PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Redland City Council v Canaipa Developments Pty Ltd & Ors* [2020] QPEC 65
PARTIES:	**REDLAND CITY COUNCIL** (applicant) v **CANAIPA DEVELOPMENTS PTY LTD** **(ACN 118 404 461)** (first respondent) **IAN ROBERT LARKMAN** (second respondent) **TLC JONES PTY LTD** **(ACN 142 234 099)** **AS TRUSTEE FOR TLC SUPERMARKETS UNIT TRUST NO 2** (third respondent)
FILE NO:	4703 of 2019
DIVISION:	Planning and Environment
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	15 December 2020
DELIVERED AT:	Cairns
HEARING DATE:	28, 29, 30 September & 1 October 2020
JUDGE:	Morzone QC DCJ
ORDER:	**1. Pursuant to s 180 of the *Planning Act 2016*, and subject to further order of the Court, the First and Second Respondents are to ensure compliance with the conditions of the changed development permit MC010476 for material change of use for mixed use (shop, commercial office and refreshment establishment) given on 4 March 2010 with respect**

to land described as Lot 100 on SP 204183 situated at 29-39 High Street, Russell Island, by ensuring that:

(a) there be no public access to any toilets on the Property, as required by Part 3 to Addendum 1 to Sustainable On-site Wastewater Management Plan for 29 High Street, Russell Island, August 2007 dated August 2007;

(b) all wastewater treated by an on-site sewage treatment plant complies with the requirements prescribed in Table 4 in Addendum 1; and

(c) access to the on-site sewage treatment plant in the western retaining wall adjoining Cambridge Road is provided so as to be generally in accordance with the "West Elevation" depicted in drawing 0652A202_6.

2. The timing requirements for the obligations set out in paragraph 1 above comprise:

(a) for paragraph 1(a), compliance is required forthwith

(b) for paragraphs 1(b) and 1(c), compliance is required upon the replacement of the existing on-site sewage treatment plan with any system delivered pursuant to the requirement of paragraph 3(b)(ii) below; and

(c) further for paragraphs 1(a) and/or 1(c), if an application to change the DA is made

so as to remove the requirement to comply with the matters set out in those paragraphs, the requirement to comply with the paragraphs the subject of a pending change application be stayed, subject to the First and Second Respondent:

(i) not withdrawing the change application, unless they have a reasonable excuse; and

(ii) taking all necessary and reasonable steps to enable the change application to be decided as soon as practicable, unless they have a reasonable excuse; and

(iii) if the First and Second Respondents appeal the decision on the change application, them taking all necessary and reasonable steps to enable the appeal to be decided as soon as practicable, unless they have a reasonable excuse.

3. Pursuant to s 505(5) of the *Environmental Protection Act 1994*, and subject to further order of the court, within a period of 9 months from the date of this order, the First and Second Respondents are to:

(a) cease all operation of the existing Sewerage Treatment Plant and the existing land application area underneath the car park on the Property; and

(b) either:

(i) remove and lawfully dispose of all wastewater produced on site by vacuum truck or other similar means; or

(ii) replace the existing Sewerage Treatment Plant and land application area with a new on-site wastewater treatment plant and land application area system authorised by an Environmental Authority for Environmentally Relevant Activity 63.

4. **Pending cessation of the use of the existing Sewerage Treatment Plant, the First and Second Respondents are to comply with the requirements set out in paragraph 1 of the order of his Honour Judge Jones dated 28 February 2020.**

5. **Should the First and Second Respondents fail to comply with the requirements of paragraph 3 above, they are to cease all uses on the Property being undertaken pursuant to development permit MC010476.**

6. **The parties have liberty to apply with seven days' notice in writing.**

CATCHWORDS: ENVIRONMENT AND PLANNING – APPLICATION – application for final enforcement orders compelling compliance with a lawful and functioning on-site sewage and wastewater treatment system – where current system is noncompliant with the approval – where the respondents are committing serious or material environmental harm – where enforcement orders necessary to ensure compliance.

LEGISLATION: *Environmental Protection Act 1994* (Qld) ss 130, 132, 440, 440ZG, 443, 493 & 505(5)

	Planning Act 2016 (Qld) s 180
	Plumbing and Drainage Act 2018 (Qld) s 78
	Plumbing and Drainage Regulation 2019 (Qld) s 45
CASES:	*Caloundra City Council v Taper Pty Ltd* (2003) QPELR 558
	Knight v FP Special Assets Ltd (1992) 174 CLR 178
	Warringah Shire Council v Sedevcic (1987) 10 NSWLR 335
COUNSEL:	K Wylie for the Applicant
SOLICITORS:	Gadens for the Applicant I Larkman Second Respondent for himself and as officer of the First Respondent

Summary

[1] The applicant Council is concerned about the state and operation of the on-site sewage and wastewater treatment system serving a shopping centre owned by the first respondent company of which the second respondent is the sole director, referred to throughout the judgment as the respondent. The third respondent has been excused from further active participation in this application.

[2] The shopping centre provides essential services to the people of Russell Island comprising an IGA supermarket as well as a small number of specialty shops including a kebab shop, Chinese restaurant, bakery, hair salon, post office and pharmacy. The property is the subject of a development permit for a material change of use for mixed-use (shop, commercial office and refreshment establishment) originally approved on 5 November 2007, and most recently a change approved on 4 March 2010. The approval is required for the system because Russell Island is not serviced by a reticulated sewerage network.

[3] The Council allege that the system is being operated unlawfully and is otherwise wholly inadequate and in need of immediate replacement to avoid further environmental nuisance by effluent escaping the property. On 28 February 2020 the respondents consented for interim enforcement orders to stop the use of all on-site permanent toilets, and to require the provision of portable toilets. The order provided for a precautionary measure to ensure that only "greywater," and not "blackwater," was released by existing sewerage infrastructure as a consequence of future failures. This interim enforcement order remains in effect until the proceedings have been finally determined, or further order.

[4] The Council now applies for final enforcement orders compelling the first and second respondents to comply with conditions relating to the system, and to undertake interim measures pending compliance and/or take all necessary steps to install a lawful and functional system to service the shopping centre. The Council bears the onus of proof in this proceeding,[1] with the burden of proof being the civil standard, subject to the *Briginshaw* sliding scale.[2]

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1 *Caloundra City Council v Taper Pty Ltd* (2003) QPELR 558 at [13] per Robertson DCJ.

[5] Whilst the respondents accept that the system is non-compliant in its current form and needs replacement, they argue that Council has unfairly made the process almost impossible and they deny any environmental nuisance. They rely upon their best efforts to maintain and replace the system in the wake of the manufacturer's bankruptcy and the Council's wrongful lapsing of one application and improper intervention with applications to the DES.

[6] The critical questions for determination are:

1. What is the nature and extent of the noncompliance of the system with the approval?
2. Are the respondents committing a development offence by unlawfully committing serious or material environmental harm or environment nuisance or will so commit such an offence against the *Environmental Protection Act 1994* (Qld)?
3. What is necessary to regularise the use of the land, in particular the onsite sewerage treatment system?
4. What enforcement orders, if any, should be made to assure compliance in the exercise of the court's discretion pursuant to s 180 of the *Planning Act 2016* (Qld)?
5. What restraining orders, if any, should be made in the exercise of the court's discretion pursuant to s 505(5) of the *Environmental Protection Act 1994* (Qld)?

[7] I have found that the treatment plant is grossly deficient, unfit for purpose and non-compliant with the changed development permit MC010476. Whilst it is true that the respondent's ongoing maintenance and parts replacement has been frustrated by the manufacturer's bankruptcy, I do not accept that the Council has acted improperly. The 2014 permit to facilitate a replacement system lapsed as a matter of law as a consequence of the respondent's inaction. A more recent application lodged on 27 February 2020 and the subject of an information request, has since been abandoned and also lapsed. The responsibility for currency of those remedial steps fell at the feet of the respondent, not the Council. The Council has neither improperly intervened nor otherwise acted to make the process almost impossible.

[8] I have also found that the state of the treatment plant has and is likely to cause serious or material environmental harm or environment nuisance, being an offence against the *Environmental Protection Act 1994* (Qld).

[9] It will be necessary to regularise the use of the land, in particular the onsite sewerage treatment system, to remove, install and operate a replacement system that is suitable for the purpose. This will necessitate securing the requisite permit and implementation of the work. In the meantime, the shopping centre may remain open and continue to be serviced by temporary measures, infrastructure and effluent removal services.

[10] Having regard to the respondent's unconventional and untimely endeavours to remedy the non-compliance, the distraction of ongoing collateral disputation with

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[2] Ibid at [14]; Approved in *Booth v Yardley* [2007] QPELR 229 at [17] per Wilson DCJ (as he then was).

the local authority, and resultant strained relations between the parties, I think enforcement orders should be made to assure compliance with the development approval, and require the respondent to undertake interim measures and take all necessary steps to install a lawful and functional onsite treatment plant to service the shopping centre and avoid further environmental nuisance.

[11] Accordingly, I will allow the application and make the orders accordingly.

What is the nature and extent of the noncompliance of the system with the approval?

[12] The development permit MC010476 required two NovaClear AWTS systems operating in parallel to be installed on the property to treat wastewater and sewerage and deliver treated wastewater to a land application area underneath the southern car park area in accordance with AES3500 standards.

[13] The system as originally installed, was made of two identical treatment units, each of which was connected to a primary tank. Each of the identical treatment units comprised three chambers: a primary chamber, an aeration chamber and a discharge chamber. Mr Peter Jones, a plumbing and drainage officer in the Council with over 30 years of experience, described how the approved system worked saying:[3]

1. all effluent enters the primary tank, where solids settle to the bottom, where they are broken down by anaerobic bacterial processes;

2. as the liquid level in the primary tank rises to near the top, the 'clearer' liquid overflows by gravity into one of the two treatment units' primary chamber. Given there were two identical systems, there was originally a "flip-flop" switch which transmitted liquids equally between both units;

3. within the primary chamber of each unit, further opportunity is given for solids to settle to the bottom, where further anaerobic bacterial processes occur as occurs in the primary tank;

4. as the liquid level in each of the primary chambers rises to near the top, liquid overflows into the adjoining aeration chamber. Within that aeration chamber is a pump which constantly delivers air bubbles which promotes aerobic bacterial processes to further break down harmful bacteria in the effluent. Similar to the primary chamber, solids also flow to the bottom and are broken down;

5. as the liquid level in the aeration chamber rises to near the top, the liquid from the top of the chamber overflows by gravity into the discharge

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[3] First Jones Affidavit, paras. 10(c), 18, 31 – 32.

chamber. This liquid is classified as non-potable treated effluent, and is suitable for discharge to a land application area; and

6. from the discharge chamber, a pump is activated by a float switch, such that when the liquid level nears the top, an electric pump delivers liquid from the chamber to a land application area, which in this instance is a series of sub-surface irrigation drip-lines underneath the southern part of the car park area."

[14] However, when Mr Jones inspected the system on 17 December 2019 he found it fundamentally deficient and directly connected to the stormwater system which, in turn, escaped into the stormwater network. Mr Jones explained:[4]

> "29. Once we removed all of the access lids I started to photograph the system. There were pipes everywhere, lids were not sealed on the treatment plants or the septic holding tank, and the entire area was very messy.
>
> 30. Even though I did not enter the STP cavity, I was able to observe all aspects of the STP that I felt necessary to express the opinions contained within this affidavit.
>
> 31. …
>
> 32. …
>
> 33. However, the STP did not operate as described in the previous paragraphs. In particular I observed that:
>
> a. The primary tank was completely inoperative. It was full of dirt and mud, was not in use, and in my opinion it had been inoperative for a lengthy period of time;
>
> b. the eastern treatment unit was completely inoperative. The primary chamber was full of dirt, the aeration chamber had no parts installed within it, and the discharge chamber had no pump within it;
>
> c. the effluent connection from the shopping centre to the primary tank had been diverted to deliver the effluent directly to the primary chamber of the western treatment unit;
>
> d. the western treatment unit was inoperative, in that:
>
> i. the aerobic chamber had no pipes connected to it, had no aerobic equipment installed, and it

[4] First Affidavit Jones, paras. 29 to 36 and 37.

appeared that it had not been used for a very long time; and

ii. there was no effluent being delivered into the discharge chamber; and

e. a submersible pump had been installed in the bottom of the western treatment unit primary chamber (where there would not normally be a pump) which was triggered by a float switch. This pump was connected to a common garden hose that came out from the top of the chamber and was joined to a thicker, purple-coloured hose which in turn was connected to an on-site stormwater pipe through a hole in the top of that pipe.

34. As such, instead of processing effluent in the manner described in paragraph 32 above, what I observed was that effluent was delivered directly to the primary chamber of the western unit. As the fluid level increased, a float switch triggered the submersible pump which pumped that untreated sewage directly to the on-site stormwater network.

35. Indeed, I observed, unassisted or unaltered, effluent entering the western unit primary chamber, and I observed the liquid level rise until it triggered the float switch and the pump commenced operation.

36. From my observations of the STP system, the entire system is incapable of repair, and needs to be removed and replaced with a completely new system.

37. This is the worst example of an on-site sewage treatment plant that I have ever observed.

[15] In his second affidavit, Mr Jones considered how the respondents said the system is currently operated but maintained that it was fundamentally deficient, and that future failures are simply inevitable. He said:

3. I have regard to the affidavit of Brian Paddison filed on 17 February 2020 **(Paddison Affidavit**), and the On-Site Wastewater System Assessment and Recommendations Report written by Chris Taylor dated 15 February 2020 **(Taylor Report)**.

4. Having regard to the Paddison Affidavit and the Taylor Report, it appears that wastewater is treated on the site the subject of this proceeding **(the Premises)** in a different manner to that which I observed during the inspection on 17

December 2019. **(the December Inspection)** and described in my Previous Affidavit.

5. In particular, during the December Inspection, wastewater bypassed the primary septic tank (which appeared to be disused) and directly entered one of the chambers (the primary chamber) of one of the two Nova Clear HSTP systems **(Nova Systems)**, where there was no treatment to the sewage, and from which it was delivered by submerged pump directly to the Premises' stormwater network, with that pump being activated by a float switch which energised the pump when the liquid level in that chamber was high enough to activate the float switch.

6. However, from the Paddison Affidavit, and with the benefit of reference to the photos in the Taylor Report, it would appear that wastewater is currently being treated as follows:

   a. *First*, wastewater is delivered to the primary chamber of one of the Nova Systems, where it is subjected to limited anaerobic bacterial treatment;

   b. *Second*, wastewater is delivered to an adjoining chamber via gravity through an interconnecting pipe in the same Nova System, with an aerator in the tank so that it would appear that it is subjected to some aerobic bacterial treatment; and

   c. *Thirdly*, it is pumped into a discharge chamber in the second Nova System by means of a non-approved house, with that liquid being delivered through a "home-made" PVC pipe chlorine tablet holder, where the water presumably flows over chlorine tablets. This chamber is visible in the lower photograph on page 17 of the exhibit to my Previous Affidavit, and it may be observed that this chamber is damaged, and partially collapsed; and

   d. *Finally*, from that discharge chamber, the liquid is emitted to the land application area.

7. In my opinion, the wastewater treatment process described in the previous paragraph is wholly inadequate.

8. The reasons that the system currently described in the Taylor Report and the Paddison Affidavit is inappropriate is as follows:

   a. No approval. There is no authority for the design of this system. Under the *Plumbing and Drainage Act 2018*, all STPs must have "Chief Executive" approval, which means that they must be of a design approved by the Chief Executive of the Department of Housing and Public Works. As a result of this lack of authority, the operation of the system described by Mr Paddison is unlawful.

      This authority issue is more than a mere technicality. For a system to obtain Chief Executive approval, not only must the system be demonstrated to be functional and workable, it must be proved to have been designed by a person capable of designing STPs, and there must be manuals and supporting technical documentation that explain how the system is to be installed.

      The system in place, which I infer was designed by Mr Paddison (who holds a restricted drainers licence), and which could be accurately described as 'home-made', is not supported by documents or other technical analysis to prove that the system works, and to what standard, let alone how the system should be serviced (and how often), maintained or repaired. These are fundamental issues apart from a lack of understanding as to what the throughput capacity of the system is;

   b. Insufficient capacity. Putting aside the efficacy of the wastewater treatment system in its operation (described below), it has insufficient capacity to accept the wastewater flow rates produced from the site. The approved STP required two 5750 L Nova Systems to handle the flow rates produced from the site, each of which incorporating a primary chamber (with anerobic processes), an MBR chamber (which utilised both membranes and air diffusers to break down effluent), and a final effluent chamber. However, the system in place is, in effect, one system, and one which would operate far less efficiently than one single approved Nova System design.

      Exacerbating this problem is the fact that the final 'chlorine' chamber is damaged and partially collapsed, as visible in the lower photograph on page 17 of the exhibit to my Previous Affidavit, which means liquid has even less time in the system to permit treatment to occur prior to pumping to the application area.

      What this means, in practice, is that wastewater will flow through this singular system faster that it would flow through two Nova Systems in parallel, which means that wastewater will spend less time in the system, and will therefore be subjected to less

treatment, as an essential part of effluent treatment for systems of the type in place is a set predetermined minimum time in the tanks to permit aerobic and anerobic processes to properly work;

c. No control. A good diagram depicting how a Nova System is supposed to operate is attached at page 19 of the Taylor Report. A clearer copy of this diagram is attached at page 1 to Exhibit PRJ-2 of my affidavit. A critical part of this system (or, indeed, any STP) is the control box on the top of the system, which is the "brains" of the STP.

   The control system controls the rate in which liquids move through the system so as to ensure liquids spend sufficient time in each part of the system to permit proper effluent breakdown to occur. If more liquid is attempted to be placed into the system than it can handle, an alarm would sound, so that the problem can be immediately rectified.

   However, from the Paddison Affidavit and Taylor Report, it is apparent that there is no electrical control system in place for the existing system, and instead flow is controlled through the system through use of submerged pumps driven by float switches, which automatically move wastewater on the next chamber once that chamber becomes full. What this means is that:

   i. there is no means to ensure that wastewater spends sufficient time in each chamber to permit proper and sufficient wastewater treatment to occur.

   ii there is no alarm to indicate when the capacity of the system is being reached or exceeded; and

   iii there is no alarm to indicate that there is an issue in the system. For example, foreign matter flushed down a drain or toilet such as a sanitary pad or toilet bowl cleaners could foul a pump causing the liquid level to rise to the point where untreated sewerage would overflow, all without any other warning to on-site occupants.

d. No sealed system. The pipes between the second and third tank as well as the timbers and rope supporting the pumps indicate that the system is not a 'sealed' system with a lid. This is a fundamental deficiency of any STP, and means that any blockage or breakdown in the system will result in the obstructed chamber overflowing into the STP cavity. Indeed, I am aware of previous instances of a liquid being emitted from a stormwater point on Cambridge Street, which I expect was the result of an overflowing chamber in the STP within the underground void directing liquid into the aggi pipe which is connected to a drain that is connected to the kerb adjacent to the STP underground cavity;

e. No membranes. A critical feature of the Nova System is the use of membranes in the each of the second chambers within Nova Systems, and in some respects this made the Nova series of STPs unique. How these membranes operate is described in Appendix C to the Sustainable On-Site Wastewater Management Plan attached to the Taylor Report. Mr Paddison, in his affidavit, explains that he has removed the existing membranes and he cannot obtain replacement membranes, and in the Taylor Report it is confirmed that there are no membranes being used at all. What this means is that the operator can have no confidence that the system is operating to an appropriate advanced secondary standard;

f. Use of chlorine. Potentially to mitigate against the non-use of membranes, or the use of only one STP instead of two, Mr Paddison has directed wastewater to flow over the top of chlorine tablets in a home-made basket in the final chamber. This is, in my opinion, is wholly inadequate, as there is no method to ensure that all wastewater comes into contact with the chlorine tablets, and there is no study or analysis to demonstrate that the system would work, let alone guidance as to how (and how often) chlorine tablets should be placed with the basket. While some STP systems utilise chlorine treatment as part of the wastewater system, the Nova System is not one of them, and what is occurring is really a mis-match of two different types of wastewater treatment into the one system; and

g. Quality of plumbing. The images contained in pages 25 and 26 of the Taylor Report show plumbing and drainage work of the lowest quality. There is a blower pump discarded to the side of the system, lids are unsealed, there is no control of flow through the chlorine disinfection pipe to ensure equal liquid distribution, the use of the piece of timber across the final chamber with a rope presumably attached to a submerged pump is unapproved, and the pipes and hoses used in the system are all non-approved.

9. For all of the above reasons, it is my opinion that:

a. Even when the system described in the Paddison Affidavit and Taylor Report is "working", the liquid produced would not achieve the quality standards set out in Australian Standards AS1546.3 2017 – Onsite Domestic Wastewater Treatment Units, which is the appropriate standard to apply to this STP. For example, in a properly functioning STP, treated wastewater in the "final" chamber prior to delivery to the land application area should be clear and look like water. However, the liquid in that chamber depicted in Figure 22 on page 26 of the Taylor Report appears murky and unclear. The result of this is that liquid emitted from this system will pose health and amenity risks to the public.

b. Because there is less treatment in the system, there will not be sufficient time for the breakdown of particulate matter, such that

liquid will be delivered to the land application area with coarser particulate matter than is appropriate. Indeed, I have had regard to the testing undertaken and described in the Paddison Affidavit, and note that the Suspended Solids result, which is a measure of particulate matter, is double the maximum figure required for the Nova System and Australian Standard AS 1546.3. What this means is that the fine diameter nozzles in the part of the land application system that delivers liquid to the soil will clog, causing backpressure to the STP which will result in failure of a pipe or fittings in the land application area (with discharge of effluent to a location not designed for discharge), or failure of the pump in the final STP chamber which would result in overflow of that chamber into the STP underground cavity; and

c. Because of the extremely poor quality of the system, breakdowns will be inevitable, and with no alarm to indicate the existence of a breakdown, unplanned sewage discharge to the Premises would also be, in my opinion, inevitable."

[16] In cross examination, Mr Jones rejected the suggestion that the system was "under construction and down for maintenance" and in the "process of replacement" saying that "*Around a functioning treatment plant, I wouldn't expect to see broken and discarded pumps and pipes, broken tools, loose bits of timber laying across the top of pits, pieces of rope holding pumps inside pits, noncompliant garden hose connecting pipes from a pump to the treatment outlet into the stormwater, a lay flat hose, which is a nonapproved material. Treatment plant has the chief executive approval, and everything within that approval is the only equipment that can be within that system. ... No garden pipes, no lay flat hoses. So yes, it was an appalling system*." He concluded that the principal septic tank was not connected to the sewage treatment system in place on the property,[5] and that the air blower associated with the system had not been used for a long time.[6]

[17] As for the criticism that Mr Jones did not wait to see the system "fully operational" on 17 December 2019, he explained how it was grossly deficient and the futility of any short term fix saying "*it was impossible for that system to produce any raw sewerage to a dense secondary quality without absolutely major overhauling the entire system, which would take far longer than 15 minutes*".[7]

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5 T3-56/43 to T3-57/13.
6 T3-79/20-34.
7 T3-88/2 to T3-89/3.

[18] This was consistent with the evidence of Mr Meehan, another qualified plumber who undertook a detailed inspection. He explained seeing one of the chambers filled with dirt, another chamber had collapsed, compromising its structural integrity and unable to be re-utilised,[8] and that the principal septic tank was also full of dirt and inoperative.[9] He also noted an absence of any necessary alarm or monitoring systems,[10] and testified about the absence of blowers or sealed lids.[11] He opined that the system was "beyond maintenance".[12]

[19] Mr Paddison, a contractor retained by the respondents, explained that the systems were no longer being manufactured since 2017, so he designed the "hybrid" system[13] as an interim measure[14] which quite significantly departs from the approval.[15] He accepted that future compliance was impossible and replacement was appropriate.[16] Despite the well-founded criticism about the deficiencies and timing of body camera and other footage at the time of the warranted inspection, in the end, it had little bearing on the wretched state of the system.

[20] Indeed, the second respondent also agreed that the system "needs to be replaced".[17]

[21] To that end, the respondents secured a compliance permit for plumbing and drainage work approved 5 September 2014 under the repealed *Plumbing and Drainage Act 2002*,[18] however, that lapsed because the respondents failed to substantially commence works within the currency period of two years.[19] The respondents apparently changed direction to replace the system in April 2017,[20] and it is conceded that instructions to Mr Paddison to "go ahead" to complete the installation of the 2014 permit works was not given until May 2019.[21] In any event, the permit lapsed as a matter of law due to the inaction of the respondents, and, as such, there can be no impropriety sheeted home to the Council.

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8 T2-94/15-41; T2-121/31-38.
9 T2-102 l 35 to T2-103/18.
10 T2-121/40-44.
11 T2-122/29-40.
12 T2-95/18-38.
13 T4-45/40-41.
14 T3-46/7-40.
15 T4-45/8-9.
16 T3-46/7-40.
17 T4-38/10-12.
18 Third Craig Affidavit, para 4.
19 *Plumbing and Drainage Act 2002* (Qld), s 78(2)(b).
20 Paddison Affidavit, paras 5-7.
21 Respondents' Outline of Argument para 17(f).

[22] More recently, the respondents' proposal to replace the system was the subject of a further application to the Council for a permit under the *Plumbing and Drainage Act 2018* made on 27 February 2020.[22] The respondents' hope in vain for an approval *"without further delay,"* because it has also lapsed, as a matter of law, because the respondents failed to respond to the information request given on 11 March 2020,[23] within the prescribed six months.[24]

[23] Despite acknowledging that the non-complainant system needs attention and replacement, and despite the supervision of the court, it seems to me that the respondents have distracted themselves, feeling victimised by the Council and developed somewhat of a siege mentality. Much of the respondents' focus has been on collateral issues as evidenced by the affidavit material and replete in their submissions, which are not to the point of non-compliance with the existing approval.

[24] It seems to me that the respondents have failed to ensure compliance with condition 1(1) of the approval, which requires the development to be carried out generally in accordance with the approved drawings and documents forming a part of the approval. I'm bound to conclude that the system does not comply with the approval, is not fit for its approved purpose, and requires replacement subject to a further approval.

Are the respondents committing a development offence by unlawfully committing serious or material environmental harm or environment nuisance or will so commit such an offence against the *Environmental Protection Act 1994* (Qld)?

[25] The Council contends that the noncompliant, altered and poorly maintained system has been altered such that untreated effluent is discharged to the site and surrounds.

[26] Condition 1(1) of the approval requires the development to be carried out generally in accordance with the approved drawings and documents forming a part of the approval.[25] The standards set out in Part 4 of the Sustainable On-site Wastewater Management Plan, includes section 4 as follows:[26]

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22 Second CEO Statement, #43, para 6 and Exhibit pp.69-106.
23 Ibid, Exhibit pp.107-114.
24 Ibid, para 3; *Plumbing and Drainage Regulation 2019* s 45(4).
25 First CEO Statement, CD#13, Exhibit p.75.
26 First CEO Statement, CD#13, Exhibit p.52.

"4. Waste Water Treatment

4.1 Overview

The commercial wastewater shall be treated using a commercially available package waste water treatment plant. Appropriate technologies include:

- Activated sludge
- Recirculating textile filter
- Biolytix

The treatment technology should be capable of producing Class B quality water.

4.2 Water Quality Requirements

The water quality requirements specified by the QLD EPA for Class B recycled water are listed below

Table 4: Water quality requirement sfor Class A recycled water (QLD EPA, 2003)

Parameter	**Limit**
Biochemical Oxygen Demand, BOD5 (mg/L)	< 20
Suspended Solids (mg/L)	< 30
TDS (mg/L)	< 1000
pH	6 – 8.5
Thermotolerant Coliforms (org/100 mL)	< 100

[27] I accept the evidence of Ms Danielle Fleming, a Council Environmental Health Officer, qualified in Public Health majoring in Environmental Health, that:

1. The Council has received public reports about sewage odours emanating from both the property and an unnamed creek to the south since 2009;

2. On 9 April 2019 liquid was seen discharging from a stormwater pipe leading from the system into the Cambridge Road stormwater kerb and channel, and samples of that liquid showed it to have Intestinal Enterococci readings of up to 3,600 Colony-Forming Units. She explained that this indicated a high reading of sewage contamination that would be expected in excess of 200 CFUs;

3. On 6 November 2019, an opaque liquid was seen emanating from a stormwater pipe from the shopping centre which tested at 88,000 CFUs, indicating "extremely high, and close to raw sewage effluent"; and

4. On 21 February 2020, she saw a large amount of liquid running from north to south along the surface of the lower car park area of the shopping centre toward a stormwater inlet point, which had a strong sewage-like odour. Subsequent testing showed this liquid to have IE readings of 8,000 and 17,000 CFUs.

[28] I found Ms Fleming to be both truthful and reliable. I accept her evidence, and I reject, as unsubstantiated speculation, the respondents' suggestion that the readings could be attributed to bats and other animals or perhaps the nearby police station as the source of untreated effluent being delivered to the roadside kerb, southern creek line.

[29] The respondents have failed to utilise a "commercially available package waste water treatment plant", and instead used an altered system designed by Mr Paddison, who has no authority or licence to design systems of this type. Consistent with the altered state and periodical use of the system, that untreated wastewater is diverting and escaping from the property onto public areas. That wastewater does not comply with the Suspended Solids and Thermotolerant Coliforms limits set out in Table 4 in Part 4 of the Addendum 1 to Sustainable On-site Wastewater Management Plan.[27]

[30] It is also uncontroversial that, prior to the making of Jones DCJ's interim enforcement orders, the public enjoyed access to one of the shopping centre toilets adjoining the front entrance to the IGA.[28] The respondents have failed to ensure that there is no public access to toilets in the shopping centre, as required by s 3.1 of Addendum 1 to Sustainable On-site Wastewater Management Plan. The circumstances of the access are confused and confusing for want of direct evidence, and remain in dispute.[29] Even so, if this was the only breach it would be a relatively minor matter.

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27 T3-27/4-19. Peterson Affidavit Exhibit p.12, samples 1 and 2; Second Fleming Affidavit, Exhibit p.8, samples 1 and 2, which all exceed 100 CFU/100mL by extraordinary amounts.

28 See, e.g., First Fleming Affidavit, paras 34-35.

29 Respondents' Submissions section 2(d) "Foyer Toilet Access" and related submissions.

[31] Additionally, there remains dispute about the required door access to the system within the face of the retaining wall addressing Cambridge Road, as described in the West Elevation drawing 0652A202_6 Issue 070914. There is no dispute that the access has never been constructed in drawings. The respondents contend that the Council was complicit in the final construction (absent the access door) and the construction plans were subject of building approval.[30] Even if the construction was subject of building approval, such approval does not displace the primacy of the parent material change of use approval. It seems to me that the construction is essential for safe access into the confined space at ground level and ought be remedied. However, if this was the only breach it would be a relatively minor matter in all of the circumstances.

[32] The respondents have also asserted various matters about Council's appalling internal systems, unfair harassment, incomplete and missing information, improper intervention, interference, manipulation of the system, erroneous observations of pump activation, power sources, maintenance, superseded plans, dubious camera footage and inspection behaviour, incomplete and premature inspection, misrepresentation of malfunction and non-compliance, etc. and overall frustration of the respondents' genuine efforts to simply complete the installation of the AES system as approved by RCC in 2014.[31] On my careful consideration of the respondents' submissions, none of these matters sway the degree of gross non-compliance with the existing approval. Indeed, they reinforce the exhaustive efforts of all parties to address the matter with different perspectives, obligations and priorities. These matters are relevant to the exercise of the discretion in making enforcement orders, as further discussed below.

[33] Nevertheless, I am satisfied to the requisite high level of probability that by the incidence of diversion and unlawful discharge into the street gutter, the respondents have committed a development offence by unlawfully committing serious or material environmental harm or environment nuisance or will likely continue to so commit such an offence against the *Environmental Protection Act 1994* (Qld).

What is necessary to regularise the use of the land, in particular the onsite sewerage treatment system?

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30 Respondents' Submissions section 2(2) & (f), and 23(d).
31 Respondents' Submissions dated 2/11/20.

[34] There remains common ground that the system must be replaced with a more robust and serviceable system as soon as practicable. The applicant Council does not contend for the immediate closure of the shopping centre, but would rather propose orders be made in a manner that would permit a path to regularisation. It is accepted that the shopping centre is an essential community service.

[35] Licences to install and operate sewerage treatment systems require a permit given by Council under the *Plumbing and Drainage Act 2018* (Qld), or an Environmental Authority given by the Department of Environment and Science under the *Environmental Protection Act 1994* (Qld).

[36] Schedule 2 of the *Environmental Protection Regulation 2019* prescribes that for sewage treatment that operates one or more sewage treatment works at a site that have a total daily peak design capacity of at least 21EP is an Environmentally Relevant Activity (here ERA 63). The applicable "EP" is calculated by reference to daily design capacity, with each EP being taken to be the equivalent of 200 L/day of average dry weather water flow. Accordingly, if a STP is likely to receive a peak of 4,200 L/day or more, then the activity constitutes an ERA, for which an EA is required. By way of counterpart, the definition of "*on-site sewage facility"* under the *Plumbing and Drainage Act 2018* (Qld), excludes *environmentally relevant on-site sewage facilities*, which in turn is defined as a sewage treatment plant the operation of which is an environmentally relevant activity under the *Environmental Protection Act 1994* (Qld).

[37] For the respondents' shopping centre a replacement system should have the design capacity to accommodate inflows greater than 4,200 L/day,[32] such that an EA for ERA 63 is required. This is so, in my view, even though the source of increased water use from the Chinese Restaurant tenant has been identified and curtailed. This is also consistent with the applicant Council's information request on 7 February 2020 for a replacement system. It is also consistent with the second respondent's subsequent application to the Department of Environment and Science for an EA for ERA 63 dated 17 April 2019 supported by the expert opinion of Mr Taylor,[33] saying:

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32 Second Craig Affidavit, para 39.

33 Second CEO Statement, Exhibit p.121, and T4-66/32-37 & T4-68/34 to T4-69.

"**3.3 Hydraulic Loading**

The measured potable water usage at this site, recorded from the main water supply meter during this site and soil evaluation, found the daily water usage is 3,960L/day. However, due it the sites' retail nature where tenancies can change, a design volume has been calculated using The Planning Guidelines for Water Supply and Sewage (April 2010) published by the Queensland Water Supply Regulator, Water Supply and Sewage Services, Department of Energy and Water Supply.

The following design flows have been calculated based on these guidelines and presented in Table 1, below.

Table 1: Hydraulic Loading

Activity	**GFA***	**Expected Sewage flow**	**Total**
Retail Shopping Centre	1600m^2	200 L / 100m^2	3200 L
Food Service	300m^2	900 L / 100m^2	2700 L

*Note: The GFA of retail space and food services in Table 3 is a conservative approximation only based on the overall site size.

The total calculated design flow is 5,900 L/day. This design adopts a peak design capacity of 6,000 L/day. The Equivalent Persons have been calculated below:

EP = 6000 /200 = **30 EP**

EP = [(12 / 1000) x 6000] / 2.5 = **28.8EP**

The greater result from the two calculations is adopted as the EP for the site. This site therefore has an 3**0EP**.

The hydraulic design capacity of this wastewater treatment and effluent disposal system exceeds 21 EP. This approval is therefore an ERA 63(a)(i) under schedule two of the Environmental Protection Regulation 2008."

[38] In my view a reasonable time to undertake this significant regularisation process is 9 months.

[39] Pending installation of an approved replacement system, Council seeks an enforcement order be made for regular and periodic removal and lawful disposal of all wastewater produced on site by vacuum truck or similar lawful means. This was affirmed by Mr Paddison, and I too agree.

[40] I think it is also appropriate, within the enforcement orders, to stay the effect of the enforcement orders pending the making of a change application to the 2010 material change of use development permit, in circumstances where: the installation of an ERA 63 replacement system with larger capacity to serve existing public toilets for public use; and removal of the side access door may be justified.

[41] A requirement to expeditiously make and progress any change application is consistent with the requirements set out in s 172 of the PA.

[42] Since supervision of this court is warranted, it is also appropriate to provide the parties liberty to apply for matters arising in the implementation of the orders, or other incidental requirements to change any of the orders, including timelines.

What enforcement orders, if any, should be made to assure compliance in the exercise of the court's discretion pursuant to s 180 of the *Planning Act 2016* (Qld)?

[43] In reliance upon such findings, the applicant Council seeks enforcement orders pursuant to s 180(3)(a) of the *Planning Act*.

[44] Section 180 provides:

> "**180 Enforcement orders**
>
> (1) Any person may start proceedings in the P&E Court for an enforcement order.
>
> (2) An *enforcement order* is an order that requires a person to do either or both of the following—
>
> (a) refrain from committing a development offence;
>
> (b) remedy the effect of a development offence in a stated way.
>
> (3) The P&E Court may make an enforcement order if the court considers the development offence—
>
> (a) has been committed; or
>
> (b) will be committed unless the order is made.
>
> …
>
> (5) An enforcement order or interim enforcement order may direct the respondent—
>
> (a) to stop an activity that constitutes a development offence; …"

[45] 'Development offence' is described in s 161 of the Act as including, relevantly, the offence of non-compliance with a development approval contrary to s 164. I have concluded above that by the gross non-compliance and a development offence occurring by the operation of the shopping centre inconsistent with the requirements of conditions of the approval. Enforcement orders are warranted subject to the discretionary matters below.

[46] The imposition of enforcement orders are a matter of the proper exercise of discretion as espoused by Kirby P (as he then was) in *Warringah Shire Council v Sedevcic*.[34]

[47] Kirby P (as he then was) in *Warringah Shire Council v Sedevcic,*[35] helpfully set out a number of guidelines for the exercise of discretion in relation to the imposition of enforcement orders which are relevant for this case, the Council submits:

(i) The starting point is that the Court's discretion is wide, and unfettered;

(ii) there is an indicated legislative purpose of upholding, in the normal case, the integrated and coordinated nature of planning (and environmental law). Unless this is done, equal justice may not be secured. Private advantage may be won by a particular individual which others cannot enjoy. Damage may be done to the environment, which it is the purpose of the orderly enforcement of environmental law to avoid;

(iii) the instant application is made by the local government. The local government is seen as the proper guardian of public rights. The Council's interest is deemed to be protective and beneficial, not private or pecuniary;

(iv) the relief sought here is not against a "static development" (e.g. the erection of a building) the removal of which would occur at great cost or inconvenience, but against a continuing breach by conduct; and

(v) the breach is not merely a technical breach, but is having significant adverse amenity impacts on the environment and surrounding residents in the locality and impacts on the environment as noted in the evidence before this Court.

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34 *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-341, applied in *NRMCA (Qld) Ltd v Andrew* [1993] 2 Qd R 706; *Russell v Pine Rivers Shire Council & Ors* [1996] QPELR 241.

35 *Warringah Shire Council v Sedevcic* (1987) 63 LGERA 361 at 339 & 365.

[48] The nature and extent of the breach ought be considered in the context of the relevant statutory regulatory framework.[36] There is, for the reasons discussed above about the nature and extent of non-compliance and resultant consequences, an unacceptable risk that the noncompliance, poorly serviced and maintained system will be subject of periodic and inevitable routine failure and unregulated escape of untreated effluent to the site and surrounds. This enlivens the public health risk of people attending the shopping centre and neighbourhood to come into contact with untreated effluent.

[49] The applicant is the local government. In *Sedevcic,* Kirby P noted, as a proper consideration for proceedings of this nature:

> "Where the application for the enforcement of the Act is made by the Attorney-General, or a Council, a court may be less likely to deny equitable relief than it would in litigation between private citizens: Associated Minerals Consolidated Ltd v Wyong Shire Council (at 692). This is because the Attorney-General or the Council are seen as the proper guardians of public rights. Their interest is deemed to be protective and beneficial, not private or pecuniary: cf *Rowley v New South Wales Leather Trading Co Pty Ltd v Woollahra Municipal Council* (1980) 46 LGRA 250. Of course, as the development or administrative law demonstrates, administrators who advise the Attorney-General or Councils can sometimes act from motives which are less disinterested. Courts will be alert to insensitive, unthinking administration in this as in other fields of law."

[50] In my view the Council properly pursued the enforcement proceedings. It is the custodian of the planning scheme and environmental provisions and the proper compliance regulator of resultant approvals. Here, the safety and well-being of the local Russell Island community is paramount.

[51] However, the respondents' efforts have been inadequate. The respondents' expert, Mr Paddison confirmed that the existing system became impossible to properly maintain in April 2017.[37] I have mentioned the recent lapsed applications due to the failure to respond to an information request in a timely way. Even though this proceeding started a year ago in December 2019 and has been the subject of significant court supervision, the first respondent has not obtained an environmental authority to replace the existing system. The second respondent is an engineer with

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36 *Caloundra City Council v Taper Pty Ltd & Anor* [2003] QPELR 558 at 582.
37 Paddison Affidavit, CD#15, para 6.

experience in design and operation of municipal sewage treatment systems,[38] yet he also has been distracted by his significant distrust and ill will towards the Council. He continues to mislead himself by futile reliance upon the lapsed 2014 permit, which seems unfit for the purpose in any event.[39]

[52] The cost and effort of compliance required of the respondents is justified. In the end, lawful delivery of sewerage infrastructure that will serve the first respondent, users of its shopping centre and the broader Russell Island community. Compliance will not produce undue economic harm but will likely increase the viability, operation and financial security the shopping centre.

[53] This is an appropriate case where orders should be made against both first and second respondents.

[54] As an executive officer, the second respondent also commits the development offences as imputed by s 227 of the Act. An "executive officer" is defined in Schedule 2 as meaning "*a person who is concerned with or takes part in the management of the corporation, whether or not the person is a director or the person's position is given the title of executive officer.*"

[55] The second respondent was and is the sole director, shareholder and controlling mind of the first respondent. He knew, or ought reasonably to have known, of the company's conduct constituting the offence against the executive liability provision; and, he was in a position of sole influence over the company's conduct in relation to the offence against the executive liability provision. It seems to me that the second respondent did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence, and liability provision; and having been distracted by collateral issues, he did not take all reasonable steps to ensure the corporation did not engage in the conduct constituting the offence.

[56] Having regard to the evidence in this proceeding, it is submitted that the Court would be satisfied that with respect to system maintenance, and the requirement for compliance with 2010 material change of use development permit conditions, the second respondent was an "executive officer" of the company, and that he did not

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38 First Larkman Affidavit, CD#14, paras 3-4.

39 See, e.g. Third Craig Affidavit, CD#39, paras 14-17.

take reasonable steps to ensure his company's compliance with those impugned conditions.

[57] I think this is an appropriate case given the extent of complaisance and the respondents' wilful distraction, that enforcement orders ought be made against the first respondent, as well as against the second respondent to ensure compliance.

What restraining orders, if any, should be made in the exercise of the court's discretion pursuant to s 505(5) of the *Environmental Protection Act 1994* (Qld)?

[58] Orders are also sought pursuant to s 505(5) of the *Environment Protection Act 1994* (Qld) to manage the interim period pending regulation of the treatment of sewerage for the development.

[59] Section 505(5) empowers the courts as the administering authority to make "*orders [the Court] considers appropriate to secure compliance with this Act"*. This power conferred upon a court must not be inappropriately confined by implying limits which are not found in the statutory text, and the plain words in the empowering provision should be given their full meaning unless there is something to indicate to the contrary.[40] Therefore, the court may make remedial or restraining orders if satisfied that an offence against this Act has been committed (whether or not it has been prosecuted); or an offence will be likely committed unless restrained. Such an order may require remediation or restraint, secure compliance, specify the time by which the order is to be complied with; and order reasonable costs. The same discretionary considerations apply as those discussed above.

[60] Having regard to my findings about the sewerage discharge subject of evidence, I am satisfied that offences under the *Environmental Protection Act 1994* (Qld) have occurred pursuant to ss 440, 440ZG and 443 (even though one is enough). And even if not continuing, bearing in mind the purposeful system alteration, want of maintenance and state, unlawful diversion, quality of wastewater discharge and continuing attitude of the respondents diverting from the real issues, I think there is a real likelihood of future environmental breaches. Conversely, I am unable to discern any proper basis to determine the various effluent emissions to have been characterised as being "under maintenance" and/or undertaken "lawfully".[41] As the

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40 *Knight v FP Special Assets Ltd* (1992) 174 CLR 178 at 205 per Gaudron J.

41 *Environmental Protection Act* 1994 (Qld), s.493A(2).

administration and enforcement of ss 440, 440ZG and 443 has been devolved to Council pursuant to ss 130 and 132 of the *Environmental Protection Regulation 2019*, Council is the "administering authority", as that term is defined in sch 4 of the *Environmental Protection Act 1994* (Qld).

[61] Section 493 of the *EP Act* provides that executive officers of a corporation must ensure compliance, and that if a corporation commits an offence against a provision of the Act, subject to some defences,[42] each of the executive officers also commits an offence.

[62] Accordingly, the forms of enforcement orders to achieve an outcome that will ensure the cessation of system failure and corresponding effluent emissions are set out in further detail below.

Orders

[63] For these reasons, I will make the following orders in terms of the draft order initialled and filed as follows:

1. Pursuant to s 180 of the *Planning Act 2016*, and subject to further order of the Court, the First and Second Respondents are to ensure compliance with the conditions of the changed development permit MC010476 for material change of use for mixed use (shop, commercial office and refreshment establishment) given on 4 March 2010 with respect to land described as Lot 100 on SP 204183 situated at 29-39 High Street, Russell Island, by ensuring that:

    (a) there be no public access to any toilets on the Property, as required by Part 3 to Addendum 1 to Sustainable On-site Wastewater Management Plan for 29 High Street, Russell Island, August 2007 dated August 2007;

    (b) all wastewater treated by an on-site sewage treatment plant complies with the requirements prescribed in Table 4 in Addendum 1; and

    (c) access to the on-site sewage treatment plant in the western retaining wall adjoining Cambridge Road is provided so as to be generally in

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42 *Environmental Protection Act* 1994 (Qld), s 493(4).

accordance with the "West Elevation" depicted in drawing 0652A202_6.

2. The timing requirements for the obligations set out in paragraph 1 above comprise:

    (a) for paragraph 1(a), compliance is required forthwith

    (b) for paragraphs 1(b) and 1(c), compliance is required upon the replacement of the existing on-site sewage treatment plan with any system delivered pursuant to the requirement of paragraph 3(b)(ii) below; and

    (c) further for paragraphs 1(a) and/or 1(c), if an application to change the DA is made so as to remove the requirement to comply with the matters set out in those paragraphs, the requirement to comply with the paragraphs the subject of a pending change application be stayed, subject to the First and Second Respondent:

        (i) not withdrawing the change application, unless they have a reasonable excuse; and

        (ii) taking all necessary and reasonable steps to enable the change application to be decided as soon as practicable, unless they have a reasonable excuse; and

        (iii) if the First and Second Respondents appeal the decision on the change application, them taking all necessary and reasonable steps to enable the appeal to be decided as soon as practicable, unless they have a reasonable excuse.

3. Pursuant to s 505(5) of the *Environmental Protection Act 1994*, and subject to further order of the court, within a period of 9 months from the date of this order, the First and Second Respondents are to:

    (a) cease all operation of the existing Sewerage Treatment Plant and the existing land application area underneath the car park on the Property; and

    (b) either:

(i) remove and lawfully dispose of all wastewater produced on site by vacuum truck or other similar means; or

(ii) replace the existing Sewerage Treatment Plant and land application area with a new on-site wastewater treatment plant and land application area system authorised by an Environmental Authority for Environmentally Relevant Activity 63.

4. Pending cessation of the use of the existing Sewerage Treatment Plant, the First and Second Respondents are to comply with the requirements set out in paragraph 1 of the order of his Honour Judge Jones dated 28 February 2020.

5. Should the First and Second Respondents fail to comply with the requirements of paragraph 3 above, they are to cease all uses on the Property being undertaken pursuant to development permit MC010476.

6. The parties have liberty to apply with seven days' notice in writing.

Judge DP Morzone QC