

SUPREME COURT OF QUEENSLAND

CITATION: *Maroochydore Sands Pty Ltd v Minister for State Development, Manufacturing, Infrastructure and Planning* [2019] QSC 319

PARTIES: **MAROOCHYDORE SANDS PTY LTD**
(applicant)
v
**MINISTER FOR STATE DEVELOPMENT, MANUFACTURING,
INFRASTRUCTURE AND PLANNING**
(respondent)

FILE NO/S: BS No 5769 of 2019

DIVISION: Trial Division

PROCEEDING: Interlocutory application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 December 2019

DELIVERED AT: Brisbane

HEARING DATE: 10 September 2019

JUDGE: Douglas J

ORDER: **1. The application be dismissed pursuant to s 48 of the
Judicial Review Act 1991.**
2. The parties be heard as to costs.

CATCHWORDS: ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW LEGISLATION APPLIES – DECISIONS UNDER AN ENACTMENT – GENERALLY – where the applicant wished to develop commercial plants on a site at Forest Glen – where the applicant’s agent provided a report to a division of the Department of Natural Resources and Mines supporting the inclusion of part of the site as a Key Resource Area (KRA) in the State Planning Policy (SPP) – where the Chief of Staff of the Deputy Premier advised the applicant that the Deputy Premier had decided not to proceed with the inclusion of the site in the SPP guidance or mapping given legal proceedings currently under way in relation to the site – where representatives of the applicant have continued to encourage the Minister and her representatives to make a decision to include the site in the SPP and the SPP guidance material but no such decision has yet been

made – where the applicant applied for a statutory order of review – where the respondent Minister applied for the dismissal of the application pursuant to s 48 of the *Judicial Review Act 1991* (Qld) because the decision is said not to be one to which the Act applies – whether the Minister is required to make a decision “under an enactment” namely, the *Planning Act 2016* (Qld) – whether the decision sought under s 10(5) of the *Planning Act* is an amendment to a State Planning instrument – whether the decision sought affects legal rights and interests

Judicial Review Act 1991 (Qld), s 48
Planning Act 2016 (Qld), ss 8(2), 10(5)
Sustainable Planning Act 2009 (Qld)

Griffith University v Tang [2005] HCA 7; (2005) 221 CLR 99 referred
Trask Development Corporation No 2 Pty Ltd v Moreton Bay Regional Council [2018] QSC 170; [2019] 2 Qd R 82 referred

COUNSEL: S A McLeod QC for the applicant
 JM Horton QC and JJ Ware for the respondent

SOLICITORS: Mullins Lawyers for the applicant
 Crown Law for the respondent

- [1] In this application for a statutory order of review the respondent Minister has applied for the dismissal of the application pursuant to s 48 of the *Judicial Review Act 1991* (Qld) because the decision is said not to be one to which the Act applies.

Background facts

- [2] The applicant wishes to develop a commercial sand extraction plant, wet screening and wash plant operation on a site at Forest Glen. On or about 10 October 2014, Groundwork Plus, on behalf of the applicant, provided a report to the Geological Survey of Queensland (GSQ), which is itself a division of the Department of Natural Resources and Mines, supporting the inclusion of part of the site as a Key Resource Area (KRA) in the State Planning Policy (SPP).
- [3] A KRA is not a development approval. Nor is the SPP a planning scheme; it is a document that must be taken into account by local government in preparing its planning scheme and against which development applications must be assessed to the extent the SPP is not appropriately reflected in the planning scheme.
- [4] By letter dated 21 November 2016, GSQ wrote to Groundwork Plus saying that it was proposing to introduce KRA 162 Eudlo Creek in an “upcoming amendment of the State Planning Policy (SPP)”.

- [5] Then, by letter dated 3 July 2017, the Chief of Staff of the Deputy Premier wrote to the applicant advising it that the Natural Resources Minister had requested the Deputy Premier to endorse the inclusion of KRA 162 in the SPP guidance material and SPP Interactive Mapping System (IMS). The relevant letter from the Deputy Premier went on to say:¹

“On 16 May 2017 the Deputy Premier decided not to proceed with the inclusion of KRA 162 in the SPP guidance or mapping at this time, given the legal proceedings currently under way in relation to the site. The Deputy Premier will reconsider the proposal at a later date, in consultation with DNRM.”

- [6] Representatives of the applicant have continued to encourage the Minister and her representatives to make a decision to include KRA 162 in the SPP IMS and the SPP guidance material but no such decision has yet been made, at least partly because there are proceedings in the Planning and Environment Court related to the land affected by the proposal to include KRA 162. They are the legal proceedings referred to in the letter just quoted.

Submissions for the respondent

- [7] The principal reason why the respondent argues that the application should be dismissed is that the proceeding is doomed to fail because the decision is one there is no obligation to make. Counsel for the respondent submit that the decision is not one required to be made “under an enactment” for three reasons:
- (a) Section 10(5) of the *Planning Act* 2016 (Qld) requires the Minister to make a decision in relation to a State Planning instrument.² Section 8(2) defines that term as a planning instrument made by the Minister to protect or give effect to State interests. The subsection goes on to say that it is either a State Planning Policy or a regional plan. The respondent’s submission is that neither the SPP IMS nor the SPP guidance material is or is a part of a regional plan or an SPP. Rather, they are supporting documents for the SPP, not a part of it;
 - (b) Secondly, the respondent submits that the Minister is only required to make a decision to amend an SPP instrument under s 10(5) of the *Planning Act* once she has undertaken certain steps, consisting of an initial decision to propose the amendment, public and local authority notification of the proposed amendments and consideration of submissions received as a result of the notification. No such steps have been undertaken in relation to amending the SPP IMS and the SPP guidance material to include KRA 162; and
 - (c) Thirdly, the respondent submits that the failure to make the decision does not affect legal rights and interests.

¹ Affidavit of Michael Mullins filed 1 July 2019, ex MM-1 at p 438.

² There was some debate as to whether the *Planning Act* 2016 was the appropriate legislation rather than the *Sustainable Planning Act* 2009 (Qld). Nothing was said to turn on it and it seemed to me that the proceeding was initiated under the *Planning Act*.

- [8] The real debate focussed on the first and third of those issues.

Is the decision sought under s 10(5) of the *Planning Act* an amendment to a State Planning instrument?

- [9] I have referred previously to the definition of State Planning instrument in s 8(2) of the *Planning Act* as being either a State Planning Policy or a regional plan. It was not submitted that the relevant documents here were regional plans.
- [10] Two SPPs were identified as relevant to the application, one which took effect on 29 April 2016 and another which took effect on 3 July 2017. It was submitted that the inclusion of KRA 162 in the IMS for those policies did not result in any changes to the policies. In both policies, a KRA was relevantly defined as an area that contained extractive resources of State or regional significance shown on the IMS and the IMS in turn was defined in both policies as the SPP IMS “as amended from time to time, published by the Department of Infrastructure, Local Government and Planning and located at” a particular website.
- [11] Both policies were said to make reference to the IMS as being in the nature of supporting mapping for the SPP policies and assessment benchmarks. The relevant extracts from the policies were as follows:

- (a) For the 2016 SPP:

“Supporting material

Mapping

Some state interests have supporting mapping to assist in spatially representing the policy or requirements. This mapping is referred to in the document as the SPP Interactive Mapping System. The SPP Interactive Mapping System contains both statutory and guidance mapping, which can vary in certain circumstances. Consequently, it is necessary to read the relevant state interest to determine the context of the individual mapping layers shown. The mapping will be amended from time to time to ensure the most recent state information is available.

The SPP Interactive Mapping System is located at www.dilgp.qld.gov.au/spp-mapping; and

- (b) For the 2017 SPP:

“Supporting mapping

Wherever possible and to the extent relevant, the state interest policies and assessment benchmarks in part E of the SPP are supported by mapping.

All mapping related to the SPP is contained in the SPP IMS. Where relevant, the SPP IMS represents the single point of truth for the spatial representation of the state’s interests expressed in the SPP.

Amendments to mapping occur from time to time, independently of an amendment to the SPP.

There are three categories of mapping layers provided or referred to in the SPP IMS that are intended to be used in one of the following ways:

- (1) State mapping layers that must be appropriately integrated in a local planning instrument in a way that achieves the relevant state interest policy (see appendix 1, table A).
- (2) State mapping layers that must be appropriately integrated, and can be locally refined by a local government in a local planning instrument, in a way that achieves the relevant state interest policy (see appendix 1, table B).
- (3) State mapping layers that are provided for local government information purposes only (see appendix 1, table C).

The SPP IMS contains the most up to date mapping relevant for the purposes of the SPP and applies to the extent of any inconsistency. The SPP IMS is located at [www.dilgp.qld.gov .au/spp-mapping](http://www.dilgp.qld.gov.au/spp-mapping)".

- [12] The 2017 SPP, in particular, points out that amendments to mapping occur from time to time, independently of an amendment to the SPP. From that the respondent argued, it seemed to me persuasively, that the IMS was an online mapping service provided by the State supporting the SPP and which could be amended from time to time independently of the SPP with the result that it was not an SPP and not part of one.
- [13] There were also two documents identified as guidance material for SPPs.³ Those documents were said to provide guidance in relation to SPPs in relation to a State interest, namely mining and extractive resources. Both documents provide a list of KRAs, refer to the SPP IMS as providing relevant mapping and provide guidance on various aspects of KRAs.
- [14] The evidence from Mr Aston, who swore an affidavit in his capacity as Executive Director, Policy and Statutory Planning, Planning Group within the Department of State Development, Manufacturing, Infrastructure and Planning was that such guidance material was available for each State interest in the SPP, that the material had no statutory basis and was not mandated for local governments to use.
- [15] There was no challenge to that evidence. The 2016 document pointed out that the use of such guidance material was optional while the 2017 document said that the SPP guidance material was not statutory in its effect and did not contain any new policy. Neither of them were mandatory requirements of the State.
- [16] Accordingly, the respondent submitted that neither the guidance material nor the IMS were part of the SPPs but supporting material only. Therefore, the Minister was not required to

³ Affidavit of Christopher Aston filed 31 July 2019, ex CA-1, pp 183-202 and pp 203-230.

make a decision pursuant to s 10(5) of the *Planning Act* when the IMS or the guidance material was amended.

- [17] Mr McLeod QC's submission on this point was that the inclusion of a KRA on the SPP IMS arose from the fact that the identified location as a KRA was to be shown on the IMS which was designed to provide the "spatial representation of the State's interest expressed in the SPP".⁴
- [18] That passage, however, occurs immediately before the statement that amendments to mapping occurred from time to time independently of an amendment to the SPP. It seems to me, therefore, that the process of including information in the IMS does not involve an amendment to the SPP of the type required by s 10(5) of the *Planning Act*.

Does the decision sought affect legal rights and interests?

- [19] The submission for the respondent was that the failure to make the decision sought here did not confer, alter or otherwise affect legal rights or obligations in the sense discussed in *Griffith University v Tang*.⁵
- [20] The submission was that a decision to include KRA 162 in the SPP IMS or the guidance material would not have such an effect. It may benefit the applicant in its ownership of the land but it was not a development approval nor was the SPP a planning scheme but a document that should be taken into account by a local government in preparing its planning scheme and something against which development applications must be assessed to the extent the SPP is not appropriately reflected in the planning scheme.
- [21] The submission was that the bundle of rights and obligations affecting the land had not changed as a result of anything the Minister did or did not do as the site can be used for development in exactly the same way before and after the Minister's actions. This follows because the designation of the land as a KRA was not itself an approval or a statutory prerequisite to an approval to carry out quarrying and sand extraction on the land.
- [22] The respondent relied on the decision of Ryan J in *Trask Development Corporation No 2 Pty Ltd v Moreton Bay Regional Council*⁶ where her Honour held that the Council's refusal of a developer's request for amendment of an environmental overlay map covering its land was not a decision to which the *Judicial Review Act* applied because it did not affect the developer's rights. Her Honour said:⁷

"It did have a right to *apply* for an amendment to an overlay map but that right was not affected by the decision (the refusal to commence the amendment process). That right (to apply) was not exhausted or extinguished by the refusal. TLC could apply again for an amendment to the overlay map - including for

⁴ Affidavit of Christopher Aston, ex CA-1 at p 109.

⁵ [2005] HCA 7; (2005) 221 CLR 99, 130-131 at [89].

⁶ [2018] QSC 170; [2019] 2 Qd R 82.

⁷ [2019] 2 Qd R 82 at [137].

example via the online process, via appendix 3, via a variation request or perhaps by a direct request to MBRC.”

- [23] By analogy, the respondent submitted that here the applicant’s right to urge the Minister to make a decision was not exhausted or extinguished by the Minister’s failure to do so at present.
- [24] Mr McLeod’s submission was that the applicant, having the benefit of the recommendation that the KRA be included in the IMS, meant that the respondent was required to make a decision. He argued that it was sufficient that the Act here required authorised decisions from which new rights or obligations arose such that the decision to make a recommendation was substantive, determining in a practical sense the key considerations in deciding whether amendment should be made. He sought to distinguish the decision in *Trask Development Corporation* but I am not persuaded that he has succeeded in doing so.
- [25] It seems to me that, if the applicant has a substantive right to ask for a decision to be made, that has not yet been exhausted. Perhaps more significantly, even if a decision were made one way or the other, that would not necessarily determine the right of the applicant to exploit the resources on the land. It may be able to be called in aid as a discretionary consideration to assist it in developing the land but has not, in my view, affected the applicant’s legal rights or obligations. It is not a decision from which new rights or obligations necessarily arise.

Order

- [26] Accordingly, the application is dismissed pursuant to s 48 of the *Judicial Review Act*.
- [27] I shall hear the parties as to costs.