SUPREME COURT OF QUEENSLAND

CITATION:	*Ritek Building Systems (NQ) P/L v Cairns City Council* [2005] QCA 347
PARTIES:	**RITEK BUILDING SYSTEMS (NQ) PTY LTD** ACN 010 107 150 (appellant/applicant) **v** **CAIRNS CITY COUNCIL** (respondent/respondent)
FILE NO/S:	Appeal No 5325 of 2005 P & E Appeal No 488 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Application for leave s 118 DCA (Civil)
ORIGINATING COURT:	Planning and Environment Court at Cairns
DELIVERED ON:	23 September 2005
DELIVERED AT:	Brisbane
HEARING DATE:	12 August 2005
JUDGES:	McPherson JA and Wilson and Dutney JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Application for leave to appeal dismissed** **2. Applicant to pay the respondent's costs of application to be assessed on the standard basis**
CATCHWORDS:	BUILDING CONTROL AND TOWN PLANNING – CONSTRUCTION OF PLANNING SCHEME – where Cairns City Council approved applicant's plans for conversion of part of the building into a boarding house – where the applicant applied for change of conditions of the existing approval – where amendments to the plan included moving of the recreational area inside the existing structure – where the application was refused on the basis that proposed development does not offer any landscaped outdoor area to be used as 'communal landscaped open space' – where the applicant appealed to the Planning and Environment Court – where the appeal was unsuccessful INFERIOR COURTS – PLANNING AND ENVIRONMENT COURT – APPEAL TO COURT OF APPEAL – where s 4.1.56 of the *Integrated Planning Act* 1997 (Qld) confers a right of appeal only for error or mistake of law – where meaning of the expression is a question of fact

– whether construction of the term 'communal landscaped open space' includes an area inside the building delineated by walls and windows – where words not defined – where ordinary meaning of the words applied

Integrated Planning Act 1997 (Qld), s 4.1.56

Friends of Stradbroke Island Association v Sand Dunes Pty Ltd (1998) 101 LGERA 16, cited
Hope v Bathurst City Council (1980) 144 CLR 1, cited

COUNSEL: D P Morzone for the applicant
S Ure for the respondent

SOLICITORS: Miller Bou-Samra Lawyers for the applicant
MacDonnells Solicitors (Cairns) for the respondent

[1] **McPHERSON JA:** It is not easy to see that an area enclosed by a floor, four walls and a ceiling is an open space according to any ordinary meaning of those words. That, in my opinion, remains so even though the walls may include one or more windows and especially when the full composite phrase under consideration here is "communal landscaped open space". On any view of its meaning, the issue to which that collocation gives rise remains one of fact not law, as to which s 4.1.56 of the *Integrated Planning Act* 1997 (Qld) confers no right of appeal to this Court.

[2] I agree with the reasons of Dutney J for refusing this application for leave to appeal. The applicant must pay the costs of the application.

[3] **WILSON J**: I agree with the reasons for judgment of Dutney J and with the orders His Honour proposes.

[4] **DUTNEY J**: The applicant is the owner of land on the corner of Draper Street and Victoria Street in Cairns on which there is an existing building.

[5] The applicant submitted plans to the Cairns City Council ("the Council") for conversion of part of the building into a boarding house. That application was approved.

[6] Subsequently, the applicant wished to alter the plans in several respects and submitted a request to the Council to change the conditions of an existing approval. This application was refused. A subsequent appeal to the Planning and Environment Court was also unsuccessful. The applicant now seeks leave to appeal to this Court.

[7] The land is identified in the Planning Scheme for Cairns as follows:

> "6.1 Planning Scheme: Commercial Zone
> 6.2 Strategic Plan: Mixed Use Area 5 Preferred Dominant Land Use Designation
> 6.3 DCPI (Residential Densities): Residential D designation – 400 persons/hectare
> 6.4 DCP2 (Height and Impact of Buildings): Precinct 5."

[8] The initial approval was subject to a number of relevant conditions, namely:

"The applicant/owner must at all times during the development of the subject land carry out the development and construction of any building thereon and conduct the approved uses generally in accordance with:

(a) the approved plan attached;

…

(b) to ensure that the development complies in all respects with the requirements of the Council's Planning Scheme, Development Manual and good engineering practice … except where modified by these conditions;

9. The proposed recreational area shall incorporate the following elements:
   (a) a permanent roof (e.g. of timber and corrugated iron) to enable use of the recreation area in all weather conditions;
   (b) lattice look or fretwork design on the balcony rail;
   (c) screening of the deck area from overlooking of the roofed areas below, including measures to reduce radiant heat from the roofed areas;
   (d) potted plants to meet the intent of the Planning Scheme provision 4 "Landscaped Communal Open Space". Such planting shall be low maintenance, provide quality screening and be of advanced maturity at the time of planting.
10. … the Amended Plan shall show the deletion of the tenth bedroom …"

[9] The amendments to the plan for which subsequent approval was sought included, in particular, the moving of the recreational area inside the existing structure.

[10] In refusing the request to change the conditions the Council advised:

"The proposed development does not offer any landscaped outdoor area to be used as communal landscaped open space and includes only very limited and restricted indoor areas which are unacceptable;

The amended plan significantly reduces the residential amenity of the proposed development to an unacceptable level."

[11] The reference in the council refusal to "communal landscaped open space" is a reference to section 4.6.10(iv) of the relevant Planning Scheme documents which is in these terms:

"**Communal Landscaped Open Space**

Communal Landscaped Open Space shall be provided within one or more areas so that all rooms in the development have access to the open space. The area of communal landscaped open space shall: -

- be provided at a minimum rate of 5m per bend;
- be provided such that at least 40% of the requirement is contained in one area with a maximum length to breadth of 2:1 and such that balconies, verandahs, covered walkway and the like do not encroach in this area;

- be screened by landscaping and/or fencing to maintain privacy, to the satisfaction of the City Planner;
- be exclusive of driveways, carparking, garbage collection points, clothes drying areas and other utilitarian uses;
- be properly designed and developed for recreation use to the satisfaction of the City Planner. The area may be developed to provide for a variety of passive and active outdoor recreation experiences; and
- be landscaped in accordance with the requirements of this Section, in particular to ensure that privacy, security, and segregation of incompatible uses are achieved."

[12] The appeal to the Planning and Environment Court was dismissed on the basis that a designated area inside the building as was proposed here, could not meet the requirement for "communal landscaped open space".

[13] In dismissing the appeal, White DCJ said:

> "Communal landscaped open space is not defined, but landscaping is and, in my view, the word 'landscaped' or the meaning of the word 'landscaped' is to be derived from the meaning of the word 'landscaping'. Landscaping is:
>
> > '*The treatment of areas surrounding a building for the purpose of enhancing and/or protecting the amenity of the site containing the building, as well as the amenity of adjoining properties and the streetscape.*'
>
> Simply, in my view, a communal landscaped open space must be outside a building."

[14] In seeking leave to appeal the applicant identified the construction of the term "communal landscaped open space" and whether an area inside the subject building could satisfy that description as a question of law entitling it to appeal.

[15] Section 4.1.56 of the *Integrated Planning Act* 1997 (Qld) confers a right of appeal to this Court only for error or mistake in law on the part of the Planning and Environment Court or excess of jurisdiction on the part of that court. The latter is not argued by the applicant which confines its argument to an error or mistake of law.

[16] Mr Ure for the Council argued that the application raised no point of law but rather one of fact only and hence the application must fail.

[17] In Friends of Stradbroke Island Association v Sand Dunes Pty Ltd (1998) 101 LGERA 16, Pincus JA at page 163 said:

> "For the argument in the proposed appeal to succeed, it would have to be held that s. 4.13(18), part of which I have quoted, applied severally to each of two buildings or sets of buildings construction of which was allowed by the permit. The facts to which s. 4.13(18) has to be applied are not, it appears, in issue and if an appeal is allowed

> to be brought the question will be the application of the language I have quoted to those facts.
>
> Is that a legal or a factual question? The earnest inquirer after truth in this field would formerly have found himself in a Slough of Despond. But authoritative light has been shed on the subject by the tentative approval given in *Collector of Customs v Agfa-Gevaert* (1996) 186 CLR 389 at 395, 396 to five propositions stated by the Full Federal Court in *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280. The most pertinent of them is the fifth, which as qualified by the Federal Court, is that (*Agfa-Gevaert* at 396):
>
> > '*…when a statute uses words according to their ordinary meaning and it is reasonably open to hold that the facts of the case fall within those words, the question as to whether they do or do not is a question of fact.*'"

[18] To similar effect is a dictum of Mason J with whose reasons in that case the other members of the court agreed in *Hope v Bathurst City Council* (1980) 144 CLR 1 at 7. After citing authorities for the proposition that "whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law", his Honour went on to say:

> "However, special considerations apply when we are confronted with a statute which on examination is found to use words according to their common understanding and the question is whether the facts found fall within these words. *Brutus v Cozens* [1973] AC 854 was just such a case. The only question raised was whether the appellant's behaviour was 'insulting'. As it was not unreasonable to hold that his behaviour was insulting, the question was one of fact."

[19] In this case the question was whether an internal part of a building, delineated by walls and windows could fairly be described as "communal landscaped open space". The words in that composite phrase are not defined. Applying their ordinary meaning it is difficult to see how the room proposed could meet the description.

[20] Counsel for the applicant argued that the meaning should derive from the bullet points in provision rather than from the general phrase. I have difficulty seeing why that should be so. The bullet points seem intended to do no more than limit areas that might have otherwise fallen within the scope of the general phrase. In any event, the bullet points themselves appear to me to assume that the space proposed is outside the building.

[21] Counsel for the applicant seemed to submit that any space would fall within the phrase provided it was not excluded by the bullet points. That cannot be correct because it gives no effect to the words of the phrase themselves.

[22] Leaving aside the descriptor "communal" which adds little to the argument, the expression "landscaped open space" cannot in my view be taken in its ordinary meaning to refer to anything other than an area outdoors. Since it is not defined in

the Planning Scheme so as to bear any meaning other than its ordinary one, the proposed room in the building does not meet the requirement.

[23] In my view this is a case which it is reasonably open to decide by resolving whether the facts of the case do or do not fall within ordinary meaning of the words used.

[24] It follows, in my view, that whether the proposed space falls within the expression "communal landscaped open space" is a question of fact and there is no right of appeal.

[25] Equally, I am satisfied that the decision of White DCJ was unquestionably correct and the internal space proposed does not meet the requirement for "communal landscaped open space".

[26] On either ground I do not consider that the applicant has established a basis for the grant of leave and I would refuse the application with costs.