PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*AAD Design Pty Ltd v Brisbane City Council* [2011] QPEC 54
PARTIES:	**AAD DESIGN PTY LTD** **(Appellant)** **V** **BRISBANE CITY COUNCIL** **(Respondent)**
FILE NO/S:	3169/2010
PROCEEDING:	Hearing of an appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	6 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2011
JUDGE:	R Jones DCJ
ORDER:	**Appeal dismissed.**
CATCHWORDS:	PLANNING LAW – Construction of definition of house, multi-unit development and single unit development under Brisbane City Plan 2000 (as amended) – student accommodation involving multiple bedrooms and common facilities – student accommodation where students enter into tenancy agreement – whether student accommodation falls within the definition of house or multi-unit development under the Brisbane City Plan 2000 (as amended) *Chiefari v Brisbane City Council* (2005) QPEC 9 *Collector of Customs v AGFA – Gevaert Ltd* (1995-96) 186 CLR 389 *Delfin GC Pty Ltd v Gold City Council* (2006) QPEC 4 *Friends of Currumbin Association Inc v Gold Coast City Council & Anor* (2006) QPELR 656 *Livingstone Shire Council v Brian Hooper & M3 Architecture & Ors* (2004) QPELR 307

Noosa Shire Council v Staley (2002) QPEC 18

Sunshine Coast Regional Council v EBIS Enterprises Pty Ltd [2010] QCA 379

Re BHP Billiton Petroleum Pty Ltd v Chief Executive Officer of Customs (2002) 69 ALD 453

Re LDCM Investments Ltd v Town of Newcastle (1975) 8 OR (2d) 504

Westfield Management Ltd v Pine Rivers Shire Council & Anor (2004) QPELR 337

Yu and Leung v Brisbane City Council & Anor (2006) QPELR 102

ZW Pty Ltd v Peter Hughes & Partners Pty Ltd (1992) 1 Qd R 352

COUNSEL:	Mr R. Litster SC with Mr N. Loos for the appellant
	Mr Hinson SC with Mr J. Lyons for the respondent
SOLICITORS:	N.R. Barbi Solicitor Pty Ltd for the appellant
	Brisbane City Legal Practice for the respondent

[1] These proceedings are concerned with three appeals from the Building and Development Dispute Resolution Committee (the Committee). The decisions of the Committee under appeal are that it found each of the three proposed premises in dispute to be "Multi-unit dwelling" and not a "House" under the respondent's Brisbane City Plan 2000 (as amended).

[2] It was agreed between the parties that in the hearing of these appeals they could be dealt with by reference to the material relevant to any one of the applications without having to consider each separately. That is so because of the degree of commonality between the facts and circumstances underlying each application. In the event that one of the appeals was successful then, as a matter of course, success would follow in respect of the other two appeals. Of course, the opposite follows in the event of an unsuccessful appeal. Although three separate decisions of the Committee are involved, each is dealt with in the one notice of appeal.

Background

[3] The appellant made three separate development applications to the respondent in respect of land located at 17 Wilkins Street, Annerley, 32 O'Keefe Street, Woolloongabba, and at 178 Cornwall Street, Greenslopes.

[4] The Wilkins Street application sought a development permit for the making of a material change of use described as "*Residence not complying with House Code (10 bedrooms)*". The O'Keefe Street application sought a development permit for the making of a material change of use of land described as *"Residence not complying with House Code (11 bedrooms)*". In respect of this site, an application was also

made for a preliminary approval for building work. The Cornwell Street application sought a development permit for the making of a material change of use described as "*Residence not complying with House Code (9 bedrooms)*".

[5] Between 9 and 12 July 2010 the respondent advised the appellant that each development application was not properly made. The reasons of the respondent are summarised in the grounds of appeal:[1]

> "(a) The use applied for in each of the development applications was defined as a 'Multi-unit dwelling (boarding house)' consistent with the definition of a Multi-unit dwelling (boarding house) in Chapter 3 of the Brisbane City Plan 2000.
>
> (b) The level of assessment for a multi-unit dwelling of this nature … is impact assessment.
>
> (c) For each of the development applications to be 'properly made':
>
> (i) amended IDAS forms and planning reports for impact assessment Multi-unit development (boarding house); and
> (ii) payment of fees in excess of $16,000 for each development application was required."

[6] On or about 14 July 2010 the appellant applied to the Committee seeking declarations that the development applications were in fact properly made. The applications were heard on 24 August 2010.

[7] On 30 September 2010 the Committee handed down its decisions upholding the original decisions made by the respondent. Under the heading "Reasons for the decisions, conclusion and determination", the Committee stated:[2]

> "Based on an assessment of the facts, it is the Committee's decision that the proposed use is a 'multi-unit dwelling' as that term is defined in the planning scheme, and as a result the development application was not properly made because the correct fee was not provided with the development application.
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> …
>
> The application for a declaration is dismissed."

The characteristics of the proposed development

[8] There is no dispute about the physical characteristics of the proposed developments. Consistent with the way the appeal was conducted before me, I will refer to the

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1 At para 6.

2 Exhibit 1, Tab 11 p 6.

description of the development at 17 Wilkins Street, Annerley. The Committee described this proposal in the following terms: [3]

> "2. The site is located at 17 Wilkins Street, Annerley, and is improved with a detached residential dwelling. The site is located in the 'low-medium density residential' zone and has a site area of 405 m^2. The premises contains 10 bedrooms. Despite its size, the premises maintains the appearance of a house.
>
> 3. The applicant … made a development application for a development permit for a material change of use 'house (non-complying). … The development application was made under the provisions of the council's city plan (Planning Scheme). The proposed use is intended to accommodate more than five unrelated persons for the purpose of student accommodation.
>
> 4. It is proposed that each of the students will rent a bedroom from the owner … under a separate arrangement with him. Some student couples may share a bedroom. Each student, or couple, will have available to him, her, or them, their own food storage areas in the cupboard and fridge(s), although, they share the common facilities. The accommodation is offered on the basis of a minimum tenancy of six months. There may be up to 12 students living on the premises at any one time.
>
> 5. The furniture and white goods in the common areas are provided by the owner. He pays for the electricity. The rent charged is an all up fee, inclusive of electricity. The owner has arrangements for a cleaner to clean the common areas once per week. He supplies the toilet paper and cleaning products for the premises.
>
> 6. The rental is $150-$160 per week per bedroom for one student. The rental is $220-$240 per week per bedroom where the room is shared by a couple. Rent is paid on a weekly basis.
>
> …
>
> 9. During the hearing the council conceded that if the number of students residing in the premises was five, or less, then the use would be self-assessable 'house' under the planning scheme."

[9] The reference to five or less students is undoubtedly a reference to Performance Criterion (P) 8 and Acceptable Solution (A) 8 of the respondent's "House Code"

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[3] See Exhibit 1, Tab 11 pp 1-2.

under its planning scheme. Performance Criterion 8 requires that a house must be used for domestic residential purposes. Acceptable Solution 8 relevantly provides:

> "The main dwelling, together with any secondary dwelling, is used by a household group comprising:
>
> - one person maintaining a household, or
> - two or more persons related by blood, marriage or adoption, or
> - not more than five persons, not necessarily related by blood, marriage or adoption, or
> - not more than five persons under the age of 18 and not necessarily related by blood, marriage or adoption, together with one or two adult persons who have care and control of them, or
> - …"

[10] It was because each of the developments intended to accommodate 12 or more persons that the development applications were for a material change of use for a "*residence not complying with House Code*".

The alleged errors made by the Committee

[11] On behalf of the appellant it was submitted that the Committee erred and/or led itself into error by:

(i) Failing to give effect to the natural and ordinary meaning of the words used in the definition of "House" where used within the respondent's City Plan 2000.

(ii) Failing to give effect to the final sentence of the definition of "Multi-unit dwelling" in the plan.

(iii) Using performance criterion P8 and acceptable solution A8 of the House Code to exclude the application of the definition of "House".

(iv) Taking into account tenancy arrangements in construing the competing definitions.

The definitions under City Plan 2000

[12] Section 10.2 of City Plan 2000 contains the following definitions:

> "**House:** a use of premises principally for residential occupation by a domestic group or individual/s, that may include a secondary dwelling, whether or not the building is attached, <u>but does not include a single unit dwelling</u>." (emphasis added)

> "**Single unit dwelling:** a use of premises as a principle place of longer-term residents by a household, domestic group or individual/s, whether or not in a building that is attached or detached, and the dwelling (including any land and

building/structures that may be associated with the dwelling or part of the dwelling) is contained entirely on a lot that has:

- an average width of less than 10 metres and/or an area of less than 400 m^2 (but does not include small corner lots with a minimum of lot size of 350 m^2 …
- an area of less than 600 m^2 (excluding access way) if a rear lot

For the purposes of applying this definition and corresponding provisions in the plan, the term freehold lot is a Standard Format Plan only. Excluded from this definition are lots subject to Community Titles Schemes, Building Format and/or Volumetric Format Plans.

The definition of a single unit dwelling does not apply to:

- any existing dwellings approved as another use (e.g. an existing house on a lot below the sizes stated above). …
- houses or multi-unit dwellings on existing vacant [sic] lots of the size stated above …" (emphasis added)

"**Multi-unit dwelling:** a use of premises as the principle place of longer-term residents by several discrete households, domestic groups or individuals irrespective of the building form. Multi-unit dwellings may be contained on one lot or each dwelling unit may be contained on its own lot subject to Community Title Schemes. Examples of other forms of multi-unit dwelling include boarding house, retirement village, nursing home, orphanage or children's home, aged care accommodation, residential development for people with special needs, hostel, institution (primarily residential in nature) or community dwelling (where unrelated people maintain a common discipline, religion or similar). The term multi-unit dwelling does not include a house or single unit dwelling as defined else where." (emphasis added)

Somewhat oddly, use by a "household" falls under the definitions of Single unit dwelling and Multi-unit dwelling, but not House.

The arguments

[13] Before dealing with the four matters identified above, I should make it clear at this stage that I consider the decisions under appeal raise issues concerning potential errors or mistakes in law for the purposes of s 479(1) of the *Sustainable Planning Act* 2009. This appeal is primarily concerned with questions of construction arising under a statutory instrument. The questions are to be answered by deciding the meaning and effect of definitions prescribed in the instrument and whether on the facts as found the developments fall under one definition or another. Questions of law are involved.[4]

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4 *Collector of Customs v AGFA – Gevaert Ltd* (1995-96) 186 CLR 389 at 395-397.

[14] On behalf of the appellant, it is submitted that:[5]

> "16. The last sentence of the definition of *multi-unit dwelling* compels a primary inquiry:
>
> 'Is the premises used for a "house" as defined?'
>
> 17. The words of the 'house' definition should be given their ordinary meaning.
>
> 18. If the use falls within the ordinary meaning of those words, the issue is resolved.
>
> 19. There remains no scope for operation of the definition of 'multi-unit dwelling'; the 'best fit' approach; or the *eejusdem generous* rule.
>
> 20. To the extent that it might be permissible to move beyond (the) primary inquiry enlivened by the last sentence of the definition of *multi-unit dwelling*:
>
> (a) as to the council's approach before the Committee acknowledged the definition of 'house' is met where five individuals reside in premises: why not more;
> (b) both definitions contemplate residential use by individuals; albeit a 'house' does not require 'longer term residents' and, by use of the words 'principally', that definition admits of a prospect of subsidiary use for other purposes;
> (c) neither definition requires consideration of tenancy arrangements (although we note that the sharing of cooking, groceries and common facilities in the instant cases was acknowledged by the Committee in paragraphs 4, 5 and 19 of each decision);
> (d) whether there is a direct relationship between bedroom occupants and a landlord; or subtenancies; or student living arrangements of the kind rendered infamous by John Birmingham; is not to the point;
> (e) PC8 and AS8 of the House Code do not inform the definition of 'house' (and have no application to a 'multi-unit dwelling');
> (f) the consequences of a failure to meet AS8 of the House Code is that each of the development applications is subject to the 'code notifiable' level of assessment rather than remaining 'self assessable'.
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> …

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5 Appellant's written submissions.

(h) the so-called 'best fit' test involves a search for a definition which 'best fits' the proposal. It may arise where, unlike here, the use does not fit 'neatly or specifically within any of the definitions contained in the Scheme', but it does not arise when a use falls within the plain meaning of one definition which operates to exclude the application of the other." (citations not included)

[15] During the course of argument I was referred by Mr Litster, senior counsel for the appellant, to the reasons of Chesterman JA in a Court of Appeal decision in *Sunshine Coast Regional Council v EBIS Enterprises Pty Ltd*:[6]

"18. … 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 functional 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."

The House Code and Tenancy issues

[16] In paragraphs 21 and 22 of their decision, the Committee stated:

"21. The House Code, in Performance Criteria (PC) 8 and Acceptable Solution (AS) 8 also provide some indication that the definition of 'house' does not apply in this case. The Code is for assessing a material change of use and/or building work for a 'house'. The difficulty, therefore, with referring to the matters in PC8 and AS8 is that you actually have to determine that the use is a 'house' before you can apply the Code. However, as the planning scheme is to be construed as a whole, consideration should be given to those provisions.

22. While the phraseology is a little different to that used in the definition of 'house', when regard is had to AS8, the use is not for 'domestic residential purposes' as required by PC8, because the use is for more than five persons. This

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6 [2010] QCA 379 at paras 18 and 19, per Chesterman JA.

> performance criterion confirms council's intention with respect to what the use of 'house' was intended to be." (footnotes deleted)

[17] It seems tolerably clear by the use of the words "*provide some indication*" and its identification of the difficulty in having to reach a conclusion about the definition before you could apply the Code, that the Committee did not place a lot of weight on A8 in reaching its conclusions. However, notwithstanding the principle (recognised by the Committee) that town plans should be construed as a whole,[7] in my view it would be wrong to read down the definition of "House" by reference to one of a number of acceptable solutions. There is, to use the words of Chesterman JA in *EBIS Enterprises*, no indication within City Plan 2000 that the definitions are not to be read as they are written. Further, it is not a necessary consequence of a failure to satisfy A8 that the development under consideration cannot be a House for the purposes of the Plan. It is well recognised that non-compliance with an acceptable solution does not necessarily involve conflict with a Planning Scheme and, as the Committee recognised, "*You actually have to determine that the use is a 'house' before you can apply the Code*."

[18] Notwithstanding my view that the Committee probably erred in having regard to A8 in reaching its conclusions about the proper categorisation of the subject proposals, that does not mean that the appellant succeeds.

[19] Before moving on to the more substantive issue concerning the definitions in Part 10 of City Plan 2000, I should also deal with the complaint made about the Committee's reliance on the evidence concerning the tenancy agreements. In paragraph 19 of the Committee's reasons, it is said in part:

> "The reference to individuals in the definition of 'house' appears to address the situation where individuals may have a tenancy for a dwelling together."

Reference is also made to rent being paid a weekly tenancy in paragraph 33(d) of its reasons.

[20] In *Yu and Leung v Brisbane City Council & Anor*[8] Rackemann DCJ said:

> "In determining the description which is applicable, the court must undertake its task of characterisation in a practical and common sense way to determine the appropriate genus which best describes the activities in question …" (footnote deleted)

[21] As was pointed out by Mr Hinson, senior counsel for the respondent, characterisation of a use naturally involves an analysis of the factual circumstances surrounding a proposal which, relevantly in the circumstances of these appeals, includes tenancy arrangements. I agree. In my view, the Committee did not err in bringing into account the commercial aspects of the proposals.

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7 See, for example, *Westfield Management Ltd v Pine Rivers Shire Council & Anor* (2004) QPELR 337.

8 (2006) QPELR 102 at [16].

The definition issues

[22] The detailed submissions provided to the Committee on behalf of the appellant make it clear that the use of the proposed developments could fit within the definition of a house.[9] The respondent does not disagree.[10] It is also clear that the use to which the premises would be put would satisfy the definition of a multi-unit dwelling. That is, it involves the use of premises as the principle place of longer-term residents by several discrete households, domestic groups and/or individuals.

[23] In *Yu v Leung v Brisbane City Council & Anor* Rackemann DCJ in paragraph 16 went on to say:

> "… where there are two or more defined purposes which are apt to cover a particular proposal, a 'best fit' approach is appropriate …"

In support of that proposition, his Honour cited the judgment of Robin QC DCJ in *Livingstone Shire Council v Brian Hooper & M3 Architecture & Ors*.[11] In *Yu v Leung* Rackemann DCJ was concerned with, among other things, the commercial character of a building and the definition of "house" under City Plan 2000. The best fit approach was also cited with approval by Wilson SC DCJ (as he then was) in *Chiefari v Brisbane City Council*,[12] where the court was concerned with the meaning of the definition "Farm" in Brisbane City Plan 2000. His Honour relevantly said:

> "… where, on any view, those activities are engaged in for the purpose of the appellant's business of vegetable wholesaler they are logically and conveniently defined as a warehouse use.
>
> The same conclusion is reached if the 'best fit' approach to the definitions is adopted. It can be an appropriate method of construction where there are two or more defined uses, each of which is apt to cover the proposal. … Because the dominant activity here is storage, the best fit is 'warehouse'." (footnotes deleted)

[24] According to the respondent, when the focus is put on the particulars of the use of the premises, the best fit is a multi-unit dwelling and not a house. I agree. While some of the features usually associated with a "boarding house" or "hostel" are absent, for example the provision of services such as meals, room cleaning and/or washing, there are a number of significant similarities. The right of residency is associated with a commercial arrangement whereby in consideration for the payment of rent the tenant is entitled to exclusive occupation of one of the bedrooms (but no other room) and the right to share the common areas of the premises and appliances therein. The rent also includes electricity and the owner provides cleaning products and toilet paper and arranges and pays for cleaning of the common areas. There would be very little (if any) common purpose or organisation among the tenants.[13] In circumstances where the use of the premises is

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9 See Exhibit 1 Tab 8 p 2.
10 Exhibit 1 Tab 5 pp 1-2.
11 (2004) QPELR 307 at paras 14-16.
12 (2005) QPEC 9 at [23]-[24].
13 Refer to *Noosa Shire Council v Staley (2002)* QPEC 18 and the cases referred to therein at paras 11 to 14.

exclusively for the residency of students, it has some of the characteristics of "*community dwelling (where unrelated people maintain a common discipline, religion or similar)*".[14] In this regard it should be noted that boarding house, hostel and community dwelling are but examples of forms of multi-unit dwelling meant to be included under that definition. It is not an exhaustive list of uses. It is also not without significance that, as was conceded by Mr Litster,[15] on the appellant's construction, all other things being equal, a premises having any number of bedrooms being let to individual students would still fall within the definition of "House".

[25] It is true that both definitions include reference to the use of premises by an individual and/or individuals. However, it seems tolerably clear that the emphasis of the definition of House is more focused on the entity of a domestic group whereas the emphasis of the definition of Multi-unit dwelling is more directed to the existence of multiple independent[16] "*individuals*", "*domestic groups*" and "*discrete households*".[17] The proposed use falls more comfortably under the latter descriptions than the former.

[26] As I have already mentioned, on behalf of the appellant it is contended though that once the use satisfies the definition of house that is the end of the matter. It cannot fall within the definition of multi-unit dwelling, because within the definition of that term a house is excluded. The written argument advanced on behalf of the appellants has already been referred to in paragraph 14 above. In his oral submissions, Mr Litster formulated his argument in these terms:[18]

> "If your Honour goes to paragraph 8 (a reference to the *Brian Hooper M3 Architects* case) in that decision the two definitions that competed for acceptance in that case were a combination building and multiple dwelling, but each had a clause excluding the other at the back end of each definition. Now, that's not the case we find here. What we find here is you go to house, and if you're a house you're not a multi-unit dwelling …
>
> With the greatest respect, because all they did was give rise to the necessity to consider which definition was which. But on the construction of the section – of the provision, which we contend, those words have work to do and it is consistent with the approach to the construction apparent in the administrative appeal, a decision to which I have already referred your Honour. And it's for that reason that we say, 'Well, you don't get to a best fit argument here because one specifically excludes the other. If you fall within one you're out of the other. You don't get to consider best fit because by operation of the definition you can't.'
>
> Both definitions, we accept – we have to accept – that both definitions contemplate residential use by individuals, but if you fall

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14 Part of definition of Multi-unit dwelling.
15 T 1-16 LL 30-42.
16 The tenants, apart from couples, would have little or no connection apart from being students.
17 A distinction recognised by the Committee: Exhibit 1 Tab 11 paras [17] and [19].
18 T 1-19 LL 20-55.

> within house it doesn't matter that you might also fall within multi-unit because multi-unit says if you fall within house you don't fall within multi-unit. This is just a straight application of the words of the section and when one goes to the decision of the Committee one doesn't even see reference made to this proposition. And yet it was argued quite articulately, with respect, by the planner; who was the appellant in this case."

The decision of the Administrative Appeals Tribunal to which Mr Litster referred in his oral argument is that of *Re BHP Billiton Petroleum Pty Ltd v Chief Executive Officer of Customs*.[19]

[27] In my respectful view, the exclusionary part of the definition of Multi-unit dwelling under consideration here is quite different from the statutory provisions which concerned the Administrative Appeals Tribunal in the *BHP Billiton* case. The words under consideration here do not have the consequence that where the use meets the criteria of the definition of House, that the use is thereby incapable of or prohibited from also falling within the definition of Multi-unit dwelling.

[28] Fundamental to whether or not a premises falls within the definition of "House", "Multi-unit dwelling" or "Single unit dwelling" is the use to which that premises is put. It is therefore necessary by reference to that use to appropriately characterise the premises in question. The last sentence of the definition of Multi-unit dwelling (as is indeed the case for the exclusions under House and Single unit dwelling) recognises that a premises may, at face value, be capable of falling under one or more of the definitions prescribed but than then makes it clear that it cannot be a house and/or a multi-unit dwelling and/or a single unit dwelling, or any combination thereof. It has to be one or the other. It is the characterisation of the use which determines under which definition the premises falls and once appropriately defined it is then prohibited from also being any one of the other defined uses under the plan.

[29] Further, a premises with an abnormal number of bedrooms, each let on a commercial basis to individuals or couples of students on a relatively temporary basis does not sit comfortably with the common or normal understanding of what would constitute a house within a predominantly residential area. In this regard, in the decision of the Full Court in *ZW Pty Ltd v Peter Hughes & Partners Pty Ltd*,[20] Thomas J (as he then was) with Ryan and Mackenzie JJ agreeing, said:

> "There are serious difficulties of construction of cl. 3(9) in ch. 8. It is at least surprising that in the residential "A" zone, it contemplates permitting two storeys (i.e. one storey above ground storey) with respect to a 'shopping complex' when a shopping complex is in any event a prohibited use for such a zone.
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> One may also note in passing Cater DCJ's comment in *Laworld* (at 90):

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19 (2002) 69 ALD 453 at 472.

20 (1992) 1 Qd R 352 at 360.

> 'I need hardly add the obvious comment that the relevant definitions are somewhat tortuous and difficult to comprehend. A definition is designed to elucidate meaning. That result has not been achieved here and the possibility of reformulating the definitions should not be discarded.'

> To arrive at the so-called proper construction of such provisions involves a good deal of guess-work. In the end courts endeavour to give some meaning to such provisions and endeavour to adopt a commonsense approach, or the approach which seems to make most sense out of provisions which may be contradictory as well as obscure ..."

The construction of the definitions contended for by the respondent makes, with respect, most sense.

[30] For the reasons given, the last sentence of the definition of Multi-unit dwelling does not prevent the application of the "best fit" test and, in this case, the best fit is under that definition.

[31] At first blush, the words "…*for residential occupation*…", where used in the definition of 'House', might be thought to signify a higher degree of permanency when compared to the words used in the definition of 'Multi unit development': "*principle place of longer term residents*." However, any difference seems to be largely illusory. The latter words also appear in the definition of 'Single unit dwelling'. It is clear that under both of the latter definitions a permanent common household (or domestic group) is envisaged either in a dwelling on a separate lot or under a community title scheme.

Ambiguity

[32] Before finally disposing of these appeals, it is necessary to deal with a matter raised by Mr Litster in reply. Mr Litster submitted that in circumstances where ambiguity exists which cannot otherwise be resolved, it should be resolved in favour of the landowner. In support of his argument he referred me to the decision of Robin QC DCJ in *Friends of Currumbin Association Inc v Gold Coast City Council & Anor*.[21] In paragraph 33 his Honour said:

> "Some attention was paid to whether, if there were uncertainty (which I do not think exists), it should be resolved favourably to the co-respondent. It is well established that 'it would accord with principle, where planning approvals are ambiguous, to construe them in the way which places the least burden on the landowner' … as to whether the same generosity should be extended in interpretation of planning schemes, although judges of the court have been hesitant about proceeding on that basis … I am satisfied that there may be occasions … even where there is no rezoning agreement or plan of development for the principle to be applied on construing the relevant planning scheme …" (citations deleted)

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21 (2006) QPELR 656.

[33] In the above passage Judge Robin QC DCJ referred to a number of authorities, one of which was *Delfin GC Pty Ltd v Gold City Council*.[22] In that case, Rackemann DCJ in paragraph 40 made the following observations:

> "It was submitted, on behalf of the applicant, that any conflict between the (domain) map and the description in the schedule should be resolved in its favour by application of the principles of resolving ambiguity against the planning authority and in favour of the owner/developer. That principle has been applied in the construction of the conditions of an approval granted by a planning authority. Learned senior counsel for the applicant was unable to identify any Australian case in which that principle had been applied in the construction of a planning scheme, although he did refer to one Canadian case. Both he and counsel for the respondent described its application, in the interpretation of a planning scheme, as one of last resort." (footnotes deleted)

The Canadian case to which Rackemann DCJ referred to was also considered by Robin QC DCJ in the *Friends of Currumbin* case.[23]

[34] I am also inclined to agree that the application of this "principle", if it is available at all concerning the construction of a planning scheme, could only be used as a last resort. That is not the situation here.

[35] For the above reasons, I have concluded that the decision reached by the Committee concerning each application was correct. And, notwithstanding the fact that when reaching its decisions the Committee may not have had any regard to the last sentence of the definition of Multiple unit dwelling, no determinative error of law on the Committee's part has been shown. Accordingly the appeal must be dismissed.

Order

The appeal is dismissed.

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22 (2006) QPEC 4.

23 *Re LDCM Investments Ltd v Town of Newcastle* (1975) 8 OR (2d) 504.