SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane City Council v Gerhardt* [2016] QCA 76
PARTIES:	**BRISBANE CITY COUNCIL** (applicant) **v** **TREVOR WILLIAM GERHARDT** (respondent)
FILE NO/S:	Appeal No 8728 of 2015 P & E Appeal No 351 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane - [2015] QPEC 34
DELIVERED ON:	1 April 2016
DELIVERED AT:	Brisbane
HEARING DATE:	17 February 2016
JUDGES:	Holmes CJ and Philip McMurdo JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal be granted.** **2. Appeal dismissed.** **3. Appellant to pay the respondent's costs of the appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – BUILDING CONTROL – COUNCIL CONSENT AND APPROVAL – CONSENTS, APPROVALS AND PERMITS – OTHER MATTERS – where the respondent is a building certifier (class A) performing functions under s 48 *Building Act* 1975 (Qld) ('Building Act') – where owners of a house in Wooloowin made a building development application to the respondent under s 6 Building Act – where the development was an assessable development under s 9 of the *Sustainable Planning Regulation* 2009 (Qld) and under council's City Plan 2014 – where s 11 Building Act deemed the respondent to be the assessment manager for the building development application – where the respondent referred to the council that part of the building development application within its jurisdiction as a concurrence agency to assess the amenity and aesthetic impact of the application against the City Plan 2014 – where the council indicated that the respondent's request for a response as a concurrence agency was premature because it first needed

	to grant preliminary approval under s 83(1)(b) Building Act – where the respondent obtained a declaration that no application for preliminary approval was required – where the council contends that the declaration below contained errors of law – whether, on its correct construction, s 83(1)(b) Building Act requires a separate application to be made to the council as a necessary preliminary approval
	Building Act 1975 (Qld), s 6, s 11, s 46, s 48, s 83, s 83(1)(b), s 83(1)(d), s 83(2) *Sustainable Planning Act* 2009 (Qld), s 7, s 238, s 241, s 243, s 251, s 254, s 260, s 282, s 283, s 286 *Sustainable Planning Regulation* 2009 (Qld), s 9
	Brisbane City Council v Mamczur & Anor [2010] QPEC 71, distinguished *Gerhardt v Brisbane City Council* [2015] QPELR 812; [2015] QPEC 34, approved
COUNSEL:	M D Hinson QC, with J Lyons, for the applicant P R Smith for the respondent
SOLICITORS:	Brisbane City Legal Practice for the applicant No appearance for the respondent

[1] **HOLMES CJ:** I agree with the reasons of Philip McMurdo JA and the orders he proposes.

[2] **PHILIP McMURDO JA:** In December 2014 the owners of a house at Wooloowin applied to a private building certifier for permission to make additions and alterations to it. The certifier, who is the present respondent, considered that the decision was not his alone and that the owners' application had to be considered, in certain limited respects, also by the Brisbane City Council. The council's interest was in whether the proposed work complied with its planning scheme. So the certifier referred the application to the council.

[3] But the council did not proceed to assess the proposed works against its planning scheme. Instead, the council's position is that the owners should have made two distinct development applications: that which they made to the respondent and a distinct application to the council. The respondent disagreed and brought proceedings in the Planning and Environment Court, seeking declarations to the effect that no separate application need be made to the council and that in the circumstances, the respondent had become entitled to approve the owners' application without the council's concurrence.

[4] He obtained declarations to that effect.[1] The council applies for leave to appeal under s 498 of the *Sustainable Planning Act* 2009 (Qld) (which I will call the Planning Act) against that judgment on the basis that it involved errors or mistakes in law. The case involves important questions of general application as to the proper interpretation of the Planning Act and the *Building Act* 1975 (Qld) (which I will call the Building Act). I would grant leave to appeal but, for the reasons which follow, dismiss the appeal.

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1 *Gerhardt v Brisbane City Council* [2015] QPEC 34.

The need for an approval

[5] The term "development" is defined by s 7 of the Planning Act to include the carrying out of building work. There are several categories of development under the Planning Act but the parties agree that this building work is within the category "assessable development". By s 238 of the Planning Act, a "development permit" is necessary for assessable development.

[6] Although it is common ground that the proposed work is assessable development, it is relevant for the council's argument to discuss why that is so. By sch 3 of the Planning Act, development may be made assessable development by a regulation made under s 232 of the Planning Act, a State planning regulatory provision, a planning scheme, a temporary local planning instrument or a preliminary approval to which s 242 of the Planning Act applies.

[7] Section 232 of the Planning Act provides that a regulation may prescribe that development is (relevantly here) assessable development. Section 9 of the *Sustainable Planning Regulation* 2009 (which I will call the SPR) is such a regulation. It provides that development as stated in sch 3, pt 1, column 2 of the SPR is assessable development. By that part of sch 3 of the SPR, building work such as in the present case is assessable development because it is building work to be assessed under the Building Act. The application which the owners made to the respondent was a "building development application" under s 6 of the Building Act because it was "an application for development approval under the Planning Act to the extent it is for building work."

[8] But as the council submits, this was assessable development also in another way. The council's planning scheme, more specifically Table 5.10.21 of City Plan 2014, provides that this building work is assessable development (and subject to a "code assessment") because this house is within a locality at Wooloowin which is subject to what is called the Traditional Building Character Overlay under that scheme. The assessment required by the relevant part of Table 5.10.21 is a consideration of the proposed building work by reference to what is described as the Traditional Building Character (Design) Overlay Code in the council's planning scheme.

[9] Therefore there are two reasons why this proposed work was assessable development: the first being that it was building work to be assessed under the Building Act and the second being that it was work to be assessed against part of the council's planning scheme.

The assessment manager

[10] A "development application" must be made to the "assessment manager".[2] A development application is defined to mean an application for a development approval.[3] A development permit is one form of development approval, as that term is defined in sch 3 of the Planning Act. Who was the assessment manager to whom this application was to be made?

[11] Section 246 of the Planning Act provides that the assessment manager for an application is the entity prescribed as such under a regulation. Section 12 and sch 6 of the SPR provide that the local government is the assessment manager for a development which is completely within its area (as in this case) and where "any aspect of the development is assessable against [its] planning scheme …" (as in this case).[4]

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2 Planning Act s 260(1)(a).
3 Planning Act sch 3.
4 See above at [7].

[12] However, this was overridden in the present case by s 11 of the Building Act which provides as follows:

> "**11 Who is the *assessment manager* for a building development application**
>
> (1) Generally, the *assessment manager* for a building development application is the assessment manager for the application under the Planning Act, section 246(1).
>
> (2) However, if under section 48 a private certifier (class A) is performing functions for the application, the certifier is the assessment manager for the application."

The respondent is a private certifier (class A) and performing functions under s 48 of the Building Act for the application which was made to him. Section 48 relevantly provides:

> "(1) A private certifier (class A) may—
>
> (a) receive and assess a building development application; and
>
> (b) decide the application and grant or refuse the building development approval applied for as if the certifier were the person, who, under the Planning Act, section 246(1), is the assessment manager …"

Therefore, the respondent was and is the assessment manager for the application which the owners made to him.

[13] By s 247 of the Planning Act, it is the assessment manager for an application who administers and decides the application. But s 247 further provides that the assessment manager "may not always assess all aspects of development for the application". The Planning Act provides for some aspects to be assessed by another agency, which it describes as a "referral agency",[5] which is either an "advice agency"[6] or a "concurrence agency".[7]

The council as a concurrence agency

[14] It is common ground that the council was a concurrence agency for the application which was made to the respondent. Indeed when he sought a declaration in this proceeding that the council was a concurrence agency, the court refused to make that declaration because there was no issue in that respect. Nevertheless the primary judge explained, correctly in my view, the role of the council as a concurrence agency in the present case as follows.

[15] Section 251 of the Planning Act defines a concurrence agency for an application as being (relevantly) an entity prescribed as such under a regulation. Regulation 13 and sch 7 of the SPR contain that prescription. Item 17 of sch 7 applies to an application involving:

> "Building work for a building or structure if it is—
>
> (a) a single detached class 1(a)(i) building … and

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5 Planning Act s 252.
6 Planning Act s 250.
7 Planning Act s 251.

(b) in a locality and of a form for which the local government has, by resolution or in its planning scheme, declared that the form may—

(i) have an extremely adverse effect on the amenity, or likely amenity, of the locality; or

(ii) be in extreme conflict with the character of the locality".

Section 254 of the Planning Act provides that a referral agency (thereby including a concurrence agency) "has, for assessing and responding to the part of an application giving rise to the referral, the jurisdiction or jurisdictions prescribed under a regulation."

As is common ground, the application which was made to the respondent falls within item 17 of sch 7 of SPR. Consequently, by what appears in columns 2 and 3 of sch 7, the council is a concurrence agency and its "referral jurisdiction" is "the amenity and aesthetic impact of the building or structure if the building work is carried out".

[16] As his Honour described, the council's role as a concurrence agency was to assess the amenity and aesthetic impact of the application made to the respondent against the Traditional Building Character (Design) Code and the Dwelling House Code under the council's planning scheme.[8]

[17] The application which was made to the respondent could have been made instead to the council. As noted already, the council is prescribed under sch 6 of the SPR as the assessment manager for such an application. More generally, sch 6 further provides that the local government is the assessment manager where an application "is for building work, that, under the Building Act, is assessable against the building assessment provisions …". The council's role as the assessment manager was displaced here because a private certifier was performing functions for the application. But they were not functions that only a private certifier could perform. An application such as this could instead have been made to and assessed in its entirety by the local government. Section 249 of the Planning Act provides that where the entity which is the assessment manager also has a jurisdiction as a concurrence agency, then "the entity's jurisdiction as assessment manager includes each jurisdiction the entity would have had as a concurrence agency". So had the application been made to the council it would have been assessed by the council in all respects as the assessment manager.

[18] But this was an application made to the respondent as a private certifier (class A), for which the private certifier was the assessment manager and the council was a concurrence agency with the particular and limited assessment responsibility as prescribed by sch 7 of the SPR.

[19] Section 45 of the Building Act provides that, subject to s 46, building assessment work must be carried out by a building certifier. Section 46 qualifies s 45 in the case of concurrence agencies. Section 46 relevantly provides:

"**46 Concurrence agencies may carry out building assessment work within their jurisdiction**

(1) This section applies if, under the Planning Act, a concurrence agency has jurisdiction for a part of building assessment work.

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8 *Gerhardt v Brisbane City Council* [2015] QPEC 34, [10].

(2) Only the concurrence agency may assess the part.

(3) Assessment of the part by the concurrence agency must be done under the building assessment provisions."

[20] In the Building Act, the term "building assessment work", is defined by s 7 to mean:

> "… the assessment, under the building assessment provisions, of a building development application for compliance with those provisions."

The expression "building assessment provisions" is defined by s 30 of the Building Act to include the Building Code of Australia.[9] But the expression also includes "any relevant local law [or] local planning instrument".[10] Therefore the council was a concurrence agency with jurisdiction for a part of the "building assessment work" which was required for this application. But the other parts of that building assessment work, such as the assessment of the application by reference to the Building Code, were to be undertaken by the respondent certifier.

The respondent's case for declaratory relief

[21] The respondent has always accepted that it was the council which had to perform that part of the assessment which involved a consideration of the application against the relevant provisions of its planning scheme. His case has been and is that the council was given an opportunity to do so, but failed to respond within a time limit prescribed by the Planning Act and that in that circumstance, the respondent was to decide the application as if the council (within its jurisdiction) had approved it. The primary judge accepted that argument.

[22] Section 282(2) of the Planning Act requires a referral agency, to the extent relevant to the development and within the limits of its jurisdiction, to assess an application having regard to, amongst other things, "the planning scheme". Section 283 requires a referral agency to assess the application within "the referral agency's assessment period", as prescribed by a regulation. Referring to SPR reg 15, his Honour found that the period was 10 business days from the council's receipt of the application[11] so that it expired on 29 December 2014.[12]

[23] On 13 January 2015, the council wrote to the respondent that it was yet to assess the application against relevant planning scheme codes. On four occasions the respondent wrote to the council asking it to provide its response as a concurrence agency before, on 4 February 2015, the council wrote to advise that his request for a response as a concurrence agency was "premature" and that, according to s 83(1)(b) of the Building Act, a "preliminary approval" was necessary before the respondent could proceed further with the application which had been made to him. It was at that point that the applicant brought the present proceeding.

[24] The argument which the primary judge accepted was that in these circumstances, the effect of s 285 and s 286 of the Planning Act was that the respondent, as the assessment manager, was to "decide the application as if the agency had assessed the application and had no concurrence agency requirements". Section 285 requires a response by the concurrence agency to the assessment manager if the agency wants the manager

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9 Building Act s 30(1)(g) and s 12.
10 Building Act s 30(1)(f).
11 *Gerhardt v Brisbane City Council* [2015] QPEC 34, [12].
12 Ibid.

to include conditions in the development approval, to refuse the application or to do something else in relation to it. Section 286 provides as follows:

> "**286 Effect if concurrence agency does not give response**
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> (1) If a concurrence agency does not give a response under section 285, the assessment manager must decide the application as if the agency had assessed the application and had no concurrence agency requirements.
>
> (2) However, the concurrence agency's response is taken to be a refusal of the application if—
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> (a) the application is a building development application; and
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> (b) the concurrence agency is the local government; and
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> (c) the matter being decided by the concurrence agency is a matter other than assessing the amenity and aesthetic impact of a building or structure; and
>
> (d) the concurrence agency does not give a response under section 285."

His Honour noted that s 286(2) did not apply here because there was no matter to be decided by the council as the concurrence agency other than an assessment of the amenity and aesthetic impact of the proposed work. The case was therefore within s 286(1).

[25] As foreshadowed by its correspondence, the council's case was that it was not obliged to consider that part of the application which was within its jurisdiction until an application for "preliminary approval", as referred to in s 83(1)(b) of the Building Act, was made to it. His Honour rejected that contention. The council's case is that his Honour erred in law in doing so, by adopting an incorrect interpretation of s 83.

[26] Having rejected the council's case about s 83, the primary judge concluded that there should be a judgment for the present respondent in the form of the following declarations:

> "1. Declare that no application for a development approval (including either a preliminary approval or a development permit) for carrying out building work is required to be made to and approved by the Respondent for the building work, the subject of the development application made on 11 December 2014, for the carrying out of building work on a dwelling located at 105 Lodge Road, Wooloowin.
>
> 2. Declare that the Applicant be at liberty to approve the development application within the *Sustainable Planning Act* 2009 (Qld) s 286(1) as if there were no concurrence agency requirements."

There are other parts of the judgment which the council argues involved further errors of law, to which I will return. But as I will discuss, its case effectively depends upon its argument about s 83.

Section 83

[27] Section 83 of the Building Act relevantly provides as follows:

"**83 General restrictions on granting building development approval**

(1) The private certifier must not grant the building development approval applied for—

(a) if the building development application includes development other than building work—until, under the Planning Act, all necessary development permits and SPA compliance permits are effective for the other development; and

…

(b) until all necessary preliminary approvals under the Planning Act are effective for other assessable parts of the development; and

Example—

A proposal requires building assessment work against a planning scheme under the Planning Act and the building assessment provisions. The private certifier is engaged to carry out the building assessment work and decide the building development application. The application must not be decided until all necessary preliminary approvals are effective for the assessment of the building work against the planning scheme.

(c) until the building assessment work for the application has been carried out under the building assessment provisions; and

(d) if, under the Planning Act, a concurrence agency has jurisdiction for a part of building assessment work—

(i) that part has been assessed by the concurrence agency, under the building assessment provisions; and

(ii) if the concurrence agency is the local government—any security it has required for the carrying out of the building work has been given; and

…

Maximum penalty—165 penalty units.

(2) If the private certifier receives the application before all other assessments for permits and approvals mentioned in subsection (1) are completed, for timings under IDAS, the application is taken not to have been received until the day all other assessments under IDAS have been completed.

…"

[28] The council's argument was and is that s 83(1)(b) was relevant to this application. The respondent's case, which the primary judge accepted, was that this paragraph of s 83(1) was inapplicable. It was s 83(1)(d) which was relevant because the council was a concurrence agency with jurisdiction for a part of the building assessment work and that part was to be regarded as having been assessed by the council, given the expiry of the referral agency's assessment period without a response.

[29] Section 241 of the Planning Act provides for preliminary approvals. A preliminary approval, like a development permit, is a form of development approval under the Planning Act.[13] But there are differences. By s 243 of the Planning Act, a development permit authorises assessable development to take place to the extent stated in the permit (subject to any relevant conditions). By s 241(1) of the Planning Act, a preliminary approval "approves development, but does not authorise assessable development to take place". Section 241(2) provides that "there is no requirement to get a preliminary approval for development".

[30] Because a "development application" means an application for a development approval, the provisions of ch 6 of the Planning Act, (including those which identify the entity which is to be the assessment manager for an application), also apply to an application for a preliminary approval.

[31] The primary judge apparently accepted that a preliminary approval could have been sought from and granted by the council in the present case, but noted that s 241(2) plainly states that there is no requirement to do so. His Honour concluded therefore that "the issue of a preliminary approval does not arise".[14] The council's argument is that this reveals an error of law in the interpretation of s 83(1)(b) of the Building Act.

[32] The council's argument was and is that there was here a "necessary preliminary approval under the Planning Act" within s 83(1)(b). The Planning Act did not require any preliminary approval in the present case, as the council now appears to accept. In its argument, the element of necessity, as applying to a preliminary approval within s 83(1)(b), is imposed by s 83(1)(b) itself.

[33] The first difficulty with this argument is that the language of s 83(1)(b) does not suggest that the paragraph itself is the source of a necessity for a preliminary approval. Rather, paragraph (b), like the other paragraphs within s 83(1), describes events and circumstances which can restrict the relevant power of the certifier.

[34] Paragraph (a) of s 83(1) applies where a building development application includes development other than building work. In that circumstance, it restricts the power of the private certifier according to whether "under the Planning Act, all necessary development permits and SPA compliance permits are effective for the other development." This is an unambiguous reference to development permits and SPA compliance permits which are necessary under the Planning Act in that the Planning Act necessitates those permits for that part of the development which is not building work. It cannot be thought that paragraph (a) itself is the source of a legal necessity for an effective permit for that (non-building) work.

[35] Similarly, it is the Planning Act by which any preliminary approval must be "necessary" in order to engage paragraph (b). But as s 241(2) of the Planning Act provides that there is no requirement to get a preliminary approval for development, how could

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13 Planning Act s 240.

14 *Gerhardt v Brisbane City Council* [2015] QPEC 34, [31].

a preliminary approval under the Planning Act be necessary? At least one way appears from s 242 of the Planning Act. It provides that a preliminary approval may be sought and granted in a way which varies the effect of a local planning instrument for the land. A local planning instrument includes a planning scheme.[15] If the application for a preliminary approval is for development which is a material change of use, a preliminary approval may be granted in terms which are different from the local planning instrument, in which case it is the approval which will prevail: s 242(6). In a particular case, that variation of the effect of a planning scheme for a development may be a necessary element of a permission which authorises the development to take place. That the terms of a preliminary approval may become part of a relevant permission appears from s 243 of the Planning Act, which provides:

> "A *development permit* authorises assessable development to take place—
>
> (a) to the extent stated in the permit; and
>
> (b) subject to—
>
> (i) the conditions of the permit; and
>
> (ii) any preliminary approval relating to the development the permit authorises, including any conditions of the preliminary approval."

[36] The council's argument is apparently consistent with its general stance about s 83(1) outside the present case. The council's argument referred to certain notes which appear below Table 1.6.1 in City Plan 2014, which indicate the council's understanding of its responsibilities in cases such as the present:

> "Editor's note - A decision in relation to building work that is assessable development under the planning scheme should only be issued as a preliminary approval. See section 83(b) of the *Building Act 1975*.
>
> Editor's note - In a development application the applicant may request preliminary approval for building work. The decision on that development application can also be taken to be a referral agency's response under section 271 of The Act, for building work assessable against the *Building Act 1975*. The decision notice must state this."

The first of those notes is an apparent reference to s 83(1)(b). These notes reveal misunderstandings of the council from which the course of events in this case can be explained. The apparent practice of the council, in cases such as this where the council must assess the proposed work against parts of its planning scheme, is to make that assessment in the course of deciding whether to grant a preliminary approval. However s 83, upon its proper interpretation, refers to an already existing preliminary approval which is relevant in the assessment of the development against the scheme. That is clear from the example given within s 83(1)(b), which explains that in such a case, the application must not be decided until all necessary preliminary approvals are effective *for the assessment of the building work against the planning scheme*.

[37] The primary judge was therefore correct to reject the council's argument about s 83(1)(b). This provision does not require a preliminary approval where none is otherwise necessary. Rather s 83(1)(b) has an operation, as a qualification to the certifier's power to grant an approval, where under the Planning Act there is a necessity for an effective preliminary approval. But that was not so in the present case.

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15 Planning Act sch 3.

[38] The council's argument also seeks support from s 83(2) of the Building Act. The council argues that by that provision, "for timings under IDAS" (which would relevantly include the time period specified by s 285 of the Planning Act), the application is to be taken as not having been received by the respondent when the owners delivered it to him in December 2014. Rather it is to be taken as received only after "all other assessments under IDAS have been completed" and that one such assessment was its own consideration of whether to grant a preliminary approval. However s 83(2) is engaged only where a certifier "receives the application before other assessments for permits and approvals *mentioned in subsection (1)* are completed." The council's case is that the approval in subsection (1) is its suggested preliminary approval. This submission must be rejected once the council's argument about s 83(1)(b) is rejected.

[39] The council's argument does not suggest any way in which its interpretation of s 83(1)(b) would promote any of the objects of either of these statutes. For example, it is not suggested that the interpretation of the primary judge would have the potential for some part of the assessment process to be left to a certifier when, in the public interest, it should be the responsibility of the local government. Rather the council's argument, if accepted, would distort the allocation of responsibilities between the certifier as the assessment manager and the council as a concurrence agency which these statutes define. The acceptance of the council's argument would require a series of implied qualifications to many of the provisions which I have discussed, such as those which require a concurrence agency to undertake its assessment responsibility within a certain time and which provide for the consequences of that not being done. And the council's interpretation would require, in every such case, a distinct application to be made for a preliminary approval, although there may be no proposal to vary the planning scheme.

[40] Once the council's arguments about s 83 are rejected, it follows that there was and is no relevant restriction upon the respondent in granting the approval which was sought. The respondent was entitled to the declarations which were made by the primary judge. But the council's arguments as to further suggested errors of law by the primary judge should be discussed.

[41] The council's argument was critical of this passage from the judgment:[16]

> "Curiously, Council, in its submissions, did not address the lapsing of the concurrence agency assessment period, despite the point being expressly agitated by the Applicant. It did not even acknowledge the existence of the timeframe within which concurrence agencies must communicate a response. These are telling omissions not assisting its arguments."

The council criticises that passage because, it contends, the primary judge overlooked the present respondent's concession "that he wasn't pressing for an order that he decide the application made to him as if the Council had no concurrence agency requirements".[17] That submission refers to what counsel for the present respondent said at one point in his argument to the primary judge, which was to the effect that notwithstanding the expiry of the time period for the council's response as a concurrence agency, his client would impose any conditions which the council required if that

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16 *Gerhardt v Brisbane City Council* [2015] QPEC 34, [34].

17 Appellant's written submissions at para 37.

occurred within "a reasonable time". That concession may not have been consistent with the Planning Act. But it did not call into question the relevance or correctness of what the primary judge there said. His Honour's point was that the council's argument had not addressed the consequences, according to the Planning Act, of its failure to assess the application within the concurrence agency assessment period. In other words, the council had not explained how those provisions of the Planning Act could have effect consistently with its argument.

[42] The council's argument is also critical of this passage from the judgment:[18]

> "The Applicant is the sole assessment manager for the BDA. But for s 11(2) of the *BA*, Council would ordinarily be the assessment manager.[19] However, s 11(2) is clear, and is not qualified by any other provision, whether in the *BA* or in the *SPA*. There is nothing in either statute that suggests to me that there may be more than one assessment manager concurrently."

It is said that this misunderstood the council's case: the council was not saying that there could be more than one assessment manager for the same application, rather that there should be two development applications for the same development and that the council was to be the assessment manager for one of them. But it is not clear that the primary judge misunderstood any part of the council's case. This passage appeared at the end of the reasons for judgment, by which time the primary judge had considered and disposed of the council's argument as to why there should be two applications.

[43] Finally the council's argument criticises his Honour's distinguishing his own judgment in *Brisbane City Council v Mamczur & Anor*.[20] That involved the application of the now repealed *Integrated Planning Act* 1997 (Qld). In that case, as in the present, the building owner had made a building development application to a private certifier. His Honour there upheld the council's argument that a further development application was required to be made to and approved by the council. But that was because, as his Honour confirmed in the present judgment, the owner had also required a development approval for a material change of use. Assuming that the legislation governing that case was in substantially the same terms as that governing the present case (as the council's argument assumes), that was a critical difference because a material change of use would represent a distinct "development" from development constituted by the carrying out of building work.[21] A material change of use was not a development which the certifier in that case had been asked or was able to approve.

Orders

[44] I would order as follows:

(1) Leave to appeal be granted.

(2) Appeal dismissed.

(3) Appellant to pay the respondent's costs of the appeal.

[45] **DAUBNEY J:** I agree with Philip McMurdo JA.

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18 *Gerhardt v Brisbane City Council* [2015] QPEC 34, [35].

19 See *SPA* s 246(1)*; SPR* reg 12 and Schedule 6, Item 1(a)(i)-(ii); *BA* s 11(1).

20 [2010] QPEC 71.

21 See the definition of "development" in s 7 of the Planning Act.