SUPREME COURT OF QUEENSLAND

CITATION:	*Wood v Redland City Council* [2011] QCA 242
PARTIES:	**GREGORY MARK WOOD** (applicant) **v** **REDLAND CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 3966 of 2011 Appeal No 3967 of 2011 P & E Appeal No 3592 of 2010 P & E Application No 2394 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Applications for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	16 September 2011
DELIVERED AT:	Brisbane
HEARING DATE:	31 August 2011
JUDGES:	Muir JA, Margaret Wilson AJA and North J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	1. **The application for leave to appeal in CA No 3967 of 2011 be allowed.** 2. **The declaration made by the primary judge in Planning and Environment Court Application No 2394 of 2010 be varied by deleting the words, "...in that it involves assessable development for which no effective development permit for material change of use has been issued, and the use is not otherwise lawful.".** 3. **The appeal in CA No 3967 of 2011 be otherwise dismissed.** 4. **The application for leave to appeal in CA No 3966 of 2011 be refused.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – GENERALLY – where the applicant conducted a seafood business out of his residence – where the applicant used his land for the purpose of processing, cooking and storing crabs for sale – where the applicant lodged an application with the respondent Council for a development permit authorising the use of his land for "Home Business" purposes – where the

respondent Council refused the applicant's application – where the applicant's appeal to the Planning and Environment Court was dismissed – where the respondent Council made an application to the Planning and Environment Court for a declaration that the use made by the applicant of the land without a permit constituted a development offence and an injunction restraining the applicant from unlawfully using his land without a permit – where the primary judge allowed the respondent's application – whether the primary judge erred in failing to consider whether the appeal was supported by public interest "grounds" as contained in Schedule 3 of the *Sustainable Planning Act* 2009 (Qld) – whether the primary judge erred in declaring that the use was unlawful in the absence of a development permit – whether the applications for leave to appeal should be granted

Integrated Planning Act 1997 (Qld) (repealed)
Sustainable Planning Act 2009 (Qld), s 326(1)(b), s 329(1)(b), s 498, s 582, s 604, Schedule 3

Regional Land Development Corp No 1 Pty Ltd v Banana SC & Ors (2009) 175 LGERA 115; [2009] QCA 140, considered

COUNSEL: The applicant appeared on his own behalf
S M Ure for the respondent

SOLICITORS: The applicant appeared on his own behalf
Norton Rose Australia for the respondent

[1] **MUIR JA:** The applicant is a professional fisherman. For many years he conducted his business out of his residence at 31 Drevesen Avenue, Cleveland. The primary judge described Drevesen Avenue as forming "part of a residential neighbourhood comprising of typical residential development albeit on slightly larger lots, in excess of 800 m^2." The land was zoned residential A under the Council's 1998 Planning Scheme. The nature of the applicant's business activities on the land was described by the primary judge as follows:[1]

> "The business or use conducted on the land by the appellant involves the loading of two outboard driven fishing boats, the towing from and to the subject land those vessels and, on return from fishing, their unloading and cleaning. Other uses include cleaning, cooking, freezing and storage of crabs. There was an allegation that at various times the appellant had also sold crabs on a commercial basis from the subject land but that allegation was not pursued in these proceedings. More will be said about these activities below when dealing with the question of amenity."

[2] On 24 October 2002, the respondent advised the applicant that his development permit under the *Integrated Planning Act* 1997 (Qld) would lapse on 30 March 2005. On that day, the applicant lodged a request to change an existing approval under the *Integrated Planning Act* to enable him to continue his business activities

1 Reasons at [3].

on the land. On 13 February 2006, the respondent advised the applicant that his application was refused. An appeal against the refusal of the application was abandoned on 5 September 2006.

[3] On 12 August 2010, the applicant lodged with the respondent an application for a development permit seeking approval for the use of the land for "Home Business" purposes. The application was not accompanied by the information required by the respondent. On 15 September 2010, the applicant provided a statement in respect of the proposed use of the land and plans of the structures on the land. On 19 November 2010, the respondent notified the applicant of the refusal of his application. The applicant appealed to the Planning and Environment Court, by notice of appeal filed on 2 December 2010, against the refusal of his development application.

[4] That appeal was heard together with an originating application brought by the respondent seeking a declaration that the applicant's use of his land constituted a development offence in that it involved assessable development for which no effective development permit for material change of use had been issued and the use was not otherwise lawful. The respondent also sought an injunction restraining the applicant from using the land for the purpose of processing, cooking and storing seafood for sale without having first obtained an effective development permit.

[5] On 28 March 2011, the primary judge dismissed the applicant's appeal and acceded to the respondent's application.

[6] The applicant applies for leave to appeal against each decision. CA 3966/11 concerns the appeal against the dismissal of the applicant's appeal and CA 3967/11 concerns the orders made by the Planning and Environment Court on the respondent's application.

[7] Section 498 of the *Sustainable Planning Act* 2009 (Qld) ("the Act") provides:

> "**498 Who may appeal to Court of Appeal**
>
> (1) A party to a proceeding may, under the rules of court, appeal a decision of the court on the ground—
>
> (a) of error or mistake in law on the part of the court; or
> (b) that the court had no jurisdiction to make the decision; or
> (c) that the court exceeded its jurisdiction in making the decision.
>
> (2) However, the party may appeal only with the leave of the Court of Appeal or a judge of appeal."

[8] The proposed notice of appeal in CA 3966/11, the appeal from the dismissal of the applicant's appeal to the Planning and Environment Court, relevantly states:

> "**2. GROUNDS** –
> *2009 Urban planning Act*
>
> **3. ORDERS SOUGHT** –
> 2009 Urban planning Act to be amended"

[9] In the application for leave to appeal in CA 3966/11, the "reasons justifying the granting of leave" are given as:

> "That residents of the Redland City Council area will not be able to park any commercial or associating vehicles related to any trades or even home based business under the current 2009 Urban Planning Act."

[10] The application for leave to appeal in CA 3967/11, under the heading "the reasons justifying the granting of leave", states:

> "I am at a lost (sic) on where the unlawful use of land accrued. That the Redland city council referred to the application on the 20th of August 2010 file in the Planning and Environment Court, Brisbane"

[11] Nothing appears under the heading "leave to appeal" on the form.

[12] The stated grounds of appeal are "*Primary grounds of income*" and the "orders sought" are specified as "Inquiry into the scandal why ID C2881 was cancel (sic) by Redland Shire Council."

[13] No error of law is identified in any of the applications for leave to appeal or proposed notices of appeal. The same may be said of the applicant's outline of argument.

[14] In the outline, the applicant referred to a letter to him dated 18 March 2011 from the respondent's solicitors. It stated:

> "**Redland City Council v Greg Wood – Planning & Environment Court No. 2394 of 2010**
> **Greg Wood v Redland City Council – Planning & Environment Court No. 3592 of 2010**
>
> You will recall that, towards the conclusion of the hearing on 16 March 2011, Judge Jones raised an issue with Mr Ure about whether there were sufficient grounds to justify approval of your development application in the event the Court considers there to be a conflict with the Planning Scheme.
>
> Mr Ure omitted to refer the Court to the definition of "grounds" in the Schedule 3 Dictionary of the *Sustainable Planning Act 2009*, which provides as follows:
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> > "**grounds**, for sections 326(1)(b) and 329(1)(b)-
> > 1 *Grounds* means matters of public interest.
> > 2 *Grounds* does not include the personal circumstances of an applicant, owner or interested party."
>
> Mr Ure will send a short note to the Judge's Associate reminding the Court of this definition."

[15] A note in terms of the first and second paragraphs of the letter was emailed by Mr Ure to the Judge's Associate.

[16] The letter refers to the following discussion which occurred at the conclusion of the applicant's address to the primary judge:-

> "HIS HONOUR: Mr Ure, in your addresses you referred to section 300 and – those provisions of the legislation in saying that there was conflict and there's no evidence of any justification despite the conflict.

MR URE: Yes, your Honour.

HIS HONOUR: Mr Wood's just raised, as I understand it, in effect, one of the consequences of refusing the appeal would be, obviously, to affect his livelihood but also, as I understand it, his son-in-law's livelihood.

MR URE: With respect, that's not a planning ground, your Honour.

HIS HONOUR: Mmm.

MR URE: That's not - unfortunate as it may be, that isn't a planning ground that would warrant doing the violence to the scheme that this proposal does.

HIS HONOUR: Yes. All right. I propose to reserve my decision."

[17] In the course of his submissions, the respondent's counsel had submitted:

> "With respect to the appeal, pursuant to the provisions of the Sustainable Planning Act section 493 the onus is on the applicant. It's an applicant appeal pursuant to section 461. The operative provisions of the Sustainable Planning Act with respect to a code assessable decision commence at 326 of the Sustainable Planning Act. It's a different regime to the Integrated Planning Act. It's been simplified but sub-para (1) is: 'The assessment manager's decision must not conflict with a relevant instrument' and the scheme is within that definition of a relevant instrument, 'unless the conflict is necessary to ensure the decision complies with the State planning regulatory provision', not the case here, 'or there are sufficient grounds to justify the decision despite the conflict.' There are no grounds to justify the decision in the instant case."

[18] He concluded his submissions as follows:

> "…the application that's currently before your Honour is squarely in conflict with the Codes and there are no reasons to approve it despite the conflict."

[19] Towards the end of his reasons, the primary judge adverted to the matter which he had raised at the conclusion of the applicant's address, observing:[2]

> "This case has unfortunate consequences for the appellant and his family. It is highly likely that the dismissal of his appeal will cause financial hardship for the appellant and his son-in-law who is employed in the family business. While the SPA recognises that a use can continue despite conflict with the town plan there must be sufficient grounds to justify the use despite the conflict. However, such grounds for the purposes of the Act exclude the personal circumstances of the appellant and are concerned with matters of public interest or benefit. Public interest or benefit was not a live issue in these proceedings. There are no other reasons which would justify allowing the use to continue in its current form." (citations omitted)

[20] The primary judge was correct in his conclusions that: "Public interest or benefit was not a live issue in [the] proceedings"; before "the assessment manager's

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[2] Reasons at [30].

decision" could conflict with the town plan there had to be "sufficient grounds to justify the use despite the conflict;"[3] and that the word "**grounds**", for relevant purposes, although including matters of public interest, did not include the personal circumstances of the applicant.[4]

[21] It does not follow, necessarily, that the exclusion of the personal circumstances of the applicant and his son-in-law and the financial hardship they may be expected to suffer from the concept of "public interest" meant that no public interest consideration could arise out of the closure of the applicant's business consequent upon the refusal of the subject application. "Public interest" is a broad concept, the meaning of which needs to be determined in the context of the Act.

[22] The purpose of the Act expressed in section 3 is:

> "…to achieve ecological sustainability by –
>
> (a) managing the process by which development takes place, including ensuring the process is accountable, effective and efficient and delivers sustainable outcomes; and
>
> (b) managing the effects of development on the environment, including managing the use of premises; and
>
> (c) continuing the coordination and integration of planning at the local, regional and State levels."

[23] Whether the closure of the applicant's business and the consequences of that closure could provide sufficient grounds to justify any conflict between the provisions of the town plan and the contemplated use of the land is not a question capable of being answered without careful investigation of relevant facts. No such investigation was required or undertaken as neither the applicant's application to the respondent nor his proposed appeal were based on public interest grounds. The primary judge thus did not err in failing to consider whether the appeal could be supported on such grounds.

[24] The applicant voiced concern about the communication between the respondent's counsel and the primary judge. He thought, mistakenly, that there could be no submissions made by a party after the conclusion of the evidence and final addresses. The Court can receive further submissions at any time provided that the way in which that is done is not productive of procedural unfairness. Here, counsel for the respondent merely provided the Court with the reference to a definition in the Act. The applicant was informed of what was intended. It was undesirable, as counsel readily acknowledged, that the applicant was not provided with a copy of the actual communication to the Court. That was given to him during the hearing of the appeal and it would have been desirable for the applicant to have been informed at first instance that he could, if he wished, seek to place before the Court any submissions he considered relevant relating to the definition provided by the respondent's counsel. It is highly doubtful, to say the least, that the applicant would have availed himself of the opportunity to make relevant submissions. On the hearing of the appeal, the applicant made no submissions on questions of statutory construction or as to the application of statutory provisions to the relevant facts. There was no procedural unfairness resulting from the communication with the Court.

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3 *Sustainable Planning Act* 2009, s 329(1).

4 *Sustainable Planning Act* 2009, Schedule 3.

[25] In his oral submissions, counsel for the respondent properly drew to the Court's attention to the fact that the declaration made by the primary judge pursuant to s 604 of the Act concluded with the explanatory words:

> "...in that it involves assessable development for which no effective development permit for material change of use has been issued, and the use is not otherwise lawful."

Those words are referable to s 578 of the Act, to which the primary judge had been referred, mistakenly, by counsel in his closing address. The substance of the declaration, which was to the effect that the use of the land for the purposes specified was unlawful, remained appropriate and was amply justified by the evidence which demonstrated a breach of s 582 of the Act. In the circumstances, it is desirable that the concluding words of the declaration, quoted above, be deleted.

[26] Having regard to the fact that the applicant was not legally represented, the respondent was directed to provide written submissions on this issue so that the applicant could consider them and provide further submissions if he so wished. He availed himself of the opportunity and his further submissions were duly considered. They did not address the matters of statutory construction raised by the respondent.

[27] Referring to a provision in the now repealed *Integrated Planning Act* 1997 (Qld) similar in terms to s 498 of the Act, Keane JA, Holmes and Fraser JA agreeing, said in *Regional Land Development Corp No 1 Pty Ltd v Banana SC & Ors*:[5]

> "[12] … The provisions of s 4.1.56 of the IPA serve a two-fold purpose. First, they manifest an intention on the part of the legislature that this Court should not interfere with the expert resolution of planning issues by the specialist P & E Court save to the extent necessary to ensure that that court acts within its jurisdiction and in conformity with the law. It is the evident intention of the legislature that decisions of the P & E Court as the specialist tribunal for planning matters should not be subject to general review on the merits. …
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> [13] Secondly, s 4.1.56 of the IPA is apt to achieve the wholesome purpose of conserving this Court's resources. It is often convenient for this Court to reserve its decision on the question of leave until after it has heard argument on the merits of the issues sought to be agitated on appeal. Nevertheless, s 4.1.56 of the IPA clearly contemplates that putative errors of law should be presented by an applicant so as to be recognisable as such by this Court without the need for the Court to descend into the evidence to be reviewed on the proposed appeal in order to determine whether leave should be granted.
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> [14] More than 20 years ago, Connolly J (Vasta J concurring) remarked in *Read v Duncanson & Brittain (Quarries) Pty Ltd*:

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5 [2009] QCA 140.

> 'At first glance the grounds [of appeal] do not clearly appear to raise questions of law but, as will appear, if they are benignly read, it is possible to extract one. It is I think timely to remind the profession yet again that the Court has from time to time said that the notice of appeal in a case of this sort should clearly identify the question of law which is raised.'"

[28] All of those observations have relevance to this appeal. As I have already said, no error of law was identified in the applications for leave to appeal, the proposed notices of appeal or in the applicant's outline of argument. The applicant stated in his outline of argument that as he "could not afford legal representation [he] had to present [his] case with no legal experience or knowledge." He said that, as a result, he felt he was not given a chance to be heard on certain matters or that he overlooked them, not specifying which.

[29] The applicant was in an unfortunate position and is deserving of sympathy. The primary judge appeared sympathetic to his plight. However, the primary judge, like this Court, had a duty to apply the relevant statutory provisions. A perusal of the transcript of the proceedings at first instance shows that the applicant was given every opportunity to present his case and that he was treated fairly.

[30] For the above reasons, I would:

(a) Allow the application for leave to appeal in CA No 3967 of 2011;

(b) Order that the declaration made by the primary judge in Planning and Environment Court Application No 2394 of 2010 be varied by deleting the words, "...in that it involves assessable development for which no effective development permit for material change of use has been issued, and the use is not otherwise lawful.";

(c) Otherwise dismiss the appeal in CA No 3967 of 2011; and

(d) Refuse the application for leave to appeal in CA No 3966 of 2011.

[31] **MARGARET WILSON AJA**: I agree with the orders proposed by Muir JA and with his Honour's reasons for judgment.

[32] **NORTH J:** I have read the reasons for judgment of Muir JA and agree with them and with the orders he proposes.