Land and Environment Court of New South Wales

CITATION :	**David Kettle Consulting Pty Limited v Gosford City Council [2008] NSWLEC 1385 This decision has been amended. Please see the end of the judgment for a list of the amendments.**
PARTIES :	APPLICANT David Kettle Consulting Pty Limited RESPONDENT Gosford City Council
FILE NUMBER(S) :	10429 of 2005
CORAM:	Moore C - Taylor C
KEY ISSUES:	Development Consent - Modification Application :- Commercial water extraction
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979

CASES CITED:	David Kettle Consulting v Gosford City Council & Ors [2005] NSWLEC 519 Coca-Cola Amatil (Aust) Pty Ltd v Gosford City Council [2006] NSWLEC 278 1643 Pittwater Road v Pittwater Council [2004] NSWLEC 685 BGP Properties Pty Limited v Lake Macquarie City Council (2004) 138 LGERA 237, [2004] NSWLEC 399
DATE OF JUDGMENT:	1 October 2008
LEGAL REPRESENTATIVES:	APPLICANT Mr P Tomassetti SC RESPONDENT Mr M Fraser, barrister INSTRUCTED BY P J Donnellan & Co

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JUDGMENT:

THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES

MOORE C
TAYLOR C

1 October 2008

05/10429 David Kettle Consulting Pty Limited v Gosford City Council

JUDGMENT

The consequence of the Court's decision in this appeal is the modification of an existing development consent subject to detailed conditions. These conditions are not reproduced as part of this decision but are available for inspection at the Council. In addition, a copy the Court's Orders may be obtained from the Court's registry upon payment of a fee. Details of the fee payable and process for obtaining a copy of the Orders are available on the Court's web site at http://www.lawlink.nsw.gov.au/lec/

1 **COMMISSIONERS**: Coca-Cola Amatil (Aust) Pty Ltd operates a water bottling plant at Peats Ridge – an operation which trades under the identity of Peats Ridge Springs. This operation extracts water from the Kulnura/Mangrove Mountain portion of the Sydney sandstone aquifer. The water is exported from the site in a variety of differing packaging sizes and under a variety of different brand labels (including product labelled for non-Coca-Cola water suppliers). The company has also extracted water for bulk tanker transportation for bottling off-site at a plant owned by the company at Smithfield in the outer western suburbs of Sydney.

2 The company has a licence from the Department of Water and Energy which permits it to extract up to 66 ML per annum from the aquifer for these purposes. This licence expires in 2011. Commercial water extraction and bottling is permissible at the site. The company has an existing consent from the council to operate its extraction activities at a rate of 25 ML per annum.

3 In 2005, the Court gave the company consent for a trial period of two years, subject to a number of conditions, to operate at the extraction rate permitted by the Department's licence (see *David Kettle Consulting v Gosford City Council & Ors* [2005] NSWLEC 519). The Court also imposed a condition which restricted extraction to no more than 11 ML in any 28 day rolling period.

4 Although there is a difference of opinion about the meaning of one of those conditions of consent, being a question as to whether or not the company was obliged to operate at the maximum permitted extraction rate to fulfil the terms of the trial or was only obliged to operate within and up to that limit during the course of the trial, we are satisfied that we do not need to express an opinion on that provision in order to determine the issues currently before the Court.

5 The company now makes an application that the 66 ML per annum limit be made permanent; that there be no further trial; and that two conditions sought to be imposed by an intervener, Mr Diamond, who was granted permission by Pain J to take part (on a Double Bay Marina basis limited to the two conditions he proposes), through his agent, Mr McLoughlin, should not be imposed.

6 We visited the site on the first day of the hearing. It is not necessary to describe the location; the company's activities and the surrounding area as that information is sufficiently set out in the 2005 decision cited above.

7 During the course of our inspection, we did not need to examine the workings of the bottling plant for the purposes of this application. The operation of the plant was not relevant to this appeal. Our inspection was confined to observing the location of the various bores on the company's property; inspecting the watercourse which runs through the centre of the company's property (as discussed in the earlier decision); and observing, at a distance, relevant matters on the neighbouring property upstream across the road and on the neighbouring property owned by the Azzopardi family.

8 It is also relevant to note that, in the 2005 decision, the general terms of approval required by the predecessor to the Department of Water and Energy imposed a condition requiring a monitoring process and the triggering of cessation of pumping if the water level in a nominated monitoring bore fell below 10 m below the casing in that bore. In 2006, after a modification application hearing before the Court, in which Mr Lane, the single parties' expert in these proceedings, was the Court-appointed expert [as single parties' experts were then described] gave hydro-geological evidence concerning a proposal to increase the permitted drop in the level in the monitoring bore from 10 m to 15 m before cessation of pumping was triggered.

9 In those proceedings, as a consequence of Mr Lane's evidence, the parties entered into consent orders which gave effect to the modifications sought to increase the permitted drop in the water level in that monitoring bore (see *Coca-Cola Amatil (Aust) Pty Ltd v Gosford City Council* [2006] NSWLEC 278).

10 It is appropriate, at the outset, to deal with the two conditions sought by Mr Diamond. The first of them proposes a ban on removal of water from the site by road tanker for bottling at Smithfield or, indeed, any other bottling plant other than that which is currently on the property. The second condition effectively seeks a requirement to be imposed on the company that it revegetate the watercourse which runs through the property, from the wall of the dam on the property adjacent to the processing plant, to the point where the watercourse leaves the property toward its north-eastern corner and enters the Azzopardi property.

11 We are satisfied that the first of the proposed conditions faces two fundamental and insurmountable hurdles to its imposition. The first of these is that the general terms of approval, forming part of the 2005 consent, deal with the purposes for which the water is permitted to be extracted as being *for mineral water bottling purposes*. This appears as Condition 1.3 of the general terms of approval. Nothing in this condition limits, in any respect, where such bottling is to occur or, indeed, by whom such bottling is to be undertaken. As a consequence, we are satisfied that the activity currently being undertaken by the company of bulk removal of water by road tanker for bottling elsewhere is within the permitted activities allowed by the 2005 consent.

12 The second difficulty which faces Mr Diamond in seeking the imposition of this

new condition, is that which arises from the decision of McClellan CJ in *1643 Pittwater Road v Pittwater Council* [2004] NSWLEC 685. In that decision, His Honour discussed the extent to which additional conditions could be imposed on a development consent as a consequence of an application to modify such consent. The effect of that decision is that, although the consent of the applicant is not now to be required to the imposition of additional conditions, any additional conditions imposed must arise as a consequence of the modification being sought and to be reasonably in response to such a modification if granted in whole or in part.

13 In the present instance, that which Mr Diamond seeks to have prohibited, the removal of bulk water by road tanker, is already permitted by the existing consent. No modification is sought by the company to the relevant condition nor is any increase in the volume of water permitted to be extracted sought to accommodate this method of operation. As a consequence, there is nothing in the present modification application which could found imposition of such a condition if it were justified - a matter about which we express no opinion in light of these two insuperable barriers to its consideration.

14 There is, therefore, no basis upon which such a condition that could be imposed and, therefore, we decline to do so.

15 The second additional condition sought by Mr Diamond relates to the watercourse that traverses the property. In dealing with this watercourse, we use that term neutrally and should not be taken to express any opinion as to how the watercourse might or might not be classified in a more technical and legislative sense.

16 Mr Lane was asked whether there was any relationship between the operation of this watercourse and the modification application to make permanent the presently permitted extraction at a maximum rate of 66 ML per annum. His evidence was that, under some circumstances, particularly during wetter times, there might be some impact from the aquifer on this watercourse by, for example, the surplus recharge water forming an overland flow into the watercourse. We observed such an overland flow, however caused, in the course of the site inspection.

17 As a consequence of Mr Lane's evidence, we are satisfied that the *Pittwater Road* test is sufficiently satisfied so that, if there were a proper evidentiary basis upon which to impose it, we would have jurisdiction to consider the imposition of some appropriate condition relating to the watercourse. This can only arise provided such a condition related to the consequences of permitting a continuing higher level of extraction of water from the aquifer on a permanent basis by altering the present conditions of consent.

18 We had written and oral evidence from Mrs Pontifex, a long-term resident of the area, about native plant gathering on the site and on adjacent properties, during long past times – evidence which we accept as accurate. This evidence

was that the vegetation in the riparian zone to the watercourse and other nearby land was significantly different than that which we observed during the course of the site inspection.

19 In response to a direct question, Mr Lane expressed the opinion that, although there was some (but limited) surface to aquifer connections at the site, and thus some interrelationship between the watercourse and high-level extraction from the aquifer, no additional condition was necessary or appropriate to provide any protection to the watercourse. Mr Lane's evidence was that there was no adverse impact on the watercourse as a consequence of such interrelationship.

20 In addition, we have been given no evidence of any beneficial causal relationship between remediation of the watercourse adopting the approach advocated by Mr Diamond (including the bush regeneration method proposed to be required by the new condition he seeks) and the impact of the extraction levels of water from the aquifer.

21 Mr Tomasetti SC, senior counsel for the company, tendered material which indicated that there were ongoing discussions between the company and the Council about a weed management regime for the property, particularly of Crofton Weed, an invasive weed which we observed was heavily infesting the watercourse’s riparian zone.

22 Although Mr Tomasetti put that it would be inappropriate for us to impose a revegetation requirement based on the weed management plan because it would potentially expose the company to a risk of double jeopardy if it were to breach such a requirement, we do not accept that that is a basis upon which we should reject such a condition. The company is already potentially subject to a double jeopardy regime because of its dual regulation under both water legislation and planning legislation with respect to its water extraction activities. Imposition of a vegetation management condition would merely impose liability under an analogous regime.

23 However, despite the question of the watercourse passing the connection element of the *Pittwater Road* tests, we are also satisfied on the basis of Mr Lane's uncontradicted expert evidence, that there is no causal connection between the level of water extraction and the present state of the watercourse. Further, the riparian vegetation along the watercourse’s corridor might be remedied by revegetation of the riparian corridor but will not be affected by the present proposal in any significant way. Therefore, as a consequence, we consider that we do not have jurisdiction to impose this condition sought by Mr Diamond. In reaching this conclusion we have confined ourselves to the preliminary question of whether we would have jurisdiction to impose such a condition – we should not be taken as expressing any view, on ecological or any other grounds, of whether or not such revegetation of the riparian corridor, as Mr Diamond proposes, has merit.

24 We turn, therefore, to the dominant issue of the permitted level of water

extraction from the aquifer.

25 At the outset, we note that data provided by GHD in October 2007 and May 2008, in their hydrogeological reports to the company tendered in these proceedings, discloses that there is no adverse impact on the aquifer of extraction at the actual level at which the company is presently operating. This extraction is an annualised rate of 35 ML.

26 Mr Lane has given unequivocal oral evidence that his interpretation of the data also leads him to conclude that there is no adverse impact on the aquifer of extraction at the actual level at which the company is presently operating. It was his oral evidence that, in reaching this conclusion, he has taken the GHD data and applied his own interpretation to it rather than merely adopting the conclusions of Dr Beck, the report's author employed by GHD.

27 We accept, as we indicated to the parties, during the closing stages of the hearing, that the GHD data (supported by Mr Lane's conclusions drawn from it) warrants at least a further level of permanence to the extraction assurance for the company. That assurance would be the granting of an ongoing consent at an annual rate of 35 ML rather than the present 25 ML. This position is accepted by the Council and was acknowledged as appropriate by Mr Campbell, one of local objectors who gave evidence. Mr Campbell was also a member of the committee that had developed the water sharing plan for this part of the larger aquifer.

28 In light of this, we have undertaken our further assessment on the basis that the company should be granted a modified consent at least at this modestly higher level. We have, therefore, confined our assessment to whether or not there should be some further trial period applied to any extraction above the rate of 35 ML per annum. In this context, we also note that there is no dispute that the retention of the condition of an 11 ML limit in any 28 day rolling period is also appropriate.

29 As earlier noted, the company's present licence from the Department of Water and Energy expires in 2011. Toward the expiry of this licence period, as part of any renewal process, the Department will undertake a review of whether or not a further licence at an annual rate of 66 ML should be granted or whether some other annual volumetric limit should be substituted (or, indeed, whether extraction should cease).

30 It was Mr Lane's uncontradicted oral evidence (which contradicted to some degree his written evidence) that he was now satisfied it would be appropriate to give the company a permanent consent to extract at 66 ML per annum. To understand completely the approach we consider desirable (in light of Mr Lane's earlier evidence and the position he gave in his oral evidence), we need to set out a number of extracts from his written statement to show the areas where he expressed more tentative views than in his subsequent oral evidence. The full extract from the discussion element of his report is as follows:

> At the lower extraction rate, the water level generally recovers

during the non-pumped period to the pre-pumping water level. However, at the higher extraction rate, for example in May 2008, the recovery in water level is not complete.

In the period November 2007 to February 2008 there was above average rainfall (and recharge), reflected in water level in Bore 5, and the average extraction was below 40 ML/yr. Under these conditions, the groundwater levels are relatively stable, and show full recovery.

At an extraction rate near 66 ML/yr, in April and May 2008, there was a decline in the water level in the three observation bores. The water level in Bore 5 showed no divergence between the maximum drawdown and the recovered water level.

However, due to incomplete recovery, the drawdown level in Bore 11 for each subsequent extraction period (weekly cycle of pumping) is greater than the preceding period. Hence there is a decline in the (incompletely) recovered levels and increased maximum drawdown level during the higher pumping rate period in April-May 2008.

On their own, these changes are not substantial, but they suggest that when there is average or below average rainfall, the groundwater levels will gradually decline at the 66 ML/yr extraction rate. Consistent with first principles in hydrogeology, a new "equilibrium level" will be established whereby the capture zone of the borefield stabilises and draws water from a wider area up-gradient of the site. It is not possible on the basis of available data to determine at what level the drawdown will stabilise at the 66 ML/yr extraction rate, as this depends on the seasonal recharge rate and the extent of the capture area for the pumping bores.

In terms of potential interference drawdown effect off site, the data shows the greatest drawdown in a south easterly direction away from the main pumping bore (BH7), as indicated by the higher drawdown in BH11. The significance of this will depend on the existence of any off site bores in this direction. I have no information on bores in the vicinity to the south east.

Further monitoring would be required for some months with production at or close to the 66 ML/yr limit to provide the data sufficient to identify the new equilibrium water levels for the borefield and surrounds at this site.

31 In addition, the fifth point in his conclusion was in the following terms:
If I relied only on the groundwater monitoring data provide since March 2006, I would not have sufficient information to confidently

> support a permanent increase - further monitoring at the 66 ML/yr production rate would be desirable. However, based on all information available, including the information on sustainable resource (and the UTS model) and level of current usage, it seems that the risk of 66 ML/yr extraction by PRS causing an unacceptable impact on the groundwater resource is minimal. I therefore conclude the allocation be made permanent.

32 In response to a question in relation to ground water recovery rates, Mr Lane confirmed that he had assumed a continuation of past rainfall and aquifer recharge patterns.

33 The most recent information published by the Intergovernmental Panel on Climate Change makes it clear that the validity of such an assumption is improbable. Recent observational data show that relative to the worst-case scenario model developed by the IPCC, climate change is occurring more rapidly and at a greater magnitude than anticipated. These recent significant upwards increases in climate change rates coupled with an inherent uncertainty associated with the limited temporal data elucidating the ground water-extraction relationship, direct us to consider the matter with caution.

34 In *BGP Properties Pty Limited v Lake Macquarie City Council*(2004) 138 LGERA 237, [2004] NSWLEC 399, McClellan CJ made the following relevant observation with respect to the consideration of an appropriate level of caution in such matters:

> 113. In my opinion, by requiring a consent authority (including the Court) to have regard to the public interest, s 79(C)(e) of the *EP&A Act* obliges the decision-maker to have regard to the principles of ecologically sustainable development in cases where issues relevant to those principles arise. This will have the consequence that, amongst other matters, consideration must be given to matters of inter-generational equity, conservation of biological diversity and ecological integrity. Furthermore, where there is a lack of scientific certainty, the precautionary principle must be utilised. As Stein J said in *Leatch* , this will mean that the decision-maker must approach the matter with caution but will also require the decision-maker to avoid, where practicable, serious or irreversible damage to the environment.
> 114. Consideration of these principles does not preclude a decision to approve an application in any cases where the overall benefits of the project outweigh the likely environmental harm. However, care needs to be taken to determine whether appropriate and adequate measures have been incorporated into such a project to confine any likely harm to the environment.

35 Mr Lane was asked to consider whether some form of management plan could be formulated which, if implemented, might provide some basis for accounting for and responding to any adverse changes which might arise as a consequence of changes in rainfall pattern. He provided a useful (but complex) model of a Groundwater Management Plan. This model was further revised during the course of his evidence. However, it was also his evidence that, fundamentally, at least in the immediately foreseeable future, the present simpler monitoring regime and its triggering points would have almost (if not completely) the same protective result as would the adoption of his proposed Groundwater Management Plan.

36 As earlier noted, in 2011, the company's licence from the Department of Water and Energy will expire. At that time, the company's extraction will be reviewed by the Department and a decision taken by the Department as to whether or not the licence should be renewed and, if so, whether that should be at 66 ML per annum or some other volume.

37 That Departmental review will take place in light of more than two years further data from this site and with a much longer and spatially wider view for this part of the aquifer. As a consequence, we consider that a properly cautious position for us to take is to permit the company an extended trial period at the higher-maximum 66 ML/yr level of extraction with this extended trial to expire on the same date as the company's Departmental licence expires. This will ensure a simultaneous assessment of the relevant issues along with the maximum possible data available not only for this site but also for the broader aquifer. Their collective consideration will ensure the Department is able to make the most comprehensive assessment possible. This assessment will be based on all the current available data and will assist in protecting the ongoing productivity and vitality of the groundwater resources and associated physical and ecological systems.

38 A further application can be made to the Council, prior to the end of the new trial period, to permit consideration of the outcome of the Department’s review in assessing such further application.

39 We do not express our conclusion in precise terms as being a response to the precautionary principle (and without undertaking a rigorous analysis of whether or how that principle should be applied to this operation in light of the totality of Mr Lane's evidence). However, we have concluded, consistent with the approach inherent in McClellan CJ’s observation, that this approach is the appropriate balance after weighing up the evidence of Mr Lane and the Department's past estimate of the volume of water capable of being extracted from the aquifer without damaging it [on one hand] and the broader scientific uncertainty about the extent to which climate change is highly likely to continue modifying rainfall and inturn impact potentially on the health and resource capacity of this aquifer [on the other hand].

40 As a consequence, the orders of the Court are that:

1. The appeal is upheld;
2. Development consent 22097/2003 for groundwater extraction and bottling operations on Lot 1 Deposited Plan 430586 at Euloo Road Peats Ridge is modified to permit extraction of water at the rate of 35 ML per annum on an ongoing basis with a further trial period, expiring on the date of expiry in 2011 of the present licence from the Department of Water and Energy, permitting extraction of water at the rate of up to 66 ML per annum but with all extraction continuing to be subject to the condition that such extraction is restricted to no more than 11 ML in any 28 day rolling period; and
3. The exhibits are returned.

Tim Moore
Commissioner of the Court

Dr Mark Taylor
Commissioner of the Court

01/10/2008	-	Correct error in year (2911 to 2011) - Paragraph(s) Para 40, order 2