

10 DEC 2008

APPLICANT'S POINTS OF CLAIM**COURT DETAILS**

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| Court | Land and Environment Court of New South Wales |
| Class | Class 4 |
| Case number | 41115/08 |

TITLE OF PROCEEDINGS

| | |
|-------------------|---|
| Applicant | Conservation of North Ocean Shores Inc |
| First respondent | Byron Shire Council |
| Second respondent | Billinudgel Property Pty Ltd |

FILING DETAILS

| | |
|--------------------------------|---|
| Filed for | Conservation of North Ocean Shores Inc – Applicant |
| Legal representative | Environmental Defender's Office |
| Legal representative reference | SH: 11606 |
| Contact name and telephone | Sue Higginson – Solicitor – 02 6622 7381 |

APPLICANT'S POINTS OF CLAIM

- 1 The Applicant is an incorporated association incorporated under the *Associations Incorporation Act 1984* (NSW).
- 2 The First Respondent is the Council for the Byron Shire (**'the Council'**) being the Local Government Area in which Lots 46, 402, 403, 404 and 410 in Deposited Plan 755687, Lots 2 and 12 in Deposited Plan 848618, Lots 10 and 12 in Deposited Plan 875112, Lot 30 in Deposited Plan 880376 and Lots 101 and 102 in Deposited Plan 1001878 (**'the subject land'**) are located.
- 3 The Second Respondent made a development application being DA 10.2007.462.1 to the Council in which it purported to seek development consent to carry out development on the subject land for the purposes of a temporary music festival (an event called "Splendour in the Grass") with associated infrastructure, camping and car parking.
- 4 On or about 6 August 2008 the Council purported to grant conditional development consent to the development application DA 10.2007.462.1.

- 5 The development application DA 10.2007.462.1 was made pursuant to Part 4 of the *Environmental Planning and Assessment Act 1979*.
- 6 The development the subject of the development application DA 10.2007.462.1 is a development to which the provisions of the *Byron Local Environmental Plan 1988* ('the Byron LEP') applies.
- 7 Pursuant to the Byron LEP the subject land is zoned as to part 7(k) Habitat Zone.
- 8 The proposed development properly characterised in accordance with the Byron LEP was a use of land for a "place of assembly" within the meaning of that phrase in the Byron LEP being a use of land for the purposes of an "open air theatre".

The Council Granted Consent to a "Place of Assembly" when such a Use is Prohibited in 7(k) (Habitat Zone)

- 9 Under the Byron LEP development for the purposes of a "place of assembly" is prohibited on land zoned 7(k) (Habitat Zone).

Particulars

- i. The Byron LEP zoning table for the 7 (k) (Habitat Zone) provides:

Zone No 7 (k) (Habitat Zone)

1 Objectives of zone

The objectives are:

- (a) *to identify and protect significant vegetation and wildlife habitats for conservation purposes,*
- (b) *to prohibit development within the zone that is likely to have a detrimental effect on the wildlife habitats which exist,*
- (c) *to enable the carrying out of development which would not have a significant detrimental effect on the wildlife habitats, and*
- (d) *to enable the careful control of noxious plants and weeds by means not likely to be significantly detrimental to the native ecosystem.*

2 Without development consent

Nil.

3 Only with development consent

Agriculture (other than animal establishments and clearing of land); bushfire hazard reduction; environmental facilities; home industries; primitive camping grounds; roads; utility installations.

4 Prohibited

Any purpose other than a purpose specified in item 2 or 3.

- ii. The use of land for the purposes of a "place of assembly" is not an Item 2 or 3 use and is therefore prohibited.

- 10 The Applicant says as is the fact that the Council has acted *ultra vires* in granting consent to the development application as the development is prohibited under the Byron LEP.

The Council did not take into Account Relevant Matters

In the alternative, or in addition to the facts and matters pleaded above:

- 11 The Applicant says as is the fact that the Council in determining to grant development consent failed to take account of relevant matters for consideration as required of it by s.79C of the *Environmental Planning and Assessment Act 1979* ("the Act").
- 12 Section 79C of the Act required the Council to take into account matters relevant to the determination of the development application including the provisions of the Byron LEP.
- 13 The provisions of the Byron LEP included clause 9(3) which required that consent shall only be granted to the carrying out of development on land to which the Byron LEP applies if the Council is of the opinion that **the carrying out of the development** (emphasis added) is consistent with the objectives of the zone within which the development is proposed to be carried out.
- 14 The Applicant says that the Council did not consider whether the carrying out of development for the purposes of a temporary open air theatre event was consistent with the objectives of the 7(k) (Habitat Zone) when it made the determination that it did.

**Particulars of assessment of
the development against the objectives of the zone**

See inter alia pages 118-9 of Council Officer's report to the Council,
Agenda, Extraordinary Meeting 31 July 2008.

The Council Took Into Account Irrelevant Matters

- 15 When determining whether to grant development consent to the proposed use the Council took into account that the works in the 7(k) (Habitat Zone) were prohibited yet nevertheless purported to approve the development on the basis of an irrelevant consideration namely that "roads" and "environmental facilities" were land uses which were permissible uses of land in the said Zone with Council consent.
- 16 The Applicant says as is the fact that to the extent that what was proposed was roads and / or environmental facilities, the works were merely ancillary to the proposed "place of assembly" and accordingly fell to be characterised as such.

**The Council's Decision to Grant Development Consent Was Unreasonable in
"Wednesbury" Sense**

Further or in the alternative:

- 17 The Applicant alleges as is the fact that in the circumstances and events which have happened the decision of the Council to grant development consent was manifestly unreasonable (in the "*Wednesbury*" sense¹) or manifestly illogical (in the "*Eshetu*" sense²) in that no reasonable consent authority properly discharging its statutory duties could ever form the opinion that the carrying out of the development within the 7(k) (Habitat Zone) was consistent with the objectives of that zone.

¹ Referring to *Associated Provincial Picture Houses Pty Limited v Wednesbury Corporation* [1948] 1 KB 223

² Referring to *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611

Particulars

- i. Clause 9(3) of the Byron LEP.
- ii. Pages 118-119 Council Officer's report to the Council, Agenda, Extraordinary Meeting 31 July 2008.
- iii. The objectives of the Zone No 7 (k) (Habitat Zone) being:
 - a. to identify and protect significant vegetation and wildlife habitats for conservation purposes,
 - b. to prohibit development within the zone that is likely to have a detrimental effect on the wildlife habitats which exist,
 - c. to enable the carrying out of development which would not have a significant detrimental effect on the wildlife habitats, and
 - d. to enable the careful control of noxious plants and weeds by means not likely to be significantly detrimental to the native ecosystem.
- iv. The fact that the proposed development included the construction of permanent infrastructure including a 25 metre long underpass constructed of Humes Bebo pre-cast concrete arches and rock headwalls to be constructed using a 'cut and cover' method involving:
 - a. major earth works, and
 - b. the removal of significant vegetation through a regionally significant wildlife corridor, to facilitate a one off trial music festival event.
- v. The fact that the work in (iv) is within a wildlife corridor of high conservation importance for a suite of fauna;
- vi. The fact that the wildlife corridor links the coastal Billinudgel Nature Reserve to hinterland forests, some of which include the Gondwanaland world heritage rainforests.
- vii. The fact that the Cleland Commission of Inquiry (1997) identified the wildlife corridor as a regionally significant wildlife corridor.
- viii. The fact that the wildlife corridor was identified by the then Department of Environment and Conservation (2000) as being a wildlife corridor of high conservation value.

- ix. The fact that the Byron Shire Biodiversity Study (2003) identifies the corridor as being a regionally significant wildlife corridor of high conservation value.
- x. The fact that the Council's ecologist concluded in a report to the Council that the works in the 7(k) (Habitat Zone) could have a detrimental effect on existing wildlife habitats and corridors including threatened species habitats and endangered ecological communities.

18 Accordingly, for the reasons articulated in paragraphs 10, 14, 16 and 17 above, the development consent is void and of no effect.

19 The Applicant seeks the relief in the Class 4 Application.

SIGNATURE

Signature of legal representative



Capacity

Solicitor for the Applicant

Date of signature

10/12/08