

Newsletter.....October, 2018

Gillion Pty. Ltd. (Power Pde) – commercial water extraction

The court judgment on this long running Power Parade water extraction case was delivered on Friday, 5th October. The appeal in the Planning and Environment Court by Gillion Pty. Ltd. against Scenic Rim Regional Council's refusal of its development application was dismissed by Judge Morzone.

<http://www.scenicrim.qld.gov.au/scenic-rim-planning-scheme>

This development application to SRRC was made in 2014 and followed several earlier attempts to obtain approval for commercial water extraction at this residential site. The application was virtually the same as before, except it now added a need for local supply as well as being a source for fire fighting emergencies, especially in the south end of the mountain.

Under the planning scheme, the land is designated Tamborine Mountain Zone - Village Residential Precinct. and is affected by several overlays – Nature Conservation, Development Constraints and Catchment Management, Waterways and Wetlands.

What started as a Show Cause Notice issued by Council in 2008 because of neighbours' complaints, Gillion's subsequent required development application was refused by Council in 2011. This was followed by a long winded saga stretching through several court cases before reaching the current appeal. (*See attached timeline for details.*)

As in the earlier Planning & Environment court appeal (2011 – 2013), a large number of the approx. 1,200 objectors to the proposal again elected to stand as Co-Respondents. The 108 Co-Respondents were fronted in court by Jeanette Lockey, Jenny Peat, Stuart Wright and Wendy Allender. This meant regularly coming to court in Brisbane throughout the proceedings and monitoring all experts' reports and legal communications. A number of submissions were also required by all parties. Tamborine Mountain Progress Association and Eagle Heights Village Association were also represented.

This time we had a judge from Cairns and there were occasions when court proceedings were dealt with by video link, with the judge at his desk in Cairns & proceedings being relayed via a huge video screen in the court room. When it wasn't necessary for us to go to the court in Brisbane, we were able to have input via a phone hook up at Stuart's house.

Following the compilation of experts' reports, meetings of experts, a without prejudice conference, a mediation meeting, Minor Change hearing, local sites inspection, the eventual trial was held 25th to 29th September, 2017. After further submissions by all parties, the long awaited 42 page judgment finally arrived on Friday.

In short, the Judge stated that the appellant failed to demonstrate that there is a planning need for another commercial water extraction facility on Tamborine Mountain.

The disputed issues were:

- 1) The nature and extent the proposed development conflicts with the terms of the planning scheme.
- 2) Whether there is tension between that application of the planning scheme and the public interest because the planning scheme failed to anticipate, or properly deal with, the existence of circumstances that have created a need for a commercial groundwater extraction in the public interest;
- 3) If there is tension, whether any grounds are relevant to the part of the application in conflict with the planning scheme but otherwise in the public interest;

- 4) Whether the grounds are sufficient, in the public interest, to justify approving the application notwithstanding the conflict with the planning scheme.

In considering the nature and extent of the conflict with the planning scheme as a whole and as a comprehensive expression and embodiment of the public interest, the judge examined many similar cases and found that a decision to approve the development application would result in a significant conflict with the planning scheme.

His Honour stated that, on evidence presented, the planning scheme properly anticipated the circumstances and need in the planning area.

With regard to whether any relevant grounds existed otherwise in the public interest his responses were:

Community Need - the judge was not satisfied that the appellant's proposed supply for bottled water provided any significant redress and betterment of the local community.

Bulk Supply - He stated this was a problem of service rather than limited supply from available resources. He was not persuaded that there are grounds in terms of community need sufficient to justify approval despite the conflict.

Economic Need - His Honour stated that the proposed extraction facility will not improve the facilities available to the water bottling industry, or the service and facilities available in the locality, or ultimately for the retail consumers locally, regionally or nationally. He was not persuaded that there are grounds in terms of economic need sufficient to justify approval despite the conflict.

Planning Need - The judge noted that the planning scheme makes no provision for land anywhere in the local government area for the use of Commercial Ground Water Extraction because the use is an inconsistent use in all zones. Accordingly, there is no zoned land in the planning scheme to accommodate the use. Any community benefit in terms of wellbeing is very minor in the circumstances of this case. Accordingly the appellant has failed to demonstrate that there is a planning need for another commercial water facility on Tamborine Mountain to be located at the subject site.

Public benefit – fire fighting - As there are existing good sources of water for fire fighting purposes on the southern part of Tamborine Mountain (and for several other reasons) the judge considered there were insufficient grounds for approval despite the conflict.

Judge Morzone found that the appellant had not established sufficient grounds of economic, community or planning need for Commercial Groundwater Extraction on the land to elevate the matter to an exceptional case warranting approval.

Throughout the judgment Judge Morzone makes frequent use of the words "in the public interest". In May, 2017, The Court of Appeal made a significant decision in the *Bell v Brisbane City Council & Ors* case. Here, despite a large number of objectors, Brisbane City Council approved a development application which was seriously in conflict with the area planning scheme. This concerned three high rise towers on Coronation Drive (the old ABC property). The residents appealed this approval in the Planning & Environment Court, but lost. However, one couple (with deep pockets) took the matter to The Court of Appeal (Supreme Court) – and won.

In the long judgment of this Brisbane case, the judges (three) found that his Honour in the Planning & Environment Court "formed his own judgment of what was in the public interest without recognizing the relevance of the planning scheme where there were no circumstances which displaced the assumption that the public interest was not reflected in the scheme provisions". And, "ultimately, by the judge substituting his own view of the public interest for that which was expressed in the Scheme, there was a legal error which affected his conclusion".

As far as the Gillion case was concerned, in view of this Brisbane judgment all parties were then required to make further submissions. This seems to be the reason the Gillion judgment, originally supposed to be handed down early in the New Year, has been this late in arriving.

A large thank you must be sent to all those objectors who took the trouble to respond to this important development application. Then there were the more than two hundred who chose to stand as Co-Respondents, as well as the doggedly determined and focused Corrs Chambers legal team acting on behalf of Council. Well done everyone.

The Draft Scenic Rim Planning Scheme

All households should have by now received Council's "Have your say on the Draft Scenic Rim Planning Scheme". This document is available for viewing in the library and on Council's website:

<http://www.scenicrim.qld.gov.au/scenic-rim-planning-scheme>

Several TMPA team members will be checking through this lengthy document and as responses do not need to be in before early December, we hope to put together before then some key points which we feel need to be raised. A newsletter with details should be out some time in November.

The history of our planning schemes is interesting. The first one was put together in 1983 following public concern that there was the beginning of an upsurge in development up here and a regulatory scheme needed to be put in place. TMPA distributed a lengthy questionnaire to all households, and the excellent response to this convinced Beaudesert Shire Council to incorporate the residents' aspirations into this planning scheme.

Back then town planning was in its infancy, so the 1983 Plan was a pretty loose document. During the nineties, over a number of years, further questionnaires were distributed to all households, State Government funded a Landscape Assessment of Tamborine Mountain and Council surveyed the views of visitors to the mountain. All this information again formed the groundwork for a basic draft, which went on to be massaged further by State and local governments. This formed the 1997 Development Control Plan for Tamborine Mountain.

At the time there were two other plans operating for the other parts of the shire. All three were merged in the Beaudesert Shire Plan, 2007, with Tamborine Mountain zone occupying a separate section of the lengthy Plan. It was much the same as the 1997 Plan, but in a different format. There were of course Overlays, but one could easily access the Tamborine Mountain section for whatever query one had. .

In the current draft Plan, matters relating to Tamborine Mountain are scattered throughout a very lengthy document. It is virtually a one size fits all, with bits here and there which have qualifying requirements specific to Tamborine Mountain. There are numerous motherhood statements, e.g. correctly referring to Tamborine Mountain as semi-rural with an environmental character. However, with relevant bits scattered throughout the document, it is somewhat uncertain whether any Tamborine Mountain development application would alert an outside planner to the special qualities of a very unusual area. This aspect needs to be checked out.

Certainly the Draft Plan takes a blinkered view rather than a broad impression of the whole plateau. The Draft Scenic Rim Planning Scheme to hand has been compiled from the top down. That is, approximately 75% has been formulated by the State Government, with Council filling in the rest of the draft. This time the residents come last. To what extent the formulated draft can be altered according to residents' responses is something we shall have to wait and see. As this document virtually governs just about everything that happens on the mountain, it is important for residents to make an input.

Jeanette

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