SUPREME COURT OF QUEENSLAND

CITATION:	*Loader v Moreton Bay Regional Council* [2013] QCA 269
PARTIES:	**HEATHER LORRAINE LOADER** (applicant) **v** **MORETON BAY REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 1099 of 2013 P & E Appeal No 237 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	20 September 2013
DELIVERED AT:	Brisbane
HEARING DATE:	22 May 2013
JUDGES:	Muir and Fraser JJA and Applegarth 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 is granted and the appeal is allowed, with costs.** **2. The orders made in the Planning and Environment Court are set aside.** **3. Instead of those orders, the appeal to that court is allowed and the Enforcement Notice issued by the respondent to the appellant under the *Integrated Planning Act* 1997 is set aside.** **4. The parties have leave to make submissions in accordance with the Practice Direction about the appropriate orders, if any, concerning costs of the appeal to the Planning and Environment Court.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – NOTICES AND ORDERS – where the applicant had carried out a boat building and repair business on two lots adjacent to a creek since April 2002 – where the business had been conducted in the same manner for many decades – where the first lot ('Lot 20') was a freehold lot owned by the applicant and the second lot ('Lot 1') was unallocated Crown land containing a slipway and jetty – where, after the commencement of the *Environmental Protection Act* 1994 (Qld) ('the Act'), the owners of the

business at the time applied for an environmental authority – where the real property description on the environmental authority referred only to Lot 20 – where a permit to occupy Lot 1 was first granted in 1998 – where, upon acquiring the business, the applicant applied for a transfer of the environmental authority – where the application for the transfer indicated that the business was carried out over both lots – where the environmental authority issued to the applicant in 2002 was issued over both lots and renewed in succeeding years – where, in 2007, the respondent wrote to the applicant asserting that a review revealed the authority had erroneously been issued over Lot 1, and issued a new authority over Lot 20 only – where the respondent issued the applicant with an Enforcement Notice in 2008 alleging that the applicant had carried out assessable development without authorisation, contrary to s 4.3.1 of the *Integrated Planning Act* 1997 (Qld) – where the respondent submitted that the amendment to the 2007 authority was made validly pursuant to s 73H(1) of the Act – where the applicant contended that the 2002 authority had the status of a development approval under s 619 of the Act – whether the activity on Lot 1 constituted assessable development – whether the Enforcement Notice should be set aside

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS – where the primary judge's reasons made only general reference to applications and authorities and did not otherwise refer to uncontroversial evidence in support of the applicant's argument – where the primary judge did not provide an explanation as to why that uncontroversial evidence was not relevant – whether the primary judge failed to provide adequate reasons

Environmental Protection Act 1994 (Qld), s 53, s 73H(1), s 129, s 130(1)(a), s 619
Environmental Protection (Interim) Regulation 1995 (Qld), s 4(1), Sch 1
Integrated Planning Act 1997 (Qld), s 1.3.2, s 1.3.5(b), s 1.3.5(c), s 4.1.50(5), s 4.1.52(1), s 4.3.1, Sch 8, Sch 10
Sustainable Planning Act 2009 (Qld), s 498, s 819

Loader v Moreton Bay Regional Council, unreported, Planning and Environment Court of Queensland, Griffin DCJ, No 237 of 2009, 20 December 2012, related
Mariner Construction Pty Ltd & Ors v Maroochy Shire Council [2000] QPELR 334; [2000] QPEC 31, cited
Sunland Group Ltd v Townsville City Council & Anor [2012] QPELR 449; [2012] QCA 30, cited

COUNSEL:	A Skoien, with R Northcott, for the applicant M Hinson QC, with S Ure, for the respondent
SOLICITORS:	Butler McDermott Lawyers for the applicant Thomsons Lawyers for the respondent

[1] **MUIR JA:** I agree with the reasons and proposed orders of Fraser JA.

[2] **FRASER JA:** Since April 2002 the applicant has carried out a boat repair business on two lots of land at Toorbul adjacent to Elimbah Creek near the Pumicestone Passage. Lot 20 on RP 72941 ("Lot 20") is a freehold lot which runs between Elimbah Avenue and Bishop Parade. Lot 20 is improved by a house and a shed. The house is closer to Elimbah Avenue than Bishop Parade. The shed, which is adjacent to Bishop Parade is used in the business. Lot 1 on AP 2986 ("Lot 1") is unallocated State land over which the applicant holds a permit to occupy. Lot 1 is improved by a boat ramp, slipway and jetty. The applicant's uses of that lot as at December 2008 included "repairing, sanding, spraying, fibre glassing, water blasting hulls and antifouling boats on a slipway…".[1] In the plan, Lot 1 appears as an extension of Lot 20 across Bishop Parade and into the adjacent Elimbah Creek.

[3] In December 2008 the respondent Council issued to the applicant an Enforcement Notice which alleged that the Council reasonably believed that the applicant had committed an offence on Lot 1 contrary to s 4.3.1 of the *Integrated Planning Act* 1997 "in that you have commenced assessable development without a development permit". The Enforcement Notice demanded that the applicant immediately cease operation of the "boat maintaining and repairing facility" on Lot 1.

[4] The applicant's appeal to the Planning and Environment Court against the giving of that Enforcement Notice was dismissed and that court also refused a stay. The applicant has now applied for leave to appeal against those orders. The proceeding in the Planning and Environment Court was required to be heard and determined as though the *Integrated Planning Act* 1997 had not been repealed but the decision in that court is to be treated as a decision under the *Sustainable Planning Act* 2009 for the purpose of an appeal to this court.[2] Such an appeal may be brought only with the leave of this court and (so far as is presently relevant) only upon the ground of error or mistake of law.[3]

Background

[5] So far as the evidence goes, a permit to occupy Lot 1 was first granted in September 1998 to Mr and Mrs Martin, who acquired Lot 20 from Mr and Mrs Ross in August of that year, "for marine facility purposes namely for the operation, management and maintenance of a boat building and repair facility including a ramp, jetty and slipway."[4] However the evidence showed that both Lot 20 and the land described in Lot 1 (which I will call "the slipway land", although it also comprehends part of the Bishop Parade road reserve) had been used in a boat building or repair business for many years before Lot 1 was made the subject of a permit to occupy. No doubt the

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1 *Loader v Moreton Bay Regional Council*, unreported, Planning and Environment Court of Queensland, Griffin DCJ, No 237 of 2009, 20 December 2012 at [5].

2 *Sustainable Planning Act* 2009, s 819.

3 *Sustainable Planning Act* 2009, s 498.

4 Permit to occupy dated 16 September 1998, condition (1).

boundaries of Lot 1 did not precisely reflect the land formerly used in the business, the boundaries of which may have been uncertain and fluctuating, but nothing turns upon that for present purposes. That use of the slipway land or at least so much of it as was not within the creek, in conjunction with Lot 20 was registered by the respondent's predecessor, the Caboolture Shire Council (I will refer to both of them as "the Council") as a lawful non-conforming use commencing in 1962 and included in the Council's 1978 planning scheme as "[a]ny industry requiring direct access to a river, creek, stream or other body of water as an essential part of its operations; the term includes the use of any land, building, or other structure for any of the purposes included in Appendix XII …", the appendix referred to "Boat Building and Repair".[5] In 1965, approval for construction of the jetty, boat ramp and slipway on so much of the slipway land as fell below the high tide mark was granted under s 86 of the *Harbours Act* 1955. A Department of Public Lands plan drawn in 1969 shows the same improvements. Similarly, a Port of Brisbane Authority plan drawn in 1991 described those parts of the slipway, the jetty, and the boat ramp which were within the creek as "Permit Area Structures", and a permit to occupy the part of the slipway land which was within the creek was granted by the Port of Brisbane Corporation to Mr and Mrs Ross on 25 June 1996. The permit was "solely for the purpose of operation management and maintenance of a boat building and repair facility including a ramp jetty and slipway".[6]

[6] Mr and Mrs Ross acquired Lot 20 in 1994. In September 1995, after the *Environmental Protection Act* 1994 had commenced, the Council wrote a letter to Mr Ross which referred to "Environmental Protection Act Information for Premises at 48 Bishop Pde, Toorbul Lot 20 RP 72941 Par Toorbul Assessment No: 21328-00000-000-1". The Council referred to the commencement of that Act and stated that Schedule 1 of the *Environmental Protection (Interim) Regulation* 1995 "specifies categories of businesses which the Queensland Department of Environment & Heritage consider may have the potential to harm the environment … known as 'Environmentally Relevant Activities (ERA's) [sic]' and are now required to meet certain standards and have a yearly licence or approval". The Council advised Mr Ross that "your business may fall into the following category: "Boat Building or Repair Facility – operating a commercial facility for boat building or repairs", and, if so, Mr Ross was required to apply for an environmental authority. (That advice reflected the provision in Sch 1, s 4(1) of the *Environmental Protection (Interim) Regulation* 1995 that a "Boat building or repair facility – operating a commercial facility for boat building or repairs" was an "Environmentally relevant activity Level 1 …" and the requirement in s 39 of the Act that a person carrying out such an activity must hold a licence.) The Council advised Mr Ross that if his business fell into that category the Council was the administering authority that deals with "your business" and that in the first year the "business" would not be liable for licence or approval fees until 1 March 1996. The letter attached an application form.

[7] In October 1995, Mr Ross lodged with the Council a completed application for an environmental authority. His application identified the registered business name of the applicant as "Toorbul Marine Service Pty Ltd" (for which he signed the form as a director), gave a registered business number, described the "Business address" as "48 Bishop Pde Toorbul 4510", and described the "Scheduled activity/ies" as

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5 *Loader v Moreton Bay Regional Council*, unreported, Planning and Environment Court of Queensland, Griffin DCJ, No 237 of 2009, 20 December 2012 at [5].

6 Permit to occupy dated 25 June 1996, condition 3.

"Transport – Marine 1" (a description of the business). The business address was repeated under a heading "Street address of premises/place of activity/ies". The real property description of Lot 20, which had appeared at the commencement of the Council's September 2005 letter, was written under the immediately following heading "Real Property description *Refer to Rate Notice If unknown go to next question*".

[8] On 15 February 1996 the Council issued Environmental Authority No. 0250000113 to Mr Ross, "Toorbul Marine Service Pty Ltd" ("the 1996 authority"). The 1996 authority recited that:

> "Under the provisions of the Environmental Protection Act, 1994 this environmental authority is issued:
> **Application for Environmental Authority by:**
> Toorbul Marine Service Pty Ltd
> **In respect of the following environmentally relevant activity/ies:**
> Boat Building or Repair Facility
> **being carried out at [sic] on land described as:**
> Lot 20 RP 72941 Par Toorbul
> **located at:**
> 48 Bishop Pde, Toorbul."

[9] In July 1998, a purchaser of the business, Mr Martin, applied for a transfer of the environmental authority from Mr Ross. The application described the location of the business as "48 Bishop Pde Toorbul" and referred to Lot 20 on registered plan 72941. In September 1998 the Council wrote to Mr Martin advising that the application had been granted ("the 1998 transfer"). The letter described itself as "Notice of Decision to Grant Transfer of Licence Section 57" and referred to "Land described as Lot 20 on RP 72941 located at 48 Bishop Parade, Toorbul".

[10] The applicant's solicitor wrote to the Council on 11 February 2002. Under a heading "Mr John T Martin, Environmental Authority No. 250000301 Premises Situated 48 Bishop Parade, Toorbul", the letter stated that the applicant had contracted to purchase the business "conducted from premises described as Lot 20 RP 72941 and Lot 1 AP 2986 PO 210992 Parish Toorbul." The letter sought advice about the procedure for the environmental authority to be transferred or for a new licence to be issued. The Council responded by letter dated 14 February 2002 requiring that the proposed transferee apply for a transfer of the licence, enclosing an application form for the transfer, and describing a procedure which included an inspection of the site by a Council officer prior to approval of the transfer. After the sale was settled the applicant's solicitor wrote to the Council under the heading used in the 11 February letter and enclosing the necessary transfer fee, a notice from Mr Martin to the applicant which required her to apply for a transfer of the licence and lodge a form, and a "Transfer of Level 1 Environmental Authority Form".

[11] On 9 April 2002 the Council issued an environmental authority ("the 2002 authority") to the applicant:

> "Trading as
> **Toorbul Marine Services**
> At
> **48 Bishop Parade, Toorbul**
> In respect of carrying out the Environmentally Relevant Activity at the premises described as Lot 20 RP 72941 & 1 AP 2986 PO 210992, in respect of the following Environmentally Relevant Activity described as

Boat Maintaining or Repair Facility
Activity Definition: Operating a commercial facility for maintaining or repairing any type of boat or inboard or outboard marine engine."

[12] The Council renewed the 2002 authority for succeeding years until, on 10 September 2007, the Council wrote to the applicant asserting that a review had revealed that it had "erroneously issued you with an environmental authority … for a boat maintaining or repairing facility on the slipway" and "[i]n order to provide more clarity you are now being issued with the approval documentation reflective of your application … received on 3 April 2002" ("the 2007 amendment"). The letter enclosed a registration certificate and an environmental authority for a boat maintaining or repairing facility at Lot 20 only.

[13] The Enforcement Notice given by the Council to the applicant in 2008 stated that:

(a) The Council reasonably believed that the applicant had committed a development offence contrary to s 4.3.1 of the *Integrated Planning Act* 1997 by commencing assessable development without a development permit.

(b) Lot 1 was then being used as a boat maintaining and repairing facility.

(c) That use was an environmentally relevant activity defined in Schedule 1 of the *Environmental Protection Regulation* 1998 as "69. Boat maintaining or repairing facility – operating a commercial facility for maintaining or repairing any type of boat or inboard or outboard marine engine".

(d) Schedule 8 of the *Integrated Planning Act* 1997 identified an environmentally relevant activity as assessable development.

(e) Council records indicated that a development approval for the environmentally relevant activity had not been issued for the land.

(f) A development permit which had been issued only permitted the use to occur on Lot 20.

[14] Section 4.3.1(1) of the *Integrated Planning Act* 1997 makes it an offence for a person to "carry out assessable development unless there is an effective development permit for the development."[7] The term "development" is defined in s 1.3.2 of that Act as comprehending "making a material change of use of premises" and "assessable development" is defined in Sch 10 to include development specified in Sch 8, Pt 1. From 4 October 2004,[8] Sch 8, Pt 1 included as assessable development "[m]aking a material change of use of premises for an environmentally relevant activity" and the definition of "material change of use" in s 1.3.5 included "the start of a new environmentally relevant activity on the premises" and "a material change in the intensity or scale of an environmentally relevant activity on the premises".[9] Neither part of the latter definition was satisfied in this case because there was no evidence that there had been any relevant change in the use of the land within Lot 1 for many decades.

[15] The respondent instead relied upon subparagraph (c)(ii) of the definition of "material change of use", which was added by an amendment which commenced on 18 November 2005:

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7 *Integrated Planning Act* 1997, Reprint No 9E (as in force on 1 December 2008).

8 See the *Environmental Protection Legislation Amendment Act* 2003.

9 Section 1.3.5 "material change of use", paras (b)(i) and (iv).

> "(c) the continuation of an environmentally relevant activity on the premises if—
>
> …
>
> (ii) there is no development approval for the activity and it was, at any time before 4 October 2004, carried out without an environmental authority as required under the *Environmental Protection Act 1994*."

[16] An environmental authority was required for some of the activity on Lot 1 (see [6] of these reasons). It follows that the applicant's conduct in carrying out that activity when the Enforcement Notice was issued was a material change of use, and thus the carrying out of assessable development as was alleged against her in the Enforcement Notice only if both of the following conditions were satisfied:

1. There was no environmental authority for the environmentally relevant activities described in the Enforcement Notice on Lot 1 at any time before 4 October 2004.
2. There was no development approval for Lot 1 in December 2008 when the applicant carried out the environmentally relevant activities described in the enforcement notice.

The arguments in the Planning and Environment Court

[17] The Council's arguments in the Planning and Environment Court may be summarised as follows. Both conditions were satisfied because there had never been an environmental authority for Lot 1. The 1996 authority and the application for that authority related only to Lot 20. The applicant applied only for a transfer of the authority relating to Lot 20 and the 2002 authority was therefore in error and invalid insofar as it referred to Lot 1. The 2007 amendment to omit Lot 1 from the authority (then recorded in a "registration certificate") was validly made pursuant to s 73H(1) of the *Environmental Protection Act* 1994. (At that time, s 73H(1) empowered the Council to "amend a registration certificate at any time to correct a clerical or formal error if— (a) the proposed amendment does not adversely affect the interests of the registered operator or anyone else; and (b) written notice of the amendment has been given to the operator."[10])

[18] The applicant contended in the Planning and Environment Court that neither condition was satisfied. As to the first condition, the applicant contended that the 1996 authority, upon its proper construction, authorised the conduct of the boat maintenance and repair facility on both Lot 20 and the slipway land which became Lot 1. As to the second condition, the applicant relied upon the 2002 authority. The applicant argued that, if the 1996 authority did not comprehend the slipway land, that was an error and the Council validly included Lot 1 in the 2002 authority pursuant to s 129 or s 130(1)(a) of the *Environmental Protection Act* 1994, as in force in April 2002:

> "129 The administering authority may amend an environmental authority under this chapter, at any time to correct a clerical or formal error (a 'correction') if—
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> (a) the proposed amendment does not adversely affect the interests of the environmental authority holder or anyone else; and
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> (b) written notice of the amendment has been given to the holder.

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[10] *Environmental Protection Act* 1994, Reprint No 7C (as in force on 29 August 2007).

> 130(1) The administering authority may amend an environmental authority under this chapter, other than a licence (with development approval) or a level 2 approval, at any time if—
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> (a) the holder has agreed in writing to the amendment; or
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> (b) it considers the amendment necessary or desirable because of a ground mentioned in subsection (2) and—
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> (i) if the amendment relates to a condition of the environmental authority—the amended condition is a condition that may be imposed on the environmental authority; and
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> (ii) the procedure under division 2 is followed."

[19] The applicant contended that the 2002 authority was given the status of a development approval by the transitional provision in s 619 of the *Environmental Protection Act* 1994[11] that if an environmental authority for a relevant activity was "in force immediately before the commencement" and there was no development approval for the activity "the authority has effect as if it were … a development approval for a material change of use under the Integrated Planning Act, schedule 8, part 1, table 2, item 1 …".[12] The applicant argued that the 2007 amendment of the 2002 authority was invalid, there being no evidence that the inclusion of Lot 1 in the 2002 authority was an error for the purposes of s 73H(1) of the *Environmental Protection Act* 1994, and in any event the 2007 amendment of the authority did not amend the development approval created by s 619.

[20] In support of the applicant's contentions that the 1996 authority, properly construed, authorised the conduct of the facility on the slipway land, or that the omission of that land from the authority was an error capable of correction under s 129 of the *Environmental Protection Act* 1994, the applicant advanced the following arguments. Any ambiguity in an approval or permit should be resolved in favour of the grantee.[13] When the 1996 authority was granted s 53 of the *Environmental Protection Act* regulated dealings only with the "licensee's business" and provided no limitation in respect of land. The applicant argued that the evidence allowed for inferences both that the Council regarded the street address "48 Bishop Parade, Toorbul" in Mr Ross's application and the 1996 authority as comprehending both Lot 20 and the slipway land, and that the Council was aware that Mr Ross was conducting the boat building and repair business on both areas of land. That evidence included:

(a) The Council's "History Summary of Toorbul Marine Services 48 Bishop Parade Toorbul", which referred to inspections by the Council from November 1997, including an inspection in January 2000 of work being conducted on boats both on the slipway and in the "workshop" (presumably a reference to the shed on Lot 20).[14]

(b) The 2002 authority and the Council's letter enclosing that authority referred to Lot 20 and Lot 1 as "48 Bishop Parade, Toorbul".

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11 Section 619 was introduced with effect from 4 October 2004 by the *Environmental Protection Legislation Amendment Act* 2003, s 45.

12 *Environmental Protection Act* 1994, s 619(1), s 619(2)(c)(ii).

13 The applicant referred to *Mariner Construction Pty Ltd & Ors v Maroochy Shire Council* [2000] QPELR 334.

14 Exhibit 12.

(c) The Council conducted yearly inspections of both the slipway on Lot 1 and the shed on Lot 20 both before and after the applicant purchased the business in April 2002,[15] and after that time the Council considered environmental issues arising on Lot 1 with no suggestion before September 2007 that the 1996 environmental authority did not comprehend the slipway.

(d) The first Council "audit of premises" report issued after the applicant assumed possession in April 2002 gave 48 Bishop Parade as the address of the "Toorbul Marine" business[16] and there were references in those audit reports and in other Council documents to the applicant's activities on the slipway.[17]

(e) In a letter from the Council to the applicant dated 23 November 2004, under a reference to "48 Bishop Parade" and "Lot 20 RP 72941", the Council referred to an inspection of the "the slipway" and a "collection pit" covered by the incoming tide.

(f) When the Council issued a certificate of registration in 2006 to replace the 2002 authority (which had expressly referred both to Lot 20 and to Lot 1), the certificate described the "Property Address" at which the "Boat maintaining or repairing facility" was being operated as "48 Bishop Parade, Toorbul", without any reference to real property descriptions.

(g) Between 2002 and 2004 the Council issued to the applicant rates notices which referred to 48 Bishop Parade and to Lot 20 and contained no reference to Lot 1, but the Department of Natural Resources and Mines' notices of valuation with respect to which those rates were calculated confirm that the rateable land comprised Lot 1 as well as Lot 20 and describe both lots as the "property at 48 Bishop Pde".[18]

(h) Internal records of complaints for the use of Council only (which were admitted in evidence on the basis that they were not evidence of the truth of the complaints), which described the "incident property address" as 48 Bishop Parade, recorded complaints about the use of the slipway land, including, for example, complaints made on 16 August 2006, 3 September 2007, and 15 December 2008 about water nuisances, sanding metal from a boat in the river, and work on the slipway.[19]

(i) After the Council amended the 2002 authority in 2007 by omitting reference to Lot 1,[20] the Council commenced to refer to the street number of Lot 1 as 48A instead of 48.

[21] The applicant relied upon the Council's omission to adduce any evidence to the contrary and the statutory provisions that the appeal to the Planning and Environment Court was an appeal "by way of hearing anew" and it was "for the

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15 Affidavit of Mr Cuthbert, paras 3 and 8-11.

16 Audit report 9 April 2002, exhibit 12.

17 Exhibit 12, audit report 25 January 2002 and file note for 26 March 2004 and 28 May 2004 (including, for example, references to inspections of the spraying of the hull of a boat on the slipway and the presence of "very little environmental nuisance").

18 Rates notices exhibit 10, valuations exhibit 11.

19 Exhibit 9.

20 Show Cause Notice 27 October 2008, document K in exhibit "CR-01" to the affidavit of Mr Reading of the Council.

entity that gave the [enforcement] notice to establish that the appeal should be dismissed".[21] The applicant argued that in the context of the recognised, long standing, prior use of Lot 20 and the slipway land for the boat maintenance and repair facility, the authority must have been intended to comprehend both areas of land. That was confirmed by the Council's conduct after the 1996 authority was granted of conducting inspections of the slipway land, making no suggestion at any time when the 1996 authority was in force that it did not comprehend the slipway land, and adding the slipway land (then Lot 1) to the 2002 authority. The conditions of the 1996 authority did not place any special limits on the authorised activity or any precise limitation of the land upon which it was to be conducted.

The primary judge's findings

[22] The primary judge found as follows:

(a) The inclusion of the reference to Lot 1 in the 2002 authority "taking the entire council correspondence with the parties before and after this date … was an error" and that the amendment [in 2007] did not adversely affect the applicant's interest because she had no right to operate the boat building and repair facility on Lot 1 at any time.

(b) The Council was empowered to issue the amended registration certificate in September 2007 by s 73H(1) of the *Environmental Protection Act* 1994 because "[t]he proposed amendment did not adversely affect the interests of [the applicant], the registered operator, as she had no right to operate the boat building and repair facility on Lot 1 at any time" and "[w]ritten notice of the amendment was given to [the applicant] on 10 September 2007 …".

(c) None of the applications for licences or transfers of the environmental authority referred to any lot other than Lot 20.

(d) The application made by the original owner in 1996 referred to premises located approximately 100 metres from the creek.

(e) The land was zoned residential A "which further suggests that the application described nothing other than Lot 20".

(f) Lot 1 did not exist on 15 February 1996 when the first environmental authority was issued but came into existence only on 15 July 1998, and "[t]he area continues to be a public road."

(g) The licence conditions (particularly conditions 3.2, 3.3, 3.4, 3.5, 4.2, 4.4, 4.5, 6.1) were directed towards the carrying out of activities on Lot 20, particularly to the shed and not on the road or in the creek.[22]

[23] I will discuss the applicant's challenges to those findings and the primary judge's ultimate conclusion under headings which summarise relevant grounds in the applicant's draft notice of appeal.

Error in failing to determine whether the applicant had undertaken "assessable development" on Lot 1, in failing to deal with issues raised by the applicant, and in failing to acknowledge that the use had been conducted for some fifty (50) years and there was no evidence of any "material change" in that use

[24] The Council argued that the primary judge's findings of fact, which required the conclusion that the applicant had undertaken assessable development as alleged in

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21 *Integrated Planning Act* 1997, ss 4.1.52(1) and 4.1.50(5).

22 *Loader v Moreton Bay Regional Council* unreported, Planning and Environment Court of Queensland, Griffin DCJ, No 237 of 2009, 20 December 2012 at [35]-[37].

the Enforcement Notice, were not amenable to challenge in the proposed appeal because such an appeal is restricted to mistake or error of law. The applicant replied that the primary judge did not advert to the critical question whether the omission of reference to the slipway land from the 1996 authority was an error of the kind which the Council was empowered to correct in the 2002 authority, the primary judge's reasons for finding that the inclusion of Lot 1 in the 2002 authority was "an error" were inadequate, and there was no evidence to justify that finding.

[25] The primary judge was referred to s 129 and his findings are consistent only with conclusions that the omission to refer to the slipway land in the 1996 authority was not an error and the inclusion of the corresponding Lot 1 in the 2002 authority was an error. There was some evidence in the documents discussed by the primary judge which, at least if viewed in isolation from the evidence upon which the applicant relied, favoured the primary judge's conclusion. However the primary judge's findings (a) and (b) in [22] of these reasons were not findings of fact. They were instead broadly expressed conclusions involving the application of the law to the facts. For reasons discussed under the next heading, when findings (c) – (g) are understood in the context of evidence upon which the applicant relied, those findings are not supported by the evidence.

[26] Furthermore, the evidence upon which the applicant relied was uncontroversial and, as I will explain, it supplied substantial support for the applicant's arguments. That evidence and those arguments went to the heart of the critical issues. Applying Muir JA's analysis in *Sunland Group Ltd v Townsville City Council & Anor*[23] of the law concerning the adequacy of judicial reasons, I conclude that the absence of any reference to that evidence, except for general references to the applications and authorities, and of any explanation why that evidence was not relevant or persuasive, rendered the primary judge's reasons inadequate and thereby constituted an error of law.

Did the Planning and Environment Court err in determining that there was no authority to conduct the use on land comprising Lot 1 at anytime?

[27] The 1996 authority did not incorporate the description of the business address in the application as 48 Bishop Parade, Toorbul, but instead granted a licence in respect of the environmentally relevant activities at Lot 20 "located at … 48 Bishop Pde, Toorbul". That clearly confined the geographical scope of the 1996 authority to so much of the land at 48 Bishop Parade as fell within Lot 20. This aspect of the 1996 authority is unambiguous. I nevertheless accept the applicant's argument that the Council acted within the power conferred by s 129 of the *Environmental Protection Act* 1994 when it amended the 1996 authority by including the slipway land (then described as Lot 1) in the 2002 authority and that it acted beyond its power when it omitted Lot 1 in the 2007 amendment.

[28] The Council's September 1995 letter to Mr Ross communicated that an environmental authority should be obtained if his "business" fell within the quoted category of "Boat Building or Repair Facility – operating a commercial facility for boat building or repairs". Mr Ross's application (which, it should be inferred, was lodged in response to that letter) communicated that, as the Council's letter suggested was already known to the Council, his business did fall within that category. It is objectively likely that Mr Ross intended to apply for an authority

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23 [2012] QCA 30 at [36]-[37].

which covered the whole area of land over which that business was conducted. Furthermore the evidence summarised in [5] and [20] of these reasons allowed for inferences both that the Council knew that the business was conducted over the slipway land as well as Lot 20 and that the Council regarded the slipway land as being comprehended within "48 Bishop Parade". As to the latter inference, whilst there was no direct evidence that in 1996 the Council regarded that address as comprehending the slipway land, the evidence supplied no reason for thinking that the land identified by that address was less extensive in 1996 than it was afterwards, when the Council treated "48 Bishop Parade" as comprehending the slipway land and administered the authority upon the basis that it did comprehend that land. In the following reasons I conclude that there was other evidence which supported those inferences and no persuasive evidence to the contrary. Those inferences should have been drawn.

[29] That conclusion gains support from the Council's decision in 2002 to include Lot 1 in the authority. The Council called only one witness, Mr Reading. Although he deposed in his affidavit that he had been employed by the Council in apparently relevant roles since September 1990 and that he was familiar with the land and the business, he did not give any evidence which was antagonist to the inferences for which the applicant contended. Mr Reading did depose that he could not find a record of any application for an environmental authority with respect to Lot 1, but that does not bear upon the intended effect of the 1996 authority because that lot was not created until after the 1996 authority was granted. Mr Reading also deposed that the 2002 authority "[e]rroneously" referred to Lot 1, but he did not identify the factual basis for that assertion, otherwise than by a reference to the absence of an application referring to Lot 1. No such application was necessary to empower the Council to amend the authority to correct a clerical error under s 129 of the *Environmental Protection Act* 1994 and there was no evidence that the Council was not accustomed to correcting clerical errors without an application. Furthermore, it very quickly became apparent in cross-examination that Mr Reading had no personal knowledge of any of the relevant matters which occurred before 2009.[24] Indeed, when the applicant's counsel sought to cross-examine Mr Reading upon the documents about what land was identified by the 48 Bishop Parade address at the time when the 1996 authority was granted, the primary judge upheld the Council's objection made on the ground that the cross-examination lacked utility because Mr Reading "knows nothing about these documents".[25]

[30] There was thus no evidence to support the Council's assertion in correspondence that it had conducted a "review" in September 2007 which revealed that the Council had erred five years earlier when it included Lot 1 in the 2002 authority and there was no evidence to contradict the inferences arising from the evidence relied upon by the applicant.

[31] I respectfully disagree with the proposition that Mr Ross's application excluded the slipway land. The directly relevant entry in the application was that of the "Scheduled activity/ies" as "Transport – Marine 1", a description of an "activity" which was wholly consistent with the "boat building or repair facility" comprehending the slipway land. In view of the evidence already canvassed, it was

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[24] Transcript 8 August 2012 at 2-13. Mr Reading initially mentioned 2007, but he became personally involved only in relation to a development application which was lodged in 2009 (except for some peripheral involvement which did not concern the present issues).

[25] Transcript 8 August 2012 at 2-22.

more probable than not that the "Business address" of "48 Bishop Parade" in the application was thought to comprehend both Lot 20 and the slipway land; at the very least, the Council did not fulfil the onus which lay upon it of proving that the slipway land was not identified by that address. In that context, the same address under the heading which allowed for a street address or a description of the place at which the activity was conducted conveyed that the slipway land was included, rather than that it was excluded. For the same reasons, and also because the next heading made it plain that a real property description was optional and that any such description was to be taken from the Council's rate notice (which must then have included only Lot 20), the reference under that heading to Lot 20 did not require the objectively unlikely conclusion that the business sought to be covered was confined to that lot.

[32] The Council argued in the Planning and Environment Court that the reference to Lot 1 in the 2002 authority was probably derived from the applicant's solicitor's letter of 11 February 2002 (see [10] of these reasons). The argument assumed that the Council did not refer to the terms of the 1996 authority when it formulated the terms of the 2002 authority. Such a surprisingly negligent approach to public administration should not be assumed in the absence of evidence.

[33] The primary judge's conclusions in (a) and (b) in [22] of these reasons were based upon findings (c) – (g). Finding (c) is neutral in relation to the 1996 authority because, as finding (f) recorded, Lot 1 did not exist as a separate lot when the 1996 authority was granted. Neither finding supported a conclusion that the Council did not intend the 1996 authority to comprehend the slipway land. As to finding (d), the application form enquired whether "the premise" was located "within 500 metres of" certain features. For "Hospitals, schools or residential buildings", Mr Ross ticked "yes" and indicated an approximate distance of 100 metres. The next sub-question asked about "Waterbodies, *e.g. creeks, rivers, lakes, ocean, water supply catchments*", to which Mr Ross gave the same answer. The shed on Lot 20 (which, as was common ground, was at least part of the land upon which the business was conducted) was itself very much closer than 100 metres from the nearest residential dwelling (either the house on Lot 20 itself or a neighbouring house) and from Elimbah Creek (which was less than about 23 metres from the boundary of Lot 20 where the shed was located).[26] The estimate of 100 metres cannot have been intended to describe the distance between those features. Rather, consistently with the word "within" in the first part of question 2, 100 metres was apparently the estimated maximum distance of the specified features from any point on the whole of the land, including the slipway land. That supports the applicant's case.

[34] As to finding (e), the application form asked "What best describes the locality in which the activity/ies is/are situated?" The choices were "Industrial estate", "Residential area", "Mobile operation", "Commercial area", and "Rural". Mr Ross ticked "Residential area". The primary judge appears to have accepted the respondent's submission that "the application was for land zoned 'Res A'"[27] but the application was not so confined. "Residential area" seems to have been the most appropriate description of the "locality" for the whole of the land, including the slipway land. The question did not ask about the zoning of the land. The only

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26 The similar dimensions of the slipway land and Lot 1 are given on the 1991 Port of Brisbane Authority plan and a 2010 Council report: exhibits 3 and 13 (p 10/1160).

27 Submissions of the respondent in the Planning and Environment Court, paras 19 and 35.

reference to zoning in the application form appeared in handwriting next to a question enquiring whether the activities "carried out on the premise/place have town planning approval". Mr Ross ticked "Yes", presumably upon the basis that the use of the whole of the land in his business was a nonconforming use recognised in the Town Plan. Next to that question the text "Res 'A'??" was written by a person who was not identified in the evidence. That had no probative value.

[35] Nor does the evidence support finding (g). If it were the case that some of the conditions of the 1996 authority were capable of sensible application only in relation to the shed on Lot 20, it is difficult to see how that would cast any light upon the question whether the slipway land was comprehended by the authority, but in any event the conditions were capable of sensible application on the slipway land. The environmental authority included four pages of conditions. By way of example, two of the conditions mentioned by the primary judge, conditions 3.4 and 3.5, related to spray painting, gluing, or lacquering. Work of that kind was generally not permitted in the open and it was to be carried out in a way which did not cause environmental harm. Mr Cuthbert (the applicant's husband) gave evidence that anti-fouling paint was applied to boats by roller, brush, or airless spray gun.[28] If the anti-fouling paint was applied by spray painting boats on the slipway land and that activity did not fall within any of the exceptions expressed in conditions 3.4 and 3.5, that activity might be held to be a breach of a condition, but it does not follow that it should be implied that either condition was directed towards the carrying out of activities on Lot 20 in the shed to the exclusion of the slipway land. To take another example referred to by the primary judge, condition 6.1 was directed to ensuring that the lighting of areas of the premises "does not directly illuminate or cause any environmental nuisance (eg glare) to any nearby premises or roadways." If some such illumination was necessary in Mr Ross's business, it might have been simpler to comply with that condition by carrying out the relevant activity in the shed on Lot 20 rather than in the open air on the slipway land, but it again does not follow that this condition was directed towards activities on Lot 20 rather than on the road or next to the creek; a breach of that condition presumably could be avoided by carrying out the work during daylight, or by shading or directing any necessary light away from Bishop Parade and the local houses. The other conditions mentioned by the primary judge fall within the same category. None of them support a conclusion that the licence was not intended to comprehend the slipway land which became Lot 1.

[36] As the applicant submitted in the Planning and Environment Court, other entries in the application form tended to confirm that it comprehended the slipway land. For question 5, "Environmental management", Mr Ross ticked "No" to sub-question (1) asking if any stormwater drains were located on site and sub-question (3) asking if the work area drained to the stormwater system, and "Yes" to sub-question (4) asking whether any waste water discharged to "stormwater drains, creeks, rivers, lakes, etc. …". Mr Reading gave evidence in cross-examination that there was no stormwater system in the locality. Thus, as the Council presumably appreciated in 1996, Mr Ross's answers suggested that his business activity involved waste water discharges to Elimbah Creek, a result which seems more likely if the slipway land was comprehended within the 1996 authority.

[37] The Council argued that it should not be inferred that Mr Ross required the 1996 authority to comprehend the slipway land because there was no evidence that the

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[28] Transcript 2-47.

particular activities conducted by the applicant on Lot 1 in December 2008 referred to in the Enforcement Notice had been conducted on the slipway land when Mr Ross applied for the 1996 authority. That may be so. It is possible, for example, that in 1996 Mr Ross used the slipway land only to transport boats from the creek to the shed on Lot 20, although it seems much more likely that some repair work was done on the slipway land (for example, where the extent of the work did not justify the effort of moving a boat across Bishop Parade to the shed). Even if Mr Ross's activity on the slipway land was confined to slipping boats and transporting them to the shed, that activity would likely generate effects upon the environment at least in the form of noise. More importantly, it would have remained an integral part of the business and the Council's 1995 letter and the first page of the completed application form focussed upon the "Transport – Marine 1" business, rather than any particular activity conducted within the business.

[38] Whilst the 1996 authority did not comprehend the slipway land, that is readily explicable as an error inadvertently arising from the re-formatting of the business address written on the application to the address typed on the authority, which, unlike the application, clearly narrowed the scope of "48 Bishop Parade" to so much of the land within that description as fell within Lot 20. No plausible reason was suggested either at the hearing in the Planning and Environment Court or in argument in this Court why the Council would have wished to confine the licence for a "marine" business, which it evidently knew was conducted over the whole of the land, in a way which excluded that part of the land which gave access to the water. I would hold that the applicant and the Council intended the 1996 authority to comprehend the slipway land but, by a clerical error, that intention miscarried in the form in which the authority was expressed.

[39] The 1998 transfer did not purport to alter the geographical scope of the authorised environmentally relevant activities but merely transferred the 1996 authority to Mr Martin. The Council conceded that if, as I have concluded, the application for the 1996 authority comprehended the slipway land and the 1996 authority was intended to grant a licence in respect of that land as well as Lot 20, then the omission of the slipway land could be regarded as a clerical error capable of subsequent amendment by the Council in the 2002 authority. That concession was appropriate. The Council was empowered to correct the mistaken omission of the slipway land from the 1996 authority by including Lot 1 in the 2002 authority.

[40] It follows that the 2002 authority was "in force" immediately before 4 October 2004 and then took effect as a development approval under s 619 of the *Environmental Protection Act* 1994. It also follows that it remained in force despite the issue on 10 September 2007 of an amended registration certificate and environmental authority for Lot 20 only. At that time, s 73H(1) of the *Environmental Protection Act* 1994 empowered the Council to amend a registration certificate only to correct a clerical or formal error and only if the amendment did not adversely affect the interests of the registered operator or anyone else. Neither condition was satisfied. Since the legislative purpose cannot have been that an amendment beyond the power conferred by s 73H invalidated a development approval created by s 619, the applicant held the necessary development approval when she conducted the boat maintaining and repairing facility on Lot 1 in December 2008 as alleged in the Enforcement Notice. It follows that her activity on Lot 1 did not amount to assessable development. The Enforcement Notice should have been set aside.

[41] Although the draft notice of appeal apparently challenged the primary judge's refusal to order a stay, none of the grounds of appeal was directed to that topic and

my conclusion that the Enforcement Notice should be set aside renders it unnecessary to consider whether a stay should have been granted.

Disposition and orders

[42] It is appropriate to make the following orders:

1. The application for leave to appeal is granted and the appeal is allowed, with costs.
2. The orders made in the Planning and Environment Court are set aside.
3. Instead of those orders, the appeal to that court is allowed and the Enforcement Notice issued by the respondent to the appellant under the *Integrated Planning Act* 1997 is set aside.
4. The parties have leave to make submissions in accordance with the Practice Direction about the appropriate orders, if any, concerning costs of the appeal to the Planning and Environment Court.

[43] **APPLEGARTH J:** I have had the advantage of reading the reasons of Fraser JA, with which I agree. I also agree with the orders proposed by his Honour.