PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Moramou2 Pty Ltd v Brisbane City Council* [2019] QPEC 18
PARTIES:	**MORAMOU2 PTY LTD** (appellant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	4926/17
DIVISION:	Planning and Environment
PROCEEDING:	Appeal
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	3 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 April 2019
JUDGE:	Everson DCJ
ORDER:	**1. The appeal is allowed.** **2. The enforcement notice is set aside.**
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPEAL – appeal against the decision to give an enforcement notice in respect of a backpacker hostel – whether there has been an unlawful increase in the number of residents
LEGISLATION:	*Planning and Environment Court Act 2016* (Qld)
CASES	
COUNSEL:	ANS Skoien for the appellant SP Fynes-Clinton for the respondent
SOLICITORS:	Milne Legal for the appellant Brisbane City Legal Practice for the respondent

Introduction

[1] This is an appeal against the decision of the respondent to give an enforcement notice to the appellant in respect of its use of premises located at 47 Brighton Road, Highgate Hill ("the premises") as a backpacker hostel.

[2] The only issue which remains for determination is whether there has been an unlawful increase in the intensity or scale of the use of the premises in terms of the number of people accommodated there.[1]

Discussion

[3] The lawful use of the premises was the subject of a development approval for an extension to a community dwelling dated 14 September 1989 ("the development approval").[2] A community dwelling was defined pursuant to the Town Plan in force at the relevant time as:

> "(a) a convent or monastery;
>
> (b) any common place of abode for a number of unrelated persons in the nature of a boarding house, guest house, hostel or lodging house, where that place is not part of a hospital, a hotel, an institutional residence, a retirement village, a sports and convention centre or any other premises being premises elsewhere specifically defined in this section the use of which is not characterised by some residential use."[3]

[4] Relevantly the conditions of the development approval included condition E.4.(Ak) which stated:

> "The total number of people accommodated within the combined development is not to exceed the number stipulated on the license for the premises."[4]

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1 Exhibit 1, as amended.
2 Certificate of Colin Jensen, filed 7 September 2019, pp 38-44.
3 Exhibit 7 p 1205.
4 Certificate of Colin Jensen, filed 7 September 2019, p 42.

Thereafter condition 1.(A)(l) stated:

> "At all times while the use continues to apply with (sic) all relevant Council ordinances, the Building Act and the current Standard Building By-Laws."[5]

[5] The premises were registered pursuant to Chapter 5, Part 1 of the ordinances of the Brisbane City Council as multiple dwellings.[6]

[6] The ordinances of the respondent provided for the registration of multiple dwellings which was a term defined broadly to include a "boarding-house" and a "tenement building".[7] It is noteworthy that the definition of "tenement building" in the ordinances was different to that in the Town Plan.[8]

[7] Pursuant to Chapter 5, Part 1 of the ordinances, s 2 provided:

> "(1) Except as hereinafter provided, this Part shall apply to any premises being a flat building, boarding-house or tenement building.
>
> (2) A person shall not –
>
> (a) conduct or use;
>
> (b) cause, suffer or permit to be conducted or used,
>
> any premises to which this Part applies unless those premises are registered under the provisions of this Part."[9]

[8] It is noteworthy that s 14 thereafter expressly provided for a cap on the number of people that may be accommodated in the premises in the following terms:

> "14. The Council when granting registration of premises may impose a condition that not more than a specified number of persons shall be accommodated therein, or in any specified part thereof. The Council shall give notice of such condition to the landlord and may give notice of it to any tenant or occupier of the premises or part of the premises. A person who has received such notice shall not cause or permit or suffer any greater number of

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5 Ibid.
6 Ibid pp 10-12.
7 Certificate of Colin Jensen, filed by leave on 24 April 2019.
8 Ibid and Exhibit 7 p 1215.
9 Certificate of Colin Jensen filed by leave on 24 April 2019.

> persons than the number so specified to occupy the premises or such part of the premises."[10]

[9] Registration of the premises as multiple dwellings is recorded as being pursuant to license number 824802 specifying 37 rooms and 43 persons and a fee of $333 due on 30 June 1990.[11] It is uncontentious that the numbers of people licensed to be accommodated in the entirety of the premises fluctuated pursuant to licenses issued under this regulatory regime.[12] Upon the repeal of the ordinances and the coming into effect of the *Local Law (Accommodation Standards)* 1999 and the *Local Law Policy (Accommodation Standards)* 1999, which provided for conditions relating to the maximum occupancy of a multiple dwelling and the calculation of the maximum occupancy for Backpackers' Hostels by reference to minimum floor area per occupant, 143 people were permitted to be accommodated at the premises.[13] This remained the authorised number of people to be accommodated at the premises at the time of the repeal of the Local Law on 30 August 2005.[14]

[10] The respondent has failed to comprehensively outline the precise regulatory regime that continued for ascertaining the occupation density of the premises between 9 September 2005 and 4 April 2008. This is regrettable. However, what is clear is that from 4 April 2008 this task was the responsibility of the state government and currently this task is undertaken pursuant to the Queensland Development Code which came into effect on 4 April 2008. It is uncontentious that the premises can currently lawfully accommodate up to 291 people.[15]

[11] The respondent must establish that the appeal should be dismissed.[16] There is no evidence before me that the appellant has at any point failed to comply with the regulatory requirements in respect of the permitted extent of the occupancy of the premises. Furthermore, Mr Fynes-Clinton, who appears on behalf of the respondent, expressly concedes that there is no suggestion that the appellant is failing to comply in this regard.[17] The regulation of the number of people permitted to be

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10 Ibid.
11 Certificate of Colin Jensen filed 20 February 2019, p 12.
12 Ibid.
13 Ibid p 4 and Chronology of Subordinate Legislation and Relevant Events, p 3.
14 Ibid, p 5.
15 Affidavit of Nicole O'Connor filed 3 October 2018, para 27, Exhibit NO6 and affidavit of William Mark Anderson filed 5 October 2018.
16 *Planning and Environment Court Act* 2016 s 45(3).
17 T1-66 ll 1-10.

accommodated at the premises has always been the subject of an additional regulatory assessment, initially by the respondent and, more recently, by the state government. At the time of the development approval this was effected by issuing a license to the entity carrying out the use. My interpretation of condition E.4.(Ak) is that this regulatory process set the number of people to be accommodated within the premises. If this condition continues to apply, notwithstanding the fact that this regulatory process is now undertaken under a different statutory regime by the state government, it is uncontentious that this condition is being complied with. If, on the other hand, the coming into effect of a different regulatory regime is such that this condition no longer has effect, then the only cap on the total number of people to be accommodated within the premises is set by the current regulatory regime in force. Either way to the extent relevant to the resolution of this appeal, the current use is lawfully complying with both the development approval and the relevant legislative requirements which regulate this type of use.

[12] There is therefore no unlawful increase in the intensity or scale of the use of the premises as a consequence of the number of people accommodated there.

Conclusion

[13] The respondent has not discharged the onus of establishing that the appeal should be dismissed. The evidence before me establishes that, to the extent it remains in force, condition E.4.(Ak) of the development approval is being complied with. If I am wrong in this regard and this condition no longer has lawful effect, the total number of people being accommodated within the premises does not exceed the number authorised by current statutory regime. Either way the appeal must be allowed.

[14] I therefore allow the appeal and set aside the enforcement notice.