

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Maroochy Shire Council v Barns* [2002] QPEC 025

PARTIES: **MAROOCHY SHIRE COUNCIL** (Applicant)
JAMES BARNES (Respondent)

FILE NO/S: Application No. 32 of 2000

DIVISION: Planning and Environment Court

DELIVERED ON: 10 May 2002

DELIVERED AT: Maroochydore

HEARING DATE: 30 April 2002

JUDGE: K S Dodds DCJ

ORDER: **Restraining order preserving cutting of timber or clearing of vegetation except in compliance with the *Environmental Protection Act 1994* and the *Integrated Planning Act 1997*;**
Order for remediation of land;
Order preventing logging on part of land for specified time.

CATCHWORDS: ENVIRONMENT PROTECTION – OFFENCES –
Application to remedy/restrain development offence - where reasons were handed down on 2 May 2001 indicating an appropriate restraining order/and or remediation order would be made – where the matter was adjourned for further submissions after parties suggested an order may be settled.
Environmental Protection Act 1994, ss 319, 436, 505;
Forestry Act 1959;
Integrated Planning Act 1997, s 4.3.25;
Land Act 1994, s 169

COUNSEL: Mr E J Morzone for the applicant
Mr P G Boyce for the respondent

SOLICITORS: Heiner & Doyle Solicitors for the applicant
Butler McDermott & Egan for the respondent

[1] On 2 May 2001 I handed down reasons in the above matter. I indicated that an appropriate restraining order and/or remediation order would be made. Since it had been suggested that the parties may be able to settle an order, I adjourned the matter.

The matter has been mentioned on a number of occasions since then. I have now received further submissions.

- [2] The original application by the applicant Maroochy Shire Council was for a restraining order restraining the respondents which then included a man by the name of Griggs (no longer a party to the proceeding) from clearing land and vegetation from land at corner Lakewood Drive and Monak Road, Weyba Downs described as lot 31 RP 858565 and for further or other orders.
- [3] An interim restraining order was made on that application. Eventually there was a lengthy hearing occupying a number of days which resulted in my reasons of 2 May 2001. By that time the application had been refined to:

seeking an order pursuant to s 194 of the *Environmental Protection Act 1994* (EPA) to restrain an offence or a threatened or anticipated offence against EPA;

seeking an order under Chapter 4 Part 3 Division 5 of the *Integrated Planning Act 1997* (IPA) to remedy or restrain the commission of a development offence as that phrase defined in Schedule 10 of the Act.

- [4] Since the proceedings were commenced EPA has been the subject of significant amendment. The Court's powers previously the subject of s 194 are now enacted in s 505. Section 505 empowers the court to make orders to remedy or restrain an offence or a threatened or an anticipated offence against EPA.
- [5] Section 4.3.25 IPA empowers the court to make an order to remedy or restrain the commission of a development offence if satisfied such an offence has been committed or will be committed unless restrained.
- [6] The land in question is privately owned land. Presently, the respondent is lawfully entitled to use that land for forestry as that term was used in the applicant's 1976 and 1985 planning schemes, that is, to grow and harvest trees as a commercial venture so long as his activities in that regard do not amount to a material change of use of the land. He does not require a development permit under IPA for this. And of course he must not commit an offence under EPA. Under s 436 of EPA to so use the land is not an offence of unlawfully causing environmental harm under that Act if the environmental harm that is done occurred while an activity that is lawful apart from EPA was being carried out and there was compliance with the general environmental duty.
- [7] The general environmental duty requires a person carrying out an activity that causes or is likely to cause environmental harm to take all reasonable and practicable measures to prevent or minimise the harm: s 319 EPA. Relevant compliance with an approved code of practice or a code of environmental compliance is sufficient: s 436(3) EPA.
- [8] Presently, there is no approved code of practice or code of environmental compliance as referred to in s 436(3) of EPA. There is in existence a code of practice for native forest timber production published by the Department of Natural Resources dated 31 March 1998 and a draft code of practice for native forest timber production prepared by Queensland Parks and Wildlife Service dated 11 February 02. Neither are

approved codes for the purposes of EPA. They apply to the harvesting of timber from native forests on state reserves, timber reserves, forest entitlement areas and other state lands where operations are conducted under the *Forestry Act* 1959 or in effect of s 169 of the *Land Act* 1994. It can be seen that both relate to managing timber extraction on crown land.

- [9] At the most recent hearing the parties provided the Court with further material relating to the final orders the Court should make. There was common ground and areas of difference. The proposed orders are respectively for the applicant; exhibit A to the affidavit of Lesley Steven Hawkes filed 22 April 2002 and for the respondent; the order filed on 3 April 2002.
- [10] Both proposed orders dealt in identical terms with the remediation of a 6.5 hectare area of land the subject of heavy logging before the interim restraining order took effect and with the future logging of the balance area of the respondent's land suitable for harvesting of native timbers. The continuing dispute between the parties relates to the terms of the order regulating the future use of the land for harvesting of native timber.
- [11] The order proposed by the applicant for the future management of the land for purposes of harvesting native timber restricts any further logging or clearing of vegetation from the land to one of two regimes; either the logging or clearing complies with the conditions set out in the order, or the logging or clearing is conducted in accordance with the conditions of the development permit under IPA issued by the applicant. The order proposed by the respondent added a third regime, that is, that the logging or clearing be conducted in accordance with the Department of Natural Resources's code of practice for native forest timber production. That is a reference to the code or codes referred to above. Apart from that difference the orders were for practical purposes in similar terms.
- [12] I indicated in argument that I was not in favour of the third regime proposed by the respondent. I think that to include it would introduce a lack of clarity into an order potentially leading to further lengthy disputation. The respondent indicated that if that was the case he would prefer that a restraining order in general terms be imposed rather than that advanced by the applicant.
- [13] In my reasons given earlier, I indicated that I accepted the evidence of Mr Hawkes. A great deal of evidence was led from Mr Hawkes in response to questions to him about management of native forests for timber production. Much of this evidence had only marginal relevance to the issues I was considering. It had more to do with using the hearing as a vehicle for advancing the interests of the owners of private land who may wish to use that land for forestry purposes. Nonetheless, the evidence of Mr Hawkes made it clear that the ideal management of a native forest as a source of timber required the use of various silvicultural techniques on an ongoing basis.
- [14] As I indicated to the parties I would have been prepared to make prescriptive orders in terms agreed between the parties. The effect of such orders would be to bind both parties to a regime of use of the land for native forest timber production. In the absence of agreement between the parties I am not prepared to make orders in the terms of either of the orders provided to the Court by the parties. Rather, the orders I will make will be as follows. I am conscious that the orders in themselves, except to a limited extent, do not prescribe future conduct. They do prevent the sort of cutting of

timber that occurred on the 6.5 hectare area of land and address remediation of that land.

**IN THE PLANNING & ENVIRONMENT COURT
OF QUEENSLAND**

MAROOCHYDORE

Application No. 32 of 2000

BETWEEN: **MAROOCHY SHIRE COUNCIL** Applicant

AND: **JAMES BARNES** Respondent

Date of Order: 10 May 2002

Cor: K S Dodds DCJ

ORDER

I order the respondent, by himself, his employees and agents and every one of them, be restrained:

from causing or permitting any cutting of timber or clearing of vegetation on the land situated at Monak Road, Weyba Downs described as lot 31 RP 858565 other than in compliance with the provisions of the *Environmental Protection Act 1994* or the *Integrated Planning Act 1997*;

from causing or permitting cutting of any timber or clearing of vegetation in accordance with this order or any associated operations except on those parts marked for logging by being coloured in on the map annexed to this order save for the transport of logs on existing tracks as indicated in the affidavit with annexed exhibit of James Thomas Barnes sworn and filed by leave on 30 April, 2002;

I further order the respondent on or before the 30th day of April, 2003 undertake remediation of that area of the said land comprising about 6.5 hectares which was the subject of the logging operation in September – October, 2000 restrained by the interim order of this Court made the eleventh day of October, 2000 by the following means:

- (a) All fallen logs in the area to be removed using a grapple skidder. A workman on foot is to crosscut logs during the skidding operation to minimise damage to the residual stand;
- (b) Any burning of the land in association with the remediation operations to be carried out in a way which ensures fire damage does not damage retention zones, other vegetation types on the land, or the retained habitat trees;
- (c) The area to be replanted with tubestock seedlings of eucalyptus pilularis, eucalyptus microcorys, eucalyptus resinifera and eucalyptus acmenoides at a density of 275 trees per hectare.

I further order there be no further logging of the 6.5 hectare area prior to the year 2026.