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EDO Alert! Decision in Mackay Conservation Group Case

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Mackay Conservation Group Inc v Mackay City Council and East Point Mackay Pty Ltd [168 of 2004]

On 28 September 2005, Mackay Conservation Group lost their appeal against East Point Development. Their appeal has however resulted in the imposition of a number of further conditions on the development. As you may recall the case involved a number of grounds of appeal and was heard over a series of dates in April, May and August.

We have outlined in detail Robin J's main findings of interest:

Tourism use or residential use? A key argument in the appeal was that the area was zoned for Tourism use and conflicted with a number of elements of the Strategic Plan relating to residential or urban use because it was primary use was not for tourism. The developer argued that the residential development The Court took a broad approach to the issue and suggested that there was no separation between the tourism and residential uses because although there were residential properties they could be rented out. Robin J also found the lack of integration through some form of group title was not reasonable and covenants would be sufficient to address these issues. He also found that the development was a comprehensive resort development and not precluded from being so because it had non-tourist facilities. His Honour found there was a long standing need for such development in Mackay which provided planning grounds if such conflict did exist and important economic needs. If the hotel did not go ahead there would be fraud on the part of the developer. The Court also took into account that this was a preliminary approval and that further details would assist in making the development a high quality ecologically sustainable development.

Natural values of the site:

The Court found that as the site had been earmarked for development rather than preservation for environmental purposes or open space it was difficult to see how the environmental issues could influence the broad planning outcomes and necessitate rejection of the development. The court also found that it was unlikely the site (with significant weeds) would revegetate without intervention and that the Council and State should be vigilant about environmental aspects of it.

Cyclones/Storm surge:

Robin J conceded that the safety of the site was an important issue yet it should not be assessed to prevent development. The Court referred to the decision of the Court in *Daikyo v Cairns City Council* as showing that designing the site for ultimate events such as cyclones was difficult. The Court gave credit to Dr Nott's arguments in the light of Hurricane Katrina in particular. His Honour said "it may well be that some cautious people in the circumstances will prefer to keep away from East Point". But he said there was a need to balance risk and economics. Robin J also

suggested further conditions to take into account the Appellant's expert reports and particular the need for modelling of the impacts and better policies to take into account up to date studies and protect human life.

State Coastal Management Plan

His Honour stated that while SPP have to be taken into account they will rarely be determinative. He was particularly swayed in this case by the fact that the State has been well placed to look after State interests as lessor and was under no obligation to make concessions to the developer, so the Plan required no further consideration in the circumstances.

Conditions:

The conditions the Court indicated should be strengthened included:

- Condition that no cats or dogs allowed to be kept in accommodation and residences;
- Condition attached to subdivision of land that landscaping accord with Environmental Management Plan restrict use of herbicides and fertilisers;
- Conditions requiring non-erodible bund on 3 sides of development to maximum of 6.5 metres and requirement 100 metres back from shoreline.
- Condition preventing use of groundwater by spear pumps;
- Condition attaching to residential lots requiring remain subject to clay sealing process to reduce rainfall infiltration to groundwater;
- Condition construction of subdivision comply with nutrient discharge both into groundwater and as part of stormwater match standards set out in exhibit 15;
- Condition on all accommodation units, multiple dwellings and detached housing preliminary approvals that no such future use may be occupied by permanent residents of any kind.
- Other conditions as agreed between parties.

As this is a preliminary approval there is also some scope to make more exhaustive conditions and MCG will be involved in continued dialogue with the developer and the Council to ensure strict conditions are imposed throughout the development approval process.

Lessons from the appeal:

The appeal exposes some of the problems with planning laws in protecting the environment. In particular, it demonstrates the flexibility in which the Court's will construe planning schemes to allow for development on State land along the coast. There are a number of important law reform issues that the EDO-NQ will be pursuing following this judgment including the weight to be given to State Coastal Management Plans to protect important areas of the coast. We will also seek to have further discussions with the relevant State authorities about environmental protections for the development of State land. The decision raises important issues about the risk to development from cyclones in North Queensland and makes it imperative that greater restrictions on development are drafted into planning schemes to provide protections areas from development.

For more information, contact Kirsty Ruddock at EDO-NQ on (07) 4031 4766.

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