[2011] QPEC 127

PLANNING AND ENVIRONMENT COURT

JUDGE RACKEMANN

P & E Application No 2388 of 2011

ROCKHAMPTON REGIONAL COUNCIL	Applicant
and	
R C TOOLE PTY LTD	Respondent
and	
ROGER CLEVELAND TOOLE	Respondent

BRISBANE

..DATE 25/08/2011

ORDER

HIS HONOUR: This is an application for an interim enforcement order under section 603 of the Sustainable Planning Act restraining each of the respondents from using a certain property as an airstrip pending the final hearing and determination of the originating application.

The originating application relates to the lawfulness of development and land use at lot 4 on SP138798. That lot was purchased by interests associated with the respondents and, effectively, amalgamated into a rural holding which they have held for some time. The respondents carry on a cattle business.

There was for many years an airstrip on what I will refer to as the parent parcel, however, the respondents formed the view that that airstrip was less than ideal because of, amongst other reasons, unfavourable crosswinds. Having purchased the adjoining lot, they went about building a better one. They also built facilities, including an aircraft hangar and fuelling facilities.

No secret was made of this development and it occurred with the knowledge and acquiescence of the council. Indeed, the council wrote to the second respondent on the 5th of March 2010, some five months prior to the aircraft strip becoming operational. In that letter it was stated:

"Council has further investigated this matter and taken a view that operation of a low scale private airstrip and hangar on a rural property is exempt from the planning and development requirements administered by the Rockhampton Regional Council."

The council subsequently issued a development permit for the aviation fuel tank, under the Environmental Protection Act; that approval coming in April 2011.

By way of these proceedings, it now wishes to resile from that position and to assert that the development is unlawful and to obtain an enforcement order to restrain its further use.

The land is included within the Rural zone under the relevant town planning scheme. The relevant table of development suggests that the use is not exempt development. It would appear to be a use which would require approval unless it was self assessable. There are no self-assessable categories which, on their face, appear to be relevant for an aircraft landing strip. However, Mr Cronin points out that the affidavit material at this stage does not go so far as to negative the possibility of this being characterised as an ancillary activity, that is, one which is incidental to but necessarily associated with the agricultural use.

It is not necessary for me to make any final determination of that matter. That is a matter which will be determined at the final hearing of the originating application. For the purposes of deciding the application for an interim enforcement order, it is sufficient for me to observe that there is a sufficiently strong prima facie case to consider the granting of that relief. The granting of relief, however, is, of course, discretionary and all relevant matters need to be borne in undertaking the balance of convenience.

From that perspective, the history of the matter in which the council acquiesced in the development and indeed, informed the respondents that they did not need approval, is not a particularly weighty factor today, although it may be a matter of more significance in deciding whether the ultimate discretionary remedy is granted when the full hearing takes place.

In terms of balance of convenience, the matters of greater weight, for the purpose of today, concern the relative positions if an interim order were made or if it were not. In this respect, counsel for the applicant focused upon the ongoing amenity impacts as a result of the continued use of the airstrip and also the availability of the old strip on the parent parcel for the respondents to use in order to overcome any inconvenience to them of an interim order being made.

In so far as the first of those matters is concerned, that is the alleged ongoing amenity impacts, the material falls short of demonstrating any particular level of impact. There are three neighbours who are complainants and each of those have sworn affidavits. Each of them complain about residential amenity impacts such as noise and dust, and there is also a complaint about the noise of aircraft disturbing livestock.

On the other hand, there are other neighbours who have sworn affidavits attesting to the fact that they do not feel that their amenity is unduly impacted by the operation of the air landing strip at all.

Of course, people's perception of whether their amenity is affected or not will vary accordingly upon people's sensitivities and indeed upon their tolerance of the use itself, so it's not entirely surprising to see people with different views about these matters, but this is not a case where the material goes so far as to show an unchallenged impact of a severe kind. The severity of any impacts will no doubt be a matter of further material, but on the material available to me at the moment, all that can be said is that a few neighbours have complaints of that kind, without being able to measure the severity of the impact in any precise way.

The affidavit material suggests that a concern of the

submitters is particularly planes flying over their properties in the course of landing and takeoff, as well as a concern that what is really being developed here is, or will become, a commercial activity of a much higher level of use than simply a low scale private concern. Indeed, there was a particular concern about a proposal to use the airstrip for an upcoming festival of some kind.

In order to avoid an interim order being made, the respondents are prepared to offer undertakings to the Court in terms which will need to be settled carefully. In summary however, those undertakings will see, in the period pending final determination, the airstrip used only for flights in and out by Mr Roger Cleveland Toole himself. No flights will be made for any aircraft for any other purpose.

Accordingly, the use which has occurred to date, which includes Mr Toole allowing friends to use the airstrip, will not continue under the undertakings which are being offered. The only exception to that would be one flight, being necessary for the removal of a aircraft of another person, which is currently on the property.

It may be observed that the airstrip is used only for single engined aeroplanes and it would appear, in the past, on some occasions at least, for helicopter traffic. The estimates of the extent of the use vary in the material, but on any view has typically been of the order of only about a handful of

flights per week, on average.

With the more limited use, pursuant to the undertakings, the respondents are willing to further undertake that, in any event, not more than three flights, being a total of six movements, will occur in any week. The movements do of course only happen during the daytime, there being no facilities for night time take off or landing.

In order to further protect the amenity of those residents who claim to be affected, the respondents are prepared to undertake further that the route taken for landings and take off will be such that it does not involve flying over the properties of the three neighbouring objectors at heights below 1500 feet.

It should be noted, as the material makes plain, that the aircraft which have been using this airstrip are not the only aircraft present in this locality. The locality is under the flight path of other aircraft, and there is aircraft noise otherwise in the locality. That is not to say that residents do not have a right to be concerned about further aircraft noise, but the reality that this use does not introduce a substantially different type of noise to the locality should be acknowledged.

In the circumstances then, it seems to me that, with the undertakings in place, the opportunity for any substantial further impacts upon amenity are constrained and that

potential for impact needs to be set against two other factors. The first is that the activity has now been carried on for 12 months, and secondly, that this matter should be able to be set down for a final hearing within a matter of weeks.

Accordingly, if no interim enforcement order is made, all that will happen, given the undertakings, is that there will be a very small number of flights between now and when the matter is determined, and certainly the use will be at a lesser level than has occurred over a 12 month period.

As to the inconvenience to the respondents, in the event that an order were made, Mr Toole gave evidence that, in order to confine the use to the airstrip to the adjoining land, he would have to transport fuel from the facilities adjacent to the new landing strip to the old, which would involve both cost and inconvenience or alternatively, incur costs of getting an external fuel supply to that airstrip. That inconvenience might not be dire, but it is a level of inconvenience which should be weighed in the balance.

It should also be observed that whilst the council made much of the availability of the old airstrip to be used by Mr Toole for the interim period, if he was prepared to incur the extra cost and inconvenience, it must also be said that, in that event, there would still be light aircraft flights taking off and landing in this vicinity, they would just be from a different landing strip.

In the circumstances, given the length of time that the use has gone on for, the undertakings offered, which will see a reduction in any event in the level of activity to one which is at quite a low level of intensity, and given that that low level of intensity use would be involved for only a matter of weeks before the matter can be fully heard, it seems to me that the balance of convenience in this case falls on the side of not granting the interim enforcement orders sought.
