

Why/what for
the no standing
trial on discovery
→

LISMORE CITY COUNCIL**CONFIDENTIAL MEMORANDUM**

Graham (at
Hague) right
to be heard

FROM: DIVISIONAL MANAGER-PLANNING SERVICES - N Juradowitch
TO: ALL COUNCILLORS
SUBJECT: COUNCIL AND JONATHAN - LAND AND ENVIRONMENT COURT
APPEAL
DATE: JULY 18, 1995 (HAJ:MR: DA93/754)

History

Council, at a Special Meeting of May 15, 1995, considered a report from the Planning Services Division detailing legal advice received from Council's Barrister, Mr Greg Newport, regarding the opportunities available for Council to appeal against the recent Land and Environment Court decision, handed down in favour of the applicants, being Jonathan and others. Council at this meeting resolved in the following terms:

"That the Council-

1. *Obtain a second opinion with regard to the opportunities of lodging a successful appeal with the NSW Court of Appeal against the recent Land and Environment Court ruling handed down by Justice Bannon in the matter of Council versus Jonathan and others; and*
2. *Instruct its Solicitors, Bondfield Riley, to lodge an appeal in the NSW Court of Appeal against Judge Bannon's decision in the matter of Council versus Jonathan and others no later than the close of business on Friday, May 19, 1995."*

Current Situation

Council has been informed by its Solicitors, Bondfield Riley, that the appeal was lodged in accordance with the Council resolution, and that a second opinion has been obtained with regard to the opportunities of lodging a successful appeal in the NSW Court of Appeals. Council was unable to obtain a written opinion from Mr Webster, however he verbally advised Council's Solicitors of his opinion (refer Appendix No. 1).

From the context of the letter received from Bondfield Riley dated July 12, 1995, it is apparent that unless Council obtains additional professional advice from Coffey and Partners, indicating whether Dr Shaw considered if the dwellings, roads, dams or effluent disposal sites shown on the new plan received into evidence by the Court at the hearing, were unable to be constructed due to slip or other engineering reasons, and that Dr Shaw had been able to have the proper time to prepare evidence based on the new plan, Council may experience some difficulties in succeeding with the appeal.

Mr Webster is of the opinion that should Council receive evidence from Dr Shaw indicating that he was prejudiced at the time of the hearing and that subject to further assessment, that he is able to give evidence to the Court that the proposed new developments, as shown on the "new" plan could not be established due to slip or other engineering reasons, that based upon this additional evidence, Council should succeed in the appeal.

The second matter raised by Mr Webster in his verbal advice relates directly to the issue of which plan has been approved by the Court with relation to the sixteen (16) site multiple occupancy. This issue must be resolved no matter what Council decides in relation to the appeal.

The additional costs anticipated in proceeding with the appeal are outlined as follows:

- \$1,800 to obtain transcript of the hearing.
- \$400 for additional legal advice from Mr Webster.
- \$750 - \$1,000 for Coffey and Partners further investigation.

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It is anticipated that the appeal would not be heard for approximately 18 months, however under certain circumstances the appeal hearing may be brought forward. As has been previously discussed in a confidential memorandum to the Council on May 9, 1995, the appeal does not place on hold the operation of the consent granted by the Land and Environment Court on June 15, 1995. However, prior to the erection of any buildings or development earth works (road etc), building consent must be granted.

It should also be noted that in the event that Council is successful in the appeal, the matter will be referred back to a single judge in the Land and Environment Court for re-hearing. The new hearing may be set before the judge that originally considered the application, and hence Council's opportunities for obtaining a favourable decision may not vary from the previous outcome.

It is the Planning Services Division's opinion that Council should obtain the transcripts of the case and request formal advice from Mr Webster. In addition to this, Council should engage the services of Coffey and Partners to carry out the additional geotechnical investigations with the view to submitting reports as evidence. should Council be of the opinion that the appeal should continue. These actions are in accordance with Council's previous resolutions and will be proceeded with later this week.

Conclusion

If Councillors wish to discuss this matter further before the next meeting in August, it would be necessary to raise this matter as an item of urgent business at tonight's meeting.

Council's Planning Services Division will instruct its Solicitors to obtain the written transcript of the Court hearing and refer it to Mr Webster for a second opinion. If the second opinion is not favourable a report will be submitted to the August 15 meeting of Council.


Nick Juradowitch
DIVISIONAL MANAGER-
PLANNING SERVICES

BONDFIELD RILEY

JACK RILEY
DAVID M RILEY
MATTHEW J RILEY
ADAM C RILEY
MELINDA L CLARK

SOLICITORS & NOTARY

P O BOX 165 LISMORE 2480
FACSIMILE (066) 21 9059
DX 7712 LISMORE

5 MOLLESWORTH STREET
LISMORE NSW 2480
TELEPHONE (066) 21 9000

OUR REF MR:SS

YOUR REF Mr. Johnson

12 July, 1995

The General Manager,
Lismore City Council,
DX 7761 LISMORE

PREPARED FOR THE PURPOSE OF LEGAL
PROCEEDINGS - CONFIDENTIAL

Dear Sir,

RE: COUNCIL & JONATHAN - APPEAL


We refer to previous correspondence in the above matter. As instructed we briefed a Barrister to give an opinion on Council's prospects of success in the above appeal. The Barrister briefed is Mr. John Webster and he is very experienced in Land and Environment Court matters.

Counsel has indicated as follows:

1. That unless Council can show actual prejudice to its case in being denied natural justice by being forced to deal with a plan at the hearing which was different from the plans originally relied upon by the applicant Council may experience difficulties in succeeding with the appeal;
2. There may be other grounds of appeal available which are not stated in the Notice of Appeal including whether the Judge gave reasons and findings in respect of each issue nominated by Council as issues in dispute at the hearing and whether or not the Judge approved a particular plan.

Dealing with paragraph numbered 1.

Mr. Webster indicated that evidence could be obtained from Mr. Phillip Shaw of Messrs. Coffee & Partners to indicate whether he considered, for example, if dwellings, roads, dams or effluent disposal sites shown on the "new" plan received into evidence by the Court at the hearing were unable to be constructed due to slip or other engineering reasons and that had Mr. Shaw been able to have proper time to prepare his evidence based on the new plan then this would have been his evidence and conclusion.

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12 July, 1995

Lismore City Council,

RE: **COUNCIL & JONATHAN - APPEAL**

To obtain fresh evidence on the above point will mean additional costs. We have been unable to get a firm estimate on the amount but believe the costs could be approximately \$750.00 providing Mr. Shaw does not need to attend on site from Brisbane.

Mr. Webster indicated that if we could get the above evidence Council should succeed in the appeal.

Dealing with paragraph numbered 2.

It is apparent that the Judge did not approve a plan. We do not know which plan has been approved other than a multiple occupancy for 16 dwelling sites. It is also apparent that a number of issues have not been addressed in the judgment. It is desirable to have a plan approved so all parties know what the development is. In deciding whether further appeal grounds should be raised for argument Council should consider the main basis of the refusal. Clearly the main basis was the degree of slip on the site and the level of objection by residents. The Judge took into account the resident objections.

Council should be aware that if the Court of Appeal finds an error of law occurred it will probably remit the case back to a single judge to decide on the basis of the Court of Appeals decision. This could mean that the same Judge or a different Judge may take further evidence in the matter. It may also follow that if Council wins in the Court of Appeal it does not mean Council will win any re-hearing before a single Judge. What may or may not happen if Council is successful in the Court of Appeal is speculation. It is clear that if the appeal proceeds the matter will not be heard for at least 18 months or longer given existing court backlogs.

We request instructions as to whether Council wishes us to obtain the evidence suggested by Mr. Webster from Mr. Shaw and in the meantime continue with the appeal?

Yours faithfully,

BONDFIELD RILEY

Per: 

Grahams

Solicitors & Business Consultants

Principal:

Keith J Graham LL.B.

Notary Public & Registered Tax Agent

Accredited Specialist, Business Law

Suzanne L Creak B.A. LL.B.

Consultant, Family Law

Accredited Specialist, Family Law

Graham Centre

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LISMORE NSW 2480

DX 7768 LISMORE

Phone (066) 218 144

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Your Ref:

Our Ref: KJG:sh 950576

30 October 1995

Jonathan & Taya

1/69A Francis Street

BONDI NSW 2026

Dear Jonathan & Taya,

Re: COMPENSATION CLAIM AGAINST LISMORE CITY COUNCIL

I have managed to locate one case (and as far as I can ascertain the only case that has been determined relating to a claim for compensation under Section 179 of the Local Government Act, 1993):

Interestingly enough, it relates to a development consent granted by Judge Bannon. The Applicant for compensation was represented by Queens Counsel, S B Austin and Junior Barrister, P J McEwen, so I can only assume that the Law in the matter was thoroughly researched and argued.

Unfortunately, the Judge who heard the claim for compensation (Judge Talbot) determined that a claim for compensation under Section 179 of Local Government Act can only be made virtually with respect to applications made to the Council under Part 1 Division 3 of Chapter 7 of the Local Government Act, 1993 - namely, building applications and the like - it does not relate to development applications under the Environmental Planning and Assessment Act.

In particular, I draw your attention to the bottom of page 120 and the top of page 121 where the Judge states, "I am not aware of any authority for the proposition that the determination of a development application in favour of an applicant by the granting of a consent may operate as a building approval as well as a development consent".

You will then see that the Judge goes on to say that it may be possible in some cases for this to be so, however it would require that plans, specifications and other particulars be furnished with the application.

Public Sector staff

NOMINATION FOR SPOKESWOMAN (1994/95 - 1995/96)

I, _____ wish to nominate myself for the position of SPOKESWOMAN.

Signature: _____ **Date:** _____

Location: _____

(work) Telephone: _____

I would like the following information to be used in support of my nomination.

[illegible]

Return to: The Returning Officer
Marie Besson
North Coast Regional Office
PO Box 422
LISMORE NSW 2480

Closing Date: 12 August 1994

Please mark the envelope "CONFIDENTIAL"

The other problem is that whereas the enclosed case relates specifically to a development application for the erection of a building, your development application was for "a multiple occupancy development of rural lands comprising the establishment of sixteen dwelling sites, including a community building...". Your case is therefore further distinguished in that it wasn't actually a development application for the construction of sixteen dwellings.

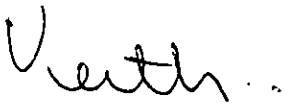
I would point out that the enclosed case involved a development application which was lodged with Council and subsequently determined on appeal by the Land & Environment Court all prior to 1 July, 1993, which was the date of commencement of the new Local Government Act. It was on this ground which the Applicant for compensation was denied any claim for compensation under Section 179 of the Local Government Act.

The Comments made however, by Judge Talbot in the enclosed case, would, I believe, ~~could~~ be applied to your claim for compensation and accordingly, I am now of the opinion that you and the other Applicants are not entitled to bring a claim for compensation under Section 179 of the Local Government Act. This does not affect in any way your claim for payment of legal costs with respect to the hearing of the appeal in the Land & environment Court pursuant to Section 69 of the Land & Environment Court Act.

I also advise that I have filed a Notice of Motion with the Land & Environment Court seeking directions that the question of whether you are entitled to make a claim under Section 179 of the Local Government Act be determined prior to the hearing of the claim.

Jonathan, as I have agreed to do this case "on spec", it would now appear that there is very little likelihood of a compensation award being made, I advise that I am not prepared to carry out any further work from here on with respect to this case. I note that you have previously advised me that you wished in any event to argue the case in Court and I am still happy to give you advice concerning this.

Yours truly



Keith J. Graham
enc

Jonathan
128 Comp & Const 28 Nov
J.3 4 days.
J. Bannon

K. Graham

Council attitudes in resp to
1/ Anson case. - Pen Com.
2/ Jiggs.

\$380,000

Grounds

- 1/ granting on unworkable
- 2/ Bent feet each. DA.
- 3/ Bent of stability

3.94

2nd Opinion not ready by Jonathan
Appeal open to Supreme Court
lasted Supreme 2 1/2 yrs.