PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Noosa Shire Council v 64 Gateway Drive Pty Ltd* [2021] QPEC 19
PARTIES:	**NOOSA SHIRE COUNCIL** (Applicant) **v** **64 GATEWAY DRIVE PTY LTD** (Respondent)
FILE NO/S:	D55 of 2020
DIVISION:	Planning and Environment
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning and Environment Court of Queensland
DELIVERED ON:	30 March 2021
DELIVERED AT:	Maroochydore
HEARING DATE:	27 August 2020
JUDGE:	Long SC, DCJ
ORDER:	**Originating Application dismissed.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATION – MATERIAL CHANGE OF USE – where the respondent lodged development application number MCU19/0-081 on 10 July 2019 seeking development approval for 16 "Ancillary Dwelling Units" – where development application number MCU19/0-081 was assessed and refused by Council – where the respondent lodged an appeal against Council's decision on 9 October 2019 – where the applicant has sought a declaration that the use the subject of development application MCU19/0-081 is not for Ancillary Dwelling Units as that term is defined in the *Noosa Plan 2006.*
LEGISLATION:	*Integrated Planning Act* 1997 (Qld) *Planning Act* 2016 (Qld) *Planning and Environment Court Act* 2016 (Qld)
CASES:	*Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 *Chesol Pty Ltd v Logan City Council* [2007] QPELR 285 *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 15

Perivall Pty Ltd v Rockhampton Regional Council [2019] QPELR 96

Stockland Developments Pty Ltd v Thuringowa City Council & Anor (2007) 157 LGERA 49

We Kando v Western Downs Regional Council [2019] QPELR 451

Woolworths Ltd v Maryborough City Council & Anor [2006] 1 Qd R 273

Zappala Family Co Pty Ltd v Brisbane City Council & Ors (2014) 201 LGERA 82

COUNSEL: JG Lyons for the applicant
AN Skoien for the respondent

SOLICITORS: Wakefield Sykes / Thynne Macartney for the applicant
P&E Law for the respondent

Introduction

[1] By originating application, the applicant seeks declarations in respect of a development application ("the development application") made by the respondent pursuant to the *Planning Act* 2016 ("*PA*"). The development application sought a development permit for a material change of use for development ("the proposed development"), which was described as "16 Ancillary Dwelling Units", on the land at 64 Gateway Drive, Noosaville, described as Lot 13 on SP 170295 ("the subject land").

[2] The following declarations and orders are sought, pursuant to s 11 of the *Planning and Environment Court Act* 2016 ("*PECA*"):

> "(a) a declaration that the use the subject of development application *MCU 19/0-081* is not for 'Ancillary Dwelling Units' as that term is defined in the Noosa Plan 2006; and
>
> (b) such further or other declarations and orders that the Court deems appropriate."

[3] The background or context to this application may be conveniently noted as follows:

(a) on 2 July 2008, the applicant issued a development permit for a material change of use – Industrial Business Type 1 – Warehouse and

Industrial Business Type 2 – Production, Alteration, Repackaging & Repairing ("the industrial approval");

(b) on 25 June 2019, the applicant issued a decision notice approving a minor change to the industrial approval including in respect of amendments to conditions, which the respondent points out, included:

(i) that in condition 1, the development generally complies with the approved plan for development, which is made up of a series of plans listed within that condition ("the industrial development plans");

(ii) in condition 53, that for multiple uses (including building format plans, group title plans, etc.), the development be served by certain requirements in respect of water metering, including individual water metres to each tenement capable of being separately rated and as to fire service; and

(iii) a requirement in condition 78 that the operational waste management plan dated 20 May 2008, be amended and resubmitted to Council to inter alia address clarification as to the role of the body corporate manager as to day to day management of waste issues on the site;

(c) on 10 July 2019, the respondent applied for a material change of use for 16 Ancillary Dwelling Units on the land, which application, as is particularly noted for the respondent, was supported by a development application planning report prepared by Pivotal Perspective, which contains an extract of the industrial development plans, showing 42 industrial lots. That report states that:

(i) the proposal under the application is to convert the upstairs portion of 16 of 42 industrial units, to include caretakers' residences; and

(ii) each residential unit is less than 65 m^2 in gross floor area and includes balcony, terraces and entrances from within the industrial tenancy;

(d) on 19 September 2019, the Council refused that application for the proposed development, for reasons which relevantly included that:

> "1. The proposed development is not for ancillary dwelling units as defined under s 2.11.5 of the Planning Scheme because:
>
> (i) multiple dwelling units are proposed on the premises;
>
> (ii) the proposed dwelling units are not subordinate to the non-residential use."; and

(e) on 9 October 2019, the respondent appealed that refusal to this Court. The grounds of appeal included that the proposed development is for Ancillary Dwelling Units on 16 premises.

The basis of the application

[4] As explained in the Originating Application, it has been prompted by the correspondence of the parties to the abovementioned appeal and in respect of their fundamental disagreement as to the following contentions of the applicant, as also stated in the Originating Application:

> "7. The Council contends that the proposed development is not for 'Ancillary Dwelling Units' for the reasons set out below:
>
> (a) '*Ancillary Dwelling Unit'* is defined in the Council's Planning Scheme Noosa Plan 2006 (**the planning scheme**) in the following terms:
>
> *'**Ancillary dwelling unit** means the use of premises for a caretaker's residence or employee residence associated with a non-residential use on the same premises where:*
>
> - *there is no other dwelling unit on the premises, except where the non-residential use is an agricultural use;*
> - *the gross floor area of the dwelling unit does not exceed 150 m^2;*
> - *the dwelling unit is subordinate to the non-residential use;*
> - *the dwelling unit is attached to or within 25 m of the non-residential use; and*

- *the dwelling unit is occupied by the owner of the non-residential use or somebody employed in the non-residential use.'*

(underlining added)

(b) the development application for the proposed development relates to a development that comprises 6 buildings (in which the 16 '*Ancillary Dwelling Units*' are proposed);

(c) pursuant to s.2.2 of the Planning Scheme, terms used in the Planning Scheme that are defined in the *Integrated Planning Act* 1997 or subsequent planning legislation, generally have the same meaning as in the *Integrated Planning Act* 1997 or subsequent planning legislation;

(d) the *'Administrative Terms'* component of the Planning Scheme confirms that the expression 'premises' has the same meaning as in the *Integrated Planning Act* 1997;

(e) In the *Integrated Planning Act* 1997, the expression '*premises*' is defined to mean:

(i) *'a building or other structure; or*

(ii) *land whether or not a building or other structure is situated on the land).'*

(underlining added)

(f) in the *Planning Act* 2016 (being subsequent planning legislation), the expression '*premises*' is defined in materially the same terms;

(g) the relevant aspect of the definition of '*Ancillary Dwelling Unit'* provides:

'***Ancillary dwelling unit*** *means the use of premises for a caretaker's residence or employee residence associated with a non-residential use on the same premises where:*

- *There is no other dwelling unit on the premises …'*

(underlining added)

(h) having regard to the use of the defined term '*premises*' and by the use of orthodox principles of statutory interpretation the word '*premises*' means either:

(i) the land the subject of the development application; in which case the Developer could apply for only 1 '*Ancillary Dwelling Unit'*; or

(ii) the buildings the subject of the development application; in which case the developer could apply for only 6 '*Ancillary Dwelling Units'*.

(i) having regard to the matters set out above, the use the subject of the development application does not fall within the defined use of '*Ancillary Dwelling Unit'*.

8. Further to the above, the definition of 'Ancillary Dwelling Unit' requires that the 'dwelling unit is subordinate to the non-residential use'.

9. Given the size of the proposed dwelling units and that, at this stage, the particular non-residential uses that are to occur within the development are unknown, the Developer is unable to demonstrate to the Court that the proposed dwelling units will be 'subordinate to the non-residential use'."[1]

[5] In opposing the relief sought in the Originating Application, the respondent substantially takes issue with the matters stated in each of paragraphs 7 and 9 in that application.

[6] In respect of paragraph 7 of the Originating Application and in addition to referring to the history of the development applications and approvals granted in respect of the land, it is contended that the development under the industrial approval will create 42 individual lots within 6 distinct buildings and common property, through the registration of a building format plan. And further, that the conditions of the industrial approval demonstrate that it is intended that a body corporate be established for the development, which is made up of 42 individual units and common property, as shown in the industrial development plans. It is contended that the development under the industrial approval creates 42 premises within parts of six buildings and common property and that the development application sought approval of 16 Ancillary Dwelling Units, on 16 of the 42 premises under the industrial approval. In summary the contentions are that:

- "The development under the Industrial Approval creates 42 premises within parts of 6 buildings and common property";
- "The Development Application sought approval of 16 Ancillary Dwelling Units on 16 of the 42 premises under the Industrial Approval."[2]

Those contentions are made in reference to the definition of Ancillary Dwelling Unit in the *Noosa Plan* 2006 and in noting the effect of that plan in defining the

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1 Originating Application filed 8/4/2020.
2 Statement of Facts, Matters and Contentions, filed 28/5/2020, at 7 (e) and (f).

reference to "premises" by reference to the definition of that concept in the *Integrated Planning Act* 1997 *("IPA")*, as follows:

> "**premises** means -
>
> (i) a building or other structure ; or
>
> (ii) land (whether or not a building or other structure is on the land)."

And the separate definition of "building", as follows:

> "'**building'** means a fixed structure that is wholly or partly enclosed by walls and is roofed, and includes a floating building and any part of a building."

Subsequently, the *PA* is noted to have commenced on 3 July 2017 and that by s 289(2)(a) of that Act, it is stated that unless a contrary intention appears, a reference to the repealed *IPA* is a reference to the *PA*. Reference is then made to an effectively similar definition of premises" in the *PA*, with emphasis on again the alternative meaning of "a building", with reference also being made to the definition of "building" in the *PA*, as follows:

> "Building means
>
> (a) a fixed structure that is wholly or partly enclosed by walls and is roofed; or
>
> (b) a floating building; or
>
> (c) any part of a building."

[7] As to the contentions in paragraph 9 of the Originating Application, the respondent's position is that the proposed Ancillary Dwelling Units are 'subordinate to the non-residential use' for the following reasons:

> "a. As set out in the Planning Report, the Ancillary Dwelling Units are proposed to only be occupied by owners or employees of the industrial businesses operating on the lower level of each premises, which is a non-residential use on the same premises.
>
> b. The Ancillary Dwelling Unit use is secondary to the primary industrial use.
>
> c. The built form will be integrated with the industrial use on the lower level.

d. Given their proposed built form, the Ancillary Dwelling Units will not function as a residential use independent of the industrial use.

e. The floor area of the Ancillary Dwelling Units is less than the floor area of the industrial use on each premises.

f. Access to the Ancillary Dwelling Units is in some cases only through the corresponding industrial unit."[3]

[8] As is correctly pointed out for the respondent and whilst the declaration sought by the applicant is expressed in terms "that the use the subject of the development application … is not for Ancillary Dwelling Units as that term is defined…", this application is not for the purpose of any assessment or approval of the proposed development. Accordingly, the question which arises is as to whether or not there is a legal impediment to any such approval, in the sense that the use for which the application has been made is not encompassed by the applicable definition of that use.

[9] More particularly and as clarified upon the hearing of this application, it is primarily premised upon the applicant's contention that upon an objective reading of the application for the proposed development,[4] the Court would determine that, objectively read, what was applied for was and could only have been, despite the form in which it was made, directed at a single planning unit being the whole of the premises, or the subject land described as Lot 13 on SP 170295 and therefore permitting of only one caretaker's unit. As will be elaborated below, it may be observed that the couching of the applicant's position in this way may tend to somewhat obscure that what is sought to be raised here is a legal question as to the interpretation of the relevant legislative provisions, as they are incorporated into the planning scheme.

[10] It may therefore be accepted, as was effectively contended for the respondent, that the utility of this Originating Application may only be seen in its capacity for determination of a legal impediment to the utility of the appeal against the refusal of the development application which is otherwise before the Court.[5] That is, in the

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3 Statement of Facts, Matters and Contentions, filed 28/5/2020, at 9.

4 See *Stockland Developments Pty Ltd v Thuringowa City Council & Anor* (2007) 157 LGERA 49 at [42].

5 Notwithstanding a reluctance to unequivocally accept that such a declaration would necessarily have that effect; see; T 1-10.33 – 1-11.13.

sense that the applicant may obtain a declaration in respect of a conclusion that the proposed development is not able to be or cannot be, characterised as being for the use described as "16 Ancillary Dwelling Units". Accordingly and as further submitted, the question is not as to whether each or any of the proposed dwelling units is capable of being used other than as an Ancillary Dwelling Unit. And any issue as to conditions which might attach to any such approved use, are also a matter for the appeal and not this Originating Application.

Discussion

[11] Before dealing with those issues, it is necessary to note and explain why two distracting issues, raised for the respondent, may be put aside as unnecessary and unhelpful to the resolution of this matter:

(a) First, there is no assistance to be gained as to any impediment to this application and to which no objection was raised,[6] from the fact that the application for the proposed development was accepted, by the applicant, as a properly made application. As may be noted by reference to ss 51(4) and (5) of the *PA*, such is merely acknowledgement of acceptance of an application in accordance with the requirements of that section. There is nothing to suggest that it was necessary for the applicant to consider, let alone determine, the issue as to which the declaration is sought, in acceptance of the development application.[7] Rather and as has been noted, the Originating Application before the Court arises from the respondent's

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6 Accordingly, there is no need to consider the effect of the decision in *Perivall Pty Ltd v Rockhampton Regional Council* [2019] QPELR 96, at [31], [42], [43] and [63]-[67], or *We Kando v Western Downs Regional Council* [2019] QPELR 451, at [11]-[13]. Also and as noted in the later decision, this case does not appear to raise the same issues as were addressed in the earlier decision. However and as has been noted, an underlying issue in this matter has been in identification of the utility of the declaration which is sought in the context of the appeal which is otherwise before the Court; a matter which is recognised as being relevant to any discretionary exercise of declaratory power by a Court: eg. see: *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582.

7 Whilst and as the recent discussion of similar provisions to those in s 51(2), in s 79(1A) of the *PA* and in *Highgate Partners Qld Pty Ltd v Sunshine Coast Regional Council* [2021] QPEC 15, might indicate, that in some circumstances, the application of s 51(2) could engage a need to consider the identification of the premises to which a development application relates. However, there is no suggestion of any such issue arising here; see: s 251 Certificate, filed 6/8/2020, at p 70.

appeal in respect of the decision, made upon an assessment of the development application, to refuse it;[8] and

(b) Secondly, there is nothing to be gained in making any objective assessment of what was applied for here, or any capacity of such an application to be so considered, by reference to any contention as to the applicant's past approval of what are further contended to be similar applications "within a 300 m radius of the subject land",[9] or the observations made upon those materials in the applicant's development application assessment report.[10] And accordingly, there is nothing to be gained in consideration of the narrow points raised in this Originating Application, from consideration of any suggested inconsistency of approach on the part of the applicant, by reference to the differing and disparate circumstances revealed in the disclosed material as to the assessment and approval of those other applications,[11] or otherwise. As has been previously observed in this Court:

> "… each case must be considered on its individual merits. Such an assessment does not generally create a precedent for other approvals."[12]

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8 T 1-5.19 – 1-7.12 and 1-10.33 – 1-11.40. And see: s 251 certificate, filed 6/8/2020, at p 107.

9 As referred to in the town planning report which accompanied the development application for the proposed development; see: s 251 certificate, filed 6/8/20, at pp 78-83 and affidavit of JWM Lewis, filed 24/8/2020**,** at [4].

10 S 251 Certificate, filed 6/8/2020, at p 106.

11 See: affidavit of LA Manning, filed 24/8/2020 at [4] and Exhibit numbers LAM 2-3.

12 Eg. see; *Chesol Pty Ltd v Logan City Council* [2007] QPELR 285 at [66].

[12] As it was put in the course of submissions, the gravamen of the applicant's position is that what has been applied for does not fall within the definition of an Ancillary Dwelling Unit but is rather "a de-facto attempt to put [two bedroom] residential units within an industrial development."[13] That qualification appears to reflect the following observation in the concluding reasons of the applicant's decision notice for the refusal of the development application:

> "The proposed units are better defined by the Noosa Plan as multiple dwelling units which are an inconsistent use in the Industry zone and required to be publicly notified."[14]

Such considerations might remain germane to the assessment of the development application, such as in any relevant implications which may arise from any understanding that the scheme definition of "Multiple Housing" in the sense of "two or more dwelling units" might also be satisfied. However, they were, appropriately, not pressed in respect of this application for declaratory relief.

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13 T 1-5.1-14.

14 S 251 Certificate, filed 6/8/2020, at p 107 and: T 1-44. 12-18.

[13] Similarly, it may be noted that, ultimately, the contentions in relation to the definitional requirement that use of an Ancillary Dwelling Unit are to be "subordinate to the non-residential use" of the premises, was also, ultimately, not pressed, on an understanding that the considerations went to the assessment rather than the viability of the development application.[15] That is, it is not a matter for determination as to whether what is proposed is to be appropriately regarded as subordinate to the non-residential use of the relevant premises, but rather whether or not it is capable of being so regarded.

[14] Effectively then, the sole basis upon which the applicant proceeded,[16] is in inviting the Court to find that the application for the proposed development was, on an objective reading of it and as it necessarily had to be, made in respect of the subject land in the sense of the whole of the land described as Lot 13 on SP 170295. That was contended to particularly follow from the following aspects of the application form:

(a) in the first instance, it was submitted by email, which only made reference to a new material change of use application in respect of the land referred to in its entirety, at "64 Gateway Drive, Noosaville (Lot 13/ SP170295)";[17]

(b) also that in the application form:

(i) in the section headed "Location Details", there are the same references;[18] and

(ii) in the section requesting a "brief description of the proposal", it is provided as: "Ancillary Dwelling Units – 16 Caretakers Dwellings (65 m2 each)";[19]

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15 T 1-16.1-40.
16 See T 1-15.6-31 and T 1-44.33-42.
17 S 251 Certificate, filed 6/8/2020, at p 57.
18 Ibid at p 59.
19 Ibid at p 60.

(c) in the accompanying acknowledgement of owner's consent, it is provided by a single company as the "owner of the premises identified as "64 Gateway Drive Noosaville (13/SP170295)";[20]

(d) in the accompanying "Development Application Planning Report", there is also to be found only specific reference to the situation at 64 Gateway Drive Noosaville (Lot 13 on SP 170295) and there are similarly, references to the full extent of the land, including the full site area on 12,337 m^2 and reference to all 42 units approved for industrial or non-residential use upon that site.[21]

However, it was acknowledged[22] that in the "Development Application Planning Report", there is express reference to the application being directed at "38% of the 42 individual premises."[23]

[15] The applicant does not contend that the problem lies in there being, in effect, multiple applications, if it is in respect of 16 separate premises, or that it is necessarily impermissible for what the respondent is seeking to achieve to be the subject of a single development application.[24] Rather, a further contention is made by posing the question as to how the application could ever seek to engage the definition of Ancillary Dwelling Units in respect of the requirement that there be "no other dwelling unit on the premises." Accordingly, the submission is:

> "The problems that arise from all of that include the following. How would one actually define the premises as they currently are? Secondly, in terms of the retort from the developer, they say, well, there's 42 premises, there's no other dwelling units on the premises, that is, on each of the 16 premises, but as a matter of logic that would work absurd results. How could you have another dwelling unit on the premises within these particular 42 or 16 premises? So we say as a matter of logic, as a matter of statutory construction of the Planning Scheme, which, obviously, clearly seeks to delineate between

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20 Ibid at p 70.
21 Ibid at pp 71, 73 and 97.
22 T 1.27.35-42.
23 S 251 Certificate, filed 6/8/2020, at p 76.
24 T 1-28.10-31.

> multiple dwellings and between ancillary dwelling units being a caretaker's residence, and we say on an objective reading of the development application, the premises was always just 64 Gateway Drive."[25]

[16] Although not any more expressly put, it would appear that an underlying conceptual concern is that in any existing physical or implemented sense, there was, at the time of the application, only one premises, being the entirety of Lot 13 on SP 170295. Further and whilst the pre-existing development approval was not put before the Court on this Originating Application, it is referred to in the "Development Application Planning Report" as being a development permit for Material Change of Use – Industrial Business Types 1 and 2, in conjunction with reference to the "approved industrial development layout", depicting 42 industrial units arranged in 6 separated buildings on the land.[26]

[17] There is no contention that, in the circumstances, separate application for this material change of use could not be made.[27] As the submissions for the respondent seek to note, the proposal by way of the development application is to only convert the permissible use of the upstairs areas of the 16 of the 42 units, previously approved for industrial use, to use as an ancillary development dwelling unit. It is further pointed out that:

(a) This approach is not necessarily inconsistent with recognised principles that more than one use can be carried out upon the same premises and that "multiple planning permissions can validly co-exist for the development of the same land, even if mutually inconsistent.";[28] and

(b) What is proposed here is the addition of a separate use in "each part of a building", distinguishable from being purely ancillary to a dominant use so as to be properly regarded as part of a single use, albeit that the proposed residential use is dependent on the use approved under the

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25 T 1-23.26-36.

26 S 251 Certificate, filed 6/8/2020, at pp 75-76, affidavit of JWM Lewis filed 24/8/2020**,** at [4] and cf: Exhibit 1.

27 By comparison, perhaps, with an application for change to the existing approval, pursuant to s 78 and assessable pursuant to s 82 of the *PA*.

28 See: *Savage & Anor v Cairns Regional Council* [2016] QCA 103 at [37].

existing approval and which must be subordinate to it, and such as to be seen as consistent with the intent of the definition of Ancillary Dwelling Unit in the Noosa Plan 2006.[29]

[18] It is, in that context, the full implications of which may remain for the appeal which is otherwise before the Court, that the respondent notes the necessity for the correct identification of the "planning unit" which is to be the subject of the proposed use. As observed in *Woolworths Ltd v Maryborough City Council & Anor*:[30]

> "The problem of identifying the correct planning unit in the context of town planning law is one of long-standing and has arisen in many jurisdictions. Failure to identify it correctly can be fatal to an application. Some of the circumstances in which the problem can arise were identified over 30 years ago:
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> > 'First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from *G. Percy Trentham Ltd. v Gloucestershire County Council* [1966] 1 W.L.R. 506, where Diplock L.J. said, at p. 513:
> >
> > > 'What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a "material change in the use of any buildings or other land"? As I suggested in the course of the argument, I think for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose, including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'
> >
> > But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separate and physically distinct areas of land.
> >
> > Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a

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29 Respondent's written submissions, filed 25/8/20, at [23]-[24].

30 [2006] 1 Qd R 273 at [38].

> different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit.'
>
> That decision of the English Court of Appeal has been applied in Scotland and Ireland and frequently in England."

[19] Here, it is contended and may be accepted that there is nothing by way of any incorrect identification of the relevant planning unit, by reference to the situation of it at the street address and real property description and upon which, each of the industrial units to which the application is otherwise clearly addressed, is to be located. Moreover, there is presently no other means of description of the location of such situation of the proposal, as is expressly requested as the "location of the premises".[31] The further context is what was expressly included in the development application planning report, by way of reference to:

(a) It being prepared in respect of "material change of use for 21 ancillary dwelling units situated at 64 Gateway Drive, Noosaville (Lot 13/SP170295);[32] and

(b) Under the heading "3.0 Proposed development detail", the setting out of an annotated version of the approved plan of the 42 industrial units, in order to delineate the location of the 16 units, specifically to which the application for the proposed additional use was directed. In this context, it should be accepted, as submitted for the respondent, that upon an objective reading of the development application, it is appropriately identified that the planning unit is each of the approved industrial units, which are proposed to also be used for an Ancillary Dwelling Unit.

[20] Further, such a conclusion is supported by an understanding that:

(a) To the extent that the development application makes reference to the proposal described as: "ancillary development units – 16 Caretakers' Dwellings (65 metres squared each)", the existing approval, which must necessarily be taken to potentially allow for 42 separate such

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31 S 251 Certificate, filed 6/8/2020, at p 59.

32 S 251 Certificate, filed 6/8/2020 at p 71, notwithstanding the erroneous reference to 21 such units in the context of what is otherwise to be noted as to the delineation of six such proposed units in that report.

industrial uses, is in respect of uses of a class which is grouped under the primary use description of "Business Uses" in the Noosa Plan 2006,[33] in the context that there are also the following separate definitions:

> "'**ancillary**' means associated with but incidental and subordinate to.
>
> ….
>
> "building" means a fixed structure that is wholly and partly enclosed by walls and is roofed, and includes any part of a building.
>
> ….
>
> "**caretaker's residence**" means a dwelling unit situated on the same premises as a **business use, community use or infrastructure use** where it is occupied by the owner or employee of the business or operation for reasons of ensuring security and maintenance of the business or operation.
>
> ….
>
> "**dwelling unit**" means a *building* or part of a *building* used as a self-contained residence for the exclusive use of one *household*. It includes outbuildings and works normally associated with a dwelling;"[34] and

(b) As noted above, the effect of the incorporation of the meaning of "premises" in the *IPA*,[35] is also to incorporate a definition to the effect that the term is capable of being applied in reference to a building or any part of a building, in accordance with the following definition:

> "'**building'** means a thick structure that is wholly or part enclosed by walls and is roofed, and includes a floating building and any part of a building."

[21] Approached in that way, the definition of Ancillary Dwelling Unit is capable of application to each relevant planning unit, being each of 16 identified units approved for an industrial use and there is no absurdity of result in noting that approached in that way, each such unit would axiomatically not infringe the requirements of the definition that there be "no other dwelling unit on the premises", just as it may be observed that there is no such absurdity of result in also noting that the proposal, by its nature and inherently, does not offend other

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33 S 251 Certificate, filed 6/8/2020, at p 23.
34 Ibid at pp 32 – 34.
35 Ibid at p 41.

requirements, such as not exceeding 150 m^2 in gross floor area or being attached to or within 25 metres of the non-residential use.

Conclusion

[22] Accordingly and upon the relatively narrow basis upon which this Originating Application has been litigated, it is to be concluded that:

(a) objectively read, the development application for the proposed development, is directed at each of 16 identified units the subject of the existing approval for industrial use of each of those units; and

(b) the additional use proposed as Ancillary Dwelling Unit and as defined in the *Noosa Plan* 2000, is capable of being applied to that development application.

It must, however, be noted that such conclusions do not necessarily foreclose for the related appeal against the refusal of that development application, any relevant contention as to the application of that definition to the circumstances, including as to any limitation of such application which may arise as a matter of interpretation of the full context of the Planning Scheme,[36] or as to the appropriate application of it in any assessment against relevant benchmarks and including what has been touched upon in respect of the issue as to subordinancy to the non-residential use and also the issue as to permissible occupation of such units.

[23] Therefore there will be an order that the Originating Application be dismissed.

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36 See *Zappala Family Co Pty Ltd v Brisbane City Council & Ors* (2014) 201 LGERA 82 at [55] – [56].