SUPREME COURT OF QUEENSLAND

CITATION:	*Drew v Bundaberg Regional Council* [2011] QCA 359
PARTIES:	**RICHARD DOUGLAS DREW** (applicant) **v** **BUNDABERG REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 6299 of 2011 P & E Application No 4038 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	9 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	7 November 2011
JUDGES:	Margaret McMurdo P, Muir JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the applicant private certifier granted building development approval to land owners for the construction of a shed on their vacant land – where the applicant granted the approval on the basis that the respondent Council's assessment period of 10 days had expired without the respondent imposing requirements on the land owners – where the respondent Council notified the land owners of its refusal of their application six days after the expiry period – where the primary judge held that the applicant's building development approval was invalid – where the applicant submitted that the primary judge erred in finding that the application was governed by Table 3.4 of the Burnett Shire Planning Scheme 2006 – where the applicant submitted that Clause 1.12(3) of the Scheme provided for the application to be assessed by the respondent as a concurrence agency – whether the use of the word "Otherwise" in Table 3.4 relevantly meant that the application was impact assessable – whether the primary judge erred in finding that the application was governed by Table 3.4 of the Scheme –

whether Clause 1.12(3) was applicable to the application – whether the application for leave to appeal should be granted – whether the appeal should be allowed

Standard Building Regulation 1993 (Qld) (repealed)
Sustainable Planning Act 2009 (Qld), s 498, s 601, s 604
Sustainable Planning Regulation 2009 (Qld), Sch 7

Allina Pty Ltd v Federal Commissioner of Taxation (1991) 28 FCR 203; [1991] FCA 78, cited
Interlego AG & Anor v Croner Trading Pty Ltd (1992) 39 FCR 348; [1992] FCA 624, cited

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

SOLICITORS: The applicant appeared on his own behalf
Connor O'Meara Solicitors for the respondent

[1] **MARGARET McMURDO P:** I agree with Muir JA's reasons for refusing the application for leave to appeal with costs.

[2] **MUIR JA**: **Introduction** The applicant, a private certifier, granted a building approval for the construction of a shed on vacant land owned by Mr and Mrs Loeskow at 6 Seahorse Court, Innes Park on 25 March 2010. Mr and Mrs Loeskow also owned the adjoining parcel of land on which they resided in a detached dwelling. On 18 January 2010 Mr and Mrs Loeskow lodged with the Council a "Request for Concurrence Agency Assessment – Planning" for building matters pursuant to Schedule 7, Table 1, Items 17, 19, 20 and 21, as applicable, of the *Sustainable Planning Regulation* 2009 (Qld) ("SPR"). The Council's Planning Committee considered the application and notified the Loeskows by letter dated 4 February 2010 of its refusal.

[3] By letter dated 10 February 2010 the applicant notified the respondent that the 10 business day period for assessment of the application under Schedule 15 of the SPR had expired on 2 February 2010, but the Loeskows had not been notified of the Council's decision of 4 February 2010 until 8 February 2010 when it received the respondent's letter of 4 February 2010. On that basis, according to the applicant, the assessment period had expired without a decision and the respondent was deemed to have decided that there were no requirements in relation to the application. The respondent Council applied by originating application to the Planning and Environment Court for a declaration that the building development approval was invalid and for orders restraining the Loeskows from carrying out "assessable development, being a material change of use for the purposes of domestic storage unless and until such time as [they] obtain an effective development permit for the material change of use". The respondent also sought an order requiring the Loeskows to remove from the land "all things in connection with the use of the land for the purposes of domestic storage".

[4] On 9 June 2011 the primary judge made the declaration and orders sought in the originating application.

[5] The applicant seeks leave under s 498 of the *Sustainable Planning Act* 2009 (Qld) to appeal against the decision.

[6] In the proposed Notice of Appeal accompanying the application for leave to appeal only one ground of appeal was identified. In substance, it was that the primary judge erred in finding that the application was governed by Table 3.4 of the Burnett Shire Planning Scheme 2006 ("the Scheme") and in failing to find that, as "an SBR[1] alternative provision" was not complied with, Clause 1.12(3) of the Scheme operated so that the application was to be assessed by the respondent "as a concurrence agency to the application for Building Works under the IPA and *Integrated Planning Regulation 1998*." Table 3.4 is an assessment table in respect of material changes of use of premises.

[7] The following matters were common ground. The floor area of the shed was 134 square metres. Specific Outcome SO.264 of the *Detached Dwelling and Domestic Storage Code* provided:

Column 1: Specific outcomes		**Column 2: Acceptable solutions (if self assessable) or Probable solutions (if code assessable)**	
SO.261	Adequate vehicle parking is provided on site for the principal dwelling and the relative's accommodation.	PS.261.1	An on-site car parking space in addition to those required for the principal dwelling is provided
For Sheds –			
SO.262	A shed on the same allotment as a detached dwelling maintains the functionality of the site for car parking and provision of private open space.	PS.262.1	All sheds on the site have a combined maximum GFA, minimum frontage setback, minimum side or rear boundary clearances and maximum wall height as specified in Table 8.4.
SO.263	Sheds are to aesthetically appealing and be complementary to the character and amenity of the locality in regard to building form and materials.	PS.263.1	If shipping containers are converted to Class 10 buildings, the appearance of the container is to be modified to incorporate external colours consistent with the existing dwelling on the site.
For Domestic Storage –			
SO.264	Domestic storage – i. is visually unobtrusive; ii. retains the residential character when located in residential areas; iii. is compatible with the existing or expected	PS.264.1	Domestic storage has a – i. combined maximum GFA, minimum frontage setback, minimum side and rear boundary setback and maximum wall height as specified in Table 8.4; and

[1] *Standard Building Regulation* 1993 (Qld) (superseded).

future development in the locality; and iv. contributes to attractive streetscapes or rural landscapes.	ii. if in the Urban Residential Zone or the Hinterland Residential Zone, the maximum width of any opening that faces the street, whichever is the lesser of 6 metres; or half the width of the frontage of the lot to which the opening is facing.

[8] Table 8.4, under the heading "Siting requirements for sheds and domestic storage", provided that in urban residential zones the maximum gross floor area for domestic storage was "up to 60m²". That requirement was identified as an "SBR alternative provision".

[9] Table 3.4 relevantly provided:

Assessment table – making a material change of use of premises – Urban Residential Zone (CTPA)								
Col 1	Column 2	Col 3	Column 4					
Type of development			**Applicable codes**					
Use	Qualifications	Assessment category	Coastal Towns Planning Area	Urban Residential Zone	Development Infrastructure & Works	Landscaping	Vehicle Parking and Access	Other
Business use class –								
Home-based Business		Self						Home-based Business Code (acceptable solutions only)
	if the Home-based Business Code acceptable solutions is not complied with	Code	✓	✓				Home-based Business Code
Low-scale Business		Impact						
Otherwise #		Impact						
Community use class –								
Park		Exempt						
Public Utility Undertaking		Impact						
Telecommuni-cation Facility – Major		Impact						
Telecommuni-cation Facility – Other		Exempt						
Otherwise		Impact						
Industry use class –								
All #		Impact						
Residential use class –								
Caretaker's Residence		Self						Detached Dwelling and Domestic Storage Code (acceptable solutions only)
	If the Detached Dwelling and Domestic Storage Code, other than an SBR alternative provision, is not complied with	Code		✓				Detached Dwelling and Domestic Storage Code
Detached Dwelling		Self						Detached Dwelling and Domestic Storage Code (acceptable solutions only)
	If the Detached Dwelling and Domestic Storage Code, other than an SBR alternative provision, is not complied with	Code						Detached Dwelling and Domestic Storage Code

Domestic Storage		Self						Detached Dwelling and Domestic Storage Code (acceptable solutions only)
	If the Detached Dwelling and Domestic Storage Code, other than an SBR alternative provision, is not complied with	Code						Detached Dwelling and Domestic Storage Code
Dual Occupancy		Code	✓	✓	✓	✓	✓	Dual Occupancy Code
Higher-density Housing	If located in the Medium-density Residential Precinct or the High-density Residential Precinct and the proposed maximum building height is not more than those specified in Table 3.19	Code	✓	✓	✓	✓	✓	Higher-density Housing Code
	If located in the Medium-density Residential Precinct or the High-density Residential Precinct and the proposed maximum building height is more than those specified in Table 3.19; or If not located in the Medium-density Residential Precinct or the High-density Residential Precinct	Impact						
Tourist Park #		Impact						
Otherwise		Impact						

[10] It was non-contentious at first instance that:

(a) The shed was used for the purpose of "domestic storage" as defined in the Scheme;

(b) The gross floor area of the shed did not comply with acceptable solution PS.264.1;

(c) The application involved a material change of use of the land which was an assessable development under the Scheme; and

(d) By application of Table 3.4, as a result of the application of and non-compliance with the acceptable solution, the making of the material change of use was neither self assessable nor Code assessable.

[11] At this point, the respective contentions of the applicant and the respondent parted company. The respondent contended that on the proper construction of Table 3.4 the word "Otherwise" under "Tourist Park", at the foot of that part of the table set out above, applied to require an Impact Assessment of the application as it expressed the default provision for applications for material change of use of premises in urban residential zones which were not identified in the Table as being self assessable or Code assessable. The applicant submitted that "Otherwise" appeared under the Use column, Column 1, and not under Column 2, the qualifications column, or under both Columns. It followed from this, according to the argument, that "Otherwise" applied only where the use under consideration was not one of those specified in Column 1. Where neither Column 3 nor "Otherwise" applied, clause 1.12(3) of the Scheme applied.

[12] The primary judge held that "Otherwise" was a default provision which applied in the circumstances under consideration. That finding, with respect, was plainly

correct. If regard is had to Table 3.4 it will be seen that "Otherwise" is in a row under both of Columns 1 and 2: it has application to both those Columns. That is the first and most major impediment to the success of the applicant's argument.

[13] The second significant difficulty with the applicant's construction is that, if correct, it would mean that Table 3.4, which is obviously intended to provide for the mode of assessment of material changes of use of premises, would make no provision for such assessment in respect of "Domestic Storage", "Caretaker's Residence" and "Detached Dwelling" uses where there was non-compliance with an SBR alternative provision.

[14] As the applicant's argument on the ground under consideration was dependent for its success on establishing that Table 3.4 did not apply to render the application impact assessable, it is unnecessary to consider the further development of his argument. It is worth observing, however, that clause 1.12 of the Scheme is of the nature of a general default provision whereas Table 3.4 is a specific provision which, relevantly, is intended to provide for the assessment of a material change of use for Domestic Storage. Table 3.4 was amended with effect from 22 February 2011, relevantly, by the insertion of "Otherwise" in Column 2 under the words "If a Display Home or Estate Sales Office and the acceptable solutions are not met" in that part of the table concerned with "Low-scale Business". "Low-scale Business", which appears in Column 1 is a sub-class of "Business use class".

[15] The applicant submitted that the amendment supported his construction of Table 3.4 as the insertion of "Otherwise" would have been unnecessary if the respondent's construction was correct. It was submitted on behalf of the respondent that the amendment, which did not relate to the "Residential use class", should be seen as a "belts and braces" provision.

[16] In construing a provision of a statute by reference to a later amendment to the statute "care must be exercised to ensure that the words in the later statute have not been inserted to remove possible doubts". Also, such a course is appropriate only where the provision under consideration is ambiguous.[2] I do not consider that reference to the amendment is of assistance for present purposes. There is no confusion or ambiguity about the role of "Otherwise". It plainly relates to both Column 1 and Column 2 and Table 3.4 is plainly intended to specify the mode of assessment applicable to the specific material changes of use.

[17] There was an ancillary point raised by the applicant about the content of the order at first instance which was not raised in the proposed grounds of appeal. It appeared to take issue with the order requiring the Loeskows to "lodge a properly made development application for the material change of use by 21 July 2011". In this regard, it was said that:

> "An assessable material change of use can be either 'Code' or 'Impact'. The Draft Order does not specify what level of assessment the material change of use is to be. As such, the Order issued does not comply with the argument presented by [Mr Loeskow]."

[18] It may be doubted that the applicant has standing to object to this part of the Order. He is not affected by it. The relevant obligation is imposed on Mr and

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2 *Allina Pty Ltd v Federal Commissioner of Taxation* (1991) 28 FCR 203 at 212; see also *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 382.

Mrs Loeskow. But, in any event, no error of law, or even practical difficulty, in relation to the subject part of the Order was identified. The Court was satisfied that assessable development under the Scheme had been carried out without an effective approval and was thus empowered by ss 601 and 604 of the *Sustainable Planning Act* 2009 (Qld) to make "an enforcement order".

[19] For the above reasons, the applicant has shown no appellable error in the primary judge's reasons or decision and I would refuse leave to appeal with costs.

[20] **DOUGLAS J:** I also agree with Muir JA's reasons and proposed order.