

# ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA

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## LINDNER & WHETSTONE v REGIONAL COUNCIL OF GOYDER & ORS

**Judgment of Her Honour Judge Cole and Commissioner Botting**

**23 November 2005**

### **LOCAL GOVERNMENT - TOWN PLANNING**

Provisional development plan consent granted by Council for the establishment of a feedlot - EPA consulted and in support of the consent - third party appeals lodged - whether the taking of groundwater for the feedlot would affect the ground and surface water flows - whether the use of ground water would be environmentally sustainable - Objective 40 of the Development Plan for the Regional Council of Goyder considered - decision of Council reversed - provisional development plan consent refused.

*Development Act 1993 s 3; Natural Resources Management Act 2004; Water Resources Act 1997, referred to.*

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**Appellant: JOHN LINDNER Advocate: MR DAVID LINDNER**  
**Appellant: GRAHAM J WHETSTONE In Person**  
**First Respondent: REGIONAL COUNCIL OF GOYDER Advocate: MR J BRAK**  
**Second Respondent: SIMON ROWE Counsel: MR B HAYES QC WITH MR S HENRY - Solicitor:**  
**COSOFF CUDMORE KNOX**  
**Third Respondent: ENVIRONMENT PROTECTION AUTHORITY Counsel: MS A FIELD -**  
**Solicitor: CROWN SOLICITOR'S OFFICE**  
**Hearing Date/s: 17/10/2005 to 20/10/2005**  
**File No/s: ERD-05-131, ERD-05-132**  
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**LINDNER & WHETSTONE v REGIONAL COUNCIL OF GOYDER &  
ORS  
[2005] SAERDC 115**

**THE COURT DELIVERED THE FOLLOWING JUDGMENT:**

1           Mr Rowe applied on 13 October 2004 for provisional development plan consent to establish a feedlot on the Princess Royal Station near Burra. The Regional Council of Goyder (“the Council”) processed the application as a Category 3 application, and Mr Lindner and Mr Whetstone each made a representation. The Council consulted the Environment Protection Authority (“the EPA”). On 15 March 2005, the Council decided to grant provisional development plan consent to the application subject to 14 conditions. Mr Lindner and Mr Whetstone appealed against that decision.

**The Land**

2           The Princess Royal Station is approximately 8,900 hectares in area. The feedlot would occupy an area of 6.43 hectares within allotment 844, which forms part of the Station.

3           The Station is presently used principally for farming and grazing. There is also a vineyard on the property.

4           The proposed feedlot would be 900 metres from Burra Creek and more than 200 metres from the nearest minor watercourse.

**The Proposal**

5           The feedlot is to have the capacity to finish 1,500 head of cattle or 1,350 cattle together with 1,000 lambs at any one time. Some of the cattle and lambs will be backgrounded at the Princess Royal Station and some will be purchased locally.

6           The feedlot has been designed to conform with current best practice standards.

**The Development Plan**

7           The land is in the General Farming Zone. A feedlot may be an acceptable land use in the General Farming Zone, provided that it does not have an unreasonable adverse impact upon other land users in the area.

8           We are satisfied that the land is sufficiently remote from the neighbours of the Princess Royal Station so that the proposed feedlot will have no direct impact upon the amenity of surrounding land users in terms of dust, noise and appearance.

9 The appellants, in their original representations, raised issues concerning traffic. These concerns were not pursued at the hearing. The appellants had also raised concerns about the potential for the feedlot to pollute surface waters which ultimately run into the Burra Creek. These concerns were pursued only faintly. We are satisfied, from the evidence of Mr Clark, that the feedlot could be established in such a manner that pollution of the catchment would be prevented.

10 The principal outstanding question with respect to this proposal is whether the taking of groundwater in the quantities needed for the feedlot would have a deleterious effect upon ground and surface water flows and, if so, whether that effect is a proper basis for the refusal of the application.

### **Approach to Assessment**

11 Mr Rowe has sought provisional development plan consent under the *Development Act 1993*. An application for provisional development plan consent falls to be decided having regard to the relevant provisions of the Development Plan and general planning principles. Dr Muller, an expert natural resources manager, approached her evidence on the basis that the version of the precautionary principle which appears in s 7 of the *Natural Resources Management Act 2004*, which sets out the objects of that Act, is generally applicable. She was in error, on that point. The objects of the *Natural Resources Management Act 2004* apply only to the processes under that Act.

12 Mr Rowe proposes to take 25 megalitres per annum of groundwater from Cattleyard Bore BH 3075 for use in the feedlot. This well has not been prescribed under the *Water Resources Act 1997* or its successor, the *Natural Resources Management Act*. No licence and no water allocation is presently required to take water from that well. There was evidence that the Department of Water Land and Biodiversity Conservation and the River Murray Catchment Water Management Board are currently undertaking studies to determine the sustainable yield of the Burra Creek catchment. This is the kind of information which the Minister may take into account when considering whether or not to recommend that water resources be prescribed.

13 The existence of a system for allocating water under the *Natural Resources Management Act* does not prevent consideration of the potential environmental effect of the taking of water for a proposed development when provisional development plan consent is applied for. The objects of the *Development Act 1993* are set out in s 3 and include:-

s 3 The object of this Act is to provide for the proper, orderly and efficient planning and development in the State and, for that purpose –

...

(c) to provide for the creation of Development Plans –

- (i) to enhance the proper conservation, use, development and management of land and buildings; and
- (ii) to facilitate sustainable development and the protection of the environment; and
- (iia) to encourage the management of the natural and constructed environment in an ecologically sustainable manner; and
- (iii) to advance the social and economic interests and goals of the community.

14 The applicable Development Plan, which is the Development Plan for Goyder (Regional Council) consolidated on 24 March 2005 has, as a Council Wide Objective:-

**Objective 40:** Protection of all water resources from pollution or excessive usage which would threaten the long-term reliability of existing resources

15 It is necessary, when assessing a proposal such as this, to take a medium to long term view. Mr Rowe emphasised the social and economic benefits of his proposal - the employment opportunities it would create, and the efficiencies for the industry. These are relevant matters, but those benefits may be very short lived indeed if Objective 40 is not complied with.

### Assessment

16 An accepted method of determining long term trends in groundwater levels includes the analysis of data from the Observation Wells Network. However, no water level recording data from any Observation Wells in the area were presented to the Court. The following relevant data and observations were presented during the hearing:

- Mr Phillips owns land located downstream of Princess Royal in the Mid Burra Creek subcatchment (immediately adjacent to the Upper Burra Creek subcatchment boundary). Mr Phillips runs 2,000 sheep on his property and is totally reliant on groundwater for stock watering. He has observed Burra Creek ceasing to flow past his property during winter over recent years. Mr Phillips gave evidence showing a consistent decline in water yield from his well over the last 19 years. In 1986, the well yielded 600 gallons per hour. By the year 2000, the well yield had declined to 180 gallons per hour and in 2005 he had to lower the pump 15 feet as the well had ceased to flow. The evidence given by Mr Phillips was neither challenged nor refuted. We accept his testing method of timing how long it took to fill a large container as being an appropriate technique for determining the well yield.
- Mr Strachan owns land in the Lower Burra Creek subcatchment, approximately 40 kilometres downstream of Princess Royal. He used to

make use of 3 wells on his property. One well, referred to as the “Woolshed Bore” began to show a declining yield in the early 1980’s and is no longer used. A second well, about 4 kilometres south of the Woolshed Bore has been declining in yield over the last 6 years. His third well, about 2 kilometres east of the Woolshed Bore, is still operating satisfactorily. Mr Strachan has replaced the water supply from the declining wells with water from the Morgan Whyalla pipeline.

- The Cattleyard Bore on Princess Royal has shown an increase in the depth to standing water from 8.2 metres when drilled to 10.4 metres in April 2005. This probably reflects a lowering of the groundwater level of 2.2 metres at this site.
- Mr Falkenberg is a Ranger for the Parks and Reserves in the Mid North region of South Australia and is employed by the Department for Environment and Heritage. Mr Falkenberg has observed the surface flows in Burra Creek over the past 22 years and has seen a decline in the frequency of surface flows during that time.
- Mr Brandle is currently a Scientific Officer with the Department for Environment and Heritage. In 1991, as a Project Officer with the Nature Conservation Society, he conducted a vegetation survey along Burra Creek approximately 6 kilometres downstream of the World’s End Gauging Station. Mr Brandle observed a significant amount of decline in the River Red Gum vegetation in the creek floodplain. He considered that increased salinity levels were the cause of the vegetation decline, but was unsure of the cause of the salinity level increase.

17 When considered collectively, all of this evidence indicates that the water resources within the Burra Creek system are in a state of significant decline and the current rates of water use are not sustainable.

18 The estimated maximum annual water demand for the proposed feedlot is 25 megalitres. For a feedlot area of 6.43 hectares, this equates to a spatial water use rate of 3,888 kilolitres per hectare. The estimated existing annual groundwater abstractions were 368 megalitres. Spread over the total catchment area of 34,500 hectares, this equates to an average spatial water use rate of 11 kilolitres per hectare. It is apparent that the proposed feedlot will be a very large single demand point for groundwater, when compared to the rest of the catchment. Also, the water use for the proposed feedlot would increase the existing annual groundwater abstractions by about 7%. This amount is not insignificant for a single use.

19 The Court heard evidence from two expert witnesses, Dr Muller and Mr Howe. The experts met on the second day of the hearing and agreed that there is insufficient recorded data. They also agreed that the characteristics of the

fractured rock aquifer were not well understood. Apart from those agreements, the experts held opposing opinions.

20 Dr Muller is qualified and experienced in the field of natural resource management. Her evidence was clear. Dr Muller believes that the Upper Burra Creek subcatchment is presently in a state of unsustainable water use. She recommended that the Court adopt a precautionary approach in this matter due to, in her opinion, there being;

1. significant existing use of the water resource,
2. a high risk to the ecology in the area that was dependant on the water resource,
3. a highly variable nature to the water resource, and
4. significant gaps in the available data.

21 Dr Muller's opinion was that the approval for the feedlot should be refused since the available information at this time shows the use of the water resource cannot be sustained.

22 Mr Howe is a qualified and experienced hydrogeologist. Mr Howe's opinion was based on results from preparing a theoretical water balance for an average year. His water balance calculations were based on using streamflow data from the World's End Gauging Station for the period 1974 to 1992. Mr Howe concluded that there was sufficient groundwater to meet the demand of the Princess Royal feedlot, but his evidence was unclear as to whether the water resource was sustainable.

23 Subsequent to the preparation of his statement, Dr Muller provided Mr Howe with a longer flow record that extended from 1974 to 2004. The longer flow record showed that Mr Howe's water balance calculations were based on a period that contained 8 of the largest 10 annual runoff events. The additional data period of 1993 to 2004 clearly displayed the effects of the recent drought on the flows in Burra Creek. Mr Howe's evidence was that this additional data did not cause him to alter any of his findings or opinions.

24 Mr Howe's original opinion, as presented in his statement, was based upon inadequate evidence. Mr Howe seemed to become entrenched in his view, even when faced with the longer flow record, which, he admitted, halved his estimate of the baseflow component of the system.

25 After considering the approaches of the two experts, the Court prefers the opinions of Dr Muller in relation to the state of the catchment and the likely impact of the proposed development. We agree with her that sufficient evidence is available to establish that there is real and substantial danger that the present level of use of water from the system is not environmentally sustainable, and that the extraction of a further 25 megalitres per annum for the feedlot from a single well will aggravate that situation. The proposed development would not comply

with Objective 40; rather than protecting the catchment from excessive usage, it would aggravate the existing risk of over use.

### **Processing**

- 26 We are concerned about an aspect of the processing of this development application. The Council did not appear to address itself seriously to the issue of water use; it relied on the EPA. However, water use is not something to which the EPA addresses itself either – at a State government level issues concerning water use are dealt with by the Department of Water Land and Biodiversity Conservation and the Minister for Environment and Conservation, neither of whom seem to have been consulted.

### **Conclusion**

- 27 This proposal's failure to comply with Objective 40 is fatal to it. A development which potentially aggravates existing risks to the continuance of a natural water supply to the environment and to the existing users should not be approved. The appeal is upheld. The Council's decision is reversed. Development Application No. 422/0128/04 is refused.