# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

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| CITATION: | *Katherine Lalis v Bundaberg Regional Council* [2018] QPEC 26 |
| PARTIES: | **KATHERINE LALIS**<br>(Appellant)<br><br>**v**<br><br>**BUNDABERG REGIONAL COUNCIL**<br>(Respondent) |
| FILE NO/S: | 4349/17 |
| DIVISION: | Planning and Environment |
| PROCEEDING: | Appeal |
| ORIGINATING COURT: | Planning and Environment Court, Brisbane |
| DELIVERED ON: | 15 May 2018 (ex tempore) |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 15 May 2018 |
| JUDGE: | Kefford DCJ |
| ORDER: | I will hear from the parties about what orders might be appropriate. |
| CATCHWORDS: | PLANNING AND ENVIRONMENT – APPEAL – where the appellant owns land that is improved by two attached dwellings where there is no development permitting use of the land for dual occupancy – where council issued an enforcement notice requiring use of the land to cease – whether the use of the land is for "*dual occupancy*" – whether the use of the land involves a "*second dwelling*" |
| LEGISLATION: | *Building Act 1975* (Qld), s 83<br><br>*Planning Act 2016* (Qld), s 161, s 163, s 167, s 168, s 229, s 310<br><br>*Planning and Environment Court Act 2016* (Qld), s 43, s 45<br><br>*Sustainable Planning Act 2009* (Qld), s 578 |
| CASES: | *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2013] 1 Qd R 1, followed<br><br>*Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, applied |

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| | *Bundaberg Regional Council v Ross & Anor* [2011] QPEC 137; [2012] QPELR 322, cited |
| | *Forde v Toowoomba Regional Council* [2008] QPEC 114; [2009] QPELR 336, approved |
| | *Glastonbury & Anor v Townsville City Council & Ors* [2011] QPEC 128; [2012] QPELR 216, cited |
| | *Gympie Regional Council v Pye* [2016] QPEC 65; [2017] QPELR 109, approved |
| | *Legal & General Life of Australia Ltd v North Sydney Municipal Council & anor* (1990) 69 LGERA 201, cited |
| | *Mudie v Gainriver Pty Ltd* [2001] QCA 382; [2002] 2 Qd R 53, cited |
| | *NRMCA Queensland Limited v Andrew* [1992] QCA 8; [1993] 2 Qd R 706, cited |
| | *Sunshine Coast Regional Council v Ebis Enterprises Pty Ltd* [2010] QCA 379; [2011] QPELR 390, applied |
| | *Sweeney Pastoral Company v Snowy River Shire Council* [1993] NSWLEC 189, cited |
| | *Warringah Shire Council v Sedevcic* [1987] 10 NSWLR 335, cited |
| COUNSEL: | J G Lyons for the appellant |
| | B D Job QC and M Batty for the respondent |
| SOLICITORS: | Hopgood Ganim for the appellant |
| | Connor O'Meara for the respondent |

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**Introduction**

[1] This is an appeal by Katherine Lalis against the decision of Bundaberg Regional Council ("*Council*") to give an enforcement notice in respect of land situated at 5 Mandi Court, Kalkie.

[2] The appellant is the owner of the subject land, which is improved with two attached dwellings identified as 5a and 5b Mandi Court, Kalkie. They were built in November 2016.

[3] There is no dispute about the procedural matters associated with giving the enforcement notice.

[4] The dispute between the parties relates to:

(a) whether the use of the subject land is lawful; and

(b) if use of the subject land is unlawful, whether there are discretionary reasons that warrant an order setting aside the enforcement notice or staying its operation.

**Background**

[5] On 6 July 2017, Council issued a show cause notice to the appellant inviting her to show cause why an enforcement notice should not be given to her.

[6] Council considered the representations made on her behalf by Hopgood Ganim in a letter dated 2 August 2017 and, despite those representations, formed the belief that it was appropriate to give the enforcement notice.

[7] On 20 October 2017, Council gave the appellant an enforcement notice under s 168 of the *Planning Act 2016* (Qld).

[8] The enforcement notice alleges that the appellant:

(a) in the period until 2 July 2017, committed a development offence under s 578 of the *Sustainable Planning Act 2009* (Qld) by carrying out assessable development without an effective development permit for the development; and

(b) from 3 July 2017, is continuing to commit a development offence under s 163 of the *Planning Act 2016* by carrying out assessable development without all necessary development permits being in effect for the development.

[9] The enforcement notice required the appellant to remedy the commission of the development offence. It required:

(a) by 4.00 pm on 19 January 2018, the appellant cause the cessation of the use of either dwelling 5a or dwelling 5b; and

(b) the appellant not recommence the unlawful use of the dwelling that ceased unless and until all necessary development permits are in effect for a material change of use of premises for a dual occupancy.

[10] On 14 November 2017, the appellant filed this appeal against the enforcement notice.

**Power to give an enforcement notice about a development offence**

[11] The substantive provisions of the *Planning Act 2016* commenced on 3 July 2017.

[12] Pursuant to s 168 of the *Planning Act 2016*, an enforcement authority may give an enforcement notice to the owner of a premises if it reasonably believes a person has committed, or is committing, a development offence.

[13] A development offence includes an offence under Chapter 5, Part 2 of the *Planning Act 2016*.[1] An offence under s 163 of the *Planning Act 2016* is such an offence.

[14] Section 163 of the *Planning Act 2016* states:

> **"163 Carrying out assessable development without permit**
>
> (1) A person must not carry out assessable development, unless all necessary development permits are in effect for the development.
>
> Maximum penalty—
>
> (a) if the assessable development is on a Queensland heritage place or local heritage place—17,000 penalty units; or
>
> (b) otherwise—4,500 penalty units.
>
> (2) However, subsection (1) does not apply to development carried out—
>
> (a) under section 29(10)(a); or
>
> (b) in accordance with an exemption certificate under section 46; or

[1] See definition in Schedule 2 of the *Planning Act 2016* and s 161 of the *Planning Act 2016*.

(c) under section 88(3)."

[15] Pursuant to s 310 of the *Planning Act 2016*, an enforcement authority may also give a show cause notice under s 167, or an enforcement notice under s 168, for development offences under the *Sustainable Planning Act 2009*.

[16] Development offence is defined in Schedule 2 of the *Sustainable Planning Act 2009* as including an offence against s 578 of the *Sustainable Planning Act 2009*.

[17] Section 578 of the *Sustainable Planning Act 2009* provides:

> "**578 Carrying out assessable development without permit**
>
> (1) A person must not carry out assessable development unless there is an effective development permit for the development.
>
> Maximum penalty – 4500 penalty units
>
> (2) Subsection (1):
>
> (a) applies subject to subdivision 2; and
>
> (b) does not apply to development carried out under section 342(3).
>
> (3) Despite subsection (1), the maximum penalty is 17000 penalty units if the assessable development is on a Queensland heritage place or local heritage place.
>
> (4) Subsection (5) applies to a development permit for assessable development that is building work if, under section 245A(3) or (5), the permit does not authorise the carrying out of a part of the building work.
>
> (5) For subsection (1), the development permit is not an effective development permit for the part."

**Decision framework**

[18] This is an appeal commenced under s 229 of the *Planning Act 2016*. It is a "*Planning Act appeal*" as defined in Schedule 1 of the *Planning and Environment Court Act 2016* (Qld).

[19] The appeal is by way of hearing anew.[2] Council has the onus of establishing that the appeal should be dismissed.[3] That onus is engaged to the extent that issues are put in dispute in the proceedings.

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2 *Planning and Environment Court Act 2016*, s 43.
3 *Planning and Environment Court Act 2016*, s 45(3).

[20] It was accepted by both parties that the standard of proof required of Council is that set out in *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336 at 362-3.[4]

**Is the use of the subject land lawful?**

[21] At all relevant times, under the Bundaberg Regional Council Planning Scheme 2015:

(a) the subject land was included within the Low Density Residential Zone;

(b) "*Dwelling house*" was defined in the use definitions as:

> "A residential use of premises for one household that contains a single dwelling.
>
> The use includes domestic outbuildings and works normally associated with a dwelling and may include a secondary dwelling."

(c) "*Dwelling*" was defined in the administrative definitions as:

> "A building or part of a building used or capable of being used as a self-contained residence that must include the following:
>
> (a) food preparation facilities;
>
> (b) a bath or shower;
>
> (c) a toilet and wash basin;
>
> (d) clothes washing facilities.
>
> The term includes outbuildings, structures and works normally associated with the dwelling."

(d) "*Secondary dwelling*" was defined in the administrative definitions as:

> "A dwelling used in conjunction with, and subordinate to, a dwelling house on the same lot.
>
> A secondary dwelling may be constructed under a dwelling house, be attached to a dwelling house or be free standing."

(e) "*Household*" was defined in the administrative definitions as:

> "An individual or a group of two or more related or unrelated people who reside in the dwelling, with the common intention to live together on a long term basis and who make common provision for food or other essentials for living."

[22] "*Dual occupancy*" is currently defined in the Bundaberg Regional Council Planning Scheme 2015 as:

> "Premises containing two dwellings, each for a separate household, and consisting of:
>
> - a single lot, where neither is a secondary dwelling or

[4] See also *Gympie Regional Council v Pye* [2016] QPEC 65; [2017] QPELR 109, 117 [49].

- two lots sharing common property where one dwelling is located on each lot."

[23] This definition was introduced by amendments that took effect on 3 July 2017.

[24] Prior to that date, the Bundaberg Regional Council Planning Scheme 2015 (Version 2.0)[5] defined "*dual occupancy*" as:

> "premises containing two dwellings on one lot (whether or not attached) for separate households."

[25] The *Planning Regulation 2017* (Qld) contains slight variants on these definitions. The differences are not material in this case.[6]

[26] Within the Low Density Residential Zone under the Bundaberg Regional Council Planning Scheme 2015:

(a) a dwelling house:

(i) was exempt development prior to 3 July 2017; and

(ii) is accepted development from 3 July 2017;

(b) a dual occupancy:

(i) was, prior to 3 July 2017, either:

(A) self-assessable development where compliant with the acceptable outcomes of the Dual Occupancy Code; or

(B) code assessable development where not compliant with the acceptable outcomes of the Dual Occupancy Code; and

(ii) is, from 3 July 2017, either:

(A) accepted development where compliant with the acceptable outcomes of the Dual Occupancy Code; or

(B) code assessable development where not compliant with the acceptable outcomes of the Dual Occupancy Code.

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5 In effect from 13 June 2016 until 2 July 2017.

6 Importantly, the definition of secondary dwelling in the *Planning Regulation 2017* contains the phrase "*used in conjunction with, and subordinate to*", which is the material consideration in this case.

[27] Counsel for the appellant, on instructions, accepted that the use of the subject land does not comply with all acceptable outcomes of the Dual Occupancy Code. For example, it is apparent from consideration of the affidavit material that the use of the land does not comply with acceptable outcome AO1 of the Dual Occupancy Code in that the subject land is in the Low Density Residential Zone but does not have a minimum area of 800 square metres.

[28] On 5 July 2016, GMA Certification Group issued a development permit for building work for:

(a) building class 1a – new construction of a dwelling – 1 storey with secondary dwelling; and

(b) building 10a – new construction of attached garages.

[29] Special condition 2 of that approval states:[7]

> "This approval has been based on the condition that the Secondary Dwelling remains a maximum gross floor area of 80m2, is used in conjunction with and subordinate to the Main Dwelling House as defined in the Bundaberg Regional Planning Scheme."

[30] Standard condition 4 states:[8]

> "Compliance with the Building Act 1975 and the relevant planning scheme is the responsibility of the applicant."

[31] The approved plans that accompanied the development permit contained the following statement in red font and highlighted yellow:[9]

> "THIS APPROVAL IS BASED ON THE CONDITION THAT THE SECONDARY DWELLING REMAINS A MAXIMUM GROSS FLOOR AREA OF 80M2, IS USED IN CONJUNCTION WITH AND SUBORDINATE TO THE MAIN DWELLING HOUSE AS DEFINED IN THE BUNDARBERG REGIONAL PLANNING SCHEME"

[32] The dwelling was erected on the subject land around 22 November 2016.

[33] There is no effective development permits for the subject land that would authorise a material change of use for a dual occupancy.

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7 Court Doc 10 – Affidavit of Stephen John Purcell Exhibit SJP-1 p 16.
8 Court Doc 10 – Affidavit of Stephen John Purcell Exhibit SJP-1 p 17.
9 Court Doc 6 - Affidavit of Gregory John Ovenden Exhibit GO-1 p 21.

[34] The subject land does not enjoy any existing use rights that would allow a material change of use of premises for a dual occupancy without an effective development permit.

[35] There is no dispute between the parties about the matters outlined above.[10] As such, whether use of the subject land is lawful turns on:

(a) whether the land is lawfully being used as a "*dwelling house*" including a "*secondary dwelling*", for which there is an effective development permit for building works; or

(b) whether the land is being unlawfully used for a "*dual occupancy*", for which there is no effective development permit for material change of use.

[36] As was observed by Philippides J in *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2013] 1 Qd R 1 at 20 [82], it may be assumed that the distinction between definitions is regarded as having significance, given the different consequences that follow in terms of the assessment requirements. However, this does not mean that the exercise involves determining the "*best fit*".[11] The construction of planning schemes is to occur consistently with the principles of statutory interpretation.

[37] Council contends that the subject land is being used for a dual occupancy. The appellant contends that the use of the subject land is for a dwelling house including a secondary dwelling.

[38] There is no dispute between the parties that each dwelling:

(a) is fully self-contained, with its own front door entry, bedrooms, kitchen, lounge and dining area, laundry, garage, patio space and bathrooms;

(b) displays a separate street address, namely 5a and 5b Mandi Court;

(c) has its own separate backyard that is fenced off from the other dwelling, with no means of access between the two backyards;

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10 As was confirmed by Counsel for the appellant during the hearing.

11 *AAD Design Pty Ltd v Brisbane City Council* [2012] QCA 44; [2013] 1 Qd R 1, 13-4 [43] and 19 [73].

(d) whilst sharing a common driveway, has no gate, access or other connection permitting access to the other dwelling;

(e) has its own mailbox;

(f) has a separate connection to water services and a separate water meter, even though there is a single mains water connection to the subject land;

(g) has a separate sub-meter to facilitate a separate electricity account with the electricity provider, even though there is one mains (two phase) electricity connection to the subject land;

(h) has its own waste collection bin; and

(i) was advertised for rent, and has been rented, as a separate dwelling.

[39] It is clear from the matters referred to in paragraph [38] above that the subject land contains two dwellings and that each dwelling is used for a separate household.

[40] At the heart of the dispute is whether the land includes a secondary dwelling. That is because if the use of the subject land does not include a secondary dwelling:

(a) the use falls outside of the definition of dwelling house; and

(b) on the basis that the subject land contains two dwellings, each for a separate household, the use falls within the definition of dual occupancy.

[41] As is noted above, "*secondary dwelling*" is defined as:

> "A dwelling used in conjunction with, and subordinate to, a dwelling house on the same lot.
>
> A secondary dwelling may be constructed under a dwelling house, be attached to a dwelling house or be free standing."

[42] The key issue is whether one of the dwellings is "*used in conjunction with, and subordinate to*" the other.

[43] As was noted in *Sunshine Coast Regional Council v Ebis Enterprises Pty Ltd* [2010] QCA 379 at [19], when considering whether the use meets a particular definition, regard should be had to the ordinary meaning of terms used in definitions. One should not import into them extraneous considerations prompted by either an unconnected

part of the planning scheme or subjective notions of what may have been the drafter's intention.

[44] The use of the term "*in conjunction with*" is important as it connotes a joint enterprise, a union or a common purpose.

[45] The Macquarie Dictionary defines the term "*conjunction*" as, relevantly:

> "1. The act of conjoining: combination.
> 2. The state of being conjoined: union; association."

[46] In turn, the same Dictionary defines "*union*" as, relevantly:

> "1. The act of uniting two or more things into one.
> 2. The state of being so united: conjunction; combination."
> 3. Something formed by uniting two or more things; a combination for a number of persons, societies, states or the like, joined together or associated for some common purpose.
> 5. The uniting of persons, parties, etc., in general agreement"

[47] "*Association*" is defined as, relevantly:

> "1. An organised association of people with a common purpose and having a formal structure.
> 2. The act of associating.
> 3. The state of being associated.
> 4. Companionship or intimacy.
> 5. Connection or combination."

[48] In *Forde v Toowoomba Regional Council* [2008] QPEC 114; [2009] QPELR 336, the Court was called upon to consider what was meant by the expression "… *the establishment of commercial stables in conjunction with houses …*".[12] In so doing it cited the following passage from the New South Wales decision in *Sweeney Pastoral Company v Snowy River Shire Council* [1993] NSWLEC 189:[13]

> "In my opinion, the phrase "in conjunction with" denotes a connection or relationship or association, a quality which it is convenient to refer to as a "nexus".
>
> ... the phrase requires a nexus between, on the one hand, the tourist accommodation to be provided, and on the other hand, the use for agriculture. In the context of the clause in question, that nexus is not demonstrated by mere physical location or by the fact that they are both "economic activities". The clause requires the nexus to be between two uses. It is a question of function and accordingly, it is a functional nexus which is required."

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12 *Forde v Toowoomba Regional Council* [2008] QPEC 114; [2009] QPELR 336, 338 [18].
13 *Forde v Toowoomba Regional Council* [2008] QPEC 114; [2009] QPELR 336, 338-9 [21]-[22].

[49] In *Forde*, the court concluded that the establishment of stables required "*a functional connection*", as in *Sweeney*.[14]

[50] The dwelling that is identified with the street address of 5a Mandi Court, Kalkie:

(a) contains two bedrooms; and

(b) has a total area of approximately 100 square metres.

[51] The dwelling that is identified with the street address 5b Mandi Court, Kalkie:

(a) contains three bedrooms; and

(b) has a total area of approximately 136 square metres.

[52] The appellant submits that indicia demonstrating that the secondary dwelling is being used in conjunction with and is subordinate to the dwelling house include:

(a) they are located on the same parcel of land;

(b) they have the same driveway/street access point;

(c) there is one mains water connection to the land and two sub-meters to facilitate itemised billing of the shared water;

(d) there is one mains (two phase) electricity connection to the land with two sub-meters to facilitate itemised billing of the shared power;

(e) they are structurally integrated and separated by a common wall;

(f) one dwelling has a physically smaller gross floor area; and

(g) one dwelling comprises three bedrooms and the other comprises two bedrooms.

[53] It is clear from this that the appellant's case focuses on the built form. However, the focus of the definition is the use, not the built form.[15] I do not accept, as apparently contended by Counsel for the appellant in oral submissions, that the use of the word

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14 *Forde v Toowoomba Regional Council* [2008] QPEC 114; [2009] QPELR 336, 339 [25].

15 *cf. Legal & General Life of Australia Ltd v North Sydney Municipal Council & Anor* (1990) 69 LGERA 201, 207.

"*conjunction*", when used in this definition, shifts the focus only to the built form, rather than the use.[16]

[54] Matters such as the dwellings being located on the same parcel of land and structural integration fall well short of demonstrating that the dwellings are being "***used** in conjunction with*" each other.

[55] I also do not accept the submission made by Counsel for the appellant in oral submissions that there is a functional nexus because there is a common driveway or because one could not knock down one of the dwellings without affecting the other. Structural dependence does not demonstrate that one use is subordinate to the other or that there is a functional nexus between them. The two dwellings could be used in conjunction with each other, for example by a single extended family that wishes to allow more independence to certain family members (such as grandparents) while still operating as a single household in terms of water and electricity services, enjoyment of meals etc.

[56] In the present case, there is no relevant nexus or functional connection between the two dwellings. Each dwelling is used in a discrete and independent manner, separate to the other. Both dwellings have been let and tenanted separately and there is no evidence of any joint endeavours between the two households.

[57] In my view, the two dwellings are not used in conjunction with each other.

[58] As for the requirement that one dwelling be subordinate to the other, the Macquarie dictionary defines the term "*subordinate*" as, relevantly:

> "1. Placed in or belonging to a lower order or rank.
> 2. Of lesser importance; secondary.
> 3. Subject to or under the authority of a superior.
> 4. Subservient.
> 5. Dependent."

[59] It also defines the phrase "*subordinate to*" as:

> "(a) to make secondary to.
> (b) to make subject or subservient to."

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16 The submission was one about conjoined twins.

[60] While there is a difference between the two units in terms of floor area (either a 60/40 per cent split (no garages included) or a 58/42 per cent split (garages included)) it could not be said that the **use** of one of the dwellings (as opposed to its built form) is of lower order, secondary to, lesser importance, subservient or dependant.

[61] In determining whether one dwelling is subordinate to the other, built form is only one consideration. In terms of use, there is no indication that one dwelling is subordinate to the other. As is said by Mr Buckley:[17]

> "By their comparative size and occupation and independence, the units sit comfortably in their own right – one is not incidental, subservient or ancillary to the other".

[62] I am satisfied that the smaller dwelling is not being used subordinate to the other dwelling.

[63] Accordingly, I am satisfied that the use of the subject land is for a dual occupancy, not a dwelling house and associated secondary dwelling.

[64] Council has discharged its onus.

**Should the enforcement notice be set aside on discretionary grounds?**

[65] The appellant submits even if, contrary to their submissions with respect to the characterisation of the use, the court is satisfied that a development offence has occurred, the court has a discretion as to whether to set aside or stay the enforcement notice. It refers to *Bundaberg Regional Council v Ross & Anor* [2011] QPEC 137; [2012] QPELR 322 at 333 [37].

[66] Council accepts that the court has a discretion to stay or set aside the enforcement notice.

[67] The principles relevant to the exercise of the court's discretion have been considered extensively in previous decisions of this court and other courts. See, for example, *Warringah Shire Council v Sedevcic* [1987] 10 NSWLR 335 at 339; *NRMCA Queensland Limited v Andrew* [1992] QCA 8; [1993] 2 Qd R 706 at 712-13; *Mudie v Gainriver Pty Ltd* [2001] QCA 382; [2002] 2 Qd R 53 at 58-9, and *Glastonbury &*

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17 Court Doc 9 – Affidavit of Christopher Gerard Buckley Exhibit CBG1 p 11 [25(g)].

*Anor v Townsville City Council & Ors* [2011] QPEC 128; [2012] QPELR 216 at 234 [131].

[68] The appellant submits that a number of discretionary factors favour the court setting aside or staying the enforcement notice, namely:

(a) the use of the subject land has the benefit of a development approval and, accordingly, it ought not be suggested the use was conducted recklessly, contrary to advice or in defiance of the planning rule;

(b) the use is a "*benign*" use that is residential in character and is anticipated within residential areas, such as where the subject land is located. Any amenity impacts would be within the normal range for such residential uses;

(c) the issue does not appear to be isolated to only Ms Lalis. The dual occupancy or dwelling house issue appears widespread;

(d) Ms Lalis has relied upon others in deciding to purchase the subject land and rent it out for the current use, and Ms Lalis would not have proceeded with this investment if unable to separately let the premises out;

(e) the matter involves complicated issues of statutory construction upon which reasonable minds seem to differ; and

(f) Council has itself had difficulty interpreting the differing use definitions as can be seen by the issuing of a factsheet entitled "*Dwelling houses, Secondary dwellings and Dual occupancy*",[18] which was subsequently the subject of legal advice from its solicitors. Council's solicitors concluded that the fact sheet was not legally accurate.

[69] The fact that the use has the benefit of a development approval may, initially, seem persuasive. However, the development approval is only for building works. Further, it contained special conditions and notations on the plans that made it apparent that what was being authorised was the built form and that the authorisation was limited to a built form that was to be used as a dwelling house with a secondary dwelling.

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[18] Court Doc 10 – Affidavit of Stephen John Purcell Exhibit SJP1 pp 93-4.

[70] The building permit specifically noted the need to refer to the Bundaberg Regional Planning Scheme.

[71] Under section 83 of the *Building Act 1975* (Qld), a certifier cannot issue a development permit for building work if a separate use approval is required. This limitation clearly explains why the certifier took the trouble to include special condition 2 and the notations on the plans.

[72] I do not regard Ms Lalis' use of the land as deliberately in defiance of the planning law. However, Ms Lalis had the building approval prior to construction of the dwelling. She elected not to obtain legal advice about the lawfulness of using the dwelling in the manner that she proposed. She elected not to obtain advice about specific condition 2 or about the meaning of the words on the plans.[19]

[73] Ms Lalis' decision to proceed with the use was not informed by the fact that Council itself had difficulty interpreting the differing use definitions. As such, I also find that discretionary factor to be unpersuasive.

[74] In terms of the suggestion that the use is a "*benign*" use, the use may well be residential in character, but a dual occupancy has a higher level of assessment than a dwelling house that includes a secondary dwelling.

[75] In terms of the significance of this, I am greatly assisted by the observations of Mr Buckley, the town planner retained by Council. In his report at paragraphs [47]-[52], he observed the following:[20]

> "47. There has been a long-held practice that treats the level of assessment and use rights generally for dwelling houses as quite different to multi-unit developments.
>
> 48. This is based on considerations of:
>
> - essential service infrastructure capacity and planning; and
> - amenity and expectations.
>
> 49. Units, and relevantly many groups of unit developments simply impose a greater load on water, sewerage and traffic capacity. Inputs into planning scheme preparation routinely require assessments to be made about population yields and the capacity of these systems to accommodate expected densities. From these assessments infrastructure contributions are set and payment is required as part of the DA system.

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19 See cross-examination of Ms Lalis.

20 Court Doc 9 – Affidavit of Christopher Gerard Buckley Exhibit CGB-2.

> 50. It means higher levels of assessment are regularly required of developments of densities greater than a single dwelling house when the infrastructure planning anticipated only a dwelling house per lot.
>
> 51. Those investing and choosing to live in areas where dwelling houses predominate would have a good understanding of likely traffic turnover, ambient noise expectations and activity. As mentioned in paragraph 33, there is wide understanding of life and amenity in dwelling house dominated suburbs. Clearly where development increases those impacts, there will be legitimate anxiety.
>
> 52. The scale and extent of unexpected density change can exacerbate the concerns over both the infrastructure and amenity/expectations considerations. One additional unit may have minimal effect other than to those in close proximity to the source. But where there are high numbers of additional units across a suburb or even just part of a suburb, the cumulative impacts will be material."

[76] In this case, correspondence received by Council from the residents of the area was before the court.

[77] On 16 November 2016, a resident of the area wrote to Council indicating that the person had recently built their new home in Kalkie's One Mile Crossing Estate. They were the first to build in Mandi Court. They noted that, at the time of writing the email, there were three blocks being cleared for duplexes that were all under 800 square metres.

[78] The email expressed concern in these terms:[21]

> "Where are these people all going to park their cars… the blocks are too small for 2 houses and driveways… and the road is far to (sic) narrow for on street parking..."

[79] Council was also in receipt of an email on 21 March 2017 from another resident of the area, expressing concerns about secondary dwelling homes, which it said were continuing to be built by Homes R Us and rented out as two separate dwellings.[22]

[80] In that email, the resident said:[23]

> "Now there are cars parked all over the road/gardens… There is no room in this small estate for cars to be parked all over the road……. It is a task every day to get in and our (sic) of our street."

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21 Court Doc 10 – Affidavit of Stephen John Purcell Exhibit SJP-1 p 71.

22 Ms Lalis gave evidence during cross-examination that her building was built by Homes R Us, who obtained the building approval for her.

23 Court Doc 10 – Affidavit of Stephen John Purcell Exhibit SJP-1 p 123.

[81] It went on to say:[24]

> "These homes are being used as two separate homes… The owners don't care, the real estate agents don't care, the builder doesn't care and Bundaberg Regional Council don't care."

[82] Having regard to the matters referred to by Mr Buckley, and the concerns expressed by the residents, I put little weight on the discretionary factor referred to by the appellant of the use being one that is residential in character.

[83] In terms of the issue not being isolated but being widespread, this is not a discretionary factor which I regard as assisting the appellant.

[84] While the matter may involve complicated issues of statutory construction, I am unpersuaded that this is a sufficient basis to permanently stay the enforcement notice.

[85] To the extent that Ms Lalis has relied upon others in deciding to purchase the subject land and rent it out for current use is a matter that Ms Lalis will need to take up at the appropriate time with others and pursue any legal rights she has against those others, if she so desires.

[86] I accept the submissions of Council that there are, in fact, strong discretionary reasons that favour the Council receiving relief, including that there is a legislative purpose of upholding the planning law. The orderly enforcement of planning law is in the interests of the community. Council is the guardian of public rights in respect of the planning law and it is important that others should be dissuaded from committing the same offence, both now and in the future.

**Conclusion**

[87] For those reasons, I am satisfied that council has discharged its onus and is entitled to have the appeal dismissed. However, having regard to the time that has elapsed since the issue of the enforcement notice and the fact that the timeframes set in the enforcement notice were set without reference to when this matter might be heard, I will hear from the parties about what orders might be appropriate.

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[24] Court Doc 10 – Affidavit of Stephen John Purcell Exhibit SJP-1 p 123.