Property Law Bill 2023

Submission No:	27
Submitted by:	Unit Owners Association of Queensland Inc.
Publication:	Making the submission and your name public

See attached:

UNIT OWNERS ASSOCIATION QLD

Helping unit owners since 1978

UOAQ Submission on Property Law Bill 2023

The Attorney-General has introduced a revised Property Law Act Bill into Parliament on the 23rd February 2023. The bill is extensive and complex. However, it does contain a new concept titled the Body Corporate Certificate as part of the Seller Disclosure Statement within the Act. The UOAQ Committee has significant concerns regarding this document, especially what is left out.

The UOAQ Committee representatives have been attending the Community Titles Legislation Working Group (**CTLWG**) for just under two years. The UOAQ Committee has reviewed much and submitted hundreds of pages of material. The UOAQ is one of several groups participating in the process but the only stakeholder representing the owners of the subject properties affected.

Body Corporate Certificate must disclose Primary Object of the BCCM Act which is the 'Use of Freehold Land'

The major issue raised by the UOAQ over those two years is the requirement for the seller disclosure document to contain a simple English statement of the **lawful use of the land and the strata building** drawn from the development approval given by local government under the Planning Act. With specific reference to s. 86 (96) of BCCM Regulations, the developer must provide a copy of the Development Approval (**DA**) to the body corporate on establishment. Therefore, the argument that the DA is difficult to obtain is nullified, let alone providing just a few words from it on the body corporate certificate. More so however, the primary objective of the BCCM Act (intended purpose) goes precisely to management of the **'use of freehold land'**. UOAQ are of the view there could not be a more serious omission of seller disclosure toward fair and transparent dealings than this omission in the proposed draft Bill.

Omission of such fundamental disclosure also directly offends s. 30(1)(f) of the Australian Consumer Law which states -

30 False or misleading representations about sale etc. of land

> ***(1) A person must not, in trade or commerce, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land:***
> ***…***
>
> > ***(f) make a false or misleading representation concerning the use to which the land is capable of being put or may lawfully be put;***

Noting that 'misleading by omission' remains an offence under ACL.

The UOAQ has requested that the body corporate certificate should identify the lawful use of the strata lot and the potential non-lawful uses that could seriously compromise a buyer's interests. There is a long history in Queensland of strata development for residential use, and then the management rights holder conducting an unlawful short-term accommodation business on behalf of non-resident investment owners. When raising this topic, the UOAQ representatives have been shouted down in the sessions by the lobby groups. The responses from the CTLWG to the UOAQ submissions have sought to obfuscate the issue. The UOAQ Committee has had similar obfuscation from the Brisbane City Council and the Gold Coast City Council. Why is our government attempting to suppress the lawful use of strata property?

The UOAQ Committee would draw strata owner's attention to the statements in a recent P&E Court judgement by His Honour Judge William Everson regarding a residential strata property in South Brisbane, stated:

- Paragraph 8: It is clear on the evidence before me, that the applicant has been conducting a significant Short-term accommodation use from multiple dwelling units in the CTS for a lengthy period of time.....since August 2016.
- Paragraph 10: I am satisfied on the facts before me that the conducting of the Short-term accommodation use by the applicant has resulted in not only a material intensification of the use of the common property but also damage to the common property in a way that is unlikely to have occurred had this use not been *(apparently unlawfully)* conducted on the land.
- Paragraph 14: On the facts before me set out above, the use of a significant number of the lots in the CTS, *(apparently unlawfully)* for Short-term accommodation, has led to a material increase in the intensity or scale of the use of the common property.

Judges are supposed to choose their words carefully, so why would Judge William Everson add the words (apparently unlawfully) when referencing the use of apartments for short-term accommodation (**STA**)? The Brisbane City Council (**BCC**) advised UOAQ in 2018 confirming STA requires development approval for a Material Change of Use only to later resign from that long established position. BCC later claimed STA to be 'self assessable' even though the use was clearly in contravention to that of the development approval in place. Hence for eight years there has been no enforcement of the lawful use as prescribed in the development approval. Why?

Is the reason that the local councils have failed to enforce the "*(apparently unlawfully)"* use of many strata schemes, because owners do not fully understand the lawful use of their residential property, and the resulting unlawful use greatly benefits the developer, management rights and lobby groups interest? Is this not why we need disclosure of lawful use in this new Property Law Act 2023? Let's protect the property rights of Queenslanders.

The UOAQ believes there have been a number of applications to change the lawful use of the residential property made to the Brisbane City Council which have been approved without the knowledge or consent of owners. How does that happen?

There have been hundreds of STA complaints about such unlawful use made to the Gold Coast City Council and yet barely a handful have been properly investigated, if at all. No action is taken in order to suppress this most serious issue.

This revision of the Property Law Act should settle this issue, not continue to suppress the unlawful use of residential strata property to favour lobby groups. It makes our apartments more dangerous to occupy, more costly to maintain, compromises our insurances, obstructs our right to peaceful enjoyment of the residential amenity we purchase and significantly diminishes the capital value of our properties.

75% for Termination of a Scheme is Offensive to Queenslanders

The government media statement dated 16 February 2023, announced:

> *Proposed changes to body corporate legislation will make it easier for units to be redeveloped.*
>
> *The changes would allow for the termination of a community titles scheme with the support of 75 percent of lot owners.*
>
> *Following the October 2022 Housing Summit, the Palaszczuk Government has announced reforms to body corporate legislation to make it easier to sell and redevelop ageing or rundown community titles schemes in Queensland.*
>
> *Currently, a community titles scheme may only be terminated if no owner opposes the termination of the scheme, or if the District Court is satisfied it is just and equitable to terminate it.*
>
> *The changes will allow for the termination of a scheme with the support of 75 percent of lot owners, where the body corporate has agreed it is more financially viable for lot owners to terminate rather than maintain or remediate the scheme.*

The above is objected to in the strongest possible terms by all affected Queenslanders for reasons.

Those directly affected are those who own the properties. Owners of in excess of 600,000 units each with median values exceeding $500,000, the owners of $300,000,000,000 ($300 B) of Queensland property were not even consulted.

Despite Unit Owners having been consulted via the Community Titles Legislation Working Group for the preceding two years on this very topic, their voice appears disregarded and ignored. Unit Owners were not even invited to participate in the October 2022 Housing Summit where such a reform decision was seemingly made. More likely, the multibillion dollar property development industry led by Urban Development Industry of Australia (**UDIA**) sees a commercial opportunity to have the body corporate law changed to favour its agenda.

Any suggestion such a law if enacted would have any effect upon the current affordable housing crisis is little more than a diversionary ruse to enable a positive media spin to be delivered to those unit owners who will ultimately suffer by being so unwittingly duped.

The proposal for just 75% vote required for termination of a Community Titles Scheme is inherently flawed as it seriously violates the provisions of the *Human Right Act 2019*. However, the Statement of Compatibility with the Human Rights Act submitted by the Attorney-General to the proposed *Property Law Bill 2023*, simply makes the subtle and discrete one line acknowledgement that:

> *"Various provisions of the Bill may place limitations on property rights."*

Section 24(2) of the *Human Rights Act 2019* relating to Property Rights explicitly states:

> ***(2) A person must not be arbitrarily deprived of the person's property.***

Furthermore, the *Human Rights Act 2019* also states at section 19 with regard to Freedom of Movement that:

> *Every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it, and has the freedom to* ***choose where to live****.*

When properly considered, the proposal suggests it to be lawful for 75% of Queenslanders to override the human rights of 25% of Queenslanders and all that would be required would be the financial power to buy sufficient property.

Given the reason for the proposed reform is to "make it easier for units to be redeveloped", one can surely envisage a developer with billion dollar resources able to swiftly displace the long settled retirees from their long term abode in a sought after seaside suburb. As if developers do not already have far more power and influence than to change the law to make it even easier for them. The proposed reform represents corporate bullying at its worst.

The grave injustice of such a power imbalance is further evident in the statement by the Attorney-General that:

> *"The new process will include safeguards to protect owners in the minority who do not support termination. If the body corporate approves a termination plan, a dissenting owner will be able to make an application to the District Court, which would consider a set of just and equitable factors in deciding whether the termination should proceed."*

Owners should not be forced to court to defend the human rights they are already entitled to rely upon. Any owner is at all times able to make an application to the District Court. The real issue lies in whether a regular property owner has the financial means and backing to challenge the might of a billion dollar corporate

developer in the courts - of course not. It would surely be fairer for the dominant party (developer) to cover the legal costs of both sides and for a dissenting owner to elect their preferred representation at cost to the developer as ultimate beneficiary.

Without equitable access to the legal remedy due to the imbalanced financial means of parties, it would appear the *Human Right Act 2019* may again be offended via the provisions of section 31 Fair hearing.

There would be few who do not intimately understand the abhorrent injustice embedded within this proposed reform to the BCCM Act and Queensland property law. One needs to look no further than the inherent social message of the iconic 1997 Australian movie 'The Castle'.

It was only through the generous support of an eminent QC that the Kerrigan family was able to defend their 'home' as distinct from the mere bricks and mortar of simply a property.

Should proposed law reform allow 75% of unit owners to arbitrarily displace 25%, in contravention and denial of their human rights, it would similarly need to be on 'just terms' as provided for in section 51(xxxi) of the Australian Constitution.

Should any Queensland parliamentarian genuinely believe that their support to totally disregarding protections of the *Human Rights Act 2019* to favour developer's interests is in any way considered to be on 'just terms', affected Queenslanders (their constituents) will respond with similar sentiment to that of Darryl Kerrigan - *Tell 'em they're dreaming*.

Good luck being re-elected by the Queenslanders notified how each member votes.

Property Law Bill 2023

Submission No:	27 - *Supplementary Submission*
Submitted by:	Unit Owners Association of Queensland Inc.
Publication:	Making the submission and your name public

See attached:

JeffNicholls TOWN PLANNING

PO Box 830
Coorparoo Qld 4151

ABN 28168233289

12 February 2019

Attention: Mr Glenn Davidson - Principal Officer Built Environment

The Chief Executive Officer
Compliance and Regulatory Services
Brisbane City Council
GPO Box 1434
Brisbane Qld 4001

Via Email: [redacted]

C.C. [redacted]; [redacted]

Dear Glenn,

Re: Unlawful Use of Premises – 212 Margaret Street, Brisbane.

We have been engaged by the Unit Owners Association of Queensland Inc. (**UOAQ**) to advise in relation to the existing development approval over land at 212 Margaret Street, Brisbane (the **premises**) and whether the use of some of the units in the building, which are managed by Oaks Hotels and Resorts (**Oaks**), for short term accommodation is lawful.

As a result of our investigations we have been instructed by UOAQ, which represents unit owners/occupiers at 212 Margaret Street, Brisbane, to write to the Brisbane City Council (the **Council**) about the use of the units managed by Oaks which we have concluded is unlawful.

The relevant facts and reasoning in this regard is set out below.

Subject Site

1. The premises are identified as 212 Margaret St, Brisbane and is improved with a residential unit tower (30 plus levels) with podium, basement car parking and a restaurant at ground level.

2. We understand that the use of the premises is managed by the BODY CORPORATE FOR 212 ON MARGARET COMMUNITY TITLES SCHEME 33840 (the **Body Corporate**) (refer to title search attached in Appendix A). The common property of the site is formally described as Lot 0 on SP143450.

Existing Use

3. We understand that the residential units that make up the building are being primarily used for a combination of long term residential living (i.e. owner/occupier or long term rental) and short term accommodation such as serviced apartments.

4. A site inspection reveals advertising on front façade of the building specifying 'O*aks 212 on Margaret Serviced Apartments*', and review of the Oaks Hotels and Resorts website leaves no doubt that the company is marketing the premises as serviced apartment for overnight rent to the public with options to rent onsite car parking spaces to the public for an additional cost.

5. In accordance with correspondence issued to the Council on the 17th May 2017 (by the Body Corporate), we understand that the short term accommodation and the serviced apartment use started on the premises after the building was constructed and after the residential use commenced in May 2005.

Existing Development Approval & Legislative Appraisal

6. On the 22nd May 2001 the Council issued a Development Permit for a Material Change of Use for 'multi-unit dwelling', 'shop' and 'restaurant'. Please refer to Appendix B.

7. The Council's Reference number for the Decision Notice and Development Approval (the **DA**) was DRS/USE/H00-748542.

8. We note the original development application was lodged, and the DA was given under the relevant provisions of the *Integrated Planning Act 1997* (the **IPA**).

9. When the IPA was repealed, the DA then transitioned under the relevant provisions of the *Sustainable Planning Act 2009* (the **SPA**).

10. When the SPA was repealed, the DA then transitioned under the relevant provisions of the *Planning Act 2016* (the **PA**).

11. It is noted that the DA is for separate planning units including 'multi-unit dwellings', 'shop' and 'restaurant'. The upper planning unit is that part of the building containing the dwelling units. The lower planning unit is the podium level containing the 'shop' and 'restaurant'.

12. The DA gives approval for 'multi-unit dwellings', 'shop' and 'restaurant' as defined by the *Brisbane City Plan 2000* (**City Plan 2000**), which was in force when the development was applied for, and when the DA was granted in 2001. Under the City Plan 2000 (now superseded), the approved uses were defined as follows:

> ***'Multi– unit dwelling:*** *a use of premises as the principal place of longer term residence by several discrete households, domestic groups or individuals irrespective of the building form. Multi–unit dwellings may be contained on one lot or each dwelling unit may be contained on its own lot subject to Community Title Schemes. Examples of other forms of multi–unit dwelling include boarding house, retirement village, nursing home, orphanage or children's home, aged care accommodation, residential development for people with special needs, hostel, institution (primarily residential in nature) or community dwelling (where unrelated people maintain a common discipline, religion or similar). The term multi–unit*

dwelling does not include a house or single unit dwelling as defined elsewhere'.[1]

***'Restaurant:** a use of premises for providing meals or light refreshments on a regular basis to members of the public for consumption on or off the site, e.g. cafe, restaurant, theatre restaurant, bistro, milk bar, coffee shop, tea room, take away, drive through food outlet or fast food outlet'.*[2]

***'Shop:** a use of premises for the display and retailing of goods, and personal services such as betting, hair and beauty care, laundromats and dry cleaning shop fronts e.g. supermarket, department store, showroom, retail warehouse, liquor store, place for the hire of domestic items, stall, market or salon'.*[3]

13. 'Multi-unit dwellings', 'shops' and 'restaurants' were also defined as 'Centre Activities' uses as per the definitions of City Plan 2000.

14. The area classification of the premises under the City Plan 2000 was Multi-purpose Centre (MP1 – City Centre) Area and the premises was regulated by the provisions of the City Centre Neighbourhood Plan.

15. Under the City Plan 2000, development for 'Centre Activities' uses (including 'multi-unit dwellings', 'shops' and 'restaurants') that required new building work within the Multi-purpose Centre (MP1 – City Centre) Area and the City Centre Neighbourhood Plan area required a development permit to be issued by Council.

Appraisal of Existing Serviced Apartment Use

16. In accordance with Items 4 and 5 above, the premises and existing residential building is considered to be partly used for serviced apartments.

17. Under the City Plan 2000, serviced apartments are best defined as 'short term accommodation' which is defined as follows:

***'Short term accommodation:** a use of premises for short term accommodation (typically not exceeding 2 weeks) for tourists and travellers, e.g. holiday cabins, motel, hotel (where it entails mainly accommodation), serviced apartments, guesthouse or backpackers hostel and caravan park (that is also often appropriate for use as long term accommodation)'.*[4]

The definition clearly includes serviced apartments and encompasses the use of the apartments managed by Oaks.

18. 'Short term accommodation' is also identified as a 'Centre Activities' use as per the definitions of City Plan 2000. Accordingly, had the development application intended

[1] Brisbane City Council, Brisbane City Plan 2000, Chapter 3, page 92.
[2] Brisbane City Council, Brisbane City Plan 2000, Chapter 3, page 93.
[3] Brisbane City Council, Brisbane City Plan 2000, Chapter 3, page 93.
[4] Brisbane City Council, Brisbane City Plan 2000, Chapter 3, page 93.

that the proposed building would be used only for serviced apartments an application for that use would have been required. The same requirement would have arisen had it been intended that the apartments be used for either permanent accommodation by families or serviced apartments. No application was made to the Council to use the apartments for 'short term accommodation'.

19. In accordance with the above, and the provisions of the DA, the DA did not approve 'short-term accommodation' as defined in City Plan 2000 and the use of the dwelling units for 'short-term accommodation' contravenes the provisions of the DA.

20. At the time, the DA was sought for the purpose of 'multi-unit dwellings', 'shops' and 'restaurants' and when granted, limited the uses that may be made of the building in accordance with its terms. It did not permit serviced apartments nor 'short term accommodation'. The rights and legitimate expectations of persons purchasing units in the building were based on the terms of the DA and could not have included the 'short term accommodation' use which is a different type of use with different impacts.

21. Further, the use of the premises for 'short term accommodation' was not a use that was considered at the time of assessing the development application under City Plan 2000. As such, the proposal did not contemplate the necessary assessment criteria of the City Plan 2000 that would have applied to 'short term accommodation' if that particular use had been applied for. This included specific criteria contained within (however not limited to) the *City Centre Neighbourhood Plan Code*, the *Centre Amenity and Performance Code*, the *Transport, Access, Parking and Servicing Code* and *Transport, Access, Parking and Servicing Planning Scheme Policy*. Certain provisions of these codes would have been required to be addressed differently if a 'short term accommodation' use had been applied for at the time.

22. Of particular note, is that the *City Centre Neighbourhood Plan Code* defined a '*residential development/use*' as a 'multi-unit dwelling', and this definition specifically excluded other uses as a 'residential use' for the purposes of assessment under the Neighbourhood Plan. The exclusion of other uses from the definition, including the use of a premises for 'short term accommodation', further reinforces the different assessment path that such a use would have been required to take should it have been applied for at the time.

23. Although we are not giving advice in relation to the infrastructure charges that would have been applicable to the development at the time of assessment, we would also like to point out that the difference in the way a 'multi-unit dwelling' and a 'short term accommodation' use was defined at the time is likely to have significantly influenced the way infrastructure charges were assessed and levied for the development when the development approval was issued by Council.

24. In accordance with the above, we consider the use of the dwelling units at 212 Margaret Street for 'short-term accommodation' is an offence under s164 of the PA and an offence under the equivalent sections of the IPA and the SPA. Importantly, Section 164 of the PA specifies *'A person must not contravene a development approval.'*[5]

[5] Planning Act 2016, s164.

25. Also, the use is not a **'lawful use'** of premises under the PA and under the equivalent sections of the IPA and the SPA. Under the PA, a *'lawful use, of premises, means a use of premises that is a natural and ordinary consequence of making a material change of use of the premises in compliance with this Act'.*[6]

26. As the use of the premises for 'short term accommodation' is not the use approved on the premises as consequence of the material change use DA (this being 'multi-unit dwelling', 'shop' and 'restaurant'), the use of the site for 'short term accommodation' is an unlawful use of premises. As 'short term accommodation' has never been a lawful use of the premises, the use was unlawful under s4.3.5 of the repealed IPA, remained unlawful under s582 of the repealed SPA, and continues to be unlawful under s165 of the PA, which specifies that:

    'A person must not use premises unless the use —

    (a) is a lawful use; or

    (b) for designated premises—complies with any requirements about the use of the premises in the designation'.[7]

Existing Uses under *Brisbane City Plan 2014*

27. In 2014 the *Brisbane City Plan 2014* (**City Plan 2014**) came into effect changing use definitions of the approved development and existing relevant uses on the premises. City Plan 2014 also changed the framework for regulating development in Brisbane.

28. Under the City Plan 2014, the uses approved on premises can best be described as:

    'Multiple dwelling
    Multiple dwelling means a residential use of premises involving 3 or more dwellings, whether attached or detached, for separate households.'

    'Shop
    Shop means the use of premises for—
    (a) displaying, selling or hiring goods; or
    (b) providing personal services or betting to the public.'

    Examples of a shop— betting agency, corner store, department store, discount variety store, hair dressing salon, liquor store, supermarket.

    'Food and drink outlet
    Food and drink outlet means the use of premises for—
    (a) preparing and selling food and drink for consumption on or off the premises; or
    (b) providing liquor for consumption on the premises, if the use is ancillary to the use in paragraph (a).'

[6] Planning Act 2016, Schedule 2, Dictionary.
[7] Planning Act 2016, s165.

Examples of a food and drink outlet—cafe, coffee shop, drive-through facility, kiosk, milk bar, restaurant, snack bar, takeaway shop, tearoom. [8]

29. Under the City Plan 2014, the existing use of the premises for serviced apartments can best be described as:

    'Short-term accommodation—
    (a) means the use of premises for—
    (i) providing accommodation of less than 3 consecutive months to tourists or travellers; or
    (ii) a manager's residence, office, or recreation facilities for the exclusive use of guests, if the use is ancillary to the use in subparagraph (i); but
    (b) does not include a hotel, nature-based tourism, resort complex or tourist park.' [9]

30. 'Short term accommodation' is also identified as part of the 'Centre Activities' defined activity group as per the definitions of City Plan 2014.

31. The zoning of the premises under the City Plan 2014 is the Principal Centre (PC1 – City Centre) Zone and the premises is contained within City Centre Neighbourhood Plan.

32. When City Plan 2014 came into effect, the plan subsequently made the 'Centre Activities' activity group (which includes 'short term accommodation') *'accepted development, subject to compliance with identified requirements'* within the Principal Centre (PC1 – City Centre) Zone. This category of assessment applies *'If involving an existing premises with no increase in gross floor area, where complying with all acceptable outcomes in section A of the Centre or mixed use code'.* [10]

33. Despite the above, we note that City Plan 2014 cannot affect the rights conferred to the premises by the DA, and the changed planning scheme provisions cannot further regulate the use of the premises.

    Please refer to s260 (i)(b) of the PA (and equivalent sections of the IPA and the SPA) in relation to ***'Existing lawful uses, works and approvals'*** which specifies:

    (1) If, immediately before a planning instrument change, a use of premises was a lawful use of premises, the change does not—

    (a) stop the use from continuing; or

    (b) further regulate the use; or

    (c) require the use to be changed.

    (2) If a planning instrument change happens after building or other works have been lawfully constructed or effected, the change does not require the building or works to be altered or removed.

[8] Brisbane City Plan 2014, Schedule 1, Definitions.
[9] Brisbane City Plan 2014, Schedule 1, Definitions.
[10] Brisbane City Plan 2014Part 5, Table 5.5.7—Principal centre zone.

(3) If a planning instrument change happens after a development approval is given, the change does not—

(a) stop or further regulate the development; or

(b) otherwise affect the approval to any extent to which the approval remains in effect.[11]

34. Because the DA regulates the use and the IPA, SPA and PA made contravention of the DA unlawful this could not be altered by City Plan 2014 or any other scheme amendments made after the DA was granted and implemented. As set out above, those scheme changes could not further regulate the uses of the building. This includes scheme changes which make 'short term accommodation' accepted development (i.e. self-assessable development). That does not permit a use to happen which by operation of the planning legislation is otherwise unlawful.

35. Section 73 of the PA (and the equivalent provisions of the repealed IPA and the SPA) details *'**Attachment to the premises'*** and is to the following effect:

While a development approval is in effect, the approval—

(a) attaches to the premises, even if—

(i) a later development (including reconfiguring a lot) is approved for the premises; or
(ii) the premises are reconfigured; and

(b) binds the owner, the owner's successors in title, and any occupier of the premises.[12]

The DA binds every lot owner and they are all required to use their respective lots in accordance with it. To do otherwise involves committing offences against Sections 164 and 165 of the PA.

36. The Body Corporate appears to believe, based upon town planning advice it received following the Council's recent Show Cause Notice, that units in the building may be used for 'short term accommodation'. We have reviewed an extract from that advice. Its conclusion is based upon 'short term accommodation' in an existing building in the City Centre under City Plan 2000 being accepted (or self-assessable) development. It did not consider the legal consequences of the DA and we do not agree with it for the reasons set out above.

37. We believe the analysis and conclusions expressed above are consistent with the approach taken by, and the reasoning of, His Honour Judge Williamson QC in the recent decision of the Planning and Environment Court in *Caravan Parks Association Of Queensland Limited v Rockhampton City Council (2018) QPEC 52*. In that case the Court made enforcement orders against the Council restraining it from using part of a park of which it was trustee for the overnight parking of motor homes, without a

[11] Planning Act 2016, s260.
[12] Planning Act 2016, s73.

development approval. The Council tried, unsuccessfully, to argue that the motor home parking use was ancillary to the park use and therefore accepted development under the current planning scheme. While the facts are not exactly on all fours with those outlined in this letter, the analysis undertaken by the Court in that case is apposite.

Conclusion

38. In accordance with the above, if the premises are to be lawfully used for 'short term accommodation', that would require the DA to be changed or replaced.

39. Consequently, it is our view that unit owners of 212 Margaret Street, Brisbane who are using their units for 'short-term accommodation' without an approval are committing development offences under s164 and 165 of the PA, and the Council and affected unit owners are entitled to start enforcement proceeding to have the 'short term accommodation' use on the premises cease.

We are accordingly instructed to request the Council to take action to stop the owners of apartments who are using them for short term accommodation from continuing to do so, and to secure compliance with the DA and the provisions of the PA referenced above.

We await your response. Should you have any questions please do not hesitate to contact Jeff Nicholls directly on **0421 559 066,** or via email at **jeff@jntownplanning.com.au**.

Yours sincerely

[redacted]

Jeff Nicholls
Director I Principal Town Planner

Yours sincerely

[redacted]

David Nicholls
Consultant

Encl.

APPENDIX A TITLE SEARCH

CURRENT TITLE SEARCH

NATURAL RESOURCES, MINES AND ENERGY, QUEENSLAND

Request No: 30402319
Search Date: 17/01/2019 12:37 **Title Reference: 50548945**
Date Created: 08/04/2005

Previous Title: 18571028

REGISTERED OWNER

Dealing No: 708558433 06/04/2005

BODY CORPORATE FOR 212 ON MARGARET COMMUNITY TITLES
SCHEME 33840
ERNST BODY CORPORATE MANAGEMENT
71 DAVENPORT STREET
SOUTHPORT QLD 4215

LAND DESCRIPTION

COMMON PROPERTY OF 212 ON MARGARET COMMUNITY TITLES SCHEME 33840
COMMUNITY MANAGEMENT STATEMENT 33840
Local Government: BRISBANE CITY

EASEMENTS, ENCUMBRANCES AND INTERESTS

1. Rights and interests reserved to the Crown by
   Deed of Grant No. 19545097 (ALLOT 2 SEC 7)

2. REQUEST FOR NEW CMS No 718975592 07/09/2018 at 10:15
   New COMMUNITY MANAGEMENT STATEMENT 33840
   ACCOMMODATION MODULE

ADMINISTRATIVE ADVICES - NIL
UNREGISTERED DEALINGS - NIL

CERTIFICATE OF TITLE ISSUED - No

Caution - Charges do not necessarily appear in order of priority

** End of Current Title Search **

Requested By: D-ENQ GLOBALX TERRAIN

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Spice Apartments Residential Management Pty Ltd ATF SARM Trust v Brisbane City Council* [2023] QPEC 2
PARTIES:	**SPICE APARTMENTS RESIDENTIAL MANAGEMENT PTY LTD ATF SARM TRUST** (Applicant) **v** **BRISBANE CITY COUNCIL** (First Respondent) **BODY CORPORATE OF SPICE APARTMENTS CTS 49000** (Second Respondent)
FILE NO/S:	1881/2022
DIVISION:	Planning and Environment
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning and Environment Court, Brisbane
DELIVERED ON:	10 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	30 January 2023
JUDGE:	Everson DCJ
ORDER:	**Originating Application dismissed**
CATCHWORDS:	PLANNING AND ENVIRONMENT – ORIGINATING APPLICATION – whether development application was a properly made application – whether the development application must be accompanied by the written consent of the Second Respondent as owner of the common property in the buildings.
CASES:	*Bartlett v Brisbane City Council* [2004] 1 Qd R 610. *Ferreyra v Brisbane City Council* [2016] QPELR 334. *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* (1980) 145 CLR 485 at 501. *Savage & Anor v Cairns Regional Council* [2016] QCA 103. *Trowbridge v Noosa Shire Council & Ors* [2018] QPELR 501.

LEGISLATION:	*Planning Act* 2016
COUNSEL:	E J Morzone KC and D C Whitehouse for the Applicant B D Job KC and M J Batty for the First Respondent H M Stephanos for the Second Respondent
SOLICITORS:	Mahoneys Solicitors for the Applicant City Legal for the First Respondent Grace Lawyers for the Second Respondent

Introduction

[1] The applicant operates a property management business. Several owners of lots contained within the Spice Apartments Community Titles Scheme ("the CTS") have appointed it to manage their individual lots in the CTS. The second respondent is the body corporate for the CTS, which comprises two 15 storey buildings ("the buildings") containing a total of 274 residential lots and common property located at 23-25 Bouquet Street, South Brisbane ("the land").[1]

[2] On 22 December 2020, the applicant submitted a development application on behalf of a number of lot owners seeking a development approval for a material change of use for Short-term accommodation over part of the land.[2] An amended development application was subsequently lodged on 5 March 2021, seeking approval for 63 of the multiple dwelling units scattered throughout the buildings to be used for Short-term accommodation.[3] On 3 June 2022, the first respondent issued an action notice in relation to the amended development application ("the Action Notice").[4] It stated that the application was not properly made and that for it to be deemed properly made, the applicant was required to provide the signed owner's consent of the second respondent.[5]

[3] In its amended originating application the applicant seeks declarations to the effect that the premises relating to the development application did not include the common property in the CTS, and that the development application complied with the requirements of s 51 of the *Planning Act* 2016 ("PA") and was not required to be accompanied by the written consent of the second respondent as the owner of the common property in the CTS. Further declarations are also sought to the effect that

1 Affidavit of Bronwyn Price, filed 27 September 2022, paras 1, 4 and 5.
2 Ex. 1, p 2, para 1.
3 Ex. 1, p 293 and pp 326 – 329.
4 Ibid, p 2, para 4.
5 Ibid, p 436.

in making the decision to issue the Action Notice in the terms set out above, the first respondent made a decision that involved an error of law, or took into account an irrelevant consideration, or was a decision so unreasonable that no reasonable assessment manager could make it. Thereafter, consequential orders are sought setting aside the Action Notice and requiring the respondent to proceed to assess and determine the development application.

Factual Background

[4] The original development approval giving rise to the CTS dated 17 June 2014, was for Centre Activities - Multi-Unit Dwelling, Shop, Office and Restaurant.[6] In the report which accompanied the application leading to the development approval, the activities the subject of the development approval as they were defined in the respondent's planning scheme at the relevant time, are set out. Relevantly, Multi-Unit Dwelling was defined as *inter alia*, "a use of premises as the principal place of longer term residence by several discrete households, domestic groups or individuals irrespective of the building form."[7]

[5] As noted above, the development application giving rise to the Action Notice sought a development application for a material change of use of Short-term accommodation which is defined in the respondent's planning scheme as, *inter alia* the use of premises for "providing accommodation of less than 3 consecutive months to tourists or travellers". Examples include "Motel, backpackers, cabins, serviced apartments, accommodation hotel and farm stay". The term is expressed to not include "Hostel, rooming accommodation, tourist park".[8]

[6] The need for the development application resulting in the Action Notice is succinctly stated in the town planning report which accompanied it in the following terms:

> Short term accommodation in the PC1 Principal Centre (City Centre) zone where the subject site is located is accepted development subject to requirements under the Brisbane City Plan 2014 (City Plan) and does not require Council approval, however the site is subject to Flood overlay mapping which triggers the requirement for a Code Assessable development application to be made to Council.[9]

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6 Affidavit of Benjamin Lee Sandford, filed 24 October 2022, Ex. "BLS-3", pp 167 – 169.
7 Ibid, p 31.
8 Ex 2, p 199.
9 Ex 1, p 128.

[7] The reasoning behind this trigger is explained in the Flood Risk Assessment which accompanied the development application. Therein, it is stated that Short-term accommodation "is considered to be a difficult to evacuate use" and that a "flood risk assessment is required to satisfy PO10 of the Flood overlay code."[10] Subsequently, the Flood Emergency Procedure in the proposed Flood Emergency Management Plan contemplates a flood warden co-ordinating evacuation via means which include a loudspeaker announcement and door knocks in the event of the need to evacuate arising.[11] It appears that the respondent considers Short-term accommodation a very different use from a flood safety perspective to the approved uses of the land.

[8] It is clear on the evidence before me, that the applicant has been conducting a significant Short-term accommodation use from multiple dwelling units in the CTS for a lengthy period of time. The unchallenged evidence of the chairperson of the second respondent, Bronwyn Price, is that the applicant or its agents have been conducting this use since August 2016.[12] Ms Price then documents a number of respects in which the use of Short-term accommodation being conducted by the applicant is materially different in terms of its impacts upon the common property, to the approved uses.[13]

[9] These impacts arise from both the conduct of guests of lots used for Short-term accommodation in the buildings and the services required to service this use. Firstly, there are impacts on vehicular access and parking facilities which include congestion on the driveway and in the car park, and Short-term accommodation guests parking in visitor car parks or car parks not assigned to them. This use of the land also results in such guests loitering in the reception areas with their baggage. It results in hallways being clogged with cleaning trolleys and temporary beds, which also causes damage the walls. It results in the blocking of garbage disposal infrastructure. This use also results in the pool area being regularly utilised for large, rowdy parties. The unchallenged observations of Ms Price are confirmed by uncontested evidence given by Mr Patterson, another resident.[14] It appears that the

10 Ibid, p 57.
11 Ibid, p 64.
12 Affidavit of Bronwyn Price, filed 27 September 2022, para 12.
13 Ibid, paras 27 – 38, 43 – 48.
14 Affidavit of Michael Alexander Patterson, filed 1 November 2022.

First Respondent was at least aware of most of these impacts prior to issuing Action Notice.[15]

[10] I am satisfied on the facts before me that the conducting of the Short-term accommodation use by the applicant has resulted in not only a material intensification of the use of the common property but also damage to the common property in a way that is unlikely to have occurred had this use not been (apparently unlawfully) conducted on the land. It is the Short-term accommodation use that attracts people in large numbers who bring luggage, and require clean linen for a brief period. They are the people who may require extra beds in their units during their stay. They appear to regularly include individuals who do not care where they park, how much noise they make and whether they upset residents of the buildings. They are, on the evidence before me, a demographic regularly looking for a good time, in circumstances where they are not staying for a long time.

Discussion

[11] Pursuant to s 51 of the PA, a development application must be accompanied by the written consent of the owner of the premises relating to the application where the applicant is not the owner and the application is for a material change of use of the premises.[16] It is uncontentious that the second respondent is the owner of the common property as defined in Schedule 2 of the PA as it would be entitled to receive the rent for the common property if it were rented to a tenant. The term "material change of use" is defined in Schedule 2 of the PA as both "the start of a new use of the premises" and "a material increase in the intensity or scale of the use of the premises". As Bowskill QC DCJ (as Her Honour then was) observed in *Ferreyra v Brisbane City Council* proceedings, such as the originating application, which seek declaratory relief, are analogous to judicial review proceedings and the burden is upon the applicant to demonstrate the respondent's decision was affected by jurisdictional error.[17]

[12] The applicant submits that the consent of the second respondent was not required as the proposed use of Short-term accommodation only seeks to use the common property consistently with its ordinary use and established function in accordance

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15 Ex. 1, pp 681 – 683.
16 *Planning Act* 2016, s 51(2).
17 [2016] QPELR 334 at 336, [5] and [6].

with the already approved uses of the land. It relies in particular upon two decisions of the Queensland Court of Appeal as authority for the argument it advances. Firstly, in *Bartlett v Brisbane City Council* the Court of Appeal found, in circumstances where a lot owner in a building sought to fix laminated glass panels to enclose a balcony and reduce noise impacts, that "No part of the common property was involved or impacted upon by the respondents' proposal".[18] In delivering the judgment of the Court of Appeal, Jones J relied upon the remarks of Stephen J in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* in the following terms:

> In any such scheme for the control of land use the two critical integers, land and use, each involves a question of definition, what land and what use? The intending user of land will, in his application for consent, have to specify these two integers, but it will be one of them, the integer of use, that will dictate the precise identity and extent of the other integer, the land the subject of the application. That is a necessary consequence of the fact that the consent being sought is consent for a particular purpose. The land is merely the passive object which is being used; the active integer, use, will determine its extent.[19]

Unsurprisingly, the Court of Appeal held that the consent of the body corporate as the owner of the common property in the building complex was not required under the equivalent provision of the *Integrated Planning Act* 1997 to s 51 pf the PA, which applied at that time.

[13] The decision in *Bartlett* was applied in *Savage & Anor v Cairns Regional Council*.[20] On the facts of that case, 24 unit owners in a block of 39 strata title units applied for approval for a material change of use from "Holiday Accommodation" to "Holiday Accommodation/Multiple Dwelling". The decision of the primary judge (Morzone KC DCJ) that the consent of the body corporate as the owner of the common property was not required under the equivalent provision of the *Sustainable Planning Act* 2009 which then applied, was upheld by the Court of Appeal. His reasoning in this regard is quoted in the judgment of McMurdo JA in the following terms:

> [103] The primary judge reasoned that the consent of the body corporate:

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18 Ibid, at 616.
19 (1980) 145 CLR 485 at 501.
20 [2016] QCA 103.

> '…was only required if the proposal involved the use of the common property for particular purposes other than the ordinary right of access to and from the lots. The use of the common property for its established function providing access does not require its inclusion as part of the land.'
>
> [104] His Honour distinguished this 'from a case where parts of the common property are an important part of the proposed use or there is a material increase in the intensity or scale of the use of the common property.'[21]

[14] On the facts before me set out above, the use of a significant number of the lots in the CTS, (apparently unlawfully) for Short-term accommodation, has led to a material increase in the intensity or scale of the use of the common property. Unlike the situation considered in *Trowbridge v Noosa Shire Council & Ors*, the evidence goes way beyond mere "speculative assertions about the increased use of the common property and infrastructure in it".[22] The categorisation of whether there is a material increase in the intensity or scale of the use of the common property will always depend upon the facts before the decision maker.

Conclusion

[15] The applicant has not demonstrated any error on the part of the first respondent in deciding to issue the Action Notice. The evidence before it at the relevant time and the evidence before me demonstrates no error in the assessment of the facts relating to the impacts of the proposed Short-term accommodation use on the common property, and therefore the need for the consent of the second respondent to the making of the development application.

[16] The application is dismissed.

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21 Ibid at [103] - [104].

22 [2018] QPELR 501 at 508 [23].