PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Sunshine Coast Regional Council v Gavin & Anor* [2020] QPEC 63
PARTIES:	**SUNSHINE COAST REGIONAL COUNCIL** (applicant) **v** **MICHAEL IVAN GAVIN** (first respondent) **JDL INVESTMENTS PTY LTD (ACN 611 912 808)** (second respondent)
FILE NO/S:	D125/2019
DIVISION:	Planning and Environment
PROCEEDING:	Application
DELIVERED ON:	18 December 2020
DELIVERED AT:	Maroochydore
HEARING DATE:	15 June 2020; 16 June 2020; 17 June 2020
JUDGE:	Cash QC DCJ
ORDERS:	**Orders are as appears in the judgment**
CATCHWORDS:	ENVIRONMENT AND PLANNING – BUILDING CONTROL – OTHER MATTERS – where the first and second respondents constructed a building and used it as an 'accommodation building' in a zone where this use was not permitted – where respondents accepted this use of the building amounted to development offences – where council sought enforcement orders preventing any further unlawful use of the building including to bring about significant interior structural changes – where respondents contested the orders sought by council – what orders ought be made to ensure compliance with the legislative scheme
LEGISLATION:	*Planning Act* 2016 (Qld), s 11, s 44, s 162, s 165, s 180, s 181 *Planning and Environment Court Act* 2016 (Qld), s 61(1) Caloundra City Planning Scheme 1996
CASES:	*Australian Retailers Association v Reserve Bank of Australia* (2005) 148 FCR 446 *Caravan Parks Association of Queensland Ltd v Rockhampton Regional Council & Anor (No.2)* [2018] QPEC 59; [2019] QPELR 379

Mudie v Gainriver Pty Ltd & Ors [2002] 2 Qd R 53; [2001] QCA 382
Tynan v Meharg (1998) 101 LGERA 255
Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335

COUNSEL: R J Anderson QC with G Barr for the applicant
M J McDermott for the respondents

SOLICITORS: Heiner and Doyle for the applicant
Andrew Davis Planning Lawyers for the respondents

Introduction

[1] The second respondent owns land in Birtinya upon which it caused to be constructed a building. The first respondent is a director and controlling mind of the second respondent. The building has three storeys, seventeen bedrooms (each with their own ensuite bathroom), capacity for a kitchen on each floor, and provision for separate electrical and water metering for each bedroom. It is on land that does not permit a building to be used as an 'accommodation building'.[1] The council contends, and the respondents do not now dispute, that the building has been used as an 'accommodation building' contrary to its 'Residential A' zoning under the applicable planning provisions. The council also contends, and the respondents do not now dispute, that both respondents have committed development offences contrary to the *Planning Act* 2016 (Qld) ('the PA'). As a consequence the council seeks enforcement orders it says will have the effect of preventing any further use of the building contrary to its lawful use.

[2] The respondents initially resisted practically all of the council's application. In particular they disputed that the building was being used not as a 'dwelling house' but as an 'accommodation building' contrary to the planning scheme.[2] Shortly before the trial[3] the second respondent conceded that it had committed a development offence by using the building as an accommodation building. Even then the first respondent was unwilling to accept responsibility for a development offence. It was not until closing submissions that he accepted that he was liable for a development offence.[4]

[3] By that stage of the proceedings, both respondents accepted that the court should make enforcement orders of some kind to secure compliance with the PA. But there remained substantial dispute about what orders should be made. The council asked for orders that would result in significant changes to the interior of the building, including structural changes. The council's proposal included the removal of walls to combine rooms and create a different interior layout. It also sought the removal of eight of the 17 bathrooms. The respondents contested any orders that would alter the internal structure of the building, as well as most of the other, less significant alterations. The PA provides, in section 180(6), that an enforcement order 'may be in terms the P&E Court considers appropriate to secure compliance' with the Act. The orders that in my view are appropriate to secure compliance with the act fall between

---

1 As explained below, an 'accommodation building' includes premises used or intended to be used as a boarding house, guest house, hostel, serviced apartments, and the like.

2 See the response to grounds 36 and 41 of the applicant's grounds (court document 17) in the 'Notice responding to the applicant's grounds' (court document 20). When that document was filed on 29 October 2019 the respondents 'disputed that the building was used as an Accommodation Building or Multiple Dwelling'.

3 T.2-39.43; T.2-2.

4 T.3-97.15-28.

the orders proposed by the parties. To explain how I have reached that conclusion it is convenient to commence with a description of the building.[5]

The building

[4] The building is located at 9 Fortitude Place, Birtinya. It is properly described as Lot 144 on SP293310. There are three storeys: a ground floor, first floor and second floor. The main entrance is into the ground floor from Fortitude Place. On this floor there is a two car garage, a kitchen, two open common rooms and a patio. There are also five rooms, each with an ensuite room fitted with a toilet, shower and basin. The doors of each of these rooms are solid core self-closing doors and are individually key lockable.

[5] The first floor has a similar layout. There are six rooms each with an ensuite bathroom and solid core, self-closing, lockable doors. There are two open common rooms and a covered balcony. The council alleged, and the respondents disputed, that there is a kitchen on the second floor. At the time of an inspection by the council on 28 June 2019 there was no oven or cooktop in this area, but there was an extractor fan and lighting over a bench.[6] Whether or not this area on the first floor was actually set up as a kitchen, it is certainly an area capable of being used as a kitchen.

[6] The second floor contained a further six rooms with ensuite bathrooms and solid core, self-closing, lockable doors. On this floor there is a kitchen and two open common rooms. There was some dispute about whether there is a 'covered balcony' but that is unimportant.

[7] In total, across the three storeys, there are 17 rooms that might be properly considered to be bedrooms. For convenience I will refer to them as such. Each bedroom has an ensuite bathroom, individually controlled air conditioning, a built-in wardrobe and lockable, solid core, self-closing doors. Each of these rooms has an individual water and electricity meter. There are soundproofing and fire prevention measures that the council contends are unusual for a domestic dwelling house.

[8] Access between floors is via an internal stairway. The stairway is sealed off from each floor by a solid core, self-closing door.[7] Balconies outside the living areas on the first and second floor have a tap and laundry sink. There is laundry equipment in the garage. There are no toilet or bathroom facilities in what might be considered the common areas of the buildings. While the building has a surfeit of such facilities, they can only be accessed through the 17 individual bedrooms.

[9] The building appears to have been constructed in a manner that is generally consistent with the plans the first respondent caused to be drawn up. These plans were drawn by Mr Jamin Yarrow. The first respondent gave Mr Yarrow sketches setting out his intentions for the building.[8] These sketches contain notations such as 'BR1', 'BR2', and so on for each of the 17 bedrooms with ensuites. Attached to the sketches was a table setting out the first respondent's preferred specifications for walls and doors. The specifications seem consistent with an intention to 'soundproof' the rooms. It will be necessary to return to these sketches and the plans drawn by Mr Yarrow when

---

5 Much of this description is taken from matters agreed between the parties the applicant's grounds and the respondents' response to the grounds.

6 Affidavit of Emily Louise Isabel Rehm filed on 15 August 2019 (court document 2) at page 5.

7 There was some dispute about whether these doors are lockable.

8 Exhibit 1 to the affidavit of Jamin Robin Yarrow filed on 15 August 2019 (court document 7).

discussing the first respondent's evidence and the use of the building he seems to have intended.

Statutory framework

[10] Before discussing the evidence it is helpful to set out something of the statutory scheme and legal principles relevant to the making of enforcement orders under the PA. The real relief asked for by the council is for enforcement orders to ensure compliance with the PA. The court is empowered to make such orders by section 180 of the PA which relevantly provides:

> **180 Enforcement orders**
>
> …
>
> (2) An ***enforcement order*** is an order that requires a person to do either or both of the following—
> (a) refrain from committing a development offence;
> (b) remedy the effect of a development offence in a stated way.
>
> …
>
> (3) The P&E Court may make an enforcement order if the court considers the development offence—
> (a) has been committed; or
> (b) will be committed unless the order is made.
>
> …
>
> (5) An enforcement order or interim enforcement order may direct the respondent—
> (a) to stop an activity that constitutes a development offence; or
> (b) not to start an activity that constitutes a development offence; or
> (c) to do anything required to stop committing a development offence; or
> (d) to return anything to a condition as close as practicable to the condition the thing was in immediately before a development offence was committed; or
> (e) to do anything to comply with this Act.
>
> …
>
> (6) An enforcement order or interim enforcement order may be in terms the P&E Court considers appropriate to secure compliance with this Act.
>
> …
>
> (7) An enforcement order or interim enforcement order must state the period within which the respondent must comply with the order.

[11] Generally, an enforcement order attaches to the premises and binds any subsequent owner or occupier.[9] Contravention of an enforcement order is an offence punishable by a fine or imprisonment for up to two years.[10]

---

9 PA section 180(9).
10 PA section 180(8).

[12] Section 181 of the PA provides:

> **181 P&E Court's powers about enforcement orders**
>
> (1) The P&E Court's power to make an enforcement order or interim enforcement order may be exercised whether or not the development offence has been prosecuted.
>
> (2) The power to order a person to stop, or not to start, an activity may be exercised whether or not—
> (a) the P&E Court considers the person intends to engage, or to continue to engage, in the activity; or
> (b) the person has previously engaged in an activity of the same type; or
> (c) there is danger of substantial damage to property or injury to another person if the person engages, or continues to engage, in the activity.
>
> (3) The power to order a person to do anything may be exercised whether or not—
> (a) the P&E Court considers the person intends to fail, or to continue to fail, to do the thing; or
> (b) the person has previously failed to do a thing of the same type; or
> (c) there is danger of substantial damage to property or injury to another person if the person fails, or continues to fail, to do the thing.
>
> …

[13] As can be seen, it is necessary for the court to be satisfied a development offence has been, or will be committed, before an enforcement order may be made. However, the exercise of the power is not contingent upon a declaration to that effect made pursuant to section 11 of the PA. To the extent that the council's application seeks such declarations this is unnecessary, particularly in a case like this where the respondents accept they have committed a development offence.

[14] It is, however, helpful to identify the development offences that the respondents agree they have committed. The nature of the offence is relevant to whether, in the exercise of its discretion, the court should make an enforcement order or orders and also the content of any order. Before I set out the offences committed by the respondents it is necessary to make some observations about the permitted use of the land. The relevant planning scheme provisions concerning the land are complicated. This is a result of the age of the original development approvals for the area in which the land is situated and legislative changes, including the amalgamation of local councils, which have occurred in the time since. Mr Anderson QC and Mr Barr have helpfully set out the various schemes and transitional provisions in the council's written submissions. There was no challenge to these matters by the respondents and I accept the council's submissions. The end result is that the lawful use of the land is informed by the 'Use Definitions' found in the *Caloundra City Planning Scheme* 1996. So far as it presently relevant these definitions include:

> **'Accommodation building'** means premises used or intended for residential use for a boarding house, guest house, hostel, unlicensed residential club, services apartments, services room, and the like.

> **'Dwelling House'** means premises used or intended for a single dwelling unit on any one allotment …
>
> The term does not include Accommodation Building, Caretakers Residence, Duplex Dwelling or Multiple Dwelling.

[15] As noted in the introduction, the land is in a location where its permitted use is as a 'dwelling house', and use as an 'accommodation building' is not permitted. The development offences committed jointly by the first and second respondents are contrary to section 162, 'Carrying out a prohibited development, and section 165, 'Unlawful use of premises'. A prohibited development is one 'for which a development application may not be made'.[11] In this case the location of the land and the applicable planning provisions mean that there could be no development application to allow the use of this land other than as a dwelling house. That is, in part, because use as an accommodation building was a prohibited use under the planning documents. By carrying out the development of an accommodation building instead of a dwelling house, both of the respondents contravened section 162.

[16] Section 165 makes it an offence to use premises other than for a lawful use. Again, the only permitted lawful use for this land was as a dwelling house. Instead, the respondents in fact used the land as an accommodation building. They did so over a significant period of time and after the council brought concerns about the use of the land to the attention of the respondents. Further, as set out below, I am satisfied that the first respondent had decided to use the land as an accommodation building as early as when the development was being planned. This is a significant matter to consider when deciding what orders are appropriate to ensure the respondents comply with the Act.

Relevant legal principles

[17] The decision to make an enforcement order, and the contents of an order, are matters in the discretion of the court. The onus rests upon the council, as applicant, to satisfy the court the orders it seeks should be made. Both parties referred to *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 as containing a helpful summary of factors relevant to the exercise of a discretion such as that conferred by section 180. Of the considerations referred to by Kirby P in *Warringah Shire Council v Sedevcic*, the following seem to me to be particularly relevant in this case:

(a) The discretionary power to be exercised is wide;

(b) It is not fettered or limited to particular classes of case or to 'special' cases;

(c) Enforcement of planning provisions is not concerned with the enforcement of a private right but, rather, with a public duty. If not done, equal justice may not be secured and a particular individual may obtain a private advantage that others cannot enjoy;

(d) If unlawful exceptions or exemptions become commonplace or are condoned by the court the equal and orderly enforcement of the planning provisions could be undermined;

(e) The nature of the non-compliance with the planning provisions (in this case, the development offences committed by the respondents) will be relevant to the exercise of the discretion. An inadvertent or technical breach will be viewed

---

[11] PA section 44(2).

differently to a contumelious disregard of the requirements of the planning provisions;

(f) So too will the conduct of the party seeking to enforce the planning provisions be relevant. Delay or other conduct suggesting a relevant local authority tolerated the breach may be a factor tending against the making of orders; and

(g) The cost and inconvenience of remedying any breach is a matter to be weighed against the nature of the breach in assessing the desirability of enforcing planning provisions.

[18] *Warringah Shire Council v Sedevcic* has been consistently followed in New South Wales[12] and applied in Queensland. In one such case, *Mudie v Gainriver Pty Ltd & Ors* [2002] 2 Qd R 53; [2001] QCA 382, [13], the Court of Appeal noted, 'The Court's function in determining what is to be done in such cases is to perform a balancing exercise with a view to matters of both private and public interest.' The Court went on to cite *Warringah Shire Council v Sedevcic* before stating, 'Among potentially relevant matters is the aspect of discouraging potential developers from thinking that planning requirements may lightly be disobeyed.'

[19] There being in this case no dispute that enforcement orders of some kind should be made, the real question for the court is that posed by section 180(6) – what terms are appropriate to secure compliance with the Act?

Evidence

[20] Mr Jamin Yarrow was approached by the first respondent in about the middle of 2017. He was instructed by the first respondent, acting on behalf of the second respondent, to prepare plans and drawings for a building on the land. As part of this process the first respondent gave Mr Yarrow the hand drawn sketches referred to above. These sketches roughed out a building over three levels with 17 bedrooms, each with an ensuite bathroom. The rough design is very similar to the building as it was constructed. There are rooms labelled 'BR1', 'BR2' and so on, or in one case 'Disabled Bedrm'. These are obviously intended to refer to bedrooms. On the first floor there is a room labelled 'kitchen' in a location corresponding with a kitchen in the building as constructed. On a bench there is a drawing of a rectangle containing four circles, reminiscent of a cooktop, and a cupboard space labelled 'P' where a pantry might be found. Similar notations are found on the sketch of the first floor in the area corresponding to that labelled 'Rumpus' in the final plans and which the council alleges has been, or could be, used as a kitchen. The sketch of the second floor does not have an area labelled 'P' but does have a similar icon that might represent a cooktop.

[21] The first respondent also gave Mr Yarrow a document providing for the intended specifications for parts of the construction. These specifications included that internal walls were wider than is common and to be made of a combination of block, battens and plaster. This manner of construction was noted by witnesses called by the council as being typical of walls in between units. It may be inferred this manner of construction operates to reduce the transmission of noise between rooms. The specification sheet also had a notation 'aim for even sized br'. It appears the building was constructed in a manner consistent with this aim, in that each bedroom is about the same size. This in itself is an unusual feature. Common experience suggests that

---

12 *Tynan v Meharg* (1998) 101 LGERA 255.

in modern home design there is often a 'Master bedroom' that is larger than other bedrooms.

[22] Mr Yarrow deposed that the first respondent and his wife were, 'very specific about what they wanted, both in terms of layout and with regard to technical detail.' The first respondent told Mr Yarrow of his intention to 'get the house changed over to class 2' during the certification process. Class 2 may be taken to be a reference to a class of dwelling under the *Building Code of Australia* containing two or more sole-occupancy units as separate dwellings. The first respondent also spoke of an intention to, 'rent the building out to professionals at the hospital.' Over the months that followed Mr Yarrow prepared two sets of plans. One was a set of 'working drawings' and the other set were for 'covenant approval'.

[23] The plans prepared for covenant approval were substantially different to the working drawings, and to the building as constructed. The covenant plans, as submitted to the developer, Stockland, are most easily found at pages 36-39 of Exhibit 3. According to these plans the ground floor was to have a single large bedroom with a walk-in robe and large ensuite bathroom. The other rooms on the ground floor were a combined sitting/dining room, with adjacent powder room, a living room, a study and a garage. The first floor had three more bedrooms, each with ensuite bathroom, and rooms labelled 'music', 'sitting', 'rumpus' and 'library'. There was also a room labelled 'media' with a small ensuite toilet. The second floor had a fifth 'bedroom' with a walk-in robe and ensuite bathroom. There were also two more bedrooms, with ensuite bathrooms, labelled 'Guest 1' and 'Guest 2'. The remaining rooms on the second floor were a hobby room, entertainment room, lounge room and a 'Billiards' room with adjacent powder room. In short, the building depicted in the covenant plans had the appearance of a normal, if quite large, domestic dwelling.

[24] It was acknowledged that the covenant plans were prepared at the direction of the first respondent. They were submitted to the developer. The covenant plans substantially misrepresent the working drawings prepared by Mr Yarrow on the instructions of the first respondent. The only rational conclusion available on the evidence is that the covenant plans were prepared in this way to avoid concerns that the building as it was actually planned was not a normal domestic dwelling. The willingness of the first respondent to practice, or at least participate in, a deception of this kind, is relevant to deciding what orders are appropriate to ensure compliance with the PA. That he would do so suggests any assurance he offers as to future compliance should be viewed with scepticism. I note that in cross examination the first respondent was pressed about the reason for submitted covenant plans that were different to the working drawings. In rejecting the suggestion that he was attempting to deceive the developer, the first respondent claimed the purpose for submitted a modified internal layout to the developer was because his wife 'works with the psychiatric people, and we would not want to give them a blueprint from our house when her working environment's a few hundred metres away.'[13] This answer, if true, plainly indicates that the first respondent made a conscious decision to submit misleading plans, albeit for a reason he considered sufficient to justify the deception. However, the first respondent immediately changed his evidence, denying that he 'lied' to the developer and attempting to suggest the covenant plans were the 'truth at the particular … point in time'.[14] These two answers are inconsistent. I am left with the impression that neither answer is true and that the first respondent was attempting in cross-examination to

---

13 T.2-102.5-8.

14 T.2-103.13-40.

come up with a plausible explanation for what appeared to be deliberately deceptive conduct in submitting the covenant plans as they were.

[25] The rooms in the working drawings also prepared by Mr Yarrow had labels attached in accordance with the express instructions of the first respondent. Rooms that in the sketches bore labels such as 'BR' followed by a number became 'Study', 'Playroom', 'Grandparents Room', 'Child Bed', and so on. These were the labels on the plans submitted to council for approval. This change in labels is consistent with the case argued by the council – that the first respondent made some attempt to disguise the fact he planned to build a house with so many bedrooms and which he intended to use as an accommodation building. Another matter concerning the plans was raised by the council. According to Mr Yarrow the working drawings he prepared differed from the plans as submitted to council for approval. The differences were minor but significant. Mr Yarrow's drawings had a separate laundry on each level of the building. As well there were kitchens depicted in the area labelled 'rumpus' on the first floor and 'bar' on the second. In the plans submitted to council these features had been deleted or masked.

[26] The council suggested this was a deliberate alteration carried out by the first respondent. In support of this contention the council pointed to evidence from Mr Yarrow that when he gave the first respondent the drawings as a 'locked PDF' he was told by the first respondent that he could, 'get by that security in a matter of minutes.' Considering all of the evidence, including that of the first respondent, I am satisfied that the only rational conclusion in the circumstances is that the first respondent altered Mr Yarrow's drawings. There is no one else with the opportunity and reason to do so. It would be untenable to suggest that someone other than the first respondent, who had Mr Yarrow change labels on bedrooms and who used the substantially different covenant plans, altered the working drawings without the first respondent's knowledge.

[27] After the plans were finalised a development application was made and lodged with a private certifier, Mr Mark Duffy, in December 2017. During the certification process Mr Duffy told the first respondent the building could only be assessed as a dwelling and that any change in use would require further building and town planning applications. Mr Duffy repeatedly told the first respondent the approval was limited to use as a dwelling and any contrary use would not be lawful. In early 2018 the council's senior building certifier, Peter Chamberlain, contacted Mr Duffy. As a result Mr Duffy spoke to the first respondent and received from him an email. In the email the first respondent explained that he wished to move his family from Yaroomba because he was concerned about 'overdevelopment' resulting from the Sekisui proposal and its impact upon local amenity. In March 2018 Mr Duffy issued a decision notice approving the building as a 'single dwelling unit and associated garage'.

[28] It must be the case that the first respondent, and by extension the second respondent, were plainly aware before the building was finished that it could not be used as an accommodation building. The first respondent accepted in his own evidence that he knew multiple occupancy letting was inconsistent with the planning laws.[15] The council also relied upon earlier interactions between the council and the first respondent relating to a duplex at Coolum as supporting the contention that the first respondent well knew what was required before the building could be used for higher density residential purposes. It is unnecessary to refer to this evidence as what I have

---

15 T.2-76.5-6.

already set out is sufficient to show the respondents knew the limitation on the use of the building.

[29] Building work commenced in the early part of 2018. In late March there was an inspection of the site by the council. By this time the ground floor slab was in place and a suspended slab for the first floor had been recently poured. This work had been carried out without the relevant building permit, which was not issued until some days later. By mid-May 2018 the council wrote to the first respondent as director of the second respondent. Based on the plans, the council was concerned the building was not a dwelling house and was more aptly described as an accommodation building. The council confirmed in the letter that use as an accommodation building would be a prohibited use. The first respondent wrote back in these terms:

> I confirm the proposed use of the building is a 'Dwelling House.'
>
> I confirm the information provided to the private certifier for the Building Approval in relation to the proposed use of the building is a 'Dwelling House.'

[30] The building was completed around November 2018 and the first respondent and his family moved into the house at the end of the year. According to the first respondent he designed the building with the accommodation of his extended, multi-generational family in mind. He said the building was designed to be versatile and adaptable with each of the 17 bedroom being capable of different uses. The first respondent and his family lived in the building, along with extended family members, from late 2018 to early January 2019. After a period of about six to eight weeks the first respondent and his family moved back to Yaroomba. The only reason given for the return to Yaroomba was that 'family circumstances changed'.[16]

[31] Immediately, the first respondent began advertising and renting rooms in the building to individuals. Rooms were advertised on well-known real estate websites with descriptions such as, 'Private room with ensuite', 'Furnished room with ensuite in share house', and '1 bedroom 1 bathroom apartment'. The rent was $220 per week and the first respondent was identified as the contact person for enquiries. Over more than a year from January 2019 to March 2020 the respondents rented out rooms in the building to a number of persons. One neighbour deposed that there were as many as 15 different people living in the building. This use of the building had a significant adverse impact on the amenity of others in the area, including because of parking issues and traffic congestion.

[32] Prior to the trial the respondents had indicated a willingness to remove some kitchen facilities, locks on doors and electricity sub-meters. The first respondent began his evidence by explaining why he was no longer willing to make these concessions. He wanted to keep the possibility of a kitchen on each floor in case he used a floor as a 'granny flat' in the future. The need for locks on the internal doors stemmed from the first respondent's work as an electrical engineer and his use of live voltage, and from his wife's work which resulted in there being 'patient's records' in the building. As for the electricity sub-meters the first respondent gave a lengthy and discursive explanation of the beneficial aspects of such a system.[17] This centred on a concept he called 'demand side management'. I understood very little of what the first respondent said about this and there was no attempt to explain it to me during submissions for the respondent. I regret that I find myself in a position not unlike that of Weinberg J in

---

16 T.3-3.20-27.

17 T.2-63.37-T.2-64.35.

Australian Retailers Association v Reserve Bank of Australia (2005) 148 FCR 446 at [480] – [485]. Doing the best I can, it seems that the electricity sub-meters can be put to a lawful and beneficial use. That is relevant, but it is to be weighed against the fact that they have[18] and can be used to facilitate the use of the building for a prohibited purpose. In this regard some attempt to quantify the value of the benefits of 'demand side management' might have been expected. There was no such evidence.

[33] When asked in cross-examination about the sketches given to Mr Yarrow, the first respondent agreed they were drawn with five or six bedrooms on each level.[19] There followed this curious exchange:[20]

> MR ANDERSON: There's no multipurpose rooms, at least by way of description. They're specifically described as bedrooms, the rooms that I'm talking about now. I appreciate there's a lounge and a dining room and the like, but there's no multipurpose – there's no studies or billiards rooms or anything like that, is there? --- So when we draw the draft, just to be clear, I want to have a look what – like, it's just a standard thing and we're not sure of what we're using each room for, so - - -
>
> Well, why did you given them a name at all? --- Because this - - -
>
> Why did you draw beds in them, Mr Gavin? --- Well, so we could have a look how they look at the space and how we're going to use that, and then when we can show people – it's just – for me, it's what we normally do. It's not one way or another way. If I'd known what I'd known now, I would've just left it all blank.

[34] The first respondent then accepted the sketches were an expression of his intention to construct five or six bedrooms on each level.[21] This exchange is an example of what appeared to me to be unwillingness by the first respondent to give an honest answer to a question because he was concerned it would not reflect well on his case. The shifting between the labels on the sketches being indicative of bedrooms to the labels being essentially meaningless, and back again, was seamless. It did not convey the impression of a witness trying to assist the court with honest and accurate recollections.

[35] Having agreed that the sketches envisaged a kitchen on each level of the building, the first respondent was asked about the working drawings he received from Mr Yarrow. He did not disagree that he told Mr Yarrow he could get by the security of the 'locked' PDF in a matter of minutes. The first respondent explained this as being merely friendly advice that Mr Yarrow's practices may not be as secure as Mr Yarrow thought. The first respondent accepted that the working drawings had been altered before being provided to the certifier and to council. The first respondent denied he was responsible, saying in effect that he would have done a better job at the masking.[22] For the reasons set out at [26] above, I do not accept the first respondent's denial that he was not the cause of, and was unaware of, the alterations.

[36] The first respondent was taken to some of the evidence of Mr Yarrow. The first respondent seemed to deny telling Mr Yarrow that he intended to rent the building out to professionals at the hospital and to change the certification of the building. He even said that he considered Mr Yarrow was lying.[23] This was said despite the first

---

18 T.2-67.28-T.2-68.1.
19 T.2-83.38-40.
20 T.2-83.42-T.2-84.1-6.
21 T.2-84.8-12.
22 T.2-95.15: 'If I had done it, which I have not, I certainly wouldn't have left the line there.'
23 T.2-100.21-22.

respondent saying nothing about the conversations in his affidavit, sworn more than six months after Mr Yarrow's affidavit was filed, and there being no suggestion put to Mr Yarrow that he was wrong or mistaken in his recollection.[24] As I will shortly explain, I accept Mr Yarrow's version of events.

[37] On the whole, the first respondent was not an impressive witness. He was garrulous, unresponsive and, at times, mendacious. I do not accept his evidence that he did not set out to use the house as an accommodation building.

[38] There is another part of the evidence that I have not yet mentioned but which has significance in deciding the terms of any enforcement orders to be made. Damien Frey, who is the Co-ordinator of the council's Development Audit and Response Unit, and also a town planner, accepted that the building had been certified and approved as a Class 1(a) dwelling house and that the building could be used as a dwelling house without alteration.[25] Peter Chamberlain, the council's senior building certifier, gave similar evidence.[26] The building may be substantially over-engineered compared to other domestic dwelling houses. It may have an unusual design. But that does not in this case constitute a planning offence. It is the intended and subsequent use of the building that has caused contravention of the PA.

[39] I would lastly mention evidence presented by both the council and the respondents concerning the structural work that would be necessary if the council obtained the orders it seeks. As I have this would involve removing internal walls to combine room and the removal of eight of the bathrooms. It is plain that this work would be substantial and expensive. As I will shortly explain, I do not think structural work of the kind proposed by the council is appropriate to secure compliance with the PA. As such it is not necessary to further consider this evidence.

Consideration and findings

[40] I accept the evidence of Mr Yarrow about what he was told by the first respondent of his intentions for the building. It was not challenged in cross-examination and is consistent with other evidence. That evidence includes the following. The building was designed, in accordance with the instructions of the first respondent, in a manner that makes it particularly suitable for use as an accommodation building. There are seventeen almost equal size bedrooms. Each has its own bathroom and the water and electricity use in each can be individually measured. The first respondent made some attempts to disguise the true nature of the design in the covenant plans and the working drawings given to the certifier and to council. When the building was completed in late 2018 the first respondent and his family stayed there only for a short time before returning to Yaroomba. Rooms in the building were then immediately rented out. Based upon this evidence, I am comfortably satisfied that the first respondent intended from an early stage to use the building as an accommodation building. That is, to let individual rooms in the manner of a guest house.

[41] The first respondent's representation to council in May 2018 that he intended to use the building as a dwelling house was deceptive. I am satisfied that this, and other actions taken by the first respondent, were intended by him to reduce suspicion that he intended to use the building for a prohibited purpose. This is a relevant matter to consider when deciding what terms are appropriate to secure compliance with the PA.

---

24 T.2-101.17-19.
25 T.2-47.17-23.
26 T.1-28.1-21.

So too is the fact that the first respondent was no neophyte when it comes to building. He deposed that he has been involved in some 15 construction, renovation or redevelopment projects. His interaction with the council concerning the duplex and Coolum confirms he is not naïve. The actions of the first respondent in the present case are to be regarded as deliberate and considered. They were not the product of inadvertence or inexperience.

[42] The impact of the unlawful use of the building upon local amenity has been significant.[27] There is an irony in the first respondent's claim to be motivated to leave Yaroomba to escape overdevelopment and its impact on amenity in that area, and the subsequent, admitted use of the building at Birtinya as an accommodation building. The unlawful use of the building has allowed the respondents to generate an income in excess of that which would have resulted from a lawful use.[28] Use of this kind, if permitted, would result in particular individual gaining a private advantage not enjoyed by others. There is nothing in the conduct of the council that suggests they tolerated or acquiesced to the unlawful use of the building. Rather they acted at an early stage to express concern.

[43] There is much on the conduct of the first respondent to suggest strong terms are necessary to ensure compliance with the PA. The first respondent's very late willingness to accept that what he was doing was wrong, which even then he qualified by saying he thought he was 'doing it correctly',[29] is not such as to permit me to conclude he will, absent some strong incentive, comply with the PA in the future. Terms that would make it harder for the building to be used as an accommodation building are, in my view, necessary to secure compliance. That is so even though there will be orders prohibiting the respondents using the building other than as a dwelling house, or advertising or renting individual rooms or levels. The terms I propose will require the respondents to carry out some remedial work and will prevent the use of measures, like the electricity sub-meters, that might otherwise have some beneficial use. This is appropriate in the circumstances.

[44] The council, however, asks for orders that would result in the remodelling of substantial parts of the building. Walls are to be removed, rooms combined and bathrooms taken out. The end product of the remodelling proposed by the council would be something close to the covenant plans submitted to the developer. The changes, if ordered, will be expensive.[30] It is true that the respondents have enjoyed something of a financial windfall from the unlawful use of the building, but it is to be noted that the purpose of these proceedings is not to punish the respondents for their wrongdoing, but to ensure it does not happen again in relation to this land. It must also be noted that the building itself was constructed and approved in compliance with relevant planning schemes and is capable of being used lawfully without alteration. It was the use of the building, rather than the building itself, that gave rise to the present proceedings.

[45] Balancing the relevant considerations, it is appropriate to require some modification to the building to make it less amenable to use as an accommodation building. This will include taking out some doors, changing others from solid-core to standard cavity

---

27 Affidavit of Helen Rogers, sworn 29 July 2019; affidavit of Clayton del Fiander, sworn 9 May 2019.

28 In March 2020 the building was advertised for lease as a single dwelling at $1,500 per week. The respondents rented single rooms at about $200 per week. They would only have to rent eight of the 17 available rooms to exceed an income of $1,500 per week.

29 T.3-12.35-38.

30 The council in final submissions accepted they might costs something in the order of $150,000.

doors and removing the electricity and water sub-meters. The kitchen and laundry facilities, other than those on the ground floor will have to be removed. Some privacy screens on the northern balcony that separate the space outside individual bedrooms, so as to create a sense of an 'apartment', will also have to be removed.

[46] These measures, combined with more general orders prohibiting the unlawful use of the building, are in my view sufficient to ensure compliance with the PA. The further measures proposed by the council, including the removal of eight bathrooms and structural changes to combine rooms into larger living areas would no doubt be a further insurance against future misuse of the land. But these measures are significant and expensive. They call for the modification of structural elements of the building. They would represent substantial alteration to a building that, it must be remembered, was approved for construction through the normal processes and is capable of being used in accordance with its lawful use. Orders that would require the partial demolition and substantial remodelling, of a building that is not itself built in a manner or place contrary to planning provisions, are not in this case appropriate.

[47] The council also asked for an order that would allow them to inspect the premises at any time during business hours, as long as they have given at least 24 hours' written notice. The order would, unless otherwise ordered, attach to the premises and bind any subsequent owner of the land or occupier of the premises.[31] This is said to be necessary to ensure compliance with the PA. It seems the council is concerned that even after the work required by these orders is carried out, the respondents may use the premises in a prohibited manner. Given the evidence and findings I have set out, the council may well be justified in this concern. However, this issue again calls for an attempt to balance the public duty of the council with the private 'rights' of the respondents, and any subsequent owner or occupier. There are other processes by which the council may compel inspection of the premises, if there are reasonable grounds for so doing. It may be more work for the council to follow those processes, but they exist as a safeguard against any future contravention of the PA. In the circumstances I do not think a conditional entry order of the kind sought by the council is appropriate.

[48] I should also mention that in written and oral submissions the respondents proposed that the orders should permit a use of the building that is 'accepted development'. This term describes a type of development for which a development approval is not required.[32] Some forms of it are categorised by regulation and others might by default be accepted development.[33] The respondents did not suggest any use to which the building might sensibly be put which would fall into the category of accepted development. In these circumstances unnecessary to include such a qualification in the orders to be made. If some issue arises in the future there can be an application to change the enforcement order.[34]

[49] Finally, I would note that the contravention of an enforcement order is a serious matter. A person who commits such an offence is liable to of penalty or up to 4,500 penalty units (at the moment that would be nearly $600,000) or imprisonment for up

---

31 PA, section 180(9).
32 PA, section 44(4).
33 PA, section 44(6).
34 PA, section 181(4).

to two years.[35] This in itself should operate as a powerful incentive against the use of the building other than as a dwelling house.

Conclusion

[50] In summary the orders that are, in my view, appropriate to ensure that the respondents will comply with the PA are orders that will have the following effect.

[51] First, to make it clear that the building cannot be used other than as a dwelling house. These orders will include prohibitions on letting, or advertising to let, individual rooms or floors within the building. It is not intended to prohibit letting the building as a whole, but it is not to be used as an 'accommodation building'. In order to make the building less attractive as an accommodation building some doors will be removed or changed. The doors on the first and second floors that separate the stairwell from the rest of the building will be removed, as will the door separating the ground floor lounge room from the entranceway. All other internal solid-core doors are to be replaced with standard domestic cavity doors. The individual keyed locks on most of the internal doors will be removed.

[52] The areas on the first and second floors capable of use as kitchens are not to be used for that purpose and the plumbing in those areas is be capped-off. Any fittings that would allow the balconies on the first and second floors to be used for laundry are to be removed and the plumbing capped-off. The privacy screens across parts of the northern balcony that separates the balcony space outside some of the room are to be removed. The exception to this is the one screen that is fixed where there is a step on the balcony. The capacity to individually measure the water and electricity use in each bedroom is to be removed. There is to be only a single electricity and water meter for the building.

Orders

[53] To give effect to the decision I have reached I would propose the following orders. Orders 1 to 4 will take effect immediately. In case I have made some error in the balance of the orders, I will allow the parties until 15 January 2021 to propose, by way of a draft order, any suggested changes to better reflect my intentions. I will then make final orders.

[54] Orders 1 to 3 are directed toward the respondents and are concerned with restraining the respondents personally. It is not appropriate that these orders attach to the premises and I so order.[36] I make order 4 understanding this order will attach to the premises and bind future owners and occupiers. It will need to be registered in accordance with section 180(10) of the PA. This is to make the limitations upon the use of the building clear to any future owner or occupier, who would themselves commit an offence if they contravened this order. The balance of the orders will also attach to the premises.

[55] The orders I propose are as follows.

[56] Upon being satisfied that the first and second respondents have committed development offences contrary to section 162 and 165 of the *Planning Act* 2016 (Qld) I make the following enforcement orders pursuant to section 180 of the Act:

1. In the absence of an effective development permit authorising the making of a material change of use, the respondents must not at any time use, or permit or

---

35 PA, section 180(8).

36 PA section 180(9).

allow to be used, 9 Fortitude Place, Birtinya, properly described as Lot 144 on SP293310 ('the Premises'), as an 'Accommodation Building' or for any purpose other than as a 'Dwelling House' as those terms are defined in Part 9 of the *Caloundra City Planning Scheme* 1996;

2. In the absence of an effective development permit authorising the making of a material change of use, the respondents must not at any time enter into any tenancy agreements, whether written or oral, for individual rooms or apartments or levels at the Premises;

3. In the absence of an effective development permit authorising the making of a material change of use, the respondents must not at any time advertise individual rooms or apartments or levels at the Premises for letting for any purpose;

4. In the absence of an effective development permit authorising the making of a material change of use, the Premises must not at any time be used, or be permitted or allowed to be used, as an 'Accommodation Building' or for any purpose other than as a 'Dwelling House' as those terms are defined in Part 9 of the *Caloundra City Planning Scheme* 1996;

5. Within 30 days of final orders the respondents must:

   (a) Remove and not reinstall the stairwell doors on the first floor identified as D213 on Jamin Architecture drawing 111FP ('111FP') and second floor identified as D313 on Jamin Architecture drawing 112FP ('112FP');

   (b) Remove and not reinstall the door to the ground floor 'Lounge' identified as D106 on Jamin Architecture drawing 110FP ('110FP');

   (c) Remove and replace all other solid-core doors in the Premises with standard domestic cavity doors, and not reinstall solid-core doors;

   (d) Remove and not reinstall keyed internal locks to all doors except for:

      (i) The front entrance door, identified as D102 on 110FP;

      (ii) The garage to kitchen door, identified as D108 on 110FP;

      (iii) Two other doors on each level of the Premises as chosen by the respondents;

   (e) Permanently discontinue the use of and remove the 'kitchen' on the first floor (the area marked as 'Rumpus' on 111FP) and permanently cap-off and decommission all associated plumbing;

   (f) Permanently discontinue the use of and remove the 'kitchen' on the second floor (the area marked as 'Bar' on 112FP) and permanently cap-off and decommission all associated plumbing;

   (g) Remove the privacy screens from the balconies on the northern side of the Premises except where there exists a step between the western and eastern ends of the balcony on the first floor (adjacent to the rooms labelled 'Child Bed 3' and 'Child Bed 4' on 111FP);

   (h) Permanently discontinue the use of and remove any laundry tubs, basins or other facilities on the first and second floors and cap-off and decommission all associated plumbing;

(i) Remove and not reinstall electricity sub-meters to all rooms in the Premises such that electricity supply to the Premises is measured by a single meter;

(j) Remove and not reinstall all water sub-meters such that water supply to the premises is measured by a single meter

6. Within seven days of the completion of the work required by order 5, but in any event no later than 37 days from final orders, the respondents must give written notice to the Co-ordinator of the applicant's Development Audit and Response Unit that the work has been completed;

7. The respondents must within seven days after such notice is given arrange and facilitate the inspection of the Premises by the Co-ordinator of the applicant's Development Audit and Response Unit or the Co-ordinator's nominees.

[57] There seems to be no reason why the respondents should not pay the council's costs.[37] The case presented by the council that the respondents had committed development offences and that there should be enforcement orders made was overwhelming. So much was acknowledged by the concessions made by the respondents shortly before and during the hearing. Unless the parties propose some other order I will, when making final orders, order that the respondents pay the applicant's costs of the application on the standard basis. If any party proposes a different order as to costs, each party has leave to file written submissions of not more than five pages on the question of costs on or before 15 January 2021. If submissions are received I intend to decide the issue of costs on the papers.

---

[37] *Planning and Environment Court Act* 2016 (Qld), section 61(1); *Caravan Parks Association of Queensland Ltd v Rockhampton Regional Council & Anor (No.2)* [2018] QPEC 59; [2019] QPELR 379.