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24th May 2004

Dear Mike,

Scrutiny Review: Draft Water Resources (Jersey) Law 200-

A copy of your letter of 19th May 2004 has been passed to me by my client Mr L G de la Haye.

Mr de la Haye is keen to be involved in the Scrutiny Process and he apologises for the delay in responding to you. I enclose herewith a copy of his original letter when the draft Law went out for consultation. All of the points he raises therein remain valid.

Mr de la Haye would be keen to meet with the Scrutiny Panel. Could I ask you to liase with him direct as to a suitable date as to when he might be interviewed?

Yours sincerely,

Philip W Syvret

Enc.

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JE2 4US

16th July 2003

Dear Mr Newton,

Draft Water Resources (Jersey) Law 200- (“the Law”)

Thank you for providing me with a copy of the Law under cover of your letter of the 30th May 2003. I apologise for the delay in responding to you. You will appreciate that the draft Law will significantly impact upon the operation of my business. I have therefore taken the opportunity of obtaining legal advice as well as considering the personal impact of the terms of the Law. As a consequence of that reflection and advice the following points arise:-

1. From an overall point of view I am concerned that I am specifically being consulted at this late stage when the principle behind this Law was mooted as long ago as the 7th March 2000. I would be interested to learn what consultation there was with other parties prior to detailed drafting of the Law.
2. The lack of consideration to the position of my business is reflected in the terms of the Law. I note for example, at Article 4 there is no reference to existing businesses or the very significant contribution given to the Island's water supply by bore holes and wells on private property. The Law expressly provides at Article 4 (2) that special consideration be given to the position of the Jersey New Waterworks Company, being required as it is to provide an adequate supply of wholesome water under the terms of the Water (Jersey) Law 1972. Should consideration not be given in similar terms to the fact that the Jersey New Waterworks Company would be unable to connect every single property on this Island to its system and, that even if it were able to do so there would be insufficient capacity within the system to provide adequate supply?

In those circumstances I would respectfully suggest that Article 4 be amended to include consideration of the fact that provision of water supply from bore holes and wells within individual properties is an integral part of the system supplying water to the Island's population.

I am not a lawyer but it has been suggested to me that the wording of Article 4 is such that it might be considered to be an exhaustive list of the matters which the Committee shall have regard. Would it not be better to make reference to “all the relevant circumstances including ...”?

3. At Article 6 the Committee is required to publish reports of its regulatory activities. I note that no timetable is given for the provision of those reports. If they are to be annual reports a duty should be imposed expressly under the Law.

I was surprised however that there is only a duty to report on the Committee's regulatory activities. I would have thought that it is equally important that the Committee publish the information that it has gathered under Article 5, that is to say its monitoring of the sources of supply of water. Knowledge as to the extent of the available water supply will clearly be of interest to the public in assessing how effectively the Committee is undertaking its role and indeed assessing whether licences have been granted fairly or restricted as a matter of necessity. I would suggest that Article 6 (1) is extended to report on level of supply.

4. In my view the restriction imposed by Article 10 is a fundamental infringement of the rights of an owner of land. The maximum in Jersey law that "qui a le sol a le dessus et le dessous" freely translates to record that the owner of land is also the owner of all that is above and all that is below the land. Thus a person who has purchased land at the time of the registration of the Law which has an existing bore hole cannot surely be required to seek a licence for the abstraction of that which is already his. The coming into force of the Human Rights Law will bring with it the duties imposed under Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, namely that everyone has the right to respect for his private and family life, his home and correspondence. The Committee will need to demonstrate that this legislation is Human Rights compliant and I believe that as part of the public consultation process any legal opinion received in relation to the compliance of this legislation with the Human Rights Law should be made available for public consideration. It is my view that at the very least those bore holes and wells in existence at the coming into force of the Law should be exempted.
5. I was concerned to note that the abstraction from a bore hole or well was limited to two cubic metres in any twenty-four hours. The concern had two principle difficulties. Firstly I cannot see why that consumption level has been fixed upon. It is low enough so as to catch or at least be of concern to the vast majority of bore hole users. Basic domestic uses for even an average size family with young adult members may exceed two cubic metres in any twenty-four hours. Standard domestic appliances such as washing machines, dishwashers combined with multiple or en suite bathrooms means that that level of supply will easily be reached by a large number of units. Those units who risk reaching that level of supply will be advised in any event to obtain a licence to protect the position. Thus it will be only a very small proportion of ground water users who are not licensed. Was this the intention? If so it appears to me to be a curious way of proceeding. Either all users should be licensed or the level of consumption set higher so as to ensure that normal domestic use is not included in the licensing process.

My second concern in this regard is the sheer size of the administrative force that will be required to properly administer these arrangements. If a limit is to be imposed bore holes or wells will require metering. Meters in turn will require somebody to check the same. I wonder whether the cost of these administrators has been calculated in real terms? I would also be interested to learn how the Committee proposes to monitor the abstracting of water from an above ground source of supply. The abstraction of say three cubic meters in twenty-four hours from a brook or stream will be an infringement of the terms of the Law as drafted. It will however quite frankly be impossible to prove and therefore enforce.

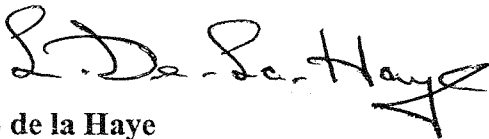
6. I note that the licensee is to be an individual rather than say a licence granted to the individual for the benefit of a property. Thus on any sale of property further administration is required for the transfer of a licence presumably into the hands of the new property owner. Would it not be better for the Law to be drafted so as to allow the benefit of a licence to run with the property upon which the bore hole or well is constructed?
7. I have considered the matters to be taken into account on an application for licence under Article 15. Again I am advised that reference to the list may be interpreted as an exhaustive list and it would be better that the list commenced by requiring the Committee to have regard to "all the circumstances of the application including ...".
8. The terms of Article 17 are understandable in the context of the Law but again require a team of administrators to monitor and enforce conditions that are imposed.
9. The power to vary a licence was given as proposed under Article 20 is surprising, particularly given the emergency drought provisions which appear later in the Law. If a person is authorised to carry out the abstraction of water and undertakes the very significant expense of the construction of a bore hole or well for that purpose, he should not be faced with the prospect of having the licence revoked without at least valid and substantial reasons. The Article does not spell out the requirement for such valid and substantial reasons. Nor does it provide for any compensation for the licence holder where the licence is revoked or suspended under Article 21. I would respectfully suggest that the Law is defective in that regard.
10. My concern in relation to the fact that no valid or substantial reasons are required for the revocation or variation of a licence arises again when I consider Article 23 (1). The Committee is only required to provide a copy of its decision in relation to the matter and not its reasons. Invariably it is the reasons for the decision which are as important to an aggrieved applicant as to the decision itself.
11. It is the Article 24 relating to charges which perhaps causes me the most concern. I have noted above that a team of administrators and enforcers is to be required. The costs will be substantial and necessarily the costs of licences or registration will be significant. This may force consumers to turn to the exclusive supply of the Jersey New Waterworks Company which is effectively unregulated by any ombudsman. Further this may increase demand on the Island's central water sources and act as a disincentive to people to use the supplies that are available on their own property. I cannot see that a system that achieves a further burden on the central supply system rather than encouraging consumers to use their own supply is a sensible way of proceeding. The absence also of any overview by the States as to the level of charges made is also of concern. There is already public concern as to the "stealth taxes". I can only see that this is yet a further example. Ironically however the Committee now proposes to tax land owners for use of a commodity which is already theirs as the Law presently stands! As Sir Humphrey would have told his Minister it would be a "bold" decision for any politician to present this form of taxation to his constituents!

12. I note the procedure for appeals in Article 39. It appears to me that there should at least be a capacity for an applicant to apply for a stay of any order pending an appeal. Given the very lengthy delay that now occurs in bringing a matter before the Royal Court there is a substantial risk that a person's water supply could be effected improperly by an incorrect decision of the Committee for an extended period.
13. My concern in relation to the failure to provide compensation in the event that a licence is revoked is compounded by reading Article 46 which expressly precludes any liability. That surely cannot provide a safe system of checks and balances within the Law restricting the Committee's activities.
14. My comments in relation to pre-existing wells or bore holes apply notwithstanding the transitional provisions at schedule 3.

It may be that the moment for objection to the principle of this Law has passed. I should however in general terms note my concerns that the management of this Island's water supply at present falls almost exclusively in the hands of the Jersey New Waterworks Company. I note that the Consumer Council in commenting upon statements in the Company's annual report recently suggested that "We feel that the Jersey New Waterworks Company have missed an excellent opportunity to get the public involved by encouraging them to be more economical in the way they consume an essential resource." Educating people and promoting more responsible water use could now have a significant impact, avoiding the massive capital expenditure that might be required in the not too distant future. When Queen's Valley was destroyed to create a reservoir it was on the basis that it would solve the Island's central water requirements for the foreseeable future. Clearly if the Law that you are now proposing is required that statement was wildly incorrect. I would suggest that the price for that error should be borne by the Jersey New Waterworks Company and not those who have expended funds on the construction of wells and bore holes at the premises.

I should be grateful if you would continue to include me in the consultation process.

Yours sincerely,

A handwritten signature in black ink, appearing to read "L. De la Haye". The signature is written in a cursive style with a large, stylized initial "L".

L de la Haye