SUPREME COURT OF QUEENSLAND

CITATION:	*Sunshine Coast Regional Council v EBIS Enterprises P/L* [2010] QCA 379
PARTIES:	**SUNSHINE COAST REGIONAL COUNCIL** (applicant/respondent) **v** **EBIS ENTERPRISES PTY LTD** ACN 001 060 021 (respondent/applicant)
FILE NO/S:	Appeal No 7980 of 2010 DC No 3591 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Miscellaneous Application – Civil
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	23 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	18 November 2010
JUDGES:	Margaret McMurdo P, Chesterman JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Grant leave to appeal;** **2. Allow the appeal;** **3. Set aside the order of the Planning and Environment Court made in Brisbane on 24 June 2010 and instead order that the respondent's Originating Application of 11 December 2009 be dismissed;** **4. Order the respondent to pay the applicant's costs of and incidental to the application for leave to appeal and the appeal to be assessed on the standard basis;** **5. The parties are to provide written submissions on the question of costs of the proceedings in the Planning and Environment Court in accordance with the Practice Direction.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING OFFENCES – USE OF LAND CONTRARY TO PLANNING SCHEME – where applicant owns a large house at Caloundra and lets the premises to groups not exceeding 20 persons usually for two or three day

periods – where respondent argued the premises was used as an "accommodation building" pursuant to the relevant Plan and constituted assessable development which required a permit – where applicant argued the premises was a "detached house" comprising a "dwelling unit" – where the Plan defines "dwelling unit" as a unit "designed, adapted or used" for the exclusive use of one household – where a flow chart contained in Part 3.2.2 of the Plan suggested premises would only be a "detached house" if used for long term accommodation – where the explicit definition of "detached house" does not refer to the long or short term nature of the accommodation – whether trial judge erred by interpreting "detached house" by reference to the flow chart – whether trial judge erred in failing to consider whether the premises were "designed or adapted" for the exclusive use of one household

Integrated Planning Act 1997 (Qld), s 4.3.1, s 4.3.5, s 4.3.22, s 4.3.26

Federal Steam Navigation Co Ltd v Department of Trade and Industry [1974] 1 WLR 505, cited

COUNSEL: S J Keim SC for the applicant
M A Williamson for the respondent

SOLICITORS: P & E Law for the applicant
DLA Phillips Fox for the respondent

[1] **MARGARET McMURDO P**: I agree with the reasons of both Chesterman JA and Philippides J, and with the orders proposed by Chesterman JA.

[2] **CHESTERMAN JA**: The premises at 26 Ascot Way, Little Mountain at Caloundra consist of a large house set on 4,000m^2 of land. The house has six bedrooms, four bathrooms and a large theatre/entertaining room as well as separate living and dinning areas. The garden boasts a large swimming pool and outdoor entertainment area.

[3] The property is owned by the applicant whose directors, Mr and Mrs Stanfield, sometimes live in it but frequently let it to groups of people not exceeding 20 persons (the bedrooms can accommodate 24). The average length of tenancy is short, usually only two or three days. On occasions the letting period is for a week or two.

[4] The premises are within the local government area administered by the respondent ("the Council"). By an Originating Application filed 11 December 2009 in the Planning and Environment Court ("P & E" Court) the respondent sought:

> "An enforcement order pursuant to section 4.3.26 of the Integrated Planning Act 1997 ('IPA') directing the (applicant) … to cease the use of land … at 26 Ascot Way … for the purpose of an 'accommodation building' as defined in the Caloundra City Plan 2004 until an effective development permit authorising such use is obtained."

[5] Section 4.3.22 of *IPA* provides that a person may bring a proceeding in the P & E Court for an order to restrain the commission of a development offence. Such an order is called an "enforcement order". By s 4.3.26 an enforcement order may direct the person to whom it is addressed "to stop an activity that constitutes … a development offence".

[6] Schedule 10 to *IPA*, the Dictionary, defines a "development offence" to mean an offence against, *inter alia*, s 4.3.1 and/or s 4.3.5. The former makes it an offence to use premises for a use which constitutes assessable development without a development permit authorising such use. The second section makes it an offence to carry out assessable development without a development permit.

[7] The applicant did not have a development permit to let out its house.

[8] The application set out the grounds on which the Council relied for its enforcement order. They were:

> "2. For the purposes of Caloundra City Plan 2004:
>
> (a) the land is … in the Rural Residential Settlement precinct …;
>
> (b) an 'accommodation building', as defined, constitutes assessable development in the … precinct.
>
> 3. The (applicant) has, or caused to permit, (sic) the land to be used for the purpose of an 'accommodation building' … without an effective development permit. …
>
> 4. The use of the land … for the purpose of an 'accommodation building' … :
>
> (a) constitutes assessable development for the purposes of (*IPA*); and
>
> (b) undertaken in the absence of an effective development permit constitutes a development offence … ."

[9] Part 3 of the Caloundra City Plan 2004 ("Plan") contains definitions of terms found in the Plan. An "accommodation building" means "a use of premises for residential accommodation which does not comprise dwelling units". The examples given of such a building are "boarding house, guest house, backpacker hostel, serviced apartments, student accommodation". There is no doubt that Ascot House was premises used for residential accommodation. The question for the P & E Court was whether the premises comprised dwelling units or, in this case, a dwelling unit. A "dwelling unit" is defined to mean "any building or part of a building comprising a self contained unit designed, adapted or used for the exclusive use of one household".

[10] It might be observed in passing that Part 3 of the Plan is organised into sub-parts the separate purpose of which is not apparent. Part 3.2 contains "Use Definitions and Classes of Use Definitions". The definition of "accommodation building" appears in this sub-part. The definition of "dwelling unit" appears in Part 3.3, "Other

Development and Administrative Definitions". Part 3.2.2 contains "Classes of Use Definitions" in a most puzzling form. The sub-part consists of five figures, or diagrams, one of which, figure 3.1 is entitled "Residential Use Class" about which more will be said later. Its relationship to the definitions in verbal form which appear in Part 3.2.1 and 3.3 is not made clear.

[11] The primary judge noted, correctly, that the use of premises as "accommodation building" constitutes assessable development in the rural residential settlement precinct and such use requires a permit which the applicant did not have. The applicant conceded in the proceedings in the P & E Court that if its premises were an accommodation building, or if its use of its property was not within one of the categories of residential use contained in the Plan, then the Council was entitled to an enforcement order.

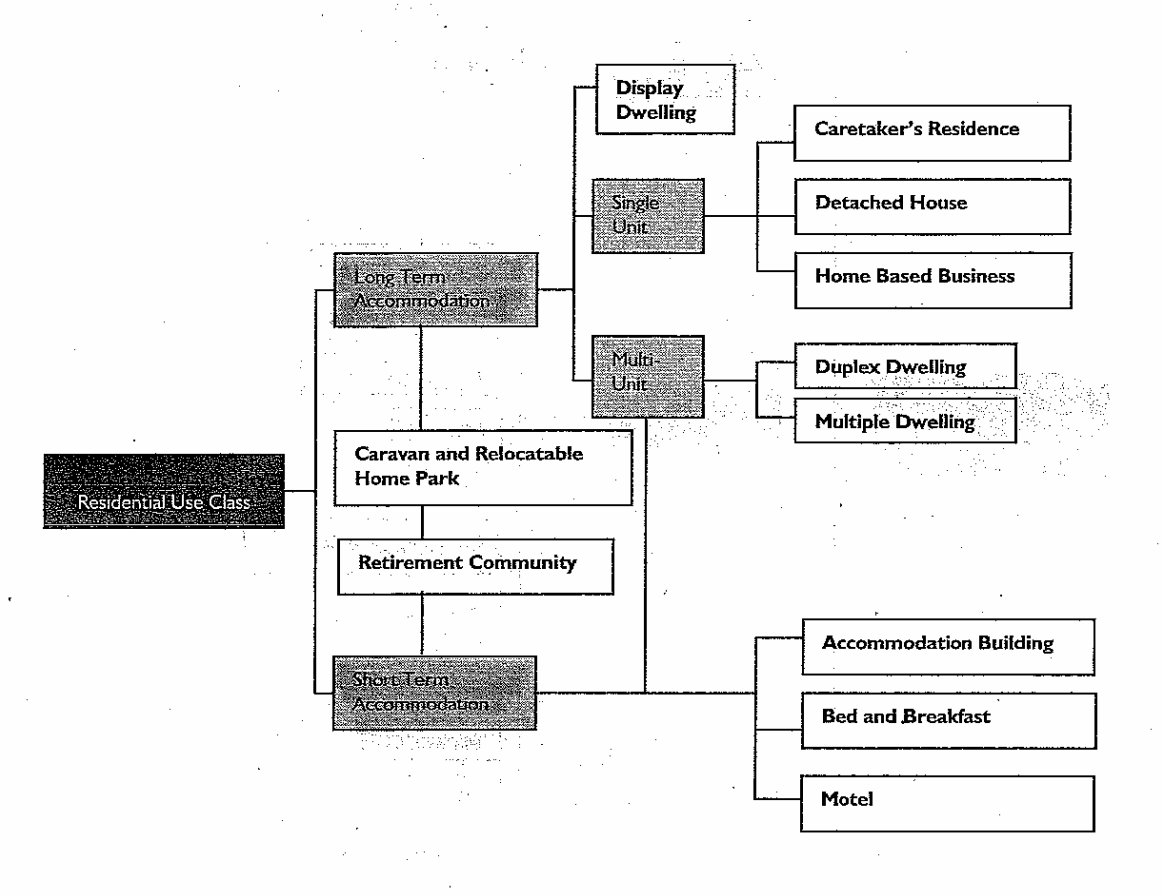
[12] The applicant contended that its premises did not satisfy the definition of "accommodation building" because the house was a "dwelling unit". It also contended that its premises came within the Plan's definition of a "detached house". That term is defined in Part 3.2.1 as meaning:

> "… a use of premises for residential accommodation comprising a detached dwelling unit on one site. The term includes:
>
> (a) an outbuilding which is subordinate to the dwelling unit;
> (b) a home office; and
> (c) a small secondary dwelling unit being an annexed unit."

[13] There is no doubt that the premises at 26 Ascot Way is a detached building and it is used for residential accommodation. If the premises fit the definition of "dwelling unit" it will be a detached house and will not be an accommodation building.

[14] The primary judge held that the premises were not a dwelling unit. His Honour said:

> "[11] Contained within the definition of dwelling unit however is a 'use' notion, that is, that the dwelling unit is to be 'used' by a household. There appears no doubt that, *prima facie* at least the definition of detached house fits very comfortably with the actual use to which the house is presently put, that is, a use of premises for residential accommodation comprising a detached dwelling on one site. No reference in this definition is made to temporal issues concerning the period during which the premises are used for that residential accommodation.
>
> [12] This however is not an end of the matter. The definitions in section 3.2.1 of which both accommodation building and detached house are defined are subject in my view to a more closely scrutinised category of uses to be found in section 3.2.2 'classes of use' definitions. These definitions are somewhat curiously I think set out not in plain English words but a type of 'flow chart'. That chart is as follows:



[13] It is immediately obvious from the flow chart that there are connections by lines amongst what I apprehend to be separate 'branches' of the residential use class. For example the 'multi unit' category is connected to the 'short term accommodation' line which has as subcategories accommodation building, bed and breakfast and motel. Whatever purpose that may serve, it is tolerably clear that by virtue of the classes of use definition – residential use class at figure 3.1, residential use classes are categorised fundamentally as either *short term accommodation* or *long term accommodation.*

[14] In my opinion some meaning must be given to the categorisation of the residential classes in the flow chart.

[15] On the evidence before me the use of the land is simply not 'long term accommodation'. On all the evidence the use to which the land is put is in fact short term accommodation for stays of two to three days normally but up to 59 days.

[16] The combined effect of the definition of 'detached house' together with the categorisation of properties under 3.2.2 means that the land cannot be described as a 'detached house' because of the short term nature of the accommodation."

[15] That opinion, as his Honour recognised, was sufficient to dispose of the proceedings in the Council's favour. The primary judge went on, however, to determine whether

the premises were an "accommodation building". He found they were because the building was not used for the exclusive use of one household.

[16] There are two errors in the approach taken by the learned judge to the Plan. The first was to rely upon figure 3.1 in Part 3.2.2 to alter the definition of "detached house". There is nothing in the explicit definition of that term which makes premises a detached house only if used for long term accommodation. Neither that term nor the other, "short term accommodation" is defined, whether in the use definitions or the administrative definitions in Part 3. Nor, for that matter, is "single unit" or "multi unit" defined in either sub-part.

[17] The administrative definitions include the term "residential use class". That is defined to mean

> "… defined use being accommodation building, bed and breakfast, caravan and relocatable home park, caretaker's residence, detached house, display dwelling, duplex dwelling, home based business, motel, multiple dwelling and retirement community (refer **Figure 3.1 – Residential Use Class**)."

It will be seen that uses mentioned in the definition of "residential use class" appear in the unshaded boxes in figure 3.1. The terms which appear in the shaded boxes are not the subject of any definition, as I pointed out. One cannot discern from the Plan what function figure 3.1 is meant to perform. It is obviously meant to be more than a restatement of the classes of residential uses designated in the Plan. It probably intends to say something about the interrelationship between various classes of residential use and, perhaps, as the primary judge thought, attempt some categorisation of them into "single units", "multi units", "long term accommodation", and "short term accommodation". Given the format of the figure it is impossible to discern what purpose is intended by the categorisation. It is, as well, not easy to understand why a "display dwelling" should be classified as "long term accommodation", nor is it immediately obvious that a duplex dwelling or multiple dwelling will more commonly be associated with long term accommodation rather than short term accommodation.

[18] It is not necessary to pursue the puzzle further. The immediate inquiry is whether it is right to amend the explicit definition of "dwelling unit" by reference to the figure, and to add to it the qualification: "provided that the use is long term", or something to the same effect.

[19] There is, with respect to the primary judge, no warrant for altering the express terms of the definition by reference to figure 3.1. If the words used in the definitions in the Plan are not to mean what they say, the manner in which, and the means by which, they depart from their ordinary meaning should appear with unambiguous clarity from the Plan itself. There is no indication that the definitions are not to be read as they are written. Whatever function or purpose the figures are meant to serve, figure 3.1 does not manifest a clear intention that a dwelling unit is only such if the residential use occurs on a long term basis, a term which is itself imprecise.

[20] The anomaly of the conclusion reached by the primary judge was pointed out in argument by the President. A holiday house within the Council's planning area which was used by its owners, and perhaps the owner's family and friends, only for brief holidays, a few days at a time or a week or two here and there, would not

constitute a dwelling unit. Its use though exclusively residential would not be *long term* residential accommodation. According to the Plan if the house were in the Township Residential precinct it would not be a detached house, because not a dwelling unit, and the owners would require a development permit, the application for which would be impact assessable. Such a result is so startling as to cast down on the conclusion.

[21] The second error made by the primary judge was to disregard the terms of the definition of "dwelling unit", a building comprising a "self contained unit *designed, adapted or used* for the exclusive use of one household" (emphasis added). His Honour held that the premises at 26 Ascot Way were not used for the requisite exclusive use. His Honour did not consider whether the house was designed or adapted for the exclusive use of one household. It appears to have been designed as a large family residence and it was common ground between the parties to the application that the building was designed for the exclusive use of one household.

[22] It is only if one notionally amends the definition by (i) deleting the words "designed, adapted or" so that a building is a dwelling unit only if used for the exclusive use of one household, or (ii) by substituting "and" for "or", that the primary judge's conclusion can be arrived at.

[23] Mr Williamson, who appeared for the Council, and defended its Plan as valiantly as the circumstances permitted, opted for the second alternative. A building, he submitted, is only a dwelling unit if it is designed *and* used, or adapted *and* used, for the exclusive use of one household. Lord Salmon remarked in *Federal Steam Navigation Co Ltd v Department of Trade and Industry* [1974] 1 WLR 505 at 523-4 that:

> "… I do not suppose that any two words in the English language have more often been used interchangeably than 'and' and 'or'. However unfortunate or incorrect this practice may be, many examples of it are to be found in all manner of documents and statutes. There are many reported cases which turn upon whether, in its particular context, the word 'or' is to be read conjunctively or the word 'and' disjunctively.
>
> …
>
> There is certainly no doubt that generally it is assumed that 'or' is intended to be used disjunctively and the word 'and' conjunctively. Nevertheless, it is equally well settled that if so to construe those words leads to an unintelligible or absurd result, the courts will read the word 'or' conjunctively and 'and' disjunctively, as the case may be; or, to put it another way, substitute the one word for the other."

[24] Before it is permissible to make the substitution there must be something in the context which requires it. Mr Williamson could not identify any contextual impediment to giving the word "or" its natural meaning, or contextual imperative for reading the word as meaning "and".

[25] If the substitution were made then the presence of "designed, adapted" in the definition would be unnecessary. It would not add to the requirement that premises be used for the requisite purpose that they be also designed for the purpose, or adapted for the purpose. The use would be enough. As well, the substitution

contended for might make the definition unnecessarily restrictive. A building would not be a dwelling unit even though used exclusively for the use of one household unless it was also designed for that purpose, or adapted for it.

[26] In my opinion the words of the definition should be given their ordinary meaning. A building will be a dwelling unit if it was designed, or adapted or used for the exclusive use of one household. The building in question was designed for the requisite use.

[27] The application to the P & E Court should have been dismissed. The enforcement order made by that court prevents the applicant from conducting its business. It is an appropriate case in which to grant leave to appeal. I would:

(a) Grant leave to appeal;
(b) Allow the appeal;
(c) Set aside the order of the Planning and Environment Court made in Brisbane on 24 June 2010 and instead order that the respondent's Originating Application of 11 December 2009 be dismissed;
(d) Order the respondent to pay the applicant's costs of and incidental to the application for leave to appeal and the appeal to be assessed on the standard basis.

[28] The applicant foreshadowed an application for an order that its costs of the proceedings in the Planning and Environment Court be paid by the respondent. In accordance with the practice direction the parties should provide written submissions on that question.

[29] **PHILIPPIDES J**: The issue for determination before the judge at first instance was whether the premises in question (which were used for holiday rental accommodation) fell within the term "accommodation building" as defined for the purposes of the Caloundra City Plan 2004 ("the Plan"). It was accepted that if the premises were so characterised, that an enforcement order is available against the applicant as it did not have development approval to use the premises for the purposes of an accommodation building. The applicant's contention before the learned judge was that the premises were properly characterised as a "detached house" and as such did not require a development permit. I agree, for the reasons expressed by Chesterman JA, that the learned judge erred in finding that the premises were not a "detached house" and that they constituted an "accommodation building". I add the following additional observations.

[30] Part 3.2.1 of the Plan which deals with "use definitions" contains the definitions of "accommodation building" and "detached house". "Accommodation building" is defined as "a use of premises for residential accommodation which does not comprise dwelling units". "Detached house" is defined as "a use of premises for residential accommodation compromising a detached dwelling unit on one site". The applicant contended that, as the premises came within the term "dwelling unit", they satisfied the meaning of "detached house", while also being excluded from constituting "accommodation building".

[31] The term "dwelling unit" is defined in Part 3.3.2 of the Plan (which deals with "administrative definitions") to mean "any building or part of a building comprising a self contained unit designed, adapted or used for the exclusive use of one household". It is beyond argument that the premises were designed for the

exclusive use of one household, as was conceded by the respondent. That, it might have been thought, was sufficient for the definition of "dwelling unit" to be satisfied. But counsel for the respondent argued that the word "or" in the definition of "dwelling unit" should be construed to mean "and", so that what is required to meet the definition is that the premises are designed or adapted for the exclusive use of one household *and* so used. That approach appears to have been implicitly adopted by the judge at first instance who, in considering whether the definition was met, focused on whether, given the temporary nature of the use of the premises by any particular group renting the premises, the group could be said to be a household.

[32] As explained by Chesterman JA, there is simply no warrant for the construction of the word "or" urged by the respondent which is contrary to the clear words of the definition of "dwelling unit"; no ambiguity or absurd result flows from giving the word "or" its usual disjunctive meaning. Once it was accepted, as it must, that the premises were designed for the exclusive use of one household, the definition was satisfied - there was no need to inquire further, as the learned judge did, as to whether the premises were to be used for the exclusive use of "one household".

[33] There is an additional error in the learned judge's determination that the premises did not constitute a "detached house" which concerned the manner in which the learned judge incorporated the Figure in 3.1 of the Plan into the definition. Whatever the purpose the diagram in Figure 3.1 (which is contained in Part 3.2.2 dealing with "Classes of Use Definitions"), it is scarcely to be contemplated that it is to be construed so as to import a temporal condition into the clear words of the definition where none is otherwise specified, and thereby override or modify the unambiguous words of the definition, particularly where to do so has an adverse affect on the rights of user. Figure 3.1 is a diagrammatical representation of the various classes of residential use contained in the plan, and while the certain types of residential uses are grouped under the categories of long term and short term accommodation (which are not defined terms), there is nothing to suggest that the purpose of that grouping is to impose a mandatory temporal condition in respect of the uses appearing in the two categories. Indeed, the use of connecting lines between the various groups suggests the contrary.

[34] I would grant leave to appeal and agree with the orders proposed by Chesterman JA.