

## Case Note

**Conservation of North Ocean Shores Inc v Byron Shire Council and Others** 167 LGERA 52; [2009]  
NSWLEC 69

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Conservation of North Ocean Shores Inc. ("CONOS") challenged the development consent granted by Byron Shire Council ("Council") to allow for the development of private land to hold the Splendour in the Grass music festival. The development consent allowed, amongst other things, the construction of a road network which included the construction of a 15m wide concrete underpass tunnel through a ridge that forms a regionally significant wildlife corridor. The regionally significant wildlife corridor is part of the last remaining intact east west link from the coastal forests of the north coast to the World Heritage Wollumbin Caldera forests.

CONOS argued that Council did not have the power to consent to the development. CONOS argued that the development was properly characterised as an assembly and under the applicable Local Environmental Plan assemblies were impermissible in the zone. CONOS further argued that Council failed to form a positive opinion, as it was required to do, that the development was consistent with the objectives of the Byron Shire Local Environmental Plan, which zoned the land as being for Habitat Protection.

As Council submitted to the legal challenge, Splendour in the Grass responded to the claims by saying that the development was for permissible purposes, namely roads and agriculture and that there was evidence that Council formed the requisite opinion.

CONOS won on both grounds of challenge, so the development consent was declared void and of no effect.

CONOS' argument on the first challenge was that Council exceeded its authority when it consented to the development for the festival (in other words, the consent was ultra vires). The *Environmental Planning & Assessment Act 1979* provides that development can be classified one of three ways: prohibited, permitted with consent, or permitted without consent. Environmental Planning Instruments and zoning regulations determine how a type of development is classified. The land at issue was zoned as 7(k) Habitat Area under the Byron Shire Local Environmental Plan. This zone prohibits most development, but permits certain types (with consent of the Council). Most notably, the zone allows for roads and agriculture. Therefore, consent of development that is not for roads or agriculture is ultra vires.

The Court upheld the first challenge to the development consent because the proposed development was for an assembly, which is not one of the permitted types of development for land zoned 7(k) Habitat Areas. The Court rejected Splendour in the Grass's argument that the development was for permissible agricultural and road use. The festival was claiming that the proposed development was for the purpose of creating a festival, but that the infrastructure accompanying it was to support permissible land use.

The Court was not persuaded because this argument neglects the purpose of the permanent infrastructure to be developed. Even if the development included some roads that would be used for agriculture after the festival, these purposes were found to be ancillary to the assembly.

The Court upheld the second challenge because Council did not consider whether development of all proposed structures was consistent with the goals of 7(k). Certain parts of the Planning Report by the Council staff made it evident that development of a bus path and security fence would threaten efforts to conserve wildlife in the area. The logical conclusion, therefore, was that the Council did not consider the goals of 7(k) zones, which are, amongst other things, "to identify and protect significant vegetation and wildlife habitats for conservation purposes," and "to prohibit development within the zone that is likely to have a detrimental effect on the wildlife habitats which exist."

Splendour in the Grass's rebuttal to the second challenge was that the development appeared to be for a permissible purpose. Of course, the Court had already ruled that it was not. Furthermore, it noted that this, alone, is not sufficient to demonstrate that the Council properly formed a positive opinion about the effect on conservation as required. Therefore, the final disposition was that the development consent was invalid, and costs were awarded to CONOS.