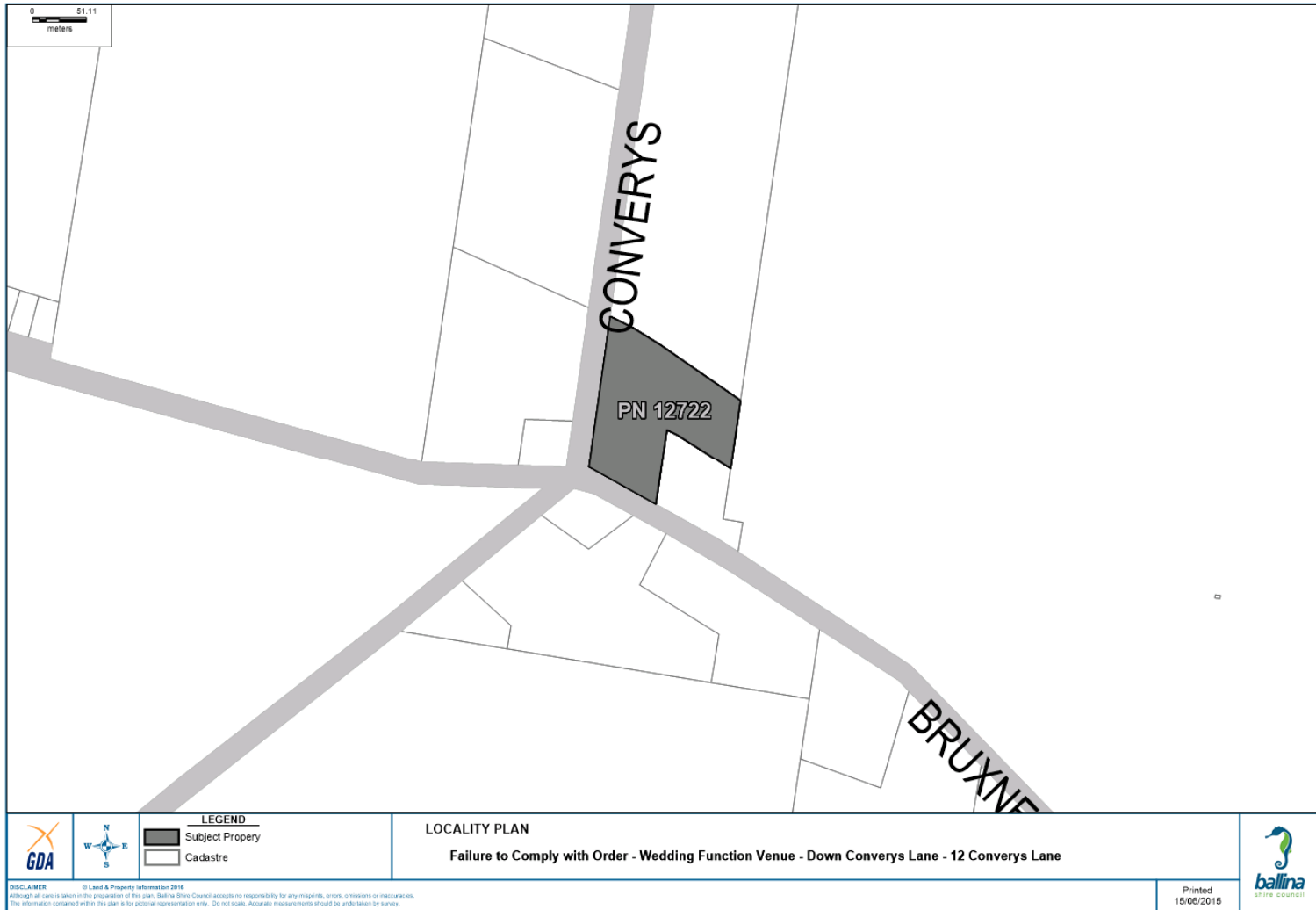


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8.4 Failure to Comply with Order - Wedding Function Venue

8.4 Failure to Comply with Order - Wedding Function Venue

Delivery Program Development Services

Objective To provide Council with an update on proceedings for this unauthorised land use and to seek Council endorsement for proposed legal action.

Background

Council officers undertook a site inspection at the subject premises on 3 November 2014.

During the inspection, Council officers confirmed that the landowners were operating a "function centre" within the subject premises. This inspection also confirmed the previously consented to operation of a retail nursery and café were no longer operating.

Further investigations revealed that the on-line advertising for the subject premises indicated that the business was operating solely as a "function centre".

In 24 November 2014, Council wrote to the landowner, Mr Tony Kratz and Mrs Kim Kratz to advise that the subject premises has two separate zones that apply to the land, these being 7 (c) *Environmental Protection (Water Catchment) Zone* under the provisions of the *Ballina Local Environmental Plan 1987* and *RU1 – Primary Production Zone* under the provisions of the *Ballina Local Environmental Plan 2012*.

The "function centre" is located in the *RU1 Primary Production Zone* under the provisions of the *Ballina Local Environmental Plan 2012* ("BLEP 2012"). A "function centre" is defined within the dictionary of BLEP 2012 as:

"function centre means a building or place used for the holding of events, functions, conferences and the like, and includes convention centres, exhibition centres and reception centres, but does not include an entertainment facility".

A "function centre" is a prohibited use within the *RU1 Primary Production Zone*.

A review of Council records indicates that on 10 August 2001 Council received development application 2002/149 to "convert existing dairy bails to a small café, that would serve a maximum of 50 patrons (comprising 20 internal patrons and up to 30 alfresco style dining patrons), erect a small toilet block and install an on-site sewage disposal system for sanitary waste and an on-site water recycling system for café trade waste, roof water and nursery effluent." On 28 November 2001, Council issued development consent 2002/149.

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Council records further indicate that on 20 May 2008, Council received a second development application, DA 2008/808 to "*undertake the removal of the existing pergola and the construction of a new larger pergola, to increase the number of patrons from 50 to 100 and to extend the hours of operation*" of the existing café and garden centre. On 19 December 2008, Council issued development consent 2008/808.

Condition 1.3 of development consent 2008/808 states that the consent was granted for a limited period of two years, unless the applicant/owner lodged a Section 96 application with Council, at least two months prior to the expiration of the approved period.

A subsequent amendment to the *Environmental Planning and Assessment Act 1979* (NSW) arising from the GFC extended this two year period to five years.

Based on an examination of the information contained within Council's files, it was initially determined that development consent DA 2008/808 had lapsed as works to physically commence the consent had not been undertaken within the five year time period allowed under the *Environmental Planning and Assessment Act 1979* (NSW) to commence development.

Key Issues

- Operation of Wedding Function Centre without the prior consent of Council
- Receipt of ongoing complaints from local residents
- Failure to operate business in accordance with development consent conditions

Information

On 3 December 2014, Council received a letter from Mr and Mrs Kratz, in which the landowners indicated that they had approached a local planning consultant to prepare an application for the continued use of the subject premises as a "*function centre*". Council provided an extension to Mr and Mrs Kratz and their consultant to prepare and to lodge the required development application to Council.

On 6 May 2015, Council staff met with Mr and Mrs Kratz to further discuss the lodging of a formal development application for the use of the subject premises as a "*function centre*". At that meeting, it was agreed that Mr and Mrs Kratz would provide written advice to Council by no later than 29 May 2015 of the date that they would be lodging this application with Council.

On 13 May 2015, Council had a DA pre-lodgment meeting with Mr and Mrs Kratz and their planning consultant, with Minutes sent to Mr and Mrs Kratz by post on 9 July 2015.

On 15 May 2015, Council formally wrote to Mr and Mrs Kratz to remind them of the requirement to provide Council with written confirmation of the date by which a development application for the use of the subject premises as a "*function centre*" would be lodged.

On 15 July 2015, Mr and Mrs Kratz and their planning consultant again met with Council officers in relation to this matter. At this meeting, Mr. and Mrs.

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Kratz outlined a number of options that they were investigating to continue their business in some form within the subject premises.

One of these options available to Mr and Mrs Kratz was to allow the restaurant approved under development consent DA 2008/808 to be booked from time to time for a wedding reception. Council has advised that there is no objection, nor any requirement, for the obtaining of an approval for this to occur, but that the issues Mr and Mrs Kratz needed to resolve were:

1. to demonstrate that DA 2008/808 had commenced for the purposes of the Act
2. to comply with the conditions of development consent DA 2008/808; and
3. for the venue to operate principally as a restaurant and not to operate solely as a "function centre".

Mr and Mrs Kratz were again advised that they would need to provide Council with written confirmation of the actions that they proposed to undertake to bring the business into compliance with the relevant approvals. Mr. and Mrs. Kratz were also advised that a Notice of Proposed Order would be issued as part of this process.

On 29 July 2015, Council served a Notice of Proposed Order on Mr and Mrs Kratz requiring that they cease the operation of the function centre from the subject premises, as this was a use that required the formal consent of Ballina Shire Council and no consent had been sought or obtained.

On 13 August 2015, a submission was lodged with Council on behalf of Mr and Mrs Kratz outlining the reasons that Council should not proceed to serve the Order. These reasons included an assertion that the development consent DA 2008/808 had not lapsed and that works required had been undertaken in line with the development consent and that a building certificate had been lodged as required by a condition of development consent. No supporting documentation was provided at this time.

This submission was reviewed and it was determined that the reasons outlined were not sufficient to prevent serving the Order.

On 11 November 2015, Council served the formal Order on Mr and Mrs Kratz requiring that they:

1. cease operating a function centre from the subject premises.
2. provide a written response outlining the functions already booked to occur within the subject premises.

The formal Order provided a compliance date of Friday 11 December 2015.

On 12 November 2015, a local solicitor engaged by Mr and Mrs Kratz submitted information to Council to substantiate the physical commencement of development consent DA 2008/808 and on 16 November 2015, Mr and Mrs Kratz's planning consultant provided additional receipts to Council to identify the dates of the physical works being undertaken.

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On 10 December 2015, a detailed review of all the supporting information supplied to Council was completed and Council issued correspondence acknowledging that development consent DA 2008/808 had been physically commenced. Whilst acknowledging "commencement", Council did advise Mr and Mrs Kratz's consultant that:

"You are also advised that there are a number of conditions of development consent DA 2008/808 which remain outstanding and your clients should not operate the café as outlined in development consent DA 2008/808 without complying with all conditions of that approval".

Council also indicated to Mr and Mrs Kratz that the date for compliance with the Order as served had been extended to Friday 8 January 2016. This timeframe was extended due to the time taken for Council to consider the additional information supplied by Mr and Mrs Kratz's solicitor and planning consultant.

A review of Council records was conducted and that review could not locate:

1. any application lodged for the operation of the subject premises as a "function centre" as required by point 1 of Council's Order, and
2. any written details provided by Mr and Mrs Kratz of functions already booked for 2016 as a formal response to point 2 of Council's Order.

Complaints continue to be received from local residents in relation to ongoing functions within the subject premises. Since 7 November 2015, Council received complaints about the noise generated by the hosting of wedding functions at the subject premises. The complaints also allege that these functions continued on after 9:00 pm, being the approved trading hours under development consent DA 2002/149.

Further, the complaints also allege that functions have continued on until 11.00 pm and later with large buses and maxi cabs attending the subject premises. On two occasions, 28 November 2015 and 19 December 2015, Council's on-call Ranger was in attendance and has provided detailed information in relation to breaches on both these occasions.

Council has since issued three Penalty Infringement Notices to Mr and Mrs Kratz for the breach of the 9.00 pm approved closing time for the restaurant under development consent DA 2002/149.

Sustainability Considerations

- **Environment**
The major impact on the environment is by the emission of noise from the unauthorized wedding function venue.
- **Social**
The disturbance of local residents and the rural amenity.
- **Economic**
The commencement of any proceedings would likely have a significant economic impact on the landowners and the Council as legal proceedings are costly but the continued disturbance of another

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business in the locality would likely have economic impacts on its operation.

Legal / Resource / Financial Implications

Legal proceedings are generally costly and to minimise costs and to achieve an acceptable outcome, there are a number of options available.

Consultation

Council has sought legal advice from one of the solicitors engaged through Council's Legal Tender and Council is acting in accordance with this advice.

This report has been made in open Council as all the information within it is a matter of public record. If the Council needs to debate any matters having potential legal privilege, it will be necessary for Council to deal with these confidentially.

Options

Council has a number of options as to what form of action, if any, it wishes to take for this unauthorised operation of a wedding function venue within the subject premises. The available options are more fully outlined in the *Ballina Shire Council Enforcement Policy* (hereinafter referred to as the "Enforcement Policy").

In determining a suitable response to this matter the Council will need to give due consideration to the requirement for a general deterrent to other residents, both within the immediate vicinity and within the Ballina Shire as a whole, that the carrying out of unapproved works is not acceptable.

Should Council decide to take minimal action for the operation of an unauthorised wedding function venue within the subject premises, it could create an undesirable situation within the local area that may result in similar unauthorised venues beginning operations within the Shire.

Having given due regard to the considerations for legal action as outlined in Part 3 of the Enforcement Policy and the need for a clear deterrent to the general public, it is considered that further enforcement action is warranted against Mr and Mrs Kratz for the operation of an unauthorised wedding function venue within the subject premises.

Council currently has seven options that are available to it identified within the Enforcement Policy. Council's options are:

1. Take no further action in relation to the operation of a wedding function venue within the subject premises.
2. Issue Formal Warnings.
3. Issue Penalty Infringement Notices.
4. Commence Local Court Criminal Prosecution Proceedings.
5. Commence Land and Environment Court Criminal Prosecution Proceedings.

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6. Commence proceedings in the Land and Environment Court seeking to enforce the Council Order as served on the landowner.
7. Commence legal proceedings in the Land and Environment Court, seeking an injunction against the landowners hosting any future weddings or other functions without the required development consent of Ballina Shire Council.

Option One

It is open to Council to resolve that no further action is required in relation to the operation of a wedding function venue within the subject premises.

Council's Enforcement Policy provides that Council may resolve that the issuing of the three Penalty Infringement Notices to Mr and Mrs Kratz are considered to be a sufficient punishment for the failure to obtain the required development consents and the failure to comply with the issued development consent DA 2008/808 and not seek to take any further action for the ongoing non-compliances within the subject premises.

This Option, whilst available to Council, is not recommended as a viable Option, as to date, the use is continuing and is not operating in accordance with any development consent.

Option Two

Issue Formal Warnings - When viewed in isolation, the service of Formal Warnings is not considered to be a suitable and substantial deterrent for the operation of a wedding function venue within the subject premises without the prior consent of Council.

Council has already issued three Penalty Infringement Notices to Mr and Mrs Kratz and it appears that these have not been a sufficient deterrent as the venue continues to operate without consent.

Option Three

Issue Penalty Infringement Notices - The wedding function venue has already received three Penalty Infringement Notices with a total value of \$9,000 for the hosting of three weddings during the months of November and December 2015.

The issuing of these Penalty Infringement Notices has not addressed the ongoing non-compliances within the subject premises. Further, the payment of at least one of these Penalty Notices is not legally viewed as an admission of guilt, but rather a decision not to challenge the Penalty Notice in Court.

The issuing of further Penalty Infringement Notices may not be a sufficient deterrent to prevent the ongoing non-compliances within the subject premises.

Options Four and Five

Options Four and Five recommend the commencement of criminal prosecution proceedings for:

8.4 Failure to Comply with Order - Wedding Function Venue

- The operation of a wedding function venue without the requisite development consent from Ballina Shire Council;
- The ongoing breaches of Council's Order as served on Mr and Mrs Kratz; and
- The failure to comply with all conditions of development consent DA 2008/808 to *undertake the removal of the existing pergola and the construction of a new larger pergola, to increase the number of patrons from 50 to 100 and to extend the hours of operation*".

The major difference between these two options is the Court jurisdiction.

The NSW Land and Environment Court is a division of the NSW Supreme Court. In this jurisdiction, any criminal prosecution, if successful, would leave any party subject to a maximum penalty of \$3m.

On the other hand, the Local Court jurisdiction would be able to impose a maximum penalty of \$110,000.

Council would need to also consider the capacity of any party to pay any penalty that may be imposed by the relevant Court. As stated, monetary penalties issued by the Land and Environment Court can be substantial.

Either of these two options would adequately address the penalty requirements and, upon successful completion of the proceedings, would provide a deterrent to the general public for the operation of an unauthorised function centre or wedding venue.

In this case however, these Options may not adequately address the ongoing nature of the use of the subject premises itself, and, in isolation, may not adequately address all of the issues associated with the subject premises.

Options Six and Seven

Options Six and Seven provide Council with avenues to obtain Orders from the Land and Environment Court that require the landowners to cease the operation of a wedding function venue within the subject premises.

The difference between these Options is that Option Six seeks to enforce Council's Order as served and Option Seven seeks to obtain a declaration that the wedding function venue is operating without the requisite approvals from Ballina Shire Council.

Council's solicitors have not suggested a preference for either Option Six or Seven, however both Options are available to Council.

Any Order of the Court carries the legal weight of the Supreme Court of New South Wales and any non-compliance with that Court Order would not be favourably viewed in any future proceedings.

Further, the obtaining of a Court Order is expected to be the most efficient avenue available to Council to seek the cessation of the unauthorised wedding function venue within the subject premises.

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Options Six and Seven do come at a financial cost to Council and these costs are not inexpensive, however Council would seek to obtain costs in these proceedings, should either Option Six or Seven be endorsed.

Use of Multiple Options:

There is no legal impediment to Council utilising more than one of the above options to remedy the unauthorised use and the non-compliance with development consent conditions within the subject premises. As reported, multiple options have been utilised but, to date, they have been ineffective.

When referring to actions within the Land and Environment Court, it is common practice, should sufficient evidence exist, for both criminal and civil proceedings to be commenced for an unlawful activity. Further, Council could utilise three or four options should circumstances require.

The use of multiple options is also consistent with the Enforcement Policy.

In this particular instance, and having regard to Council's legal advice, it is considered that there is now a need to apply more substantial options to those applied thus far. As a next step, Council's solicitors have been instructed to write to the landowners advising of their engagement and that legal proceedings in the Land and Environment Court are to be commenced without further notice should they not provide a satisfactory response by the date of the February Council meeting.

The recommendation that follows outlines the preferred course of action which is considered to be a reasonable balance in respect to the available options and the responses of the landowners to date.

RECOMMENDATION

That Council endorse the utilisation of options six and seven, as detailed in this report, and as outlined below to instigate and pursue legal proceedings in the NSW Land and Environment Court against Mr and Mrs Kratz for the offences of operating a wedding function venue without the requisite development consent and for the failure to operate in accordance with either development consent DA 2002/149 or development consent DA 2008/808.

- Option Six - Commence proceedings in the Land and Environment Court seeking to enforce the Council Order as served on the landowner.
- Option Seven - Commence legal proceedings in the Land and Environment Court, seeking an injunction against the landowners hosting any future weddings or other functions without the required development consent of Ballina Shire Council.

Attachment(s)

1. Locality Map