ATTACHMENT A Costs in class 1. matter?

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Mr Max Eastcott
General Manager
Byron Council
PO Box 159
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Attention: Manfred Boldy

Dear Mr Eastcott

LAND AND ENVIRONMENT COURT PROCEEDINGS NO 40032 OF 1994: BYRON COUNCIL & HOLIDAY VILLAGES (BYRON BAY) PTY LIMITED ATS BYRON SHIRE BUSINESSES FOR THE FUTURE INC - JUDGMENT

We refer to the judgment of Justice MJ Pearlman AM in the above matter which was handed down on Friday, 30 September 1994, a copy of which has already been forwarded by facsimile transmission to Council. (A further copy of the judgment is enclosed for Council's convenience.)

Purpose of this letter

The purpose of this letter is to summarise her Honour's decision and to canvass some of the more important ramifications of her Honour's decision, both in the context of the Club Med matter and more generally.

The Applicant's grounds of appeal in the subject proceedings

As Council will be aware, the Applicant, Byron Shire Businesses for the Future Inc (BSBF), in its Points of Claim, asserted that the development consent the subject of the Court proceedings was null and void on 4 grounds:

1. The subject development application ought to have been accompanied by a fauna impact statement (FIS) and no such FIS accompanied the application.

2. The subject development application ought to have been accompanied by an environmental impact statement (EIS) and no such EIS accompanied the application.

3. Development for the purposes of a tourist establishment was prohibited on part of the subject land.

4. Several conditions of development consent were invalid and incapable of being severed from the consent.

5. It was not open to Council to approve the development application without first referring particulars of the excavation and drainage proposals to the Department of Water Resources or the Ministerial Corporation administering the Water Act 1912 to enable meaningful consultation to take place as to the likelihood of a licence or permit being issued for the purposes of that Act and the conditions which might be attached to any such licence or permit and that, in the circumstances, Council's decision to consent to the application (having regard to its duty to consider relevant matters under s 90 of the Environmental Planning and Assessment Act 1979 [the EPA Act]) was one which Council, acting reasonably, could not have reasonably taken.

The decision of the Court

Interestingly, and significantly, all grounds of appeal but one (number 1 above) were rejected by her Honour. In that regard, as Council will also be aware, we had previously expressed the opinion that if the consent were ultimately declared to be null and void it was more likely that it would be on either or both of grounds 1 and 4.

It is also interesting to read the reported comments of the solicitor for BSBF, Mr Wroth Wall, that "the judgement was a victory, but not as big a victory as they had hoped":

> "While we are happy with the result, we don't necessarily agree with all the conclusions reached by Justice Pearlman. I would have liked for at least a couple of the other grounds to have been upheld." (*The Northern Star*, 1 October 1994, p 3)

The 5 grounds of appeal will now be addressed *seriatim*.

1. Lack of an EIS

Her Honour found that "it was not reasonably open to [Council], on the material before it, to conclude that there was not likely to be a significant effect on the environment of endangered fauna" (p 17). In that regard, her Honour said:

> "In summary, the material before the council showed that 33 endangered species were predicted on or in the vicinity of the site; that there was no likelihood of significant effect on the environment of one of those species by reason of proposals for amelioration of impact; there was, however, a likelihood of significant effect on the environment of one other species; and further information was necessary in order to apply s 4A [of the EPA Act] to determine whether or not there was likely to be a significant effect on the environment of other endangered fauna." (p 17)

In the opinion of her Honour, Council "started off with at least the possibility of significant effect" and was "then bound by the [Act] to determine whether or not that was so" (p 17). In respect of the comb-crested jacana, "the only reasonable conclusion was that its environment was likely to be significantly affected", and as to other species of endangered fauna Council "was required to make a determination one way or the other as to significant effect on environment" (p 17).

In short, her Honour concluded that the information on fauna impact before Council was "insufficient" (p 17). Accordingly, it was "not reasonably open to [Council] to conclude that there was no likelihood of significant effect on their environment" (p 17).

The legal consequence of her Honour's conclusion that Council's decision on the fauna question was "not reasonably open" to it is the invalidation of "the very foundation of the development consent process" (p 18).

Perhaps the most important part of her Honour's judgment is the following:

> "The council could not proceed to exercise its power of determination under s 91 [of the EPA Act] because a pre-condition for the exercise of that power did not exist. In the circumstance where the development application itself disclosed the fact that approximately 33 species of endangered fauna were likely to be within or near the site, the council was on notice that a question of the likelihood of significant effect on their environment arose for determination. Without a proper determination of the threshold question [ie whether or not the proposed development would have a significant effect on the environment of endangered fauna] in those circumstances, a development application which complied with the requirements of s 77 [of the EPA Act] could not exist, and without such a conforming development application, the council was not empowered to exercise its power of determination of the development application under s 91." (pp 18, 19)

In effect, her Honour found that Council made a "jurisdictional error" by misdirecting itself in law or applying the wrong legal test. It proceeded on the "wrong premise" (p 17), by taking the information on fauna that it had and proceeding to determine the question of impact (p 17) and otherwise ameliorate impact. In her Honour's opinion, that is "not the scheme" of the EPA Act. The scheme of the Act is as follows:

(1) Is the proposed development likely to have a significant effect on the environment of endangered fauna?

(2) If the answer to question (1) is yes, an FIS is required.

(3) If an FIS is required, it must properly address the question of impact.

(4) With the FIS before it, Council can then proceed properly to determine (and, if consent is granted, ameliorate) impact using the FIS as a tool.

2. Lack of an EIS

In summary, her Honour found, consistent with previous judicial authority, that it was reasonably open to Council to conclude that the proposed development (including its various components) was not "designated development" within the meaning of the EPA Act.

3. Prohibited development

Whilst her Honour concluded that development consent was granted, in respect of the Bayshore building, for a purpose which was prohibited by Byron Local Environmental Plan 1988 [the LEP] (see pp 34, 35), she was nevertheless of the view that that part of the consent which referred to the Bayshore building could be severed from the remainder of the consent (see p 37).

In all other respects, her Honour was satisfied that the proposed development was not prohibited by the LEP.

4. Invalid conditions

The Applicant asserted that 21 of the conditions of consent were invalid and could not be severed from the consent.

Her Honour did not think that the Applicant's challenge to any of the 21 conditions could be sustained (see p 39).

This matter will be further addressed below (see p 8 of this letter).

5. Manifest unreasonableness/failure to take into account relevant matters

Her Honour found that Council "had before it ample material on the issue of potential acid sulphate soils and the proposed drainage" (p 42). Further, her Honour noted that Council "did consult with relevant authorities in its assessment of the development application" (p 43) and that the Court "should not lightly conclude that [Council] failed to take into account relevant considerations" (p 43).

Finally, her Honour found that Council was "under no duty to seek out any expert's contrary opinion, nor was it bound to seek details of the criteria and conditions of

any licence the Department of water Resources might issue" (p 44).

In short, her Honour concluded that Council had material before it which would enable it to form an opinion as to the relevant matters Council was bound to consider under s 90 of the EPA Act, and she was otherwise not satisfied that Council had failed to consider them, or that Council's decision was unreasonable in the circumstances (see p 44).

The practical consequence and significance of the decision

Need for formal "threshold or intermediate" determination of faunal impact

The practical consequence and significance of her Honour's decision is that in future - in the case of every development application - Council will need to make administrative provision, in the assessment process, for a formal "threshold or intermediate" determination of the question of whether or not the proposed development will have a significant effect on the environment of endangered fauna. In our opinion, this matter ought, in the light of her Honour's decision, to be addressed, for all intents and purposes, before any other merit-based assessment under s 90 of the EPA Act (and certainly before any purported determination under s 91 of that Act) takes place.

As her Honour put it:

> "In my opinion ... there is a threshold or intermediate question to be determined before the council can exercise its power under s 91(1). Is there a development application to be determined? That question must be answered in every case but it is not required to be answered at the time of lodgement. It must have been answered, however, at the time when a consent authority comes to make its determination to grant or refuse consent." (p 5)

Although this threshold question need not be answered "at the time of lodgement" of the development application, we are of the view that the earlier the question is answered the better, before Council proceeds too far down the trackin the assessment process. However, at the risk of stating the obvious, Council's consideration of this threshold question must be "proper", "genuine" and "real".

Adequacy and sufficiency of material before Council

This leads to the important issue of ensuring that the material before Council is "sufficient" to enable Council to discharge its statutory responsibility, both in relation to the threshold (or intermediate) determination under s 4A of the Act and in relation to assessment under s 90 and final determination under s 91 of the Act.

An administrative decision maker (such as Council) is not ordinarily under a legal duty to initiate inquiries. The obligation of consideration has traditionally been said to extend to only those matters which are known to the decision maker. The

general principle is those matters should be notified to the decision maker by the party who relies upon them.

To that extent there is ordinarily no obligation on a decision maker to initiate inquiries (see Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24) or to give a person advance notice that a submission or an application is insufficiently persuasive to warrant a favourable decision or determination (see Barina Corporation v Deputy Commissioner of Taxation (NSW) (1985) 59 ALR 401). In other words, the obligation of consideration is more passive than active.

However, in recent years there have been some important developments in administrative law at the federal level which indicate that the obligation of consideration is more active than has traditionally been thought to be the case. We believe that these developments have important implications for local councils.

In Prasad v Minister for Immigration & Ethnic Affairs (1985) 65 ALR 549 "unreasonableness" was the ground chosen by Wilcox J to describe the failure of a decision maker to initiate inquiries "where it is obvious that material is readily available which is centrally relevant to the decision to be made". In addition, it has been held that a decision maker acts unlawfully by not making further inquiries where the available material "contains some obvious omission or obscurity": Videto v Minister for Immigration & Ethnic Affairs (No 2) (1985) 8 ALN 238.

These authorities were cited with approval by Pearlman J in Hospital Action Group Association Inc v Hastings MC (1993) 80 LGERA 190. Although the duty to inquire may be a limited one, failure to inquire (or, at least, solicit from the applicant sufficient information) in an appropriate case can have dire consequences. In that regard, it must be kept in mind that the courts have already held that a decision maker must make a decision on the basis of logically probative material rather than mere speculation or suspicion: see, for example, Minister for Immigration & Ethnic Affairs v Pochi (1980) 31 ALR 666; Mahon v Air New Zealand Ltd (1983) 50 ALR 193; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321. This is known as the "no evidence" or "probative evidence" rule.

When one thinks about it, the difference between making a decision on the basis of "no evidence" and on the basis of "insufficent or inadequate evidence" is one of degree only. Hence it is essential that decision makers - including councils - have sufficient probative material before them on which to make their decisions.

The result of not making further inquiries is that the decision maker cannot raise the defence that it was unaware of the matter and unable for that reason to consider it or to appropriately condition the decision or determination. In short, the decision maker is taken to have constructive or deemed knowledge of the matter in question which ought to have been taken into account in the decision making process.

The significance - and relevance - of all this to the matter of fauna assessment is that Council cannot just rely on the applicant's answer to the "threshold question" of whether or not the proposed development will have a

significant effect on the environment of endangered fauna without making its own assessment of the matter. Council is, in the words of Pearlman J, itself "bound ... to determine whether or not that [is] so, by taking into account the matters set out in s 4A" (p 17).

In the first instance, Council should require the applicant for development consent to furnish Council with **sufficient information** (whether in the initial statement of environmental effects or otherwise) to enable Council to make a proper determination of the threshold question. In that regard, an applicant may need to be told by Council that Council will not begin to assess the subject application on its merits until such time as Council has been supplied with sufficient information to determine whether or not an FIS is required in the particular case.

However, where it is obvious that other material is readily available which is centrally relevant to the decision to be made, or where the available material contains some obvious omission or obscurity, Council will need to go further and make further inquiries, as the authorities cited above indicate.

Reliance on views of officers, consultants, etc

Council may, of course, ordinarily rely on the inquiry, advice and recommendations of its officers: see Parramatta CC v Hale (1983) 47 LGRA 319 at 346. Equally, Council may also rely on the recommendations of a consultant employed by it: see Bohun v Commissioner for Main Roads (L & E Ct, 11December 1987, unreported). There is also no legal or policy objection why Council should not be able to take into consideration a consultant's report submitted by, say, an applicant for approval: see Oshlack v Richmond River SC & Anor (1993) 82 LGERA 222. However, it is for Council to determine what weight, if any, it places upon such a report: Oshlack.

Finally, Council is also entitled to have regard to the views of a statutory authority or government department whose functions impinge upon a council domain, although it is not strictly bound by those views: see, for example, Wiggins v Kogarah MC (1958) 3 LGRA 328; Tracey v Waverley MC (1959) 5 LGRA 7; Amoco Australia P/L v Albury CC (1965) 11 LGRA 176.

However, regardless of the source and adequacy of the relevant material, two things are very clear:

1. Council, entrusted with a statutory discretion, must exercise that power itself and in an independent manner, and must not be dictated to by a third party: see R v Stepney Corporation [1902] 1 KB 317; Evans v Donaldson (1909) 9 CLR 140.

2. Council is, in the words of Pearlman J, itself bound to determine whether or not the proposed development is likely to have a significant effect on the environment of endangered fauna, by itself taking into account the matters set out in s 4A of the EPA Act.

Inability to remedy statutory non-compliance by imposition of consent conditions

On further thing is very clear from her Honour's judgment. If an FIS is required in a particular case, and none has been provided, the deficiency **cannot** be remedied by Council purporting to attach "appropriate" conditions to the development consent to protect fauna or ameliorate any adverse effects on the environment of fauna. In her Honour's words:

> "What is required is a determination of the question of likelihood of significant effect on the environment of endangered species. If there is likely to be such an effect, an FIS is required, and it addresses that question of impact. With the FIS before it, the council can then proceed properly to determine impact using that document as a tool ... ." (p 17)

Thus, Council cannot determine the question of whether or not a proposed development is likely to significantly affect the environment of endangered fauna by reference to the imposition of certain conditions which may have the effect of mitigating the environmental impact. (See also Drummoyne MC v Maritime Services Board & Ors (1991) 72 LGRA 186.)

Finally, in framing conditions which actually deal with the crucial issues relating to the matters listed in s 90 of the EPA Act, Council must take care not to purport to postpone or defer the resolution of difficult issues, particularly where those issues really go to the fundamental question of whether or not the development **ought** to be approved, or whether the development is even **legally capable** of being approved in the first place.

This is especially so with respect to measures to reduce environmental harm. Conditions requiring the preparation of management plans and the like are not necessarily bad or flawed (see Oshlack), but extreme care must be taken to ensure that they are not void for lack of finality or uncertainty. At any rate, it is highly desirable that the "substance" of such plans be in existence at the time the conditions are imposed, even if the "final details will, of perforce, need to be settled at a later date" (Oshlack, per Stein J).

See, relevantly, her Honour's comments on pp 39 and 40 of her judgment. In particular, the "aspects" of the proposed development the subject of the conditions must arise out of Council's "consideration of relevant impacts of the proposed development" (p 39). Furthermore, the conditions must specify "the relevant aspects which the various management plans must address" (p 39).

The question of an appeal

We are of the opinion that there is no substantive legal basis on which Council could seriously contemplate an appeal to the Court of Appeal against the decision of Pearlman J.

Indeed, any appeal by either Council or Holiday Villages might lead to a cross-appeal or notice of contention being filed by BSBF which might result in the Court of Appeal reversing her Honour's findings in relation to the other four grounds of appeal.

Amplification of letter

Should you have any queries in relation to the contents of this letter, or require any further information, please do not hesitate to contact us.

Yours faithfully

HENNINGHAM & ELLIS-JONES

Encl

1984 Federal election - The Greens formed

1987 Federal election - 32,000 votes

1990 Federal election - 64,000 votes

By-elections Granville 14%
Heffron 13%

1991 State elections 105,000 Upper House votes
8 Lower House seats contested
Marrickville 13%
Port Jackson 7%
Heffron 7%
Wollongong 5%
Drummoyne, Lismore & Vaucluse received over 4%

Newcastle Green ,John Sutton was elected to Newcastle Council
Inner Sydney Green , Bruce Welsh was elected to Marrickville Council

1993 Federal elections
14 Lower House seats contested
Sydney 7.75%
Newcastle 7.35%
Grayndler 6%
Wentworth 5.9%
Kingsford-Smith, Cunningham, Throsby, Gilmore and Richmond all received over 4%

Senate - 84,000 votes

1994
Byelections- Mackellar 6.1%
Vaucluse 9.0%
Council elections - Randwick 11%

In Tasmania The Greens are represented by 5 MPs

At the Federal level The Greens are represented by 2 WA Senators

1995 State Election
With support we can achieve representation in NSW

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The Greens NSW

- Ecological Sustainability
- Social Justice
- Grass Roots Democracy
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NSW Election '95

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2. Josephine Faith
3. Leeza Dobbie

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