PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Surfers Beachfront Protection Association Inc. (IA 39544) v Council of the City of Gold Coast & Anor (No 2)* [2022] QPEC 3
PARTIES:	**SURFERS BEACHFRONT PROTECTION ASSOCIATION INC. (IA 39544)** (applicant) **v** **COUNCIL OF THE CITY OF GOLD COAST** (first respondent) **and** **CHIEF EXECUTIVE, DEPARTMENT OF STATE DEVELOPMENT, MANUFACTURING INFRASTRUCTURE AND PLANNING** (second respondent)
FILE NO/S:	D104/2021
DIVISION:	Planning and Environment
PROCEEDING:	Originating Application
ORIGINATING COURT:	Planning and Environment Court, Southport
DELIVERED ON:	28 January 2022
DELIVERED AT:	Brisbane
HEARING DATE:	23 and 24 November 2021 with supplementary submissions received on 17 December 2021
JUDGE:	Rackemann DCJ
ORDER:	The applicant has failed to demonstrate that the decision of the second respondent was legally unreasonable. I will hear from the parties in relation to minutes of order.
CATCHWORDS:	PLANNING AND ENVIRONMENT – APPLICATON FOR DECLARATIONS AND ORDERS – Whether approval of an application for operational works to construct an "oceanway" pedestrian and cycleway with associated facilities within a Coastal Management District was unlawful and should be set aside – Where application code assessable – Where application approved on basis of compliance with performance outcomes – Whether decision unreasonable
CASES:	*Asia Pacific LNG Pty Ltd & Ors v Treasurer, Minister for*

	Aboriginal and Torres Strait Islander Partnerships and Minister for Sport [2019] QSC 124 at [155] – [162]
	Bon Accord Pty Ltd v Brisbane City Council [2008] QPEC 119
	Carter v Mid-Murry Council & Anor (2006) 152 LGERA 1
	Friends of Buddina Limited v Sunshine Coast Regional Council & Anor [2021] QPEC 57 at [93]
	Goldicott House Pty Ltd v Brisbane City Council [2020] QPELR 1153 at [175]
	Jedfire v Logan City Council [1995] QPLR 41
LEGISLATION:	*Planning Act 2016* (Qld) s 48
	Planning Regulation 2017 (Qld) s 21 and Schedule 8
COUNSEL:	R Anderson QC and B Rix for the applicant
	J Horton QC and N Loos for the first respondent
	D O'Brien QC and W Macintosh for the second respondent
SOLICITORS:	Hickey Lawyers for the applicant
	Minter Ellison Gold Coast for the first respondent
	McInnes Wilson Lawyers for the second respondent

Introduction

(i) The relief sought

[1] The applicant seeks declarations and orders to the effect that operational works to effect the development known as "Surfers South Oceanway" proposed by the first respondent (the Council):

(i) have not been lawfully approved by the second respondent (the Chief Executive), and

(ii) would contravene ss 437 and 438 of the *Environmental Protection Act 1994* (EPA);

such that

(iii) the Chief Executive's purported approval ought be set aside;

(iv) the Council restrained from carrying out the development, and

(v) such further or other orders made as the court deems fit to ensure no potential for works to cause material or serious environmental harm.

[2] The court is, at this stage, asked only to determine the so-called "judicial review" component of the proceeding,[1] being issues in relation to the approval purportedly granted by the Chief Executive, since that will have a bearing on the lawfulness of the project from the perspective of the EPA issues.

(ii) The development application and decision

[3] On 24 November 2020, the Council made a development application for a development permit for operational work that would involve interfering with quarrying material on State coastal land above the high-water mark and interfering with coastal dunes within an erosion prone area.[2] The works are to construct a four metre wide shared public-use path (and associated works) over a 1.6 kilometre length of the beachfront[3] seaward of properties located along Northcliffe Terrace, Garfield Terrace and Old Burleigh Road.[4] The pathway, called the "Surfers South

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1 See order of Jones DCJ 25 January 2021 Book of Documents (BOD), p 77.
2 (BOD p 1264.
3 BOD, p 1262.
4 BOD, p 1289.

Oceanway," is intended to link to similar existing sections of oceanway to both the north[5] and south[6] and form part of the broader Gold Coast Oceanway network.[7]

[4] The path itself is proposed to be constructed of new fibre-reinforced concrete atop a heavily bound base material.[8] Associated infrastructure is to include lighting and construction/relocation of park facilities such as showers, seating, bins, viewing platforms etc.[9]

[5] The Chief Executive was the assessment manager for the development application,[10] since the works would be within a Coastal Management District.[11] The development application was confirmed as properly made on 24 November 2020. Notice of approval of the application, subject to conditions, was given by a decision notice dated 27 January 2021[12] under the hand of the Chief Executive's delegate, Mr Gareth Richardson, Manager, Planning and Development Services (SEQ South).

(iii) The assessment benchmarks

[6] The development application was code assessable. The State Development Assessment Provisions (SDAP) provide assessment benchmarks for the assessment of development applications where relevantly, the Chief Executive is the assessment manager. The SDAP feature a number of codes. The code of relevance for present purposes is State Code 8: Coastal Development and Tidal Works (State Code 8).

[7] State Code 8 is in a familiar format. It features a purpose statement followed by a table of performance outcomes and acceptable outcomes. The relationship between those elements is explained in the SDAP. In summary:[13]

(i) performance outcomes serve as the primary test for development being assessed against the code;

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5 BOD, p 1230.
6 BOD, p 1328.
7 BOD, p,1290.
8 BOD, p,1301
9 BOD, pp 1301, 2157.
10 Section 48 of the *Planning Act 2016* (PA), s 21 and Schedule 8, Table 4, Item 3 (l)(ii) of *Planning Regulation 2017* (PR).
11 BOD, pp 1269, 1296, 1735, 1736.
12 BOD, p 2157.
13 Section 2.3.

(ii) acceptable outcomes identify ways in which performance outcomes can be met, but it is open to an applicant to demonstrate compliance with the performance outcome in another way;

(iii) the purpose statement is the highest order test.

(iv) if a development application complies with all of the relevant performance outcomes of a code, it complies with the purpose statement of the code, and therefore the code itself.

(v) if development does not comply with one or more particular performance outcomes then a determination will be made, on balance, whether the purpose statement is complied with or not.

The nature of the challenge

(i) The delegate's reasons

[8] The reason for approval, as stated in the decision notice, was that, as conditioned, the development complies with the performance outcomes in State Code 8.[14] Having so found, it was unnecessary for the delegate to go further to consider the purpose statement, since as has been observed, compliance with the performance outcomes means that the purpose statement and State Code 8 itself were complied with.[15]

[9] Other than concluding that the performance outcomes were complied with, the delegate specifically found that the development:

- has been located and designed to avoid impacts on coastal processes;
- will not significantly increase the risk or impacts to people and property from coastal erosion or increase the severity of coastal erosion in proximity to the site;
- enhances appropriate public use of, and access to and along, State coastal land;
- avoids impacts on matters of State environmental significance, and

14 BOD, p 2164.
15 Section 2 – 3 – BOD, p 98.

- has been located as far landward as possible and represents a development type that may occur in a mapped erosion prone area (i.e. infrastructure able to be abandoned and cannot feasibly be located elsewhere).

[10] The delegate's reasons, in the decision notice, did not descend into detailed reasons for finding compliance with each of the relevant performance outcomes, although he had the benefit of material which contained an analysis of compliance. The applicant did not request a statement of reasons.

(ii) the case pleaded by the applicant

[11] The applicant's case, as pleaded, particularised and ultimately argued, did not attempt to find fault with the delegate's construction of the Code or process of reasoning. Rather, the case was argued on the basis that the decision was so unreasonable that no decision-maker could have reasonably made it and that it amounted to an improper exercise of the decision-maker's power.[16] In that regard:

(i) the originating application and particulars make reference to the purpose statement, but the decision was made on the basis of compliance with the performance outcomes, by which, as has been observed, the purpose statement and State Code 8 are taken to be complied with;

(ii) reference was also made to the acceptable solutions, but none are specified for the performance outcomes save for AO23.1, which, it is common ground, is not applicable as that acceptable solution relates to tidal work, and

(iii) reference is made to the failure to have regard to non-compliance with performance outcomes. The delegate did not get to that point, as compliance was found.

[12] The argument therefore focussed on whether the decision to approve, on the basis of compliance with the relevant performance outcomes, was unreasonable in a legal sense. No complaint could be made of an approval being granted in the event of compliance with the performance outcomes. The attack was on the finding of compliance. The appellant ultimately limited its case, in this regard, to POs 1 – 5 and 23. Performance outcomes 1 – 5 all apply to development in the erosion prone

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16 Paragraph [16] of the originating application.

area. Performance Outcome 23 applies to operational work which is not assessed by local government.

(iii) The principles relating to the ground of unreasonableness

[13] In the course of my earlier ruling on the admissibility of evidence, I respectfully adopted the statements of principle in relation to the unreasonableness ground of judicial review by Bond J[17] in *Asia Pacific LNG Pty Ltd & Ors v Treasurer, Minister for Aboriginal and Torres Strait Islander Partnerships and Minister for Sport* [2019] QSC 124 at [155] – [162] and I respectfully do so again. Further, as I observed in the following passages from *Bon Accord Pty Ltd v Brisbane City Council*[18] a challenge to an approval on this basis is quite different from merits review:

> "[112] The Applicant relies on what is commonly referred to as "Wednesbury reasonableness". The test has been described as "stringent" and "extremely confined". It is not sufficient to establish that, as a matter of merit, a different decision ought to have been preferred. What must be established is that no decision maker, acting reasonably, could have made that decision. In applying that standard, a court must proceed with caution, lest it exceed its supervisory role, by reviewing the decision on the merits. Whilst this Court is often charged with the responsibility of reviewing a planning authority's decision on the merits in the context of an appeal, that is not its role in proceedings of this kind. In Associated Provincial Picture Houses Ltd v Wednesbury Corporation (supra) itself, it was said that "to prove a case of that kind would require something overwhelming".
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> [113] In *Lillywhite v Chief Executive Liquor Licensing Division, Department of Tourism, Fair Trading & Wine Industry*, the Court of Appeal referred, with approval, to the principles expressed by Gibbs J in *Buck v Bavone* in which, after discussing other grounds for review, it was said:
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> > "Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a

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17 As he then was.

18 [2008] QPEC 119.

> very wide discretion which cannot be effectively reviewed by the courts."

Accordingly, a challenge on the basis of unreasonableness may fail even where the court would or might have made a different decision had it been considering the matter afresh on a merits review. There was no controversy about those principles.

The material before the decision-maker

[14] The decision notice states that the material used in the assessment of the application included the development application material and submitted plans. That included a positive assessment, undertaken by the Council's consultants (SMEC), of compliance with State Code 8.[19]

[15] The application was referred to the Department of Environment and Science (TA) for technical agency advice (TA advice). The response provided a further positive assessment of compliance with State Code 8.

[16] An internal assessment report, having regard to both the SMEC assessment and the TA advice, was prepared within the State Assessed Referral Agency (SARA), which included a recommendation to approve the application subject to conditions.

[17] The affidavit material reveals that the Chief Executive's delegate, Mr Richardson was sent a copy of the SARA assessment report which also contained, as an attachment,[20] a document setting out the SMEC and TA assessments of the application against the performance outcomes in State Code 8. It is common ground that Mr Richardson is not fixed with the reasoning in those assessments.[21] Mr Richardson holds a Bachelor of Built Environment and a Graduate Diploma of Urban and Regional Planning and has had experience in town planning positions in the private and public sectors.[22]

Performance outcome 1

[18] Performance outcome 1 provides as follows:

> "**PO1** Development does not occur in the **erosion prone area** unless the development:
> 1. is one of the following types of development:

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19 BOD, p 1304 – 1316.
20 Affidavit of Coles, BOD 1257, Exhibit MAC2 commencing at p 2226.
21 T2-3, 4.
22 Exhibit 1.

a. **coastal-dependent development**; or
b. **temporary, readily relocatable or able to be abandoned**; or
c. **essential community infrastructure**; or
d. **redevelopment** of an existing permanent building or structure that cannot be relocated or abandoned; and

2. cannot feasibly be located elsewhere."

It is common ground that the development is proposed to occur in an erosion prone area and that sub-paragraphs 1(a), (c) and (d) do not apply. Compliance therefore depends upon the development meeting both 1(b) and 2. The applicant contended, in effect, that a finding of compliance with those provisions was beyond the bounds of reasonableness.

[19] The applicant's challenge in relation to the feasibility of locating the development elsewhere was misconceived. The applicant took no issue with the start or finish points of the path (which link to other similar paths)[23], but advocated for an alignment otherwise to the west of the existing built form, utilising existing roads and footpaths, or at least somewhat further west of the chosen alignment. The primary difficulty in this regard however, is that:

(i) the performance outcome provides that development not occur in the erosion prone area unless amongst other things, it cannot feasibly be located elsewhere;

(ii) as senior counsel for the applicant ultimately acknowledged in the course of oral submissions[24] "elsewhere" means elsewhere than in the erosion prone area;

(iii) the locations to which the applicant pointed are also in the erosion prone area, and

(iv) it is difficult to see why it would be unreasonable to conclude that, an oceanway connecting to other sections of oceanway, could not feasibly be located elsewhere than in the erosion prone area when the entirety of the beach, the houses fronting the beach and the road they front are all within that erosion prone area.[25]

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23 T1-39.
24 T1-38.
25 BOD, P 1735.

[20] Further, the SMEC assessment, endorsed by the TA advice, set out a reasonable basis for concluding that the proposed path alignment of what is intended to be an oceanway, is as far landward as is feasible, within the erosion prone area, having regard to the constraint of leaving what was thought to be an appropriate clearance to existing private properties.[26]

[21] The remaining question (and the one senior counsel for the applicant submitted was the most significant for PO1[27]) in the first sub-paragraph and relevantly, whether it was within the bounds of reasonableness to find that the development is able to be abandoned. The bold lettering used in sub-paragraph 1(b) indicates that the expression is defined in State Code 8. That definition is as follows:

> "**Temporary, readily relocatable or able to be abandoned** means a structure that, if threatened by **coastal erosion**, will be relocated, removed or allowed to be lost rather than protected from the impacts because it is:
> 1. of low economic value; and
> 2. is capable of being disassembled, is easily removed, or loss by erosion is of low consequence; and
> 3. is not an intrinsic part of infrastructure or will have high social value or need; or
> 4. intended to remain in place for only a short period and then removed, whether or not it is threatened by **coastal erosion**."

Coastal erosion is defined as the loss of land or the removal of beach or dune sediments by wave action, wind action, tidal currents or water flows or by permanent inundation due to sea level rise.

[22] This point was argued by reference to the path. The definition refers to a "structure". It was not submitted, for the first or second respondents, that the definition was inapplicable because the path is not a structure. It is to be the product of a construction process, using the materials referred to earlier and falls within the broad ordinary meaning of the term "structure".[28] There is no reason to construe the term more narrowly, noting that rather than creating a trigger for requiring an approval, the term is instead used in the definition of a type of

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26 BOD, p 1424, s 3.1.1
27 T1-40.
28 Macquarie Dictionary 7th Edition.

development, referred to in a performance outcome against which the subject development by way of operational works is to be assessed.[29]

[23] To meet the definition of being able to be abandoned, the development must be for a structure that, if threatened by coastal erosion, will be allowed to be lost rather than protected from impacts because, relevantly for present purposes, it has all of the qualities in sub-paragraphs 1, 2 (that part referring to loss by erosion being of low consequence) and 3 of the definition.[30] It is not enough that there be an intention to allow it to be lost, rather than protected. It should be noted that each of those sub-paragraphs include matters requiring evaluative judgements to be made. In such circumstances it is not easy to demonstrate unreasonableness in a legal sense.

[24] It has already been noted that the delegate found that the development was able to be abandoned. Condition 4 of the approval contemplated that the structure may be lost, by providing that, in the event of collapse, failure, or other structural consequences which impact on their integrity or ability to function as intended, the works must, as soon as practicable, be reinstated or removed and disposed of.

[25] The material in support of the development application described the oceanway as "sacrificial in nature"[31]. This, it was said, is reflected in its design and proposed operational procedures. It was asserted that its loss by erosion would be of low consequence and it could simply be allowed to be lost when threatened by coastal erosion.

[26] The design philosophy was explained in a report that accompanied the development application.[32] In essence the risk of failure of the structure can be addressed by using deep piled foundations (approach 1) at significant expense, which might not be justifiable relative to the facility provided. The alternative (approach 2) is to design a structure that is sacrificial, but has an acceptable level of consequence in the event of failure. In this case the approximate order of magnitude of cost of approach 1 is some 5 times greater than that of approach 2. The report described the consequence of damage to a facility provided in accordance with approach 2

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29 Cf *Carter v Mid-Murry Council & Anor* (2006) 152 LGERA 1.

30 Sub-paragraph 4 relates to "temporary" structures and the early parts of sub-paragraph 2 relate to "readily relocatable" structures.

31 BOD 1292.

32 BOD 1628 at 1662 – 1666.

relative to the capital cost of approach 1 as insignificant or minor. The proposal has been designed using the relatively economical type 2 approach.

[27] It was submitted, for the applicant, that the fact that parts of the path are intended to be sacrificed only to be potentially replaced does not speak of abandonment but rather of permanent development. PO1(b) is relevantly about development that is "able" to be abandoned. What the definition focuses on is a "structure" that will be allowed to be lost rather than protected from impact. That the structure once lost (rather than protected) might then be replaced with a like structure to perform the same function does not prevent satisfaction of the definition or compliance with the performance outcome.

[28] Reference was made to parts of the application documents and supporting report which:

(i) reveal the monetary value of the operational works to be $6.1m;[33]

(ii) describe the subject proposed section of oceanway as forming "a vital link between existing sections of the ocean way at the tie-ins and is expected to convey large pedestrian and cyclist volumes,[34] and

(iii) fail to expressly address the sub-paragraphs of the definition

to submit as follows:

> "That the Council (and SARA by virtue of its approval) may be willing to permit a high value piece of infrastructure forming an intrinsic part of the broader Oceanway network that the Council is seeking to implement simply wash away does not mean that the test as espoused in PO1(1)(b) is met. It clearly is not."

[29] As has already been acknowledged, the intention to permit the oceanway to be lost, rather than defended, is insufficient unless, relevantly for present purposes, sub-paragraphs 1, 2[35] and 3 of the definition are met. Whether the economic value of the structure and the consequences of its loss are both low are questions which call for judgments to be made about concepts that are relative. There was information in

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33 BOD 1276.
34 BOD 1290.
35 The relevant part thereof.

relation to both of those matters. The applicant has not established that it was beyond the bounds of reasonableness to find that sub-paragraphs 1 and 2 of the definition were met.

[30] Sub-paragraph 3 of the definition could be more clearly worded, but will not be satisfied if the structure falls within any of the following:

(a) will be an intrinsic part of infrastructure;

(b) will have high social value, or

(c) will have high need.

The last two of those again involve an evaluate judgement about whether the social value of, or need for, the structure in question is "high". The material included descriptions of the utility and benefits of the proposal.[36] Although clearly planned to enhance the facilities available to the public, for the public benefit, it was not beyond the bounds of reasonableness to conclude that the structure would not meet the description of having a "high" social value or "high" need.

[31] The remaining question, with respect to PO1, is whether it was beyond a decision-maker, acting within the bounds of reasonableness, to find that the proposal would not be an intrinsic part of infrastructure. The proposed section of oceanway would, once constructed, form part of infrastructure whether one is speaking broadly of the suite of infrastructure provided for the movement of pedestrians and cyclists, or more specifically of the broader Gold Coast oceanway network to which it will physically link. The question is whether it would be an "intrinsic" part.

[32] The word "intrinsic" is commonly understood as referring to something that belongs to a thing by its very nature.[37] It was submitted, for each of the respondents, that the expression should be construed in the context of the definition as a whole and, in particular, having regard to the fact that the definition is concerned with whether structures are such that they will be allowed to be lost rather than protected or, to put it another way, whether they will be treated as expendable. Senior counsel for the first respondent submitted that the issue could be approached by asking whether

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36 See e.g. the responses to PO13 in the application documents.

37 See Macquarie Dictionary 8th Edition, Shorter Oxford Dictionary 6th Edition.

the proposed structure would be an inseparable part of infrastructure.[38] To similar effect, it was submitted on behalf of the second respondent, that the word "intrinsic" should be taken as used in this context in accordance with another of the ordinary meanings attributed to it, namely "essential",[39] such that the question is whether the proposed structure would be an essential part of infrastructure. That was also taken up by senior counsel for the first respondent. In that regard the concern of the provision is not for structures which are simply a part of infrastructure, but rather with those which form an inseparable or essential (rather than expendable) part of infrastructure such that they would be unlikely to be allowed to be lost rather than protected when under threat. I accept that construction.

[33] Notwithstanding the reference, in the application material, to the proposal as a "vital link", and acknowledging that it would doubtless be of some significance, I consider that the question of whether the proposed structure would form an intrinsic, (in the sense explained) part of infrastructure is a matter of judgement upon which reasonable minds may differ. The applicant has therefore not established that it was beyond the bounds of reasonableness to conclude that there was compliance with PO1.

Performance Outcome 2

[34] Performance Outcome 2 provides as follows:

> **"PO2** Development other than **coastal protection work**:
> 1. avoids impacting on **coastal processes**; and
> 2. ensures that the protective function of landform and vegetation is maintained."

[35] The proposed development is not coastal protection work. This performance outcome was addressed in the material that accompanied the development application and asserted compliance. The TA advice was that there was compliance. The material in support of the application, in addition to asserting compliance, pointed out the following:[40]

(i) there has been a heavy influence of manmade coastal structures within the Gold Coast;

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38 T1-46 – 47, T1-47, 49.
39 See shorter Oxford English Dictionary.
40 Book of Documents, response to PO2 at p 1305 – 1306 and the response to PO5 at p 1310.

(ii) by locating the oceanway as far landward as possible impacts on coastal processes have been minimised;

(iii) there is a low likelihood of the oceanway being impacted by storm tide inundation;

(iv) further, the oceanway will have minimal resistance to erosion and the presence of the ocean-way on top of the sea wall, or seaward of it, is unlikely to have any noticeable impact on the natural process of the erosion of sand from the upper beach and dunes and disposition offshore in sandbars. In short, the slab-on-ground construction would not have any impact on the coastal processes;

(v) no sand will be removed from the dune system as part of the construction works;

(vi) a large portion of the alignment of the oceanway is within the relatively stable hind dune area;

(vii) the width of the oceanway corridor has been minimized to reduce the extent of dune vegetation impacted and the extent of cut/fill;

(viii) within the proposed works area the vegetation is substantially impacted by prior work and it is unlikely that the proposed works will have any further substantial negative impact on the protective function of the landform and vegetation within the works area, and

(ix) reinstatement works, to ensure restoration of the protective function of dune land forms and vegetation, will nevertheless be done. Those works will, amongst other things, revegetate the area of dune impacted by the works, promote establishment of a stable dune seaward of the oceanway, and mitigate issues with wind blown sand impacting on the oceanway whilst ensuring that wind blown sand continues to be captured within the dune area and that natural dune-building processes continue.

The TA advice also pointed out that the sacrificial nature of the oceanway means that future impact by reason of otherwise having to protect a structure would be avoided.

[36] The applicant pointed to:

(i) the use of the terms "avoids" and "maintained" in this performance outcome rather than terms such as "minimise" used elsewhere;

(ii) the location of the oceanway relative to existing coastal processes and references within the material to suggest some extent of impact or potential impact, including on the dune or its vegetation.

[37] In that regard however:

- Although different from the term "minimise", the term "avoids" when used in a planning document such as the subject code, which is to be applied in assessing applications in the erosion prone area where development may be permitted to proceed, is not to be read in an absolute way, as if the applicant for approval must demonstrate that there will be no impact whatsoever even at a trivial, immaterial or insignificant level[41]. Senior counsel for the applicant did not cavil with that proposition.[42]
- It is the impact on "coastal processes" (a defined term relating to the natural processes of the coast) that is the focus of PO2(1), not simply any impact on the dune.
- The requirement in PO2(2) that the "protective function" be "maintained" is not a requirement that there be no impact on landform or vegetation.[43]

[38] Given the material, including that summarised above, I do not accept that it was beyond the boundaries of reasonableness to conclude that there was compliance.

Performance Outcome 3

[39] Performance Outcome 3 provides as follows:

> **"PO3** development is located, designed and constructed to minimise the impacts from **coastal erosion** by:
> 1. locating the development as far landward as practicable; or
> 2. where it is demonstrated that 1. is not feasible, mitigate or otherwise accommodate the risks posed by **coastal erosion**."

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41 See e.g. *Jedfire v Logan City* Council [1995] QPLR 41, *Goldicott House Pty Ltd v Brisbane City Council* [2020] QPELR 1153 at [175].

42 T1-57, l 44.

43 Cf. *Friends of Buddina Limited v Sunshine Coast Regional Council & Anor* [2021] QPEC 57 at [93].

[40] The applicant's submissions, in relation to this performance outcome, focussed on PO3(2). They did so on the basis that the TA advice stated that the proposal did not comply with PO3(1). That is however, contradicted by the TA discussion of compliance with PO3(2), in which it is stated that the minimisation and mitigation actions include: "Oceanway and associate [sic] infrastructure located as far landward as practicable…". Further, a statement to similar effect was made in the TA assessment of compliance with PO1(2). One of the few specific reasons given by the delegate for his decision was that the development "has been located as far landward as possible", which, if anything, is a stronger finding than is required for PO3(1). I have already referred to the fact that there was material that provided a basis upon which he could have reasonably found that the proposed oceanway is located as far landward as practicable.[44] That is sufficient to dispose with the challenge based on this performance outcome. It is unnecessary to consider the arguments based on PO3(2).

Performance Outcome 4

[41] Performance Outcome 4 provides as follows:

> "**PO4** development does not significantly increase the risk or impacts to people and property from **coastal erosion**."

[42] It was submitted for the applicant that the proposal involves risk to the oceanway itself which is to be put in harm's way, to say nothing of the risk of parts of the pathway becoming dislodged during severe events and potentially impacting other existing property and/or people in the locality.

[43] The fact of some level of potential risk or impact may be acknowledged, but the performance outcome calls for an evaluative judgement about whether the development "significantly" increases the risk or impacts. In assessing compliance, the documents lodged in support of the development application referred to the location of the oceanway as far landward as possible, and to maintain structural separation from the seawalls to prevent compromising their integrity or function. Further, it was pointed out that advanced notice would be expected of a severe weather event giving rise to risk, providing scope for management in that context. The TA advice was that compliance was achieved. The applicant has not

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44 Including as far landward as practicable within the erosion prone area.

demonstrated that it was beyond the bounds of reasonableness to conclude that there was compliance.

Performance Outcome 5

Performance Outcome 5 provides as follows:

> "**PO5** development other than **coastal protection work** avoids directly or indirectly increasing the severity of **coastal erosion** either on or off the site".

It has already been noted that the proposed development is not coastal protection work.

[44] The material lodged in support of the application[45] acknowledged that the proposed development would alter the natural state of the dunes through the addition of built infrastructure, but went on to explain that the severity of erosion would not be increased, particularly as:

- The slab-on-ground construction would not impact on coastal processes, with sand continuing to be removed from the upper beach and dunes and deposited off-shore in sand bars, and
- The oceanway would maintain structural separation from the foreshore seawalls, so as not to impact upon their functioning or integrity.

[45] The TA advice was as follows:

> "**TA response**: Complies with PO5
> The proposed development complies with PO5 because the applicant has suitably demonstrated that the proposal avoids directly or indirectly increasing the severity of coastal erosion either on or off the site. In addition to the design considerations as outlined in PO1 PO3, the applicant has proposed a comprehensive landscaping and revegetation plan also incorporating extensive dune fencing. The promotion and establishment (including fencing) of a stable frontal dune seaward of the proposed Oceanway will ensure that wind-blown sand continues to be captured within the dune area and natural dune building processes continue which ensure greater resilience to storm tides, waves of short duration and wind impacts."

[46] The written submissions for the applicant focused on the impact erosion may have and the consequences of that for the path, including the potential consequences of resulting debris from the path or parts of it, breaking up. The performance outcome

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45 Book of Documents, p 1310, p 1438.

is not concerned with that. It is focused on coastal erosion and whether the proposed development avoids increasing the severity of coastal erosion, a proposition senior counsel for the applicant accepted in the course of oral submissions.[46] The fact that the impact of erosion may lead to the path breaking up and consequent debris and clean-up costs does not support an assumption that the proposed path will increase the severity of coastal erosion.

[47] Senior counsel for the applicant pointed to one part of an ecological assessment that, in a table, listed as a long-term impact of development that "alteration of existing sand retention patterns by dune vegetation could lead to exacerbated erosion". That was however, part of a table which went on to set out management actions to respond to that. Further, it was but one passage from the material which otherwise dealt with this topic in the way outlined above.

[48] In the circumstances I am not satisfied that it was beyond the bounds of reasonableness to the conclude that this performance outcome was satisfied.

Performance Outcome 23

[49] Performance Outcome 23 and its corresponding acceptable outcome is as follows:

PO23 Works are located and designed such that they continue to operate safely during and following a **defined storm tide event.**	**AO23.1** Tidal work is designed and located in accordance with the Guideline: Building and engineering standards for tidal works, Department of Environment and Heritage Protection, 2017.

Defined storm tide event (DSTE), defined storm tide event level, storm tide inundation and sea level rise are defined as follows:

Defined storm tide event (DSTE) means the event, measured in terms of likelihood of reoccurrence, and associated inundation level adopted to manage the development of a particular area. The DSTE is equivalent to a one in 100-year average recurrence interval storm event incorporating:

1. **Sea level rise**; and
2. an increase in cyclone intensity by 10 percent relative to maximum potential intensity.

Note: Where **storm tide inundation** levels have not been determined by a local study, the **defined storm tide event level** can be determined by reference to default **storm tide inundation** area mapping as depicted in the **DA mapping system**. In these mapping layers, **storm tide inundation** is

46 T2-24.

based on default values of 1.5 metres above highest astronomical tide (HAT) for South East Queensland and 2.0 metres above HAT for the remainder of the state. Where required, the storm tide level can be related back to Australian Height Datum by reference to the Queensland Tide Tables.

Defined storm tide event level means the peak water level reached during a **defined storm tide event**.

Storm tide inundation means temporary inundation of land by abnormally high ocean levels caused by cyclones and severe storms.

Sea level rise is defined as follows:

Sea level rise means an increase in sea level caused by global warming due to climate change. Sea level rise is projected to be 0.8 metres from the present day to 2100.

Note: **Sea level rise** projections based on the best available science are prepared by the intergovernmental Panel on Climate Change.

[50] The proposed works are not tidal work and so there is no relevant acceptable outcome. The TA advice was that PO23 was therefore inapplicable. It was common ground that that is not correct. The material, lodged in support of the application, contended that PO23 was complied with.

[51] The Council's assertion of compliance, at the development application stage, focussed on demonstrating a low level of likelihood of the proposed path being affected by storm tide inundation. In particular, the basis for compliance was put as follows (underlining added):[47]

> "The proposed oceanway has an average design elevation of 5.8 metres AHD, varying between 4.1 metres AHD and 7 metres AHD over the length of the alignment. These levels are well above the storm tide levels presented in s 2.1.3 of the Coastal Management Assessment (Appendix E), indicating a low likelihood of the oceanway being impacted by storm tide inundation. This aligns with the general understanding that all activities and development on land higher than 1.5 metres above HAT in South-East Queensland are considered to be at very low risk of storm tide inundation over the next 100 years."

[52] There was some challenge to the level of inundation as presented in the material lodged in support of the application. The note to the definition of DSTE contemplates situations in which inundation levels have been determined by a local study. It is therefore unsurprising that the material in support of the application

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47 Book of Documents, p 1315 – 1316.

referred to the storm tide levels for Gold Coast beaches that were developed as part of a local study (GHD 2013). That study, which included future climate change scenarios (including allowance for sea level rise and potential increases issues in storm intensity and frequency) was used to derive an inundation level of 2.64 AHD for the 100-year ARI event[48]. It was pointed out for the applicant however, that the allowance for sea level rise in that study was not the same as that in the definition of the Code and it is unclear whether the same allowance for increase in cyclone intensity was used.

[53] If the local study is to be put to one side however, the note to the definition of DSTE contemplates use of the DA mapping system which, it says, is based on default values of 1.5m above the highest astronomical tide (HAT) for South-East Queensland. The application included information on the HAT which, after addition of the 1.5m, produces a figure of 2.63m AHD, which approximates the figure derived from using the local study (as had been pointed out in the material in support of the application). It may be noted that, consistently with the assertion of low risk of storm tide inundation, the coastal hazard areas map, which also contains a note about the default storm tide inundation level being 1.5m above HAT in south-east Queensland, shows the site as outside the mapped hazard areas for storm tide inundation.[49]

[54] As has been observed, the material sought only to demonstrate a low risk of impact in terms of storm tide inundation. In this case however, as has been discussed, the proposal was designed to be "sacrificial" when threatened by the effects of coastal erosion during a severe erosion event impacting upon its foundations.

[55] The report lodged in support of the application[50] explained and depicted how, in a severe erosion event, up the beach from the zone of wave impact, a zone of slope adjustment (ZSA) can occur where the seaward face of the beach slumps to the natural angle of the beach sand following wave erosion. Further up the beach, a zone of reduced foundation capacity (ZRFC) develops. During a 20-year ARI event, the ZRFC reaches the oceanway over the majority of its alignment, creating the potential for geotechnical failure of the oceanway foundations,[51] whilst the more

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48 BOD, p 1414, Table 2-3.
49 BOD, p 1296, 1736.
50 Book of Documents at p 1433.
51 BOD, p 1435, s4.13 2nd paragraph.

vulnerable parts of the oceanway would become subject to a ZSA, resulting in failure and slumping of the oceanway.[52] The report pointed out however, that erosion impacts will be limited to severe events with associated large wave conditions, that can be forecast in sufficient time to permit implementation triggers for management measures such as closing the walkway. It was submitted, for the applicant, that the oceanway clearly would not operate safely in the DSTE, which is defined by reference to the ARI 100-year storm event.

[56] In response to an invitation to make further submissions, including as to whether the DSTE would trigger such measures for safety reasons, the second respondent accepted that it would, but submitted that the recommended management measures (including closing the oceanway in advance), would mean that the oceanway continued to operate safely. In that regard a distinction was sought to be drawn between the requirement in PO23 for the works to continue to "operate safely" and for them to be always open for use. That distinction had also been drawn in the primary submissions and was also advanced on behalf of the first respondent. Reference was made to what was described in the development application material as the "safety in design" approach, which led to recommended mitigation steps or controls to implement closure triggers based on the forecast of severe erosion events and re-opening requirements based on scalable geotechnical assessments and other appropriate actions, such as reprofiling of the beach following severe erosion events and implementation of an existing beach emergency works guideline to implement beach closures and clean-up operations, following severe events, to remove debris resulting from damage to the oceanway within appropriate timeframes.

[57] Whilst there may, in many instances, be a valid distinction between safe operation and continued use, the distinction is illusory in this context. The provision focuses upon the location and design of works so that they continue to operate safely during and following the DSTE. I do not accept that the recommended management steps are part of the design[53] of the works and I do not see how, the oceanway would continue to operate when closed, particularly when it has failed and broken up.

[58] The first respondent's supplementary submissions in relation PO23 were to different effect. They pointed out that the concerns for the oceanway and the triggers for the

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52 BOD, p 1435, s 4.1.3, 3rd paragraph.
53 Or location.

management steps are related to coastal erosion in severe erosion events and that coastal erosion is dealt with in other performance outcomes (PO3 and PO4) rather than PO23. It was submitted that what was contained in the application documents with respect to PO23 demonstrated compliance with that performance outcome.

[59] When PO23 is read in isolation it does not appear to be confined to impediments to continued safe operation by reason of storm tide inundation. I accept however, that when the provision is read in the context of the Code as a whole, including in the context of the definition of a DSTE and the provisions of the purpose statement of State Code 8, it should be construed to be so limited.

[60] The definition of a DSTE is set out earlier. After the words "means the event, measured in terms of likelihood of reoccurrence, and" the definition goes on to provide "associated inundation level adopted to manage the development of a particular area…" before describing what a DSTE is the "equivalent" of in terms of a storm event. It is the inundation level associated with the event and which is adopted to manage the development of a particular area which lies at the core of the definition.

[61] That the concern is for storm tide inundation is confirmed when the performance outcome is read in the context of the purpose statement. As has already been observed, compliance with the performance outcomes is a way of achieving compliance with the purpose statement of the Code and therefore State Code 8 itself. There is, in that way, a clear nexus between the purpose statement and the performance outcomes. PO23 is the last performance outcome and the only performance outcome in Table 8.2.3 which is headed "Operational work which is not assessed by local government". It has an obvious nexus with the following part of the purpose statement:

> "In addition to the above, the purpose of this Code is to ensure that development involving operational works which is not assessed by local government is designed and located to protect life and property from the impacts of **storm tide inundation**."

[62] When one has regard not only to the fact that, as was pointed out for the first respondent, coastal erosion is dealt with in other performance outcomes, but the features of the definition of DSTE and the relevant part of the purpose statement, it is tolerably clear that PO23 is concerned with works being located and designed such as they continue to operate safely during and following a defined storm tide

event from the perspective of storm tide inundation. Accordingly, I accept that it was within the bounds of reasonableness for the decision-maker to be satisfied that PO23 was complied with.

Conclusion

[63] For the reasons given the applicant has failed to demonstrate that the decision to approve the development application on the basis of compliance with the performance outcomes was legally unreasonable and an improper exercise of discretion on that basis. I will hear from the parties in relation to the minutes of order.