Re JONATHAN

Di. 16/5/95 Re Appeal DA.
Special Meeting re Appeal
✓O Approved to get in by Frid-
✓O 2nd opinion to be obtained & if
useless appeal withdrawn.
✓O Di raised why J. & Riley (present) said the
EPA aims had been raised (only in
points of claim) was not addressed.
✓O Council to buy tapes & transcribe
✓O Di raised Q of Councillors personal liability
(as I suggested) Riley to get an opinion
✓O Jonathan case apparently lodged
under EPA & LG - 'vexatious' claim
✓O Heresay that Crowther is exploring some
action against J.
✓O 3 Objectors - grounds - we dont want effluent
flow to their land / overdev. / unsuitable.
✓O Barron due for retirement - he is seen to
be doddering viz-a-viz his judgement!

(6) Councillors to attend the appeal
Fares o/p. Say
2000

23.000	29 000
1500	2500
$24,500	$31,500

(7) Council staff?
(8) Solicitor (or in Syd.)?

Robin Osborn

- Cost of 2nd opinion. ?
- Council costs ($10-15000)?
- Transcript. ?
  $15 x 3½ day d/space.
- If lost by Council. What will Grattan's cost to be? Likely to be?
- If Council successful + case returned back to Court court, what will be the costs of the return?

- Grounds
  1. amended plans
  2. unstable land
  3. —

2nd opinion essential
Why did Council. Not

Dr Council Meeting re Jonathan DA Appeal 18/5/95

Failure to immediately seek a second opinion

Q. Has J. been advised of this meeting & report? If not why not? Why did reports of 9 May & Solicitor's 9 May confidential. Will clear for appears.

N-M (1) That the DA not be appeal. in the absence of Council not implementing the resolution to obtain a second opinion.

N-M (2) In the event that Council resolve to appeal.

That a second opinion be obtained & that Council consider this with a view to the advisability of maintaining the appeal. (ie can withdraw)

N of M (3) That "procedural fairness" and "natural justice" entitles Jonathan to be given the opportunity to address Council before Council resolves to appeal the DA.

Notice of Motion-

(4) That legal opinion be sought on whether Councillors who oppose the prior motion, may be personal liable for costs in the event that Jonathan is successful in obtaining a court judgement for damages & compensation against the Council under the E.P.A and 2 G Acts.

off on land on 4 (+ final) day. It has been said this was a device to exhaust the total hearing time, to limit the time available to address the J.

N.B. Nicks report re both Sol + Barr of views to appeal

N.B. Nicks report p. 2π. "may cant to error of law" = "may not."

There is no evidence to support any view that ship protected or worse on the subject site than much of on other foothills to the Nightcap

If this argument was upheld it should apply to all factors dev to the N. hemisphere of the shire.

Grounds 1 – embedded flow –
2 – unstable land. – reasonable precaution
3 – defendant re geotech for hazard.
Normal practice + "reasonable"

Comments:

- Newport has a vested interest in appealing. (self interest at stake ever if he is "objective" as possible.

- two independent opinions ought to have been obtained.

- Rilly opinion is simple a regurgitation/rephrasing of Newport.

- Newports strategy has from the outset has been "a strategy — of attrition" to "wear down" & "economical exhaust" his opponent.

  eg. // Normally such a DA would be heard before an assessor unless there are points of law, eg interpretation of SEPP-15.

On Newports advise the SEPP-15 4(in 2c F2C(iii)) was argued as a grand for refusal of the DA and used as submission to the Court as why a Judge needed to be appointed. This grounds was then raised by Newport leaving one to speculate was there or ulterior reason in seeking that a J preside. Could it be that he was laying the grand for appeal — which would be to the Supreme Court. Note appeal from an Assessor goes only to a J in the L&E Court.

Note also Newports protracted court presentation & Sue's staff See Mission Statement re support for low cost housing etc + quote

LISMORE CITY COUNCIL

MEMORANDUM - CONFIDENTIAL

FROM: DEVELOPMENT CONTROL PLANNER - Mr M Scott

TO: ALL COUNCILLORS

SUBJECT: COUNCIL AND JONATHAN - LAND AND ENVIRONMENT COURT APPEAL

DATE: MAY 9, 1995

---

1. Please find attached advice from Council's Solicitor, Bondfield Riley and Barrister Newport regarding the above matter, particularly on the issue as to whether or not Council has a strong chance in making a successful appeal to the NSW Court of Appeal.

2. Generally it is the view of both the Barrister and Solicitor that Council has a strong position in respect of the matter. Firstly in relation to denial of natural justice and procedural fairness and secondly that the Court should not have concluded that development should be permitted on areas of recognised instability.

3. The function of the NSW Court of Appeal is to determine the points raised in appeal as the "errors". This Court will not determine the application but rather determine points of law and then return the matter to the Land and Environment Court for re-assessment. The Court of Appeal has the power to award costs to the successful party in the appeal Council's Solicitors have estimated the cost to Council of approximately $5,000. If Lismore City Council wins it may get an order for part of the cost against Jonathan. If Lismore City Council lose it would be liable for a designated portion of Jonathan's cost and its own $5,000.

4. Council if it chooses to proceed with an appeal to the Court of Appeal must do so within twenty eight (28) days of the date of the determination of the Land and Environment Court. An Appeal would therefore have to be lodged by Friday May 19, 1995.

5. It appears that there is currently up to a three year backlog within the NSW Court of Appeal, ie the matter may not be heard for two or three years. As a matter of law an appeal does not place on hold the operation of the consent granted by the Land and Environment Court. However, prior to the erection of any buildings or development earthworks (road etc) building consent must be granted. Council should not approve building consent until the determination of the Appeal. If Jonathan then proceeds, regardless, Council can seek an injunction to restrain.

6. Should Councillors desire to proceed with an appeal to the NSW Court of Appeal they are requested to contact the General Manager in order to set a date for a special meeting of Council no later than the evening of May 17, 1995 (Wednesday).

Nick Juradowitch
DIVISIONAL MANAGER-
PLANNING SERVICES

Newport advise re/ proposed judgement. F-5-95

Grounds 1. Denial natural justice + procedural fairness (A)
2. Not open to conclude that area was stable. (=merit)

(A) re charged $ hrs on day 1 + application for adjournment.

Re The arguments are so weak that we can only conclude this is a 'tongue in cheek' situation – where Greg has had his nose put out of joint either by being wiped by a layperson and/or a weak case/untenable case, not proffered by Council on merit, but for alternate reasons. eg Legatory/voter/factional fighting/etc

I claim it would be "manifestly absurd" to rule against the fact (eg dam/road/effluent etc) as an arguable ground for to do so would preclude all building on the slopes of the caldera!

While acknowledging that the bulk (if not all) of the rural foothills in L&S area is 'slip prone' the evidence is that slips affecting houses are rare and to my knowledge no loss of life has occured.

In other words, Greg is speculating, there is no evidence to support this contention as a supportable ground of appeal.

This grounds, as a merit issue, would be referred for Council determination, viz that the hill was about to slip away!!

This is a war of attrition! Wearing down "beating" a citizen morally/economically/energy

BONDFIELD RILEY

SOLICITORS & NOTARY

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DAVID M. RILEY
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MR:SS

OUR REF.

YOUR REF.

Why confidential. Is he afraid of public scrutiny or endangering to [illegible] or his own rest

9 May, 1995

"STRICTLY CONFIDENTIAL"

The General Manager
Lismore City Council
DX 7761
LISMORE.

Dear Sir,

RE: COUNCIL and JONATHAN - LAND AND ENVIRONMENT COURT APPEAL

We have been verbally requested to provide an Advice from Counsel on the prospects of an Appeal against the Judgment delivered by Mr. Justice Bannon. We enclose Counsel's Advise for perusal by you. We suggest that no part of this Advice should be held in strictest confidence.

Council should also be aware of the following matters:

1. That Mr. Newport and the writer are of the opinion that the evidence presented and the quality of the Council evidence and personnel including expert witnesses was of the highest calibre. — of S.94

2. The case presented was extremely strong for the Council and should not have been lost. — poor grounds was not defensible

3. The initial perception or apprehension expressed on the first day of the hearing by the Court unfortunately made it almost impossible for the Council to succeed on the Appeal. — success

4. A Class 1 Appeal is a re-hearing and the Court has all the powers held by the Council. To that end, it has all of the discretion and is able to display preferences and indeed bias so as to favour the Applicant (as was relevant in this case). The nature of the hearing is entirely subjective and, consistent with advice given, the outcome is never able to be predicted with absolute confidence. — not a re-hearing 'de nova' — as was Council — true in life.

5. Counsel indicated that from all the material before him at the beginning of the case and after the conclusion of the case that on all reasonable grounds the Appeal should have been dismissed. The Council's case was, on face value, overwhelmingly strong. — opinion

...2/-

Ethical position for Greg was to have notified the Brief!
Is Darrin this is ridiculing the J. & Lalding the court in contempt?

---

6. Counsel has further advised that the mere fact of a significant public objection does not, in most instances, persuade the Court by itself that the Appeal should be dismissed. The Court is largely unconvinced by large numbers of objectors but rather is persuaded by the very substance of the objection. The substance of the objections made by the residents was equally strong.

Quotable

— not accurate re J.

7. We understand a comment has been made by an "interested" third party relating to the objectives of SEPP 15. Counsel advised that the aspect relating to the objectives of SEPP 15 for Multiple Occupancies relating to areas in decline was not a persuasive argument to the Court.

Council should be aware that the Counsel did put into evidence the fact that the area was not in decline and was inconsistent with the objectives. This written material was tendered and the Court took the opportunity to read the material. This may not have been apparent to objectors, or indeed third parties not involved in the case.

— no substance

While Counsel was of the view that this particular aspect by itself was not persuasive, it did not mean that it was not important, rather it was not the significant or paramount basis for objection. This view was reinforced and summed up by the Court when in its Judgment it indicated that the principal reason for objection by the Council was that relating to unsuitable dwelling sites by reason of soil instability and slip.

Sour grapes justifying

Re - what is meant

There were approximately 16 issues in all for decision by the Court and the fact that each was not specifically orally addressed in Court in no way means that they were not considered by the Court. It is the practice and procedure of the Court that reports of witnesses are tendered in the Court. The whole entirity of the report is then evidence without any further comment necessary in relation to any specific aspect of that evidence. It is possible that third parties do not understand the Court process.

Why not considered - implausible - instead of padding gestalt

Who?

relevance?

8. Counsel further has noted that it is notoriously difficult to run a case against an unrepresented Applicant. Significant advantages are given to an unrepresented party and to that end those advantages significantly disadvantage the Council. This occurred clearly in the present case. The Applicant was allowed to tender plans, including exhibits "H" and "N" on the first day of the hearing when such a procedure, if attempted by a Solicitor or Barrister would have been immediately disallowed.

Sour grapes.

not true, suppositions reflection on Greg natural justice

Opinion not true - de novo

...3/-

4 day hearing, fillabuster, to stiffle addressing
NB report 5 senior staff ~~kat~~ present (an avat what action)
on 4th day. to fill up time / erode available time for addressing.

The Land and Environment Court Rules and Practice Notes specifically provide for the filing of Statements of Evidence and all documentation to be relied upon by the Applicant a minimum of 14 days before the hearing. The Applicant, being unrepresented, and despite being warned in writing by us of the Practice Directions regarding the filing of material, which letters were tendered to the Court, was given permission to file the evidence and this was notwithstanding our objection. The only remedy available to Council was to seek an adjournment of the proceedings so that Council's witnesses and the objectors could consider the amended Plans. This Application for adjournment was sought and was denied by the Court.

sour grapes & ploy to ~~get~~ set the ground for appeal where they had such a poor case.

9. The Court's inclination to do all that it could to favour the Applicant was clearly to the prejudice and disadvantage of the Council. Counsel is of the view that the Council was clearly denied the most basic of natural justice and certainly the procedural fairness of being able to respond to the Plans submitted by the Applicant.

Subjective view could be ~~nes~~ if supported by fact. changes unrecog. sought by Council!

10. Counsel believes there is a clear ground of Appeal on a point of law to the New South Wales Court of Appeal.

Pursuant to the request we have received from Mr. Johnson *(Hugh (A))* the writer has also obtained quotes from other junior Counsel in relation to the giving of advice on the prospects of an Appeal against the existing Judgment. For this purpose the writer has attempted to contact three different Counsel and has been able to get a firm indication of costs from Mr. J. Webster and Mr. C. Harris. Mr. Webster indicated that he would not expect the cost of his advice to exceed $1,000.00 as did Mr. Harris. Clearly if Counsel is required to listen to the evidence of a three and a half day hearing and then read the reports and peruse the Development Application we would have thought the costs could really be up to $4,000.00 or $5,000.00.

What this is saying is he does not believe them (1)

Mr. Newport of Counsel has indicated in the penultimate paragraph of his advice that if Council is successful on Appeal the matter would be remitted back to the Land and Environment Court. The costs associated with such a re-hearing would, for the Council case, be borne by the Council and could be expected to be in the vicinity of $10,000.00 to $15,000.00 depending upon whether on the re-hearing the parties could agree to limit argument to he substantial matters of landslip and stability. *(2)*

or decided!

(A) Riley instructed by Nick to consult/get advise from Lindsay Taylor (of Warrnambool Council) re recommendation of counsel for 2nd opinion.

...4/-

2nd Opinion (1) 4,000 – 5,000
Re hearing (2) 10,000 – 15,000 if lost.
– (3) 5,000 – 5,000 Jonathan costs / out of pocket
– (4) 3,000 – 3,000 say $3000
1/2 Transcript. (5) say 1,000 – 1,000
$ 23,000 – 29,000

If Council appeals to the Court of Appeal and is successful an order for costs for the Appeal could be made by the Court in favour of the Council against Jonathan. However, Council would then have to recover the money from Jonathan, which depending upon his financial situation may be difficult. We understand from Counsel that the delay in obtaining a hearing of the Appeal could be approximately three years unless Jonathan was able to establish a need for expedition of the hearing of the Appeal, which is unlikely.

Costs involved if Council lose the Appeal would be in the vicinity of $5,000.00 on Council's side together with such legal costs as the Court awards to Jonathan. If he remains unrepresented this would probably be a modest sum.

Council must appeal within 28 days of the Judgment.

An Appeal will not automatically stay the operation of the Consent granted by the Court. However, Counsel has indicated that Jonathan would be required to lodge a Building Application which would require consent of Council prior to commencing building works on the site. Council should refuse any such Application until the Appeal is determined. If Jonathan seeks to proceed, Council could obtain an Injunction to restrain him.

If after perusing Counsel's advice and the material contained in this letter, Council would like the writer to be available to assist with any aspect of determining its course in the matter, the writer would be pleased to attend.

It is the writer's view that the evidence in this case was so strong that the Appeal should have been dismissed. There was unfairness to the point of bias to the Applicant. The Judge gave the impression from the moment the matter started, that he would grant the Appeal regardless.

Finally, we would suggest that Council give consideration to perhaps having a Councillor present at the hearing of future major Court cases so that a direct appreciation of the matter can be obtained. We understand a number of Councils, particularly in the Metropolitan area, adopt this practice and that such a practice has proved very beneficial.

Yours faithfully,

BONDFIELD RILEY

Per:

Enclosure (2)

2679/ss

Greg Newport
Barrister at Law

Windeyer Chambers
8th Floor
225 Macquarie Street
Sydney, N.S.W. 2000
Phone: 235-3033
Fax: 223-3515
DX 650 SYDNEY

8 May, 1995

Messrs. Bondfield Riley,
Solicitors,
DX 7712 LISMORE

Dear Sirs,

RE APPEAL AGAINST DECISION IN JONATHON MULTIPLE OCCUPANCY AT DAVIS ROAD, JIGGI

I am briefed with a copy of the judgment of the Court and I am asked whether the Council would be likely to succeed on an appeal against the decision.

Essentially there are two separate grounds of appeal and they are firstly that the Council was denied natural justice and procedural fairness and secondly that it was not open to the Court to conclude that development should be permitted upon areas of recognised instability in the circumstances.

The facts involved include:-

(a) **Exhibit "A"** contained the development plans that the Applicant intended to rely upon and such plans were served upon the Council 14 days before the hearing. They were different from the plans dealt with originally by the Council.

(b) On the first day of the hearing exhibits "H" and "N" were tendered and they were the plans the Applicant sought to have the Court approve.

(c) Exhibits "H" and "N" were substantially different and the Respondent submitted that the Court did not have power to consent to those plans.

(d) Exhibits "H" and "N" were different in that they proposed new locations for a significant number of dwellings, the access tracks had been altered, the locations of dam sites and effluent disposal areas had been altered.

(e) The Respondent Council did not have the opportunity to examine the plans so as to adequately prepare evidence.

(f) The objection to the tender of Exhibits "H" and "N" was overruled.

(g) The Respondent Council's evidence was prepared upon the basis of exhibit "A". The Applicant's own evidence including bore hole tests was carried out upon the basis of exhibit "A". Further oral evidence was given by the Applicant upon the exhibit "H" and "N" plans.

(h) The Respondent Council's application for adjournment to enable it to consider the plans and prepare evidence was dismissed.

(i) It was not in contest that the proposed locations of dwelling sites, access roads, dams and drainage disposal areas was in an area of high instability and it was conceded by the Applicant that slip was evident on specific sites. The Applicant conceded that bore holes were not excavated for all of the dwelling sites shown on Exhibits "H" and "N".

(j) The Court granted consent upon the assurances of Mr. Byrnes, who held no formal qualifications at all. The Court also held that the "certification" of Mr. Jones, structural engineer, was adequate even though he had not carried out tests himself and had only visited the site on one brief occasion. The Court concluded that land slip could be sold by imposing a term of consent and that no building was to be erected until a certificate from a geotechnical engineer was forwarded to the Council.

Ground (1)

In my opinion the Court did not have power to grant consent to exhibits "H" and "N" as they were different. See Parkes Developments Pty. Limited v. Cambridge Credit Corporation 33 LGRA 196. The Council, by allowing the Applicant to bring forward new plans, being exhibits "H" and "N" on the first day of hearing denied the Council the opportunity to properly assess the new plans and present evidence after careful consideration. The Council was denied natural justice and procedural fairness by allowing the tender and denying an application for an adjournment.

In my opinion this is the strongest ground of appeal and would succeed.

(2.) The second ground of appeal is that the Court's conclusion that development should occur on areas of high instability was not reasonably open to it in the circumstances. No planning body (in this case the Court), properly understanding its function could have reasonably arrived at the conclusion that dwellings, access roads, dams and drainage disposal areas could be placed on such unstable areas. The Court did not accept the Council's proposition that there was a danger to life and property by allowing persons to occupy such areas. The Applicant conceded the danger from slip and the Court dismissed the notion that dwellings should not be permitted on such areas. The danger to persons in vehicles using access tracks on areas of slip was not held to warrant rejection. The real danger of large

storage areas of water being located on slip areas was not held sufficient to warrant objection. Additionally, extremely large storage areas of effluent disposal, again on slip areas, with the potential to rupture and discharge contaminants into the natural water course was not held to warrant rejection.

Whilst an appeal against the Court's decision is limited to an error of law, an error of fact such as cited above, may amount to an error of law. Whilst an error of fact which is perverse may not amount to an error of law (see Randwick v. Manousaki 66 LGRA 330 the Court, when reviewing the exercise of administrative discretion will overturn such decision if the finding was manifestly absurd. See Minister for Aboriginal Affairs v. Peko Wallsend Limited 162 CLR 24. It is not the function of the Court of Appeal, when reviewing the decision of the single Judge of the Land and Environment Court to substitute its own decision for that of the Court exercising discretion but to determine whether limits of the exercise of that discretion can be impugned. In other words, notwithstanding the fact that the Council forms a different opinion from that held by the Court, the Court of Appeal, when reviewing the decision, will not simply substitute its own decision because it agrees with the Council. The Council must demonstrate that there has been manifest absurdity. In my opinion it is arguable that this second ground can be made out by the Council. Whilst I would not pursue this ground alone as the basis for appeal, I believe that it ought to be pressed given the strong nature of the first ground of appeal.

For the sake of completeness I mention that a third ground may arise but unfortunately I am not able to pursue or articulate the matter until a transcript of the proceedings is available. I note that the Court essentially deferred the issue of the stability until such times as a geotechnical report was submitted. It is arguable that the Court should finally determine such a fundamental matter. In my opinion, the stability of the soil was absolutely fundamental to the approval for the erection of dwellings, access roads and the like. For that reason the Court, notwithstanding Section 91(3A) EPA Act, ought to finally determine that matter rather than defer the matter to a later stage. See Mison v. Randwick 23 NSWLR 734.

I am of the opinion that Council would succeed on ground 1 and has reasonable prospects of success on ground 2. The appeal must be filed within 28 days of judgment and would be heard by the NSW Court of Appeal. If successful, the matter would be remitted to the Court below and to avoid the matter coming back to the same Judge, an application may be made to have the matter determined by a different Judge.

I would be pleased to discuss any aspect of this Advice.

Yours faithfully,

Greg Newport

GREG NEWPORT

LISMORE CITY COUNCIL

MEMORANDUM - CONFIDENTIAL

FROM: DEVELOPMENT CONTROL PLANNER - Mr M Scott

TO: ALL COUNCILLORS

SUBJECT: COUNCIL AND JONATHAN - LAND AND ENVIRONMENT COURT APPEAL

DATE: MAY 9, 1995

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Nick Juradowitch
DIVISIONAL MANAGER-
PLANNING SERVICES

BONDFIELD RILEY

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OUR REF MR:SS

YOUR REF

9 May, 1995

"STRICTLY CONFIDENTIAL"

The General Manager
Lismore City Council
DX 7761
LISMORE.

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...2/-

6. Counsel has further advised that the mere fact of a significant public objection does not, in most instances, persuade the Court by itself that the Appeal should be dismissed. The Court is largely unconvinced by large numbers of objectors but rather is persuaded by the very substance of the objection. The substance of the objections made by the residents was equally strong.

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Mr. Newport of Counsel has indicated in the penultimate paragraph of his advice that if Council is successful on Appeal the matter would be remitted back to the Land and Environment Court. The costs associated with such a re-hearing would, for the Council case, be borne by the Council and could be expected to be in the vicinity of $10,000.00 to $15,000.00 depending upon whether on the re-hearing the parties could agree to limit argument to he substantial matters of landslip and stability.

...4/-

If Council appeals to the Court of Appeal and is successful an order for costs for the Appeal could be made by the Court in favour of the Council against Jonathan. However, Council would then have to recover the money from Jonathan, which depending upon his financial situation may be difficult. We understand from Counsel that the delay in obtaining a hearing of the Appeal could be approximately three years unless Jonathan was able to establish a need for expedition of the hearing of the Appeal, which is unlikely.

Costs involved if Council lose the Appeal would be in the vicinity of $5,000.00 on Council's side together with such legal costs as the Court awards to Jonathan. If he remains unrepresented this would probably be a modest sum.

Council must appeal within 28 days of the Judgment.

An Appeal will not automatically stay the operation of the Consent granted by the Court. However, Counsel has indicated that Jonathan would be required to lodge a Building Application which would require consent of Council prior to commencing building works on the site. Council should refuse any such Application until the Appeal is determined. If Jonathan seeks to proceed, Council could obtain an Injunction to restrain him.

If after perusing Counsel's advice and the material contained in this letter, Council would like the writer to be available to assist with any aspect of determining its course in the matter, the writer would be pleased to attend.

It is the writer's view that the evidence in this case was so strong that the Appeal should have been dismissed. There was unfairness to the point of bias to the Applicant. The Judge gave the impression from the moment the matter started, that he would grant the Appeal regardless.

Finally, we would suggest that Council give consideration to perhaps having a Councillor present at the hearing of future major Court cases so that a direct appreciation of the matter can be obtained. We understand a number of Councils, particularly in the Metropolitan area, adopt this practice and that such a practice has proved very beneficial.

Yours faithfully,

BONDFIELD RILEY

Per:

2679/ss

Enclosure (2)

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8 May, 1995

Messrs. Bondfield Riley,
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Dear Sirs,

RE APPEAL AGAINST DECISION IN JONATHON MULTIPLE OCCUPANCY AT DAVIS ROAD, JIGGI

I am briefed with a copy of the judgment of the Court and I am asked whether the Council would be likely to succeed on an appeal against the decision.

Essentially there are two separate grounds of appeal and they are firstly that the Council was denied natural justice and procedural fairness and secondly that it was not open to the Court to conclude that development should be permitted upon areas of recognised instability in the circumstances.

The facts involved include:-

(a) **Exhibit "A"** contained the development plans that the Applicant intended to rely upon and such plans were served upon the Council 14 days before the hearing. They were different from the plans dealt with originally by the Council.

(b) On the first day of the hearing exhibits "H" and "N" were tendered and they were the plans the Applicant sought to have the Court approve.

(c) Exhibits "H" and "N" were substantially different and the Respondent submitted that the Court did not have power to consent to those plans.

(d) Exhibits "H" and "N" were different in that they proposed new locations for a significant number of dwellings, the access tracks had been altered, the locations of dam sites and effluent disposal areas had been altered.

(e) The Respondent Council did not have the opportunity to examine the plans so as to adequately prepare evidence.

(f) The objection to the tender of Exhibits "H" and "N" was overruled.

(g) The Respondent Council's evidence was prepared upon the basis of exhibit "A". The Applicant's own evidence including bore hole tests was carried out upon the basis of exhibit "A". Further oral evidence was given by the Applicant upon the exhibit "H" and "N" plans.

(h) The Respondent Council's application for adjournment to enable it to consider the plans and prepare evidence was dismissed.

(i) It was not in contest that the proposed locations of dwelling sites, access roads, dams and drainage disposal areas was in an area of high instability and it was conceded by the Applicant that slip was evident on specific sites. The Applicant conceded that bore holes were not excavated for all of the dwelling sites shown on Exhibits "H" and "N".

(j) The Court granted consent upon the assurances of Mr. Byrnes, who held no formal qualifications at all. The Court also held that the "certification" of Mr. Jones, structural engineer, was adequate even though he had not carried out tests himself and had only visited the site on one brief occasion. The Court concluded that land slip could be sold by imposing a term of consent and that no building was to be erected until a certificate from a geotechnical engineer was forwarded to the Council.

In my opinion the Court did not have power to grant consent to exhibits "H" and "N" as they were different. See Parkes Developments Pty. Limited v. Cambridge Credit Corporation 33 LGRA 196. The ~~Council~~, by allowing the Applicant to bring forward new plans, being exhibits "H" and "N" on the first day of hearing denied the Council the opportunity to properly assess the new plans and present evidence after careful consideration. The Council was denied natural ~~Justice~~ and procedural fairness by allowing the tender and denying an application for an adjournment.

In my opinion this is the strongest ground of appeal and would succeed.

The second ground of appeal is that the Court's conclusion that development should occur on areas of high instability was not reasonably open to it in the circumstances. No planning body (in this case the Court), properly understanding its function could have reasonably arrived at the conclusion that dwellings, access roads, dams and drainage disposal areas could be placed on such unstable areas. The Court did not accept the Council's proposition that there was a danger to life and property by allowing persons to occupy such areas. The Applicant conceded the danger from slip and the Court dismissed the notion that dwellings should not be permitted on such areas. The danger to persons in vehicles using access tracks on areas of slip was not held to warrant rejection. The real danger of large

storage areas of water being located on slip areas was not held sufficient to warrant objection. Additionally, extremely large storage areas of effluent disposal, again on slip areas, with the potential to rupture and discharge contaminants into the natural water course was not held to warrant rejection.

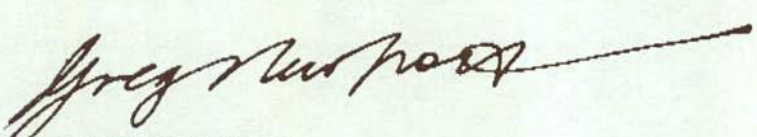
Whilst an appeal against the Court's decision is limited to an error of law, an error of fact such as cited above, may amount to an error of law. Whilst an error of fact which is perverse may not amount to an error of law (see Randwick v. Manousaki 66 LGRA 330 the Court, when reviewing the exercise of administrative discretion will overturn such decision if the finding was manifestly absurd. See Minister for Aboriginal Affairs v. Peko Wallsend Limited 162 CLR 24. It is not the function of the Court of Appeal, when reviewing the decision of the single Judge of the Land and Environment Court to substitute its own decision for that of the Court exercising discretion but to determine whether limits of the exercise of that discretion can be impugned. In other words, notwithstanding the fact that the Council forms a different opinion from that held by the Court, the Court of Appeal, when reviewing the decision, will not simply substitute its own decision because it agrees with the Council. The Council must demonstrate that there has been manifest absurdity. In my opinion it is arguable that this second ground can be made out by the Council. Whilst I would not pursue this ground alone as the basis for appeal, I believe that it ought to be pressed given the strong nature of the first ground of appeal.

For the sake of completeness I mention that a third ground may arise but unfortunately I am not able to pursue, articulate the matter until a transcript of the proceedings is available. I note that the Court essentially deferred the issue of the stability until such times as a geotechnical report was submitted. It is arguable that the Court should finally determine such a fundamental matter. In my opinion, the stability of the soil was absolutely fundamental to the approval for the erection of dwellings, access roads and the like. For that reason the Court, notwithstanding Section 91(3A) EPA Act, to finally determine that matter rather than defer the matter to a later stage. See Mison v. Randwick 23 NSWLR 734.

I am of the opinion that Council would succeed on ground 1 and has reasonable prospects of success on ground 2. The appeal must be filed within 28 days of judgment and would be heard by the NSW Court of Appeal. If successful, the matter would be remitted to the Court below and to avoid the matter coming back to the same Judge, an application may be made to have the matter determined by a different Judge.

I would be pleased to discuss any aspect of this Advice.

Yours faithfully,



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