **Not something that we did** but, you know, we did move equiptment from our other sites there to maintain them. We do it at the site with contract fitters and I guess, you know, the other componentry of that is the other equiptment that was newer would be stuff that would be looked after by dealers, and what not.

Q. What about the work shop and that seems again to compete with things that you've said in your affidavit?

A. **Well, it sounds good on the document that we were trying to promote ourselves that we had our capability in order and we can make it all happen.** The logistics of whether we did it or we had a contract fitter do it wasn't something that we really wanted to out there tell people (sic) we just made sure – **what we wanted to make sure people knew was that, you know, we were capable of handling everything. You know, they didn't have to worry**. If they approached us – you know approached us to do a program, whether it was local or it was regional, that we could do it. It would be like – you know we wouldn't bring equiptment from Townsville back here to service it or – you know, it just wouldn't make financial sense to do that." (Emphasis added)

[95] Alex Tenkate was also asked a number of questions about this document and according to him, he did not understand how "*all this works*". According to him, Matthew Tenkate was the person who would "*probably (be) more over it than what I am*".[69] Having regard to the level of details contained in the document, together with the proud assertions about Major's capabilities and its modern fleet and the incorporation of a number of testimonials, I find it difficult to accept that Matthew Tenkate had not seen this document, or was otherwise unaware of it, until either the day of or the day before these proceedings commenced.[70]

---

68 T7-29 ll 23-40. (Yatala is the head office of the first respondent).

69 T6-58 ll 4-7.

70 T7-19 ll 1-24.

[96] Returning to the issue of the truck movements, when taken to the table in Exhibit 41, Matthew Tenkate said that he could not remember doing this work and that while he sent the email, it may have been the work of others.[71]

[97] During cross-examination, it was also put to him that he would have appreciated when preparing that table that it could have had financial consequences for the first respondent by way of infrastructure charges. His response was that he did not appreciate that at the time.[72] This evidence is inconsistent with other evidence that I accept. First, the email from Ms Ross made it clear that there could be infrastructure charge consequences. Second, by this time Matthew Tenkate was the general manager and presumably in control of the "*core aspects*" of the first respondent's business, including the banking and cash flow (i.e. revenue and expenditure) aspects of the business.[73]

[98] As can be discerned from the discussion above, I have some real concerns about the reliability of both Alex and Matthew Tenkate. While there is considerable objective evidence that corroborates their evidence concerning the other educational aspects of the first respondent's use of the land, there is little that supports their case in this proceeding.

[99] Indeed, most of the more contemporaneous documents are contradictory. In this context, the observations of the Court of Appeal in *Guirguis Pty Ltd & Anor v Michel's Patisserie System Pty Ltd & Ors*[74] seem apt.

> "Most experienced judges subscribe to the view expressed by Goff LJ in Armagas Ltd v Mundogas SA (The "Ocean Frost")37 that it is essential "when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities". Goff LJ was referring to cases of fraud, but the statement is of general application. As Goff LJ observed in the same passage:
>
>> **'It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.'**

---

71 T7-37, ll 18-42.
72 T7-67, ll 22-30.
73 Exhibit 24, para 14.
74 [2017] QCA 83 at [50]-[51]

> This is not a recent revelation. About 60 years earlier, for example, Atkin LJ, after observing that "an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour", confirmed that trial judges were encouraged "to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events".38 The primary judge's failure to consider and make findings about many aspects of the evidence, including evidence relevant to causation, deprived his Honour of those important tools for judging the credibility and reliability of the contentious oral evidence." (emphasis added)

[100] For the reasons discussed, I have reached the unfortunate conclusion that I am also only able to place reliance on the evidence of Matthew Tenkate where it is supported by other objectively established facts and, in particular, discretionary evidence. And, where their evidence is inconsistent with the relevant documents, I find that documentary evidence to be more persuasive and reliable.

Conclusions

[101] Leaving aside for the moment what I consider to be the unlikely situation that Gassman misunderstood what uses were actually occurring on the land, the evidence I find to be reliable all points to the conclusions, that at the material times:

1. There had been a material change in the use of the land as a conseqeuence of intensification in the driving instruction use on the land;[75]
2. Accordingly, while there has been driving instructing courses being conducted on the land since the late 1990s, it was at a scale materially less than as at the date of the development application. That is, that use at its current scale, does not have the benefit of existing lawful use status.
3. The first respondent was unlawfully using the land for, among other uses,[76] the purposes of a motor vehicle workshop.
4. It follows from the third finding that:
    (i) It was necessary for the first respondent to obtain a development permit for a material change of use – ERA 28; and

[75] Driving instruction included that involving heavy rigid, medium rigid, multi combination vehicles and also other plant and equipment such as forklifts, bobcats and backhoes.

[76] The other uses being the educational uses being conducted on the land.

(ii) The motor vehicle workshop was not an existing lawful use and nor could it be described as merely an ancillary use of a "*de-minimus nature*"[77]

[102] Turning to the first matter, the respondent's own documents stand in contradiction to the case being advanced on their behalf. In fact, it strongly supports the Council's case in my view.

[103] The documentary evidence which I consider to be the most reliable evidence, makes it more likely than not that "*truck training*" was being conducted on the land at least five days a week by February 2008 and up to six days a week by September 2009. [78] Also, by September 2009 medium rigged and heavy rigged truck movements (ingress and egress) ranged from 20 to 38 per day. [79]

[104] Those conclusions also find support in the promotional material referred to above including the reference to there being "*continued growth over the past decade, Major has made its primary focus on training the transport and construction industries…*".[80] In this context, Alex Tenkate accepted that since at or about 2000, the operation of the first respondent had been growing through to 2010, with a primary focus on transport and construction industry.[81]

[105] Indeed, in respect of growth and Alex Tenkate's "vision", in other promotional material said to be "*a message from the managing director*" it was stated that "*Major Operation and Driving Training Services have grown from a fledging driver training school consisting of one truck in 1998 to what it is today. One of the most modern and well maintained plant and training fleets in Australia.*"

[106] The intensification of truck driving instruction up to and including 2018 is also supported by the evidence of the increased number of trucks registered in the name of the first respondent.[82] As Mr Litster pointed out, there is no direct evidence linking any particular vehicle to anyone of the three locations from which the first respondent conduct their training courses. That can be accepted. However, bearing in mind that the Yatala site is the head office and bringing into account Alex

---

77 Respondent's written submissions, paras 129 and 130.
78 Exhibit 39; see also Exhibit 40.
79 Exhibit 41.
80 Exhibit 34, p 1.
81 T6-22 ll 44-46; T6-23 ll 1-7.
82 Exhibit 43: see also Exhibit 40, p 6.

Tenkate's concession and the other documentary evidence to which I have referred, it can be readily inferred that the growth in the truck fleet was, in no small part, as a consequence of the intensification of the driving instruction classes being conducted on the subject land.

[107] The above evidence leaves me in the situation where I am simply unable to accept Matthew Tenkate's evidence that "*The conduct of Ashtrail's truck driving business has remained unchanged since around 2002. In particular…truck movements to and from Lot 36 rarely exceeded 10 per day, and regularly are none…*".[83]

[108] Turning then to the workshop and ERA 28, not only is a maintenance workshop what might reasonably be expected with the growth and maintenance of a modern fleet of trucks, it was a facet of the driver training business of the first respondent that was keenly promoted. That is clear from the documents to which I have already referred.

[109] Also, as has already been identified, in correspondence dated 23 March 2007, Gassman wrote to the first respondent advising, among other things, that "*it may be necessary to apply for extra MCU components to cover the motor vehicle repairs being conducted from the sheds on the site*". Consistent with that observation, in the report prepared by Gassman which accompanied the development application, it was stated that "*the use of the motor vehicle repairs is provided solely to service the machinery and vehicles associated with the driver training and should not be considered a standalone facility.*"

[110] In addition to the contents of the Gassman communications and the other documentary evidence to which I have referred, there is the evidence of Ms Bennett and Mr Cole. Ms Bennett is a Development Compliance Officer employed by the Council. Insofar as the motor vehicle workshop is concerned she said:[84]

> "At the rear of the building which had the reception area, an area which **appeared** to be a motor vehicle repair workshop. The area contained a vehicle which had its bonnet open and appeared to be in the process of being serviced or repaired, a hoist, tools, machinery and vehicle parts, consistent with my observation of its use as a motor vehicle repair workshop. I did not observe any training activities being undertaken in this area." (Emphasis added)

---

[83] Exhibit 24, para 59(a).

[84] Exhibit 3, para 12(a).

[111] The reference to what "appeared" to be a workshop is of itself far from convincing. That said, her observation has a level of support in the evidence of by Mr Cole. Mr Cole is an earth moving equipment fitter, who was called on behalf of the respondents. His evidence was that he did only a small amount of work for "*Major's road-registered truck fleet*".[85] After being taken to that part of his affidavit, the following exchange took place between him and Mr Bain:[86]

> "**Q.** What sort of work do you do for the truck fleet or on the truck fleet?
>
> **A.** We had done a gear box replacement on one of them [indistinct] which we did up in our workshop.
>
> **Q.** Yes?
>
> **A.** We had – we were doing bi-monthly inspections on them, which is just going around checking all the lights are working, the condition of fan belts, etc, adjusting breaks if required, just general safety check points that were (sic) occurred for them to maintain their maintenance management.
>
> **Q.** Alright. And when you speak of your material – your plant and equipment not fitting in the shed, what shed are you talking about?
>
> **A.** **The one that has the – the hoist in it at the back of the premises there on – on Prairie Road.**
>
> **Q.** Now when you say the hoist is – will have to articulate this. We haven't got the ability – … to show you something but [indistinct].
>
> **A.** That's alright, it's those pictures that were taken by the Council officer.
>
> **Q.** Yes?
>
> **A.** Which show **a four-post hoist in the middle of the workshop** with a …
>
> **Q.** I was just about to say that very thing. You look from the foreground down past the large hoist and out to some roller doors at the other end and on the left hand side, as you look down, there is a desk for someone to work at and the right hand side, there is tools in racks and so on. Do you remember those features of the photo?
>
> **A.** Yes.
>
> **Q.** Righto. And I was going to ask you about the hoist in particular. Is the hoist the blue hoist of a size that is much larger than is needed for ordinary light commercial industrial and domestic passenger cars? Indeed, it's for very big vehicles?
>
> **A.** Yes, it is for the larger vehicles.
>
> **Q.** Up to what size of vehicle can be put on that hoist?
>
> **A.** I don't know. I haven't looked at the specifications of the rating on it, but I'd assume – well, I can't assume. I would think that a – a small truck would go on it quite easily." (Emphasis added)

---

[85] Exhibit 22, para 17.

[86] T5-10 ll 44-45; T5-11 ll 1-31.

[112] Before leaving the evidence of Mr Cole, it is necessary to deal with some other aspects of his affidavit. After referencing the "*wet hire business*", he went on to say that after that part of Major's operations had ceased, the workshop had been "*shut*" and a number of employees dismissed.[87] He then went on to say:[88]

> "Since that time, I have provided contract services to Major for its fleet of training, plant and equipment, cranes and some forklifts. Since then, Major has not employed any workshop staff, and to my knowledge My Fitter provides all of their maintenance."

[113] While his evidence on this topic was not seriously challenged, I do not consider it to be particularly probative evidence for a number of reasons. First, it is quite clear that Mr Cole's primary focus whenever he was on the site was not directed to the road registered truck fleet, but instead on other plant and equipment. In this context he said: "*the work that I do on road registered trucks is limited to bi-monthly maintenance checks, which take about 60 to 90 minutes per truck, and like the plant and equipment is ordinarily undertaken out of doors*".[89] That his association with the road registered trucks is limited to that extent is not surprising because, according to him, the "*fleet is much newer than the old wet hire fleet, and the working conditions are much less severe*."[90]

[114] Second, the evidence given by Mr Cole makes it tolerably clear that he considered this workshop to be associated with driver training use being made on the land. During cross-examination he responded to a number of questions with answers which, in essence, were to the effect that the workshop had the appearance of being able to be used for the repairing and/or maintenance of vehicles but it could also have been used or be suitable for use by the drivers who would prepare their trucks prior to giving driving lessons.[91] While Mr Cole's evidence provides little insight into what use the workshop was actually put it, insofar as it does provide any insight, tends to support the other evidence that it was directly associated with the driving instructing use being made of the land.

[115] In the written submissions on behalf of the respondents it is asserted, after referring to evidence given by Matthew Tenkate, that:[92]

---

87 Exhibit 22, paras 9-13.
88 Exhibit 22, para 14.
89 Exhibit 22, para 17.
90 Exhibit 22, para 15.
91 T5-12 ll 40-47; T5-13 ll 1-14.
92 Respondent's written submissions, para 117.

> "Having regard to this evidence, it is apparent that activities undertaken within the Training Workshop did not fall within the defined use of Motor Vehicle Repairs, because those activities did not relate to the 'purpose of carrying out repairs to motor vehicles' but instead related to vocational training."

[116] I respect that submission. It can be accepted that the hoist and workshop referred to by Ms Bennett and Mr Cole[93] might be typical of what might be found in a workshop used solely for training/educational purposes. However, the other evidence to which I have referred leaves me far from satisfied that the primary purpose of this workshop was for other educational training. To put it in another way, it was more than likely that its primary purpose was to service and maintain the driver training fleet.

[117] Before leaving the topic of the workshop it is appropriate to deal with a number of specific submissions made on behalf of the respondents concerning ERA 28. It was the respondent's position that while it was open for the first respondent "*to apply for a development permit for MCU for ERA-28 (as it could for any other use), it did not need to do so, so as to authorise its continued activities*".[94]

[118] In the respondent's supplementary written submissions it was said:

> "The material question is whether, on the 2010 approval taking effect, activities were occurring that relevantly fell within the definition of ERA 21 (as transitioned). And, not just any activities; what was taking place had to be activities which the aspect of the 2010 approval authorised for ERA 21…."

[119] Thereafter I was referred to paragraphs 163 to 171 of the respondent's substantive written submissions where it was submitted that the activities comprising the ERA did not start for a number of reasons. I will deal with each in turn insofar as it is necessary.

[120] The first submission can be rejected on the basis that I have determined that there has in fact been a material change of use in respect of the activities that fell within the meaning of the relevant ERA. The second submission can also be disposed of on the basis of my determination concerning the existence and use of the maintenance workshop. As to the third submission, having regard to my findings concerning the intensification of the use of the land for driving training, I am not at all satisfied that

---

93 Exhibit 3, p 5 photograph 'Vehicle Repairs Workshop'.

94 Respondent's written submissions, para 149

I should proceed on the basis that the so called "*threshold of ten vehicles has not been reached".* Finally, for the reasons given, the level of driver training activity being conducted on the land could not be properly categorised as an existing lawful use. Further in this regard, I have concluded for the reasons given, the workshop was not being used primarily for educational purposes as contended for by the first respondent, but was instead primarily associated with the maintenance of the first respondent's driver training fleet.

Discretion

[121] After correctly observing that "*ordinarily, the court would tend toward making an enforcement order in favour of a council, on basis that it is seen as the proper guardian of public rights and the public interest in seeking compliance with the law*",[95] it is then contended that there are a number of factors that militate against granting the relief sought. They are delay, absence of impacts, the respondents' conduct, the beneficial aspects of the respondents' use of the land and finally, the so called "*appropriateness of the infrastructure charges*". Not surprisingly, the Council contends that there is no sensible reason why it would not be entitled to the relief sought.

[122] In *Warringah Shire Council v Sedevcic,*[96] when considering whether to exercise a discretion of the type provided for in s 11 of the *Planning Act* 2016 is wide and not one limited to either particular classes of cases or special cases, Kirby P (as he then was) said:[97]

> "In exercising the discretion, it must be kept in mind that the restraint sought is not, in its nature, the enforcement of a private right, whether in equity or otherwise. It is the enforcement of a public duty imposed by or under an Act of Parliament, by which, Parliament has expressed itself on the public interest which exist in the orderly development and use of the environment…because…the Act permits any person (and not just the Attorney General or a person with a sufficient interest), to bring proceedings in the court for an order to remedy or restrain a breach of the act, there is indicated a legislative purpose of upholding, in the normal case, the integrated and coordinated nature of planning law. Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy. Damage may be done to the environment which it is the purpose of the orderly enforcement of environmental law to avoid…

---

[95] Respondent's written submissions, para 251 (footnotes deleted).

[96] (1987) 63 LGRA 361; endorsed by the Court of Appeal in *Mudie v Grainriver Pty Ltd & Ors* [2001] QCA 382.

[97] *Warringah Shire Council v Sedevcic* (1987) 63 LGRA 361, 365-366

> There is nothing in the act by which the discretion is fettered or limited to 'special cases' …. But the obvious intention of the Act is that, normally, those concerned in development and use of the environment will comply with the terms of the legislation. Otherwise, if unlawful exceptions and exemptions become a frequent occurrence, condoned by the exercise of the discretion…the equal and orderly enforcement of the Act could be undermined. A sense of inequity could then be felt by those who complied with the requirements of the Act or who failed to secure the favourable exercise of the discretion….
>
> Where the application of the enforcement of the Act is made by…a council a court may be less likely to deny equitable relief than it would in litigation between private citizens…this is because the…council are seen as the proper guardians of public rights. The interest is deemed to be protective and beneficial, not private or pecuniary."

[123] Here of course, the court is not concerned with the breach of an obligation imposed under an Act of Parliament. Nonetheless, the observations made by Justice Kirby remain apt. That is so because, as the respondents themselves accept, the infrastructure conditions under challenge involve issues of public interest. To that, I would add, the need to ensure the equal and orderly application of planning law to avoid creating a sense of inequality that might be felt by those who have complied with charges such as these or otherwise had failed to secure similar favourable exercises of discretion.[98]

[124] Turning then to the issue of delay, it is submitted that the Council's delay in bringing these proceedings of nearly eight years from the date the conditions had been breached was "*inordinate, inexcusable and unexplained. It is extraordinary*."[99] It is submitted on behalf of the respondents that the consequences of the delay were not academic, but had caused meaningful prejudice and, in particular:[100]

> "(a) The respondents have been required to respond and establish the nature and type of on-site activities undertaken on-site before the 1995 scheme repeal on 18 August 2003, in circumstances where:
>
> (i) well over 15 years have passed;
>
> (ii) documents to assist proving on-site activities prior to 2003 are not available, as physical documents have been destroyed, electronic documents are no longer accessible and financial records are no longer accessible;
>
> (iii) Commonwealth and State Government Education regulator records are not available; and

---

98 *Whitsunday Regional Council v Branbid Pty Ltd* [2017] QPEC 3 at [27] per Bowskill DCJ (as she then was).

99 Respondent's written submissions, para 254.

100 Respondent's written submissions, para 257.

> (iv) Key people who are employed and closely involved with Ashtrail's business who could have knowledge of relevant events have died, or are unavailable;
>
> (b) There have been significant adverse financial impacts on the Respondents, including most recently the cessation of training contracts with Council that coincide with the commencement of these proceedings." (footnotes deleted)

[125] As to the assertion of evidentiary prejudice, I am unable to accept the submission made. It may well be the case that there has been an unsatisfactory delay in commencing this proceeding. It might also be that the delay has meant that witnesses and documents are no longer available because of that delay. However, it is my firm view that that has not caused any material prejudice to the respondents for the following reasons.

[126] First, Matthew Tenkate has been involved in the business operations of his father since 1995 when he was a ten year old. By 15 years of age he was operating plant and equipment and, after obtaining his economics degree in or about June 2006, he began to work with his father in the business. Initially, as a training manager, then as the operations manager from March 2010 and then as the general manager from April 2013. According to him, he was well versed with the "core aspects" of the operations of the first respondent including course design, marketing, business development, recruitment and human resources, supplier management, banking and financing, and cash flow.[101]

[127] Turning to the evidence of Alex Tenkate, he was the sole director of Ashtrail from at or about 1992 and has remained a director since that time. Also, notwithstanding his purported poor memory, he was able to give a detailed account of what has occurred in the evolution of the first respondent from 1993 or 1994 through to more recent times. Even to the extent of remembering having to wait for a meeting for some time at or about February 1997.[102]

[128] Finally on this topic, having regard to the conclusion that I have reached regarding the evidence of both Alex and Matthew Tenkate, I strongly doubt that any of the matters identified by Matthew Tenkate[103] would have led to a different result.

---

[101] Exhibit 24, para 14.
[102] Exhibit 32A, para 27.
[103] Exhibit 24, para 93.

[129] As to the financial impacts resulting from the cessation of training contracts with the Council, according to Matthew Tenkate this has resulted in a loss of between $200,000 to $300,000 per annum in revenue since May 2017. That may well be the case, but I find it wholly unsurprising that the Council would consider it appropriate to terminate its business dealings with the first respondent once it became abundantly clear that litigation was inevitable.

[130] Turning then to the conduct of the respondents, my attention was drawn to the fact that on 1 February 2016, the first respondent lodged with the Council a development application for a development permit for a material change of use for an educational establishment. It is then submitted:[104]

> "Council assessed the 2016 application, and on 20 February 2017 it decided to approve the application, and issue a development permit for educational establishment and office (associated with industry activity), subject to conditions).
>
> Relevantly:
>
> (a) Conditions of that approval require construction works on part of the site that fronts Prairie road, with associated land dedication; and
>
> (b) Infrastructure charges notices have been issues associated with that approval seeking contributions in the order for $460,000.
>
> It is telling that, unsolicited Ashtrail applied for a development permit to regularise the predominate activities on lot 36,
>
> Council had knowledge of the on-site activities having engaged Ashtrail to provide training since around 1999 and specifically through compliance inspections dating from 2007 yet never raised the need for that application."

[131] What these submissions overlook or at least understate is that, as was the case with the driving instructing uses being made of the land, the educational activities, as was conceded by Mr Litster, were being conducted unlawfully and had to be regularised. The first respondent was simply doing what it had to do to make its activities lawful. That the Council did not press or otherwise cause that to occur is of no real consequence in my view. Second, the reference to the infrastructure charges is, in the absence of anything else, of little consequence. There is no suggestion by way of example that the infrastructure charges associated with the approval of the educational facilities has in some way resulted in a "double dipping" on the part of the Council. This proceeding is, in this context, only concerned with whether or not the subject conditions ought be enforced.

---

[104] Respondent's written submissions, para 267-270.

[132] Turning then to the beneficial aspects associated with the use being made of the land, it is said that if the first respondent was required to pay the infrastructure charges in dispute, that would cause both the first and the second respondent to become insolvent and, as a consequence of that, their "campuses" at Yatala, Morayfield and Dinmore would have to close. It is then submitted that would impact negatively not only on employment opportunities in those areas, but also on the educational opportunities that are offered to somewhere in the vicinity of 7,500 students per annum.

[133] According to Matthew Tenkate, "*the bottom line is that neither Ashtrail, Talranch, my Father nor I can pay the amount said to be owing under the conditions…as well as the associated infrastructure charges notice and cost of associated works*". According to him, if required to do so, their business group would become insolvent causing the closure of the aforesaid campuses.[105] It is true that that evidence was unchallenged, but one might have expected at least some evidence in support of those assertions. (i.e. bank statements, tax returns etc). None were advanced.

[134] On this topic, I would make two further observations. While Alex Tenkate speaks of being "*dismayed*" by the amount of the infrastructure charges and, if he had been advised of how much would be involved, he would not have proceeded with the development application for two reasons in particular. First, because there was at the time "*no way*" that the first respondent could have afforded to pay those charges. Second, it would have been impossible to obtain sufficient finance from the bank because the business overdrafts were fully drawn at the time.[106] What Alex Tenkate does not say though, is that if required to meet the subject infrastructure charges, the first respondent would be rendered insolvent. The second observation I would make is that it was unnecessary for either Matthew or Alex Tenkate to be cross-examined on those aspects of their evidence in order for the Council to succeed in the proceeding. It may have been prudent, with the advantage of hindsight, to do so to meet the discretionary arguments now being made, but it was not necessary to succeed in the substantive proceeding.

[135] Turning then to the complaints about the appropriateness of the subject charges, it is said that this aspect of the respondents' case is not a de facto appeal against the

---

105 Exhibit 24, para 100.
106 Exhibit 32A, para 150.

conditions nor an application for declarations that the conditions 5 and 6 are unlawful. Instead, "*it is submitted that the court would be disinclined to make an order requiring payment of infrastructure contributions where it is apparent that the amount sought may be calculated incorrectly or unrelated to actual demand on the identified network*".[107] To support this submission, reliance in particular is placed on the evidence of Mr Reynolds, a town planner.

[136] Mr Reynolds' summary of conclusions was:[108]

> "The resulting number of ET's (Equivalent Treatment) calculated in conditions 5 and 6 are excessive, which increases the value ($) of contributions to a level having no correlation with the nature of the uses approved.
>
> Having regard to the philosophy of each policy, the resulting contributions are neither reasonable nor relevant. They do not reflect the much lower demand placed upon infrastructure by the development."

[137] As to the first of those conclusions, after an analysis of policies that might affect the method used to determine the amount of infrastructure charges payable, Mr Reynolds concludes:[109]

> "The formula is applied to calculate ET'ss on this site, without regard to the nature of the use, site cover, site population or number of fittings and fixtures. For example, an acceptable solution AS 3.1.1 of the industry 1 (high impact) Domain in the Gold Coast Planning Scheme 2003 allows 70 per cent site cover, which might be accepted on smaller sites in an industrial estate. However, the subject site is very large (4.2 ha) with a very low site cover, because of the use characteristics.
>
> For these reasons, the methodology for the calculation of applicable ET's bears no relationship to the characteristics of the approved use."

[138] As I have already mentioned, up until these proceedings were contemplated there had not been a challenge to either the relevance or the reasonableness of the subject infrastructure conditions. More importantly though, despite not being cross-examined, I do not find Mr Reynolds' evidence concerning the first of his conclusions to be persuasive for two reasons. First, he proceeds on the basis of the level of intensification of use (driver training) contended for by the respondents. I have rejected their evidence about that. Second, there is, as far as I have been able to discern, no meaningful discussion about what the "*characteristics of the approved use*" might include or not include.

---

[107] Respondent's written submissions, para 282.
[108] Exhibit 31, SRR-1, p 6.
[109] Exhibit 31, SRR-1, p 3.

[139] As to the second conclusion, it in my view, suffers from the same problems. In those circumstances the comparison with the other types of uses identified by Mr Reynolds are of themselves unhelpful. In this context Mr Reynolds made no meaningful attempt to say why it was appropriate to compare the subject use of the land with those uses chosen by him,[110] rather than a use more comparable to that which is actually occurring on the land.

[140] Finally, I consider Mr Reynolds' ability to comment on what might constitute a reasonable infrastructure charge is also limited by his lack of expertise in the calculation of dollar value of such charges.[111] Finally, even if I found Mr Reynolds' evidence on this topic persuasive, it would not enliven any favourable discretionary considerations. Despite the protestations to the contrary made by Mr Lister, to set aside the charges on the basis of them being neither relevant nor reasonable, would constitute an impermissible review of the Council's decision. Or, to adopt the terminology used by Mr Litster, it would at a practical level amount to a "*de-facto appeal*" against the conditions.

[141] It also needs to be borne in mind, and indeed borne in mind with all of the discretionary issues raised by the respondents, that the infrastructure conditions under challenge are those imposed pursuant to a "negotiated" decision notice.

[142] Pursuant to conditions 5 and 6 of the original decision notice dated 18 November 2009, the contribution at the date of that approval was, insofar as water supply network infrastructure was concerned, $380,639.64. In respect of sewerage network infrastructure, then the current contribution was $547,607.98.[112] Following that, on 27 January 2010, Ms Ross, employed by Gassman, wrote to the Council in pursuit of a negotiated decision notice. That negotiated decision notice was sought "*as a result of conditions failing to be relevant or reasonable to the application….*". The challenge was directed to condition 10 dealing with road works where a series of alternatives were advanced that, it was said, would result in a more "*equitable*" outcome. There was no challenge made in respect of the infrastructure conditions.

[143] Following those representations, on 15 February 2010 the negotiated decision notice was issued. Relevantly, insofar as condition 10 dealing with roadworks was

---

110 Exhibit 31, SRR-1, p 4.
111 Exhibit 31, SRR-1, p 2.
112 Exhibit 6, Volume 3, attachment 10, p 539.

concerned, among other things, the design and construct status of Prairie Road was changed but the water supply and sewerage network infrastructure contributions (conditions 5 and 6) remained materially the same. As already stated, no complaint was made about the relevance or reasonableness of those charges at the time and nor was there any appeal lodged in respect of those charges. Finally on this topic, as I have already also noted, I am unable to accept the evidence of either Alex Tenkate or Matthew Tenkate that they did not know of, or failed to appreciate that these infrastructure charges existed and/or of the quantum involved.

[144] Turning then to the last of the discretionary matters raised on behalf of the respondents, it is asserted that the Council had failed to adduce any evidence as to either any inappropriateness associated with the activities conducted on lot 36 or adverse consequences that would or could arise as a consequence of the failure to comply with the conditions.[113] It is said in particular, that the Council had failed to adduce any evidence to the effect that:

> (i) The activity said to be conducted pursuant to the 2010 approval have resulted in particular impact on council's existing water supply and sewerage networks which payment of over $1m is required to ameliorate; or
>
> (ii) The activity said to be conducted pursuant to the 2010 approval require the construction of the roadworks and footpaths/bikeway along the full frontage of the site to Prairie Road, along with associated land dedication.

[145] It is also asserted that the Council had adduced no evidence from members of the public effected by noncompliance with the conditions.

[146] As to the last matter, there was no obligation on the part of the Council to adduce any such evidence. As to the first complaint, it is again the situation that it was not necessary in these proceedings for the Council to have adduced evidence about what activities and/or impacts warranted the imposition of the infrastructure charges imposed. The Council no doubt would have been obliged to provide some justification for the charges imposed had they been challenged after the initial decision notice was issued or in circumstances where the conditions were the subject of an appeal to this court, but that did not happen.

---

113 Respondent's written submissions, para 259.

[147] To put the situation bluntly, the evidence clearly establishes a number of facts. First, the first respondent with the consent of the second respondent was conducting an unlawful use of the land. Second, that use was sought to be regularised and eventually was there through the development approval process. Third, there was, up until these proceedings, no challenge to the subject conditions. And finally, the first respondent had and continues to conduct on the land the use the subject of the development approval process.

[148] For the reasons given I consider there are no discretionary grounds that would warrant denying the Council relief of the type sought. Accordingly, the orders of the court are:

Pursuant to section 11 of the *Planning and Environment Court Act* 2016 (Qld) it is declared that:

1. On or about 15 February 2010, a development permit for a material change of use – Service Industry Type B (driver instructing and commercial equipment hire), Motor Vehicle Repair Station and Environmentally Relevant Activity (ERA28 – Motor Vehicle Workshop) for the Land (**Development Approval**), took effect;
2. That Development Approval has not lapsed;
3. Conditions 5, 6, 10, 12 and 16 of the Development Approval have not been complied with; and
4. The Respondents' contravention of the Development Approval constitutes a development offence pursuant to section 164 of the *Planning Act* 2016 (Qld).

Further, it is ordered pursuant to s 180 of the *Planning Act* 2016 (Qld) that:

1. The respondents' are required to comply with conditions 5, 6, 10, 12 and 16 of the Development Approval;
2. It is further ordered that the parties be heard if necessary to establish a timetable for compliance with conditions 5 and 6; and
3. I will hear further from the parties as to the final form of consequential orders including as to costs.