

SUPREME COURT OF QUEENSLAND

CITATION: *Mayo & Anor v Gold Coast CC* [2002] QCA 424

PARTIES: **PHILIP GRANT MAYO**
(appellant/first applicant)
JEANETTE ALISON MAYO
(appellant/second applicant)
v
GOLD COAST CITY COUNCIL
(respondent)

FILE NO/S: Appeal No 5068 of 2002
P & E Appeal No 1123 of 2001

DIVISION: Court of Appeal

PROCEEDING: Application for Leave *Integrated Planning Act*

ORIGINATING COURT: Planning and Environment Court at Southport

DELIVERED ON: 18 October 2002

DELIVERED AT: Brisbane

HEARING DATE: 4 October 2002

JUDGES: McPherson JA, Helman and Jones JJ
Separate reasons for judgment of each member of the Court, each concurring as to the order made

ORDER: **Application for leave to appeal dismissed with costs.**

CATCHWORDS: APPEAL - PRACTICE & PROCEDURE - QUEENSLAND - when appeal lies - by leave of Court - requirement of question of law under s 4.1.56(1)(a) of *Integrated Planning Act 1997* - whether questions of law raised

Integrated Planning Act 1997 (Qld), s 4.1.56(1)(a)
Land Act 1994 (Qld), s 14(2), s 30(a), s 31(1), s 35(1)(b), s 46
Workplace Health and Safety Act 1995 (Qld)

COUNSEL: The applicants appeared on their own behalf
W Cochrane for the respondent

SOLICITORS: The appellants appeared on their own behalf
King & Company for the respondent

[1] **McPHERSON JA:** This is an application for leave to appeal from a decision of the Planning and Environment Court at Southport. The applicants Mr and Mrs Mayo applied to the Gold Coast Council for approval of a reconfiguration of their land at Brydon Creek Drive, Upper Coomera, by subdividing it into two allotments. The

application was granted subject to conditions, of which condition 7 is that the applicants must at their expense dedicate to the Crown as a park or public open space an area of land designated on the proposal plan.

- [2] The applicants' land has frontages on Brydon Creek, which is tidal, and the area designated in condition 7 is the strip of land (the trust land) that runs along the bank of the creek and is some 100 metres wide. The Council's objective as disclosed in its Strategic Plan is to secure an open space corridor along the banks of creeks with a view to protecting the environment and providing public access in the form of a walking or bicycle path. At present it has obtained one other but discontinuous such strip of land from another owner, and it accepts that it will be a long time before it succeeds in achieving its overall objective.
- [3] There is no doubt that the Council has power to acquire land for the purpose disclosed here. The applicants' complaint in the Court below was, however, in essence that the Council would not be able lawfully to carry out the duties of trustee of the land, and that in any event it had no intention of doing so within the foreseeable future.
- [4] It was agreed that if dedication of the trust land were to proceed as contemplated by condition 7 of the approval, two steps would be involved. First, the applicants would transfer the land to the Crown, whereupon it would become "unallocated" State land within the meaning of the *Land Act 1994*. The Crown would then, acting pursuant to s 30(a) of the *Land Act* either "dedicate" it as a reserve for community purposes: s 31(1); or grant it to the Council in fee simple in trust for community purposes: s 14(2). The effect of such a dedication was considered by Windeyer J in *Randwick Corporation v Rutledge* (1959) 102 CLR 54, 73-78. For present purposes, the difference between it and a grant in trust is of little or no significance; but the assumption here is that the latter alternative will be adopted.
- [5] Section 35(1) (b) of the Act provides that the way in which the land granted in trust is used must not be inconsistent with a community purpose for which it is granted. If that occurs, or if the affairs of the trust are not properly managed, the deed of grant in trust may be cancelled. Section 46 is, so far as material, as follows:
- “46 Trustee's administrative functions**
- (1) A trustee's functions are to -
- (a) manage the trust land consistent with achieving the purpose of the trust; and
- (b) fulfil the trust within their conditions of appointment (if any); and
- (c) control noxious plants on the trust land; and
- (d) keep records required by the Minister or required under this and other Acts.
- (2) A trustee has the responsibility for a duty of care for the trust land.
- (3) Unless the Minister otherwise decides, a trustee's functions include protecting and maintaining, so far as is reasonable, all improvements on the trust land.”
- [6] It was submitted by the applicants that if the land were transferred to the Council in fee simple in trust for the community purposes referred to, the Council would inevitably fail to perform the functions described in s 46(1), or that it would

not discharge its duty under s 46(2) of caring for the land, or under s 46(3) of protecting or maintaining improvements on the land. Since there are at present no improvements on the land, and are not likely to be for some time to come, no question arises of any failure by the Council to satisfy the provisions of s 46(3). The function or duty of managing the trust land and caring for it are limited by the needs of the land as it is now and is likely to be in the future. At present it consists essentially of native bush and vegetation, which calls for little attention to keep it in order and prevent it from presenting a bush fire hazard or a haven for noxious weeds. The Council is not planning to provide a bush walkway or public path or cycleway until it acquires other such strips of land to form a corridor along the creek. But that, his Honour found, afforded no reason to remove from the approval the requirement in condition 7 for open space dedication “for that would prejudice the long term intent envisaged by the Planning Scheme to acquire a corridor of public open space along the creek”.

- [7] There was evidence on which his Honour could make a finding that such an intention existed and that it was not inconsistent with the community purposes for which the trust land would be dedicated and ultimately used. It was nevertheless submitted that the topography of the trust land is such that it would be impossible for Council employees to gain access to it either at all or consistently with the Council’s duties under the *Workplace Health and Safety Act 1995*. There is a ridge above the creek which slopes down in a gradient that is both steep and rocky, and it would, it was said, effectively prevent Council employees from entering the land to carry out maintenance and reduce fire hazards.
- [8] As to that, the learned judge concluded that there was no reason why workers with brush cutters and herbicides could not access the dedicated area for the purpose of weed management and fire control. That was a finding of fact reached by his Honour on evidence, given by a Mr Perkins, a town planning expert, considered in the light of an inspection of the site which his Honour carried out in the course of the hearing. On appeal, the applicants challenged the credentials of Mr Perkins as an expert in the field of workplace safety; but questions of accessibility and safety of the area are essentially matters of fact and not of law whether they are considered in the context of the relevant statutory provisions or otherwise. In the last resort, as Mr Perkins pointed out in his evidence, it would be possible for a worker to reach the area in question by using a shallow bottomed boat. If the waters are tidal, it should, if necessary, be possible to choose a suitable time at which to carry out this method of approach.
- [9] The issue for determination by the Planning and Environment Court in the appeal before it was one of fact and there was evidence on which the learned judge was entitled to make the finding that he did. It is impossible to say that there was no evidence on which such a finding could reasonably have been made. It follows that the applicants have not established any issue, question or matter of law on which an appeal against the decision can be entertained by this Court under s 4.1.56(1)(a) of the *Integrated Planning Act 1997*. Leave to appeal should therefore be refused and the application should be dismissed with costs.
- [10] **HELMAN J:** I agree with the order proposed by McPherson JA and with his reasons.
- [11] **JONES J:** For the reasons expressed by McPherson JA, I agree that the application for leave to appeal should be dismissed with costs.