PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Gold Coast Motorsport Training Centre Pty Ltd v Gold Coast City Council & Ors* [2021] QPEC 33
PARTIES:	**GOLD COAST MOTORSPORT TRAINING CENTRE PTY LTD ACN 144 541 480** (Appellant) v **GOLD COAST CITY COUNCIL** (Respondent) AND **MARK LOWE** (First Co-respondent by Election) AND **ROSS EVANS** (Second Co-respondent by Election) AND **RAYMOND P BLENKIRON** (Third Co-respondent by Election)
FILE NO/S:	3387 of 2016
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	2 July 2021
DELIVERED AT:	Kingaroy
HEARING DATE:	22 and 23 March, 31 May, 1 – 2 and 4 June 2021
JUDGE:	Kefford DCJ
ORDER:	**The appeal is dismissed. The development application is refused.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – DEVELOPMENT APPLICATION – where the Appellant seeks a development for an outdoor sport and recreation use being a kart racing and motorsport training facility – whether the proposed development conflicts with the planning scheme – whether the proposed development would detract from the amenity of the local area – whether the proposed

development would have an unacceptable noise impact – whether there are sufficient grounds to justify approval despite the conflict

LEGISLATION: *Local Government Act 2009* (Qld) s 251

Planning Act 2016 (Qld) ss 264, 311

Planning and Environment Court Rules 2018 (Qld) r 25

Planning Regulation 2017 (Qld) s 70, sch 22

Sustainable Planning Act 2009 (Qld) ss 311, 314, 326, 341, 493, 495, 587, 590

Uniform Civil Procedure Rules 1999 (Qld) r 428

CASES: *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2007] QPEC 112; [2008] QPELR 342, approved

Bell v Brisbane City Council & Ors [2018] QCA 84, applied

Broad v Brisbane City Council & Anor [1986] 2 Qd R 317, applied

Clermont Quarries Pty Ltd v Isaac Regional Council [2020] QPEC 18; [2021] QPELR 65, approved

Dasreef Pty Ltd v Hawchar [2011] HCA 21; (2011) 243 CLR 588, applied

Gillion Pty Ltd v Scenic Rim Regional Council & Ors [2014] QCA 21; [2014] QPELR 168, applied

Gillion Pty Ltd v Scenic Rim Regional Council & Ors [2013] QPEC 15; [2013] QPELR 711, followed

Gold Coast City Council v K&K (GC) Pty Ltd [2019] QCA 132, [2020] QPELR 631, applied

Intrafield Pty Ltd v Redland Shire Council [2001] QCA 116; (2001) 116 LGERA 350, applied

Isgro v Gold Coast City Council & Anor [2003] QPEC 2; [2003] QPELR 414, approved

Leda Holdings Pty Ltd v Caboolture Shire Council & Ors [2006] QCA 271, applied

Lifnex Pty Ltd and Oil Recyclers Australia Pty Ltd v Ipswich City Council [1998] QPELR 517, approved

Lockyer Valley Regional Council v Westlink Pty Ltd & Ors [2011] QCA 358; (2011) 185 LGERA 63, applied

Lockyer Valley Regional Council v Westlink Pty Ltd [2012] QCA 370; [2013] 2 Qd R 302, applied

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305,

(2001) 52 NSWLR 705, applied

Matijesevic v Logan City Council [1984] 1 Qd R 599, considered

Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor [2019] QPEC 46; [2020] QPELR 328, approved

NRMCA (Qld) Ltd v Andrew [1992] QCA 8; (1993) 2 Qd R 706, applied

Parmac Investments Pty Ltd v Brisbane City Council & Ors [2008] QPEC 7; [2008] QPELR 480, considered

Re Earlturn Pty Ltd [2021] QSC 137, applied

Redland City Council v King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd & Anor [2020] QCA 41, applied

Stappen Pty Ltd v Brisbane City Council & Ors [2005] QPEC 3; [2005] QPELR 466, followed

Steendyk v Brisbane City Council & Anor [2016] QPEC 47; [2016] QPELR 868, approved

Trowbridge & Anor v Noosa Shire Council & Ors [2019] QPEC 54; [2020] QPELR 504, approved

Ward & Anor v Rockhampton Regional Council & Anor; R C Toole Pty Ltd v Rockhampton Regional Council & Ors [2014] QPEC 67; [2015] QPELR 252, followed

Weightman v Gold Coast City Council & Anor [2002] QCA 234; [2003] 2 Qd R 441, applied

William McEwans Pty Ltd v Brisbane City Council [1981] QPLR 33, approved

Woolworths Ltd v Maryborough City Council & Anor (No. 2) [2005] QCA 262; [2006] 1 Qd R 273, applied

Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors [2014] QCA 147; (2014) 201 LGERA 82, applied

COUNSEL: A N S Skoien for the Appellant
K Wylie for the Respondent

SOLICITORS: Gannt Legal for the Appellant
Corrs Chambers Westgarth for the Respondent
First, Second and Third Co-respondents by Election were self-represented

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Introduction

[1] In December 2014, Gold Coast Motorsport Training Centre Pty Ltd ("*the Appellant*") applied to the Gold Coast City Council ("*the Council*") for permission to use land at 484 Pimpama Jacobs Well Road, Pimpama ("*the subject land*") as a kart racing facility and for motor sport training for a variety of vehicles, including motorcycles. The application was lodged in response to an enforcement notice issued by the Council on 17 October 2014. The report that accompanied the application indicated that the purpose of the application was to make lawful the use that was already being made of the subject land.

[2] The Council refused the development application on 26 July 2016. On 25 August 2016, the Appellant commenced this appeal against that decision. During its protracted preparation for the hearing of the appeal, the Appellant changed its development application. The Council now supports approval of the proposed development subject to identified conditions, provided the Court is satisfied that the proposed use will not detract from the amenity of the local area. Three residents of the local area have elected to join the appeal. They are opposed to the development.

[3] The key issue for determination is whether the development application should be approved with conditions or refused.

What is the relevant framework for the decision?

[4] The appeal was commenced during the operation of the *Sustainable Planning Act 2009* (Qld). Despite the repeal of that Act, the application is to be assessed and decided under that framework.[1]

[5] The appeal proceeds by way of hearing anew.[2] The Appellant bears the onus of establishing that the appeal should be allowed, and the development application should be approved.[3]

[6] The Appellant seeks a development permit for making a material change of use of the subject land for an outdoor sport and recreation use (motor sport and training facility). The assessment of the application must be carried out against the Gold Coast Planning Scheme 2003 *Our Living City* version 1.2 amended November 2011 ("*the Planning Scheme*").[4]

[7] As the development application is impact assessable, it requires assessment against the whole of the Planning Scheme. Despite that, the parties contend that the outcome of the appeal turns on two provisions. They are pt 5, div 1, ch 2, s 4.6.1 and performance criteria PC19 of the Emerging Communities Domain Place Code. Those provisions require consideration of:

(a) whether the proposed use is appropriate in the Emerging Communities Domain; and

(b) whether the proposed use will detract from the amenity of the local area.

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1 *Planning Act 2016* (Qld) s 311.
2 *Sustainable Planning Act 2009* s 495.
3 *Sustainable Planning Act 2009* s 493.
4 This is the version of the Planning Scheme that was in effect when the development application was properly made. See *Sustainable Planning Act 2009* ss 311, 314.

[8] The assessment must have regard to the material received during the application process, including the properly made submissions objecting to the proposed development. The assessment must also have regard to any development approval for, and any lawful use of, the subject land.[5]

[9] The development application is to be decided in accordance with s 326 of the *Sustainable Planning Act 2009*. As such, the decision must not conflict with the Planning Scheme unless there are sufficient grounds to justify the decision despite the conflict.

[10] The task for the Court involves an evaluative exercise. In determining whether there are sufficient grounds to justify approving the application notwithstanding any conflict, the Court is required to examine the nature and extent of the conflict with the Planning Scheme.[6]

[11] The term "*grounds*" is defined to mean "*matters of public interest*" and to exclude "*the personal circumstances of an applicant, owner or interested party*".[7]

[12] The Court of Appeal gave guidance on the appropriate approach to the evaluative exercise in *Bell v Brisbane City Council & Ors*,[8] *Gold Coast City Council v K&K (GC) Pty Ltd*[9] and *Redland City Council v King of Gifts (Qld) Pty Ltd and HTC Consulting Pty Ltd & Anor*[10].

[13] Whether there are sufficient matters of public interest that warrant approval of the proposed development involves a discretionary value judgement. It is to be made by reference to factual matters confined only by the subject matter, the scope, and the purpose of the *Sustainable Planning Act 2009*.[11] The decision should not be made capriciously. It should assume that it is in the public interest to maintain the terms of the Planning Scheme unless the contrary is demonstrated.[12] After all, a planning scheme seeks to strike the balance between ecological protection, economic development, and the maintenance of the cultural, economic, physical and social wellbeing of people and communities in a manner that expresses the will of the community.[13]

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5 *Sustainable Planning Act 2009* s 314.

6 *Woolworths Ltd v Maryborough City Council & Anor (No. 2)* [2005] QCA 262; [2006] 1 Qd R 273, 286 [23]-[25].

7 *Sustainable Planning Act 2009* sch 3.

8 [2018] QCA 84.

9 [2019] QCA 132; [2020] QPELR 631.

10 [2020] QCA 41.

11 *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132; [2020] QPELR 631, 640 [37] citing *O'Sullivan v Farrer* [1989] HCA 61; (1989) 168 CLR 210, 216.

12 *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132; [2020] QPELR 631, 641 [42] citing *Bell v Brisbane City Council & Ors* [2018] QCA 84, [70].

13 See the observations of Carter DCJ in *William McEwans Pty Ltd v Brisbane City Council* [1981] QPLR 33, 35; *Murphy v Moreton Bay Regional Council & Anor; Australian National Homes Pty Ltd v Moreton Bay Regional Council & Anor* [2019] QPEC 46; [2020] QPELR 328, 335 [15] and *Trowbridge & Anor v Noosa Shire Council & Ors* [2019] QPEC 54; [2020] QPELR 504, 522 [85]. These observations are apt for planning schemes promulgated under the *Sustainable Planning Act 2009*. In that respect, see ss 3, 4, 5, 88 and 89 of the *Sustainable Planning Act 2009*.

Is the proposed use appropriate in the Emerging Communities Domain?

[14] The Planning Scheme area is divided into 18 domains. The subject land is within the Emerging Communities Domain.

[15] The Co-respondents by Election contend that the use is not an appropriate use in the area. Their position is supported by pt 5, div 1, ch 2, s 4.6.1, which states that:

> "**4.6 Default Assessment Categories for the Table of Development**
>
> **4.6.1 Material Change of Use**
>
> All uses included in Section A of the Table of Development may be considered as appropriate for the domain to which the Table of Development applies, subject to each use meeting the relevant assessment criteria.
>
> **Any use not listed in Section A of the Table of Development, should be considered as undesirable or inappropriate in the domain to which the Table of Development applies.**
>
> Any Material Change of Use not individually listed in Section A of the relevant Table of Development will be treated as impact assessable, except where this would conflict with the provisions of **Schedule 8** of the **IPA**."
>
> (emphasis added)

[16] Section A of the Table of Development for the Emerging Communities Domain does not include "*Outdoor Sport and Recreation*". That is the use for which the Appellant seeks approval.

[17] In *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors*[14], Fraser JA, with whom White JA and Douglas J agreed, considered an analogous planning scheme provision. In that case, the provision identified that uses not specifically listed within the applicable table were "*not consistent with the purpose of the zone*". Fraser JA observed that:

> "[33] Accordingly, the effect of s 4.12(k) is that the proposed use is "not consistent" with the purpose of the zone for which it was proposed. The expression "not consistent" is used as a synonym for the word "inconsistent", as is suggested also by the general provision in s 1.11(2) that "[u]ses not specifically identified in column 1 of each assessment table are considered to be inconsistent uses." Having regard also to the context supplied by s 4.9, s 4.10, and s 4.11, s 4.12(k) conveys that the proposed use is inconsistent with the Rural General zone code. The fact that the Planning Scheme eschews any express statement of a "conflict" or "inconsistency" between the scheme and a decision on an application concerning this proposed use, or any particular use, does not detract from that

14 [2011] QCA 358; (2011) 185 LGERA 63.

> conclusion. Nor does the presence of the specific provision in s 4.11(2)(b) supply a ground for reading down the clear words of s 4.12(k). In the absence of any other provision which qualifies the operation of s 4.12(k) in relation to the proposed use, that paragraph requires the conclusion that a decision to approve the application is at variance with the Planning Scheme."[15]

[18] Although neither the Appellant nor the Council directed my attention to pt 5, div 1, ch 2, s 4.6.1 at the commencement of the hearing, both parties now accept that a decision to approve the proposed development would conflict with this provision of the Planning Scheme. There is no provision in the Planning Scheme that justifies reading down its effect. The parties accept that, construed in the context of the Planning Scheme as a whole, s 4.6.1 has the effect that a decision to approve the application would necessarily conflict with the Planning Scheme.[16]

Will a decision to approve the proposed development detract from the amenity of the local area?

[19] The Co-respondents by Election contend that a decision to approve the proposed development would conflict with performance criteria PC19 of the Emerging Communities Domain Place Code. It states that:

> "The proposed use must not detract from the amenity of the local area, having regard, but not limited, to the impact of:
>
> a) noise;
>
> …"

[20] There is no acceptable solution provided for this performance criteria.

[21] The Appellant and the Council contend that a decision to approve the proposed development subject to the conditions in Exhibit 4.8 would not conflict with performance criteria PC19 of the Emerging Communities Domain Place Code. The Appellant and the Council agree that the conditions are appropriate.

[22] The determination of the dispute on this issue requires consideration of three questions:

1. What is the amenity of the local area?
2. What is the evidence about the noise impact of the proposed development?
3. Will the proposed development unacceptably detract from the amenity of the local area?

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15 *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2011] QCA 358; (2011) 185 LGERA 63, 76 [33].

16 See Exhibit 16.6, Outline of Submissions on behalf of the Appellant, [3.69] and Exhibit 17.5, Outline of Argument for the Respondent Council, [25]-[28].

What is the amenity of the local area?

[23] To understand the amenity of the local area, it is necessary to first appreciate the features of the subject land and the context in which it sits.

What are the features of the subject land and the surrounding area?

[24] The subject land is an irregularly shaped parcel of land with an area of about 455,710 square metres. It is located about 4.8 kilometres east of the Pacific Motorway. To the northeast, it has a frontage of approximately 170 metres to the Pimpama River. To the north, it has an approximately 1,180-metre-long frontage to Pimpama Jacobs Well Road.

[25] Pimpama Jacobs Well Road is a sealed, two-lane road that links the Pacific Motorway to Jacobs Well village. The road is designated as an arterial road and carries traffic associated with rural activities, particularly sugar cane farming, the various extractive industry uses in the area, and commuter traffic associated with the Jacobs Well, Calypso Bay and Steiglitz localities.

[26] The bulk of the subject land has been cleared. There is a scattering of trees along the boundaries of the subject land and a small stand of mature trees in its northwest corner.

[27] The northwest corner of the subject land has been improved by rural sheds and storage facilities. A motorsport facility has been built on the eastern portion of the subject land. It includes a reception building, a sealed track, an unsealed track, a gravel car park, and other related facilities. The motorsport facility occupies about one third of the subject land. The sealed track is between 140 and 200 metres from Pimpama Jacobs Well Road. The unsealed track is between 20 and 40 metres from Pimpama Jacobs Well Road. The reception facility is about 150 metres from the road, and the car park is between 100 and 200 metres from the road.

[28] Apart from the constructed motorsport facility, the subject land presents as a relatively open parcel of land with a generally rural appearance.

[29] The subject land is in the southern third of the northern Gold Coast rural area that is generally known as the cane lands. South of the subject land are large rural lots that are utilised for rural activities (predominantly grazing and sugar cane cultivation).

[30] Immediately north of the subject land is a 17.839-hectare parcel of rural land with a dwelling at its western end. The dwelling is approximately 300 metres from the nearest part of the proposed motorsport track. Further north are rural properties that are generally utilised for sugar cane cultivation.

[31] To the west of the subject land is a minor topographical ridge. It sits between the subject land and the developed areas of Pimpama, which are located about three kilometres to the west of the subject land and proximate to the Pacific Motorway. The ridge is characterised by smaller rural allotments of approximately four to five hectares. They are used for residential, rural and storage activities. The residences on the land are well set back from the road frontage. They are elevated above the subject land but have no direct line of sight to the tracks due to vegetation in the area.

[32] To the immediate east of the subject land are dwelling houses that front Pimpama Jacobs Well Road. Further to the east are areas of cane cultivation and an extractive industry facility that has temporarily ceased operation.

[33] The Co-Respondents by Election own residences proximate to the subject land. None of them can see the motorsport facility from their residences due to intervening vegetation.

What was the evidence of the residents about the amenity of the local area?

[34] The First Co-respondent by Election, Mr Lowe, lives at 507 Pimpama Jacobs Well Road. He moved there with his family in early 1996. Until around early 2013, Mr Lowe enjoyed an amenity that he describes as "*rural living*". He accepts that the traffic on Pimpama Jacobs Well Road can get noisy at times but says there are times during the weekdays when there is very little traffic and, importantly, there is very little traffic on the weekends. He and his family particularly cherish the amenity they experience during the weekend. In his written statement, Mr Lowe describes that from early 2013, the amenity he experienced was adversely affected by operations on the subject land. His evidence about the impact was as follows:

> "1. The appellant commenced operating around early 2013 and a number of different types of Vehicles were being operated including four stroke Go-karts, and Racing high performance ride on lawn mowers.
>
> 2. The types of vehicles slowly progressed to Motor bikes two stroke and four stoke including dirt bikes, road bikes, high performance race bikes, also High performance go-karts two stoke and four stroke and modified race cars have also operated on the tracks and a highly modified 6 wheel kart with a 600cc Yamaha road bike engine known as the monster kart and owned by the appellant. The noise from this machine dominates the area when it is operating.
>
> 3. All of the vehicles that have been operating at this facility since 2013 are unlawful and are not listed as approved vehicles to operate in the conditions of the 2010 Planning and Environment Court approval Appeal no. 1426 of 2008.
>
> 4. Over the years I have submitted over 800 noise complaints to Gold Coast City Council and to their lawyers also to the Appellant (xtreme karting) and the facility continues to operate unlawfully.
>
> 5. I am appalled and angry that Gold Coast City Council has allowed this facility to continue to operate unlawfully from Planning and Environment Court approval of 2010 Appeal no.1426 of 2008 and therefore a massive loss of our amenity we once enjoyed.
>
> 6. It is my belief the appellant has absolutely no consideration for his neighbours amenity over 800 noise complaints proves that, I also have absolutely no faith the appellant will comply with any court approval based on his past actions the appellant has a

> total disrespect for the Planning and Environment Court by blatantly continuing to operate vehicles not approved by the Court order of 2010."

[35] The Second Co-respondent by Election, Mr Evans, lives at 598 Pimpama Jacobs Well Road. He has lived there since late 2003. He describes the amenity as affected by noise from road traffic. He says the nature of the road traffic noise is a continuous "*droning*" slowly rising in volume as a vehicle approaches, and then slowly falling as it passes. He says the karting business commenced on the subject land in March 2013. It creates a different noise. Mr Evans describes how a significant number of the drivers who attend the Xtreme Karting facility on the subject land "*rev*" their engines excessively when leaving. He says they churn their wheels, often leaving long rubber marks on Pimpama Jacobs Well Road.

[36] The Third Co-respondent by Election, Mr Blenkiron, lives at 458 Pimpama Jacobs Well Road, on a property adjoining the subject land. He says that the current unlawful activities on the subject land are disruptive to the amenity of the area. He describes the amenity prior to the unlawful activity as being that commensurate with a rural setting. He acknowledges that it includes an ever-increasing volume of traffic along Pimpama Jacobs Well Road, and that the road is part of the heavy haulage route. He has not noticed an increase in heavy trucks since living in the area but has noticed an increase in light vehicles since the development of a new housing estate in Jacobs Well. He says that the traffic peaks associated with that development are at the time of school drop off and pick up.

[37] Mr Blenkiron describes a different character of noise associated with the unlawful motorsport facility as compared to that from the regular traffic. He says that the noise from traffic on the road passes relatively quickly. He explains that it takes about ten seconds for a truck (and any other vehicle travelling at speed of about 80 km/h) to traverse the stretch of road adjoining his property. By way of contrast, he says the noise from the events at the subject land, including the noise of karts and motorbikes, lasts in the order of ten minutes. He describes this as 60 times longer than the noise of a vehicle passing by the front of his home.

[38] This evidence of Messrs Lowe, Evans and Blenkiron was not challenged.

[39] In its written Outline of Argument, the Council submits that weight ought not be placed on the evidence of the Co-respondents by Election because evidence going to noise impacts must properly be given by experts.[17] The Council's submission is not supported by any authority. I do not accept it. The Co-respondents by Election can give evidence of what they have heard and experienced.

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[17] Exhibit 17.5, [58].

[40] The Council's submission is also contrary to oft-cited appellate court authority about amenity expectations. In *Broad v Brisbane City Council & Anor*,[18] the Full Court of the Supreme Court of Queensland provided guidance on the concept of amenity, the use that can be made of perceptions of residents and the potential relevance of a development approval to considerations of amenity. Thomas J, with whom Connolly J agreed, observed the following:

> "I do not think that the concept admits of a tidy "objective or subjective" classification. Many statements can be found in the Local Government Reports indicating the relevance of subjective factors and many others can be found suggesting that the ultimate test is objective. Such views are not necessarily inconsistent. **In support of the fact that the ultimate test is objective are statements that the court must bear in mind "that an injury to the amenity must be determined according to the standards of comfort and enjoyment which are to be expected by ordinary people of plain, sober and simple notions not affected by some special sensitivity or eccentricity**" (*Rio Pioneer Gravel Co. Pty. Limited v. Warringah Shire Council* (1969) 17 L.G.R.A. 153, 168). **Again, descriptions of amenity of a neighbourhood as "the quality which it has of being pleasant or agreeable"** (*Cecil E. Mayo Pty. Limited v. Sydney City Council* (1952) 18 L.G.R. 152, 156) **and as "that element in the appearance and layout of town and country which makes for a comfortable and pleasant life rather than a mere existence" suggest that the ultimate inquiry is an objective one at the same time recognising that it involves wide-ranging and subtle criteria that may affect different individuals in different ways. It is inevitable that individual perceptions be received and evaluated in the course of ascertaining what the amenity is in a particular neighbourhood and what effect the relevant proposal will have upon it.**
>
> It seems to me that the learned trial Judge adopted the above admittedly vague perceptions, not simply as those of an individual but as valid perceptions with which he agreed and which an ordinary person in the neighbourhood might possess. Neither their reception from an individual nor their adoption by His Honour as accurate perceptions reveals any improper subjectivity.
>
> The real criticism of His Honour's use of these perceptions is not so much that they were subjective as that they were vague, irrational or incapable of adequate explanation. Common lawyers and men of equity alike have a healthy and long-standing distrust of the mystical explanation, and of the alleged factor which cannot be rationally justified. The question arises whether the use of the present criteria was impermissible or unsafe in principle. I do not think that they were. **The wide-ranging concept of amenity contains many aspects that may be very difficult to articulate. Some aspects are practical and tangible such as traffic generation, noise, nuisance, appearance, and even the way of life of the neighbourhood.**

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18 [1986] 2 Qd R 317.

> **Other concepts are more elusive such as the standard or class of the neighbourhood, and the reasonable expectations of a neighbourhood**. **The creation of an institution within a neighbourhood is in my view capable of altering its character in a greater respect than can be measured by the additional noise, activity, traffic and physical effects that it is likely to produce.** All counsel agreed that the provision of a funeral parlour was a good example of an institution which, whilst discreet in its conduct and relatively small in its production of physical consequences, would be likely to have an effect in the way of "atmosphere". Whether this is described as prejudice or otherwise does not matter. It is a recognisable and normal enough perception of the ordinary resident.
>
> **These remarks are not intended to encourage resort to vague statements as justification for an irrational conclusion. But it is necessary to recognise that some matters in this area, although intangible and difficult to articulate, may be real and may properly to** (*sic*) **taken into account.** Aesthetics may of course be a relevant consideration in a town planning decision although the basis of the opinion may be difficult to explain. **It follows that although some of the particular factors upon which His Honour relied were admittedly vague, they were not necessarily invalid or improper considerations.** No error of law is disclosed on this point."[19]

[41] Similar observations were made by de Jersey J (as His Honour then was), with whom Connolly J also agreed. His Honour found that the reasonable expectations concerning the use to which land would likely be put are relevant factors in assessing detriment to the amenity of a neighbourhood. His Honour also observed that:

> "Miss *Kiefel*, who appeared for the Council, relied, in support of her submission, on two decisions of Sugerman J. in the New South Wales Land and Valuation Court. Each involved consideration of the ambit of the expression "injury to amenity" appearing in a planning ordinance. **Neither case supports the conclusion that only objectively based views on the likely effect of a proposal on amenity may be admitted into evidence and affect a Judge's determination of the issue**. In *Cecil E. Mayo Pty. Ltd. v. Sydney City Council* (1952) 18 L.G.R. 152, 156 **Sugerman J. described the amenity of a neighbourhood as "the quality which it has of being pleasant or agreeable". One would think that the assessment of that quality would necessarily involve subjective judgments, and often judgments for which it would be difficult to offer a rational, concrete foundation**. In *Balgowlah Investments Ltd. v. Manly Municipal Council, supra*, he suggested that **central to the significance of apprehended injury to amenity is the question of what residents are "justly entitled to expect". But that question is ordinarily not to be answered by reference to absolute,**

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19 *Broad v Brisbane City Council & Anor* [1986] 2 Qd R 317, 319-20 (emphasis added).

immutable standards, but will usually itself depend in turn on other "questions of degree".

In *Vacuum Oil Company Pty. Ltd. v. Ashfield Municipal Council* (1956) 2 L.G.R.A. 8, 11, Sugerman J. offered the following observations on the concept of "amenity" in town planning legislation:

> "'**Amenity' is not confined to the negative factor of freedom from physical discomfort through the effects of noise**, smell, and the other matters referred to in the proviso to clause 27 of the 'County of Cumberland Planning Scheme Ordinance'. **It relates also to the preservation of such characteristics of a neighbourhood as make it pleasing in appearance as well to the passer-by as to the resident, and as well to those across the road**, who may be unaffected by noise etc., as to the adjoining and other occupiers on the same side. **'Amenity' may be taken to express that element in the appearance or layout of town and country which makes for a comfortable and pleasant life rather than a mere existence.**"

See also *Humby v. Woollahra Municipal Council* (1964) 10 L.G.R.A. 56, 65.

There is no doubt that the concept of amenity is wide and flexible. In my view it may in a particular case embrace not only the effect of a place on the senses, but also the resident's subjective perception of his locality. Knowing the use to which a particular site is or may be put, may affect one's perception of amentiy (*sic*)."[20]

[42] Similar observations were made by this Court in *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors*.[21] His Honour Judge Dodds observed that:

> "[40] A person's right to put their land to any lawful use they wish is in these more enlightened times, tempered by town planning considerations, one of which is amenity. **Consideration of amenity in a town planning context is not in the abstract. It is informed by the planning controls applying in the area under consideration and the notion of reasonableness.** *Bell v. Noosa Shire Council* [1983] Q.P.L.R. 311; *Feldham v. Esk Shire Council* [1989] Q.P.L.R. 91. Proposed development will often affect existing amenity. **What is unacceptable is a detrimental effect to an unreasonable extent according to the reasonable expectation of other landholders in the vicinity given the sorts of uses permitted under current town planning controls**. **While the subjective views of those whose amenity may be affected by a proposed development are not to be ignored, in the final analysis the question**

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20 *Broad v Brisbane City Council & Anor* [1986] 2 Qd R 317, 326 (emphasis added).

21 [2007] QPEC 112; [2008] QPELR 342.

> **must be answered "according to the standards of comfort and enjoyment which are to be expected by ordinary people of plain, sober and simple notion not effected** (*sic*) **by some special sensitivity or eccentricity". The weight to be accorded to subjective views can only be judged in the light of all the evidence about the subject. The views may be supported by other evidence or other independent evidence may show that in an objective sense they are overblown** as in *Telstra Corporation Limited v. Pine Rivers Shire Council* [2001] Q.P.E.L.R. 350."[22]

[43] As is apparent from the evidence of the Co-respondents by Election referred to above, their observations about amenity are not limited to observations about the amenity they enjoyed absent a motorsport facility on the subject land. They give evidence that contrasts that amenity with their experience when the existing unlawful motorsport facility is operating.

[44] In *Leda Holdings Pty Ltd v Caboolture Shire Council & Ors*,[23] the Court of Appeal provided guidance on the appropriate use to be made of evidence about an existing unlawful use. Jerrard JA, with whom McMurdo P and Philippides J agreed, observed that:

> ""**The unlawful use issue"**
>
> [29] The error asserted under the issue given this heading was the description by the learned judge that the evidence "revealed a significant planning need, albeit by reference to past trading in those stores without planning permission", that the development had created "no adverse impacts, economic or otherwise", and that it was clear that "[w]ithin the existing complex ....the existing tenants derive[d] benefit from the operations of Makro and the Warehouse". Mr Gore QC complains that the reference to that evidence contravened what he described as a principle in town planning cases that **while prior unlawful use should not disqualify an applicant for an approval to regularise the use, nor should any advantage accrue to a wrongdoer as a result of the wrongdoing**. He particularly referred to the remarks in *Kouflidis v City of Salisbury* (1982) 49 LGRA 17 by King CJ, with whom Mohr J agreed, that:
>
> > "Any argument based either directly or indirectly upon the unlawful use should be firmly rejected. For instance, the argument put in the present case that the patronage given the unlawful business by the public indicates a local demand for the facility and is a consideration in favour of planning consent, should be rejected as an attempt to gain an advantage from the unlawful use by erecting an argument on the basis of that unlawful use."

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22 *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2007] QPEC 112; [2008] QPELR 342, 348-9 [40] (emphasis added, footnotes omitted).

23 [2006] QCA 271.

[30] The learned judge referred to that principle when remarking that the evidence "revealed a significant planning need, albeit by reference to past trading in those stores without planning permission", in the context of a reference to a larger body of evidence, including the concession by witnesses called for Leda that there were no vacant retail areas in Morayfield Road where a Makro or Warehouse store could take up a tenancy in the near future; and that an inspection of the stores supported (a named witness' evidence) that they cater for persons of limited means and meet a need exhibited by that part of the community in the Shire. The learned judge later went on to state:

> "Nor, for the sake of completeness, can evidence of a use previously carried on unlawfully (as occurred here before the proceedings in 2004) be seen in this instance as a significant impediment to later approval. The proper approach in those circumstances was summarised by Brabazon QC DCJ in *Westfield Management Ltd v Pine Rivers Shire Council* at [22]:
>
> > **In my opinion, it is appropriate to look at all factual matters, even those created by a period of unlawful use. They may be for or against the application. To consider them is not to give an applicant a benefit because of improper conduct. Rather, it is to use the best available information about the present merits of the application. The real principle is to ensure that such an applicant receives no benefit merely because the use is already in place. Likewise, hardship to an applicant will usually be irrelevant.**
>
> Save in the very limited respects already mentioned no weight has been given to the earlier unlawful use, this being a case in which the parties' contentions are to be considered primarily by reference to the planning documents and the legislation."

[31] It is clear that the learned judge was well aware of the principle referred to by Gore QC, and cautious about breaching it; the judgment by Brabazon QC DCJ in *Westfield Management* also refers to a submission that the settled practice in Queensland is to investigate the facts up to the present time, including any unlawful use. Brabazon QC DCJ referred, *inter alia*, to the decisions in *Cherrabun Pty Ltd v Brisbane City Council* [1985] QPLR 205 at 208, and to *Mt Gravatt Bus Service v Brisbane City Council* [2002] QPELR 35 at 36. **Those references are to cases in which Planning and Environment Court judges considered it inappropriate to allow any advantage to an appellant as the result of the commencement of a use contrary to the provisions of a planning scheme, but recognised that the fact a use was already underway had some consequences which could be regarded as relevant in the determination of an appeal to that court. One was that it allowed a real assessment of the**

> **impact that the proposal under appeal would have on the amenity of the area and on environmental matters, noise nuisance, and the like. I respectfully agree with that approach**, and that the learned judge in this matter was entitled to conclude that the development had created no adverse impacts, economic or otherwise, on the evidence; and this Court was not told on appeal of any constraint placed on the use to which the learned judge might put the inspection of the premises. I agree with the learned judge's own implicit concession, that it would have been preferable to not rely upon evidence of a planning need established by past trading without planning permission, but I consider that to the extent that the learned judge erred in so doing, no error as to the proper principle was demonstrated, and the fact the judge did err in applying it had so little effect on the outcome that that is not a ground for giving leave to appeal."[24]

(emphasis added)

[45] Having regard to those authorities, I am satisfied that the evidence of the Co-respondents by Election is relevant to my determination of the amenity of the area absent the proposed development. It is also relevant to my consideration of the potential impact of the proposed development. It provides available information about the merits of the proposed development without allowing an inappropriate advantage to the Appellant.

[46] In determining what weight should be afforded to the evidence of the Co-respondents by Election, it is relevant to have regard to four matters. First, whether the use is within their reasonable expectations as informed by the planning controls applying in the area under consideration.[25] Second, the extent to which the reasonable expectations with respect to amenity are affected by any development approval for, or any lawful use of, the subject land. Third, the extent to which the existence of the reception building and tracks on the subject land affects reasonable expectations. Fourth, whether, in an objective sense, the independent evidence indicates that the views of the Co-respondents by Election are unreliable.

Is the proposed use within reasonable expectations as informed by the Planning Scheme?

[47] The Appellant submits that the prospect of motorsport activity on the subject land after 2010 was high. It says the location of the subject land, with limited noise sensitive uses nearby, on a busy and noisy haul route, in a rural setting, makes it ideal for a land consumptive use such as the proposed motorsport facility. On that basis, it says there could reasonably be an expectation that a motorsport use could locate on the subject land, even if rights under an existing motorsport approval had not been exercised. The Appellant also submits that the expectation of a motorsport

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24 *Leda Holdings Pty Ltd v Caboolture Shire Council & Ors* [2006] QCA 271, [29]-[31] (emphasis added, footnotes omitted).

25 *Acland Pastoral Co Pty Ltd v Rosalie Shire Council & Ors* [2007] QPEC 112; [2008] QPELR 342, 348-9 [40].

facility on the subject land is also consistent with the location of the subject land in the Rural Precinct of the Inter-Urban Break Structure Plan area.

[48] Despite the characteristics of the subject land relied on by the Appellant to submit it is an ideal location for a motorsport facility, the proposed development is considered an undesirable and inappropriate use on the subject land.[26]

[49] The Planning Scheme provides additional guidance on the future development of land within the Emerging Communities Domain through a series of Structure Plans. The subject land is in the Rural Precinct under the Inter-Urban Break Structure Plan. The purpose of that Structure Plan is:

> "To preserve an area of land with scenic, landscape and environmental qualities with the objective of providing a break in and visual relief to the emerging urban corridor. To contribute also to the achievement of a viable City wide nature conservation network, through the protection of the Pimpama-Wongawallen Major Linkage."[27]

[50] The Appellant and the Council submit that active recreational facilities are anticipated uses in the Structure Plan area as they are referenced in the planning outcomes for the Structure Plan area. In particular, the Council refers to pt 5, div 2, ch 18, s 14.4, which states:

> "The promotion of appropriate, compatible land uses within the Structure Plan area:
>
> - The creation of active and passive recreational facilities which will support the emerging residential development to the north and south of the residential area.
>
> - …"

[51] The Council's reference to this provision ignores important contextual matters. As is explained in pt 5, div 2, ch 18, s 14.5:

> "The identified local area features and established planning outcomes outlined above relate to the Inter-Urban Break Structure Plan area in its entirety. In order to achieve optimal planning outcomes for the local area it is desirable to divide the Structure Plan into smaller precincts. The Structure Plan area has been divided into five precincts.
>
> These precincts are differentiated by the nature of the existing settlement pattern, their visual and ecological significance, and consequent ability to support development. The establishment of the precincts enables the refinement of planning controls within the local area, permitting detailed development and environmental controls to be applied to respond to the particular constraints and opportunities presented by each precinct within the Inter-Urban Break. This

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26 See paragraphs [14] to [18] above.

27 Planning Scheme pt 5, div 2, ch 18, s 14.1.

approach seeks to ensure that the specific development intent of each precinct is achieved and preserved in the future.

The Structure Plan precincts are:

- Open Space and Landscape Protection;
- Small Lot Rural;
- Low Key Commercial Node;
- Park Living; and
- Rural."

[52] This provision reveals that the outcomes referred to in pt 5, div 2, ch 18, s 14.4 do not apply to all precincts of the Inter-Urban Break Structure Plan. One must look at the provisions for each precinct to ascertain the extent to which each outcome in s 14.4 relates to a particular precinct. The purpose and applicable planning measures for each precinct are set out in pt 5, div 2, ch 18, ss 14.5.1 to 14.5.5. Those provisions indicate that land in the Open Space and Landscape Protection Precinct and the Small Lot Rural Precinct may be used for appropriate recreational and tourism activities. No such encouragement exists for land in the Rural Precinct.

[53] With respect to the Rural Precinct, the Planning Scheme states that:

"**The purpose and provisions relevant to this precinct are those contained within the Rural Domain and associated codes. It is intended that the existing amenity of this precinct not be adversely impacted upon.**

Most of the areas included within the Rural Precinct are designated Good Quality Agricultural land, and it is intended that the land use within these areas is predominately rural and subdivision is limited. Rural subdivision in these areas will be limited and regulated by the Rural Subdivision – Overlay Map OM1 and the Reconfiguring a Lot Code.

Rural (and other) land uses occurring within the Rural Precinct should also enhance the desired planning outcomes of the Inner-Urban Break Structure Plan. In particular, land uses and associated activities within the precinct will preserve the landscape character as rural and open, and will ensure protection and rehabilitation of potential wildlife corridors and habitats. Council will encourage alternative, sustainable farming practices, that achieve the objectives of the Inter-Urban Break Structure Plan.

Implementation

a) **Land uses occurring within the Rural Precinct should comply with the relevant codes, including**:

- **Rural Domain Code**
- the Reconfiguring of a Lot code; and

- other relevant codes pertaining to protection and enhancement of wildlife corridors, conservation and waterways.

b) Subdivision within the Rural precinct is restricted.

c) Land uses occurring within the Rural precinct should not compromise the Inter-Urban Break Planning Objectives, having regard to:

- protection of landscape character
- enhancement of an open and rural visual break; and
- protection and enhancement of potential wildlife corridors and habitats."[28]

(emphasis added)

[54] Although the Table of Development for the Rural Domain Code indicates that outdoor sport and recreation uses may be anticipated in the Rural Domain,[29] that is only on sites not identified on Overlay Map 2 - Good Quality Agricultural Land. The subject land is identified on that map as good quality agricultural land.[30] Further, performance criteria PC10 of the Rural Domain Code stipulates that a proposed use must not detract from the amenity of the local area.

[55] As such, when s 14.4 of pt 5, div 2, ch 18 of the Planning Scheme is read in the context in which it appears, it is apparent that active recreational facilities are not an anticipated use on the subject land.

[56] The designation of the subject land as part of the Emerging Communities Domain and the exclusion of the defined use of "*outdoor sport and recreation*" from the Table of Development for land in the Emerging Communities Domain reflects a deliberate policy decision by the Council. So too does the designation of the subject land as good quality agricultural land and as part of the Rural Precinct of the Inter-Urban Break Structure Plan, which land is not encouraged to be developed for the defined use of "*outdoor sport and recreation*".

[57] When the Planning Scheme is read as a whole, and in a practical and sensible way, there is a clear planning policy that uses such as the proposed development are not to be established in these areas. In anticipation that such a use may be applied for, the Planning Scheme sets a high bar by indicating that such uses should be considered as undesirable or inappropriate.

[58] For the reasons outlined above, the Planning Scheme lends support to the reasonableness of the expectations of the Co-respondents by Election that their amenity should not be impacted by the type and duration of noise that would be associated with the proposed development.

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28 Planning Scheme pt 5, div 2, ch 18, s 14.5.5.
29 Planning Scheme pt 5, div 2, ch 1, s 3.0.
30 Exhibit 17.3.

How do the development approvals for the subject land, and the existing use, affect reasonable expectations about amenity?

[59] As I have already noted in paragraph [8] above, the assessment must have regard to any development approval for, and any lawful use of, the subject land.[31] The weight to be given to such matters is a question of fact that will be informed by considerations that include, but are not limited to, whether there is an extant right to develop in accordance with any development approval and the impacts that might be occasioned by any lawful use were extant rights to be exercised.

[60] Pursuant to the *Planning Act 2016* (and its predecessors), the Council is obliged to keep a record of any development approvals over the subject land, including those development approvals authorising any use of the land, any operational works (such as those undertaken to establish the two tracks on the subject land) and any building works, such as those associated with the constructed motorsport facility.[32]

[61] The Council tendered a Certificate of the Chief Executive Officer of the Gold Coast City Council dated 1 June 2021 ("*CEO Certificate*")[33] with respect to the development approvals over the subject land. According to the CEO Certificate, the Council records show that the subject land is subject to two development approvals, being:

(a) a development permit described as being for a material change of use for outdoor sport and recreation facility (WRX driving facility and dirt buggy track), originally given by way of Judgment (per His Honour Judge Searles) in Planning and Environment Court Appeal No. B1426 of 2008 ("*the 2010 Motorsport Approval*"), and changed by Judgment (per His Honour Judge Jones) in Planning and Environment Court Application No. 943 of 2013, dated 26 April 2013; and

(b) a development permit described as being for material change of use (impact assessment) for outdoor sport and recreation (paint ball facility), originally given by way of decision notice dated 20 September 2016, and changed on 14 March 2017 and 17 July 2018.

[62] The CEO Certificate also states that the Council records do not show when, or if, development has commenced under either of these approvals.

[63] The CEO Certificate was provided under s 251 of the *Local Government Act 2009* (Qld), which states that:

> "**251 Evidentiary value of certificates**
>
> (1) This section applies to a certificate that—
>
> (a) purports to be about the state of, or a fact in, a record of the local government; and

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31 *Sustainable Planning Act 2009* s 314.

32 The Council is obliged to keep a record of such matters under s 264 of the *Planning Act 2016* and s 70 and sch 22 of the *Planning Regulation 2017* (Qld). Similar obligations existed under the *Integrated Planning Act 1997* (Qld) and the *Sustainable Planning Act 2009* (Qld).

33 Exhibit 17.4.

(b) purports to be signed by the chief executive officer.

(2) Also, this section applies to a certificate that—

(a) purports to be about the state of, or a fact in, a record of a joint local government; and

(b) purports to be signed by the chairperson of the joint local government.

(3) **The certificate is evidence of the matters contained in the certificate**."

(emphasis added)

[64] The Appellant tendered a document that it contended was the 2010 Motorsport Approval.[34] The Council did not object to the tender. In those circumstances, I am prepared to assume that the document tendered by the Appellant is a true copy of the 2010 Motorsport Approval.[35]

[65] The 2010 Motorsport Approval demonstrates that on 20 January 2010, the Planning and Environment Court approved a development application for a development permit for a material change of use for an outdoor sport and recreation facility (WRX driving facility and dirt buggy track) in relation to the subject land. The application was approved subject to conditions that were attached to the judgment and marked "A". They included the following requirements that are relevant to an appreciation of the extent of the use that was authorised:

"**Real Property Description**	**Lot 1 on WD3475**
Address of Property	**484 Pimpama Jacobs Well Road, Pimpama**
Area of Property	**455,710m^2**
Proposed Use	**Outdoor Sport & Recreation (WRX Driving Facility and Dirt Buggy Track)**
Further Development Permits	**Building Work, Plumbing & Drainage, Operational Works (Landscaping), Operational Works (Civil), Operational Works (Vegetation Clearing)**

APPROVED PLANS/DRAWINGS

1 Development to be generally in accordance with specified plans/drawings

The development must be carried out generally in accordance with the approved plans/drawings listed below, stamped and returned to the applicant with this decision notice.

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34 Exhibit 2.4.

35 *Planning and Environment Court Rules 2018* (Qld) r 25.

Plan No.	Rev.	Title	Date	Prepared by
MLP2310	B	Site Plan (includes setbacks to Good Quality Agricultural Land)	May 2009	McLynskey Planners Pty Ltd
MLP2310	B	Site Plan (includes Carpark Details)	May 2009	McLynskey Planners Pty Ltd

2 Decision notice and approved plans/drawings with building development application

A copy of this decision notice and accompanying stamped approved plans/drawings must be submitted with any building development application relating to or arising from this development approval.

…

4 Any deviations require further approval

Any proposed deviation from the approved plans/drawings as a result of on-site or in-situ conditions must not be made unless amended plans/drawings are submitted and approved by Council. The development must be carried out in accordance with the approved amended plans/drawings.

COMPLETION DATE

5 Completion date

The change of use to an Outdoor Sport & Recreation (WRX Driving Facility and Dirt Buggy Track) must happen within 2 years from the date of the decision notice). Pursuant to section 3.5.21A of the Integrated Planning Act 1997, this development approval lapses if the change of use does not happen by this date.

…

9 Acoustic Impacts Management

a Technical matters

i The development shall be designed and constructed in accordance with the acoustic report recommendations outlined in Section 6.0 of the acoustic report (Reference no. WRX0310007/1) dated 3 October 2007 and prepared by Craig Hill Acoustics).

ii Each Subaru WRX vehicle and buggy to be used on the site shall be tested using a drive-test method to determine the level of noise emitted by the vehicles.

iii The drive-by test method is to be based closely on the method used for certification of all motor vehicles to Australian Design Rule ADR 28/01 "External noise of Motor Vehicles." The drive-by test method is described in Condition 11 of these conditions.

b Testing of each Subaru WRX vehicle and buggy shall be conducted on-site prior to first use on the site and then at least once every 12 months or on receipt of a complaint or at the request of Council commencing the date the approval takes effect.

c **A Subaru WRX vehicle or buggy may be used on the site only if the maximum vehicle noise level emitted as measured using the drive-by test method does not exceed the maximum permitted noise level. The maximum permitted noise level for the Subaru WRX vehicle is 78dBA and for the dirt buggy 72dBA**.

d **The Subaru WRX vehicle shall be limited to the use of standard mufflers only**.

e If the vehicle or buggy's maximum noise level emitted when measured using the drive-by test method exceeds the maximum permitted noise level, the vehicle/buggy shall not be used until such time as it complies with the maximum permitted noise level.

f Testing of the level of noise from a Subaru WRX vehicle and buggy shall be conducted only by a person competent to perform such tests and holding appropriate qualifications for such tests. The person must be a member of the Australia Acoustical Society or, if not a member, must be eligible for full membership of the Society. Documentary evidence of the competent person's qualifications shall be kept on-site with the records of noise-level testing.

…

12 General

a **All activities associated with the operation of the approved use are to be conducted only between the hours of 9.00am to 5.30pm, seven (7) days per week**.

b **A maximum of two (2) Subaru WRX vehicles shall be permitted on the gravel circuit at any one time. A**

maximum three (3) buggies shall be permitted on the sealed circuit at any one time. The use authorised by this approval is limited to the use of Subaru WRX vehicles and buggies only.

c **The gravel circuit shall only be utilised for driver instruction and not for racing and rally training.**

d **The applicant shall bitumen seal the entire length of the buggy track.** Works shall be carried out to the satisfaction of the Chief Executive Officer, and at no cost to Council.

…"

(emphasis added)

[66] It is apparent from these conditions that the approved motorsport activities were very limited in their extent.

[67] Other conditions of the 2010 Motorsport Approval indicate that operational works approvals were required for earthworks associated with the construction of the approved tracks.[36]

[68] The approved plans reveal that buildings associated with the use included the "*WRX Experience Office*" and the "*Vehicle Storage Compound*". They also show two tracks: the "*Buggy Track*" and the "*WRX Experience Track*".

[69] The 2010 Development Approval was changed by the Judgment of His Honour Judge Jones given on 26 April 2013.[37] That judgment records that the court was satisfied that the development permit lapsed within the meaning of s 341 of the *Sustainable Planning Act 2009* on 16 August 2012. Despite the lapse, it was adjudged that:

(a) condition 5 of the 2010 Development Approval be taken to be of no effect; and

(b) it be taken that the relevant period of the development permit is 4 years, starting the day the development permit took effect.

[70] The Appellant submits that, despite the discouragement in the Planning Scheme, the use of the subject land for a motorsport activity should be within the reasonable amenity expectations of the residents of the local area. The Appellant's submission is founded on its assertion that the 2010 Motorsport Approval has not lapsed as the use started prior to 20 January 2014. The Appellant says the commencement of the use is demonstrated by the evidence of Mr Lowe referred to in paragraph [34] above.

[71] On the evidence of Mr Lowe, several different types of motor vehicles have operated on the subject land since 2013. They include four stroke go-karts, racing

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36 See, for example, Exhibit 2.4, conditions 19a, 26, 27, 29 and 31.

37 Exhibit 17.4.

high performance ride on lawn mowers, motor bikes (two stroke and four stroke and including dirt bikes, road bikes and high performance race bikes), high performance go-karts, modified race cars, and a highly modified six wheel kart with a 600cc Yamaha road bike engine known as the monster kart. Mr Lowe was unequivocal that all the vehicles that have been operating at this facility since 2013 are not listed as approved vehicles to operate under the 2010 Motorsport Approval. That evidence was not challenged.

[72] The evidence of Mr Lowe is consistent with admissions made by the Appellant in its Outline of Submissions that:

> "2.30 **Some key aspects of the history of the use of the land are relevant and can be summarised as follows**:
>
> (a) in January 2010 the Court granted the Existing Motorsport Approval, with a currency period for that development permit of 2 years;
>
> (b) **in early 2013 GCMS commence motorsport activities at the Motorsport Facility on the Subject Land**;
>
> (c) in April 2013 this Court noted that the Existing Motorsport Approval had lapsed, but ordered under section 440 of the SPA the currency period for the Existing Motorsport Approval be taken to be 4 years (starting in January 2010);
>
> (d) **the motorsport activities of GCMS have continued since 2013**;
>
> (e) **it is accepted that the motorsport activities of the GCMS have not complied with all of the conditions of the Existing Motorsport Approval**;
>
> (f) in October 2014 Council issued an enforcement notice in respect of the motorsport activities on the Subject Land, alleging that those activities involved non-compliance with conditions of the Existing Motorsport Approval;
>
> (g) in December 2014 GCMS lodged the Development Application to seek to regularise the existing and proposed motorsport activities on the Subject Land by seeking a further development approval; and
>
> (h) **the motorsport activities have continued on the Subject Land while the extensive investigations into the Proposed Motorsport Facility have been conducted**, predominantly in respect of acoustic matters, resulting in the changes to the Development Application to produce the current proposal.
>
> 2.31 **The motorsport activities that have been conducted on the Subject Land**, and those proposed by the Development

> Application, **involve regular use of the facility with karts provided by the operator as well as the use of karts and bikes brought by visitors to the facility**.
>
> 2.32 The regular use of the Proposed Motorsport Facility would involve various levels of testing of vehicles that use the track, together with limits on the vehicles that can use the track.
>
> 2.33 **In addition to this regular use of the facility, there has been**, and is proposed to be, **a single annual racing event held at the facility as a showpiece for karting in the region.**"
>
> (emphasis added, footnotes omitted)

[73] The evidence establishes that the use that commenced in early 2013 was materially different to that which was approved. Having regard to the evidence of Mr Lowe, the use of the subject land in 2013 could not fairly be described as "*outdoor sport and recreation facility (WRX driving facility and dirt buggy track)*". On this basis alone, I am satisfied that the use that was commenced was not the use that was authorised by the 2010 Motorsport Approval.

[74] Another material respect in which the use of the subject land differs from that authorised under the 2010 Motorsport Approval is with respect to the nature of the tracks and their use. Conditions 1 and 12 regulate the types of tracks approved and their use.

[75] When the 2010 Motorsport Approval is construed as a whole, including the detailed conditions with respect to acoustic impacts and the testing of the vehicles to be used,[38] it is apparent that the limits on the use imposed in condition 12 are material to an appreciation of the use that was authorised.

[76] A comparison of the approved plans to aerial photography of the subject land shows that the "*Buggy Track*" is in the general vicinity of the existing dirt track on the subject land and the "*WRX Experience Track*" is in the general location of the sealed bitumen track on the subject land. Both tracks have a configuration that is different to that which was approved. They are also constructed of materials that differ from that which was authorised. Further, it is apparent from condition 12 that the only racing permitted involved a maximum of three buggies at any one time. The use described in the evidence, and the admissions, does not accord with this.

[77] As the use conducted on the subject land since 2013 could not fairly be described as that which was authorised by the 2010 Motorsport Approval, the Appellant has not demonstrated that the 2010 Motorsport Approval has not lapsed. In those circumstances, I am not persuaded that the existence of the 2010 Motorsport Approval is a weighty consideration supporting approval of the proposed development. The existence of the approval does not demonstrate that the amenity expectations of the residents are unreasonable.

[78] Further, even if I were to assume that use of the subject land commenced under the 2010 Motorsport Approval sufficient to prevent the approval from lapsing, I am not

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38 See conditions 9 and 13.

satisfied that the 2010 Motorsport Approval provides material support to the Appellant's case for approval of the proposed development for two reasons.

[79] First, the election to construct a different track to that which was authorised under the 2010 Motorsport Approval is objective evidence of the landowner's subjective intention to abandon its use rights under the 2010 Motorsport Approval.[39] As such, the re-establishment of the use authorised by the 2010 Motorsport Approval would constitute a material change of use[40] and would likely require a new development permit before it could lawfully commence.

[80] Second, assuming the 2010 Motorsport Approval has not lapsed or been abandoned, the prospect of the subject land being used in accordance with that approval does not persuade me that the proposed development is a use that ought be reasonably expected in the area or that the proposed development will not unacceptably detract from the amenity of the local area. This is because the proposed development differs from that authorised under the 2010 Motorsport Approval in three material respects.

[81] The first material difference is that the maximum noise emission permitted from each vehicle under the 2010 Motorsport Approval is less than that sought to be permitted for the proposed development. Pursuant to condition 9c of the 2010 Motorsport Approval, the maximum permitted noise level was 78dBA for the Subaru WRX and 72dBA for the dirt buggy. Further, the Subaru WRX vehicle was limited to the use of standard mufflers only.

[82] In relation to the proposed development, proposed condition 8 states that, subject to condition 14 (which relates to the preparation of the Commissioning Plan), the use must be conducted in accordance with the Noise Management Plan[41] and all requirements of, and all steps contemplated by or arising under, the Noise Management Plan must be fully complied with or implemented. To the extent that the Noise Management Plan stipulates a maximum permitted noise level for each individual vehicle, it is a much higher limit.

[83] The Noise Management Plan[42] outlines two tests that are to be undertaken to set noise limits for individual vehicles. They are the static test and the passby test.

[84] Section A3.0 of the Noise Management Plan states:

> "In addition to observing the responsibilities in Section 2.0, the Operator must take all reasonable steps to minimise noise emission from the Facility, including all of the following:
>
> …

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39 *Steendyk v Brisbane City Council & Anor* [2016] QPEC 47; [2016] QPELR 868, 884-5 [69]-[72].

40 In sch 2 of the *Planning Act 2016*, a "*material change of use*" of premises is defined to include the re-establishment on the premises of a use that has been abandoned.

41 Although the condition is not explicit, I assume this is the version listed in the approved plans in condition 2, being the Noise Management Plan dated November 2020.

42 Exhibit 4.4.

(vi) Other than at times when the Facility is being used for the Special International Karting Event, **ensuring that all karts and motorbikes, prior to their being permitted onto any circuits at the Facility, are tested in accordance with the Static Test Procedure detailed in Attachment B**, to ensure that they comply with the static noise level limit of 112dBA.

…"

[85] Further detail of the static test requirements is set out in s A4.4 of the Noise Management Plan. It states:

"**A4.4 Static Test**

Other than when the facility is used for an annual Special International Karting Event, **each vehicle must be tested in accordance with the static test procedures of the 2 Metre Max Method in Appendix C of the *2018 Manual of Motorcycle Sport* (extracted at Attachment B of this NMP), before being permitted access to any of the four circuits**.

The specific sections of Appendix C of the *2018 Manual of Motorcycle Sport* to be complied with are s.1.2.3, s.1.2.4, s.1.3, s.1.4.1 (a)-(d), s.1.4.1(g), s.1.4.2, s.1.4.3(a)-(i), s.1.4.3(k)-(m), s.1.4.3 (o) and s.1.4.3(p).

Notes:

(1) For the purposes of this NMP, all references in Appendix C of the *2018 Manual of Motorcycle Sport* to "competition and racing" should be interpreted to mean simply and subsequent operation of the vehicle on any of the circuits of the facility.

(2) For karts, the "reference point" cited at s.1.4.2 of Appendix C of the *2018 Manual of Motorcycle Sport* is at a point on the ground directly below the discharge point of the exhaust.

The static test noise level limit applying under s.1.4.3(p) of Appendix C of the *2018 Manual of Motorcycle Sport* is 112dBA. All results shall be rounded to the nearest whole decibel. To remove any, doubt, the 112dBA noise limit applies to the maximum noise level that is recorded when conducting the test in accordance with the static test procedure detailed. The results of all tests are to be kept on the Testing Register.

All testing must be conducted within the purpose-designed test shelter, located and configured generally as shown in Figures 6-10 at Attachment B of this NMP, with the vehicle positioned at the orientation shown marked on the ground within the test shelter and the sound level meter positioned at the point shown marked on the ground at the test shelter.

> In the case of track-owned vehicles such as hire karts, static testing of each vehicle is to be carried out as follows:
>
> - An initial test before commencement of use under the Approval.
> - After engine/exhaust related maintenance or repairs to the vehicle.
> - Otherwise every three months.
>
> In the case of privately owned vehicles, static testing is to be carried out:
>
> - Each day prior to the vehicle using the facility.
> - After engine/exhaust related maintenance or repairs on a vehicle, if carried out after a static test conducted earlier in the same day."
>
> (emphasis added)

[86] The maximum noise level limit of 112dBA is specified to apply under s 1.4.3(p) of Appendix C of the *2018 Manual of Motorcycle Sport* (provided as Attachment B of the Noise Management Plan). That provision states that:

> "Motorcycles that do not comply with sound test limits pre-race will not be permitted to enter the course."

[87] Section A4.4 of the Noise Management Plan does not specify a static test limit to apply under s 1.3.1 of Appendix C of the *2018 Manual of Motorcycle Sport*, which states that:

> "No person may compete in any event on a machine whose sound emissions exceed the prescribed levels."

[88] The effect of the provisions of the Noise Management Plan referred to above is unclear. On one construction, they only require motorcycles to comply with the 112dBA limit. Alternatively, they could be construed as requiring all vehicles to comply with the 112dBA limit on application of the static test.

[89] As development approvals operate, in effect, *in rem* and may be relied upon by subsequent owners and users of the land, where the approval is ambiguous it should be construed in the manner that places the least burden upon the landowner.[43] In those circumstances, the Noise Management Plan may be construed as setting a static test maximum noise limit of 112dBA for motorcycles only and as setting no static test limit for the other types of vehicle authorised on the track. Even if this is not the intended outcome, the 112dBA limit is far greater than the 78dBA limit that applied under the 2010 Motorsport Approval.

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43 *Matijesevic v Logan City Council* [1984] 1 Qd R 599, 605.

[90] The other test that is prescribed in the Noise Management Plan to set noise limits for individual vehicles is the passby test. In relation to that test, s A4.5 of the Noise Management Plan states that:

> "Other than when the facility is used for an annual Special International Karting Event, all vehicles are to comply with the passby noise level limit of 95dBA when the vehicle is driven under maximum acceleration past a pair of sound level meters set at a distance of 10m either side of the vehicle centreline."

[91] The 95dBA noise level limit is also considerably higher than the 78dBA limit that applied under the 2010 Motorsport Approval.

[92] The second material difference between the proposed development and the use authorised under the 2010 Motorsport Approval relates to the number and type of vehicles permitted on the track at any one time. Condition 12b of the 2010 Motorsport Approval permitted a maximum of two Subaru WRX vehicles on the gravel circuit at any one time and a maximum of three dirt buggies on the sealed circuit at any one time. The proposed development involves a significantly larger number of vehicles. The vehicles permitted are proposed to be regulated by a table of activities, which is referenced in proposed condition 13.

[93] During the annual special international karting event, there is no limit on the number or type of vehicles permitted on the track.[44] Otherwise, under the table of activities,[45] at any one time:

(a) the bitumen track may be used for:

(i) 25 karts that are 4-stroke hire karts up to a maximum capacity of 390cc; or

(ii) 25 karts that are 4-stroke hire karts with two engines of 270cc each; or

(iii) seven karts that are 2-stroke hire karts up to a maximum capacity of 125cc; or

(iv) eight karts that are 4-stroke private karts up to a maximum capacity of 390cc; or

(v) seven karts that are 2-stroke private karts up to a maximum capacity of 125cc; or

(vi) one 4-stroke hire kart up to a maximum capacity of 600cc; or

(vii) six trike bikes that are 4-stroke private trike bikes up to a maximum capacity of 200cc; or

(viii) 20 motorcycles that are private road registered motorcycles; or

(ix) two motorcycles that are private non-road registered motorcycles; or

(x) 12 skateboards that are private petrol or electric powered skateboards; or

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44 Exhibit 4.3.

45 Exhibit 4.3.

(xi) 25 electric kart that are private or hire electric karts; and

(b) the dirt track may be used for:

(i) 12 skateboards that are private petrol or electric powered skateboards; or

(ii) ten karts that are 4-stroke hire karts up to a maximum capacity of 270cc; or

(iii) ten quad bikes that are 4-stroke hire or private quad bikes up to a maximum capacity of 250cc; or

(iv) ten motorcycles that are 4-stroke motorcycles up to a maximum capacity of 250cc.

[94] The third material difference between the proposed development and the use authorised under the 2010 Motorsport Approval relates to the annual special international karting event. Not only are there no vehicle limits associated with this event. The event also has the potential to attract a significant volume of additional traffic to the subject land on a weekend.

[95] The Appellant proposes to counteract the increased intensity of the use associated with the proposed development by the incorporation of two noise mitigation measures that do not feature in the 2010 Motorsport Approval. The proposed mitigation measures were a global noise monitor limit of 77dBA $L_{Aeq,event}$ during all activities other than the special international karting event and the construction of two acoustic mounds. For reasons explained in paragraphs [110] to [183] below, I am not satisfied that these noise mitigation measures will ensure that the increased intensity associated with the proposed development will not unacceptably detract from the amenity of the local area.

[96] For the reasons provided above, having regard to the 2010 Motorsport Approval, I am not persuaded that the proposed development is a use that ought to be reasonably expected in the area. I am also not satisfied that the 2010 Motorsport Approval assists the Appellant to demonstrate that the proposed development will not unacceptably detract from the amenity of the local area.

How does the constructed motorsport facility affect reasonable expectations?

[97] The Appellant seeks to rely on the constructed building and operational works associated with the motorsport facility (such as the constructed tracks) in assessing the reasonable amenity expectations of the locality. It submits that there is no suggestion that the building and operational works associated with the motorsport facility (including the existing reception building and existing tracks) are unlawful.

[98] The Appellant has not provided any authority to support a suggestion that the Court should have regard to any lawful works.[46] In any event, the Appellant's submission about the lawfulness of the building and operational works is not supported by the evidence.

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46 Section 314 of the *Sustainable Planning Act 2009* only requires the assessment to have regard to any development approval for the subject land, and any lawful **use** of the subject land.

[99] The Appellant tendered a copy of the development application dated December 2014.[47] The brief description of the proposed development given on the application forms is "*Change of use from Outdoor Sport & Recreation Facility (WRX driving facility and dirt buggy track) to Outdoor Sport & Recreation (Motor Sport and Training Facility)*". The application forms describe the current use of the premises as "*Outdoor Sport & Recreation Facility (WRX driving facility and dirt buggy track)"*. The forms also indicate that the proposed development does not include new building work or operational work, rather the Appellant intends to reuse existing buildings on the subject land and to reuse existing operational works on the premises. In that context, the only "*current approvals ... associated with this application*" that the Appellant lists is as follows:

List of approval reference/s	Date approved (dd/mm/yy)	Date approval lapses (dd/mm/yy)
PN183001/01/DA3/-(P3)	20 January 2010	exercised

(referred to herein as "*the 2010 Motorsport Approval*").

[100] The report that accompanied the development application indicates that the development application is a response to a show cause notice issued under s 590 of the *Sustainable Planning Act 2009* and the subsequent enforcement notice. The report identifies that the application seeks a rearranged track layout compared to that approved under the 2010 Motorsport Approval.

[101] Under s 587 of the *Sustainable Planning Act 2009*, it was an offence to give the Council a document containing information that the person knew was false or misleading in a material particular. In those circumstances, it is reasonable to infer that the Appellant regarded the information provided as part of the development application to be accurate at the time it was given.

[102] Having regard to the information provided in the development application, it is reasonable to infer that:

(a) the current use of the subject land for motorsport activities is not a lawful use; and

(b) there is no development approval authorising the operational works, such as those undertaken to establish the two tracks on the subject land, and the building works associated with the constructed motorsport facility.

[103] The first of these inferences is consistent with admissions made by the Appellant referred to in paragraph [72] above and the unchallenged evidence of Mr Lowe referred to in paragraph [34] above.

[104] The inference that there is no development approval authorising the operational works is supported by the enforcement notice issued by the Council on 17 October

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47 Exhibit 6.1.

2014[48] ("*the enforcement notice*"). It records that a Council Development Compliance officer inspected the premises on 25 March 2014. The observations of that officer informed a show cause notice issued on 23 April 2014, which invited representations as to why an enforcement notice should not be issued in relation to numerous alleged contraventions of the 2010 Motorsport Approval.

[105] Relevant to the Appellant's submission regarding lawfulness of the works on the subject land, the contraventions alleged in the enforcement notice include:

(a) the construction of the gravel circuit and the sealed bitumen circuit in a shape and layout that is inconsistent with the approved drawings, contrary to condition 1 of the 2010 Motorsport Approval;

(b) the construction of the buggy track in gravel, contrary to the requirement in conditions 1, 12b and 12d that it be bitumen sealed; and

(c) the construction of the WRX circuit track as a sealed surface, contrary to the requirement in conditions 1 and 12b that it be gravel.

[106] The enforcement notice indicates that no written representations were made in response to the show cause notice.[49]

[107] The enforcement notice required, amongst other things, the restoration of the premises to a state that complies with the 2010 Motorsport Approval by no later than 5 pm on 14 November 2014. Having regard to the observations made by numerous experts about the state of the subject land, I infer that there has not been compliance with this requirement of the enforcement notice.

[108] The inference that there is no development approval authorising the building works associated with the constructed motorsport facility is supported by the proposed conditions of approval for the proposed development. Proposed condition 4b requires an application to be made to a building certifier to obtain a development permit for building works with respect to the existing buildings and structures. Such a condition would be unnecessary if the buildings and structures had been lawfully constructed.

[109] In those circumstances, the existence of the reception building and tracks on the subject land does not persuade me that the proposed use is appropriate or that it is a use that ought to be reasonably expected in the local area.

Does the expert evidence cause doubt about the legitimacy of the amenity expectations of the Co-respondents by Election?

[110] The evidence of the Co-respondents by Election about the noise from traffic is supported by the observations of the acoustical engineer retained by the Council, Mr Enersen.

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48 Exhibit 17.1. The enforcement notice was tendered by the Council without objection. It is a document that the Council is obliged to keep a copy of under s 264 of the *Planning Act 2016* and s 70 and sch 22 of the *Planning Regulation 2017*.

49 There is no suggestion that the Council withdrew the enforcement notice. The Council is obliged to keep a record of any notice withdrawing the enforcement notice under s 264 of the *Planning Act 2016* and s 70 and sch 22 of the *Planning Regulation 2017*.

[111] In the Second Joint Report of Noise Experts,[50] Mr Enersen observes that the noise levels of the existing environment[51] are generated predominantly by individual vehicle passbys, rather than a continuous and consistent flow of traffic. He says that, depending on the number of individual passbys during a measurement period (for example 15 minutes), a significant amount of time exists where sound pressure levels may be substantially lower than the overall 15-minute $L_{Aeq,T}$. Even during "*heavier*" traffic periods with a high percentage of heavy vehicles, Mr Enersen observed sound pressure levels more than 10dBA below the overall 15-minute $L_{Aeq,T}$, for greater than 50 per cent of the measurement period. During periods of lower traffic flow, the contribution of ambient (non-traffic noise) per measurement period increases further.

[112] Further, as was explained by Mr Enersen during cross-examination by Mr Blenkiron, the human ear is better than a sound level meter at detecting sounds of a different character. It can identify different types or character of sounds at the same noise level. The human ear allows us to identify a whipper snipper or a ride on mower or a motorbike distinct from each other, even if they emit a similar measurable sound pressure and even if they do not necessarily have any occurrence of tonality. Mr Enersen acknowledged that the Co-respondents by Election would be able to distinguish the noise from the motorsport facility from that on the road as it is different in character. He also acknowledged that because the sound from the motorsport facility will not have impulsive tonality or other low frequency characteristics, there is no allowance made for its treatment. As such, even though the human ear will be able to tell the difference between the noise created by the proposed development and other noise sources, i.e. the noise of the motorsport facility will be heard as a different type of noise to that of the traffic on the road, it is treated by the experts as though it produces the same impact.[52]

[113] It is apparent from this evidence of Mr Enersen that the science applied by the acoustical engineers assumes that there is no unacceptable amenity impact occasioned by noise that is of a different character. This approach ignores that while road traffic should be anticipated in the locality, the separately distinguishable noise from a motorsport facility is not within reasonable expectations set by the Planning Scheme. In addition, as the proposed global noise limit is a limit that is measured across an average of time, that criteria does not provide a true reflection of the maximum noise that will be experienced at the residences of the Co-respondents by Election, nor does it ensure an appropriate means of protecting amenity, particularly if the duration of the race is shorter than the period over which the noise is averaged.[53]

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50 Exhibit 7.2.

51 It is apparent from the context that Mr Enersen is speaking of the noise environment absent the unlawful use of the subject land.

52 Transcript of Proceedings, *Gold Coast Motorsport Training Centre Pty Ltd v Gold Coast City Council & Ors* (Planning and Environment Court of Queensland, 3387/16, Kefford DCJ, 2 June 2021) 26-7.

53 This is apparent from the evidence of Mr Enersen during cross-examination and re-examination: see Transcript of Proceedings, *Gold Coast Motorsport Training Centre Pty Ltd v Gold Coast City Council & Ors* (Planning and Environment Court of Queensland, 3387/16, Kefford DCJ, 2 June 2021) 28-9 and 31-3. Mr Enersen's assumption about the duration of the race is unsubstantiated. There is no proposed control on the race duration, nor any evidence about the likely race duration.

[114] In those circumstances, the evidence of the noise experts does not persuade me that, in an objective sense, the evidence of the Co-respondents by Election about the amenity of the area absent the unlawful activities is unreliable or unrealistic or that their concerns about unacceptable amenity impacts are overblown.

What is the evidence about the amenity impact of the proposed development?

[115] The proposed development introduces an increased level of motorsport activity into the local area than has previously been authorised. The dominant issue with respect to amenity impacts relates to the noise impact of the proposed development, particularly in relation to the impact on the residences of the Co-respondents by Election.

[116] As outlined in paragraphs [34] to [37] above, the Co-respondents by Election gave evidence about the noise impact of the past (and continuing) unlawful use of the subject land for motorsport activities of the type for which approval is now sought. Although different people have different tolerances to noise, neither of the acoustical engineers who gave evidence suggest that the reactions of the Co-respondents by Election to the past (and current) noise impacts of the use of the subject land are unreasonable.[54] I accept that the use of the subject land for motorsport activities of the type now sought to be approved has caused undue annoyance to the Co-respondents by Election in the past.

[117] Approval of the proposed development has the obvious potential to cause continued annoyance to residents of the local area in the future. The Appellant proposes to address that potential through conditions and a Noise Management Plan that impose operational constraints. The proposed operational constraints require:

(a) the construction and maintenance of noise barriers comprising earth mounds topped with shipping containers; and

(b) other than at times when the subject land is being used for the annual special international karting event:

(i) operations to be constrained to the approved hours of operation;[55]

(ii) each vehicle to undertake a static noise test within a test shelter to ensure that no individual vehicle noise exceeds 112dBA at the source. Track owned vehicles require three-monthly testing (and testing following engine or exhaust maintenance or repairs) and privately owned vehicles require daily testing (and testing following engine or exhaust maintenance or repairs);[56]

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54 During cross-examination, Mr Skoien, Counsel for the Appellant, established that Mr Lowe operates a small engine mechanic business from his land and that, when conducting repairs, there are times when he operates the small engines that are, by their nature, noisy. However, it was not suggested to Mr Lowe that, considering the business he conducts from his residence, he was unduly sensitive about the noise impacts of the motorsport activities. I do not consider that Mr Lowe's tolerance to the noise associated with his repair business detracts from his evidence about the impact of the motorsport activities. They involve a different character of noise. See Transcript of Proceedings, *Gold Coast Motorsport Training Centre Pty Ltd v Gold Coast City Council & Ors* (Planning and Environment Court of Queensland, 3387/16, Kefford DCJ, 2 June 2021) 37-8.

55 See paragraph [94] above.

56 This is described in more detail in paragraphs [84] to [89] above. As I have explained in paragraphs [88] and [89] above, I do not consider that the current draft of the Noise Management Plan makes the

(iii) each vehicle to undertake a "*passby test*", to ensure that a vehicle driven under maximum acceleration does not exceed 95dBA. Immediate feedback is proposed to be provided to the driver regarding the success or otherwise of the test by a "*traffic light*" system. The testing regime frequency is identical to the static test regime, save that track-owned vehicles require six-monthly testing;

(iv) the establishment of a global noise monitor, which is to ensure that the level of noise generated by the operation of motor vehicles on any of the four circuits of the facility does not exceed a 77dBA $L_{Aeq,event}$ Global Noise Monitor Limit. An early warning feature is proposed to operate when that level is likely to be exceeded, although the point at which the early level warning is triggered has not yet been determined;

(v) the implementation of a Commissioning Plan to ensure that passby test equipment is functioning accurately and that the global noise monitor is performing as intended; and

(vi) the proposed development to be operated in full compliance with the Noise Management Plan. This includes ensuring that the maximum number of motor vehicles operated on any track on the subject land does not exceed the permitted maximum number of vehicles allowed under the table of activities. The motor vehicle limits are described in paragraph [93] above.

[118] The Appellant and the Council initially contended that the amenity impact of the proposed development would be acceptable if it were operated in accordance with the operational restrictions as outlined in the proposed conditions and the Noise Management Plan. However, in its closing submissions the Council contended that an express condition should be imposed requiring the red light described in the Noise Management Plan (which is to be used in association with the global noise monitor) to be visible to drivers and riders on the track, and for there to be a direction that they are to end any activities upon that light being illuminated. The Appellant does not oppose a condition to that effect. With that qualification, the Appellant and the Council both contend that the evidence of the acoustical engineers demonstrates that the operation of the proposed development in accordance with the operational constraints in the proposed conditions, including the Noise Management Plan, would limit unreasonable noise emissions from the proposed development.

[119] Mr Brown and Mr Enersen, the acoustical engineers retained by the Appellant and the Council respectively, were tasked with assessing the potential for noise impact. They prepared four joint experts reports about the acoustic impact of the proposed development. They each also prepared an individual report.

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application of the noise limit sufficiently clear. However, the acoustic engineer engaged by the Appellant, Mr Brown (see Exhibit 11.1, [29]), appears to have assumed that the control will operate with respect to all vehicles and I accept that the Noise Management Plan could be amended to reflect that intention.

[120] In its written submissions, the Appellant describes the effect of their evidence as follows:

> "3.40 The acoustic engineers commenced by trying to identify an appropriate means of measurement, and an appropriate limit using that measurement, to ensure that the level of noise from the proposal at the noise sensitive receptors (being the residences of the Co-Respondents) would be acceptable. That is, an acoustic outcome to be achieved at the noise sensitive receptors.
>
> 3.41 Quite properly, that exercise involved consideration of the true acoustic amenity of the locality, including the substantial influence of noise from traffic on Pimpama Jacobs Well Road.
>
> 3.42 Neither of the acoustic experts adopted audibility as an appropriate outcome.[57]
>
> 3.43 Having identified that outcome to be achieved (i.e. the noise level to be met at each residence) the acoustic experts then set about determining the level of noise from the Subject Land that would be needed to achieve that outcome and/or the level of attenuation of the noise from the Subject Land to achieve that outcome.
>
> 3.44 Both acoustic experts agreed that $L_{Aeq,\ T}$ is the appropriate means of measuring and managing noise from the Proposed Motorsport Facility. Neither accepted that L_{Max} is the appropriate mean (*sic*) of measuring and managing such noise to achieve the appropriate outcome for the noise sensitive receptors.[58]
>
> 3.45 Modelling by the acoustic experts, in the context of specified attenuation measures (i.e. the Proposed Acoustic Mounds), resulted in the identification of a limit for noise at the Proposed Motorsport Facility that, with such attenuation measures (along with the attenuation over distance), would achieve the acceptable acoustic outcome at the noise sensitive receptors. That limit was identified as the Global Noise Monitor Limit of $77dBL_{Aeq,\ event}$.
>
> 3.46 The acoustic experts then turned their attention to the measures and checks that would be necessary to ensure that that Global Noise Monitor Limit would not be exceeded (in which event, the acceptable acoustic outcome at the noise sensitive receptors may be exceeded).
>
> 3.47 They proposed, in particular four key layers of checks and balances.

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57 See, for instance, Mr Enerson's (*sic*) rejection of audibility as an appropriate acoustic outcome at paragraph 6 of Exhibit 12.2.

58 See, for instance, Mr Brown's rejection of this suggestion at paragraphs 57 and 58 of Exhibit 11.1.

3.48 Firstly, each vehicle would have to undergo the Static Test, being a test to ensure that the noise limit for the individual vehicle necessary for the overall noise from all vehicles is met by that individual vehicle. If the vehicle fails the Static Test, it does not get onto the track!

3.49 Second, each vehicle that passes the Static Test would have to undergo the Passby Test, being a test to ensure that the noise limit for the individual vehicle actually using the track, necessary for the overall noise from all vehicles, is met by that individual vehicle. If the vehicle fails the Passby Test, it does not get onto the track with other vehicles!

3.50 Third, there would be limits on the number and types of vehicles that can use the track together – again, designed in accordance with the modelling to ensure that the overall noise limit would be met by the use of the track by all vehicles.

3.51 Fourth, there would be continuous measurement of the Rolling Noise Level, which would trigger a Red Light if the Pre-warning Tolerance is exceeding (*sic*). There are two important matters to note about this Rolling Noise Level, namely:

(a) the Rolling Noise Level is measured over 90 seconds, being about 1 lap – it is not measured over the event or over some longer period; and

(b) exceedance of the Pre-warning Tolerance does <u>not</u> mean that there has been exceeding (*sic*) of the Global Noise Monitor Limit (on which acceptable outcome is based) – it simply means that continuation of that activity for longer than the measured 90 seconds would potentially produce an exceedance of the Global Noise Monitor Limit.

…

3.61 It is submitted that the Court can be well satisfied that the acceptable acoustic outcome agreed between the acoustic experts would be achieved by the conduct of the Proposed Motorsport Facility in accordance with the recommendations of the acoustic experts, including the Noise Management Plan, the Commissioning Plan and the Table of Activities.[59] It is submitted that the Court would be so satisfied without giving any consideration to the Existing Motorsport Approval."

(original footnotes)

[121] The only evidence that the Appellant referred to in support of these submissions is that referenced in the footnotes of the extracted written submissions above.

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59 See Exhibit 4.3.

[122] The Appellant submits that there does not seem to have been any real challenge to the conclusions expressed by the two acoustical engineers regarding the appropriateness and level of attenuation of the proposed acoustic mounds.[60]

[123] The Council's written submissions also described the effect of the evidence of the acoustical engineers. Its submissions say that:

> "41. The Appellant's noise expert Mr Brown, and the Respondent's noise expert Mr Enersen, produced four joint reports, which between them comprise a detailed analysis of the receiving acoustic environment, and the adequacy of proposed controls to ensure that the acoustic impacts of the proposed development does not impact upon the amenity of the surrounding environment.
>
> 42. In the first JER,[61] Mr Enersen disagreed with the proposed acoustic analysis methodology set out by Mr Brown, and instead proposed a much more rigorous methodology. The Court is invited to consider paragraph 10 of that report.
>
> 43. In the second JER,[62] the experts considered a series of noise monitoring activities undertaken by them to identify appropriate background noise levels to apply to any analysis,[63] and undertook acoustic testing of the various karts and motorbikes associated with the proposed development.[64] Bearing in mind the fact that the development at that stage did not include acoustic berms, Mr Enersen expressed opinions to the effect that the proposed development would result in an adverse impacts to the acoustic amenity of Mr Lowe and Mr Evans,[65] but not Mr Blenkiron.[66]
>
> 44. Whilst the experts did not agree upon the noise limits and controls to be applied to the development,[67] within the "Areas of Agreement" the experts explained:[68]
>
> > *"The noise experts are of the view that, noise emissions from activities at the site the subject of the appeal can be attenuated to a point where they satisfy noise limits at the noise-sensitive receptor locations, provided various noise control treatments, management actions and constraints on activities are implemented. The exact nature of the noise control treatments, management actions and constraints on activities, however, is still a point of disagreement between the experts. (Refer also Paragraph 62 (v) following.)"*

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60 Exhibit 16.6, 24 [3.15].
61 Exhibit 7.1.
62 Exhibit 7.2.
63 Part 4.0.
64 Part 5.0.
65 Paras 50 and 52.
66 Para 48.
67 Part 8.0.
68 At para 61.

45. In the third JER,[69] in which there were no areas of disagreement, the experts produced a Noise Management Plan (**NMP**), which identified a number of separate and overlapping control measures to ensure off-site adverse acoustic amenity impacts are appropriately controlled. Those measures comprise:

    a) the construction of a series of acoustic mounds;[70]

    b) a requirement for each vehicle to undertake a static noise test within a test shelter to ensure that no individual vehicle noise exceeds 112dBa at the source. Track owned vehicles require three-monthly testing (or following engine/exhaust maintenance or repairs), whilst privately owned vehicles require daily testing (or following engine/exhaust maintenance or repairs);[71]

    c) a requirement for each vehicle to undertake a "passby test", to ensure that a vehicle driven under maximum acceleration does not exceed 95dBa, with immediate feedback being provided to the driver by a "traffic light" system. The testing regime frequency is identical to the static test regime, save that track-owned vehicles require six-monthly testing;[72] and

    d) a requirement for the establishment of a global noise monitor, which is to ensure that the level of noise generated by the operation of motor vehicles on any of the four circuits of the facility does not exceed the 77dBA $L_{Aeq,event}$ Global Noise Monitor Limit, with an "early warning feature" to operate when that level is likely to be exceeded.[73]

46. As to the Global Noise Monitor Limit, Council's position is that an express condition ought be imposed requiring the "red" light described in the NMP to be visible to drivers and riders on the track, and with a direction that they are to end any activities upon that light being illuminated.[74]

47. The NMP also includes rigorous record keeping obligations, and a complaint response system and procedure. It is also noted that the NMP sits alongside the Commissioning Plan, which details various matters relating to the initial configuration and verification of the NMP's noise controls – e.g. setting out a prescribed process for determining the noise level for the early warning feature.[75]

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69 Exhibit 7.3.
70 Ibid, NMP Part A4.3 at p. 16.
71 Ibid, NMP Part A4.4 at pp. 16-17.
72 Ibid, NMP Part A4.5 at pp. 17-19.
73 Ibid, NMP Part A4.6 at pp. 19-20.
74 See the evidence of Mr Enersen, T5-18, l 46 to T5-19, l 5.
75 Exhibit 4.5 at p.5.

> 48. Within the third JER, the experts also jointly respond to each of the issues raised by the Co-respondents by Election, and the Court is invited to consider Part 4.0 of that report in detail.
>
> 49. In the fourth JER,[76] the experts agreed upon a "temporary" table of development to be applied prior to the final construction of the acoustic mounds.[77]
>
> 50. In his individual statement,[78] Mr Enersen unambiguously confirmed that the analysis undertaken by himself and Mr Brown had regard to the pre-existing amenity of the local area, and imposed a mechanism to limit unreasonable noise emissions from the proposed development, consistent with the requirements of PC19(a).[79]"
>
> (original footnotes)

[124] The evidence on which the Council relies in support of its submissions is that referenced in the footnotes of the extracted written submissions above.

[125] The extracts of the submissions of the Appellant and the Council set out in paragraphs [120] and [122] above, and the evidence of the acoustical engineers, highlight that the experts' assumption about the appropriate noise level to be achieved at each residence is fundamental to their conclusions about the appropriate noise attenuation measures and the acceptability of the impact occasioned by the proposed development. The acoustical engineers have assessed the adequacy of the proposed operational constraints and acoustic attenuation measures by reference to their ability to achieve certain noise standards at the residences of the Co-respondents by Election.

[126] The noise standard selected by the experts is not sourced in the Planning Scheme. Performance criteria PC19 does not prescribe an applicable standard or guideline. The experts did not otherwise identify a standard or guideline that they say would provide appropriate guidance in the present circumstances. Ultimately, the opinion of the acoustical engineers about the level of noise that the Co-respondents by Election should expect as an acceptable acoustic outcome appears to have involved an exercise of judgment on the part of the acoustical engineers.

[127] The absence of an applicable standard or guideline, and reliance on experts' professional judgment in the absence of relevant standards, is not novel. However, the Court is not bound to accept the professional judgment of the experts about such matters.

[128] In *Makita (Australia) Pty Ltd v Sprowles*,[80] Heydon JA made the following pertinent observations about expert evidence:

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76 Exhibit 7.4.

77 See, also, the evidence of Mr Enersen confirming the appropriateness of these temporary constraints: T5-19, ll 13-38.

78 Exhibit 12.2.

79 At para 7.

80 [2001] NSWCA 305, (2001) 52 NSWLR 705, 729-30 [59]-[60].

"59 **If Professor Morton's report were to be useful, it was necessary for it to comply with a prime duty of experts in giving opinion evidence: to furnish the trier of fact with criteria enabling evaluation of the validity of the expert's conclusions**. In *Davie v Lord Provost, Magistrates and Councillors of the City of Edinburgh* 1953 SC 34 at 39–40, Lord President Cooper, in a case concerning liability for damage to dwelling houses allegedly caused by blasting operations in the course of constructing a sewer, said:

> "The only difficulty experienced by the Lord Ordinary and developed before us arose from the scientific evidence regarding explosives and their effect. This evidence was given by Mr Teichman, one of the technical staff of the ICI, with whom a fellow employee, Mr Sheddan, was taken as concurring. Mr Sheddan was cross-examined on his qualifications with considerable effect, and the point was taken that Mr Teichman was truly uncorroborated. I do not consider that in the case of expert opinion evidence formal corroboration is required in the same way as it is required for proof of an essential fact, however desirable it may be in some cases to be able to rely upon two or more experts rather than upon one. The value of such evidence depends upon the authority, experience and qualifications of the expert and above all upon the extent to which his evidence carries conviction, and not upon the possibility of producing a second person to echo the sentiments of the first, usually by a formal concurrence. In this instance it would have made no difference to me if Mr Sheddan had not been adduced. The true question is whether the Lord Ordinary was entitled to discard Mr Teichman's testimony and to base his judgment upon the other evidence in the case.
>
> Founding upon the fact that no counter evidence on the science of explosives and their effects was adduced for the pursuer, the defenders went so far as to maintain that we were bound to accept the conclusions of Mr Teichman. This view I must firmly reject as contrary to the principles in accordance with which expert opinion evidence is admitted. **Expert witnesses, however skilled or eminent, can give no more than evidence. They cannot usurp the functions of the jury or Judge sitting as a jury, any more than a technical assessor can substitute his advice for the judgment of the Court. … Their duty is to furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case, but the decision is for the Judge or jury. In particular the bare *ipse dixit* of a scientist, however eminent, upon the**

> **issue in controversy, will normally carry little weight, for it cannot be tested by cross-examination nor independently appraised, and the parties have invoked the decision of a judicial tribunal and not an oracular pronouncement by an expert.**"

Lord Carmont expressed "complete agreement" with those views. Lord Russell said (at 42):

> "… **The opinion expressed by an expert witness in any branch of technical science depends for its effect on, *inter alia*, his qualifications, skill and experience in that science. If it appears to be based on a sufficiency of research directed accurately and relevantly to a particular issue and to be so supported as to convince a Court of its fundamental soundness and applicability to the particular issue, a Court is entitled, although not obliged, to accept it, even if unsupported by any corroborative expert opinion**. **Secondly the defenders argued that in the absence of any counter evidence of expert opinion in the science professed by Mr Teichman the Court is bound to take his opinion as conclusive, and as decisive of the issue. I am clearly of opinion that that argument must be rejected as being contrary to the principles by which the rules of evidence are regulated, and as constituting an unwarrantable encroachment on the judicial function of the Court.** I respectfully agree with your Lordship's observations on that topic."

Lord Keith concurred with all the opinions expressed.

60 *Davie's* case is not to be read as reflecting only a principle peculiar to Scottish law. Before it was decided, in *R v Jenkins; Ex parte Morrison* [1949] VLR 277 at 303, Fullagar J said that **an expert witness must "explain the basis of theory or experience" upon which the conclusions stated are supposed to rest**, for, as Sir Owen Dixon said in an extra-judicial address quoted by Fullagar J, "**Courts cannot be expected to act upon opinions the basis of which is unexplained**"."

(emphasis added)

[129] As was noted by Heydon JA, the trier of fact must arrive at an independent assessment of the opinions and their value.[81] This cannot be done unless their basis is explained. Heydon JA found that for expert opinion evidence to be admissible, it must meet the following criteria:

(a) it must be agreed or demonstrated that there is a field of specialised knowledge;

(b) there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;

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81 *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305, (2001) 52 NSWLR 705, 733 [68].

(c) the opinion proffered must be wholly or substantially based on the witness's expert knowledge;

(d) so far as the opinion is based on facts observed by the expert, those facts must be identified and admissibly proved by the expert;

(e) so far as the opinion is based on assumed or accepted facts, those facts must be identified and proved in some other way;

(f) it must be established that the facts on which the opinion is based form a proper foundation for it; and

(g) finally, the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of specialised knowledge in which the witness is expert by reason of training, study or experience, and on which the opinion is wholly or substantially based, applies to the facts assumed or observed so as to produce the opinion propounded.[82]

[130] The observations of His Honour Judge Rackemann in *Ward & Anor v Rockhampton Regional Council & Anor; R C Toole Pty Ltd v Rockhampton Regional Council & Ors*[83] are also apposite in this regard. His Honour observed:

> "[110] I am not critical of the noise experts for doing their best in reliance upon their professional judgment. Published standards or guidelines do not provide the answer in every situation. However, once the reference to inapplicable documents is put in (*sic*) one side, the views of the experts about the number of movements which might produce a reasonable outcome in amenity terms appears to lack any compelling scientific or other intellectual basis, within the field of their specialist knowledge, for the conclusions reached.[84]
>
> [111] The evidence of the experts is not the totality of the evidence before me in relation to acoustic amenity. Counsel for Lever and Ward referred to the following words of Jones DCJ in *Bassingthwaite v Roma Town Council*:[85]
>
> > While the evidence of appropriate experts must of course be respected and given due weight, the court is not obliged to fall in with their assessment of what impacts other people ought find acceptable. (*Australian Capital Holdings Pty Ltd v Mackay City Council* [2008] QPELR 224 at [51]; [2007] QPEC 100). Reasonable and genuine concerns about impacts on amenity must be given weight notwithstanding contradictory conclusions that might be expressed by expert witnesses. (*Mooloolah Commercial Pty Ltd v Caloundra City*

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82 *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305, (2001) 52 NSWLR 705, 743-4 [85].
83 [2014] QPEC 67; [2015] QPELR 252.
84 see *Makita (Aust) Pty Ltd v Sprowles* (2001) 52 NSWLR 705; [2001] NSWCA 305.
85 *Bassingthwaite v Roma Town Council* [2011] QPELR 63; [2010] QPEC 91 at [61]-[63].

> *Council* [2005] QPELR 648; [2005] QPEC 29 at [61] and [92]).”[86]

[131] Here, there are several aspects of the evidence of the acoustical engineers that leave me unpersuaded about the reliability of their professional judgment that the proposed development will not result in unacceptable noise impacts.

[132] The first problematic aspect of the evidence of the acoustical engineers relates to the level of noise that they say should be regarded as acceptable at the noise sensitive receptors, being the residences of the Co-respondents by Election. There is a lack of transparency about both the level of noise that the experts say should be adopted as an acceptable standard at the residences of the Co-respondents by Election and the basis on which the experts conclude that the apparently agreed level is the appropriate standard. It is not apparent that the standard that the acoustical engineers have determined to be appropriate is either wholly or substantially based on their expert knowledge, nor is it apparent that, if based on their expert knowledge, it was founded on appropriate assumptions about the level of amenity that the Co-respondents by Election should reasonably expect. My findings in that regard are informed by the matters outlined in paragraphs [134] to [160] below.

[133] In the Second Joint Report of Noise Experts, the acoustical engineers disagree about the nature of the noise level limit to be used as a base standard for an acceptable amenity outcome at the residences of the Co-respondents by Election.

[134] Relevantly, Mr Brown opines that:

> “ordinarily, limits for acceptable levels of noise emission from continuously occurring noise sources would be set at a point where the emitted $L_{Aeq\ adj,T}$ noise level is equal to the RBL plus 5dBA.”

[135] Mr Brown does not explain the nature of a “$L_{Aeq\ adj,T}$” noise level. In addition, Mr Brown does not identify the basis for his evidence that “*RBL plus 5dBA*” would “*ordinarily*” be an acceptable level of noise emission.

[136] Chapter 2.20 of Freckelton’s *Expert Evidence*[87] discusses the extent to which experts can give opinions that are wholly or partly based on material which is:

(a) not identified;

(b) not proved;

(c) not adduced as admissible evidence;

(d) generally understood or resorted to by professionals of the kind giving evidence; or

(e) in the form of assumptions.

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86 *Ward & Anor v Rockhampton Regional Council & Anor; R C Toole Pty Ltd v Rockhampton Regional Council & Ors* [2014] QPEC 67; [2015] QPELR 252, 276 [110]-[111] (original footnotes).

87 Ian Freckleton QC, Westlaw AU, *Expert Evidence* (online at 21 June 2021) [2.20.01]-[2.20.540].

[137] As is explained in Freckelton's *Expert Evidence*:

> "The general approach of the courts has been articulated by Ormiston JA in *R v Noll* [1999] 3 VR 704; [1999] VSCA 164 at [3]:
>
> > As a matter of principle, as exemplified by the authorities, experts can speak of many matters with authority if their training and experience entitle them to do so, notwithstanding that they cannot describe in detail the basis of knowledge in related areas. Professional people in the guise of experts can no longer be polymaths; they must, in this modern era, rely on others to provide much of their acquired expertise. Their particular talent is that they know where to go to acquire that knowledge in a reliable form.
>
> (See, too, *R v Karger* (2001) 83 SASR 1; [2001] SASC 64 at [69].) However, without clear explication of the bases upon which experts purport to offer expert opinions, evaluation of those opinions has been regarded by the courts as at least problematic, if not impossible.
>
> As Heydon J in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588; [2011] HCA 21 at [90] explained:
>
> > If the expert's conclusion does not have some rational relationship with the facts proved, it is irrelevant. That is because in not tending to establish the conclusion asserted, it lacks probative capacity. Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist. The expert opinion is then only a misleading jumble, uselessly cluttering up the evidentiary scene.
>
> A similar approach was taken by Wessels JA in *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingsbekämpfung Mbh* 1976 (3) SA 352 at 371:
>
> > an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some of her competent witnesses. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, is disclosed by the expert."[88]

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88 Ian Freckelton QC, Westlaw AU, *Expert Evidence* (online at 21 June 2021) [2.20.40].

[138] Here, at best, it might be assumed that Mr Brown's reference to the level being "*ordinarily*" acceptable was intended to convey that it is a standard customarily applied by acoustical engineers. But what can be made of such evidence?

[139] In *Re Earlturn Pty Ltd*,[89] Henry J analyses the relevant commentary and authorities about such matters. He observes that:

> "In his aforementioned text, Freckelton observes of this issue at 2.20.460:
>
> > "Little case law on this issue exists in England, Canada, Australia or New Zealand, but the indication from the decisions of Gowans J in *Borowski v Quayle* [1966] VR 382 and of Muirhead J in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141 and the cases that have followed them is that a liberal attitude will be taken by the courts when called upon to receive technical evidence based on customary professional means of acquiring skills and knowledge.
> >
> > It appears that an expert may give an opinion on an issue before a court based on the general state of the literature within the area of expertise in question or on the history of a series of well-known events … In *R v Zandel* (1987) 31 CCC (3d) 97 at 143–146, it was held, citing Pattenden (1982, pp 90–91), that there are several exceptions to the proposition that expert evidence founded on hearsay will be of no weight:
> >
> > > 'There are two exceptions to the hearsay rule which are relevant, and in the circumstances of this case, are, in our opinion, mutually supportive. The first is that events of general history may be proved by accepted historical treatises on the basis that they represent community opinion or reputation with respect to an historical event of general interest…The second exception which is relevant in this case is that an expert witness may give evidence based on material of a general nature which is widely used and acknowledged as reliable by experts in that field. This exception, however, has hitherto been confined to a few narrow classes of cases such as, eg, mortality tables and a standard pharmaceutical guide'.
> >
> > It appears that when articles from learned journalists are referred to by experts to explain or justify their opinions, they should be referred to in such a way 'that the cogency and probative value of their conclusion can be tested and evaluated by reference to it'."

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89 [2021] QSC 137.

What was described as the second exception in *Zandel* was discussed by Gowans J in *Borowski v Quayle* [1966] VR 382. At 386–387, his Honour cited the following passage from *Wigmore on Evidence*, third edition, volume 2 at pp 784–5:

> "The data of every science are enormous in scope and variety. No one professional man can know from personal observation more than a minute fraction of the data which he must every day treat as working truths. Hence a reliance on the reported data of fellow-scientists, learned by perusing their reports in books and journals. The law must and does accept this kind of knowledge from scientific men.
>
> On the one hand, a mere layman, who comes to Court and alleges a fact which he has learned only by reading a medical or a mathematical book, cannot be heard. But, on the other hand, to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on finical and impossible standards.
>
> Yet, it is not easy to express in usable form that element of professional competency which distinguishes the latter case from the former. In general, the considerations which define the latter are (a) a professional experience, giving the witness a knowledge of the trustworthy authorities and the proper source of information, (b) an extent of personal observation in the general subject, enabling him to estimate the general plausibility, or probability of soundness, of the views expressed, and (c) the impossibility of obtaining information on the particular technical detail except through reported data in part or entirely. The true solution must be to trust the discretion of the trial judge, exercised in the light of the nature of the subject and the witness' equipments. The decisions show in general a liberal attitude in receiving technical testimony based on professional reading."

More recently, in *Bodney v Bennell* (2008) 167 FCR 84 at 108, the Full Court of the Federal Court observed:

> "Before the *Evidence Act*, it was well established that experts are entitled to rely upon reputable articles, publications and material produced by others in the area in which they have expertise, as a basis for their opinions. … Experts may not only base their opinions on such sources, but may give evidence of fact which is based on them. They may do this although the data on which they base their opinion or evidence of fact will usually be hearsay information, in the sense they rely on such data not on their own knowledge but on the

> knowledge of someone else. The weight to be accorded to such evidence is a matter for the court".”[90]

[140] Mr Brown's evidence that "*RBL plus 5dBA*" would "*ordinarily*" be an acceptable level of noise emission is of no assistance. Absent the basis of the opinion, it is not possible to ascertain whether it is wholly or substantially informed by specialised knowledge based on training, study, or experience. Further, even if I were to assume that it was so based, because Mr Brown does not refer to articles or other professional sources to explain or justify his opinion, the cogency and probative value of his conclusion cannot be tested and evaluated. For example, absent the identified professional source, it is not possible to test the circumstances in which the industry might regard the standard as appropriate. Does it include circumstances where the type of noise sought to be introduced is of a different type or character to that which otherwise is present in the locality? Does the industry regard the standard as appropriate where the type of noise sought to be introduced is readily distinguished from the typical noise in the locality and is not a type of noise that would be reasonably expected in the locality?

[141] Despite opining "*RBL plus 5dBA*" would ordinarily be an acceptable level of noise emission, Mr Brown goes on to express the view that a "*sliding scale*" set of noise level limits is appropriate in this case rather than a noise level of "*RBL plus 5dBA*". He says that for noise-generating activities that occur frequently several times per day, the "*RBL plus 5dBA*" basis would be an appropriate starting point for establishing the appropriate limit. By contrast, for noise-generating activities which occur only very infrequently, but which may generate relatively high levels of noise emission, Mr Brown says the appropriate limit may be set at a point substantially higher than the "*RBL plus 5dBA*", with the limit point being inversely related to the frequency of occurrence of the activities. He considers that the restrictions imposed on the types and frequency of noise generating activities at the subject land as detailed in exhibit "MBN-1" to the affidavit of Michael Brian Nash dated 20 March 2017 sufficiently constrain both the duration of the activities carried out at the facility and the activities themselves such that the generation of noise at the facility could not be judged to be continuously occurring. Furthermore, the level of noise emitted by the activities is a function of the activities themselves and, as such, Mr Brown says the level of noise generated varies substantially from one period to the next.

[142] Mr Enersen disagrees with Mr Brown's view that a "*sliding scale*" set of noise level limits should be adopted. He notes that more than 13 different types of proposed vehicle activities have been nominated by Mr Brown for assessment. Mr Enersen says the event for each type of activity is proposed to have a duration of between ten and 15 minutes, with the typical number of events per day for each activity being nominated as between two and 20 depending on the activity. He explains that, based on this and other available information, the potential exists for regular and frequent use of the various activities throughout each operating day.

[143] Neither Mr Enersen nor Mr Brown describe the "*different types of proposed vehicle activities*" that had been nominated by Mr Brown for assessment, nor do they identify the <u>controls</u> that were proposed (at that stage) on the duration of activities

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90 *Re Earlturn Pty Ltd* [2021] QSC 137, 2-4.

or the number of events per day for each activity. Those details may have been provided in the affidavit of Michael Brian Nash dated 20 March 2017 or the "*Particulars of the proposed use the subject of the application provided to the parties on 2 March 2017 as required by paragraph 2 of the Order made on 24 February 2017 by the ADR Registrar*" referred to in paragraph 3 of the Second Joint Report of Noise Experts. However, neither the Appellant nor the Council tendered a copy of either of those documents. They are not in evidence before me. As such, neither Mr Enersen nor Mr Brown has identified with clarity the assumed or accepted facts on which they have based their opinion and, to the extent that the assumed facts are disclosed, they have not been proved. In the circumstances, the experts have provided insufficient detail to enable me to test their opinions about the appropriateness of a "*sliding scale*". Further, and in any event, to the extent their opinions were informed by matters such as the duration of activities or the number of events per day for each activity, there are no proposed controls on those matters in either the proposed conditions or the Noise Management Plan.

[144] The experts' opinions about the appropriate type of noise limit measurement to be used was not resolved when they each considered its potential application to the results of the noise level monitoring conducted at each of the residences of the Co-respondents by Election.

[145] Mr Brown opines that, in light of the results of the noise level monitoring at each of the residences of the Co-respondents by Election, while it may be appropriate to use the "*RBL plus 5dBA*" basis as an appropriate starting point for setting limits at the Evans residence, it would be inappropriate to adopt the same approach at the Lowe Residence. He concludes that the noise level limit at each of the residences should be set at a point no lower than the "*relevant 10 Percentile $L_{Aeq,T}$ value*". In support of his opinion, Mr Brown says that if the acceptable level of noise emission to the Lowe residence were to be set at a value equal to the "*RBL plus 5dBA*" or "*the average background level plus 5dBA*" as suggested by Mr Enersen, the resultant noise level limit would be respectively 50dBA $L_{Aeq\ adj,T}$ (i.e. 45 + 5 dBA) by reference to the results of Mr Brown's analysis of jointly conducted tests or 46dBA $L_{Aeq\ adj,T}$ (i.e. 41 + 5 dBA) by reference to the results of Mr Enersen's analysis of jointly conducted tests. Further, Mr Brown notes that for 90 per cent of the time the otherwise prevailing $L_{Aeq,T}$ noise level has been determined to be 63dBA, i.e. a noise level he says is sufficiently high that it would be impossible to accurately measure noise levels as low as 46dBA or 50dBA due to the operation of motor vehicles on the track in the context of the otherwise prevailing road traffic noise. Mr Brown also says that, while the validity of any condition of approval which required compliance with such stringent noise levels would be a matter for others, such a condition is likely to fail the test of being relevant to, but not an unreasonable imposition on, the development, or being reasonably required in relation to the development.

[146] Mr Enersen opines that limits for acceptable levels of noise emission from regular activities at the subject land should be set at a point where the emitted $L_{Aeq\ adj,T}$ noise level is equal to the average background level plus 5dBA, where T is a time interval of either 15 minutes or, if the noise continues for less than 15 minutes, the duration of the source noise. As I have already mentioned in paragraph [111] above, Mr Enersen explains that, depending on the number of individual passbys during a measurement period, for example 15 minutes, a significant amount of time exists

where short-term sound pressure levels are substantially lower than the overall 15 minute $L_{Aeq,T}$. Mr Enersen says that even during "*heavier*" traffic periods with a high percentage of heavy vehicles, he has observed short-term sound pressure levels more than 10dBA below the overall 15-minute $L_{Aeq,T}$ for a significant portion of the measurement period. During periods of lower road traffic flow, the proportion of low-level ambient (non-traffic noise) becomes more evident. Consequently, in Mr Enersen's view, he has regularly acquired the level of direct noise contributions from the subject land in between vehicle passbys. He did so by pausing measurement during times of extraneous noise.

[147] As is evidenced by paragraphs [145] and [146] above, the experts' explanations about the application of their disputed noise standards to the monitoring results does not provide any clarity about which is the appropriate standard to be adopted. Further, neither Mr Brown nor Mr Enersen provide the source noise level data that they analysed to produce the results in their respective tables of results. They do not describe the way they analysed the data nor explain why their results differ even though they were apparently produced from jointly collected data, or at the very least data collected over the same period.

[148] The only details the acoustical engineers provided about the source noise level data used by them are as follows:

> "5 Over the period 15-24 February 2017 (10 days inclusive), continuous noise level monitoring was jointly conducted by Mr Brown and Mr Enersen at the residences located at 598 Pimpama – Jacobs Well Road (ie Evans Residence), 507 Pimpama – Jacobs Well Road (ie Lowe Residence) and 458 Pimpama – Jacobs Well Road (ie Blenkiron Property).
>
> …
>
> 10 Over the period 15-24 February 2017, continuous noise level monitoring conducted at the residences located at 598 Pimpama – Jacobs Well Road (ie Evans Residence) and at 507 Pimpama – Jacobs Well Road (ie Lowe Residence) was either (i) in close proximity to the facade of the residence directly exposed to noise from the activities on the site the subject of the appeal (ie Evans Residence), or in line with the facade of the residence directly exposed to noise from the activities on the site the subject of the appeal (ie Lowe Residence).
>
> …
>
> 12 Over the period 16-24 February 2017, continuous noise level monitoring was conducted on the property situated at 458 Pimpama – Jacobs Well Road (ie Blenkiron Property). The noise monitoring was at a secure location adjacent to the house slab formed on the subject site.
>
> …
>
> 36 Over the period 15/16 February 2017, Mr Brown and Mr Enersen, each with assistance from members of their staff and aided by Mr David Moore of David Moore and Associates

Pty Ltd, conducted a series of noise level measurements on various karts and motorbikes which may operate on sealed and/or dirt tracks at the subject site.

37 These measurements were conducted for two reasons.

38 Firstly, the noise level measurements were used to establish the level of noise emission from the operation of specific classes of vehicle on the track to three "remote" locations within the confines of the subject site, ie Lot 1 on WD 3475. (In this instance "remote" refers to locations which were situated 250-450m from the centre of the sealed track. At these locations, and for most classes of vehicle, it was possible to obtain adequately accurate measurements of the noise levels emitted by the operation of the vehicles on the track without undue influence due to extraneous and ambient noise sources.)

39 Secondly, Mr Moore installed noise loggers at two in-field locations, ie locations inside the confines of the sealed track. These noise loggers were set up to continuously record noise levels at one second intervals. The output of these noise loggers was used as one component of the input to the determination of the vehicle source sound power levels.

40 The instrumentation used to gather that noise level data at each of the five locations was synchronised to ensure that the data collected at each location could be directly cross-referenced to the data at each other location.

41 In addition, one individual rider or driver participating in each of various selected noise-generating events was instrumented with two GPS devices, one capable of recording video at the same time.

42 Using the results of the one second interval sound level measurements together with the GPS and video data, Mr Brown undertook a very extensive data analysis exercise to quantify source sound power levels and source directivity patterns at a large number of specific locations around the track.

43 Thereafter, Mr Brown prepared a series of noise models to quantify the extent of noise emission into the community for each of the specific classes of motor vehicle proposed to be used to track (*sic*).

44 Mr Enersen reviewed the noise models prepared by Mr Brown and assessed these predictions against noise level measurement data acquired by Mr Enersen at the noise sensitive receptor locations.

45 The output of the model prepared by Mr Brown was used for comparison with various noise level limits and used by Mr Brown to evaluate the effectiveness of specific noise control treatments."

[149] When one considers this description of the jointly collected data, together with the Appellant's admissions about operations on the subject land, it appears that the "*continuous noise level monitoring*" was conducted during a period when the (unlawful) motorsport facility was being operated. At the very least, the "*continuous noise level monitoring*" at the residences of the Co-respondents by Election was conducted during a period when various karts and motorbikes were being operated on the subject land.[91] Despite this, neither expert explains how the use of the subject land affected their measurements or their analysis of the collected data. Importantly, they do not clarify whether such noise was excluded when determining the appropriate amenity outcome to be achieved at the residences of the Co-respondents by Election and deriving their respective proposed noise limits.

[150] During final addresses I asked Mr Wylie to direct me to the evidence that demonstrates that Mr Enersen and Mr Brown had regard to the amenity of the local area unaffected by unlawful activities when determining the noise standard they say should be achieved at the residences of the Co-respondents by Election. Despite taking some time to look for relevant evidence, Mr Wylie was unable to direct my attention to any. The subsequent joint reports and individual reports do not provide sufficient clarity on this issue.

[151] In the Third Joint Report of Noise Experts, the acoustical engineers refer to the "*required level of acoustical attenuation*",[92] the "*required degree of acoustical attenuation*",[93] the "*noise level limits applying to the nearby residential premises*"[94] and the design of measures to ensure the level of noise emission is within "*acceptable bounds*".[95] The experts do not identify the noise level, limits or bounds to which they refer. The Fourth Joint Report of Noise Experts does not make any reference to any standard, even in general terms.

[152] In his Supplementary Individual Statement,[96] Mr Enersen observes:

(a) at paragraph [6]:

> "Given that there is no specific noise criterion contained within PC19(a), it should be noted that audibility is not a criterion and it would, in my opinion, be inappropriate to require avoidance of all noise emissions from the site."

(b) at paragraph [7]:

> "While it is not expressly stated within the JERs, the acoustic assessment of the development application undertaken by me and Mr Brown in the JERs, has taken into account the pre-existing amenity of the local area and proposes a mechanism to limit unreasonable noise emissions from the subject site, consistent with the requirements of PC19(a)."

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91 See, for example, Exhibit 7.2 p 9 [36].
92 See, for example, Exhibit 7.3 p 5 [10].
93 See, for example, Exhibit 7.3 p 5 [12].
94 See, for example, Exhibit 7.3 p 7 [21].
95 See, for example, Exhibit 7.3 p 6 [16].
96 Exhibit 12.2.

(c) at paragraph [17]:

> "The proposed outcomes resulting from the joint expert process will lead to noise emissions at the receptor locations below the existing average traffic noise level at each of the receptor locations."

[153] Mr Enersen does not explain what he means by the phrase "*the pre-existing amenity of the local area*". Is he referring to the present amenity, that is the amenity prior to commencement of the use for which approval is sought, or does he mean the amenity of the local area absent the proposed development and absent the present unlawful use of the subject land. In addition, Mr Enersen does not explain how the "*pre-existing amenity of the local area*" has been "*taken into account*". For example, how does a single noise limit take account of an amenity that is informed by low volumes of traffic on weekends and periods where there is no traffic noise? Mr Enersen also does not reveal the basis for his opinion that "*the proposed outcomes resulting from the joint expert process will lead to noise emissions at the receptor locations below the existing average traffic noise level at each of the receptor locations*". Further, he does not explain why this outcome leads him to conclude in paragraph [18] that the proposed development will not detract from the amenity of the local area, particularly given his observations in the Second Joint Expert Report about the intermittent nature of the traffic noise in the locality.

[154] In his Supplementary Individual Statement, Mr Brown made the following observations about the standard adopted for the background noise level:

> "27 Information based upon further modelling following the preparation of the multiple earlier joint reports and the preparation of the conceptual design of additional acoustical attenuation measures (ie the acoustic mounds now included in final design form in the current changed development proposal) was provided to the parties on 6 October 2017. This information established the following:
>
> (i) Based on the accepted acoustical standard of a 5dBA exceedance of the background noise level – which I consider to be conservative in the case – the limits for acceptable levels of noise emission to the reference locations (used for the noise modelling) at Lowe and Evans residences were determined to be 46dBA and 48dBA, respectively. These limits apply under the agreed calm wind conditions, ie under the conditions representing the likely conservative background noise level – noting that that accepted background noise level is a background noise level value that will be exceeded 90% of the time.
>
> (ii) Provided the 10m high Acoustic Wall Type A (Evans) and 8m high Acoustic Wall Type B (Lowe) shown in the drawings prepared by Cozens Regan as current at that time were constructed, compliance with these limits could be achieved under the likely most intense operating condition of the facility. This compliance

> with the limits was shown on Mediation Figure M1 which was presented to the parties on 6 October 2017. This figure is attached together with additional Figures M1A and M1B which are individual enlargements extracted from Mediation Figure M1 and which show in more detail the noise contours at the Lowe and Evans residences. Note: Labels showing the locations of the Lowe and Evans residences have been added to the figures. The reference location at each of the Lowe and Evans residences is indicated by a cyan asterisk …
>
> 28 Adopting the agreed noise level limit setting regime of background noise level plus 5dBA, it was established that limits for acceptable levels of noise emission to the Lowe and Evans residences sufficient to preserve acoustical amenity were determined to be 46dBA and 48dBA, respectively, under calm wind conditions."[97]

[155] This additional information does not overcome the difficulties already identified. Mr Brown does not explain the basis for his opinion that the limit for acceptable levels of noise emission at the Lowe and Evans residences is 46dBA and 48dBA, respectively. The Mediation Figure M1 that is attached to Mr Brown's individual statement refers to "$L_{Aeq,T}$" noise levels. Mr Brown does not explain why this is the appropriate type of measure to adopt, rather than the "$L_{Aeq\ adj,T}$". He does not explain how the background noise level was determined, nor does he explain why it is acceptable to add 5dBA to that level. Mr Brown does not justify the adoption of a single noise measure, nor explicate how a single measure appropriately takes account of the unchallenged evidence of the Co-respondents by Election and Mr Enersen that there is significantly less noise from traffic on weekends. Mr Brown does not explain how the level he has selected addresses the observations of Mr Enersen in the Second Joint Expert Report of Noise Experts, particularly the evidence referred to in paragraph [146] above. Mr Brown does not identify the prevailing situation with winds, nor explain why it is appropriate to set a limit by reference to calm wind conditions.

[156] It is unclear on the material before the Court how the experts came to adopt the "*agreed noise level limit setting regime of background noise level plus 5dBA*" that is referred to by Mr Brown in his individual report.[98] Neither of the experts have addressed whether the "*agreed*" standard addresses each of their concerns expressed in the Second Joint Report of Noise Experts.

[157] These deficiencies are material. The proof of the expertise of the acoustical engineers is not sufficient to overcome them. This is particularly so in this case where the Co-respondent by Election have put in issue the appropriateness of the noise criteria applied by the acoustical engineers.[99]

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97 Exhibit 11.1, p 7.

98 Exhibit 11.1, p 7 [28].

99 See, for example, Exhibit 2.2B pp 84 and 86-7 (PDF pagination) or pp 246 and 248-9 (based on pagination written in the PDF version). In correspondence identifying issues in dispute provided prior to the Third Joint Report of Noise Experts, Mr Evans raised the appropriateness of the criteria adopted. He contended that the required criteria should be the "*LA max*" on the basis that the proposed development is planned as primarily a "*full-throttle experience*", meaning tonality and

[158] The need to provide an explanation of the scientific or other intellectual basis for the selection of the criteria was also raised, prior to the Third Joint Report of Noise Experts, by the evidence of the town planners. In the Second Joint Experts Report – Town Planning, Mr Reynolds explains that:

> "26 When considering the reasonable expectations for amenity in the local area, in my opinion the following considerations are also relevant:
>
> a. It is necessary to take into consideration the full allowance of activity sought on the site. It should not be selective – but contemplate maximum use as sought by this development permit;
>
> b. It is appropriate to take into account the overall pattern of background noise, rather than a numeric single point of reference. That is, whilst traffic noise from roads may be audible, it is not audible at all times. Residents are likely to appreciate those times with no or little traffic. To 'fill' those gaps in traffic noise, with noise from the development, will have a consequential effect on amenity;
>
> c. The mathematical nature of the noise assessment cannot fully account for real world conditions, including weather. The noise assessment only considers calm winds, which may change exacerbating noise impacts;
>
> d. The noise assessment does not deal with the character of the noise. Tonality and other factors can influence the acceptability of noise upon amenity. I note Australian Standard AS 1055.-1997 '*Acoustics – Description and measurement of environmental noise – Part 2: Application to specific situations*' refers at para 4.3 to '*Assessment of other factors in noise annoyance*'. It states:
>
> > *"The methods of assessment described in this Standard involve the measurement of sound pressure levels in dB(A). This has been found to give a good correlation with annoyance caused by continuous broadband noise. However, in assessing the severity of noise annoyance, care shall be exercised because other factors may be important.*

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impulsivity come more to the fore, and with a resultant increased irritation to amenity. He contended that short duration or non-steady noise should be measured with the "*LA max*". Mr Evans also contended that the use of "*LAeq T=10 minutes*" may fail to show excessive noise levels when an event is of a shorter duration, and that, if "*LA max*" was not to be used, "*LAeq T= 5 minutes and Rolling LAeq T=5 minutes*" may be more appropriate. The acoustical engineers did not appropriately address this contention.

Note: Noise annoyance may have many causes, including the following:

(a) A high noise level over certain periods of the day or night either in absolute values or related to the ambient sound or the background sound at the receiver position in the absence of the noise being investigated.

(b) A single event or unusual change in the character of the noise.

(c) The presence of some characteristics in the noise which are not sufficiently reflected in the A-weighted level. Examples of such characteristics are tonal components and impulsiveness not adequately described in terms of tonal and impulse adjustments, if any and strong low frequency components.

(d) Strong ground or building vibrations, or vibrations of certain parts of a building, e.g. windows. Usually, noise will occur simultaneously with such vibrations.

(e) Psychosocial factors, e.g. personal sensitivity to noise and attitudes towards the source.

(f) History of occurrence and expectations raised as a result of previous assurance being given."

e. Further to the above, I also note that the *Explanatory Notes for SL 2008 No. 442* (being the *Environmental Protection (Noise) Policy 2008*) states at '*Section 8 Acoustic quality objectives for sensitive receptors*' that '*... meeting the objectives does not always mean that the environmental values are protected and not meeting the objectives does not always mean that the environmental values are not protected*' (page 10).

f. Expectations for noise amenity in a rural setting (the Rural zone) are different to what might be expected in an urban setting. Whilst occasional noise from farming activity may reasonably be anticipated, motor sport noise is not.

g. The noise assessment has not dealt with noise from special events."[100]

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100 Exhibit 9.2, pp 7-8.

[159] Although Mr Reynolds is not an acoustical engineer, he is qualified to express an opinion about the considerations that are relevant to a determination of reasonable expectations for amenity in the local area and that are relevant to assessing compliance with performance criteria PC19 of the Emerging Communities Domain Place Code. His observations about the traffic noise accord with the evidence of the Co-respondents by Election and that of Mr Enersen. The issues raised by Mr Reynolds reflect the concerns and issues raised by the Co-Respondents by Election. They are legitimate issues. The acoustical engineers do not address them.

[160] The deficiencies in the evidence of the acoustical engineers identified above relate to an issue that is fundamental to their opinion about the acceptability of the noise impact of the proposed development.[101] The deficiencies are such that I am not prepared to attribute any meaningful weight to the opinions of the acoustical engineers about the acceptability of the noise impact that would be occasioned by the proposed development. Their evidence does not persuade me that the proposed development would not detract from the amenity of the local area.

[161] The doubts that I harbour about the reliability of the evidence of the acoustical engineers because of the deficiencies outlined above are heightened by other deficits in their evidence.

[162] The second major deficit in the evidence of the acoustical engineers relates to the modelling of the noise generated by the proposed development. Figures 1 to 4 in the Second Joint Report of Noise Experts present the result of modelling undertaken by Mr Brown to predict the level of noise emission from what Mr Brown says are major noise-generating activities associated with the operation of the proposed use without the implementation of any specific noise control measures. Mr Brown does not describe the nature of the modelling undertaken, nor provide any details of it, other than those that are evident on the figures. Each of the figures describes the modelled wind conditions as "*calm*". The vehicles modelled are described as:

(a) 7 x Race Registered Motorbikes;

(b) 14 x 400cc-1000cc Road Registered Motorbikes;

(c) 7 x 125cc Praga DD2 Dragon Karts; and

(d) 15 x 20HP Ricciardo 35 GT Karts.

[163] These descriptions do not accord with the number and type of vehicles proposed in the table of activities that constitutes the proposed development (and which is referenced in the proposed conditions). Further, as observed by Mr Enersen, this modelling does not include the results of any downwind noise propagation. For those reasons, to the extent that this modelling informs Mr Brown's opinions, I have doubt about the reliability of those opinions.

[164] The third major deficit in the evidence of the acoustical engineers relates to their opinions about the acoustic attenuation that will be achieved by the proposed acoustic mounds. It is proposed that the acoustic mounds will be formed by placing shipping containers on top of earth mounds.

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101 See the explanation in paragraph [125] above.

[165] In the Consolidated List of Issues of the Co-respondents by Election attached to the court order of 25 September 2020, the Co-respondents by Election put in issue that:

> "It has not been independently demonstrated that the proposed acoustic mounds, involving shipping containers placed on top of dirt mounds, will achieve an acceptable level of noise attenuation."

[166] The acoustical engineers quoted this issue and then addressed it in a single paragraph in the Third Joint Report of Noise Experts. Their joint response was that:

> "Physical demonstration of the acoustical performance achieved by the acoustic mounds can be provided only after the mounds been (*sic*) constructed. In these circumstances, it is standard acoustical design practice to evaluate the acoustical performance of the acoustic mounds prior to construction by application of noise modelling using well-researched and widely-accepted barrier attenuation performance algorithms. In doing so, it has been determined that the 8m high Lowe W mound and the 10m high Evans NE mound – each constructed as a flat-topped earth mound with a line of 3.0m high shipping containers placed on top – will achieve the required level of acoustical attenuation when constructed in accordance with the set of plans prepared by Cozens Regan Group [CRG] which were submitted as part of the changed development application. CRG Drawing Nos E.07.10 SK10 P17, SK02 P9, SK03 P4 and SK04 P5 refer."

[167] The experts did not provide further elucidation on this issue either in this joint report or in other reports placed before the Court. This evidence suffers the same deficit already canvassed at length, that is the experts failed to identify the "*required level of acoustical attenuation*" to which they refer. In addition, the experts did not provide the modelling, nor did they refer to the "*well-researched and widely-accepted barrier attenuation performance algorithms*" in such a way that the cogency and probative value of their conclusion could be tested and evaluated by reference to them.

[168] Mr Brown provided some elucidation during cross-examination as part of the following exchange with Mr Evans:

> "The other matter is regarding the structure of these mounds and containers?---Yes.
>
> I have personally found [indistinct] searched for, research on – into it, and I've received no information from either you or Mr Enersen as – why they will work. Okay. I'm a general practitioner by income and a scientist by hobby, to the point where I have – I've had three national papers published back in the 1990s, so I [indistinct] I've got a – a grip on scientific methods. As – **are you able to give me any papers or references to papers which describe why this combination works?---Well, no, I would need to undertake some research to be able to provide you with material of the nature that you're requesting**. I have myself undertaken research on the adequacy of barriers, and barriers can be constructed in many forms. In general terms, they fit into three categories. I don't wish to take up

> too much time explaining it in detail, but I'm happy to do so, if that would be of assistance to you.
>
> Right – precis outline, if you would, please?---The most common barrier, of course, is what was ter – what's termed the freestanding barrier, which is sort of barrier you'll see adjacent to motorways, and the like. The second common barrier is an earth mound, which as you will – will recall is what was originally proposed for this particular facility, and the third most common, or third form of barrier, is a combination barrier, which is a combination of earth mound and a freestanding or, in this case, a container-chain barrier on top. Now, the – the key – the key factor that determines the effectiveness of a barrier is its height. The second important matter is its length, and the third is what's termed its superficial density. Now, that's – that's irrelevant in an earth mound, but in a freestanding barrier, it becomes important. There is – can be readily determined that the performance of this barrier will be equivalent to an earth mound of the same height, because it is its height that will determine it. The superficial density requirement of the container component of it is more than adequately met by the double-steel construction of the – the barrier. It will be important, of course, to ensure that the gaps within the containers are – are closed off, and there are measures being put in place to ensure that's, in fact, the case."[102]
>
> (emphasis added)

[169] This evidence suggests to me that Mr Brown has not undertaken research into the efficacy of noise attenuation of the type proposed. While he did refer to some research, it is apparent from the cross-examination by Mr Blenkiron that immediately followed that the research was of a generalised nature and not specific to the type of attenuation proposed in this case. The relevant exchange was as follows:

> "CO-RESPONDENT BLENKIRON: The question relates to the last answer. You've done research. Is there a case anywhere in Australia or the world that has steel containers on a – on a mound to act as a sound barrier?---**You're asking me whether I have conducted research or I've been involved in a case** - - -
>
> **Well, either your research** - - -?---Yes.
>
> - - - **or a case study that has occurred to indicate the efficacy of steel containers on mounds**?---**No, I haven't**, although I can direct you to where they've been used successfully. The first instance is the construction of the Airport Link Tunnel in Brisbane. Containers were placed by the State to control the noise from tunnelling activities at two locations that I'm aware of. One was at the – the exit of the tunnel, or the roadworks that were – the roadworks that were undertaken at the intersection of Stafford Road and Gympie Road, and those containers were stacked at least two high, and I think in

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[102] Transcript of Proceedings, *Gold Coast Motorsport Training Centre Pty Ltd v Gold Coast City Council & Ors* (Planning and Environment Court of Queensland, 3387/16, Kefford DCJ, 1 June 2021) 16-7.

> some instances three high, to shield the residents behind from the – the noise of – of traffic and construction activity. The second application of containers was at the exit point of the tunnelling machine at Eagle Junction, or Clayfield. I'm not sure where – which – which suburb it was – not visible from the road, but clearly visible from the – from the community, and again for the same reason. It was – it was a – a – a barrier put in place to provide shielding to the – to the residents.
>
> So in those cases, were there any follow ups to the effectiveness of the barriers?---I have – I have no knowledge of that, but I would fully expect the State would not engage upon such activity if it didn't work.
>
> **HER HONOUR: The question was premised on the basis of steel containers on mounds, not - - -?---Yes.**
>
> **- - - in reference to containers. Were they on mounds?---Oh, no, these were on the ground, your Honour.**
>
> **Yes, so you purported to give an answer that there are examples of steel containers on mounds, because that was the question, but in fact, they are only steel containers on the ground, not on mounds?---Yes, that's correct,** and - - -"[103]
>
> (emphasis added)

[170] Neither Mr Brown's description of general research about noise attenuation barriers and their attributes, nor his assertion during re-examination that it makes no difference whether the container is on the ground or a mound, does not assuage my concern that the cogency and probative value of his conclusions could not be tested. He did not provide the relevant research, nor identify it with any particularity, even though in his document identifying issues in dispute, Mr Blenkiron said that:

> "If I held reservations that the proposed earth bunds (absorptive properties) would achieve acoustic quality objectives at the receptor sites then I have further reservation of the effectiveness of steel containers (reflective/reverberating/resonating properties) added into the mix. Furthermore, the modeling (*sic*) has been based on unproven assumptions and no empirical evidence provided."[104]

[171] Further, as was identified by Mr Brown during his re-examination, the efficacy of the proposed noise attenuation assumes there would be no settlement of the earth mounds after the containers are placed on top of them. There is no evidence that demonstrates this assumption is valid. It was not addressed in the report of Mr Elkington, the geotechnical engineer retained by the Appellant.

[172] My concerns about the evidence in the joint reports of the acoustical engineers were not assuaged by their individual reports or their oral testimony. Those reports

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103 Transcript of Proceedings, *Gold Coast Motorsport Training Centre Pty Ltd v Gold Coast City Council & Ors* (Planning and Environment Court of Queensland, 3387/16, Kefford DCJ, 1 June 2021) 17-8.

104 Exhibit 2.2B p 81 (PDF pagination) or p 243 (based on pagination written in the PDF version).

similarly contained bald assertions that were so devoid of explanation that the opinions could not be tested.

[173] In addition, Mr Brown's contributions to the joint reports, his individual statement and his oral testimony left me with the impression that Mr Brown was inclined to act as an advocate for his client rather than present independent evidence for the assistance of the Court. My impression was informed by numerous matters, including the lack of responsiveness in his answers during cross-examination. It is sufficient to illustrate my concerns by reference to two additional examples from Mr Brown's evidence.[105]

[174] First, in paragraph 55 of the Second Joint Report of Noise Experts, Mr Brown opines that five types of noise control actions, adopted singly or in concert, could adequately address the exceedance of what he regarded as relevant noise level limits. They are:

(a) construction of an earth mound of appropriate height likely to be in the range of five to eight metres in height generally at the location shown on an attached figure;

(b) specific constraints on the days/hours of operation of particular noise generating activities;

(c) replacement of existing engine mufflers currently fitted to the two-stroke hire karts with higher acoustical performance mufflers;

(d) acoustical vetting (i.e. passby noise level testing) of private vehicles of some vehicle classes to ensure that excessively noisy vehicles (i.e. vehicles which do not achieve compliance with a prescribed passby noise level requirement) are not permitted on the track until appropriate rectification works are undertaken; and

(e) continuation of/extension of the development permit for a material change of use (code assessment) for a temporary use (special event) for specific events conducted annually.

[175] It is apparent from paragraph 58 of that report that, at the time of the report, Mr Brown had not yet developed the final schedule of noise control actions. It is difficult to accept that, even with his experience, Mr Brown could be confident that the adoption of the fifth of these measures "*singly*" would achieve the required degree of attenuation. That measure would provide no attenuation to the daily activities of the proposed motorsport facility.

[176] In paragraph 62(v) of the Second Joint Report of Noise Experts, Mr Brown describes the development of noise control measures as a collaborative task that was yet to be undertaken between him and his client. It is apparent from that statement that Mr Brown was prepared to proffer an opinion that noise emissions from the proposed development could be attenuated to a point that would satisfy the selected noise limits at the noise-sensitive receptors without having an identifiable engineering foundation for the opinion. In comparison, Mr Enersen accepted that it may be possible, but explained that the noise control actions identified by

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105 The deficits with Mr Brown's evidence referred to above are also examples of the matters that create the impression that he was inclined to act as an advocate.

Mr Brown did not contain sufficient detail to accurately determine whether noise emissions would be adequately attenuated to preserve acoustic amenity at all noise-sensitive locations. The subsequent reports of the experts demonstrate that the opinions expressed by Mr Brown in the Second Joint Report of Noise Experts were ill-founded. For example, the earth mounds now proposed are eight and ten metres in height (not five to eight) **and** the mounds are proposed to be topped by three-metre high shipping containers.

[177] The second example relates to Mr Brown's individual statement.[106] Mr Brown indicates that the purpose of the report is to, amongst other things:

> "demonstrate that, from an acoustical perspective and having regard to the set of joint reports of noise experts **as well as supporting information previously prepared for this matter**, there is no reason to refuse the development application."
>
> (emphasis added)

[178] At paragraph 32 of his individual statement, Mr Brown opines:

> "From an acoustical perspective and having regard to the set of joint reports of the noise experts **as well as the supporting information prepared for this matter**, there is no reason to refuse the development application."[107]
>
> (emphasis added)

[179] It is clear from these statements that the supporting information prepared for the matter is fundamental to the opinion expressed by Mr Brown. In that respect, Mr Brown's individual report purports to provide a summary of:

(a) four joint reports of noise experts;

(b) two without prejudice reports of noise experts;

(c) one report prepared pursuant to a Mediation Agreement consented to on 23 April 2018;

(d) one report prepared pursuant to a Mediation Agreement consented to on 31 May 2018;

(e) one report prepared pursuant to a request made on 5 July 2018 by the solicitors engaged by the Council on behalf of Mr Ross Evans;

(f) one report prepared pursuant to a request made on 12 July 2018 by the solicitors engaged by the Council on behalf of Mr Ross Evans; and

(g) four reports prepared pursuant to a request made on 22 July 2019 by the solicitors engaged by the Council.

[180] In his summary, Mr Brown asserts that the reports provide details of technical matters, yet he did not attach the reports to his individual statement or otherwise reveal the technical details that he asserts those reports contain. Further, while

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106 Exhibit 11.1.

107 A similar observation is made in Exhibit 11.1 p 15 [70].

Mr Brown attests to his belief that the facts in the four joint reports are true and correct and that the opinions in the four joint reports are honestly held by him, no such attestation is made with respect to the other ten reports. Other than the four joint reports, the relevant supporting information relied on by Mr Brown was not placed before the Court, nor were the "*technical matters discussed ... during the mediation held on 6 October 2017*"[108] on which Mr Brown relies. As such, the facts on which his opinion is based have not been identified, let alone proved. Mr Brown's report does not comply with the requirements of r 428 of the *Uniform Civil Procedure Rules 1999* (Qld).

[181] For the reasons provided above, I am not prepared to accept the evidence of the acoustical engineers.

Has the Appellant demonstrated that the noise impact will not unacceptably detract from the amenity of the local area?

[182] Having regard to the evidence of the Co-respondents by Election and the evidence of Mr Enersen about the traffic noise, I find that the proposed motorsport facility would detract from the amenity of the local area by reason of adverse noise impacts. The evidence of the acoustical engineers does not persuade me that the proposed noise mitigation measures will achieve suitable sound pressure levels. Even if further noise mitigation measures were employed, such as more stringent noise limits or additional acoustic attenuation, I am not satisfied that such measures could appropriately address the severity of noise annoyance that would be caused by the proposed development. The evidence of the acoustical engineers falls seriously short of demonstrating that a decision to approve the proposed development would comply with performance criteria PC19 of the Emerging Communities Domain Place Code.

[183] Further, even if I were to assume that the proposed noise attenuation measures were capable of addressing the noise sound pressure impact of noise occasioned by the proposed development, such measures would not address the impact associated with the character of the noise. That character of noise is not consistent with the amenity that is reasonably expected in the locality.[109] Having regard to the reasonable expectations of the residents, I find that the proposed development would unacceptably detract from the amenity of the local area.

What is the nature and extent of the conflict?

[184] The Appellant submits that there is an absence of impacts from the proposed development and, as such, the conflict with pt 5, div 1, ch 2, s 4.6.1 of the Planning Scheme would be minor. The Council similarly submits that the evidence indicates that there is no practical measure of incompatibility between the proposed development and current (and anticipated) surrounding uses in the Emerging Communities Domain. It says that the seriousness of the identified land-use conflict is reduced because:

(a) active recreational facilities are an anticipated use within the Inter-Urban Break Structure Plan area;

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108 Exhibit 11.1 p 12 [55].

109 See paragraphs [112] and [113] above.

(b) the evidence of Mr Leslie Curtis, the visual amenity expert retained by the Appellant, indicates that the proposed development, with the conditioned landscaping treatments and works, would have no unacceptable visual amenity impacts. He opines that it would maintain the anticipated rural character of the area and that there will be a positive contribution to the visual amenity of the local area after five years when the landscape buffer is established;

(c) the evidence of the air quality experts, Mr Welchman and Mr Galvin (retained by the Appellant and the Council respectively), indicates that, subject to compliance with an appropriate dust management plan, the proposed development can be conducted such that adverse impacts on the health and amenity of sensitive receptors are avoided;

(d) Dr Watson, the ecological expert called by the Appellant, demonstrates that the conditions would achieve the rehabilitation and conservation outcomes identified as appropriate for the Inter-Urban Break Structure Plan area. Dr Watson explains that:

> "48. The proposed development includes the creation of conservation buffers in the order of 5.7ha with additional landscape buffers to 0.4ha. These areas are essentially (currently) devoid of native vegetation with limited ecological value.
>
> 49. The Appellant/Council agreed conditions (and the Council Draft Conditions) of approval include specific (and detailed) requirements for the rehabilitation (weed control and planting), protection (i.e. covenant) and ongoing management of these areas.
>
> …
>
> 51. In my opinion, for the reasons described in this Statement, the proposed development (specifically the landscape and conservation buffer rehabilitation on (*sic*) long-term protection) will significantly increase the ecological values of the area.";[110] and

(e) the evidence of the acoustical engineers demonstrates that the proposed development would not adversely impact upon the existing amenity of the Rural Precinct of the Inter-Urban Break Structure Plan area.

[185] Ultimately, the Council submits that the land-use conflict arising as a consequence of the use not being one listed within Table A of the Emerging Communities Domain Table of Development is of a lower order, in circumstances where the planning rationale of that restrictive land-use provision would not be compromised by the proposed development.

[186] The approach of this Court in assessing the nature and extent of any conflict is well documented in previous decisions of this Court and the Court of Appeal.[111] The

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110 Exhibit 11.9.

111 *Weightman v Gold Coast City Council & Anor* [2002] QCA 234; [2003] 2 Qd R 441; *Woolworths Ltd v Maryborough City Council & Anor (No. 2)* [2005] QCA 262; [2006] 1 Qd R 273, 286; *Lockyer*

conflict should be considered in the broader context of the Planning Scheme to ascertain the nature of any planning policy reflected in the provision and the degree of importance the planning scheme attaches to compliance with that policy.[112]

[187] Here, the conflict with the Planning Scheme occasioned by approval of the proposed development is twofold. First, a decision to approve the proposed development would conflict with the Planning Scheme because outdoor sport and recreation is categorised as an undesirable use in the Emerging Communities Domain.[113] As I have already mentioned in paragraph [18] above, the Appellant and the Council accept this land-use conflict. Second, a decision to approve the proposed development would conflict with the Planning Scheme because it would authorise a use that would detract from the amenity of the local area.

[188] The conflict occasioned by the proposed outdoor sport and recreation use is at the more serious end of the spectrum. It is at variance with an evident policy intention that outdoor sport and recreation uses not be located in the Emerging Communities Domain.[114] The policy to nominate these uses as "*undesirable or inappropriate*" does not lose force merely because of its operation as a default provision that applies to all outdoor sport and recreation uses irrespective of their nature, intensity and scale, although such matters are relevant to the overall seriousness of the conflict.[115]

[189] In this Planning Scheme, the domains are the key to the assessment status of individual development proposals within their subject areas. This includes their policy status of "*undesirable or inappropriate*" development. The Planning Scheme explains that domains provide for the distribution, mixing and segregation of different types of uses, and each domain is intended to provide for compatible development and to segregate incompatible development.[116]

[190] I do not accept the Council's submission that the planning provisions in the Inter-Urban Break Structure Plan ameliorate the land-use conflict. For the reasons provided in paragraphs [47] to [58] above, I do not accept that active recreational facilities are an anticipated use within that part of the Inter-Urban Break Structure Plan area occupied by the subject land.

Valley Regional Council v Westlink Pty Ltd [2011] QCA 358; (2011) 185 LGERA 63; *Lockyer Valley Regional Council v Westlink Pty Ltd* [2012] QCA 370; [2013] 2 Qd R 302, 322-3 [18]-[21]; *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2013] QPEC 15; [2013] QPELR 711, 718 [19] and *Zappala Family Co Pty Ltd v Brisbane City Council & Ors; Brisbane City Council v Zappala Family Co Pty Ltd & Ors* [2014] QCA 147; (2014) 201 LGERA 82. It was also considered more recently in *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132, [2020] QPELR 631.

112 *Stappen Pty Ltd v Brisbane City Council & Ors* [2005] QPEC 3; [2005] QPELR 466, 473 [31].

113 *Lockyer Valley Regional Council v Westlink Pty Ltd & Ors* [2011] QCA 358; (2011) 185 LGERA 63.

114 For the reasons provided in paragraphs [47] to [57] above, the policy intention, as it relates to the subject land, is not modified by the provisions of the Inter-Urban Break Structure Plan.

115 *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2013] QPEC 15; [2013] QPELR 711, 757-8; *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2014] QCA 21; [2014] QPELR 168.

116 Exhibit 5.1 p 156.

[191] In addition, I do not accept the submissions of the Appellant and the Council that the conflict is diminished by reason of the absence of any unacceptable impact and any practical measure of incompatibility between the proposed development and current (and anticipated) surrounding uses. As I have already found above, the proposed development will detract from the amenity of the local area by reason of the noise impact it would occasion. It is incompatible with the surrounding land uses. In those circumstances, the evidence of Messrs Curtis, Welchman and Galvin and that of Dr Watson is insufficient to meaningfully diminish the extent of conflict occasioned by the approval of an undesirable and inappropriate use that will detract from the amenity of the local area.

What grounds does the Appellant rely on to justify approval?

[192] The grounds that the Appellant relies on to justify approval of the proposed development are as follows:

> "1. There is an absence of unacceptable impacts occasioned by the proposed use
>
> 2. The proposed use will significantly increase the ecological values of the area through rehabilitation, revegetation and appropriate land use and management
>
> 3. The proposed use is a compatible land use in the Rural Precinct of the Inter-Urban Break Structure Plan within the Emerging Communities Domain in the [Planning Scheme], in that the proposed use:
>
> i. creates active recreational facilities within the Structure Plan area;
>
> ii. is a tourist facility which complements the rural/open landscape character of the Structure Plan area
>
> 4. The proposed use is a "consistent" use in the Rural Zone in Gold Coast City Plan 2016, which was in effect when the respondent decided to refuse the development application
>
> 5. The proposed use is appropriate in a rural setting (such as the subject site), as opposed to an urban setting
>
> 6. There is a planning need for the proposed use
>
> 7. The site is in a location that is easily accessible to its intended patrons, while still being sufficiently remote as to avoid negative impacts on existing or likely future land uses/users in the area
>
> 8. The proposed use will attract visitors from outside the local government area, thereby providing increased economic activity for the region
>
> 9. The proposed use has no demand on Council services and infrastructure while satisfying and (*sic*) unmet demand for this type of outdoor sport and recreation

10. The proposed use would make a substantial positive contribution towards:

    i. improving the supply of tourist facilities, particularly on the northern Gold Coast

    ii. improving opportunities for recreation and interaction"[117]

[193] The grounds relied on by the Appellant raise six issues for consideration, namely:

(a) whether there is a need for the proposed development;

(b) whether there is compatibility between the proposed development and the intent for the Rural Precinct of the Inter-Urban Break Structure Plan within the Emerging Communities Domain;

(c) whether the proposed development is a type of use that is generally appropriate in a rural setting rather than an urban setting;

(d) whether the Gold Coast City Plan 2016 supports approval of the proposed development;

(e) whether there would be an absence of any unacceptable adverse acoustic, air quality, and visual amenity impacts from the proposed development; and

(f) whether there would be an enhancement of environmental or ecological values because of proposals for conservation zones on the subject land.

[194] Each of the matters that the Appellant seeks to rely on is a matter of public interest. The issue is whether they have been established on the evidence and, if so, whether they are sufficient to justify approval of the proposed development despite the identified conflict.

Is there a demonstrated need for the proposed development?

[195] The general principles that inform and guide an assessment of planning need are well settled. They are conveniently summarised by His Honour Judge Wilson SC (as he then was) in *Isgro v Gold Coast City Council & Anor*.[118] As His Honour stated:

> "Need, in planning terms, is widely interpreted as indicating a facility which will improve the ease, comfort, convenience and efficient lifestyle of the community… Of course, a need cannot be a contrived one. It has been said that the basic assumption is that there is a latent unsatisfied demand which is either not being met at all or not being adequately met."[119]

[196] Other relevant principles referred to in the analysis of the authorities in *Isgro v Gold Coast City Council & Anor*[120] include:

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117 Exhibit 2.8.
118 [2003] QPEC 2; [2003] QPELR 414, 417-20 [20]-[30].
119 *Isgro v Gold Coast City Council & Anor* [2003] QPEC 2; [2003] QPELR 414, 418 [21].
120 [2003] QPEC 2; [2003] QPELR 414, 417-20 [20]-[30].

(a) need in the town planning sense does not mean a pressing need or a critical need or even a widespread desire, but relates to the well-being of the community;

(b) a thing is needed if its provision, taking all things into account, improves the services and facilities available in a locality such that it will improve the ease, comfort, convenience and efficient lifestyle of the community;

(c) the question of whether need is shown to exist is to be decided from the perspective of a community and not that of the applicant, a commercial competitor, or even particular objectors;

(d) providing competition and choice can be a matter which also provides for a need, in the relevant sense, but of itself the addition of choice to the marketplace does not necessitate a finding of need;[121]

(e) need is a relative concept to be given a greater or lesser weight depending on all the circumstances which the planning authority is to consider; and

(f) in some instances, public or community need for a service or facility may not be great, and other considerations may be of greater moment.

[197] The Appellant contends that the need for the proposed development is a strong ground in support of approval. It says the proposed development will contribute to the general economy in the City of Gold Coast, including the tourism economy, by attracting visitors from within and outside the region and improving the supply of recreational and tourist facilities. It relies on the evidence of Mr Coghlin and Mr Norling, the need experts retained by the Appellant and the Council respectively.

[198] Mr Coghlin opines that there is a strong need for the proposed development, and that there is no suitable alternative site for the use in the Gold Coast local government area. His opinion is premised on six matters.

[199] First, Mr Coghlin says there are no existing or approved alternative facilities in or near Gold Coast City that have comparable characteristics to the proposed development. Mr Coghlin notes that the proposed development is distinct among karting tracks in South East Queensland in that it:

(a) has by far the longest kart track in South East Queensland;

(b) has the highest potential maximum speeds of any karting track in the Gold Coast and Brisbane areas;

(c) has the largest number of track options in one location, comprising a bitumen track with up to three configurations, and a dirt track;

(d) permits the largest variety of karts; and

(e) is available to the widest variety of patrons, as access is not restricted by club membership requirements or kart specifications.

[200] He says that management of the Appellant advises that it is the only karting track at the Gold Coast that meets the highest Australian Karting Association standards. As

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121 *Intrafield Pty Ltd v Redland Shire Council* [2001] QCA 116; (2001) 116 LGERA 350, 354 [19]-[21].

such, the Appellant tells him that it is the only karting track at the Gold Coast with the technical qualifications to host national and international karting events sanctioned by Karting Australia. No evidence was produced verifying this assumption.

[201] Second, Mr Coghlin opines that amongst Gold Coast karting tracks, the proposed development is best able to extend the breadth and impact of local motorsport as an industry and visitor attraction in that:

(a) it is used as a professional motorsport venue, in contrast to other local karting tracks which are primarily recreational facilities;

(b) the manager of the Norwell Motorplex advised that the proposed development has value as an entry level motorsport from which participants can advance to full-size motorsport facilities like Norwell Motorplex;

(c) the Appellant advises that it is a preferred local venue for professional drivers to maintain driving fitness in the off-season; and

(d) the proposed development has enhanced the profile of major Gold Coast motorsport events – most notably the Gold Coast 600 – through associated events featuring professional drivers.

[202] No evidence was produced verifying these assumptions.

[203] Third, Mr Coghlin relies on the fact that the track is an established venue for non-motorsport events. He says it hosts events that have been sponsored or endorsed by the Council, school boards and charitable institutions. He also says it provides a venue for testing and trialling new technology and vehicles, including use by the local Griffith University racing team for its racing cars. It provides a safe off-road venue for driver education for schools.

[204] Fourth, Mr Coghlin says that the supporting role of the existing facility in events such as Race of Stars during the Gold Coast 600 Supercars event contributes to Gold Coast tourism by extending the potential length of stay of intrastate, interstate, and overseas visitors. By establishing a motorsport hub within the Gold Coast area (along with complementary motorsport facilities such as Norwell Motorplex), it is creating a destination that offers "*hero experiences*", which Mr Coghlin says is an aim of the Gold Coast Destination Tourism Management Plan 2014-2020. A copy of that document was not placed in evidence before me.

[205] The fifth matter relied on by Mr Coghlin is that the proposed development is the only facility in Gold Coast City capable of hosting major karting events, plus various other motorsport and non-motorsport events. He says that in 2020, the existing facility generated around 11,450 visits from kart users alone, plus additional visits generated to various motorsport and non-motorsport events. He says that most of these visits were by patrons living outside Gold Coast and hinterland area.

[206] Finally, Mr Coghlin opines that there are no suitable alternative sites for the subject use. Mr Coghlin's assessment considers only those limited number of sites identified by Mr Norling in the Joint Experts Report on Need as being preferable

sites under the Planning Scheme. Mr Coghlin's conclusion that there are no suitable alternative sites is informed by his decision to disregard any site that is:

(a) now in a zone where karting uses would be regarded as an inconsistent use; or

(b) flood affected and which would require a flood assessment; or

(c) potentially affected by environmental constraints; or

(d) proximate to residential uses.

[207] Mr Norling opines that there is a moderate to strong level of community and economic need for the existing kart tracks on the subject land to continue operations. He says that each of the sites identified in the Joint Experts Report on Need as potential alternative sites remain theoretically able to accommodate an outdoor sport and recreation use as a consistent use. Nevertheless, he opines that presently there is a moderate to strong level of need. His opinion is informed by his assumption that, in Gold Coast City Plan 2016, there are no suitable lands that are ranked higher than the subject land to accommodate karting tracks of a similar scale and operation.

[208] The temporal constraint on Mr Norling's opinion is informed by two matters. First, there is an extant development application for a motorsport facility at 1416-1462 Stapylton Jacobs Well Road, Woongoolba that is currently in the referral period. Second, in the Joint Experts Report on Need, the experts agree that s 3.2.3 of Gold Coast City Plan 2016 states that the Council would investigate the City's agricultural cane lands for their suitability for use as a "*tourism-related adrenalin precinct*". The experts understand that this term is used to include one or more motor sport facilities. The experts note that s 3.5.4.1 of Gold Coast City Plan 2016 expands on this planning intent, stating that:

> "the suitability of an area within the city's agricultural cane lands will be investigated for use as a tourism related sports adrenalin precinct. Until this investigation is undertaken, and any amendments to the City Plan are completed, this area is to maintain its intent as a natural resource area."

[209] Mr Norling also opines that the need for the proposed development is strengthened by the fact that it already exists on the subject land and has a proven demand.

[210] I accept that if the proposed development were approved, it would provide a facility that is of some benefit to the community. It would contribute to the general economy in the City of Gold Coast, including the tourism economy. However, I am not persuaded that the need could properly be regarded as of any great moment for four reasons.

[211] First, the nature of the facility, being a kart racing and motorsport training facility, limits the potential for the facility to play a significant role in terms of fulfilling any substantial public or community need or in providing a benefit of significance.[122]

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[122] It can be contrasted with a use that provides for the daily essentials of ordinary life for which the bar should not be set too high: *Parmac Investments Pty Ltd v Brisbane City Council & Ors* [2008] QPEC 7; [2008] QPELR 480, 485 [30].

[212] Second, those who wish to enjoy this type of outdoor sport and recreation use have a range of options. In the Joint Experts Report – Town Planning, Mr Reynolds identifies that there are a significant number of other motorsport facilities located within the Gold Coast local government area and other parts of South East Queensland. He provides details of them in Attachment C of the Joint Experts Report – Town Planning. They include many motorsport facilities that exist or are approved in the Gold Coast City local government area, as well as others that exist or are approved in the local government areas of Brisbane City Council, Redland City Council, Logan City Council, Ipswich City Council, Moreton Bay Regional Council, Southern Downs Regional Council, Sunshine Coast Council and Lockyer Valley Council.[123] As is apparent from the evidence of Mr Norling, the proposed development is a type of use that draws patrons from a vast geographic area. In his individual statement, Mr Norling notes that 41 per cent of patrons originate from the Gold Coast, 36 per cent originate from Greater Brisbane and at least 15 per cent are assumed to comprise tourists.[124] As such, the existence of other facilities identified by Mr Reynolds is relevant.

[213] The need experts also identify a list of potentially competitive karting facilities that they inspected and provide a summary of the characteristics of the facilities. They include:

(a) Ipswich Kart Club, located in the Ipswich Motorsport Precinct at Willowbank. At the time of the Joint Experts Report on Need, the experts noted that the Ipswich Kart Club was in the process of upgrading its facilities to meet the highest standard set by the sport's national governing body;

(b) Archerfield Kart Hire, located adjacent Archerfield Airport;

(c) Kingston Park Raceway;

(d) Norwell Motorplex;

(e) Slideways Go Karting World (formerly LeMans);

(f) Slideways Nerang; and

(g) Game Over in Helensvale.

[214] I accept that the proposed development has several different characteristics to the other existing facilities and, as such, presents another choice to the market. However, that does not, of itself, demonstrate that there is a strong need for the proposed development.

[215] Third, I am cautious about the reliability of the opinions expressed by Mr Coghlin and the matters that Mr Norling says strengthen the need for the proposed development. Both need experts support their opinions by reference to the existing unlawful use. They were apparently oblivious to the caveats imposed on this Court, whereby no advantage can be given to the Appellant because of an unauthorised use.[125]

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123 I accept that the list was produced some time ago. I have placed more weight on the list produced by the need experts referred to in paragraph [213], which those experts verified recently.

124 Exhibit 12.1 p 4 [16].

125 See the observations of Jerrard JA in *Leda Holdings Pty Ltd v Caboolture Shire Council* [2006] QCA 271 referred to in paragraph [44] above.

[216] In addition, I do not accept Mr Coghlin's opinion that there are no suitable alternative sites. The basis on which he discards each of Mr Norling's identified sites as suitable alternatives is that they have constraints that are similar to those that apply to the subject land. The subject land falls within the Designated Flood Affected Area on Natural Hazard (Flood) Management Areas – Overlay Maps OM17-12 and OM17-13; Major Linkages (Land & Water Based) area on Conservation Strategy Plan – Overlay Map OM20-1; Scenic Tourist Rotes – Land on Scenic Tourist Routes – Overlay Map OM22-1; and Good Quality Agricultural Land area on Good Quality Agricultural Land – Overlay Map OM2.[126]

[217] Further, it was apparent from the cross-examination of Mr Coghlin that his opinion was informed by information provided to him by the Appellant that he did not independently verify and the accuracy of which is questionable. During re-examination Mr Coghlin indicated that even if the information provided by the Appellant was incorrect, it would not change his opinion. This only causes me to further doubt the reliability of his opinion.[127]

[218] Fourth, to the extent that there is a need for further motorsport facilities, it seems that the Council intends to investigate the best location for such uses. There is no evidence of a pressing need that warrants cutting across the Council's future planning for such facilities.[128]

[219] For the reasons outlined above, I accept that there is some evidence of need for, and community benefit deriving from, the proposed development but find that it is of minor weight only.

Is the proposed development compatible with the intent for the Rural Precinct of the Inter-Urban Break Structure Plan?

[220] The Appellant has not demonstrated that the proposed development is compatible with the intent for the Rural Precinct of the Inter-Urban Break Structure Plan. For the reasons provided in paragraphs [47] to [58] above, I do not accept that active recreational facilities and tourist facilities are anticipated uses within that part of the Inter-Urban Break Structure Plan area occupied by the subject land. The proposed development is not a use that is intended under the Planning Scheme to complement the rural or open landscape character of the local area.

Is the proposed development a type of use that is generally appropriate in a rural setting rather than an urban setting?

[221] Assuming that the proposed development is a type of use that is generally appropriate in a rural setting rather than an urban setting, this is not a ground that tells in favour of approval in this case. This is because, for reasons I have already provided, the proposed development will unacceptably detract from the amenity of the local area in which it is proposed.

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126 Exhibit 17.3.

127 The relevant information indicated that a competitor facility was changing its facilities in a manner that would make it less attractive as an alternative option.

128 Although the contents of Gold Coast City Plan 2016 was not proved by the Council, it did not suggest that the evidence of Mr Norling about the contents was incorrect. As such, it is reasonable to infer that the quotes from Gold Coast City Plan 2016 were accurate.

Does the Gold Coast City Plan 2016 support approval of the proposed development?

[222] In its written Outline of Submissions, the Appellant summarised the issues arising from the grounds it relied on. The summary made no reference to Gold Coast City Plan 2016. As such, it appears that the Appellant has abandoned the ground referenced in paragraph 4 of Exhibit 2.8.

[223] In any event, the Appellant has not established that Gold Coast City Plan 2016 supports approval of the proposed development. Gold Coast City Plan 2016 was not placed in evidence before the Court.

Is there an absence of any unacceptable acoustic, air quality, and visual amenity impacts from the proposed development?

[224] The Appellant alleges that there will be an absence of any unacceptable acoustic, air quality, and visual amenity impacts from the proposed development. It says this is a matter of public interest.

[225] In *Lockyer Valley Regional Council v Westlink Pty Ltd*, Holmes JA (with whom White JA and Atkinson J agreed) observed that:

> "It may be accepted, as *Grosser* says and *Palyaris* implies, that the mere absence of adverse effects will not amount to sufficient grounds to outweigh a conflict with the planning scheme; but it does not follow that the absence of a negative impact or detrimental effect is not a relevant consideration. In any case, *Grosser* and *Palyaris*, it should be remembered, were concerned with a different expression, "planning grounds", and hence a narrower inquiry than that entailed in assessment of the unqualified and broadly defined "grounds" which are now relevant. It must be a matter of public interest, for example, that the project under consideration will not destroy local amenity. The isolation and screening of the project were properly considered as a ground, to be weighed with other grounds in considering their sufficiency."[129]

[226] As such, the absence of detrimental impact on amenity is a matter of public interest to be weighed with other grounds in considering their sufficiency.

[227] The evidence of Messrs Welchman and Galvin about the absence of adverse air quality impacts was unchallenged. They opine that, subject to compliance with an appropriate dust management plan, the proposed development can be conducted such that adverse impacts on the health and amenity of sensitive receptors are avoided.

[228] There was also no challenge to the evidence of Mr Curtis that, with the conditioned landscaping treatments and works, the proposed development would:

(a) have no unacceptable visual amenity impacts;

(b) maintain the anticipated rural character of the area; and

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[129] *Lockyer Valley Regional Council v Westlink Pty Ltd* [2012] QCA 370; [2013] 2 Qd R 302, 323-4 [25].

(c) provide a positive contribution to the visual amenity of the local area after five years when the landscape buffer is established.

[229] In those circumstances, the absence of adverse air quality and visual amenity impacts from the proposed development sound in support of its approval.

[230] For the reasons provided above, including at paragraphs [182] to [183] above, the Appellant has not demonstrated that the proposed development would not occasion unacceptable acoustic impacts.

Would the proposed development enhance the environmental or ecological values of the subject land?

[231] The Appellant alleges that the proposed development will enhance the environmental or ecological values of the subject land. It says Dr Watson expresses a firm opinion that the proposed landscaping, rehabilitation, and conservation works would significantly increase the ecological values of the area.[130] The Appellant submits that this ground, consistent with the views of Mr Curtis regarding positive contribution to visual amenity,[131] is strong justification for approval of the proposed development despite any conflict with the Planning Scheme. It submits the strength of the ground is supported by consideration of the specific purposes for the Inter-Urban Break Structure Plan and the Rural Precinct under the Inter-Urban Break Structure Plan. Those purposes are heavily directed toward preservation of landscape character and protection and enhancement of ecological features.

[232] Dr Watson's evidence was not challenged. His conclusions are summarised in paragraph [184](d) above.

[233] I accept that from an ecological perspective the proposed works in the conservation and landscape buffers will be an improvement on the current state of the subject land. However, given the outcomes the Appellant says are sought under the Inter-Urban Break Structure Plan for any development in the Structure Plan area, of itself this ground is not a particularly weighty consideration in support of approving a development that is considered to be an undesirable use and that will detract from the amenity of the local area.

Are there sufficient grounds to justify approval of the proposed development, despite the conflict with the Planning Scheme?

[234] It must be accepted that the Planning Scheme is an expression of the public interest in terms of land use and that, *prima facie*, ensuring development conforms with the Planning Scheme is in the public interest. It is apparent from the Planning Scheme that use of the subject land for outdoor sport and recreation is not considered to be in the public interest. The proposed development is also not considered to be in the public interest as it would detract from the amenity of the local area.

[235] In this case, the real question to be decided is whether the deviation from the Planning Scheme to approve the proposed development serves the public interest to an extent greater than the public interest in certainty that the terms of the Planning

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130 Exhibit 11.9, p 11 [51].

131 See page 41 of the Exhibit 11.5.

Scheme will be faithfully applied.[132] This is not determined by a general weighing exercise, but by considering whether there are identifiable public interest reasons why the terms of the Planning Scheme should not prevail such that it is appropriate to override the public interest in its application to the subject land.

[236] I am not persuaded that the combined weight of those grounds established by the Appellant is sufficient to overcome the clear planning strategy with respect to the subject land. The Council has made a deliberate planning decision to categorise an outdoor sport and recreation use as an undesirable and inappropriate use on the subject land. It has also made a deliberate planning decision to protect the amenity of the local area. In this case, it is not in the public interest to subvert the planned outcomes for the subject land nor to approve the proposed development given it will detract from the amenity of the local area.

Are the disputed conditions appropriate?

[237] Considering my findings about the appropriateness of the proposed development, it is unnecessary for me to consider the issues about conditions in any detail. It suffices to say that I was not satisfied that the conditions proposed by the Appellant and the Council were entirely appropriate. Below I identify a few of the inadequacies.

[238] Had I determined that it was appropriate to approve the proposed development, I would have imposed an additional condition to require the operator to capture closed circuit television camera footage of the activities on each of the tracks. It would be reasonable to require the maintenance of that material for a period of two years. A video recording of this nature would assist with ensuring compliance with the proposed limits on the number and types of vehicles that are proposed to be permitted. I consider this type of condition to be a reasonable requirement in response to the proposed development given the history of unlawful conduct of a motorsport facility on the subject land.[133]

[239] If I were minded to approve the proposed development, I would have also requested further submissions about the appropriateness of a condition requiring the operator to provide noise data and closed circuit television camera footage to any person who requests it within a reasonable period of receiving a request for such data or footage. At first blush, a condition of that nature might seem excessive. Ordinarily one would expect the Council, as proper guardian of development rights and amenity expectations in this local government area, to ensure that any unlawful development is brought to account.[134] However, for reasons unexplained, the Council has apparently been content to allow the deliberate breaches of planning law on the subject land to continue. It has acquiesced in the continued unlawful operation of a motorsport facility on the subject land since it issued an enforcement notice on 17 October 2014. The unfortunate attitude of the Appellant as a corporate citizen carrying on business in the City of the Gold Coast, and the even more troubling attitude of the Council as proper guardian of development rights and amenity

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132 *Gold Coast City Council v K&K (GC) Pty Ltd* [2019] QCA 132; [2020] QPELR 631, 646 [67].

133 *Lifnex Pty Ltd and Oil Recyclers Australia Pty Ltd v Ipswich City Council* [1998] QPELR 517, 518; *Clermont Quarries Pty Ltd v Isaac Regional Council* [2020] QPEC 18; [2021] QPELR 65, 111 [183].

134 *NRMCA (Qld) Ltd v Andrew* [1992] QCA 8; (1993) 2 Qd R 706, 712-3.

expectations in the area, are not immediately relevant to the merits of this application. They would not be a reason to refuse an otherwise meritorious development (if such a development was proposed). However, they may be a reason to carefully consider the extent of conditions that are appropriate.[135]

[240] I would have also required a condition in the nature of the draft condition 9 attached to the Appellant's Outline of Submissions. That condition requires the automated light system for the global acoustic monitoring device to be visible to drivers of vehicles on the tracks and requires the drivers to immediately leave the track if the red light is activated.

[241] Several other conditions proposed by the Appellant and the Council are also unsatisfactory. They are poorly drafted and open to challenge, particularly in terms of the timing of compliance with the conditions. For example, condition 36 requires a copy of an approval for a covenant management plan to be provided with any future operational work development applications. Condition 5 requires one such application to be made within one month of the grant of the subject approval. Despite that, condition 35 does not require the covenant area management plan to be submitted to the Council until six months after the date of the subject approval. This is but one example of the difficulties with the proposed conditions. In general, the difficulties are attributable to adoption of a drafting style that assumes that the operator must commence the proposed development under the approval from the date the approval is granted, rather than imposing conditions on the basis that the proposed development will not be lawful until all necessary approvals are in place, including those for building and operational works.

Conclusion

[242] The Appellant has not discharged the onus in the appeal. The appeal is dismissed, and the development application is refused.

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135 *Lifnex Pty Ltd and Oil Recyclers Australia Pty Ltd v Ipswich City Council* [1998] QPELR 517, 518.