

Our Ref: 27 34 4740:LK
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Attention: Seth Philbrook

The General Manager
 Tweed Shire Council
 PO Box 816
 MURWILLUMBAH NSW 2484

Dear Sir,

Re: Proposed Class 5 proceedings in the Land and Environment Court
Ppty: Lot 4 Section 2 DP 7309 (26) Seaview Street, Kingscliff

We refer to the email received on 30 March 2009 and the writer's subsequent telephone conversation with Mr Philbrook.

We confirm that Council seeks our brief advice on the implications of commencing prosecution proceedings in Class 5 of the Land and Environment Court jurisdiction.

We understand that Council is contemplating commencing prosecution proceedings in Class 5 of the Land and Environment Court jurisdiction for the failure to comply with conditions of consent DA05/0824 for multi dwelling housing at 26 Seaview Street, Kingscliff in that parts of the roof and the floor have been constructed higher than the approved levels.

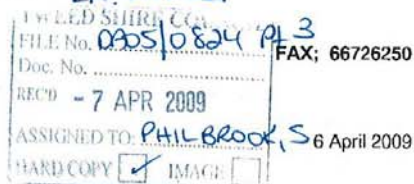
Furthermore we understand that an application to modify DA05/0824 pursuant to section 96 of the Environmental Planning and Assessment Act 1979 ("EPA Act") is presently being considered by Council and there is the likelihood that Council will give approval to the modifications sought.

Class 5 of the Land and Environment Court is the jurisdiction within which criminal prosecution proceedings are commenced. Section 21 of the Land and Environment Court Act 1979 provides that the Land and Environment Court, in Class 5 of its jurisdiction, has jurisdiction to hear and dispose of in a summary matter proceedings under section 127 of the EPA Act.

Section 127 of the EPA Act provides that proceedings for an offence against the Act may be taken either in the Local Court or before the Land and Environment Court in its summary jurisdiction.

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Section 125 of the EPA Act provides that where any matter or thing is directed or forbidden to be done under the EPA Act and is not done or is done in those circumstances then it is an offence under the EPA Act.

Section 76A of the EPA Act relevantly provides:

- "(1) If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless:*
- (a) such a consent has been obtained and is in force, and*
 - (b) the development is carried out in accordance with the consent and the instrument."*

We note here that it is alleged that the development has not been carried out in accordance with the consent that has been issued. If Council has available to it admissible evidence to confirm that the development consent has not been complied with then an offence has occurred under section 76A and section 125 of the EPA Act.

In those circumstances section 127 of the EPA Act and section 21 of the Land and Environment Court Act 1979 provides that the Land and Environment Court has jurisdiction in Class 5 of its jurisdiction to hear proceedings for the offence.

The Court only has the power to issue a fine in Class 5 of its jurisdiction for an offence under section 76A and section 125 of the EPA Act. In this regard section 126 of the EPA Act provides that presently the maximum penalty for the offence alleged is \$1.1m if the matter is heard in the Land and Environment Court.

Criminal prosecution proceedings for this offence can be heard in the Local Court however if Council decides to commence proceedings in the Local Court then the maximum penalty that the Local Court can impose pursuant to section 127 of EPA Act is \$110,000.00.

Council if it wishes is also able to issue a Penalty Infringement Notice for an offence under section 76A and 125 of the EPA Act however the penalty is limited to \$750.00 for an individual and \$1,500.00 for a corporation.

If the application to modify the development consent pursuant to section 96 of the EPA Act is approved by Council then this does not provide a defence to any prosecution proceedings that have been commenced for carrying out development otherwise than in accordance with the conditions of the development consent. The offences occurred at the time that the development has been carried

out otherwise than in compliance with the conditions of consent and it does not stop being an offence if the conditions are subsequently modified.

If the conditions however are subsequently modified to address the building work that has been carried out otherwise than in compliance with the original conditions of consent then, if convicted of the offence, a Court may take this into consideration when considering the gravity of the offence. That is when considering the appropriate penalty and the fact, if the modification is granted, that the Council has accepted the otherwise unauthorised building work.

We have not been provided with the evidence in Council's possession and so it is difficult to advise on prospects of success for such a prosecution. It would be necessary for Council to prove to a Court, using evidence in admissible form, that a valid development consent has been issued and that building work has taken place on a certain date which does not comply with a condition of consent or with the approved plans. Proceedings in Class 5 of the Land and Environment Court can be costly. It is necessary to draft and file a Summons, Notice of Charge and supporting affidavits. Before the Notice of Charge can be issued by the Court an appointment needs to be made with a Judge of the Land and Environment Court with the evidence in Council's possession so that the Judge can be sufficiently satisfied that there is a prima facie case. The evidence is in affidavit form so it is necessary to draft lengthy affidavits.

If the proceedings are defended then it is necessary to run a contested hearing before a Judge of the Land and Environment Court. It may also be necessary to brief Counsel.

We estimate that costs for a one (1) day hearing in the Land and Environment Court would be in the order of \$15,000.00 to \$20,000.00.

As indicated previously proceedings can also be commenced for such an offence in the Local Court. It is only necessary to file in the Local Court a Court Attendance Notice. It is only necessary to provide to the Defendant statements of witnesses and a Statement of Facts. Proceedings would come before a Magistrate in the Local Court. If the matter was to proceed to a hearing of not more than one (1) day in the Local Court then we would estimate that costs would be in the order of \$5,000.00 to \$10,000.00.

The only limit in the Local Court is that the Magistrate cannot issue a penalty for greater than \$110,000.00.

Having regard to the nature of the offences alleged we would think that it is highly unlikely that a Court would issue a penalty for greater than \$110,000.00. Furthermore if the development consent is modified to recognise the unauthorised building work or to address it then this would also have an

Tweed Shire Council

6 April 2009

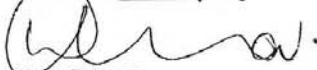
impact on the penalty to allow a Court to place it in the lower range of penalty than it might otherwise have imposed.

We confirm the writer's advice to Mr Philbrook that if Council wishes to seek declarations and orders requiring the unauthorised building work to be rectified then Class 4 of the Land and Environment Court is the appropriate jurisdiction. If you require our further advice in this regard then we are happy to provide it.

We trust that the above advice addresses the issues that you are seeking to have addressed.

Should we be able to provide you with any further assistance in this regard then please do not hesitate to contact the writer.

Yours faithfully
MARSDEN LAW GROUP



D. R. BAIRD
Partner