PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Sunshine Coast Regional Council v Dwyer & Others* [2019] QPEC 36
PARTIES:	**SUNSHINE COAST REGIONAL COUNCIL** (Appellant) **v** **VICKI DWYER** (First Respondent) **v** **WAYNE GEOFFREY DWYER** (Second Respondent) **and** **DWYER HOMES PTY LTD (ACN 626 131 922)** (Third Respondent) **and** **OCTOCLAY PTY LTD (ACN 010 839 139)** (Fourth Respondent)
FILE NO:	2388/19
DIVISION:	Planning and Environment Court
PROCEEDING:	Application for interim enforcement orders
ORIGINATING COURT:	Planning and Environment Court of Queensland, Brisbane
DELIVERED ON:	22 July 2019 (delivered ex-tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	22 July 2019
JUDGE:	RS Jones DCJ
ORDER:	It is ordered that: 1. pursuant to section 32 of the *Planning and Environment Court Act 2016* (Qld), the date for giving written notice of the proceeding to the Chief Executive of the Department of State Development, Manufacturing, Infrastructure and Planning be extended to 8 July 2019; and 2. pursuant to section 37 of the *Planning and Environment Court Act 2016* (Qld), to the extent there

is any non-compliance with rule 12 of the *Planning and Environment Court Rules 2018* (Qld) in relation to serving a copy of the application on the First Respondent, that non-compliance be excused;

Upon the court being satisfied that:

3. There has been compliance with statutory requirements relating to the giving of written notice of this proceeding.

It is further ordered that pending a decision in proceedings for the enforcement order, interim enforcement orders are made pursuant to section 180(5) of the *Planning Act 2016* (Qld) that:

4. The First, Second, Third and Fourth Respondents by themselves, servants or agents stop carrying out all works associated with the Rooftop Work and the Rooftop Area until a development permit for building work is in effect for the development;

5. The First and Second Respondents by themselves, servants, agents or permittees:

   (a) must not use or allow the use of the Rooftop Work or the Rooftop Area for a Prohibited Use until the Development Approval is in effect;

   (b) must not withdraw the Development Application unless they have a reasonable excuse;

   (c) must take all necessary and reasonable steps to enable the Development Application to be decided as quickly as possible;

   (d) if an appeal against the decision of the Development Application is commenced, must take all necessary and reasonable steps to enable the appeal to be decided by the Court as quickly as possible;

   (e) if a Development Approval takes effect, must ensure that all works and other obligations that are necessary to bring the use of the Premises into full compliance with the Development Approval are completed by the Compliance Date; and

   (f) upon the giving of no less than three days' written notice, must permit the representatives of the Applicant to enter the Premises to

perform an inspection of the Rooftop Area and Rooftop Work; and

6. For the purpose of paragraphs 4 and 5, the following definitions apply:

   (a) '**Compliance Date**' means the date which is two months after the date a Development Approval takes effect or other date as ordered by this Court;

   (b) '**Development Application**' means the properly made development application lodged by the First and Second Respondents with the Applicant on 24 April 2019 seeking a development permit for a material change of use (extension to existing dwelling house – roof top deck) for the Premises (Council reference: MCU19/0085);

   (c) '**Development Approval**' means a development approval for the Development Application;

   (d) '**Premises**' means land located at 5 Minyama Island, Minyama, described as Lot 18 on RP838132;

   (e) '**Prohibited Use**' means use for:

      (i) recreational, sporting, aviation and community purposes;

      (ii) social and meal preparation purposes other than as authorised or permitted by law; and

      (iii) the operation of lighting on the Rooftop Work.

   (f) '**Rooftop Area**' means the rooftop of the dwelling house at the Premises; and

   (g) '**Rooftop Work**' means the work constructed, and being constructed, on the Rooftop Area, being a deck, a fence, a set of stairs, equipment including lighting, a roofed and partially walled structure, and a lift to give access to the rooftop;

7. The matter be listed for review on 16 August 2019;

8. The costs of, and incidental to, the hearing on 22 July 2019 be reserved;

9. Service on all Respondents may be effected by email to the Second Respondent; and

10. Liberty to apply with two clear business days' notice in writing.

COUNSEL: Wayne Dwyer for all respondents

SOLICITORS: McInnes Wilson Lawyers for the appellant

[1] I am concerned here with an application for, essentially, interim orders to restrain the respondents from carrying out certain works, pending the determination by the council of a development application or, as might otherwise occur, by virtue of orders made by this court. Very briefly, the first respondent is the wife of the second respondent. The third and fourth respondents are companies of which the second respondent, Wayne Dwyer, is a director. Mr Dwyer appeared, acting on behalf of all the respondents. It would appear that Mr Dwyer is a well-known builder, operating in the Sunshine Coast, and I suspect elsewhere.

[2] The first and second respondents either own and/or reside in what could only be described as a very impressive and attractive dwelling, on a canal in Mooloolaba. Approval was sought and granted to permit a new roof to be constructed over the existing roof. Subsequent to that, a development application was made, which would, if approved, permit the construction of what is described as a recreational deck, which would have artificial grass laid on it, and would be able to be used for various activities. The recreational deck would be lit by what was described as normal lighting, to permit use at night. The proposed uses of the grassed area on the newly constructed roof, would include basketball, croquet, tennis, bocce, handball, table tennis, and socialising including barbecues.

[3] The construction or, if you like, the use of the roof as a tennis court would appear to have attracted a fair degree of notoriety in the local press. It is not in dispute that construction has occurred, which in essence, seemed to be a structure of a form of netting around, at least, part of the roof, which can be quite ingeniously raised and lowered by some form of hydraulics, the details of which I do not know and I do not need to know. Those structures are shown in exhibit 1, at pages 4, 6, 7, 8 and 9. It is also quite clear that those structures have been raised and used at night, including being lit. The lit form is shown in exhibit 1 at pages 10, 11 and 12. None of those works have the necessary approvals in place.

[4] A number of affidavits have been filed and, save for one of a neighbour, have not been seriously challenged. Indeed, the respondents today, in addition to only challenging the affidavit of one neighbour, did not seriously challenge any of the other material relied on by the council and tendered no material in support of their position. What Mr Dwyer did though, without reference to any direct evidence, was refer to six points. The first was to do with the lighting, in that what Mr Dwyer said, as I understood it, that the emission levels of the lighting of the type shown in exhibit 1 at pages 10, 11 and 12, do not exceed an acceptable level. That point is really of no consequence. The real issue is, whether or not what has occurred on the roof is permitted at law.

[5] Associated with that was another point associated with the question of lighting. Reference was made to a part of the roof being used as a bar facility. Mr Dwyer said that is not the case at all, and that the area that has been referred to as a bar, is in fact a shelter, designed in particular to protect the lift doors. Again, having to determine whether there is a bar there or not is irrelevant. The point is whether what is occurring on that roof is lawful or not.

[6] The second point that was raised was that the roof, having been covered with artificial grass, is no different to a backyard. Mr Dwyer rhetorically asked:

> "In a backyard, why wouldn't it be lawful to play tennis, have a barbecue, play bocce, play darts, and indeed, play basketball?"

[7] The answer to that rhetorical question may well be that it would not be unlawful. But again, that is simply not to the point. It is not a backyard. What we have here are structures located on the roof of a dwelling, and on that roof, a number of sporting and social-type activities taking place.

[8] The third point raised was, if the order is made of the type initially sought, it would prohibit the first and second respondents from doing what would otherwise be lawful. Again, it was rhetorically asked – why should we be prohibited from taking a chair and sitting on the roof or taking a beer onto the roof or going to the roof with friends or any combination thereof?

[9] In that regard, I have some grave concerns about the level of the uses that were prohibited in the council's first draft of the orders. And, indeed, that has been taken

on board by Mr Housten, who appeared on behalf of the council. He now has instructions to make some material difference to the relief sought.

[10] The fourth point is what Mr Dwyer said in respect of an affidavit filed on behalf of a neighbour. To use Mr Dwyer's words or to paraphrase his words – he had input into what has been constructed, and according to Mr Dwyer, and this is a direct quote:

> "He is happy with what is there."

[11] I do not have to decide what that neighbour's position is. It is not that neighbour's views that are determinative.

[12] The fifth matter was that the respondent is happy to agree to not carry out any work whatsoever on any structure permanently above 8.5 metres. As I said earlier, the works that have been carried out are substantial, and are quite sophisticated. They permit the raising and lowering of screening that surrounds a significant portion of the new roof structure.

[13] According to Mr Dwyer, when lowered, they do not offend any laws and he went so far as to say that, indeed, no work has been occurring on the premises since around May of this year. Without finally resolving the matter, I have some reservations about that, having regard to the affidavit of Ms Poppel, which was filed today. She refers to that on the 19th of July 2019, she attended the premises and made observations from the road immediately outside the premises and from the bridge approaching the island upon which the subject premises is located. She said that she observed that further works had been carried out to the roof area since her last visit, on the 4th of July. According to her, additional screens had been installed along the front edge of the deck and other works, which include, interestingly, the installation of a windsock.

[14] Again, it is not necessary for me to determine where the truth lies in that regard, but I would observe that that evidence of Ms Poppel directly contradicts what I was told by Mr Dwyer.

[15] The sixth point that that Mr Dwyer made, was that there had been 72 submissions made in support, including, as I understand it, a submission made by Pat Rafter, that are all quite enthusiastic about what the respondents intend, and at least as I understand it, in particular, the tennis court.

[16] On balance, I am satisfied that orders ought be made in the form now proposed by the council, which include, in respect of paragraph 6, subparagraph (e), that prohibited uses are now limited to recreational sporting, aviation and community uses and then social and meal preparation uses other than those authorised or permitted by the law. It should be emphasised that these are interim orders only and I am more than satisfied that a sufficient case has been made out by the council. Accordingly, there will be orders made in the form handed up by the council, including those orders 4 through to 8, subject to the amendments to which I have referred. Now, when should the matter be reviewed?

[17] MR HOUSTEN: Yes, your Honour, thank you. Paragraph 7 contemplates the next review. My instructions are to seek a return date in the week commencing the 26th of August. I am not sure whether or not your Honour is sitting or whether or not it is necessary that it be reviewed before your Honour. My expectation with the selection of that time is that the development application decision period may have reached its end and we might be better informed about what the outcome of the development application might be.

[18] HIS HONOUR: And I intended also to include a liberty to apply, to allow the respondents – Mr Dwyer, which would allow you, on behalf of the other respondents, to bring the matter back before the court to revisit the matter, if necessary. But you know, obviously, you would have to some good grounds to do so. So you mean the 26th of August?

[19] MR HOUSTEN: The week commencing the 26th of August. It would be preferable that it be – that it occur on the 26th, 27th or 30th but I am your Honour's hands.

[20] HIS HONOUR: You do not have any preference for 26th, twenty – what were those dates? Twenty-sixth - - -

[21] MR HOUSTEN: Twenty-sixth, 27th or 30th of August.

[22] HIS HONOUR: Twenty-six, 27 or 30th. Are you away or unavailable?

[23] RESPONDENT: I am away from the 17th of August for seven weeks, your Honour.

[24] HIS HONOUR: But would your wife be able to – it is just for review. It is not going to be a hearing. It is just to see where everything is at and, in particular, where Mr Housten's client's at in respect of the processing of the development application.

[25] RESPONDENT: Okay. I would like to be at that – I would like to be there. Can it be held before the 17th of August?

[26] MR HOUSTEN: Your Honour, the matter can certainly be listed for review. Whether or not the council has reached the conclusion of the application, I do not know.

[27] HIS HONOUR: Well, why don't we make it – list it for review on the 17th of August and we can get an update then.

[28] MR HOUSTEN: Your Honour - - -

[29] RESPONDENT: That's a Saturday.

[30] HIS HONOUR: Is it? Well, what's the Friday?

[31] MR HOUSTEN: The 16th, your Honour.

[32] HIS HONOUR: So it will be the 16th. Look, it will not be me.