PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Edith Pastoral Company Pty Ltd v Somerset Regional Council & Ors* [2021] QPEC 52
PARTIES:	**EDITH PASTORAL COMPANY PTY LTD** (appellant) **v** **SOMERSET REGIONAL COUNCIL** (respondent) And **KARREMAN QUARRIES PTY LTD** (first co-respondent by election) And **GTC ENTERPRISES PTY LTD** (second co-respondent by election) And **WAYNE MILLS, LISA MILLS, DEAN RUTHERFORD, BELINDA RUTHERFORD, ROBERT MEHL, MONIQUE MEHL, CHRISTOPHER GEORGE MILLS, NEIL MALLER, NARELLE MALLER, JOHN STEWART, BONNIE JEAN ANNAN, VALMA JOHNSON, MAREE OLIVER, KAREN MARSHALL, LEIGHTON MARSHALL, PETER MARSHALL, NEIL O'CONNOR, WALTER SMITH, MARY OLIVER, PETER POLIANSKY, GRACE POLIANSKY, WILLIAM JOHN BICKERS, RONDA WILLIAMS, JASON WEARE, AMANDA WEARE** (third to twenty-seventh co-respondents by election)
FILE NO/S:	2773 of 2019
DIVISION:	Planning and Environment Court
PROCEEDING:	Applicant appeal against refusal
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	13 October 2021
DELIVERED AT:	Brisbane
HEARING DATE:	8, 9, 10, 11, 12, 17, 18, 19, 22, 23, 24 and 26 February 2021 with further submissions delivered on 5 March 2021

JUDGE: Williamson QC DCJ

ORDER:

1. **The appeal is dismissed.**
2. **The respondent's decision to refuse the appellant's development application is confirmed.**

CATCHWORDS: PLANNING AND ENVIRONMENT – APPEAL – where appeal against decision to refuse an application for a material change of use comprising an extractive industry, concrete batching plant and environmentally relevant activity – whether the development is a single planning unit – whether the development will have unacceptable visual amenity and character impacts – whether the development will have unacceptable noise impacts – whether the development will have sufficient access to water – whether operational characteristics of the development warrant refusal – whether the development complies with the respondent's 2005 planning scheme – the weight to be given to the respondent's 2016 planning scheme – whether the development complies with the respondent's 2016 planning scheme – whether there is a town planning, community, and economic need for the development – whether there are discretionary matters that support approval – whether the planning discretion should be exercised in favour of approval.

LEGISLATION: *Planning Act 2016*, ss 45, 59 and 60
Planning and Environment Court Act 2016, ss 43, 45 and 46
Water Act 2000, s 119

CASES: *Abeleda & Anor v Brisbane City Council & Anor* [2020] QCA 257
Agtec Holdings Pty Ltd v Kilcoy Shire Council & Ors [1999] QPELR 208
Ashvan Investments Unit Trust v Brisbane City Council & Ors [2019] QPEC 16
Barro Group Pty Ltd v Sunshine Coast Regional Council [2021] QPEC 18
Bell v Brisbane City Council & Ors [2018] QCA 84
Brisbane City Council v YQ Property Pty Ltd [2020] QCA 253
Bunnings Building Supplies Pty Ltd v Redland Shire Council & Ors [2000] QPELR 193
Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor [2018] QPEC 52
HPC Urban Design and Planning Pty Ltd & Anor v Ipswich City Council & Ors [2020] QPELR 534
I.B. Town Planning v Sunshine Coast Regional Council [2021] QPEC 36
Luke & Ors v Maroochy Shire Council & Anor [2003] QPELR 447
Sellars Holdings Ltd v Pine River Shire Council [1988] QPLR 12
Trinity Park Investments Pty Ltd v Cairns Regional Council

& Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors [2021] QCA 95
Walker v Noosa Shire Council [1983] 2 Qd R 86
Wilhelm v Logan City Council & Ors [2020] QCA 273

COUNSEL: Mr C Hughes QC and Mr M Batty for the appellant
Mr J Davies for the respondent
Mr B Job QC and Mr D Quayle for all co-respondents by election

SOLICITORS: Thynne Macartney for the appellant
King & Company for the respondent
Connor O'Meara for all co-respondents by election

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Introduction

[1] This appeal is against a refusal by Council of a development application seeking approval to start a new use of rural land located at Gregor's Creek. The new use comprises two components, namely a hard rock quarry extracting up to 100,000 tonnes per annum and a concrete batching plant.

[2] Council opposes the appeal.

[3] A number of Co-respondents, who made a submission about the development application during the public notification process, elected to be parties to the appeal. They share common representation, and oppose the appeal.

[4] The appeal is a hearing anew.[1]

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[1] Section 43, *Planning and Environment Court Act 2016*.

[5] It is for the appellant (**Edith Pastoral**) to establish the appeal should be upheld.[2]

The land and surrounding locality

[6] The land the subject of the development application is situated at Gregors Creek Road, Gregors Creek (**the land**). It is irregular in shape and comprises seven (7) lots having a total area in the order of 369 hectares.[3]

[7] Aerial photography, read in conjunction with a smart map,[4] reveals the land is, in broad terms, separated into a northern and southern portion. The southern portion comprises four lots and accounts for approximately 95 percent of the total land area.[5] The separate portions are created by the upper reach of the Brisbane River, which meanders through the landscape.[6] Connection between the northern and southern portions of the land is achieved by way of a constructed causeway across the river.[7] Access to the land is obtained via an unsealed track connecting to Gregors Creek Road. The majority of the land is described as cleared grassland with areas of scattered trees.[8]

[8] The land is a rural property used for grazing. It is improved with a dwelling house, sheds, fences, dams and unsealed access tracks. One of the sheds, which is located on the southern portion of the land, is large and open-sided. It was used in conjunction with the balance of the land as a dairy farm. Historically, an extractive industry was undertaken on the land. This activity involved the extraction of sand and gravel, along with the operation of a screening plant and an associated concrete batching plant.[9] The extractive industry ceased in the late 1990s.[10] Save for changes to topography in the area where sand and gravel was extracted, there is no other evidence of this historical use of the land.[11]

[9] The majority of the land is gently undulating with a small number of dams and channels. There are two exceptions to this description. First, the topography varies in elevation with the bed and banks of the Brisbane River to the north, west and south. Second, the elevation of the site rises up to a ridge line in the east/north-east to a maximum height of 220m AHD. The ridge line is an extension of a hill protected as part of the Cressbrook Conservation Park to the east. The ridge line creates a semi-amphitheatre, partly screening the land from views that would otherwise be obtained from the north, south and east.[12]

[10] The town planning and visual amenity witnesses called to assist the Court helpfully identified surrounding land uses. In giving their evidence, they each considered a study area. The area was described in various parts of the joint reports as an '*area*' or '*locality*'. Whilst the town planning witnesses did not identify the precise extent

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2 Section 45(1)(a), *Planning and Environment Court Act 2016*.
3 Ex.3.14, para 17.
4 Ex.14.03, pp 2 and 3.
5 Ex.3.14, para 19.
6 Ex.3.14, para 19.
7 Ex.3.14, para 22.
8 Ex.3.14, paras 25 and 26.
9 Ex.3.14, para 28.
10 Ex.3.14, para 28.
11 The aerial extent of the use can be seen, in part, in Ex.14.37A.
12 Ex.3.14, para 24.

of the area or locality they examined, it appears to be generally consistent with the same area examined by the visual amenity experts. The area they studied is depicted on Figures 2 and 17 of the visual amenity joint report.[13] Taking the area or locality to be that depicted on Figures 2 and 17 of the visual amenity joint report, it is fairly described as '*a rural area in the Brisbane Valley*'.[14] The area is located approximately 32.5km north of Esk, and 9 kilometres west of the nearest township, Harlin.[15] The town planning witnesses described the land use character of the area/locality as '*primarily rural and working pastoral land*'. Uses of this kind adjoin the land to the north and west, and are also located to the south of the Brisbane River.[16] The town planning and visual amenity witnesses also identified that surrounding land uses include large lot rural living home sites and two existing extractive industry uses.[17]

[11] Exhibit 15.07 assists in identifying the location of existing large lot rural living home sites. It also gives an appreciation as to the degree of separation between those home sites and the footprint of the proposed development. The home sites are located to the north, west and south-west. The extent of separation varies significantly, from 155m to 1.3km. Five of the home sites were the subject of particular focus for the visual amenity experts, and were described as '*viewpoints*'. Viewpoints A, B and C are home sites located to the north and north-west and accessed via Gregors Creek Road. Viewpoints D and E are home sites located to the west and accessed via Braemore Lane.[18]

[12] Two existing extractive industry operations are located at the northern end of the area/locality examined by the town planning and visual amenity witnesses. One of those uses is operated by the first co-respondent by election, Karreman Quarries. It is operated pursuant to a development approval granted in September 2012[19] and is located about 2.7km to the north-west of the land. The operation includes a hard rock quarry. Photographs taken from public roads in the area/locality reveal the quarry face, and stockpiles of material, are plainly visible.[20] Vegetation has been stripped from the quarry face. Its presentation is unmistakable; it has scarred the landscape.

[13] The existing character of the area/locality was described by Dr McGowan at paragraph 46 of the visual amenity joint report as follows:

> "*...the local visual environment is characterised by: varied topography; open pastoral landscapes and treed slopes; the meandering Brisbane river and associated riparian landscape; various rural, recreational, and extraction activities; and dispersed built form and structures. Both the built form and the activities observable in the local area are relatively varied, typical of most productive rural landscapes. The Brisbane River and ridgelines seen*

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13 Ex.3.06, pp 9 and 23.
14 Ex.3.14, para 29.
15 Ex.3.14, para 29.
16 Ex.3.14, para 30.
17 Ex.3.14, para 29.
18 Ex.3.06, Figure 1, p 74.
19 Ex.14.27.
20 Ex.14.12.

> *as the backdrop to many views are key landscape features in the local area.*"

[14] I accept this is an accurate description of the existing character of the area/locality. It is made good having regard to photographic evidence before the Court. This evidence, in combination with the site inspection, demonstrates the existing character of the area/locality is a very attractive rural and natural landscape,[21] with a notable intrusion (Karreman Quarry). This landscape includes a number of attractive visual features, which were described by Mr Curtis at paragraph 51 of the visual amenity joint report. He observed:

> "*Although a rural landscape with cleared pastures, the appearance of the landscape is enhanced by the vegetated ridgeline of the Cressbrook Conservation Park that provides a prominent treed backdrop to the undulating open fields. For some receptors these elements are complemented by the Brisbane River, which further enhances visual interest and contributes to the natural amenity and character of the setting. The combination of these elements within the site's setting contributes to the general scenic qualities of the Brisbane River Valley and in particular the character of the locality.*"

[15] In keeping with Mr Curtis' evidence, the town planning witnesses agreed the setting of the land is, inter alia, of visual significance. A number of features were said to contribute to this setting. The relevant features were identified at paragraph 20 of the town planning joint report as follows:

> "*…The riverine, hillslope and environmental setting of the subject land is of rural landscape, ecological, and/or visual significance. Contributing features include:*
>
> *(a) the containment of the majority of the subject land within a significant and sweeping meander of the Brisbane River;*
>
> *(b) its location immediately below the elevated Cressbrook Conservation Park;*
>
> *(c) prominent elevated areas to the north and west; and*
>
> *(d) subject to the scientific findings of the terrestrial and aquatic fauna experts, occurrences on or adjacent to the subject land of koala, platypus, lung fish and murray cod."*

[16] In addition to its visual attractiveness, the area/locality has a high level of acoustic amenity. This contributes to the pleasantness of the '*place*', which Mr King described as a quiet area. It is an area unaffected by road noise from the Brisbane Valley Highway. It is unaffected by noise from existing extractive industry operations.

The development application

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[21] As was agreed by Mr Schomburgk at T9-35, Lines 10 to 15 and Mr Ovenden at Ex.5.03, para 2.5.

[17] The application before the Court seeks a development permit authorising the making of a material change of use for:[22] (1) an Extractive industry (Hard rock quarry); (2) a Concrete batching plant; and (3) Environmentally relevant activity 16, extractive and screening activities. The extractive industry is to be carried out in stages and capped at a maximum extraction rate of 100,000 tonnes per annum.[23] It is intended the existing grazing use of the land will continue in conjunction with the proposed development.[24]

[18] A site layout plan depicts a development footprint located in the eastern portion of the land, about 2.8km from Gregors Creek Road.[25] The footprint includes four identifiable components, namely: (1) an extraction area; (2) overburden stockpiles; (3) a processing and stockpiling area where the crushing and screening plant is located; and (4) an area for plant and equipment comprising the concrete batching plant.[26]

[19] Access to the land is proposed via the existing Gregors Creek Road access, which is to be upgraded to service the quarry and concrete batching plant. This access will connect to an internal road, which, in turn, connects to the proposed development.[27] An internal haul road between the extraction area and processing/stockpiling area will also be constructed.

[20] Part of the access road, extraction area and processing and stockpiling area will be screened with vegetation.[28] The vegetation will be planted prior to commencement of the use, and will consist of two rows of native trees planted at 10m centres and offset 5m.[29] Acoustic screens for plant and equipment are proposed in the processing and stockpiling area.[30] The extraction area is approximately 20 hectares in size and follows the natural contours of the land.[31] It has been deliberately sited to sit within the natural semi-amphitheatre created by existing topography. It will not extend above the ridgeline. Extraction will occur in seven (7) stages, moving east to west. The time estimated to complete stages 1 to 6 will exceed 45 years.[32]

[21] A top down approach is proposed. Extraction will move progressively down the slope of the land, with the quarry expanding over time until the full extraction area is in use. The benches will have a maximum height of 10 to 15m depending on the elevation, and a width of 12m. Upper benches will be taken to terminal positions before lower benches are excavated.[33] Drilling and blasting will be required to extract the rock.[34] The extracted material will be transported to the on-site crushing, screening and washing plant, located to the south of the extraction area. Processed material will be stored in stockpiles.

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22 Ex.3.14, para 33.
23 Ex.3.14, para 33.
24 Ex.3.14, para 34.
25 Ex.3.14, para 23.
26 Ex.14.03, pp 6, 7 and 16.
27 Ex.14.03, p 6.
28 Ex.14.03, p 6.
29 Ex.3.14, para 44.
30 Ex.14.03, p 8 and pp 18 to 24.
31 Ex.3.14, paras 35 and 40.
32 Ex.3.14, para 39, which describes each of the stages.
33 Ex.3.14, paras 36 and 37.
34 Ex.13.02, p 13.

[22] Geology and feasibility of quarrying are fundamental matters for the assessment of an extractive industry.[35] Here, the evidence establishes that investigations have been undertaken to assess the type, quality, and quantity, of hard rock resource on the land. The investigations took the form of drilling in 2015 and 2019,[36] which revealed a source of andesite porphyry. This is the same rock extracted at the nearby Karreman Quarry and is an intermediate igneous rock of sub-volcanic or shallow intrusive origin.[37]

[23] Testing of the drill samples revealed the rock is hard, strong and durable.[38] It is suitable for a range of uses and applications. Two petrographic reports dated 4 December 2019 predict the samples tested were, subject to a qualification, suitable for use as road base, concrete aggregate, railway ballast, marine armour rock and rip rap.[39] The qualification referred to in the reports was addressed by subsequent testing, which confirmed the rock exceeds the technical standards prescribed by the Department of Transport and Main Roads for the production of concrete aggregate.[40]

[24] Based on the drilling results, it is estimated the quantity of resource to be commercially recovered from the proposed quarry is approximately 10 million tonnes.[41] This does not represent the entire quantity of the resource on the land. It is the quantity the quarry pit is designed to extract.[42]

[25] The resource is not favoured with a KRA designation. Nor is it recognised under any adopted planning control as being a resource of local significance.

[26] Mr Huntley, who is an expert called by Edith Pastoral to address issues in relation to geology and quarry design and operation, was of the view that sufficient testing had been carried out to establish there is a proven resource on the land. Further, it was his view that sufficient testing had been carried out to demonstrate the resource could be feasibly, and viably, extracted. Whilst there was some residual disagreement about viability and the quality and quantity of the resource,[43] I accept Mr Huntley's evidence. It is supported by sufficient information to prove these matters for the purposes of assessing and deciding a development application for a material change of use. That there is a proven resource on the land, which can be feasibly and viably extracted, is a matter of town planning importance.[44]

[27] Turning to the concrete batching plant, it is located on the same pad as the processing and treatment area. It includes sand and gravel hoppers, feed hopper material bins and cement silos. The proposed plans indicate the silos have an overall height of 12.5m.[45]

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35 *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 18, [3], citing *Sellars Holdings Ltd v Pine River Shire Council* [1988] QPLR 12, 16 to 17.
36 T7-15, Lines 26 to 37 and drill locations and results depicted in Ex.3.07 at pp 141 to 146.
37 T7-12, Line 45 and Ex.14.35.
38 Ex.3.07, p 168.
39 Ex.3.07, p 169 and p 175.
40 Ex.14.17 and T7-18, Line 41 to T7-19, Line 8.
41 Ex.3.08, para 8 and T7-14, Lines 13 to 16.
42 T7-14, Lines 20 to 21.
43 Ex.15.18.
44 *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 18, [4].
45 Ex.14.03, p 28.

[28] It is accepted that any approval granted by the Court should be conditioned to require compliance with, inter alia, a draft Site Based Environmental Management Plan (**SBEMP**). The SBEMP is before the Court as exhibit 13.02. Attachment 5 to this document is a noise management plan. The latest iteration of the noise management plan was marked exhibit 14.23.

[29] The noise management plan details a proposed noise management strategy. This strategy specifies amelioration measures for the development. Amelioration measures are not limited to those stated in the plan. The document envisages that circumstances may call for an adaptive management response for unusual circumstances.[46]

[30] A key part of the noise management strategy is that articulated in s 1.5, which states:[47]

> "*The operations on the site have been split into complimentary operations based on the limited staff required to service the 100,000 tonne per annum operation. The details of the proposed operations are shown in* ***Appendix E*** *which shows both the Steps in the operation and the pit development Stages.*
>
> *The Site Operations are to be undertaken as per the following separated processes to allow the limited staff to operate all aspects of the plant, and to address the noise emission limitations of the operation:*
>
> 1. *Operation/Step 1 (Extraction)*
>
> *OR*
>
> 2. *Operation/Step 2A (Primary Crusher)*
>
> *OR*
>
> 3. *Operation/Step 2B (Secondary Crushing and Screening)*
>
> *OR*
>
> 4. *Operation/Step 3 (Product Sales)*
>
> *OR*
>
> 5. *Operation/Step 4 (Concrete Batching Plant)*
>
> *The above steps cannot be undertaken concurrently as noise limit at surrounding noise sensitive receivers may be exceeded.*"

[31] Section 1.5 speaks of '*limited staff to operate all aspects of the plant*'. It is proposed to limit the number of staff on-site at any one time to three (3).

[32] It is proposed the land will be progressively rehabilitated in conjunction with quarry operations so that only parts of the quarry face will be visible from external viewing points. This is required to ensure the scenic amenity of the locality is safeguarded.[48] The rehabilitation works will commence in the early stages of the extraction process and will move progressively down the slope of the land until the terraces are complete.

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46 Ex.13.02, p 214.
47 Ex.14.23, p 5.
48 Ex.13.02, p 43.

[33] Draft conditions of approval tendered on behalf of Edith Pastoral envisage that a comprehensive rehabilitation plan will be prepared and submitted with an application for operational works.[49] The plan is to be based on Attachment 6 to the SBEMP,[50] along with a number of stated design principles. Taken in combination, the plan to be submitted with the operational works application is required to, inter alia:

(a) identify specific timeframes for the rehabilitation of each stage;

(b) provide for bench-by-bench revegetation;

(c) assume that no more than a single stage is stripped of overburden at any one time;

(d) assume quarry walls will be taken to terminal position before extraction of a subsequent bench commences; and

(e) specify control points to ensure a subsequent stage of extraction does not progress until 75% of the vegetation of the preceding stage has established.

[34] The development application was made to Council in February 2015. It was accepted as being a properly made impact assessable application on 2 March 2015. At this time, the Esk Shire Planning Scheme 2005 was in force (**the 2005 planning scheme**). About 12 months later, in March 2016, a new planning scheme took effect, namely the Somerset Region Planning Scheme (**the 2016 planning scheme**). For the purposes of both planning schemes, the land is included in the Rural zone.

[35] The development application was publicly notified in August 2015 and attracted a number of properly made submissions.[51] Changes were made to the application after the notification process. It was, as a consequence, publicly notified again in August 2016. This round of public notification attracted 26 properly made submissions.[52] Copies of the submissions were tendered. I have had regard to those submissions.

[36] Council resolved to refuse the development application in July 2019. The decision notice communicating the refusal contains nine grounds.[53] Six of the grounds assert non-compliance with the 2005 planning scheme. None of the grounds assert non-compliance with the 2016 planning scheme. The grounds do not assert the development, if approved, would prejudice the implementation of the 2016 planning scheme.

The disputed issues

[37] The central issue to be determined in the appeal can be stated as: whether Edith Pastoral's development application should be approved with conditions, or refused,

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49 Ex.13.01, p 4, Condition 1.8.
50 Ex.13.02, p 227.
51 Ex.3.14, para 49.
52 Ex.3.14, para 51.
53 Ex.3.14, pp 82 to 84.

in the exercise of the planning discretion.[54] To assist the Court in the determination of this broadly expressed issue, an agreed list of questions and relevant assessment benchmarks was tendered.[55] I am grateful to the parties for preparing this document. Whilst it was not ready for the first day of the trial, it is clear considerable effort was brought to bear to prepare the document, which, in turn, resulted in a material reduction in the number of reasons for refusal to be considered by the Court. In this regard, I note that issues associated with water quality, ecology and traffic were not pressed as reasons for refusal.[56] Rather, it is accepted these are matters for conditions in the event an approval is forthcoming.

[38] It is agreed there are seven (7) questions for the Court to consider in this appeal. That list, in my view, whilst helpful, needs to be expanded to capture a number of sub-questions that are not readily apparent from the agreed list. With this in mind, I intend to deal with the following questions, namely:

1. Is the proposed development a single planning unit? (‘**The planning unit**’)

2. Whether the proposed development will have unacceptable noise impacts?[57] (‘**Noise**’)

3. Whether the proposed development will have unacceptable visual amenity or character impacts?[58] (‘**Visual amenity and character**’)

4. Whether it has been demonstrated the proposed development has adequate access to water?[59] (‘**Access to water**’)

5. Whether operational issues have been satisfactorily resolved?[60] (‘**Operational issues**’)

6. Whether the proposed development complies with the 2005 planning scheme?[61] (‘**Compliance with the 2005 planning scheme**’)

7. What weight, if any, should be given to the 2016 planning scheme? [62] (‘**The issue of weight**’)

8. Whether the proposed development complies with the 2016 planning scheme?[63] (‘**The 2016 planning scheme**’)

9. Whether there is a town planning, community and economic need for the proposed development?[64] (‘**Need**’)

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54 Ex.1.24; Ex.15.24, para 41 citing *Ashvan Investments Unit Trust v Brisbane City Council & Ors* [2019] QPEC 16.
55 Ex.1.24.
56 Ex.15.24, para 34.
57 Ex.1.24, Section A, para 3.
58 Ex.1.24, Section A, para 4.
59 Ex.1.24, Section A, para 5.
60 Ex.1.24, Section A, para 6.
61 Ex.1.24, Section A, para 1 and Section B.
62 Ex.1.24, Section B.
63 Ex.1.24, Section A, para 1 and Section B.
64 Ex.1.24, Section A, para 2.

10. Whether there are discretionary matters, either individually or collectively, that favour approval of the proposed development?[65] (‘**Relevant matters**’)

11. Whether the development application should be approved, or refused, in the exercise of the planning discretion? (**Exercise of the planning discretion**)

The statutory assessment and decision-making framework

[39] It is common ground the statutory assessment and decision-making framework applicable to this appeal is prescribed by the *Planning Act 2016*.[66] This Act requires the development application be assessed in accordance with s 45, and decided in accordance with ss 59(3) and 60.

[40] The statutory framework is to be approached consistent with four recent Court of Appeal decisions, namely *Brisbane City Council v YQ Property Pty Ltd* [2020] QCA 253, *Abeleda v Brisbane City Council & Anor* [2020] QCA 257, *Wilhelm v Logan City Council & Ors* [2020] QCA 273 and *Trinity Park Investments Pty Ltd v Cairns Regional Council & Ors; Dexus Funds Management Limited v Fabcot Pty Ltd & Ors* [2021] QCA 95. In particular, it can be observed:

(a) *YQ Property* confirms the ultimate decision called for when making an impact assessment under ss 45 and 60 of the Act is a ‘*broad evaluative judgment*’;[67] and

(b) *Abeleda*, confirms, inter alia, that: (1) in contrast to its statutory predecessor, the discretion conferred by s 60(3) of the Act admits of more flexibility to approve an application in the face of non-compliance with a planning scheme; and (2) the exercise of the discretion under s 60(3) of the Act is subject to three requirements, including that it be based upon the assessment carried out under s 45.[68]

[41] The clear words of s 45(5)(a)(i) of the *Planning Act 2016* require the development application to be assessed against applicable assessment benchmarks. Section 45(7) confirms the reference to an assessment benchmark is one in effect when the development application was properly made. Here, that captures the 2005 planning scheme.

[42] Whilst not an assessment benchmark, the 2016 planning scheme may also be considered. Section 45(8) of the *Planning Act 2016*, read with s 46(2) of the *Planning & Environment Court Act 2016*, confers a discretion upon the Court to give the weight it considers appropriate to the document in the circumstances.

[43] I will now turn to consider the disputed issues.

The planning unit

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65 Ex.1.24, Section A, para 7.
66 Ex.14.54, para 31; Ex.16.03, para 12; and Ex.15.24, paras 37 to 41.
67 *YQ Property*, per Henry J at [59].
68 *Abeleda*, per Mullins JA at [53] and [58].

[44] As I have already observed, the development application before the Court seeks approval to authorise the making of a material change of use of the land for three identified purposes. This is confirmed by two documents. First, the IDAS forms submitted with the development application. Second, Edith Pastoral's Notice of Appeal.

[45] The IDAS forms require an applicant to respond to this question: '*What is the nature of the development proposed and what type of approval is being sought*?'[69] In response to this question, the form was completed to indicate that a development permit for a material change of use was sought. The description given to the proposal was '*Proposed Extractive Industry (Hard Rock Quarry) and Medium Impact Industry) Concrete batching plant*'.[70] The Acknowledgement Notice and Decision Notice for Edith Pastoral's development application confirm Council, as assessment manager, exercised its decision-making function on the footing the proposal for which approval was sought was that described in the IDAS forms.[71]

[46] The Notice of Appeal states in the preamble, before the prayer for relief, that the appeal is against the decision of Council to refuse a '*development application for a development permit for a Extractive Industry (Hard Rock Quarry and Medium Impact Industry (Concrete batching plant) ("Development Application")*'.[72] The prayer for relief seeks an order that the '*Development Application*', as defined in the preamble, be approved.

[47] Division 1, Schedule 2 of the 2005 planning scheme sets out the defined uses. Schedule 2 defines an extractive industry and medium impact industry as follows:[73]

> ***"extractive industry*** *means the use of premises for the purpose of carrying on an industry which involves dredging, excavating, quarrying, sluicing and any other mode of winning materials from the earth, and including any ancillary processing of that material. The term does not include mining within the meaning of the Mineral Resources Act 1989.*"

And:

> "***medium impact industry*** *means any industry not being a low impact industry or high impact industry as defined herein.*"

[48] There is no dispute the above definitions appropriately characterise the uses for which approval is sought.

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69 Ex.2.02, p 75.
70 Ex.2.02, p 75.
71 Ex.2.02, pp.637 and 1112.
72 Ex.1.01, p 1.
73 Ex.8.26, pp 2 and 3.

[49] At the time the development application was properly made, the *Sustainable Planning Act 2009* was in force. For the purposes of that Act, a '*use*' was defined to include a subordinate use that was '*incidental to and necessarily associated with*' the principal use of premises. There is no suggestion the concrete batching plant is incidental to, or necessarily associated with, the extractive industry, or vice-versa. This, in my view, even if contended, could not be sustained. The evidence falls well short of establishing either use is '*necessarily associated*' with the other.

[50] The matters discussed above have the consequence that the development application accepted by Council as being properly made seeks approval for two planning units, that is, a quarry and a concrete batching plant. Those planning units are defined in the 2005 planning scheme as an extractive industry and medium impact industry.

[51] During Council's assessment of the development application, the *Sustainable Planning Act 2009* was repealed, and the *Planning Act 2016* took effect. The latter brought with it a new definition of '*use*'. For that Act, a use includes '*an ancillary use of premises*'. The difference between the use definition in the *Planning Act 2016*, and its counterpart in the *Sustainable Planning Act 2009*, was canvassed in *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52.

[52] Edith Pastoral submits that, if the development application were remade today, the concrete batching plant would be considered an ancillary use to the quarry.[74] This point, if accepted, would mean the proposed development is treated as a single planning unit. This has relevance to an assessment of the development application against the Rural zone code in the 2005 planning scheme and the significance of any non-compliance. In that zone, an extractive industry is, subject to a qualification, a consistent use in the zone. This stands in contrast to a medium impact industry, which is an inconsistent use in the zone. If the proposed development is assessed as a single planning unit, the concrete batching plant ceases to be regarded as an inconsistent use in the zone.

[53] Council made no submissions in response to this point other than to endorse the position adopted by the Co-respondents by election.

[54] The Co-respondents join issue with this aspect of Edith Pastoral's case. It was submitted the concrete batching plant is not an ancillary use.[75] It follows from this submission that the Co-respondents contend the proposed development, irrespective of which definition of '*use*' is applied, comprises two planning units.

[55] To assist the Court, both parties referred to *Caravan Parks* (supra), in particular, that part of the judgment dealing with '*what is an ancillary use*'. With the relevant principles in mind, Edith Pastoral submitted:[76]

> "*...As was recognised by the Planning and Environment Court in the Caravan Parks decision, to be an ancillary use one of the considerations is:*

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74 Ex.14.54, para 62.
75 Ex.15.24, paras 31 and 32.
76 Ex.14.54, para 60.

> *(a) whether there is a dominant and subservient relationship between the two uses; and*
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> *(b) whether the secondary use is present not to merely co-exist with the primary use, but whether the secondary use serves the purposes of the primary use."*

[56] Edith Pastoral submitted that both (a) and (b) above are met in the circumstances of this case. No reasoning was provided in support of this assertion.

[57] I am not satisfied the assertion should be accepted.

[58] The evidence establishes that hard rock extracted from the quarry may be utilised as aggregate in the concrete batching plant. That the uses are co-located to facilitate this exchange of product is, no doubt, beneficial to the operator, but it does not follow from the exchange that one use is necessarily dominant, or subservient, to the other. Nor does it follow that one use necessarily serves the purpose of the other. Issues of this kind turn on the facts and circumstances of each case, as revealed by the evidence.

[59] What does the evidence reveal?

[60] Here, the evidence establishes that the concrete batching plant may receive processed hard rock in the form of aggregate which will, in turn, be utilised as part of the batching process. The extent to which this may occur is, however, far from clear. This point was well made by Mr Job QC and Mr Quayle. As to if, and how much rock will be provided to the concrete batching plant as aggregate as distinct from the provision of hard rock products to the market generally, they submitted:[77]

> "*The Court has not been favoured with any evidence on behalf of the proponent itself. The ambiguity was not addressed. The court does not have available to it an indication of what, in fact, the Appellant intends. Equally, there is no other evidence in terms of potential customers.* ***It is therefore unknown whether the operations will be primarily rock products exported off-site; primarily concrete as Mr Huntley was clear about; or any combination of the two.*** *Whilst Mr Duane proceeded on an assumption of something in the order of 20,000 tonnes of material being used for concrete production both on and off-site by the Appellant, that is the only suggestion of that. The "split" he did not know. When made aware of Mr Huntley's evidence, Mr Duane indicated that "As I said, Mr Gray and Mr Huntley are more experienced in the day to day operations of these facilities. I defer to their expertise on those sorts of topics".*" (emphasis added)

[61] I accept the submission made by Mr Job QC and Mr Quayle.

[62] There is a paucity of evidence (other than assumptions made by experts) that establishes if, when, and how much, aggregate the quarry would provide to the concrete batching plant. The state of the evidence in this regard is, in my view, decisive. It leaves me unpersuaded the concrete batching plant is ancillary to the

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77 Ex.15.24, para 286, with footnotes omitted.

quarry. At its highest, the evidence establishes the relationship is one of co-location and convenience. These matters are not, individually or collectively, sufficient to establish one use is '*ancillary*' to the other.

[63] For these reasons, the development application is to be assessed and decided on the footing it has always comprised two planning units.

Noise

[64] It is uncontroversial that an extractive industry and associated concrete batching plant have the potential to give rise to serious and unacceptable impacts on the rural character and amenity of the locality. In this context, particular attention was given to potential impacts arising by reason of noise and dust emissions. Edith Pastoral proposes to manage and ameliorate those impacts in the manner articulated in a draft set of conditions and the SBEMP. All respondents accept that dust impacts can be appropriately managed and, as a consequence, do not rely upon impacts of this kind as a reason to warrant refusal of the development application. Noise impacts were, however, a significant point of controversy in the appeal.

[65] Council and the Co-respondents contend the evidence with respect to noise is deficient and falls well short of demonstrating an appropriate acoustic amenity outcome would be achieved by approval. The deficiencies in the evidence are also pointed to as support for a submission that the proposed development cannot be conditioned to comply with the 2005 planning scheme. Mr Job QC and Mr Quayle emphasised that the development does not comply with, nor can it be conditioned to comply with the 2005 planning scheme, which:[78] (1) intends a '*high quality living environment*' be maintained in the Shire;[79] (2) requires development to maintain or enhance local rural amenity and character;[80] (3) requires development in rural areas to be compatible and consistent with the desired character and amenity of the area;[81] (4) seeks to ensure extractive industries do not have adverse amenity and environmental impacts;[82] (5) requires extractive industry to locate in a way that ensures the character of the area is not unduly prejudiced;[83] and (6) requires industrial development to ensure potentially detrimental impacts on the acoustic environment be ameliorated, or mitigated, to an acceptable level.[84] Non-compliance with these features of the 2005 planning scheme is said to call for refusal of the development application.

[66] There is considerable force in the submissions advanced on behalf of all respondents with respect to noise. Those submissions find support in the evidence of the noise experts.

[67] Three noise experts were retained to assist the Court, namely Dr Richardson (Edith Pastoral), Mr Brown (Council) and Mr King (Karremann). In accordance with the usual practice of the Court, the experts prepared a joint report to record points of

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78 Ex.15.24, paras 198 to 212.
79 s 3.1(3), DEO (g).
80 Rural zone code, overall outcome (2)(c) and Specific outcome SO3.
81 Rural zone code, Specific outcome SO10 and Industrial development code, overall outcome (2).
82 Extractive industry code, overall outcome (2).
83 Extractive industry code, Specific outcome SO3.
84 Industrial development code, Specific outcomes SO4 and SO6.

agreement and disagreement. Prior to the first joint report, Dr Richardson conducted ambient noise monitoring at two locations.[85] It was agreed between the experts that the '*background monitoring dataset*' was suitable for defining the existing background noise levels for the locality.[86] The *'Rating Background Levels'* calculated from that dataset were as follows:[87]

> "*Position 1: Day (7am-6pm) – 28 dB(A), Evening (6pm-10pm) – 31 dB(A), Night (10pm to 7am) – 28 dB(A)*"
>
> "*Position 2: Day (7am-6pm) – 25 dB(A), Evening (6pm-10pm) – 25 dB(A), Night (10pm to 7am) – 22 dB(A)"*

[68] After all experts had agreed the noise levels measured at Position 2 were suitable to represent background noise levels at surrounding sensitive receptors,[88] the first joint report records at paragraphs 33 and 34:

> "*33. To allow Dr Richardson to prepare the acoustic assessment, it is necessary to define the acoustic criteria to be adopted.*
>
> *34. In the opinion of the Experts, the following acoustic criteria should be adopted:*
>
> *$L_{Aeq,adj,T}$: Day (7am-6pm): 30 dB(A), Evening (6pm-10pm): 30 dB(A), with criteria for the night time to be determined on the basis of more detailed analysis of the background noise levels for the relevant operational time periods (if any).*"

[69] The acoustic criteria agreed at paragraph 34 of the first joint report is, as Mr Job QC and Mr Quayle submitted, the product of a well-recognised formula; '*background plus 5 dB(A)*'. The formula, and the product of it, was applied and adopted by the noise experts without qualification.

[70] As foreshadowed at paragraph 33 of the first joint report, Dr Richardson prepared an accoustic assessment report.

[71] The first report was dated 7 February 2020.[89] Section 1.1 of the report states a study was undertaken '*to assess the potential impacts of the proposed development on nearby sensitive receptors*'.[90] Forty-seven receptors were identified on figure 3.1 to the report. The assessment was undertaken using computational modelling. Specific acoustic mitigation measures were not included in the modelling scenarios.[91] The results of the modelling were compared to the noise criteria agreed in the first joint report.[92]

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85 Ex.3.02, para 29 and Figure 1.
86 Ex.3.02, para 30.
87 Ex.3.02, para 31.
88 Ex.3.02, para 32.
89 Ex.16.01.
90 Ex.16.01, p 6, s 1.1.
91 Ex.16.01, p 9, s 3.5.
92 Ex.16.01, p 7.

[72] Section 3.8 of Dr Richardson's report discusses the '*predicted results*' for the modelled operating scenarios. It states:

> "*The results of the modelling indicate predicted exceedance of the noise criterion of 30 dB(A) at a number of sensitive receptors. During normal operations and operation of a drill rig, a noise level of up to 40dB(A) is predicted and exceedances are predicted at up to 32 receptors. During operation of a rock breaker, noise levels increase to 43 dB(A) with exceedance at up to 42 receptors.*"

[73] Section 3.9 of Dr Richardson's report discusses additional modelling that was undertaken to identify potential mitigation measures. Four options were considered in this regard, namely: (1) acoustic enclosures achieving 15 dB(A) attenuation; (2) a 5m high earth mound along the western boundary of the processing pad; (3) 4m high acoustic barriers along the southern side of the concrete batching plant; and (4) locating rock breaking activity at the processing pad within a 3-sided enclosure. Whilst the modelling indicates these measures provided noise attenuation, it also reveals that the extent of attenuation was insufficient to achieve compliance with the agreed noise criteria. In this regard, section 4 of the report states:[93]

> *"With the above measures in place, predicted noise levels reduce significantly. The mitigation scenario results indicate a significant reduction to noise levels (4-7 dB(A)) compared to the base scenario. Furthermore, the total number of receptors predicted to exceed the criteria decreases from 31-42 receptors down to 6-11 receptors (depending on the operational scenario and extraction stage). While significant reductions are noted, exceedances are still predicted and further mitigation investigation is necessary to achieve the 30 dB(A) criterion."*

[74] In order to demonstrate compliance with the agreed noise criteria, further noise attenuation measures were investigated by Dr Richardson. The measures were reflected in a further noise assessment report prepared by her, dated 13 March 2020. At section 1.3, this report states:[94]

> "*...This updated report provides further modelling to identify mitigation and management measures for achieving predicted compliance with the noise criteria. One of the key considerations of this updated report is that quarry activities can be divided into separate stages, so that the number of noise sources operating at any given time is minimised. The previous report considered all sources operating simultaneously, however, based on the size of the operations, it is feasible to operate activities separately and in isolation. For example, during processing, no extraction and hauling would occur. Further details are specifically discussed in the noise modelling scenarios section (Section 4.5).*"

[75] The conclusion to Dr Richardson's second noise assessment report states that the results of the modelling predict compliance with the 30 dB(A) criterion at all nearby sensitive receptors, provided six (6) measures are implemented. One of the measures

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93 Ex.16.01, p 26.

94 Ex.16.02, p 5.

requires site operations to be separated in accordance with a non-concurrent mode of operation.

[76] A second joint report was completed in September 2020. By this time, Ms Adams had been substituted for Dr Richardson as the noise expert retained by Edith Pastoral. This replacement was sanctioned by way of court order,[95] which was made having regard to, inter alia, an affidavit sworn by Ms Adams.[96] In the affidavit, Ms Adams deposed to her agreement with the opinions expressed by Dr Richardson in the first joint report. She indicated she would not seek to contradict, depart from, or qualify matters that were the subject of agreement in the first joint report. Ms Adams further confirmed her agreement with Dr Richardson's analysis, methodology, modelling, conclusions and recommendations in cross-examination.[97]

[77] A review of the second joint report reveals Ms Adams updated the modelling undertaken by Dr Richardson. That exercise was said to '*shore up*' assumptions, and address detailed operational information obtained after the preparation of the first joint report.[98] With the benefit of the review and updated inputs, the second joint report records the modelling still did not demonstrate compliance with the 30 dB(A) criterion. The non-compliances recorded with the criterion were as follows:[99]

(a) an exceedance of 1 dB(A) at two of the nearest residences for the Processing 2B (crushing and screening) stage; and

(b) an exceedance of 1 to 3 dB(A) in Stage 5 for the drilling operation when placed at the most exposed location.

[78] In the second joint report, Ms Adams expressed the opinion that the first of the above exceedances could be addressed with the addition of vinyl curtains to conveyor openings on crushing and screening acoustic enclosures.[100] A mitigation measure was also suggested for the drilling operation involving an acoustic screen. Although, Ms Adams accepted this measure may not be practically achievable.[101]

[79] At paragraph 39 of the second joint report, Ms Adams stated the access road had been modelled assuming the maximum practical number of trucks on the road in one hour. This modelling supported her view that a 130 metre long barrier was required on the southern side of the access road to attenuate noise to achieve compliance with the 30 dB(A) noise criterion at the nearest sensitive receptor, being receptor number 33.[102]

[80] Both Mr King and Mr Brown reviewed the further modelling undertaken by Ms Adams. Both experts confirmed this modelling had not, at the time of the second joint report, demonstrated compliance with the agreed noise criterion.[103] They also raised concerns with underlying assumptions embedded in the modelling. It is

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95 Ex.1.10, Order of 9 April 2020.
96 Ex.1.11.
97 T5-34, Lines 1 to 21.
98 Ex.3.16, para 31.
99 Ex.3.16, para 37.
100 Ex.3.16, para 37 iv.
101 Ex.3.16, para 37 v and T5-7, Lines 20 to 22.
102 Ex.3.16, para 39.
103 Ex.3.16, paras 72, 74, 77(a) and 79.

specifically recorded in section 12 of the second joint report that Mr King and Mr Brown took issue with: (1) the correctness of assumptions made with respect to sound power levels, source heights and source operating durations; and (2) the practicality of the engineering noise control measures proposed.

[81] Ms Adams prepared a further statement of evidence dated 11 December 2020.[104] It is apparent from this report that Ms Adams had continued to review and 'tinker' with the noise model after the second joint report was completed. This process still did not achieve an outcome whereby compliance with the 30 dB(A) criterion was achieved. This is confirmed at paragraphs 17 and 18 of Ms Adams' further statement of evidence. The report provides that the modelling produced the following results: (1) a 1 dB(A) exceedance at Receptor 9 from the cone crusher during the Processing 2B (secondary crushing and screening) stage; (2) a 3 dB(A) exceedance at Receptor 33 due to truck movements on the access road; and (3) non-compliances at eight receptors (5, 7, 8, 9, 11, 12, 13 and 33) during rock drilling operations when the drill is in its most exposed bench location.

[82] Mr Brown and Mr King also prepared further statements of evidence.[105] Both reports confirmed the views they expressed in the second joint report. The reports also set out the results of their respective reviews of the SBEMP and draft conditions put forward on behalf of Edith Pastoral. Neither expert was satisfied the conditions, or SBEMP, would appropriately mitigate acoustic impacts for sensitive receptors. Mr Brown expressed the view that the SBEMP was of no utility from a noise perspective.

[83] After the completion of the further statements of evidence, but before trial, Edith Pastoral provided the parties with electronic access to the latest noise model prepared by Ms Adams.[106] A list of assumptions underpinning the modelling was also provided to the parties. On 9 February 2021, I directed the noise experts to conduct a further joint meeting in relation to this material. That occurred, and the experts prepared a third joint report.[107] Attached to this report is a table[108] identifying 19 areas of clarification/dispute.

[84] Having regard to the third joint report, Mr King and Mr Brown took issue with nine assumptions underpinning the noise modelling. Their criticisms of these assumptions were supported, in large measure, by the evidence of Mr Gray and Mr Huntley. They were also supported by Mr King's experience with quarry operations over many years. The underlying assumptions criticised can be identified as follows.

[85] First, the noise model assumes a steady state[109] '*maximum practical*'[110] number of truck movements, namely 2 trips an hour for trucks associated with the quarry and 3 trips per hour associated with the concrete batching plant. It was pointed out that: (1) there is no condition proposed to limit truck movements in this way; and (2) the assumption is inconsistent with the evidence of the quarry design and operation experts. With respect to item (2), Mr Huntley confirmed that quarries and concrete

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104 Ex.4.01.
105 Ex.6.06 and Ex.5.01.
106 Ex.3.17, para 6.
107 Ex.3.17.
108 Ex.3.17, Attachment 1.
109 T5-65, Line 4.
110 Ex.4.01, para 24.

batching plants do not operate on a 'steady state'[111] and, under normal conditions, there would likely be more truck movements than assumed by Ms Adams.[112]

[86] I accept the first criticism of the noise model is a valid one.

[87] Second, the evidence establishes that the exceedances of the agreed noise criterion are, in large measure, due to the activities of the rock drill. It was assumed by Ms Adams that the model of rock drill used will operate with a sound power level of 109 dB(A). It was also assumed the rock drill would be in operation for only 30 minutes in every hour. Mr King and Mr Brown were critical of the 30-minute assumption. It was their joint view that the drill should be modelled for a period of 60 minutes. This evidence was supported by Mr King's experience of other operating quarries. It was also supported, in part, by the evidence of Mr Huntley. He was reluctant to give a precise figure, but thought drilling might, conservatively, occur up to 45 minutes in every hour of drilling.[113] Ms Adams conceded the noise level of the rock drill would be 3 dB(A) higher than that tabulated in her further statement of evidence if a 60-minute operating period was assumed rather than 30 minutes.[114]

[88] I accept the second criticism of the noise model. It undermines the confidence the Court can have in the modelling, and the extent to which it can be regarded as representative of the proposed development and its noise impacts.

[89] Third, Mr Brown and Mr King were critical of an assumption that front end loaders would operate for only 15 minutes in every hour. The point made was that this assumption had the effect of materially understating the sound power level input into the model in circumstances where front end loaders will be an essential piece of equipment in the operation of the quarry and concrete batching plant. In this regard, Mr Gray, a quarry design and operation expert, confirmed in his oral evidence that this equipment would need to work almost continuously.[115] Mr Huntley did not disagree with this suggestion and, further, identified that no allowance had been made in the modelling for '*blending*' product on site. This process will require the use of front end loaders.[116]

[90] I accept the third criticism of the noise model. It undermines the confidence the Court can have in the modelling, and the extent to which it can be regarded as representative of the proposed development and its noise impacts.

[91] Fourth, Mr King and Mr Brown were critical of the assumption made in the noise model with respect to the sound power level for the cone crusher. Ms Adams adopted 110 dB(A). This was based upon information obtained from her firm's library, which suggested a sound power level of 107 dB(A) be adopted, plus a safety factor of 3 dB(A).[117] Mr King and Mr Brown preferred a sound power level of at

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111 T7-41, Lines 1 to 17.
112 T7-70, Lines 14 to 17.
113 T7-22, Lines 15 to 16.
114 T5-76, Lines 1 to 3.
115 T8-75, Lines 20 to 25.
116 T7-60, Lines 32 to 36.
117 T6-6, Line 47.

least 112 dB(A). This was based upon measurements taken personally by Mr King in the field ranging from 113.7 to 117 dB(A).[118]

[92] I prefer Mr King's evidence in relation to the third criticism of the noise model. His evidence is based on actual measurements in the field as distinct from a theoretical sound power level.

[93] Fifth, it is uncontroversial the model made no allowance for noise emissions from a water truck operating on the land. No allowance was made because it was assumed the truck would be an infrequent activity and occur when other operations had ceased. Mr King and Mr Brown were critical of this assumption. It was described by Mr Gray as counterintuitive[119] and, as Mr Huntley conceded, was not in accordance with normal practice.[120]

[94] I prefer Mr King and Mr Brown's evidence in relation to the water truck. An allowance should have been made for the water truck in the model. This undermines the confidence the Court can have in the modelling, and the extent to which it can be regarded as representative of the proposed development and its noise impacts.

[95] Sixth, the model assumes no rock breaker will be used in the operation of the primary crusher. This assumption was criticised as being inconsistent with Mr King's practical experience. It was also said to be inconsistent with Mr Gray's experience. He was strong in his view that a rock breaker would be required for day-to-day operations. This was supported by, inter alia, the proposed method of rehabilitation. The proposed method of rehabilitation envisages that rock benches will be shattered/broken up to permit the penetration of tree roots. This, it was submitted, would necessarily require a rock breaker, which was not allowed for in the noise model.

[96] I accept the sixth criticism of the noise model. It undermines the confidence the Court can have in the modelling, and the extent to which it can be regarded as representative of the proposed development and its noise impacts.

[97] Seventh, Mr King and Mr Brown were critical of the assumptions made about proposed acoustic enclosures for plant and equipment. Ms Adams modelled the proposed development on the basis these enclosures would achieve 17 dB(A) of attenuation. Mr King and Mr Brown were of the view this would not be achieved in practice, be it when first installed, or over the life of the use. Further, they pointed to the absence of test data that would support the assumption. The absence of test data was of import to Mr King given his personal experience. He had personally observed and measured existing acoustic enclosures which had achieved only 10 dB(A) of attenuation.[121]

[98] I prefer Mr King's evidence in relation to the seventh criticism of the noise model. His evidence is based on actual measurements in the field as distinct from a theoretical assumption.

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118 T6-45, Line 23 to 42.
119 T8-76, Lines 25 to 34.
120 T7-54, Lines 15 to 24.
121 T6-53, Line 6.

[99] Eighth, the modelling was criticised because it made no allowance for an establishment phase. The evidence suggested this phase would involve formalising the internal access road, construction of berms, bunds and water infrastructure. Work of this nature would require plant and equipment and truck movements to, from and on the land.

[100] An allowance for the establishment phase of the development should have been incorporated into the noise model, having regard to Mr Gray's evidence. His evidence strongly suggests the establishment phase will take some period of time and involve not an insignificant demand for plant, equipment and trucks. All of these demands will generate noise emissions, which have not been modelled. This undermines the confidence the Court can have in the modelling, and the extent to which it can be regarded as representative of the proposed development and its noise impacts.

[101] Finally, the modelling was criticised for assuming a non-concurrent mode of operation. This was described as impractical and unproven.

[102] For reasons given in paragraphs [121] to [128], I accept this is a fair criticism of the noise model. It materially undermines the confidence the Court can have in the modelling, and the extent to which it can be regarded as representative of the proposed development and its noise impacts.

[103] After completing the third joint report, each of the noise experts were called to give oral evidence. In her evidence, Ms Adams said it was '*incredibly tiring*' and '*challenging*' to achieve compliance with the agreed criteria.[122] Despite considerable effort, Ms Adams said she could not demonstrate compliance with the criteria.[123] This was confirmed in cross-examination.[124] The following interchange between Mr Job QC and Ms Adams was particularly telling:[125]

> "*…So this is your best case. If His Honour agrees with everything you have said set out in writing in your oral evidence, about the modelling being appropriate and the like, this is as good as it gets for you, isn't it, in terms of compliance. There is still non-compliance?--For the rock drill, yes*"

[104] The reference in Mr Job's question to '*this is as good as it gets for you*' was intended to reflect that compliance with the agreed criterion could not be achieved even ignoring the nine criticisms set out above. It is correct, as is submitted, that the position only deteriorates for Edith Pastoral if the modelling is amended to reflect some, or all, of the assumptions Mr King and Mr Brown said should be adopted in the model.

[105] I am persuaded the criticisms directed towards a number of assumptions underpinning the noise model are of significant force. This leads me to conclude that the model materially understates the likely impact of the proposed development on

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122 T5-41, Line 10 and T5-42, Line 11.
123 T5-42, Lines 1 to 2.
124 T5-41, Lines 8 to 12.
125 T5-53, Lines 15 to 18.

sensitive receptors. The exceedances of the agreed criterion are, on the balance probabilities, likely to be appreciably greater than the model suggests.

[106] What is the consequence, in amenity terms, if the agreed criterion is exceeded?

[107] The evidence in relation to the agreed noise criterion and the consequences of an exceedance appeared to be the subject of little disagreement.

[108] Turning first to the criterion and its purpose, Ms Adams and Mr King said that a '*background plus five*' criterion was commonly used and is a contemporary standard.[126] As Ms Adams also agreed, the criterion permits an increase in noise above the background level, which is considered to be acceptable for a large part of the population.[127] Whilst that increase will be perceptible, there was no dispute that the purpose of the criterion is to protect the acoustic amenity of sensitive receptors. In this case, they are existing residential uses.[128]

[109] Mr King was asked in examination-in-chief to explain the consequences associated with an exceedance of the agreed noise criterion. He said:[129]

> "*…exceedance of the criteria will mean that the…local residents will…experience…noise levels even further above the ambient background noise levels than the 30 dB criteria permits, which means the audibility and the apparent noise from the quarry will stand out more than it's permitted to under a background plus five criteria.*"

[110] It was put to Mr King in cross-examination that the exceedances would not result in '*unacceptable acoustic amenity…for anyone*'. He did not accept this proposition. In response Mr King said:[130]

> "*…I regard…the criteria..[as]…the speed limit. If you're exceeding the speed limit, in this case, you're exceeding the noise criteria. Criteria is set for the very purpose of protecting amenity. If you're creating noise levels that are exceeding the criteria that is set to protect amenity, then by inference you must be affecting amenity…*"

And again later in the cross-examination Mr King said:[131]

> *"…as I stated earlier this afternoon, my consideration of impact on amenity is compliance with the noise criteria. So if you're not compliant with the noise criteria, there will be an adverse impact on a person's amenity."*

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126 Adams:T5-70, Lines 3 to 4; and King:T6-41, Lines 39 to 42.
127 T5-71, Lines 9 to 13.
128 Adams:T5-46, Line 25; and King:T6-73, Lines 45 to 46.
129 T6-54, Lines 9 to 15.
130 T6-73, Line 44 to T6-74, Line 2.
131 T6-75, Lines 8 to 11.

[111] This point was taken up in Mr King's re-examination. He was asked whether the noise impact would be acceptable. Mr King confirmed it would not be acceptable and, in his view, would likely give rise to a valid noise complaint.[132]

[112] Mr Brown agreed with Mr King. So much is clear from the following passage of Mr Brown's cross-examination:[133]

> "*Mr Brown, can I put this to you. Do you accept for this quarry that if there were no exceedances of the 30 dB(A) standard, there would be no unacceptable acoustic amenity impacts and no reasonable complaints able to be made?--That's true. Yes.*
>
> *Right. So the exceedances we've seen on the basis of accepting the modelling of Ms Adams take it from acceptable acoustic amenity to unacceptable acoustic amenity?—Because there are exceedances shown against the 30 dB(A) criterion, yes. That's correct.*"

[113] Finally in this context, Ms Adams conceded in cross-examination that a 3 dB(A) exceedance of the agreed criterion would be unacceptable. A concession was given, albeit with considerable hesitation:[134]

> "*…well, by any usual measure, a three dB exceedance of an agreed criterion background plus, is unacceptable; correct?--It's an exceedance, yes.*
>
> *And it's unacceptable in your profession?--Yes. In this situation you'd actually probably – yes. Yes. Just go with yes.*"

[114] I also understood Ms Adams to agree, in part, with Mr King's view that a noise complaint would be valid where it was made in response to an exceedance of the agreed criterion. This topic was explored with Ms Adams in cross-examination by Mr Job QC:[135]

> "*…are you seriously suggesting that activities that do not comply with the agreed criterion would not give rise to a reasonable complaint?--In some circumstances, they may not when the background noise level is not at is minimum.*
>
> *So, in some circumstances, they may not. Necessarily follows that, in some circumstances, they may?--True*"

[115] An examination of the noise evidence establishes that the proposed development, if approved, would have an adverse impact on the amenity of nearby sensitive receptors. The impact is likely to be appreciably greater than that modelled by Ms Adams. This is, in my view, symptomatic of a fundamental difficulty: it has not been demonstrated the land is suitable for a hard rock quarry and concrete batching plant from a noise impact perspective.

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132 T6-79, Lines 24 to 37.
133 T6-27, Lines 36 to 43.
134 T5-66, Lines 17 to 21.
135 T5-71, Lines 26 to 32.

[116] This is made good when four matters of context are considered.

[117] Mr King identified four matters of context that combine to create '*extremely challenging*' circumstances for the proposal to achieve an acceptable noise outcome.[136] Three matters of context identified were as follows:[137]

> "*... firstly, we'll start with the ambient noise environment, the 10 measured background noise level, 25 decibels, is low. So it's a very quiet vocality. So that [sets] the 30 dB(A) criteria. Secondly, the location of the proposed quarry, and, particularly, the pit and the extraction place. It's not afforded much in the way of topographic screening, especially for the higher stages with respect to surrounding residence. Thirdly, it's the proximity of a number of residences around the quarry. Whilst they're set back distances between ...800 metres to the pit to 1000 metres or more from the processing area, that's not a great distance where in parts there will be line of sight to some operations, particularly ...with the background noise level of 35 and a criteria of 30, that's not a lot of distance to try and achieve compliance with the criteria ...*"

[118] The fourth item of context relates to the number of receptors. In this regard Mr King said:[138]

> "*Is the number of receptors relevant?---It's always relevant, but you need to comply at one receptor as you need to comply with them all, but ...in designing a quarry to comply, when you have a number of receptors spread out around the compass, it's more difficult to achieve compliance than if you're dealing with a single receptor, for example, in one direction.*"

[119] I accept Mr King's evidence. That the circumstances here are, as Mr King said, extremely challenging, is confirmed having regard to: (1) the agreed noise criterion; (2) the outputs of the noise model, which ignore the nine valid criticisms identified by Mr King and Mr Brown; and (3) aerial photography, which identifies the location of known sensitive receptors.

[120] The four points of context, coupled with the matters identified in (1), (2) and (3) above also make good Mr King's overall view that the land is not suitable, from a noise impact perspective, for what is proposed. His opinion in this regard was expressed in this way:[139]

> "*...I think it's not a suitable site for what's proposed, and to make it a suitable site would be, I believe, impractical with the degree of control measures that need to be put in place.*"

[121] The modelling undertaken by Dr Richardson demonstrates the quarry and concrete batching plant cannot operate simultaneously. The acoustic constraints are insurmountable in such circumstances. As Mr Job QC and Mr Quayle submitted,

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136 T6-40, Line 31.
137 T6-40, Lines 10 to 20.
138 T6-40, Lines 22 to 27.
139 T6-40, Lines 35 to 38.

Edith Pastoral therefore '*finds itself in the horns of a dilemma*'.[140] Edith Pastoral is required to agree to accept an operational strategy that is unorthodox to demonstrate partial compliance. The strategy involves onerous conditions[141] that, inter alia, prohibit concurrent performance of various aspects of the quarry and concrete batching plant. This operational strategy is articulated in sections 1.3 and 4.5 of Dr Richardson's noise assessment report published on 13 March 2020.[142] It is also reflected in s 1.5 of the Noise management plan prepared by Ms Adams.[143] It is a strategy Ms Adams conceded is '*fundamental*' and '*absolutely crucial*'[144] to achieving compliance with the agreed noise criterion.[145]

[122] Two aspects of the evidence taken in combination leave me with little confidence that compliance could be achieved with the non-concurrent mode of operation every day the proposed use operates, which is likely to be for a period of 100 years.

[123] First, none of the noise experts have experience of a quarry or concrete batching plant with noise controls of this kind.[146] The experts called in relation to quarry design and operations were in the same position. Mr Huntley and Mr Gray had not experienced similar controls like those proposed in the noise management plan.[147]

[124] Second, the non-concurrent mode of operation is challenging, and unproven. The following passage of Ms Adam's cross-examination was telling in this regard:[148]

> *"…I want to touch on enforceability and there's obviously debate between you and Mr King and Mr Brown about whether compliance has been demonstrated and/or whether it can be achieved. And you say it can be achieved with conditions?---Yes.*
>
> *But as you've accepted, the conditions are onerous?---Challenging.*
>
> *Challenging. And in terms of aspects such as non-concurrent operations unlike anything you've seen before in an operational quarry?---Agreed.*
>
> *And I'd hazard a guess that, collectively, they are the most onerous conditions you've ever seen suggested for an operation of this type?---Yes.*
>
> *And, of course, if they're not complied with for whatever reason, the agreed noise 30 criterion will be exceeded?---Yes. The 30 dBA would be exceeded."*

[125] A matter that has also informed my assessment of the likely success of the non-current mode of operation is the extent to which there is margin for error, or

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140 Ex.15.24, para 181.
141 T5-46, Lines 38 to 39.
142 Ex.16.02.
143 Ex.14.23.
144 T5-38, Lines 24 to 29.
145 T5-81, Lines 30 to 31.
146 Adams:T5-46, Lines 32 to 36 and T5-47, Lines 1 to 5; andEx.3.16, paras 63, 75 and 89.
147 T7-43, Lines 40 to 43 and T8-71, Line 26.
148 T5-81, Lines 18 to 31.

redundancy to accommodate a breach of such a requirement. Mr King's evidence establishes there is little, if any, margin for error or redundancy.

[126] It was put to Mr King that the number of staff on site (3), coupled with the annual tonnage output for the quarry were, in effect, self-limiting factors. Those factors, in combination, were said to support the success of the non-concurrent mode of operation. Mr King disagreed. In response, he pointed out the limited margin for error:[149]

> "*...I'm not saying they're all going to operate at once, but it only takes one extra bit of mobile plant to be operating, so two front-end loaders operated rather than one, for the noise limit to potentially be breached. So it's not about that they will be running the primary and secondary at the same time, it's that sensitive in terms of compliance to the number of trucks per hour or the number of front-end loaders operating at the one time.*"

[127] Given the 'sensitivity' of the analysis as discussed by Mr King, and given the non-concurrent mode of operation is challenging and unproven, I am not persuaded it was prudent for the noise modelling to assume non-concurrent operation of activities. Nor am I persuaded that the results of the modelling demonstrate the proposal will have no unacceptable noise impacts on the amenity of sensitive receptors. I have reached this view, firstly, by ignoring[150] all but the criticism directed towards the non-concurrent mode of operation assumption for the modelling. When the other criticisms are taken into account, this view is confirmed.

[128] I say this cognisant that the Court ordinarily assesses an application on the footing an applicant will comply with conditions of approval. I am not satisfied that would be the case here. There is, in my view, a sound evidentiary basis to depart from the ordinary position.[151] In simple terms, the conditions that Edith Pastoral contends will ensure noise is appropriately managed are, for reasons given above, onerous, impractical and unproven.

[129] An objective examination of the noise evidence establishes, in my view, that: (1) the proposed development does not comply with an agreed noise criterion intended to protect amenity; (2) the impact of the non-compliance with the agreed noise criterion will be adverse in amenity terms; and (3) the extent of non-compliance with the agreed noise criterion, and the consequential impact on amenity have been appreciably understated by Edith Pastoral. All of this occurs in circumstances where Mr Schomburgk, the town planning witness retained on behalf of Edith Pastoral, relied upon the following matter to support approval of the application:[152]

> "*Assessment of noise impacts from the proposed use has demonstrated that the development will comply with relevant noise criteria*"

[130] Do the noise impacts warrant refusal in their own right?

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149 T6-56, Lines 28 to 34.
150 Paragraphs [85] to [100].
151 *I.B. Town Planning v Sunshine Coast Regional Council* [2021] QPEC 36, [222].
152 Ex.3.14, para 193(b)(ii)(I).

[131] It was submitted on behalf of Edith Pastoral that '*any occasional exceedance of the 30 dB(A) standard does not call for the proposed development to be refused*'.[153]

[132] A significant number of reasons were cited in support of this submission, which can be summarised as follows:

(a) the 30 dB(A) level is not a measure or standard reflected in the adopted planning controls, particularly those that are assessment benchmarks and must be considered by the Court;

(b) the agreed criterion is conservative;

(c) the exceedances of the agreed criterion are minor, or bordering on trivial;

(d) the exceedances of the agreed criterion of 1 to 3 dB(A) may not be perceptible;

(e) Mr King and Mr Brown focussed on the fact of the exceedance rather than its impact on overall acoustic amenity;

(f) no other hard rock quarry is required to achieve a noise level of 30 dB(A);

(g) the noise modelling undertaken was 'very conservative' having regard to the location of the data loggers to measure existing background noise levels;

(h) the agreed noise criterion is a higher standard than that adopted by the Department of Environment and Science, being 40 dB(A) in an associated Environmental Authority;

(i) the proposed development will comply with the 40 dB(A) noise criterion in the associated Environmental Authority; and

(j) the proposed quarry is a consistent use in the Rural zone.

[133] I accept (a) and (j) are correct as a matter of fact. I will return to their significance, if any, later in these reasons for judgment.

[134] With respect to (b), whilst the agreed noise criterion is low[154] and conservative when compared to the criterion imposed by way of condition in an associated Environmental authority,[155] this does not establish, in my view, that the criterion adopted and agreed between the experts is inappropriate. The evidence establishes to the contrary. The noise criterion was calculated by reference to a known and accepted methodology. The inputs for the calculation were agreed. The agreed noise criterion is the product of these inputs. It is, as Mr King said, '*the criterion that's appropriate in this location based on the noise measurements that were undertaken*'.[156] Describing the criterion as conservative, given Mr King's view, which I accept, does not take the matter very far.

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153 Ex.14.54, para 106.
154 T6-20, Line 28.
155 T6-20, Lines 32 to 34.
156 T6-42, Lines 3 to 8 and T6-30, Lines 16 to 19.

[135] I pause to observe that this Court has recognised there '*are obvious difficulties, when considering the environmental appropriateness of a proposal…in using existing background levels in a relatively remote areas as a determinative point of reference*'.[157] The principal concern is that any adopted noise criterion in such circumstances may be artificially low or deflated so as to defeat an otherwise meritorious proposal. Whether such a point is applicable in any given case turns on the evidence. Here, the evidence does not establish the agreed criterion is artificially low, or so low as to suggest it ought not be used as a determinative point of reference. The evidence suggests otherwise.

[136] I do not accept that the exceedances of the noise criterion of 1 to 3 dB(A) (sub-paragraphs (c) and (d)) will be minor, trivial or imperceptible. This proposition was put to Mr King and Mr Brown. They both rejected the proposition. It is also inconsistent with the evidence of all noise experts to the effect that an exceedance of the agreed noise criterion would be unacceptable.

[137] Further, it should be observed in this context that the exceedances of the agreed noise criterion (calculated by the noise model) will occur in circumstances where: (1) the modelling assumes the non-concurrent mode of operation is practical and feasible – for the reasons given above, I am not satisfied this is a prudent assumption; (2) the modelling assumes the quarry and concrete batching plant will operate at a uniform rate – the evidence establishes the uses will be reactive to the market resulting in highs and lows with equipment running for longer periods of time than assumed by Ms Adams;[158] (3) the modelling is based, in part, upon favourable professional judgment calls that may not be achieved in practice;[159] and (4) the exceedances are based on calculations that do not include all drilling activities – for example, Ms Adams confirmed the modelling does not take into account drilling activities associated with the rehabilitation of benches, which occurs at the cessation of a stage.[160]

[138] I do not accept the proposition stated in sub-paragraph (e). It is inconsistent with the oral evidence of Mr King and Mr Brown. It is also inconsistent with the position of all noise experts that an exceedance of the agreed noise criterion would be unacceptable having regard to the underlying purpose of the criterion. The proposition also cannot be sustained once it is appreciated the noise modelling understates the impact of the proposed development on amenity.

[139] I accept the proposition stated in sub-paragraph (f) is correct as a matter of fact, but it does not take the matter very far. The timing and circumstances associated with approvals for other like facilities does not provide a sound basis to depart from the body of evidence before the Court that establishes: (1) there is an agreed noise criterion calculated by reference to the circumstances of the relevant locality; (2) the purpose of the agreed noise criterion is to protect the amenity of nearby sensitive receptors; and (3) even on the most favourable basis for assessment, the noise emissions from the proposed development will exceed the agreed noise criterion applicable to this locality.

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157 *Agtec Holdings Pty Ltd v Kilcoy Shire Council & Ors* [1999] QPELR 208, 211.
158 T6-42 to 43. A further example is found at T5-77, Lines 30 to 40.
159 T5-73, Line 40 to T5-76, Line 3.
160 T5-78, Line 45 to T5-79, Line 4.

[140] As to the proposition stated in sub-paragraph (g), I do not regard it as a valid criticism, or alternatively, a matter of significant weight. All of the noise experts agreed the location selected by Dr Richardson for background monitoring was '*suitable for defining the existing background noise levels for the locality*'. If the monitoring locations were regarded as conservative, or requiring specific qualification, that would ordinarily be expected to be addressed in the joint report. There is no such qualification in the first joint report, which deals specifically with the monitoring locations and the appropriateness of the existing background noise dataset.

[141] I accept the proposition stated in sub-paragraph (h) is correct as a matter of fact. It does not however take the matter very far. The criterion imposed by the Department of Environment & Science on an associated environmental authority is inconsistent with that agreed by all noise experts in this appeal. The reason for the inconsistency could not be explained.[161] Further, as Mr King pointed out, the criterion stated in the Environmental Authority is insufficient to adequately protect amenity for surrounding sensitive receptors.[162]

[142] I accept the proposition stated in sub-paragraph (i), that is, the proposed development would likely comply with the 40 dB(A) criterion identified in the Environmental Authority. This was conceded by Mr Brown[163] and Mr King[164]. This point does not advance Edith Pastoral's case given this criterion, if applied here, would not adequately protect the amenity enjoyed by surrounding residences.

[143] Whether the noise impacts of the proposed development warrant refusal, in my view, is informed by the adopted planning controls rather than the matters advanced on behalf of Edith Pastoral.

[144] The 2005 planning scheme is an assessment benchmark for the development application that must be considered by the Court. The respondents to the appeal have identified a number of provisions of that planning scheme with which the development does not comply by reason of noise impacts. The relevant provisions in this regard were identified, in general terms, at paragraph [65].

[145] Having regard to the noise evidence, I am satisfied that an approval, even allowing for the imposition of conditions, would not comply with a number of parts of the 2005 planning scheme that are directed towards the protection of character and amenity.

[146] The 2005 planning scheme anticipates that the desired character and amenity of the area reflects the significance of rural activities, character and lifestyle. The specific character description having application here is that for the Sub-catchment Valleys Precinct, which is said to contain mostly grazing lands within the lower sloping area of the major tributaries of the rivers of the Shire.[165] The rural lifestyle and character of this location is, as the evidence establishes, pleasant and quiet. The noise evidence, read with the statements of local residents, comfortably establishes the

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161 T6-42, Lines 14 to 32 and T6-64, Lines 26 to 33.
162 T6-64, Lines 35 to 36.
163 T6-33, Lines 38 to 46.
164 T6-74, Lines 26 to 27.
165 Ex.8, Tab 8.11, p 1.

proposed development will adversely impact upon this character. The impact, in my view, will be significant. It is an impact that is incompatible with the intended character and amenity of the area. It has not been demonstrated the impact can be mitigated to acceptable levels by imposing conditions of approval.

[147] It is unnecessary to identify an exhaustive list of provisions in the 2005 planning scheme with which there is non-compliance. It is sufficient to identify the provisions of the 2005 planning scheme with which I am satisfied there is non-compliance and regard as matters of import in the exercise of the planning discretion. The provisions are as follows:

(a) Overall outcome (2)(c) of the Rural Zone Code, which requires development to maintain and enhance rural amenity and character;

(b) Specific outcome SO10 of the Rural Zone code, which requires development in rural areas to be compatible with the desired character and amenity of the area;

(c) Overall outcome (2) of the Extractive industry code, which requires an extractive industry to not have adverse amenity impacts;

(d) Specific outcome SO3 of the Extractive industry code, which requires an extractive industry to be located in a way that ensures the character of an area is not unduly prejudiced;

(e) Overall outcome (2) of the Industrial development code, which requires the concrete batching plant to be consistent with the desired character and amenity of the locality; and

(f) Specific outcome SO4 of the Industrial development code, which requires potentially detrimental impacts on the acoustic environment and '*noise sensitive purposes* (sic)' to be ameliorated to acceptable levels.

[148] In concluding that an approval would give rise to non-compliances with the 2005 planning scheme, I have been mindful of two points made on behalf of Edith Pastoral.

[149] First, it was correct for Edith Pastoral to submit that the 2005 planning scheme does not require compliance to be demonstrated with an empirical noise standard, let alone the noise criterion agreed by the experts. That does not mean the evidence of the noise experts is put to one side, or of little value. That body of evidence establishes a cogent and persuasive means of examining the acceptability of noise impacts against the 2005 planning scheme. The evidence, in my view, is deserving of significant weight. The weight of the evidence is not diminished by the matters relied upon by Edith Pastoral, which are set out at paragraph [132].

[150] Turning to the second point, it was correctly submitted by Edith Pastoral that an extractive industry is a potentially consistent use in the Rural zone under the 2005 planning scheme. As a general proposition, I accept the identification of a use as consistent in the zone ought properly be understood as conferring a land use expectation. The nature and extent of that expectation is not the same for all

planning schemes. It is necessary, as a consequence, to closely examine relevant provisions of the 2005 planning scheme. Such an examination reveals the land use expectation is a qualified one.

[151] Section 4.4(1)(iii) of the 2005 planning scheme states, in part:

> "*(1) Column 1 of table 1 identifies:*
> ...
> *(iii) impact assessable uses which comprise development which may or may not be suitable for a site, depending on the individual circumstances of the proposal, but which are potentially consistent with the outcomes sought for each zone…*"

[152] Extractive industry is identified in Column 1 of table 1 of the assessment tables for the Rural zone. It is, by virtue of s 4.4(1)(iii), development that may or may not be suitable for a site, depending on the circumstances. This qualification calls for an assessment of the individual circumstances of a site to determine whether a particular use is suitable. That examination here, in terms of noise, demonstrates the land is not suitable for the use proposed. As a consequence, that an extractive industry is potentially consistent in the Rural zone does not assist Edith Pastoral in overcoming the difficulty that has been identified with unacceptable noise impacts.

[153] The development application also seeks approval for an industrial use, namely a concrete batching plant. A use of this kind is not contained in Column 1 of table 1 of the assessment table for the Rural zone. The consequence of this is identified in s 4.4(2) of the 2005 planning scheme, which states, in part:

> "*Other uses not identified in Column 1 of table 1…are generally considered to be inconsistent with the outcomes sought for a zone and are subject to impact assessment.*"

[154] The noise evidence confirms the concrete batching plant is inconsistent with the outcomes sought in this part of the Rural zone. The general designation as an inconsistent use in the zone is therefore confirmed by the particular circumstances of the application before the Court. Again, this does not assist Edith Pastoral in overcoming the difficulty identified with unacceptable noise and related character impacts.

[155] The extent of the impact demonstrated on the evidence is, in my view, sufficient to warrant refusal of the development application in its own right. This result is confirmed when it is appreciated there is an absence of a town planning need for the proposed development, and the impacts manifest in non-compliances with the 2005 planning scheme. The non-compliances with the 2005 planning scheme are not minor or trivial. They are non-compliances that give rise to a readily identifiable planning consequence.

Visual amenity and character

[156] The Co-respondents contend the proposed development, if approved, would have an unacceptable impact on visual amenity and character. Council initially shared the

same position but softened during the hearing of the appeal. It ultimately accepted the impact was a matter for conditions, assuming progressive rehabilitation of the quarry was successful.

[157] To examine the visual amenity issue, I was assisted with the evidence of Dr McGowan, Mr Curtis and Dr Chenoweth. In keeping with the usual practice of the Court, they prepared a joint report.[166] The joint report examines five viewpoints that were said to be representative of the study area. For each viewpoint, a visualisation of the proposed development was prepared. After reviewing the visualisations, the joint report records the experts reached the following points of agreement:[167]

> "*The visualisations also show that:*
>
> *(a) to the extent that it is seen, the proposed pit represents (in terms of physical extent of disturbance) a minor proportion of the overall field of view from these viewpoints, although experts disagree as to whether or not this represents a minor change in visual amenity;*
>
> *(b) the minor ridgeline behind the proposed pit will remain intact as a discernible feature of the landscape, visible on or close to the local skyline as seen from some viewpoints;*
>
> *(c) the proposed development will not obscure or remove any other notable landscape features in the views.*"

[158] Section 4 of the joint report contains a useful summary of the points of agreement and disagreement between the experts. Mr Hughes QC and Mr Batty emphasised the contents of paragraph 109 of that summary, which states:

> "*The experts have assessed impacts on five representative receptors in the local area and agree that:*
>
> *(a) the river, rural landscapes, treed slopes, and background ranges are features of most views from these receptors;*
>
> *(b) the proposed quarry pit will not be plainly visible from VP A and VP B, but will be from VP C, VP D and VP E;*
>
> *(c) to the extent that it is seen, the proposed pit represents (in terms of physical extent of disturbance) a minor proportion of the overall field of view from these viewpoints, although experts disagree as to whether or not this represents a minor change in visual amenity;*
>
> *(d) the proposed processing plant would be entirely or mostly screened from view (by existing or proposed topography and vegetated screening) from all assessed receptors;*
>
> *(e) the haul route will be visible from some of the assessed receptors but the proposed screening will be effective in screening the route and traffic along it, except at the western end of the route;*

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166 Ex.3.06.

167 Ex.3.06, para 44.

> *(f) the minor ridgeline behind the proposed pit will remain intact as a discernible feature of the landscape, visible on or close to the local skyline as seen from some viewpoints; and*
>
> *(g) the proposed development will not obscure or remove any other notable landscape features in the views."*

[159] In my view, there are two important points of agreement set out above that inform an assessment of visual impacts in this case. First, it was agreed the proposed quarry pit will represent a '*minor proportion*' of the overall field of view when considered with the benefit of the visualisations. Second, it was agreed the proposed development, if appropriately conditioned, will ensure the processing plant and the haul route, save for the western end, will be mostly screened from view. The point of difference between the experts was therefore reduced to one about the acceptability of a change in visual appearance to a minor proportion of a field of view. There was also disagreement about whether the proposed rehabilitation would be successful.

[160] Dr McGowan, who was called by Edith Pastoral, did not regard the impact as unacceptable, provided progressive rehabilitation of the quarry was effective.[168] This qualification was consistent with a point of agreement recorded in paragraph 111(a) of the joint report. The experts agreed that rehabilitation, and revegetation of the extraction pit, will be important to reduce visual impacts. The rehabilitation will limit the extent of exposed benches and walls that can be viewed in any given stage.

[161] Given the findings I have made in relation to noise impacts, it is unnecessary to dwell upon the alleged visual amenity and character impact. I am satisfied having regard to the evidence of Dr McGowan, Mr Huntley and Mr Friend that this impact can be appropriately conditioned and ought not stand in the way of an approval. In particular, Dr McGowan's evidence is made good having regard to the background discussed in paragraphs [6] to [15], the SBEMP and the visualisations for the proposed development.

[162] Dr McGowan's evidence was the subject of a specific challenge in the written submissions prepared on behalf of the Co-respondents. It was contended on their behalf that a key assumption underlying Dr McGowan's evidence was not made good by admissible evidence. The assumption to which this submission was directed related to the timing of rehabilitation, that is, would the rehabilitation for any stage commence at the cessation of a stage, or be undertaken '*intra-stage*'. Dr McGowan assumed the latter, that is he assumed rehabilitation would be undertaken bench-by-bench within each stage, rather than at the end of each stage. If this assumption is incorrect, the Co-respondents point out that the visual impacts of the proposed development are likely to be far greater than that assumed by Dr McGowan and presented in the visualisations. In short, it is said a greater proportion of un-remediated quarry benches would be open and exposed to view if Dr McGowan's assumption was incorrect.

[163] I regard this as a fair point to raise, but it does not take the matter very far. It is my view the assumption made by Dr McGowan can readily be the subject of a condition/s of approval. If an approval was granted, it would be on the basis that

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168 Ex.3.06, para 110(a).

rehabilitation be conditioned to occur in a manner consistent with Dr McGowan's assumption, that is, on an intra-stage basis.

Access to water

[164] A reliable supply of water is required for the extraction and processing of hard rock. Water is also important to the concrete batching plant. It requires a supply of high-quality water to achieve a high-quality product.[169] Three sources of water have been identified for the development, namely recycled water, harvested water and the Brisbane River. Mr Clarke, who was called by Edith Pastoral in relation to flooding and stormwater issues, prepared a '*water balance*'. With the benefit of that work, it was his opinion the development could source water by recycling or harvesting, but primarily through extraction from the Brisbane River. Table 6-6 of Mr Clarke's report suggests the supply of water from the Brisbane River in any given year could range up to 50 per cent of the total water demand for the proposal.[170] As I understood the evidence, this is in the order of 27 to 51 mega-litres per annum.[171]

[165] Mr Clarke assumed the proposed development could lawfully source water from the Brisbane River under existing water licenses attaching to the land. The particular licenses to which he referred permit extraction for '*industrial*' purposes. The licenses are said to be limited only by a rate of extraction, rather than a total volume of extraction.[172]

[166] Council does not suggest that reliance on the Brisbane River as a source of water for the development warrants refusal. The Co-respondents have a different view. It is submitted on their behalf that the Brisbane River will not provide a sufficient supply of water for the development.[173] It was submitted:

(a) s 119 of the *Water Act 2000* provides that water taken under a license must be used only on the land to which the license attaches;

(b) a contravention of s 119 of the *Water Act 2000* is an offence; and

(c) the vast majority of the plant and equipment for the proposed development is located south of the land to which the relevant licenses attach.

[167] An examination of the existing water licenses, in conjunction with the proposed plans of development and a smart map, confirm the difficulty identified by the Co-respondents is a real one.[174] These documents demonstrate the concrete batching plant and processing equipment for the quarry are located on Lot 1 on RP15328. The license attached to this land permits water extraction for irrigation and not an industrial purpose. The license to which Mr Clarke referred as permitting extraction for an industrial purpose is attached to Lots 1 and 2 on RP75267. They adjoin Lot 1 on RP15328.

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169 Ex.4.04, p 63.
170 Ex.4.04, p 71.
171 Ex.6.09, p 8, para (iii).
172 Ex.4.04, p 63 and Appendix B, pp 80 to 84.
173 Ex.15.24, para 341.
174 Compare Ex.14.03, pp 3, 6 and 16.

[168] Mr Huntley was cross-examined about the supply of water to serve the development. He was aware of the supply issue, but confidently identified solutions that could be adopted in response.[175] The solutions involve taking water from dams, the quarry retention basin and the sump at the base of the quarry, which grows in capacity over the life of the quarry.[176] I accept this evidence. It establishes there is, on the balance of probabilities, a number of feasible solutions to the water supply issue raised on behalf of the Co-respondents. I am, as a consequence, satisfied there is likely to be a sufficient supply of water for the proposed development. Accordingly, this is not a matter that should stand in the way of approval.

[169] It can also be observed that the issue raised by the Co-respondents could be cured by a further approval under the *Water Act 2000* in relation to Lot 1 on RP15328. That a further approval may need to be obtained is not a matter that warrants refusal, save where it is established the application to secure a further approval is either a '*clear futility*', or '*tainted with illegality that cannot be cured*'.[177] The Co-respondents did not suggest an application under the *Water Act 2000* would be a clear futility or tainted with illegality.

Operational issues

[170] Council and the Co-respondents contend there are amenity issues for the proposed development that can only be resolved by adopting impractical management measures that are, in effect, incapable of execution. It is said this gives rise to operational issues for Edith Pastoral.

[171] It is unnecessary to deal with the operational issues as a separate reason for refusal. As was correctly submitted on behalf of the Co-respondents, the points are inter-related with the issues raised with respect to the management of noise and visual amenity impacts. I have considered the operational issues said to warrant refusal in the context of these impacts. As can be seen from the reasons above: (1) operational issues have impacted negatively on the confidence the Court can have on a number of assumptions that underpin Ms Adams' noise modelling; and (2) operational issues raised in relation to visual amenity are not adverse to Edith Pastoral's case.

Compliance with the 2005 planning scheme

[172] Non-compliance has been established with the 2005 planning scheme by reason of unacceptable noise and related character impacts. The impact, together with its likely severity, confirm the development is not suitable for the land. The severity of the impact also confirms that non-compliance with the 2005 planning scheme is not fairly regarded as minor or trivial. In such circumstances, the 2005 planning scheme is entitled to its full force and effect. It militates against an approval being granted in the circumstances of this case.

The issue of weight

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175 T7-75, Lines 9 to 45.
176 Ex.14.03, pp 9 to 15.
177 *Walker v Noosa Shire Council* [1983] 2 Qd R 86, 89.

[173] Council's 2016 planning scheme was not in force at the time the development application was properly made. The document, however, may be given weight in the assessment of the development application under s 45(8) of the *Planning Act 2016*. This provision does not identify when, and how, weight is to be given. It is a discretionary matter for the assessment manager, or this Court on appeal.

[174] Edith Pastoral submitted that approval or refusal is not likely to depend on weight being given to the 2016 planning scheme.[178] It did, however, submit the planning scheme is of some relevance to the appeal. There is, in my view, good reason to accept both submissions.

[175] As to the first submission, the 2016 planning scheme document represents the most recent statement of planning intent for the planning area. It has had close to five years to take hold in a planning sense. These two factors are sufficient to establish that weight should be given to the 2016 planning scheme. This is reinforced once it is appreciated the primary assessment benchmark against which the development application is to be assessed is 16 years old, and promulgated under the repealed *Integrated Planning Act 1997*.

[176] As to the second submission, a detailed review of the 2016 planning scheme, which is set out below, does not suggest the fate of Edith Pastoral's development application turns on this document being given weight.

[177] I will now deal with those parts of the 2016 planning scheme that touch upon the acceptability, or otherwise, of the proposed development, particularly in terms of noise impacts.

The 2016 planning scheme

[178] Edith Pastoral points to two aspects of the 2016 planning scheme that can fairly be regarded as touching upon, and informing, an assessment of the proposed development.

[179] First, it is submitted the 2016 planning scheme does not designate particular uses as consistent, or inconsistent, in a given zone. That a planning strategy of this kind was not maintained from the 2005 planning scheme has the potential to improve Edith Pastoral's case. In simple terms, the concrete batching plant is no longer regarded as an inconsistent use in the Rural zone. As a consequence, cases such as *Lockyer Valley Regional Council v Westlink Pty Ltd* [2013] 2 Qd R 302 and *Gillion Pty Ltd v Scenic Rim Regional Council & Ors* [2014] QCA 21 cease to have direct application. That said, it does not mean an approval should follow. Nor does it mean that the noise impacts of the proposed development cease to warrant refusal of the development application. Rather, the exercise called for is one that looks closely at the provisions of the 2016 planning scheme informing land use expectations in the relevant zone/locality, along with the '*tests*' intended to protect character and amenity in that zone. With this approach in mind, relevant planning scheme provisions are considered below. When examined in this way with the evidence, I am not persuaded the 2016 planning scheme leads to a different conclusion to that expressed in paragraph [155] above.

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178 Ex.14.54, para 40.

[180] Second, Edith Pastoral submits the 2016 planning scheme embodies a planning shift.[179] It was submitted the 2005 planning scheme seeks to regulate and manage noise impacts by reference to qualitative rather than quantitative measures. This, it was said, can be contrasted with the 2016 planning scheme, which adopts, in part, a quantitative approach to the assessment of noise impacts.

[181] The 2016 planning scheme includes a Strategic framework that is, unlike its counterpart in the 2005 planning scheme, intended to be utilised in the development assessment process.[180] It bears a familiar structure in that it comprises a number of components, each building upon broadly stated forward planning objectives. The Strategic framework, read as a whole, sets the policy direction for the planning scheme. The shift from qualitative to quantitative measures is, perhaps unsurprisingly, not evident in the Strategic framework. It is redolent with broadly expressed qualitative assessment measures.

[182] A number of qualitative statements in various sections of the Strategic framework suggest Council, as the planning authority, has adopted a planning strategy whereby a high quality noise environment is to be maintained by,[181] inter alia: (1) minimising land use conflicts through the appropriate separation of incompatible land uses;[182] (2) minimising off-site impacts from development on sensitive land uses;[183] and (3) requiring high impact activities be appropriately located and managed to provide a reasonable level of amenity protection for communities and individuals.[184] These strategies do not, in my view, represent a material departure in planning terms from the various amenity tests stated in the 2005 planning scheme. It can, however, be said there is a new dimension to the assessment; the 2016 planning scheme expressly calls for an <u>appropriate separation</u> between incompatible land uses. Even allowing for this additional dimension, none of the qualitative tests stated in the Strategic framework suggest a different conclusion to that expressed in paragraph [155] should be reached in the circumstances of this case.

[183] For the purposes of the 2016 planning scheme, the land is included in the Rural zone. The use of land in this zone for an Extractive industry is impact assessable. The use is also included in a class of uses defined by an administrative term, namely '*High impact activities*'. Uses of this kind are anticipated in the Rural zone where '*appropriately separated from towns, small townships and rural residential settlements*'. The stated purpose of this is to, inter alia, protect the existing and future amenity of these areas.[185]

[184] The Concrete batching plant is characterised in the 2016 planning scheme as '*High impact industry*'. A material change of use of this kind is impact assessable in the Rural zone. Whilst there is no specific overall outcome in the Rural zone code that anticipates such a use, identified categories of non-rural uses are anticipated in the zone. Such uses may be established where they are, inter alia, '*consistent with the amenity of the locality*'.[186]

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179 Ex.14.54, para 46.
180 Ex.8.04, p 1.
181 Ex.10.07, p 20, s 3.4.4.
182 Ex.10.07, p 9, s 3.3.1(11); p 12, s 3.3.6.1(b) and (d); and p 21, s 3.4.4.1 (b).
183 Ex.10.07, p 12, s 3.3.6.1(d); p 21, s 3.4.4.1(a); and p 22, s 3.5.1(5).
184 Ex.10.07, p 15, ss 3.3.10.1(a) and (b).
185 Ex.10.15, p 1, overall outcome (3)(d).
186 Ex.10.15, p 1, overall outcome (f)(i).

[185] The Rural zone code includes a table of Performance outcomes and Acceptable outcomes.[187] Performance outcomes PO13 and PO14 are relevant for assessable development and sit beneath a heading of '*Amenity*'.

[186] PO13 states, in part:

> "*The design, location and operation of development does not result in any undue adverse impact on amenity of the locality, having regard to:*
> *...*
> *(c) noise;*"

[187] PO14 states, in part:

> "*Development must take into account and seek to ameliorate any existing negative environmental impacts, having regard to:*
> *(a) noise;*"

[188] No acceptable outcome is prescribed for Performance outcome PO13 or PO14. This is surprising given the same code, in Performance outcome PO11 and its accompanying Acceptable outcome 11.2, calls up the *Environmental Protection (Noise) Policy 2008* to inform an assessment of '*environmental management principles*'. PO11 does not apply to the proposed development. It is only applicable to Rural activities.

[189] It can be observed that the tests prescribed in the overall outcomes and PO13 and PO14 of the Rural zone code, do not introduce quantitative considerations. Like the 2005 planning scheme, the tests call for a qualitative assessment, the outcome of which can be informed by evidence of the kind given by the noise experts in this appeal. That evidence, when read with the overall outcomes for the Rural zone and PO13 and PO14 of the zone code, does not suggest a different conclusion to that expressed in paragraph [155].

[190] The 2016 planning scheme includes an Extractive industry code. The purpose of that code is, inter alia, to ensure extractive industry operations are undertaken in a manner that minimises off-site impacts.[188] The purpose of the code is said to be achieved through six overall outcomes. Relevantly, overall outcomes (a), (b) and (e) state:

> "*(a) extractive industry is appropriately separated from incompatible and sensitive land uses;*
>
> *(b) extractive industry appropriately manages the operational impacts of the activity and protects public safety;*
>
> *...*
>
> *(e) new haulage routes do not ...adversely impact on the amenity of sensitive land uses adjacent to the route;*"

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187 Ex.10.15, p 2 and onwards.
188 Ex.10.21, p 1, s 8.2.7.1.

[191] The Extractive industry code includes a table of Performance Outcomes and Acceptable Outcomes.[189] Section 5.3.3(4)(c), which relates to code assessment, suggests compliance can be demonstrated with the code in one of two ways, namely: (1) by demonstrated compliance with the purpose and overall outcomes of the code; or alternatively (2) by demonstrated compliance with the performance outcomes or acceptable outcomes.[190] Two performance outcomes and their accompanying acceptable outcomes in the code have relevance to the noise issue in this appeal.

[192] There is an identifiable connection between overall outcome (a) and Performance outcome PO1 of the Extractive industry code. The former calls for extractive industries to be appropriately separated from incompatible and sensitive land uses. The latter, and its accompanying acceptable outcome, which sit in Table 8.2.7.3 beneath the heading '*Separation distances*' state:

Performance outcomes	**Acceptable outcomes**
PO1 The effects of *extractive industry* operations (dust, air and noise emissions, blasting, vibration and overpressure) and from associated transport movements do not create significant environmental harm, unreasonably disrupt the amenity of nearby *sensitive land uses*, or detract from the significance of protected areas.	**AO1.1** *Extractive industry* operations that involve blasting and/or crushing, are located a minimum 1,000 metres from: (a) a *sensitive land use* not associated with the *extractive industry* excluding *dwelling(s)* on land that is the subject of the *extractive industry*; or (b) land located in the General residential zone or Rural residential zone. **AO1.2** *Extractive industry* operations that do not involve blasting and/or crushing of rock (namely sand, gravel, clay and soil) are located: (a) a minimum of 200 metres from a *sensitive land use* excluding a *dwelling(s)* on land that is the subject of the *extractive industry*; or (b) land in a General residential zone, General residential zone - park residential precinct or Rural residential zone. **AO1.3** External haul routes, other than a *State-controlled road* or transport haul route identified on **OM006a-b**, are located not less than 100 metres from a *sensitive land use* (not associated with the subject site) or land in a General residential zone, General

189 Ex.10.21, p 1 and onwards.

190 This approach was adopted for an analogous provision in Brisbane City Council's planning scheme, and not criticised, in *Bell v Brisbane City Council & Ors* [2018] QCA 84, [50]. The development application in that case was impact, rather than code assessable.

	residential zone - park residential precinct, or Rural residential zone.

[193] Acceptable outcome AO1.1 requires '*Extractive industry*' operations that involve blasting and/or crushing to be, inter alia, located a minimum of 1000 metres from a sensitive land use not associated with the industry. This standard is quantitative. It has no analogue in the 2005 planning scheme. Non-compliance with the standard does not equate to non-compliance with Performance outcome PO1. A departure from the standard requires attention to be directed to the terms of PO1 to assess compliance.

[194] Exhibit 15.07 is an aerial photograph prepared by Mr King to illustrate separation distances between sensitive receptors and particular elements of the proposed development. It demonstrates there are two sensitive land uses,[191] namely receptor numbers 33 and 35 within 1000 metres of the proposal. The former is 980 metres to the north-west of the quarry pit where blasting may be undertaken. The latter is 860 metres to the north of the quarry pit where blasting may be undertaken. These matters establish the development does not comply with the standard prescribed by AO1.1.

[195] On the face of Exhibit 15.07, a legitimate enquiry is also raised as to whether separation distances from the internal haul route are of relevance. It is not particularly clear from the terms of AO1.1 if the phrase '*Extractive industry operations*' is intended to capture the internal haul route proposed. In my view, it should be construed to capture all parts of the Extractive industry use for which approval is sought. Here, that includes the internal haul route. It is part and parcel of the use. Exhibit 15.07 demonstrates there are three sensitive land uses located within 1000 metres of that haul route. The relevant sensitive receptors and their distance from the internal haul route are: (1) sensitive receptor number 33 – in the order of 155 metres to the south-east;[192] (2) sensitive receptor number 1 – 520 metres to the west; and (3) sensitive receptor number 5 – 700 metres to the south-west. Whilst not determinative of the issue, these matters also establish non-compliance with the standard prescribed by AO1.1.

[196] Performance outcome PO1 requires consideration to be given to whether, inter alia, '*the effects*' of extractive industry operations, which include noise emissions, will '*unreasonably disrupt the amenity of nearby sensitive land uses*'. Like the assessment carried out against many parts of the 2005 planning scheme, this provision requires a judgment call to be made having regard to the evidence. The evidence establishes this question is answered in the affirmative, leading to a finding of non-compliance with the provision. It also supports a finding of non-compliance with overall outcome (a) of the same code. The non-compliances are consistent with the conclusion expressed in paragraph [155].

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191 Which is defined in the 2016 planning scheme to include, inter alia, a dwelling house.

192 The distance measured on the exhibit is from the dwelling house to the haul route located on the road reserve rather than the subject land. A correction for this would appear to add in no material way to the separation distance, but is more accurately described as 'in the order of'.

[197] Performance outcome PO7 of the Extractive industry code sits beneath a heading of '*Managing the effects of extractive industry operations*'. The provision and its accompanying Acceptable outcomes state:

Performance outcomes	Acceptable outcomes
PO7 Noise and vibration is managed in accordance accepted standards.	**AO7.1** Blasting operations are limited to between the hours of 9:00am to 5:00pm Monday to Friday. **AO7.2** Extraction, crushing, screening loading and the operation of plant equipment and haulage are only to be undertaken between the hours of: (a) 6:00am and 6:00pm Monday to Friday; and (b) 8:00am and 3:00pm on Saturdays.

[198] Edith Pastoral have demonstrated compliance with Acceptable outcomes AO7.1 and AO7.2. It has done so by agreeing to accept conditions of approval that limit the hours of operation as stated. This has the consequence that the development complies with Performance outcome PO7. The development is, for the purposes of the Extractive industry code, therefore taken to manage noise in accordance with accepted standards.

[199] At first blush, compliance with PO7 appears to be of considerable importance. In simple terms, it is a provision of Council's most recent statement of planning intent having direct application to the quarry the subject of the development application. A finding of compliance with the provision appears directly at odds with a finding that the proposed development, if approved, would give rise to unacceptable noise impacts. This uncomfortable juxtaposition assists Edith Pastoral. However, compliance with PO7 is far from a complete answer to the noise issue.

[200] The Extractive industry code reflects that the planning authority seeks to manage the amenity impacts of such uses by a combination of at least two measures: (1) by ensuring the use is appropriately separated from sensitive land uses; and (2) by ensuring the operational impacts of the activity are appropriately managed. Item (1) is reflected in overall outcome (a) and PO1 of the code. Item (2) is reflected in overall outcome (b) and, of direct relevance to noise, PO7 of the code.

[201] The proposed development complies with item (2). It does not comply with item (1). Whilst partial compliance is relevant to the merits of the application, the extent of non-compliance is also relevant. Here, that there is non-compliance with item (1) is a matter of import. The non-compliance with item (1) establishes the use will not be sufficiently separated from sensitive receptors. The significance to be attached to

this non-compliance is informed by, inter alia, the consequences that flow from it. I accept the consequences will manifest in adverse and significant amenity impacts.

[202] The importance to be attached to the non-compliance is also informed by the Strategic framework in the 2016 planning scheme. I have already observed the Strategic framework reflects a planning strategy relating to the management of impacts. It is a strategy calling for an appropriate separation distance between incompatible land uses. An example of this strategy is to be found in section 3.4.4, which deals with the '*Air and noise environment*' element. Specific outcome 3.4.4.1(b) applies to this element and the proposed extractive industry, which is grouped with other '*High impact activities*'. The provision states, in part:[193]

> "*(b) High impact activities that are likely to generate noise…avoid unacceptable environmental and amenity impacts through* ***appropriate separation*** *from…other settlements of established small rural lifestyle lots…*" (emphasis added)

[203] Here, the pattern of subdivision coupled with the nature of existing development to the north, west and south-west of the land is fairly described as an established area of '*small rural lifestyle lots*'. As a consequence, any new extractive industry use on the land must avoid unacceptable impacts through appropriate separation from such areas. This requirement is, in my view, also reflected in overall outcome (3)(d) of the Rural zone code and Specific outcome 3.3.6.1(b) of the Strategic framework,[194] which state:

> "*(d) High impact activities are appropriately separated from towns, small townships, rural residential settlements, the Glamorgan Vale Urban Investigation Area, the regional water storages of Lake Somerset and Lake Wivenhoe and tourism focus areas to protect the existing and future amenity and environmental values of these areas;*
>
> And:
>
> *(b) The location of industry activities is appropriately separated from sensitive land uses to protect the health, wellbeing, amenity and safety of the community and individuals from the impacts of air, noise and odour emissions, and hazardous materials;"*

[204] The noise evidence establishes that an appropriate separation distance has not been achieved in relation to the management of noise impacts leading to non-compliance with the 2016 planning scheme. The resulting non-compliance is entitled to weight and is consistent with the conclusion expressed in paragraph [155].

[205] The Industrial activities code in the 2016 planning scheme applies to the proposed concrete batching plant. The purpose of that code is to, inter alia, establish industrial uses that appropriately manage environmental risks, public safety and operational

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193 Ex.10.07, p 21.

194 Which captures the concrete batching plant.

impacts.[195] The purpose of the code will be achieved through three overall outcomes. overall outcome (a) relevantly states:

> "*(a) ensure that the environmental performance of industry achieves a satisfactory standard and minimises adverse impacts on natural environment, sensitive land uses, and public open spaces;*"

[206] The code also includes a table of Performance outcomes and Acceptable outcomes. Performance outcome PO6, and its accompanying Acceptable outcome, sit beneath a heading of '*Operational impacts*'. PO6 and A06 state:

Performance outcomes	**Acceptable outcomes**
PO6 Noise is managed in accordance accepted standards and the use is of a scale, intensity, and duration that has minimal impacts on the surrounding area, *sensitive land uses*, and the enjoyment of public open spaces.	**AO6** Activities occur between 7am to 6pm Monday to Friday and 7am to 2pm on Saturdays. No operations occur on Sundays or public holidays.

[207] Edith Pastoral demonstrated compliance with Acceptable outcome AO6. It has done so by agreeing to accept conditions of approval that limit the hours of operation as stated in the Acceptable outcome. This has the consequence that compliance with Performance outcome PO6 has been demonstrated. The development is, for the purposes of the Industrial activities code therefore taken to '*manage noise in accordance with accepted standards*' and '*has minimal impacts on…sensitive land uses*'.

[208] Consistent with the compliance demonstrated with PO7 of the Extractive industry code, compliance with PO6 appears to be of importance. It sits uncomfortably with a finding that the proposed development, if approved, would give rise to unacceptable noise impacts. Again, this assists Edith Pastoral. However, compliance with PO6 is not a complete answer to the noise issue for two reasons.

[209] First, compliance with PO6 relates only to the concrete batching plant component of the proposed use. As it relates only to this aspect of the proposal, it cannot be said to diminish, or render acceptable, the noise impacts from the extractive industry, particularly the use of the rock drill in the quarrying process.

[210] Second, compliance with PO6 should not sensibly be considered in isolation. It needs to be balanced with non-compliances demonstrated with other provisions of the Strategic framework and Rural zone code. In particular, the compliance demonstrated with PO6 ought be balanced against an examination of the proposal against: (1) s 3.3.6.1(b) of the Strategic framework; (2) s 3.4.4.1(c) of the Strategic framework; and (3) s 6.2.9.2(1)(b) of the Rural zone code.

[211] Section 3.3.6.1(b) of the Strategic framework is set out above in paragraph [203]. The evidence establishes non-compliance with this provision. The non-compliance arises by reason the proposed development is not sufficiently separated from sensitive land uses to protect amenity.

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[195] Ex.10.22, p 1, s 8.2.9.2.

[212] Section 3.4.4.1(c) is a Specific outcome applying to the Air and Noise environment element in the Strategic framework. The provision states:[196]

> "*(c) High impact industry is located, designed, constructed and operated to avoid or minimise air, odour and noise emissions and any potential impacts on sensitive land uses.*"

[213] The proposed development includes High impact industry. This provision of the Strategic framework, as a consequence, requires that part of the development be located and operated to '*avoid or minimise*' noise emissions and any potential impacts on sensitive land uses. That has not been demonstrated on the evidence with respect to noise.

[214] The purpose of the Rural zone is articulated in s 6.2.9.2 of the Rural zone code. One of the identified purposes is stated in subsection (1)(b)(ii). It is to provide for '*other uses and activities that are compatible with the character and environmental features of the zone*'. The character of this locality, which is included in the Rural zone, is a quiet rural area. I am not satisfied the noise generated by the proposed use would be compatible with that character. This is so even assuming Ms Adams' noise modelling was accepted.

[215] The balancing exercise overall does not favour a conclusion that compliance with PO6 of the Industrial activities code is decisive, let alone deserving of significant weight in the determination of this appeal.

[216] One final matter that should be observed in relation to the 2016 planning scheme is that, unlike the 2005 planning scheme, there are provisions suggestive of an intent to strike a particular balance between amenity considerations and the economic benefits associated with the extraction of natural resources. An initial sense of how that balance is to be struck appears in s 3.2.5 of the Strategic framework.[197] The provision sets out the Strategic intent for 2031 and states, in part:

> *"…While the importance of protecting the amenity of human settlement areas and tourism areas is well understood, the further evolution of sustainable economic activity in rural areas, the historical economic foundation of Somerset Region and the essence of its character, is encouraged to occur without undue interference or over-regulation."*

[217] The above provision is relevant to the development application, but does little to inform how the balance of which it speaks is to be struck. It is necessary to look to more detailed provisions of the planning scheme for guidance in this respect. This includes the Rural zone code.

[218] The Rural zone code anticipates High impact activities may be located in the zone, subject to meeting stated requirements. Those requirements do not suggest the ultimate balance is to be struck in favour of extractive uses at the expense of sensitive land uses in the locality. Rather, the zone code suggests the balance is to be

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196 Ex.10.07, p 21.
197 Ex.10.07, pp 7 to 8.

struck in a way that extractive industry uses are to be: (1) '*appropriately separated*' from, inter alia, sensitive receptors;[198] and (2) compatible and consistent with the character and amenity of the zone and locality.[199]

[219] This is not to say that the Rural zone code does not strike the balance in favour of extractive industries in particular circumstances. Overall outcomes (j), (k) and (l) of the zone code all speak to protecting natural resources and extractive industries from encroachment from incompatible land uses. This protection does not elevate uses involving the extraction of resources above the need to appropriately mitigate adverse amenity impacts on nearby sensitive land uses. Rather, protection is directed towards identified resources, and existing extractive facilities that may be compromised by the approval of new incompatible land uses. This is to avoid what is referred to as 'reverse amenity' impacts. Reverse amenity considerations do not arise in this appeal.

[220] This is a case where a natural resource of value has been found, and proven. An application is made to extract it. It has not been demonstrated the resource can be extracted without adverse impacts on the amenity of existing sensitive land uses. This is because: (1) the proposed use would not be sufficiently separated from the sensitive land uses; and (2) it has not been demonstrated the proposed use can be operated in a manner that makes up for this deficiency. These matters, in combination, support Mr King's point; the land is unsuitable for an extractive industry. This is not overcome by reliance upon the 2016 planning scheme, including a provision such as s 3.2.5 of the Strategic framework.

Need

[221] Edith Pastoral submits there is '*an obvious town planning, community and economic need for the proposal*.[200]

[222] Council's written submissions do not address this issue.

[223] The Co-respondents submit need has not been demonstrated for the proposed development.

[224] Edith Pastoral's need case is founded on the evidence of Mr Duane. He prepared a joint report with Mr Gray and a further statement of evidence.[201] In both the joint report and further statement of evidence, Mr Duane opined there is an economic, community and public need for the proposed development.[202] As is evident from the combined size of those reports, a considerable body of work sits beneath that opinion.

[225] The joint report reveals Mr Duane undertook a demand assessment. This assessment included the identification of a '*defined study area*'. That area is identified on Map 2 of the joint report, and includes two catchments, namely:[203] (1) a local catchment,

198 Ex.10.15, overall outcome (3)(d).
199 Ex.10.15, ss 6.2.9.2(1)(b)(ii) and overall outcome (3)(f)(i).
200 Ex.14.54, para 162.
201 FG-1 and FG-2.
202 FG-1, para 264 and FG-2, para 7.1.
203 FG-1, para 92.

comprising the Somerset Regional Council local government area; and (2) a regional catchment, comprising three local government areas adjoining the local catchment, namely the local government areas for Lockyer Valley, Ipswich and Moreton Bay. At paragraph 93 of the joint report, Mr Duane stated the study area is about 80 kilometres by road, measured from the land.[204] This travel distance is referrable to a point of agreement in paragraph 41 of the joint report wherein it was said most quarries can, generally, service an area within a 50 to 100 kilometre range, and sometimes more.

[226] Section 2 of Mr Duane's further statement of evidence refined his position in relation to the catchment area. Map 2.1, which can be compared to Map 2 of the joint report, descends to particularity in terms of the areas that are up to 80 kilometres by road from the land. It can be seen that the road network on Map 2.1 does not extend as far south, or east, as the defined area identified in Map 2. The road network does however extend a considerable distance to the west beyond the defined area.

[227] Table 1 of the joint report identifies existing and projected population levels within the defined study area. The total population for the area was 703,095 persons in 2016. This population is predicted to increase to 1,345,810 persons by 2041.[205] The increase in population predicted for the 25-year period is greater than 90%, or put another way, it is projected to almost double in size.[206] This level of growth is not uniform in all parts of the defined study area. Substantial growth is predicted in Caboolture West, in and around Fernvale/Lowood within the Somerset Regional Council Area, and in the western part of the Ipswich City Council area.[207]

[228] By applying a rate of demand per capita for quarry material to population figures for the Somerset Regional Council Area, Mr Duane estimated the underlying local demand for hard rock. It is projected to increase from 226,557 tonnes in 2016 to 351,153 tonnes by 2041.[208] The same methodology was applied to the broader catchment. Mr Duane estimated the annual demand for quarry materials would increase in this area from 6.3 million tonnes per annum in 2016 up to 12.1 million tonnes by 2041.[209] Central to both calculations is the consumption rate assumed for demand. Mr Duane's demand assessment assumed: (1) a demand rate of 9 tonnes per annum per person; and (2) a percentage apportionment to reflect that 9 tonnes per annum includes a range of quarry products, not just hard rock. Mr Duane assumed 85% of total demand could be apportioned to hard rock products.[210]

[229] In section 5 of the joint report, Mr Duane examined the available supply to meet the assessed demand for hard rock quarry products. Map 5 of the joint report identifies existing and proposed hard rock quarries. In the context of the local market, Mr Duane identified one existing hard rock quarry, namely Karreman Quarry. Having regard to confidential trading figures, Mr Duane concluded this quarry is supplying part of the estimated demand for hard rock quarry products in the Somerset

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204 FG-1, para 93.
205 FG-1, para 97.
206 FG-1, para 99.
207 FG-1, para 100.
208 FG-1, para 106.
209 FG-1, para 108.
210 FG-1, para 106.

Region.[211] The differential between demand and supply confirms the local government area is a net importer of hard rock quarry products.[212]

[230] Under the heading '*Reconciliation of Quarrying Products Supply and Demand*', the joint report attributes the following opinions to Mr Duane in relation to '*local need*':[213]

> "*197. In the Somerset Regional Local Council Area, as detailed in Table 2 hard rock demand is projected to increase from 200,000-300,000 tonnes per annum over the period to 2041. The major existing hard rock quarry within Somerset…has approval up to 1 million tonnes but is currently producing in the order of…tonnes. Of this total, only…are being directed to Somerset Regional Council Area.*
>
> *198. On the current basis, therefore, there is deficiency of at least…tonnes of hard rock quarry material which is being sourced from outside the local area. Although theoretically,…could service that market, quarry operators would have a range of orders to serve based on price, size of the job and the like. One operator cannot service an entire market.*
>
> *199. Consequently, proposals such as the subject quarry would add to supply within the relevant catchment to meet future quarrying demand throughout the defined local study area.*"

[231] The following opinions are attributed to Mr Duane in the same section of the joint report in relation to the broader study area:

> "*200. In the broader study area, as detailed in Table 3, regional demand for hard rock is currently around 6.6 million tonnes and almost doubling to 12 million tonnes per annum by 2041. This is the equivalent of five new 1 million tonne quarries. Existing quarries can be expanded, however, new quarries will be required to meet this demand.*
>
> *201. It is also relevant to note that approved limits of quarries does not mean that they are able to produce at these limits, depending on capacity of their extractive and screening plants. An approved limit does not mean that existing plants can or will upgrade their facilities to meet demand over time.*

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211 FG-1, paras 128 and 129.
212 FG-1, para 130.
213 FG-1, p 58, with confidential information omitted.

> *202. Consequently, with demand likely to outstrip supply in the broader study area over the next 15 – 20 year period, in an environment where a number of quarries may close such as the Boral Purga, independent quarries are* [an] *important part of ensuring* [a] *competitive environment.*"

[232] Mr Gray disagreed with Mr Duane's estimate of the likely demand for hard rock quarry products. Little appears to turn on this difference of opinion. The significant point made by Mr Gray related to the deficiencies he saw in Mr Duane's assessment of supply. In circumstances where it was agreed there is substantial movement between local government areas of quarry materials, which is neither unusual or undesirable from an economic perspective,[214] the following opinion is attributed to Mr Gray in the joint report:[215]

> "*268. In my opinion, the Appellant has demonstrated that demand for hard rock quarry products exists at both a local and regional level, which is not surprising, but has not adequately accounted for the existing and probable supplier base available to meet current and foreseeable demand.*
>
> *269. No existing shortfall in the demand/supply balance for quarry products or concrete, at either a local or regional level, has been demonstrated by the Appellant that might otherwise suggest there is a lack of convenience, choice, competition or capacity from existing suppliers.*"

[233] Mr Gray's point is well made. The supply analysis undertaken by Mr Duane does not establish that the existing base of suppliers, both locally and more broadly, is insufficient to accommodate the estimated demand for quarry products now, and into the future.[216] In simple terms, this is because there is no empirical evidence that would permit such an assessment to be undertaken. The only '*empirical*' data available relates to current rates of production. Current production rates, taken in isolation, speak little about a quarry's capacity to meet existing, and future, demand.

[234] This shortcoming was not cured by general assertions attributed to Mr Duane in paragraph 201 of the joint report. In that paragraph, he suggested: (1) that the actual capacity of a quarry may not necessarily equate to its approved capacity: and (2) it cannot be assumed approved quarries can, and will, be upgraded to meet demand over time. These points can be accepted as general propositions, but they fall well short of establishing Mr Duane's opinion that demand is likely to '*outstrip supply*'.[217]

[235] When the evidence is examined, I am not persuaded it demonstrates there is a demand for hard rock quarry products, either existing or future, that will go unmet in Mr Duane's local or broader study area. This is because: (1) the evidence, namely Map 4.2 of Mr Duane's statement of evidence, demonstrates there are ten (10)

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214 FG-1, paras 70 and 71.
215 FG-1, para 268.
216 T8-48, Lines 4 to 23.
217 FG-1, para 202.

existing quarries servicing the Somerset Regional Council local government area, including a local hard rock quarry; (2) there is no evidence to suggest there are supply constraints, or capacity limitations, that would result in a shortage of supply from these facilities into the future; and (3) increased demand is heavily tied to '*significant population growth*', which will occur in locations well removed from the land.

[236] In relation to item (3), Mr Duane conceded that existing quarries servicing the Somerset Regional Council local government area are '*very well placed*' to service areas where significant population growth is forecast to occur.[218] This is to be contrasted with the subject proposal. At paragraph 231 of the joint report, Mr Gray said:

> "*...Because the subject site is somewhat remote, there are numerous quarries closer to the Appellant's higher growth target areas in Moreton Bay and Ipswich, supplying a full range of aggregate and road base products and which benefit from lower transport distances and thus lower transport costs to end users in adjoining LGAs. There are also large resources particularly in the Scenic Rim LGA which have been approved for development, but not yet commenced. These resources if developed will be future major suppliers into the Ipswich and Brisbane cities.*"

[237] Maps 2.1 and 3.1 of Mr Duane's further statement of evidence, read in conjunction with Map 3 of the joint report, make good Mr Gray's evidence. The maps demonstrate that little, if not modest, population growth is predicted in areas that are within the 80 kilometre road distance identified by Mr Duane. It is accurate to say the land is remote from the areas of predicted population growth, which are heavily relied upon to fuel future demand. These areas are located towards the end of, or beyond, the 80 kilometre road distance applied by Mr Duane. This was confirmed by Mr Duane in cross-examination.[219]

[238] The matters discussed above are, in my view, sufficient to dispose of the economic need argument advanced in relation to the proposed quarry. The points taken collectively suggest there is no latent unsatisfied demand that cannot, or will not, be met by existing quarries.

[239] Mr Duane was asked in evidence in chief whether he had established there was a clear need for a further hard rock quarry at Somerset.[220] In responding to this question, Mr Duane identified what he saw as the '*nub*' of the need argument:[221]

> *"...so the [nub of] the need argument, for me, is that within a large, growing market, having a smaller operator to service Somerset LGA, which is a net importer of quarry material, is important in terms of competition and choice and convenience for that market. It'll also be the case that they would also service areas outside Somerset LGA, so this quarry won't be limited to*

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218 T8-51, Lines 17 to 19.
219 T8-38 to T8-45.
220 T8-16, Lines 9 to 10.
221 T8-17, Lines 7 to 13.

> *servicing Somerset LGA, but it would…be best placed to service Somerset LGA in relation to the competition, along with the Karreman quarry."*

[240] There are four assumptions underlying Mr Duane's opinion.

[241] First, the opinion assumes the local market is a net importer of hard rock quarry products. This assumption has been established by the evidence.

[242] Second, the opinion assumes demand for quarry products will increase in areas close to existing quarries, which will, in turn, reduce the supply available to the Somerset Regional Council area. The point being made is that a reduction in supply to the local government area will manifest in a consequential reduction in choice, competition and convenience. I am not satisfied this is established by the evidence.

[243] The evidence establishes that the demand for hard rock quarry products in the Somerset Region local government area is small.[222] It is a small market. Adopting Mr Duane's estimated demand, which is optimistic, the market is about 200,000 tonnes per annum increasing to 300,000 tonnes per annum in 2041. This level of demand equates to about 2.5% of the total demand for the broader catchment. I accept Mr Gray's evidence that this demand can be comfortably accommodated by existing suppliers in circumstances where they are better placed to service areas of forecast growth, and continuity of supply can be reasonably expected.[223] The evidence does not establish that the supply to the local market is, or will be, adversely impacted by a lack of choice, competition, or convenience.

[244] Third, Mr Duane assumed there is only one local supplier of hard rock quarry products with no competitor, which is disadvantageous to the community. This assumption has been made out in part. The evidence does not establish that the existence of one local supplier is disadvantageous to the market.

[245] Fourth, Mr Duane assumed the single local supplier is a large quarry, which may not take the time and effort to service '*smaller orders*' in circumstances where the local government area is a net importer of hard rock quarry products. This was identified by Mr Duane as a gap in the market. It was a gap he considered particularly suited to small independent operators,[224] such as the proposed development. The introduction of a small operator into such a market was said to benefit the public in terms of competition and choice.[225]

[246] I have difficulty accepting the fourth assumption. As a starting point, it assumes a large quarry may choose not to fill small orders. This may be true as a generalisation, but there is no specific evidence to support that this occurs in the local catchment area. Indeed, this was a point taken up by Mr Job in cross-examination of Mr Duane where he asked:[226]

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222 T8-30, Lines 21 to 24 and T8-36, Line 21.
223 T8-35, Lines 31 to 32.
224 T8-33, Lines 1 to 2.
225 T8-35, Lines 14 to 17.
226 T8-34, Lines 9 to 11.

> "*Can you point me to any evidence here…that there's a lack of supply for smaller orders in your catchment?-- I can't point to anything specifically.*"

[247] In a similar vein, the following interchanges occurred later in the cross-examination:[227]

> "*…you've got no basis to suggest that Karreman, for example, is not supplying smaller jobs or smaller customers?--- No, I don't.*
>
> …
>
> *And you've got nothing to point to; to suggest that the quarries we've discussed that are outside the Local Government Area pose any problems in terms of continuity of supply for… smaller jobs?-- As I said, I haven't said that's the case at the moment.*"

[248] Again, as a general proposition, I can accept that the introduction of a small independent quarry operator into the catchment will increase choice and competition for the public. There are, however, specific circumstances that suggest such a benefit is not significant, let alone sufficient, to establish need in this case. The relevant circumstances involve an appreciation that: (1) there are a number of existing quarries well located to service the Somerset Regional Council area, particularly areas where high population growth is forecast and infrastructure projects are planned;[228] (2) the boundaries of the catchment area and local government areas identified by Mr Duane are not fixed borders and there is movement of quarry products in and out of the identified catchment; (3) it was agreed the market is highly competitive; and (4) there is no real world evidence suggestive of a market that is supply constrained, either now or in the future.

[249] As consequence of the above, I am not persuaded competition, choice and convenience carry the day for the need argument in this case. The highest these matters can be put was exposed by Mr Job QC in the following passage of cross-examination:[229]

> "*…The Somerset market is a relatively small one?--In population terms, compared with the rest of South East Queensland, yes.*
>
> *Well, in terms of a market for a quarry, it's a relatively small market for a quarry?--Well, in terms of the amount we've agreed, it's certainly – we say large quarries are up to a million tonnes per annum, and I'm saying the market is between 200 to 300,000 tonnes over time, so it's not the size of a large quarry – the market itself.*
>
> *Within that market, there's already choice?--There is some choice, yes.*
>
> *There's already competition?--There would be competition from those providers, yes.*

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227 T8-57, Lines 37 to 39 and T8-58, Lines 34 to 37.
228 FG-1, p 30.
229 T8-55, Line 10 to 29.

> *And I'm talking about providers outside as well, as are you?--Correct.*
>
> *There's already convenience?--Correct.*
> *And there's no undersupply?--Correct, but I think they can be improved, is what I've spoken about through my factors.*"

[250] This passage of the evidence makes it clear the '*market*', which is not limited to the local market, has convenient access to competitive facilities that provide product choice. Further, this evidence does not suggest the market is suffering as a consequence of undersupply. Mr Duane's view is that these matters could be improved by the introduction of a small independent operator into a local monopoly. That improvement does not, in my view, demonstrate an obvious town planning, community and economic need for the proposed hard rock quarry.

[251] The consideration of need to this point has focussed on the hard rock quarry. I will now turn to deal with need in relation to the concrete batching plant.

[252] It can be accepted that concrete, like hard rock, is an essential resource for the community. It is a major input for key economic activities in Australia, namely infrastructure, building and construction activity. The likely future demand for the product is related to population growth.

[253] The perishable nature of concrete requires a smaller catchment to be adopted in comparison to that for a hard rock quarry. In this regard, Maps 7 and 8 of the joint report reveal Mr Duane considered an area up to 50 kilometres radius from the subject land. He particularly focused on the area within a 30 kilometre radius. Within that area, he assumed the population would increase from about 11,000 persons up to 14,000 persons in 2036.[230] Based on a consumption rate of 1.5 m3 per annum for South East Queensland, Mr Duane estimated the demand generated by the relevant population in the year 2036 would exceed 20,000m3 of concrete.[231] Mr Duane pointed out that there is only one existing concrete supplier within a 30 kilometre radius supplying the market with about 5,000 to 7,000m3 per annum. This was calculated to represent a market share of 65 to 70%, with the balance being imported from outside of the 30 kilometre radius.[232]

[254] The need for a concrete batching plant in this case was said to be supported by two matters. First, the addition of a supplier into the market discussed above would improve choice, competition and convenience. Second, the co-location of the concrete batching plant would sound in a benefit to the public, namely a saving in transportation costs.[233]

[255] When considered by reference only to the matters discussed above, it is superficially attractive to conclude there is a need for a co-located concrete batching plant on the land. The need argument in this respect however loses its force once it is appreciated:

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230 FG-1, para 185.
231 FG-1, para 186.
232 FG-1, para 187.
233 FG-1, p 70 and T8-66, Lines 23 to 25.

(a) the catchment area does not include high growth population areas or infrastructure projects that would generate demand for concrete products;

(b) the catchment area is small and predominantly rural in nature;

(c) the existing supplier in the catchment has additional capacity to ensure continuity of supply;

(d) the market is supplied by five other plants, which are located outside of the 30 kilometre radius, but have an overlapping catchment – the other plants are, in some cases, better located to serve the need than the subject land and already service the market (catchment) identified by Mr Duane; and

(e) there is a facility approved and constructed at Kilcoy that can come online to ensure continuity of supply in the future.

[256] Mr Gray opined there was sufficient concrete supply capacity to meet the identified demand for the foreseeable future. I accept his evidence. In combination with an absence of real-world evidence suggestive of a market suffering from a lack of supply continuity or quality, I am not persuaded an economic or planning need for the concrete batching plant has been established. This is so even taking into account a benefit that was identified here, namely the facility would be co-located with a hard rock resource strategically located near major road infrastructure.

[257] I was reminded by Mr Job QC and Mr Quayle of the basic assumption in terms of need, namely there is in existence '*at the time of the application*' a latent unsatisfied demand on the part of persons affected by the planning scheme, which is not being met at all or being adequately met by the planning scheme in its present form.[234] I am not satisfied having regard to the evidence this basic assumption has been established for the proposed development.

[258] In reaching this conclusion, I have been mindful of the planning importance that attaches to a proven hard rock resource that can be feasibly extracted.[235] Hard rock is fairly characterised as an essential commodity.[236] I discussed the planning importance of such a resource, which exists here, in *Barro Group Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 18 at [4] (footnotes omitted):

> *"…As has been recognised by this court, it is in the community's interest that a proven deposit of quarriable material of high quality be availed of wherever possible. The rationale for this is two-fold, namely: (1) a proven deposit of quarriable material is an essential resource (for construction and infrastructure) in finite supply and of significant economic value; and (2) quarries can only locate where sufficient quality resources exist and are economically viable to extract…*"

[259] I have also been cognisant of four other matters.

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234 Ex.15.24, para 283.
235 Ex.14.54, para 144.
236 Ex.14.54, para 146.

[260] First, this Court has recognised for many years that the bar should not be set too high for need when the use applied for involves a necessary of life.[237] Given the importance of hard rock and concrete products to the community, this is a proposition applicable to the subject proposal. It does not however follow that the bar is set so low that it will be established by the nature of the use applied for. It is still necessary to examine the facts and circumstances of each case. The facts and circumstances of this case do not establish a need for the proposed development.

[261] Second, as was confirmed during the town planning evidence, it is a good town planning outcome to have access to additional sources of hard rock located as close as possible to the community it serves.[238] This point, along with the benefits of co-location with a concrete batching plant, and the proximity of the development to major road infrastructure and the local market, can be accepted as having application to this case. These matters do not however establish there is a need for the proposed development. One must look to evidence such as that examined by Mr Duane and Mr Gray to consider whether there is a need for the proposed development. For reasons given above, the evidence falls well short of establishing there is a town planning, community or economic need for the proposed development.

[262] Third, I have also been cognisant of the proposition that the provision of competition in a market where there is none has been treated by this Court as representing the fulfillment of a town planning need.[239] This proposition loomed large in the local need argument advanced on behalf of Edith Pastoral.[240] The difficulty is that the market here is not just the local market. The market is much broader in area, and is highly competitive. These are strong indicators that decisions of this Court about the introduction of competition where there is none, need to be treated with circumspection here. Indeed, the circumstances here are such that the proposition, in my view, has little, if any, work to do. So much is confirmed by that part of Mr Duane's evidence set out in paragraph [249] above, and Mr Gray's oral evidence at T8-96, Lines 30 to 36.

[263] Finally, in the context of need, Mr Job QC and Mr Quayle pointed out that Edith Pastoral's need case was undermined by the absence of any evidence as to the intended market for the proposed. This was said to be important because in the absence of such evidence one of three scenarios could be assumed: (1) all of the material extracted could be supplied to the concrete batching plant leaving no hard rock products for supply to the local market as assumed by Mr Duane; (2) none of the material extracted from the quarry would go to the batching plant, with aggregate sourced externally to produce concrete; or (3) a combination of (1) and (2), depending on market conditions. This point is not a hollow one given Mr Huntley's evidence. He volunteered that the money to be made on the land is in concrete, and not the quarry. He said concrete will take prime importance over everything, with hard rock produced to '*feed*' concrete production.[241]

[264] Whilst this has given me pause for concern, it has not led to the findings I have set about above in relation to need. That said, if this aspect of the evidence is taken into

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237 See for example *Luke & Ors v Maroochy Shire Council* [2003] QPELR 447, [35].
238 T9-5, Line 44 and onwards.
239 *Bunnings Building Supplies Pty Ltd v Redland Shire Council & Ors* [2000] QPELR 193 at [21].
240 Ex.14.54, para 149.
241 T7-72, Lines 19 to 23 and T7-73, Lines 10 to 13.

account, Edith Pastoral's case with respect to need does not improve. It is evidence that serves to confirm the need case advanced is of little force. Mr Huntley's evidence, in particular, sits uncomfortably with one the of the foundation stones of Mr Duane's need evidence, namely the hard rock quarry will meet a need for smaller orders that may not be met by larger quarry operators. Mr Huntley's evidence leaves me with serious doubt as to whether any hard rock would be made available to the local market, let alone be made available to fulfill small orders.

[265] For the above reasons, I am not persuaded there is, as submitted by Edith Pastoral, an obvious town planning, community and economic need for the proposed development.

Relevant matters

[266] Edith Pastoral relies upon a number of matters said to be relevant, and favour approval of its development application. Those matters were canvassed in detail by Mr Schomburgk at s 5.8 of the town planning joint report. He identified the following matters said to favour an approval:

(a) the proposed development complies with, or can be conditioned to comply with the assessment benchmarks put in issue by the respondents in their reasons for refusal;

(b) the proposed development will be constructed and operated in a manner consistent with the outcomes sought by the 2005 planning scheme;

(c) the proposed development will be constructed and operated in a manner that will have no unacceptable or adverse impacts on amenity or character;

(d) the proposed development will exploit an existing and available extractive industry resource while improving the long-term productive capacity of the land for agricultural use, thereby promoting outcomes sought by the 2005 planning scheme;

(e) the proposed development promotes the outcomes sought in the 2016 planning scheme with respect to:

  (i) providing a reasonable level of amenity;

  (ii) ensuring no adverse impacts on known sources of drinking water;

  (iii) ensuring the opportunity for adjoining premises to be used for rural activities is not prejudiced; and

  (iv) ensuring high impact activities are appropriately located and managed to protect the health and amenity of communities and individuals.

[267] In the alternative, that is, in the event there is non-compliance with the 2005 planning scheme, Mr Schomburgk expressed the view that this ought not be determinative of the appeal having regard to the following matters, namely:

(a) the land is contained within an area that is rich in available resources;

(b) there is a high quality proven hard rock resource on the land;

(c) the development footprint is generally clear of significant vegetation;

(d) the majority of infrastructure necessary for the access and haul road are in place from previous uses of the land;

(e) significant upgrades have been completed on key road intersections in the locality;

(f) there is sufficient demand and economic need for the proposed development;

(g) the proposed development will add competition, choice and convenience; and

(h) there are significant public benefits associated with the co-location of quarries and concrete batching plants, including a saving in transportation costs.

[268] Having regard to the reasons set out above, I make the following findings with respect of each of the relevant matters relied upon by Edith Pastoral.

[269] I am not satisfied the matters identified in paragraph [266], (a), (b) and (c) have been established.

[270] I accept paragraph [266](d) has been established in part only. That is, in so far as it has been established there is a proven quality resource on the land, this is a matter favouring approval. It is, however, unclear how and, in what way, an approval which would authorise significant land transformative works would improve the long-term capacity of the land for agricultural purposes. That said, I do accept that a significant part of the land will remain available for rural activities. This is consistent with the intent of the Rural zone in both the 2005 and 2016 planning schemes. To the extent the proposal would allow rural activities to continue, this is a matter favouring approval.

[271] I am not satisfied paragraph [266] (e)(i) and (e)(iv) have been established.

[272] I accept paragraph [266](e)(ii) and (e)(iii) have been established. These matters favour approval.

[273] I accept paragraph [267](a) – (e) and (h) have been established and favour approval.

[274] I am not satisfied paragraph [267](f) has been established.

[275] Whilst the addition of a local hard rock quarry and concrete batching plant would improve choice, competition and convenience as stated in paragraph [267](g), for the reasons given above, this does not attract any significant weight in the circumstances of this case.

[276] It can be observed that the agreed list of issues identified three further matters relied upon in support of approval that were not traversed by Mr Schomburgk. Those matters are: (1) the land has previously been used for an extractive industry; (2) other extractive industries are found in the locality; and (3) there is a public benefit obtained from extracting the resource on the land in circumstances where the topography provides a natural screen to minimise impacts.

[277] I accept the evidence establishes items (1) and (2). They are matters favouring approval.

[278] I accept the evidence establishes item (3), but only to the extent that it relates to impacts other than noise impacts. The topography is not sufficient to screen the development from surrounding noise sensitive receptors. To the extent item (3) has been established, it is a matter favouring approval.

Exercise of the planning discretion

[279] The case advanced by Edith Pastoral in support of approval is founded upon five propositions: (1) the proposed development complies with, or can be conditioned to comply with the assessment benchmarks; (2) the proposed development will not have unacceptable impacts on amenity or character; (3) there is an obvious town planning, community and economic need for the proposed development; (4) public benefits accrue in the event an approval is granted; and (5) non-compliance with the 2005 planning scheme ought not stand in the way of approval.

[280] For the reasons given above, Edith Pastoral has not discharged the onus in relation to items (1), (2) and (3).

[281] Whilst I accept item (4), and that some relevant matters have been established by Edith Pastoral, which are supportive of approval,[242] those matters taken individually, and collectively, fall short of persuading me an approval ought be granted in the circumstances of this case.

[282] Here, the evidence establishes the proposed development does not comply with the 2005 planning scheme. The non-compliances manifest in an identifiable and adverse planning consequence, namely an unacceptable impact on acoustic amenity and a related impact on character. Despite Ms Adams' best efforts, the impacts cannot be conditioned in a manner that would render them acceptable. Nor can it be said the matters advanced in favour of approval render the impacts acceptable, or justifiable, in the circumstances.

[283] The adverse impacts warrant refusal because the land is not sufficiently separated from sensitive receptors, which are located around many points of the compass. To make up for this short-coming, Dr Richardson and Ms Adams prepared a noise model that assumed a raft of noise mitigation measures. The short-coming could not be overcome even adopting impractical and unproven mitigation measures.

[284] The adverse impacts, coupled with associated non-compliances with the 2005 planning scheme, call for refusal of the development application. In simple terms, an approval does not withstand scrutiny when examined against the assessment benchmarks in the 2005 planning scheme.

[285] This position is not altered having regard to the 2016 planning scheme, particularly those provisions directed towards the mitigation and management of noise impacts.

[286] That a refusal ought follow is, in any event, confirmed when the findings in relation to noise are coupled with the findings in relation to town planning, community and economic need. These findings establish the proposed development would give rise to unacceptable character and amenity impacts in circumstances where there is no identifiable town planning, community or economic need for the development. It has

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242 Paragraphs [269] to [278].

been recognised that, in combination, these factors can be decisive in a decision to refuse a development application.[243] In my view, when taken in combination here, they provide a further compelling reason for refusal.

Conclusion

[287] The appellant has not discharged the onus.

[288] It is ordered that:

1. The appeal is dismissed.

2. The respondent's decision to refuse the appellant's development application is confirmed.

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243 *HPC Urban Design and Planning Pty Ltd & Anor v Ipswich City Council & Ors* [2020] QPELR 534, [253].