SUPREME COURT OF QUEENSLAND

CITATION:	*Braudmont Pty Ltd & Ors v Gold Coast City Council* [2012] QCA 140
PARTIES:	**BRAUDMONT PTY LTD** ACN 067 531 131 (first applicant) **GEMSTONE NOMINEES PTY LTD** ACN 005 344 552 (second applicant) **BRIAN NEIL SINGER** (third applicant) **v** **GOLD COAST CITY COUNCIL** (respondent)
FILE NO/S:	Appeal No 11956 of 2011 P & E Appeal No 217 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Brisbane
DELIVERED ON:	29 May 2012
DELIVERED AT:	Brisbane
HEARING DATE:	14 May 2012
JUDGES:	Muir and Fraser JJA and Martin J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Application for leave to appeal refused with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITH ENVIRONMENT JURISDICTION – QUEENSLAND – SUPREME COURT – LEAVE TO APPEAL – where applicants seek leave to appeal under s 498(2) of *Sustainable Planning Act* 2009 against decision setting aside subpoena to Chief Executive Officer of respondent Council and ordering applicants pay costs in relation to setting aside – where applicants are owners of residential property with boundaries contiguous to path constructed by respondent Council – where applicants sought declarations, and consequential orders, against respondent Council in Planning and Environment Court for unlawful construction of path – where trial commenced and adjourned part heard – where applicants came into possession of email sent by councillor's personal assistant to constituent

regarding path – where applicants issued subpoenas against Chief Executive Officer of respondent Council, five councillors and councillor's personal assistant who sent email – where respondent Council applied to set aside subpoenas – where applicants abandoned reliance on all subpoenas other than subpoena directed to Chief Executive Officer of respondent Council – where primary judge ordered subpoena directed to Chief Executive Officer of respondent Council to be set aside for abuse of process – where applicants seek liberty to issue further subpoena to Chief Executive Officer of respondent Council seeking same documents as in subpoena that was set aside – where applicants argued documents described in subpoena relevant to issues in litigation and "on the cards" that it would materially assist applicants – where applicants argue primary judge wrongly disregarded particulars in deciding pleadings did not raise any issue concerning subjects in subpoena – where applicants argued subpoena should be varied if too wide – whether the primary judge erred in setting aside subpoena – whether leave to appeal should be granted

Sustainable Planning Act 2009 (Qld), s 498(2)
Uniform Civil Procedure Rules 1999 (Qld), r 415(1)

Alister v The Queen (1984) 154 CLR 404; [1984] HCA 85, cited
Braudmont & Ors v Gold Coast City Council & Anor (Searles DCJ, QPEC, 16 November 2011, unreported), related

COUNSEL: G Allan for the applicants
N J Kefford for the respondent

SOLICITORS: Treherne & Associates for the applicants
Minter Ellison for the respondent

[1] **MUIR JA:** The application for leave to appeal should be refused for the reasons given by Fraser JA.

[2] **FRASER JA:** The applicants seek leave to appeal under s 498(2) of the *Sustainable Planning Act* 2009 against a decision setting aside their subpoena to the Chief Executive Officer of the respondent Council and ordering the applicants to pay the Council's costs of and incidental to the application to set aside the subpoenas.

[3] Each applicant owns residential property fronting an unformed road reserve, Pacific Parade, at Currumbin. In May 2009, the Council constructed a path on Pacific Parade, contiguous with the eastern boundaries of the residential properties fronting Pacific Parade, as part of a network of paths along beaches from the Gold Coast seaway to Point Danger. The path on Pacific Parade is apparently constructed on the landward side of and partly on misaligned, discontinuous boulder walls buried under the coastal dune.

[4] In April 2010, the applicants sued the Council in the Planning and Environment Court seeking declarations that the path had been constructed unlawfully, without

an effective development permit under the *Integrated Planning Act* 1997. The applicants sought consequential orders, including an injunction requiring the Council to remove the path and restore the coastal dune to its original condition, as near as practicable. The trial commenced on 4 May 2011. On 6 May 2011, the trial was adjourned, part heard, for a further three days commencing on 14 November 2011.

[5] In about mid-October 2011, the applicants came into possession of an email dated 4 October 2011 which had been sent by a councillor's personal assistant to a constituent. The email included a statement that the section of the path in front of Hedges Avenue at Mermaid Beach had not been done "because Hedges Avenue has an inconsistent 'A' line which means that realignment of the boulder wall will be necessary before the pathway is constructed." (The "A-line" is referred to in Council's Planning Scheme Policy No 7: FORESHORE ROCK WALL-DESIGN AND CONSTRUCTION as the "leading edge" of the boulder walls (according to the applicants' submission[1]) or of walls to be constructed (according to the Council's submission[2].)

[6] The applicants then issued subpoenas against the Chief Executive Officer of the Council, five councillors, and the councillor's personal assistant who had sent the email. The Council applied to set aside the subpoenas on the grounds that they were issued for an improper purpose, did not disclose a legitimate forensic purpose, were an abuse of process, were tantamount to disclosure, were an impermissible fishing exercise, and were oppressive and not in compliance with form 43 and *UCPR* r 415(1). The primary judge heard the application on 14 November 2011. Towards the end of the day long hearing, the applicants abandoned reliance upon all of the subpoenas other than the subpoena directed to the Chief Executive Officer. On 16 November 2011, the primary judge found that the issue of the subpoenas was an abuse of process and ordered that they be set aside.

[7] The substantive order sought by the applicants in their draft notice of appeal is that the applicants be at liberty to issue a further subpoena to the Chief Executive Officer seeking the same documents set out in the subpoena which was set aside by the primary judge on 16 November 2011.

[8] Before the primary judge, the applicants challenged the standing of the Council to apply to set aside the subpoenas on the ground that the Council was not the person to whom the subpoenas were directed. The primary judge did not find it necessary to consider that challenge once the applicants conceded that, in the event that an abuse of process was found, the Planning and Environment Court had an "inherent jurisdiction" (perhaps more accurately, an implied jurisdiction) to regulate its own proceedings and to set aside the subpoena. The applicants abandoned their proposed grounds of appeal which contended that the primary judge erred by finding that the Council had standing to apply to set aside the subpoena issued to the Chief Executive Officer.

[9] The primary judge found that the subpoenas did not comply with the approved form as required by *UCPR* r 415(1) because each subpoena was headed "Subpoena for production and to give evidence" but omitted the words "and attend for the purpose of giving evidence" as required by the approved form 43. The primary judge did

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1 Amended outline of argument on behalf of the applicants 2 May 2012, para 9.

2 First respondent's amended outline of argument 8 May 2012, para 44(b), footnote 57.

not rely upon that non-compliance in deciding to set aside the subpoenas. Rather, the primary judge found that the issue of the subpoenas was "…an ill-conceived, opportunistic attempt on the part of the applicants to embark upon a fishing exercise to seek to force the CEO and Councillors to produce documents unrelating to any matter in issue before the court". [3] The primary judge found:[4]

> "On the issue of oppressiveness, Ms Amanda Dowers the legal information unit coordinator deposed to the enormity of the task involved in identifying and collating the documents the subject of the subpoena directed to the Council's CEO. She estimated that a minimum of 127 hours would be involved, which, on an eight hour day, represents around 16 days of continuous work.
>
> I'm satisfied that the issue of the subpoenas constitutes an abuse of the court's process, was issued for an improper purpose, not a legitimate purpose. It constituted an impermissible fishing exercise on the part of the applicants seeking to find something in the documents of the Council and Councillors which might somehow assist them in prosecuting their case."

[10] The central question in the proposed appeal is whether, as the applicants argued, the documents described in the subpoena are apparently relevant to the issues in the litigation, in the undemanding sense of the requirement for relevance in this context.[5] The applicants argued that it was sufficient that it was "on the cards" that the documents would materially assist the applicants.[6]

[11] The subpoena required the production of documents described in the following schedule:

> "The following documents ('documents' includes, in addition to a document in writing - any part of a document in writing; any email or any other record of information whatever) are to be produced:
>
> 1. All minutes of meetings of the Gold Coast City Council held on or after 1 December 2010, which refer to or relate to the **Foreshore Rock Walls** (also referred to as 'Boulder Walls'; 'Boulder Sea Walls'; 'Foreshore Sea Walls') including the discontinuous nature of the walls; the ineffective nature of the walls; the risks posed to persons and/or property and/or coastal dunes and/or coastal resources by the walls; the realignment of, and/or the need to realign the walls (including any part or section of the said walls) such walls as hereinbefore described being as constructed along, proximate or adjacent to the **'Foreshore seawall line (A line)'**:

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3 *Braudmont & Ors v Gold Coast City Council & Anor* (Searles DCJ, QPEC, 16 November 2011, unreported) at [22].

4 *Braudmont & Ors v Gold Coast City Council & Anor* (Searles DCJ, QPEC, 16 November 2011, unreported) at [23]-[24].

5 See *Xstrata Queensland Ltd v Santos Ltd & Ors; Santos Ltd & Ors v Xstrata Queensland Ltd* [2005] QSC 323 at [47]-[48], [55] citing *National Employers' Mutual General Association Ltd v Waind & Hill* [1978] 1 NSWLR 372 at 378-386, per Moffitt P (with whom Hutley and Glass JJA agreed).

6 In *Alister v The Queen* (1984) 154 CLR 404 at 414, Gibbs CJ observed that "[a]lthough a mere "fishing" expedition can never be allowed, it may be enough that it appears to be "on the cards" that the documents will materially assist the defence."

(a) as shown on the 'Foreshore Seawall Line Maps', such maps being referred to in Part 13.17 of the February 1994 Town Planning Scheme for the Gold Coast City Council; and

(b) as shown on the 'Overlay Map OM 12 - Foreshore Seawall Line and Building Set Back Line from Ocean Beaches', such map(s) being referred to in the August 2003 Town Planning Scheme for the Gold Coast City Council in Part 7, Division 3, Chapter 11, The Constraint Code for Ocean Front Land **AND** in Note 9 to **Drawing 59402**, which forms part of Planning Scheme Policy 7 'Foreshore Rock Wall Design and Construction';

2. All reports, memorandum, maps, records, survey plans, engineering detail or other documents prepared by any person for the purposes of informing or providing information to the Gold Coast City Council, the Mayor, or any councillor or councillors that have come into existence on or after 1 December 2010 and refer to or relate to the **Foreshore Rock Walls** (the walls) the discontinuous nature of the walls; the mal-alignment of the walls; the ineffective nature of the walls; the risks posed to persons and/or property and/or coastal dunes and/or coastal resources by the walls; the realignment of, and/or the need to realign the walls (including any part or section of the said walls) such walls as hereinbefore described being constructed along, proximate or adjacent to the '**Foreshore sea wall line (A Line)**' as referred to in paragraph 1 of the Schedule.

3. All email correspondence, letters, memorandum, reports or other documents, **received** by the Chief Executive Officer or any person on his/her behalf, on or after 1 December 2010 from any member or members of the public, the Mayor, councillor or councillors, council officer, employee or agent, or any other person relating to the **Foreshore Rock Walls** including the discontinuous nature of the walls; the mal-alignment of the walls; the ineffective nature of the walls; the risks posed to persons and/or property and/or coastal dunes and/or coastal resources by the walls; the realignment of and/or the need to realign the walls (including any part or section of the said walls) such walls as hereinbefore described being constructed along, proximate or adjacent to the '**Foreshore sea wall line (A Line)**' as referred to in paragraph 1 of the Schedule.

4. All email correspondence, letters, memorandum, reports or other documents, **sent** by the Chief Executive Officer or any person on his/her behalf on or after 1 December 2010 to any member or members of the public, the Mayor, councillor or councillors, council officer, employee or agent, or any other person relating to the discontinuous nature of the walls; the mal-alignment of the walls; the ineffective nature of the walls; the risks posed to persons and/or property and/or coastal dunes

> and/or coastal resources by the walls; the realignment of and/or the need to realign the walls (including any part or section of the said walls) such walls as hereinbefore described being constructed along, proximate or adjacent to the '**Foreshore sea wall line (A Line)**' as referred to in paragraph 1 of the Schedule."

[12] Three points about that schedule should be noted. First, each of the specified subjects to which the required documents relate concerns the boulder walls. The specified subjects are: "the discontinuous nature of the walls; the mal-alignment of the walls; the ineffective nature of the walls; the risks posed to persons and/or property and/or coastal dunes and/or coastal resources by the walls; the realignment of, and/or the need to realign the walls…". Secondly, with one possible exception, the subpoena does not limit the required documents by reference to any of those specified subjects, but requires the production of documents which merely relate to the boulder wall. For example, item 1 of the Schedule requires the production of all minutes of the Council meetings on or after 1 December 2010 which "refer to or relate to" the boulder walls. The word "including" in that item, as in item 3, precludes a construction which limits the required documents to those which relate to one of the specified subjects. Item 2 omits the word "including", but that seems to be an error. Item 4 alone may limit the required documents by reference to the specified subjects. Thirdly, to the extent that the subpoena requires the production of documents which relate to the specified subjects, the nature of that relationship is expressed in very wide terms ("refer to or relate to" and "relating to") and, as I will now explain, the specified subjects are expressed in terms which travel well beyond the issues in the litigation.

[13] Before the primary judge, the applicants submitted that the documents sought by the subpoena were apparently relevant to two issues in dispute in the Planning and Environment Court, namely:

> "(a) the identification of the landward boundary of the Coastal Management District (CMD) in the location where the path is constructed in Pacific Parade, Currumbin between Tomewin Street and the north-eastern corner of Len Wort Park, which depends upon the Court's determination of the location of the GC aline (the 'A' line) of segment 3057 (the western boundary of that segment) as generally described in Table 1 on Map 13-33 (see Exhibit 3) – 'the boundary argument.' …
>
> (b) that the construction of the path has caused and will continue to cause serious or material environmental harm in its location partly on and immediately landward of the misaligned discontinuous boulder walls, as constructed."

[14] The applicants' arguments in this Court focussed upon (b). It is therefore sufficient to observe that the description of documents in the subpoena does not bear any apparent relationship to the identification of the boundary in terms of (a).

[15] In relation to (b), the applicants' submission as to "apparent relevance" was informed by the email of 4 October 2011. The applicants submitted that the documents sought by the subpoena "…may have disclosed a position or a policy adopted by the Council in another part of the coast that a pathway should not be

constructed until the realignment [and discontinuous nature of any relevant boulder wall] was corrected because of increased risks of erosion; increased risks of damage to buildings during storm surge events and increased risks to public safety during storm surge events."[7] It was submitted that such a policy would be relevant to the primary judge's discretion to order that the Council remove the path or that it be closed to members of the public; the documents might reveal an inconsistency between, on the one hand, the conduct of the Council in the present case of denying environmental harm or that the applicants were entitled to relief because of discretionary factors, and, on the other hand, the Council's position, as evidenced by the email, not to construct a path at Hedges Avenue, until the misaligned boulder walls were realigned.

[16] As the primary judge considered, there is substance in the Council's challenge to the proposition that any Council policy in relation to the construction of the path at Mermaid Beach would bear upon the exercise of the court's discretion (if it were found that the path was constructed unlawfully) to order removal of, or the preclusion of public access to, a path constructed years earlier at Currumbin. In any event, the argument is incapable of justifying a subpoena which requires the production of documents referring or relating to the boulder wall and the specified subjects in any way. The subpoena does not limit the required documents by reference to any Council policy and it is obvious that most of the described documents could not conceivably bear upon the question whether there was any such policy.

[17] The applicants submitted that the documents sought by the subpoena were apparently relevant to the following allegations in their fourth further amended originating application:

> "14 The construction of part of the public accessway (the path) in May 2009 at the location south of Tomewin Street, Currumbin to the northern corner of Len Wort Park (more particularly described as Lot 318 on Plan Wd 5519, Parish of Tallebudgera, County of Ward) has caused and will continue to cause serious environmental harm in breach of s 437(2) of the *Environmental Protection Act 1994*.
>
> **Particulars**
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> (a) The path is constructed on the rear section of a frontal coastal dune, ~~in~~ an erosion prone area with significant ecological values, namely an area of high conservation value and/or special significance.
>
> (b) The path as constructed involved the removal of vegetation that maintained the stability and integrity of that part of the frontal dune.
>
> (c) The path as constructed involved interfering and removing a section of the frontal dune surface (sand and/or soil) for a distance of approximately 143 metres, varying in width from approximately 3.95 metres in the northern section, to 3.6 metres in the southern section and comprising approximately twenty percent of the area of the frontal dune.

[7] Amended outline of argument of behalf of applicants 2 May 2012, para 32.

(d) The removal of the barriers which prevented public access to that part of the frontal coastal dune where the path was constructed and the construction of the path, has allowed unrestricted public access to the coastal dune which has interfered with and damaged and will continue to damage the stability and integrity of the dune, exposing the dune to increased risks of erosion and week infestation.

(e) By reason of the matters alleged in subparagraphs (a) to (d) herein, the residential buildings with frontage to the path face increasing risk of structural instability due to storm surge.

15 Further or in the alternative, the construction of part of the public accessway (the path) in May 2009 at the location south of Tomewin Street, Currumbin, to the northern corner of Len Work [sic] Park, has caused and will continue to cause material environmental harm in breach of s 438(2) of the *Environmental Protection Act 1994*."

(The particulars of paragraph 15 repeated those in paragraph 14.)

[18] The allegations in paragraphs 14 and 15 must be understood in the context of the particulars of those allegations. Those particulars made it plain that the case mounted by the applicants did not involve any allegation that the boulder walls had any role in the alleged effect of the construction of the path in causing environmental harm. This was made clearer still by the presence in the fourth amended originating application of text which was struck through to indicate that the applicants abandoned allegations in the preceding pleading. Those abandoned allegations had made a case that the boulder wall was implicated in the alleged environmental harm:

> "~~When the Council constructed the boulder seawall as hereinbefore alleged it knew or ought to have known the leading edge of the boulder seawall was constructed on the wrong alignment, namely, not on the alignment approved by the Chief Executive administering the **CPMA** as depicted on Drawing No. 40223A, and was not continuous and thereby had the potential to cause serious environmental harm~~…
>
> ~~In addition to there being no boulder wall constructed by the Council under the beach access ways, no boulder wall has been constructed and/or required by Council to be constructed:~~
> ~~(a) in front of Lot 3 RP 1983 (the Adler property);~~
> ~~(b) in front of CP on BUP 400 (Seaspray property);~~
> ~~(c) in front of CP on BUP 547 (the Singer property).~~
> …
>
> ~~Accordingly, as at about **October 2002**, the boulder walls that have been constructed in the unformed road reserve Pacific Parade south of Tomewin Street:~~
> ~~(a) do not form part of a continuous boulder wall;~~
> (b) ~~are not constructed on the alignment of the ***GC aline*** as shown in Plan No. **40233A**.~~ …
>
> …

> ~~In the premises, the Council's action to construct a boulder seawall has the potential to cause serious and/or material harm in the form of increased erosion to the frontal coastal dune and structural damage to the oceanfront residential properties front the unmade section of Pacific Parade during significant, or in the alternative, ARI 100 year events~~."

[19] As the primary judge observed, the only reference in the fourth amended originating application to the alignment of the boulder wall was in paragraph 5 R(c)(viii), which alleged that Drawing No 40223A "…as it depicts the 'GC aline'" "shows a different alignment for the 'leading edge' for the boulder sea wall" to that shown on certain other maps. The documents sought by the subpoena were not referable to that allegation. The primary judge therefore concluded both that there was no issue that the misalignment of the boulder wall under the path caused or contributed to the alleged environmental harm and that no issue had been raised about any of the other subjects described in the subpoena.

[20] The applicants' challenge to that analysis relied upon their solicitor's letter of 11 October 2011, in which they purported to give further and better particulars of paragraphs 14 and 15 of the fourth further amended originating application. No request for any such particulars had been made. The applicants purported to give the following particulars, substituting a new paragraph (e) and adding paragraph (f):

> "(e) The path is constructed on parts of and immediately landward of the boulder seawalls which are malaligned and discontinuous as shown on the Goodwin Midson Sketch Plan 13802-9 dated 28 April 2011 and in front of the Sanctuary Beach Development (CP BUP 525) along the alignment approved by the Beach Protection Authority as shown on Plan No. 40223A;
>
> (f) By reason of the matters alleged herein:
>
> (i) the frontal dune faces increased risk of erosion;
>
> (ii) residential buildings with frontage to the path face increased risk of damage during significant storm surge events;
>
> (iii) members of the public (including the owners and occupiers of the residential buildings with frontage to the path) are exposed to increased risk of injury or death during significant storm surge events."

[21] The applicants argued that the primary judge wrongly disregarded those particulars when deciding that the pleadings did not raise any issue concerning the subjects mentioned in the subpoena. They argued that the documents sought in the subpoena might be relevant to evidence already before the Court concerning the discontinuous nature of the boulder walls and the effect of that discontinuity in relation to the potential for erosion of the coastal dune of the construction of the path. It was submitted that the new particulars merely reflected that evidence, which had been adduced without objection. The Council pointed out, however, that this evidence was adduced at a time when the issues were defined by reference to the preceding pleading. As I have indicated, the relevant allegations were abandoned in the pleading which was current when the subpoena was issued.

[22] I have difficulty in accepting that, under the guise of supplying particulars which had not been requested, the applicants were entitled unilaterally to expand their case to reintroduce a case which they had earlier abandoned. In any case, the subpoena does not limit the documents sought by reference to the allegations in paragraphs 14 and 15 as so particularised. There was no justification for requiring the production of documents which referred or related in any way to the boulder walls, or their discontinuous nature, for example. That would inevitably catch documents which had no conceivable bearing upon the allegations in paragraphs 14 and 15 that the construction of the path caused or would cause environmental harm.

[23] The applicants argued that the primary judge had not made a finding that the subpoena was oppressive. They argued that the primary judge's statement about the issue of oppressiveness (quoted in [9] of these reasons) amounted merely to a recitation of the evidence. Since there was no challenge to that evidence the absence of an explicit finding is immaterial and, in the context of this interlocutory application, unsurprising. The primary judge's conclusion that the issue of the subpoenas constituted an abuse of the Court's process was plainly informed by the oppressive nature of the subpoena as revealed by unchallenged evidence that, in the context of the imminent resumption of a part heard trial, compliance with the subpoena would require 16 eight hour days of continuous work. Consistently with the primary judge's findings, that work would include searches for broad categories of manifestly irrelevant documents. There was no error in the primary judge's conclusion that the issue of the subpoena in the terms in which it was issued was an abuse of process.

[24] The applicants' counsel submitted that, if the subpoena was too wide, it should be saved by appropriate variation. The Court was referred to the submission made to the primary judge on 14 November 2011[8] that, "[w]ith that focus bearing steadily in mind your broad powers to vary those as you see fit." That submission was made shortly after the applicants' counsel informed the primary judge, towards the end of the hearing, that "we're not pressing that your Honour rule in relation to the subpoenas issued to the Councillors" and that the applicants confined their case to the subpoena to the Chief Executive Officer "[a]s varied as your Honour sees fit, if you're minded to do so." The applicants did not then apply to amend the subpoena. They did not describe, even in general terms, any narrower class of documents which might legitimately be sought.

[25] Nor did the applicants address those topics in their submissions in this Court. Rather, they sought to justify the subpoena in the terms in which they had issued it and their draft notice of appeal sought an order that the subpoena be re-issued in the same terms. Leave to appeal should be refused because there is no prospect that the Court would make such an order. It is also not appropriate to grant leave to appeal to permit the applicants to seek to re-draft their subpoena on appeal for the first time.

[26] The applicants argued before the primary judge that they should not have been ordered to pay the costs of the application to set the subpoena aside because they had reasonable grounds for issuing the subpoena. The primary judge was right to rebuff that attempt to re-litigate his Honour's decision that the issue of the subpoena was an abuse of process.

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8 Transcript 4-78.

Proposed Order

[27] I would refuse the application for leave to appeal, with costs.

[28] **MARTIN J:** I agree with the orders proposed by Fraser JA and with his Honour's reasons for them.