PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Gympie Regional Council v Atthow & Ors* [2019] QPEC 23
PARTIES:	**GYMPIE REGIONAL COUNCIL** (applicant) **v** **LANCE ATTHOW** (first respondent) **BELLA CREEK MULTI SPORTS PARK LIMITED (ABN 65602397937)** (second respondent) **EVELYN ATTHOW** (third respondent) **SCOTT CANTY** (fourth respondent) and **LISA CANTY** (fifth respondent)
FILE NO/S:	D26 of 2017
DIVISION:	Planning and Environment
PROCEEDING:	Application in pending proceedings
ORIGINATING COURT:	Planning and Environment Court at Maroochydore
DELIVERED ON:	24 May 2019
DELIVERED AT:	Maroochydore
HEARING DATES:	20 April 2018 and 10 May 2019 (otherwise determined on written submissions)
JUDGE:	Long SC DCJ

ORDER:

1. **The respondents are to pay the applicant's costs of the originating application filed on 3 March 2017 and the application in pending proceedings filed on 17 April 2018.**
2. **The costs of the originating application filed on 3 March 2017 are to include the amount of $1,182.50 in investigation costs.**
3. **If not otherwise agreed, the costs of each application are to be decided in accordance with Part 3 of Chapter 17A of the Uniform Civil Procedure Rules 1999 and assessed upon the standard basis in accordance with rule 702 of those rules.**

CATCHWORDS: ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – COSTS – Where the applicant filed an application for various declarations and consequential enforcement orders pursuant to s 604 *Sustainable Planning Act 2009* in respect of the respondents' use of land – Where the application was determined by orders made, with consent, on 21 April 2017 – Where the applicant made an application for costs of the application and for assessment on the indemnity basis in accordance with the *Uniform Civil Procedure Rules 1999*, including investigation costs – Whether the applicant is entitled to costs and assessment on the indemnity basis – Whether the applicant is entitled to investigation costs

LEGISLATION: *Planning Act* 2016 ss 311
Planning and Environment Court Rules 2010 r 3(2)
Sustainable Planning Act 2009 ss 450, 456, 457, 578, 582, 601, 604, 605
Uniform Civil Procedure Rules 1999 rr 702, 703

CASES: *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52
Gympie Regional Council v Pye (2017) QPELR 109
Gympie Regional Council v Tregoning (2017) QPELR 458
Paroz v Paroz & Ors (No 2) [2010] QSC 157

SOLICITORS: p&e Law for the applicant

Andrew Morris Legal Practice for the respondents

[1] On 21 April 2017 and upon an originating application filed on 3 March 2017, declarations were made by this court, in the following terms:

> "**It is declared that**:
> 1. The use of land located at Bella Creek Road, Bella Creek and more particularly described as Lot 764 on CP L37551, Lot 16 on RP 841632 and Lot 14 on CP LX 1131 (**the land**) for the purpose of Motor Sport Facility and Tourist Park as defined under Schedule 1 of the *Gympie Regional Council Planning Scheme 2013* is assessable development for which a development permit is required.
> 2. The construction of an ablution building on the land is assessable development for building work for which a development permit is required.
> 3. The construction of various motor cross tracks, trails and enduro areas on the land is assessable development for operational work for which a development permit is required."

Various enforcement orders were consequently made and expressed to be made pursuant to s 604 of the *Sustainable Planning Act* 2009 ("*SPA*") and finally there was an order that costs be reserved.

[2] On 16 March 2018 the present application in pending proceedings was filed by the applicant, seeking an order that the first to fifth respondents pay the applicant's costs of the originating application and the application for costs, on the indemnity basis.

[3] On 20 April 2018 the solicitors for the first to fifth respondents were given leave to withdraw from the record for the proceeding and it was further ordered that:

> 1. The applicant file and serve its written submissions on costs on that day and leave to read and file those written submissions was then given;
> 2. The respondents file written submissions on costs on or before 8 May 2018;
> 3. The applicant be able to file any written reply on or before 11 May 2018; and
> 4. The application in pending proceedings be decided on the papers.

Substantially in accordance with those directions, the respondents filed written submissions on 9 May 2018 and the applicant filed a written reply on 10 May 2018.

[4] The power of the Court in respect of the costs of each application is to be found in s 457 of the *SPA*, as it stood prior to amendment on 19 May 2017.[1] And this remains so, despite the repeal of the *SPA* and replacement by the *Planning Act* 2016, as from 3 July 2017.[2]

[5] However, a complication is that the judge of this Court, who made the orders on 21 April 2017 and 20 April 2018, has since retired. However and having regard to a review of the matter conducted on 10 May 2019 and the supplementary written submissions filed by each party on 15 May 2019, in accordance with leave to do so granted on 10 May 2019, each consents to this application being now decided by me, and on the materials which includes the court record in the determination of the originating application and to which all of the written submissions as to the costs application have been addressed. For the applicant, it is pointed out that an order may be made pursuant to s 450(2)(b) of the *SPA* to regularize this. The premises upon which s 450 is engaged are, as relevantly set out in s 450(1): "…. if, after starting to hear a proceeding, the judge hearing the proceeding …. can not continue with the proceeding for any reason…." Although it may not necessarily be the effect of the orders made on 20 April 2018, that another judge had started to hear the proceeding in respect of the costs application, it is unnecessary to dwell on this or any further concern as to what is the relevant proceeding and appropriate to now make an order that this costs application be decided on the written materials before the Court, by me.

[6] The applicant not only seeks an order for the payment of its costs but also contends that it should have "indemnity costs", which and because of specific reference to *Gympie Regional Council v Pye*,[3] is a contention for an order that such costs be assessed upon the alternative basis of assessment of costs available under the *Uniform Civil Procedure Rules* 1999 ("UCPR"), in UCPR 703 and an alternative to the ordinary basis of assessment "on the standard basis" as provided by UCPR 702. That is clarified in the more recent submissions, as the parties make specific reference to the absence of anything in the rules of this Court, making provision for the assessment of costs and also the following rule:

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1 See s 999 of the *SPA*, as introduced as from 19/5/17 by the *Local Government Electoral (Transparency and Accountability in Local Government) and Other Legislation Amendment Act* 2017.

2 See s 311(1)(a) and (2)(a) of the *Planning Act* 2016.

3 (2017) QPELR 109.

> "If these rules do not provide for a matter in relation to a proceeding, or proceedings, in the court and the rules applying in the District Court would provide for the matter in relation to a proceeding, or proceedings, in the District Court, the rules applying in the District Court apply for the matter in the court with necessary changes."[4]

[7] In doing so, the applicant appropriately recognises the need to identify some "special circumstances" or "unusual features", in accordance with the principles identified in *Paroz v Paroz & Ors (No 2)*,[5] which includes a reference to an earlier application of a test focusing upon the identification of "something irresponsible about the conduct of the losing party which exposed its opponent to costs which should, in fairness, be ordered on the indemnity basis."

[8] However, it is necessary to first note the following provisions in s 457 of the *SPA*:

> "(15) The court may, if it considers it appropriate, order the costs to be decided under the appropriate procedure, and scale of costs, prescribed by law for proceedings in the District Court.
>
> (16) An order made under this section may be made an order of the District Court and enforced in the District Court."

[9] The effect, without recourse to the rules, is to allow, rather than mandate, the engagement of the provisions of the UCPR as to the assessment of costs. In the present case, the applicant has specifically identified its costs of the originating application as:

(a) $34,060.23 in legal fees; and

(b) $1,182.50 in investigation costs (being town planning expert fees).

However, there is no such quantification of costs in respect of the application in pending proceedings and whilst the respondents take no explicit issue as to the necessity or propriety of any part of those claimed costs, the counter position is first that each party bear its own costs and alternatively, in the event that costs are awarded, that such are awarded on the standard basis.

[10] Despite there being some issue raised in this regard by the respondent, the applicant necessarily seeks to engage s 457(6) of the *SPA* in respect of the investigation costs, upon the basis that the originating proceedings involved either or both:

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4 Which appeared as rule 3(2) in the *Planning and Environment Court Rules 2010,* as in force when the application made and directed to be determined on the papers. And as now appears, in effectively the same terms, as rule 4(2) of the *Planning and Environment Court Rules 2018.*

5 [2010] QSC 157 at [4] and [5].

> "(a) a declaration under section 456(1)(e);[6]
>
> …
>
> (d) a proceeding mentioned in section 601(1)."[7]

And it is also necessary to note s 457(7) and (9):

> "(7) Investigation costs for subsection (6) include costs the court decides were reasonably incurred by a party to the proceeding relating to investigations or gathering of evidence for the making of the declaration or order, the giving of the enforcement notice or the bringing of the proceeding.
>
> …
>
> (9) Costs of a proceeding mentioned in section 601, including an application in a proceeding mentioned in that section, are in the discretion of the court but follow the event, unless the court orders otherwise."

[11] The issues raised by the respondents are, first, that despite the originating application being expressed in terms seeking declarations, both as to contravention of s 578 of *SPA* "by carrying out assessable development without permit on the land" and of s 582 "by using the land for two unlawful uses, Motor Sport Facility and Tourist Park", no such declaration was made by the Court on 21 April 2017. It is contended that, in the event that costs are awarded against the respondents, and because "the applicant was unsuccessful in obtaining a declaration under s 456(1)(e) … investigation costs should not be included."[8]

[12] However it may be noted that s 456(1)(e) allows for the seeking of "a declaration about … the lawfulness of land use or development". Accordingly a declaration under s 456(1)(e) is a declaration about the lawfulness of land use or development and it may be seen that each of the declarations made on 21 April 2017 is in terms addressed to the types of unlawfulness expressed respectively pursuant to s 578 and s 582 of the *SPA*. Therefore it should not be accepted that the orders made on 21 April 2017 "did not go as far as including … declarations that the Court is satisfied that a development offence has been committed."[9] Neither is it necessary that there be any declaration expressed in such terms. All that is required to engage s 457(6) is that there be a declaration about the lawfulness of land use or development.

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6 Which allows for proceedings for declaration about "the lawfulness of land use or development".

7 Which, relevantly, allows for proceedings "for an order to remedy or restrain the commission of a development offence (an **enforcement order**).

8 Respondents' written supplementary submissions filed on 15/5/19 at [2(e)].

9 Ibid at [1(e)].

[13] Secondly, it is contended the orders made on 21 April 2017 "did not go as far as including … orders to remedy or restrain the commission of a development offence" and therefore any "enforcement order",[10] pursuant to s 604(1) of the *SPA*.[11] The power of the Court to make such an order is expressed in s 604(1), as follows:

> "(1) The court may make an enforcement order if the court is satisfied the offence—
> (a) has been committed; or
> (b) will be committed unless restrained."

Accordingly, it is such satisfaction which is required rather than any express declaration to such effect.[12] The orders made on 21 April 2017 were preceded by the introduction: "IT IS ORDERED pursuant to section 604 of the SPA that" and may be noted to then be addressed, in paragraphs 5 to 7, as to effects of a type permitted by s 605(1) of the *SPA*.

[14] And further and by reference to the submissions relied upon when the orders and declarations were made on 21 April 2017 with, as opposed to by, the consent of the parties to the draft provided to the Court, so much was made clear as to the bases upon which the Court was invited to act, in so making the orders and declarations.[13]

[15] In these circumstances, s 457(6) of the *SPA* is engaged and the costs of the proceeding, which are in the discretion of the Court pursuant to s 457(1), include, pursuant to s 457(7):

> " …. costs the court decides were reasonably incurred by a party to the proceeding relating to investigations or gathering of evidence for the making of the declaration or order, the giving of the enforcement notice or the bringing of the proceeding"

In this regard, the applicant claims the sum of $1,182.50 in town planning expert fees,[14] referable to discussions with and advice provided by a town planner up to 24 March 2017 and including the notations: "[r]eview draft originating application" and "[b]riefly review draft affidavit to be provided". In all of the circumstances, including that there is nothing specifically raised as to this aspect of the applicants claim, it should be concluded that these costs were reasonably incurred as relating to

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10 As defined in s 601(1).
11 Respondents' written supplementary submissions filed on 15/5/19 at [1(e)].
12 Cf: *Gympie Regional Council v Tregoning* (2017) QPELR 458 at [23] and *Caravan Parks Association of Queensland Limited v Rockhampton Regional Council & Anor* [2018] QPEC 52 at [72].
13 See applicant's written submissions read and filed on 21/4/17, at [1]-[4].
14 As per an invoice attached as RVW-4 to the affidavit of RV Wallerstein filed 16/3/18.

investigations or gathering of evidence for the making of the declarations and orders, or the bringing of the proceeding.

[16] Further, s 457(9) is also engaged in that while the costs of the proceeding remain in the discretion of the Court, they follow the event of the making of the enforcement orders "unless the court otherwise orders".

[17] In essence, this application for costs is premised upon the applicant's success in obtaining orders by way of enforcement of the public interest, as represented in the planning scheme, and after a history in respect of the development of the subject site by or for use for motocross and camping events, dating back to 2010. It is contended that it was the conduct of the respondents that necessitated the originating application, in that, despite the refusal of development applications for the land in 2010 and 2013:

> "since 2014 the Land was progressively developed to cater for motocross events, including toilets and showers, camping areas, obstacles, signage and various motocross tracks"[15]

And that the enforcement proceedings were commenced due to complaints received as to the occasioning of significant impacts on residents, due to noise, dust and traffic impacts and in order to secure compliance with planning laws. In the written submissions provided to the Court on 21 April 2017, in support of the orders sought, with consent, the discretionary grounds upon which it was contended that the Court should make those orders were identified as follows:

> "a) The use of the Land as a Motor Sport Facility and Tourist Park has caused significant disturbance to surrounding residents due to increases in traffic along Bella Creek Road, which has caused noise and dust impacts.
>
> b) Two development applications for motor sports and camping on the Land have been refused by Council.
>
> c) The use of the Land is similar to that proposed in the refused development applications.
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> d) Council has sent correspondence to Scott Canty advising that using the Land for motor sports events without approval is a development offence.
>
> e) The Respondents continue to use the Land for motor sports and camping.

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15 Applicant's written submissions on costs filed on 20/04/18 at [20(d)].

f) It is unlikely that the Respondents will cease utilising the land as a Motor Sport Facility and Tourist Park unless restrained by this Court.

g) As the Respondents have indicated they will make applications for each of the material change of use, building works and operational works, it is appropriate to defer any requirement for the removal of the building works or operational works pending resolution of those applications."[16]

[18] On the other hand and in a context that the circumstances leading to the originating application and the resolution of it, have not been subjected to any contested hearing or detailed examination, the respondents point to contentions that:

(a) prior to early 2016, there had been an ongoing issue, in contemplation by Council (or at least councillors) as to the legitimacy of the staging of "temporary" events on the land;

(b) that it was not until 22 February and about a month prior to a scheduled "Mud Bikes and Music" event, that it was definitively indicated that the view of the applicant was that this would be a use in the nature of assessable development;[17]

(c) the originating application came some 13 months later and without any prior active enforcement steps taken by the applicant; and

(d) as agreed by the applicant, the originating application was resolved in an expeditious and conciliatory way.

Although it may be noted that the contended inconsistencies in the Council correspondence dated 18 January 2016 and 22 February 2016 are not necessarily apparent,[18] it can be observed that the earlier correspondence did include the following:

> "Despite the above advice I am aware that individual Councillors have stated their opinion to you that one event per year is considered acceptable. On this basis should you proceed with the event, it is evident that Council may or may not decide to take some action in response. Whether Council is of a mind to take any action will likely depend on the level of complaint that Council receives from the community. Therefore, should you proceed with the event you would be well advised to implement all procedures,

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16 Applicant's written submissions read and filed on 21/4/19 at [16(a)]-[16(g)].
17 See respondents' written submissions filed on 9/5/18 at [4.7] to [4.20].
18 Ibid at [4.20].

> actions and measures to minimise impacts upon nearby residents and the local community."[19]

[19] It must be noted that these submissions are also made in the context of the misconceived contention that there has been no declaration "that the respondents have carried out any unlawful use on the land."[20] And it is otherwise noted in the submission for the respondents that they:

> "have made a number of attempts to confirm Council's position with respect to the lawfulness of temporary events on the land prior to the commencement of these proceedings."[21]

It is also pointed out that the order made on 21 April 2017, permitted a then advertised "Mud Bikes and Music Fest" to proceed on 29 April to 1 May 2017. But as was expressed in the written submissions of the applicant to the Court on 21 April 2017, this was upon the basis that:

> "21. Whilst two previous applications have been made and refused, the Respondents still seek to have the current event proceed.
>
> 22. The Council has been giving consideration to scheme amendments, at a preliminary stage, around occasional events of this nature but have not arrived at a position in relation to any changes.
>
> 23. In the circumstances the Council is consenting to an order permitting the current event, restraining any further use of the land and quarantining the removal of building works and operational works pending the outcome of any application made."

[20] The applicant is entitled to rely upon its substantial success in obtaining the order made on 21 April 2017, despite, as is pointed out for the respondents, the fact that not all of the orders which were sought in the originating application were made. Moreover, the applicant has the benefit of the effect s 457(9) and also the expressed basis upon which the exercise of the discretion of the Court was obtained, with the consent of the respondents, on 21 April 2017.

[21] An appropriate exercise of discretion, in these circumstances, is to allow the applicant to recover its costs of both the originating application and the application made in pending proceedings for those costs, the first conclusion constituting also sufficiently substantial success in respect of the application for costs. And in circumstances where the submissions of the parties have contemplated only the

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19 Affidavit of T Stenholm filed 20/4/17, at TS-15 (p 132).
20 See respondents' written submissions filed on 9/5/18 at [4.9].
21 Ibid at [4.21].

prospect of the engagement of the assessment procedure under the UCPR, it should be ordered that, if so necessary, the costs be so assessed but only on the standard basis. In the circumstances and whilst there is a clear indication of the need for the applicant to have ultimately obtained the orders so as to achieve a desired outcome, there has been a lengthy prior history in respect of the matter, including some indication to the respondents as to prevarication about their use of the land, and particularly in the recognition of their essentially prompt resolution of the proceeding, an absence of the necessary special circumstances or sense of irresponsibility of conduct, such as to warrant an order for assessment on the indemnity basis.

[22] The further orders are:

1. The respondents are to pay the applicant's costs of the originating application filed on 3 March 2017 and the application in pending proceedings filed on 17 April 2018.

2. The costs of the originating application filed on 3 March 2017 are to include the amount of $1,182.50 in investigation costs.

3. If not otherwise agreed, the costs of each application are to be decided in accordance with Part 3 of Chapter 17A of the Uniform Civil Procedure Rules 1999 and assessed upon the standard basis in accordance with rule 702 of those rules.