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ILLEGAL USE / ILLEGAL BUILDING WORK COUNCIL RESPONSES

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1 ILLEGAL USE

It is necessary from the outset to distinguish between circumstances of illegal use and illegal building work. Generally speaking, the decision as to how to proceed in circumstances of illegal use is more easily arrived at than in circumstances of illegal building work.

In broad terms, the occurrence of an illegal use may give rise to one or more of the six possible responses set out hereunder. The responses are not mutually exclusive and, in many instances, it will be appropriate to invoke more than one response.

1.1 To take no action

A Council may, after consideration of the relevant issues, in the exercise of its discretion, decide to take no action. See *Ryde City Council v Echt* 107 LGERA 317.

1.2 To invite a submission of a development application and to process same

It is open to the applicant to attempt to regularise future use of the subject activity at any time by seeking consent in relation thereto and the lodgement of such an application gives a Council the opportunity to consider its attitude to same. This also provides a Council with the opportunity to impose conditions of consent which regulate the activity and, in some instances, this may be sufficient for a Council's purposes.

1.3 To issue a penalty notice

Schedule 5 of the Environmental Planning and Assessment Regulations ("EPA Regs") provides for the issuance of a penalty notice in relation to a contravention of section 76A(1). That section provides as follows:

> *"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."*

If the penalty notice is issued and paid then section 127A(4) provides that this precludes "*any further proceedings for the alleged offence*". The wording is rather wide. We assume that it is intended simply to prevent any further criminal prosecution based on the same offence and ought not extend to preclude a Council from bringing subsequent proceedings by way of injunction. Our view, in that regard, is strengthened by section 127A(5) which provides that payment of a penalty notice is not to be taken as an admission of liability "*and does not in any way affect or prejudice any civil claim, action or proceedings arising out of the same occurrence*". An injunction proceeding commenced by a Council is properly characterised as a "civil proceeding".

If the penalty notice is disputed or not paid, Council will be faced with the need to prove the offence beyond reasonable doubt in Court.

1.4 To issue an order pursuant to order no. 1 to the table to section 121B of the Environmental Planning and Assessment Act 1979 ("EPA Act")

There are a number of technical requirements to be met for the proper issuance of such an order.

In many cases, we would question the efficacy of taking this course having regard to the fact that:

- The perceived benefit of the service of an order is that, in the event of a failure on the part of the recipient to comply with the order, a Council is in a position to prosecute and/or commence injunction proceedings. Since a Council is in a position to do so in the event of an illegal use quite independently of the orders provisions in section 121B of the EPA Act then we see little utility in resorting to them.

- The Court has adopted a quite "legalistic" approach to the issuance of such orders (see *Ryde v Echt*) and a Council may create a rod for its own back in resorting to the orders procedure in circumstances where it is not necessary.

The possible advantages of using the orders procedure can be:

- Some persons may be persuaded to regularise the position upon receipt of a Notice of Intended Order.

- Representations made pursuant to the Notice of Intended Order may assist in clarifying a situation and providing a solution thereto.

- Council gains a theoretical power to enter and undertake remedial works.

- The provisions of the Order bind successors in title.

1.5 To seek injunctive relief

A Council is in a position to approach the Land and Environment Court for injunctive relief where a breach of the EPA Act has been committed and the Court has power to make such orders as it thinks fit to remedy or restrain the breach.

This course is often adopted by a Council in circumstances of illegal use in preference to other courses of action because:

- A Council is only required to prove its case to the civil standard of proof, ie on the balance of probabilities as distinct from the criminal standard, ie beyond reasonable doubt.

- The Court has wide powers as to the kind of orders it might make and orders can be tailored to the constraints of a particular situation.

- There is no time limit on the bringing of proceeding.

It should be noted that a Council is not entitled as of right to the relief sought. The Court has a discretion according to the circumstances of the case as to whether or not to make orders and as to the form of the orders it will make.

It should also be noted that pursuant to section 124(3) of the EPA Act the Court may adjourn the proceedings to allow a development application to be made in an attempt to regularise the activity.

The Court will frequently avail itself of this opportunity to adjourn injunction proceedings in order to await the outcome of some merit based assessment.

It should be noted however that this would not prevent a Court from making interlocutory orders pending a final determination of the merit based assessment. Typically, these would be to restrain or ameliorate any environmental harm, fire safety hazard, public safety and/or health risk or the like.

1.6 To proceed by way of prosecution

There are substantial penalties provided for in the EPA Act in the event of a successful prosecution.

As a matter of practice, a Council is often reluctant to bring prosecutions (where alternative courses of action exist) for the following reasons:

- The criminal standard of proof, ie beyond a reasonable doubt is not always easily met.

- Even the successful bringing of a prosecution is not always the end of the matter, ie it would be open for the defendant to pay the penalty and continue the unlawful activity.

- Section 127(7) of the EPA Act provides that:

> *"A person shall not be convicted of an offence against this Act where the matter constituting the offence, is at the date upon which the conviction would, but for this subsection be made –*
>
> *(a) the subject of proceedings under section 123, which proceedings have not been concluded; or*
>
> *(b) the subject of an order made under section 124,"*

Effectively, this subsection requires that a prosecution be commenced and completed prior to the bringing of any injunctive action. Since prosecution procedure may take many months, this is a substantial deterrent to the bringing of a prosecution.

In a practical sense, the proceedings by way of prosecution represent a reasonable alternative only where a Council has decided not to proceed with injunctive relief.

2 ILLEGAL BUILDING WORK

2.1 To take no action

A Council may, after consideration of the relevant law, in the exercise of its discretion, decide to take no action (see *Ryde City Council v Echt* 107 LGERA 317).

2.2 To retrospectively modify an existing consent pursuant to section 96(2) EPA Act

Except for the limited circumstance set out hereunder, unauthorised building work cannot be retrospectively approved so that the course

of action 1.2 referred to above cannot apply in the manner set out above. There is, nonetheless, a need for a Council to make some assessment of the unauthorised work (see *Ryde v Echt)* and we will return to that topic later herein.

The exception to the general rule that there can be no retrospective consent for unauthorised building work is the proposition that a pre-existing development consent can be modified to grant consent retrospectively to works that have already been carried out.

Windy Dropdown Pty Ltd v Warringah Council (2000) 111 LGERA 299.

The perceived practical benefit and utility of the *Windy Dropdown* decision is that a consent authority can deal with unexpected contingencies which arise during the course of construction of a development provided, of course, that at all times there was a development consent in force and that the development to which the consent, even as modified, relates is substantially the same development.

2.3 To issue a building certificate pursuant to sections 149A to 149G of the EPA Act

The building certificate provisions provide a further means for regularising illegal building work after the event. The notion that the building certificate provisions do not apply to an unlawfully erected building has been rejected by the Land and Environment Court. See *Ireland v Cessnock City Council* (1999) 103 LGERA 285.

Section 149D(1)(b) makes it clear that it is not incumbent upon a Council in every case where it has received an application for a building certificate and, upon inspection, finds some irregularity or another to commence action for the removal of same.

Section 149D(1)(b) envisages that there will be occasions where a Council "*in the circumstances*" does not propose to take such steps. This might occur for example where some illegal building work has occurred many years before and gives rise to no environmental harm or breach of any significant building standard.

2.4 The need to assess illegal building work

It is necessary in all cases to make some retrospective assessment of illegal building work for the purpose of determining a Council's response thereto (*Ryde v Echt*).

In cases of an application for modification of an existing development consent pursuant to section 96(2) above or an application for a building certificate there exists a formal mechanism and structure

within which a Council may make that assessment. It is noteworthy that in each case a right of appeal exists against a Council's decision.

Even in circumstances where there is no application initiated by the applicant, there will be a need for a Council to decide its attitude to the illegal work in order to assess whether:

- to allow the work to remain,
- to prosecute,
- to proceed by way of injunction to have the work demolished, or
- to seek alternative remedies.

There will be a number of matters of obvious interest to a Council in making that assessment such as:

- whether the work is structurally sound;
- whether the work complies with the relevant controls;
- whether the work gives rise to some environmentally disadvantageous consequences

and so on.

2.5 What to do where an offender will not submit material to a Council

If a Council can establish that illegal building work has taken place and the offender will not co-operate with a Council in providing "*as built plans*" or certificates of structural soundness or the like, a Council may be able to seek the provision of same by way of injunction proceedings.

Where a breach has been established, the Court is empowered by section 124 of the EPA Act to "*make such order as it thinks fit to remedy or restrain the breach*". These words are wide enough, in our view, to include orders for the provision of certificates of structural soundness and the like.

2.6 In making its assessment, what weight can a Council give to the fact that works were illegally carried out?

A Council can give only limited weight to the fact that works were illegally carried out. Where a formal assessment procedure has been invoked, the authorities have made it clear that the fact that works were illegally carried out will not be a factor which, of itself, justifies refusal of the application.

In the *Windy Dropdown* decision referred to above, for example, the Court had earlier made orders requiring the removal of the illegal works but those orders were stayed to allow a determination of the section 96 modification appeal.

Similarly, in the *Ireland v Cessnock* decision, the Court had earlier ordered the removal of the unauthorised works but it again granted a stay to enable an application to be made to regularise the position.

There is, therefore, clear authority in each such instance that the carrying out of illegal work does not impede the consideration of an application on its merits. Other authorities support this.

See *Kouflidis & Ors v City of Salisbury* (1982) 49 LGRA 17; *Longa v Blacktown City Council* (1985) 54 LGRA 422.

The following quotation from Mr Justice Bignold in *Ireland v Cessnock* is of assistance:

> *"The proper approach to be taken to the available discretion will generally be that outlined in the judgment of King CJ of the South Australian Supreme Court in Kouflidis v Salisbury City Council (1982) 29 SASR 321, 49 LGRA 17, namely to leave to the criminal law, the punishment of the unlawful conduct involved in the erection of the building and to determine the present application on the merits* ***but taking care not to allow the wrongdoer to benefit from his wrongdoing****."*

The same principles apply where no formal application procedure is invoked but where a Council is nonetheless making its own assessment of the illegal works for the purposes of deciding whether to seek injunctive relief or not. The Court, in exercising its discretion as to whether or not to grant the relief sought, will generally require more than simply evidence that the works have been illegally carried out. There will usually need to be some evidence of non-compliance with standards or of environmental harm or some aggravating factor.

2.7 A wrongdoer is not to benefit from his wrongdoing

Where there is building work without consent but the works themselves comply with relevant standards, cause no environmental harm and are not otherwise objectionable then there is little justification for seeking injunctive relief and the appropriate sanction would normally be prosecution.

Where there is some non-compliance with standards or some environmental harm then neither a Council nor the Court should resile from requiring rectification just because the work has been completed.

2.8 To issue an order pursuant to orders no. 2, 3 or 4 in the Table in section 121B of the EPA Act

There are a number of technical requirements to be met for the proper issuance of any such order.

In many cases, where the "trigger" for the issuance of the order is the carrying out of illegal works, we would question the efficacy of taking this course:

- The perceived benefit of the service of an order is that, in the event of a failure on the part of the recipient to comply with the order, a Council is in a position to prosecute and/or commence injunction proceedings. Since a Council is in a position to do so in the event of any illegal works quite independently of the orders provisions in section 121B of the EPA Act then we see little utility in resorting to them.

- The Court has adopted a quite "legalistic" approach to the issuance of such orders (see *Ryde v Echt*) and a Council may create a rod for its own back in resorting to the orders procedure in circumstances where it is not necessary.

2.9 To seek injunctive relief

The comments made under paragraph 1.5 above apply.

2.10 Whether to prosecute or not

The comments made under paragraph 1.6 above apply, but a prosecution must be commenced within twelve months of the offence.

The decision as to whether or not to prosecute needs to be taken on a case-by-case basis.

In many cases, a prosecution will be precluded because of the desirability of obtaining alternative injunctive relief having regard to the provisions of section 127(7) of the EPA Act referred to earlier.

In other circumstances, a Council might elect to proceed by way of prosecution rather than injunction. For example, where the work is almost complete and there is little obvious justification at that stage for its removal.

In order to prosecute effectively, however, a Council will need to give consideration to providing adequate training to its building assessors on the gathering and compilation of evidence for the purposes of criminal prosecutions.

Prosecutions for illegal building work can be vigorously defended and some of the factual scenarios that present themselves with owners, occupiers, building contractors and subcontractors can be quite complicated. The onus of proof is on a Council to prove each and every ingredient of the offence beyond a reasonable doubt.

2.11 To issue a penalty notice

The comments made under paragraph 1.3 above apply.

The penalty notice procedure for "*failure to demolish/remove unlawful building*" is not immediately available because it requires firstly the issuance of an order number 2 and this substantially reduces the efficacy of that penalty notice option.

Where the illegal building work was work which required development consent, then a Council can avoid having to await the issuance of an order before it can issue a penalty notice by the issuance of a penalty notice for a contravention of section 76A(1) as advised in paragraph 1.3 above.

2.12 To enter and undertake works to remedy the breach

If an Order takes effect, but the breach continues, Council has the power to enter on the land and do all things that are "necessary or convenient" to give effect to the Order. Council also has power to remove and sell any material concerned, and recover its expenses.

In practice, Council rarely uses these powers, because of:

- The risk of confrontation with the owner/occupier of the land.
- The possibility of a claim for damages for alleged negligent or excessive use of Council powers.
- Possible difficulty in recovering expenses.