# PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

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| CITATION: | *Sunland Group Limited & Anor v Gold Coast City Council* [2019] QPEC 14 |
| PARTIES: | **SUNLAND GROUP LIMITED (ACN 063 429 532)**<br>**AND**<br>**SUNLAND DEVELOPMENTS NO 22 PTY LTD (ACN 164 903 011)**<br>(Applicants)<br>**v**<br>**GOLD COAST CITY COUNCIL**<br>(Respondent) |
| FILE NO/S: | 1497/17 |
| DIVISION: | Planning and Environment Court, Brisbane |
| PROCEEDING: | Originating Application |
| ORIGINATING COURT: | Planning and Environment Court, Brisbane |
| DELIVERED ON: | 4 April 2019 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 18 March 2019 |
| JUDGE: | Everson DCJ |
| ORDER: | **1. I declare that the respondent has power to collect the infrastructure contributions calculated under and in accordance with conditions 13 to 16 of the preliminary approval dated 3 May 2007 for infrastructure for development authorised by future permits given for applications referred to in conditions 13 to 16 of the preliminary approval.**<br>**2. I further declare that the respondent has no power to issue an infrastructure charges notice under s 119 of the *Planning Act* 2016 for infrastructure for development authorised by future permits given for applications referred to in conditions 13 to 16 of the preliminary approval.** |
| CATCHWORDS: | PLANNING AND ENVIRONMENT – APPLICATION – declarations sought as to the continuing effect of infrastructure charges conditions imposed pursuant to a preliminary approval under s 3.1.6 of the *Integrated Planning Act* 1997 – did conduct by the respondent give rise to an |

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| | Infrastructure Agreement pursuant to the *Sustainable Planning Act* 2009 |
| CASES: | *Gladstone Regional Council v Homes R Us (Australia) Pty Ltd* [2015] QCA 175 |
| LEGISLATION: | *Integrated Planning Act* 1997 (Qld) |
| | *Planning Act* 2016 (Qld) |
| | *Sustainable Planning Act* 2009 (Qld) |
| | *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act* 2011 (Qld) |
| COUNSEL: | SL Doyle QC and SJ Webster for the applicants<br>RG Bain QC and D Whitehouse for the respondent |
| SOLICITORS: | Holding Redlich for the applicants<br>Hopgood Ganim for the respondent |

**Introduction**

[1] In this proceeding the applicants seek declaratory relief to the effect that:

1. on the proper construction of the *Planning Act* 2016 ("PA"), the respondent has the power and obligation to collect infrastructure contributions in accordance with the specific conditions set out in a preliminary approval given by court order on 3 May 2007 ("the preliminary approval") over land located at 259 Rio Vista Boulevard, Mermaid Beach ("the land");
2. in the alternative, that the formal written commitment given by the respondent in 2014 embodies the terms of an infrastructure agreement pursuant to s 677 of the *Sustainable Planning Act* 2009 ("SPA") to the effect that the respondent will:
    (i) apply infrastructure credits of 5,564.9 equivalent tenements as offsets for infrastructure contributions for developments authorised by approvals under conditions 15 and 16 of the preliminary approval; and
    (ii) not assess infrastructure contributions and recognise infrastructure credits under the charging regime in place at the time of giving the subsequent approval (meaning the regime of adopted charges, as amended from time to time).[1]

[1] Written submissions for the applicants, para 4.

**The preliminary approval**

[2] The preliminary approval took effect under s 3.1.6 of the *Integrated Planning Act* 1997 ("IPA"). It contains conditions relating to infrastructure contributions. In particular, conditions 13 to 16 are in the following terms:

> "13. Contributions toward Recreational Facilities Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 16 – Policy for Infrastructure Recreation Facilities Network Developer Contributions.
>
> Contributions shall be calculated at rate current at due date of payment.
>
> 14. Contributions toward Transport Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 19 – Policy for Infrastructure Transport Network Developer Contributions.
>
> Contributions shall be calculated at rate current at due date of payment.
>
> 15. Contributions towards Water Supply Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 3A – Policy for Infrastructure Water Supply Network Developer Contributions.
>
> Contributions shall be calculated at rates current at due date of payment. Council acknowledges that credits exist over the site as a consequence of previous payments and that the calculation of this contribution will recognise these existing credits.
>
> 16. Contributions towards Sewerage Network Infrastructure shall apply at the time application is made for a Development Permit. The contribution to be paid to Council shall be in accordance with Planning Scheme Policy 3B – Policy for Infrastructure Sewerage Network Developer Contributions.
>
> Contributions shall be calculated at rates current at due date of payment. Council acknowledges that credits exist over the site as a consequence of previous payments and that the calculation of this contribution will recognise these existing credits.
>
> …"[2]

[3] Substantially all of the land is the subject of the preliminary approval.[3] In the Statement of Agreed Facts provided to the court, the parties do not distinguish

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2 Statement of agreed facts, paras 2 and 3.

3 Ibid, para 7.

between the applicants merely referring to them as "Sunland". They also adopt the term "Council" for the respondent. I will adopt the same approach.

[4] The currency period of the preliminary approval has twice been extended and it presently remains in effect until 2023. The Council continues to publish up-to-date rates for the Planning Scheme Policies identified in the infrastructure conditions quoted above in the preliminary approval ("the infrastructure conditions").[4]

**The status of the infrastructure conditions**

[5] On 29 May 2015 Sunland became the owner of the land. Between 16 December 2015 and 30 September 2016, Sunland lodged a series of development applications and Council decided to grant development permits in respect of each of the applications.[5] Council also issued what purported to be infrastructure charges notices to Sunland in respect of each application. The purported infrastructure charges notices did not assess charges or allow credits in accordance with the infrastructure conditions.[6] The first issue for determination therefore is whether the Council must recover contributions and recognise identified credits in accordance with the infrastructure conditions.

[6] The starting point, Sunland submits, in support of the proposition that the Council must recover contributions (and recognise identified credits) in accordance with the conditions of the preliminary approval is to be found in Chapter 8, Part 2 of the PA which provides transitional provisions for the repeal of SPA which is defined as the "old Act".[7] Section 286 provides for the continuing effect of "documents" which include a preliminary approval.[8] Relevantly s 286 states:

> "(1) This section applies to a document under the old Act that is in effect when the old Act is repealed.
>
> (2) Subject to this part, the document continues to have effect according to the terms and conditions of the document, even if the terms and conditions could not be imposed under this Act."

[7] It is further submitted that the preliminary approval was in effect when SPA was repealed as a consequence of, firstly, s 801 of SPA which provides:

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4 Ibid paras 4 and 5.
5 Ibid paras 17-19.
6 Ibid paras 19 & 20.
7 PA s 285(1).
8 PA s 286(7)(a)(iii).

> "(1) A development approval under repealed IPA that is in force immediately before the commencement continues as a development approval under this Act.
>
> (2) For this Act, a development approval continued in force under subsection (1) is taken to have had effect on the day it had effect under repealed IPA."[9]

[8] Secondly s 808 of SPA specifically addressed preliminary approvals under IPA in, relevantly, the following terms:

> "(1) This section applies to a preliminary approval to which repealed IPA, section 3.1.6 applies, whether the approval was given under repealed IPA before the commencement or after the commencement for a development application made before the commencement."

[9] The Council contends that while the preliminary approval had continuing effect as a preliminary approval under SPA, the infrastructure conditions ceased to be a lawful part of that approval as a consequence of amendments to SPA pursuant to the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act* 2011. The effect of these changes was summarised by Fraser JA in *Gladstone Regional Council v Homes R Us (Australia) Pty Ltd* in the following terms:

> "In 2011 the *Sustainable Planning Act* 2009 ("the Act") was amended by *the Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act* 2011 in a way which, in relation to future approvals of this kind, precluded the imposition of a condition requiring payment of infrastructure charges and instead provided for an "adopted infrastructure charges notice".[10]

[10] Accordingly it is submitted that the development applications which were lodged pursuant to the preliminary approval were fresh applications that were required to be assessed and determined to having regard to the legislative regime in place at the time which contemplated an infrastructure charges notice in place of the infrastructure conditions. To do otherwise it is submitted was precluded by the operation of s 880 of SPA. It was in the following terms:

> "(1) This section applies—
>
> (a) on the day a State planning regulatory provision (adopted charges) first has effect; and
>
> (b) until the day the State planning regulatory provision ceases to have effect.

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9 A preliminary approval is a development approval pursuant to Schedule 3 of SPA.

10 [2015] QCA 175 at [2].

> (2) A local government must not—
>
> (a) levy an infrastructure charge or regulated infrastructure charge under chapter 8, part 1, division 4 or 5; or
>
> (b) impose a condition under a planning scheme policy to which section 847 applies.
>
> (3) Subsection (2)—
>
> (a) applies despite chapter 8, part 1, division 4 or 5 and sections 847 and 848; and
>
> (b) does not stop a local government—
>
> (i) collecting an infrastructure charge or regulated infrastructure charge lawfully levied by the local government; or
>
> (ii) collecting an infrastructure contribution payable under a condition lawfully imposed under a planning scheme policy to which section 847 applies; and
>
> (c) does not stop a local government giving a new notice under section 185(8) or 364; and
>
> (d) does not affect a right or liability, or action that can be taken, under this Act in relation to a charge or infrastructure contribution mentioned in paragraph (b)."

[11] The difficulty with the Council's submission is that s 880(3) appears to preserve the lawful effect of the infrastructure conditions. To overcome this difficulty the Council submits that the preliminary approval did not levy infrastructure charges, rather it was worded such that this was left to the development permit stage. I reject this argument. The infrastructure conditions were in mandatory terms. Each contribution was obliged to be paid at a clear point in time (at the time application is made for a development permit). Each contribution is to be calculated in accordance with identified Planning Scheme Policies at the rates current at the due date of payment. The fact that these Planning Scheme Policies have now apparently been repealed is of no consequence in circumstances where,[11] it is uncontentious that the Council continues to publish up-to-date rates for them.[12]

[12] There is a further difficulty with the Council's contention that while the preliminary approval has continuing effect under SPA, the infrastructure conditions do not. There

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11 Submissions of the respondent, paras 21-22.

12 Statement of agreed facts, para 5.

is no provision of SPA which expressly purports to preserve some parts of a preliminary approval and not others. Given the general effect of s 801, and more specifically, the effect of s 808 of SPA in preserving preliminary approvals, clear words would be required to bring about the outcome contended for by the Council. On the contrary s 880(3)(b) and (d) expressly preserved the infrastructure conditions and the rights and obligations pertaining to them. Upon the commencement of the PA they were in turn preserved pursuant to s 286 thereof.

[13] It follows that the Council can and is obliged to recover infrastructure contributions (and recognise identified credits) in accordance with the infrastructure conditions.

**The correspondence between the parties**

[14] In order to appreciate the alternative argument of Sunland that it entered into an infrastructure agreement under s 677 of SPA in September 2014, which governs the charging and payment of infrastructure charges concerning the land, it is necessary to set out the negotiations which took place between Sunland and the Council before Sunland purchased the land.

[15] In September 2014 the vendor of the land and its town planning consultant identified that there were approximately 19 million dollars in infrastructure credits applicable pursuant to the preliminary approval. Sunland sought confirmation from the Council in this regard.[13]

[16] On 8 September 2014, one of Sunland's town planning consultants, Kelli Adair of Cardno, wrote to Jeremey Wagner of the Council (then the Executive Coordinator of Planning Assessment) in the following terms:

> "Further to our meeting last week, have you had the opportunity to look at the existing infrastructure credits for Lakeview to confirm that there is an approximate $19 million credit?"

[17] On 11 September 2014, Ms Adair sent a further email to another senior Council employee, David Lohoar (then the Supervisor of Developer Contributions), copied to Mr Wagner in the following relevant terms:

> "Thank you for your phone call this afternoon and as understood from our conversation, Council have acknowledged that the 1,424 ETs for water and 1,398 ETs for sewer will be honoured, if the future

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13 Statement of agreed facts, paras 8 & 9.

> development is carried out under the provisions of the… Preliminary Approval. Based on current ET rates, the total value of these ET credits equates to approximately $19,960,525.34.
>
> It was also understood from our discussions that any subsequent development lodged under the… Preliminary Approval would be subject to [Planning Scheme] Policy charges as set out in the Conditions of the Court Order rather than AICR [Adopted Infrastructure Charges Resolution] charges.
>
> Can you please provide me with written confirmation (preferably on Council letterhead) that I have understood the above points and that this is Council's position on infrastructure contributions for this major development site.
>
> I look forward to receiving formal correspondence confirming the above…"

[18] In response to these inquiries, on 12 September 2014 the Council provided an initial letter dated 10 September 2014 as follows:

> "I refer to our telephone conversation of 11th September and your subsequent e-mail requesting an updated review of available credits pertaining to the Lakeview at Mermaid site.
>
> I wish to advise that a credit of 1,378.22 equivalent tenements for water infrastructure and 1,404.23 equivalent tenements for sewer infrastructure are held in Council's database against this development.
>
> The details of the credits are:
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> | | |
> |---|---|
> | Water 1 Molendinar | 1,404.23 equivalent tenements |
> | Water 2 Molendinar | 1,404.23 equivalent tenements |
> | Sewer 1 Merrimac | 1,378.22 equivalent tenements |
> | Sewer 2 Merrimac | 1,378.22 equivalent tenements |
>
> …
>
> These credits are available as offsets against charges required for the Water and Wastewater Networks under conditions 15 and 16 of the Court Order dated 3 March 2007 and any subsequent approvals under the umbrella of that approval.
>
> Should there be any new application lodged outside of this Preliminary Approval contributions would be assessed in accordance with the charging regime in place at that time and credits recognised in accordance with that regime."

[19] Following further discussions about whether the preliminary approval might be amended by a permissible change application, Sunland's senior town planning consultant, David Ransom (of Cardno) sent a further email to Mr Lohoar relevantly as follows:

> "I'm assisting Sunland with their due diligence to purchase the [land].

…

As you know there is an infrastructure credit on the site to the value [of] approximately $19 m and you have previously confirmed in writing to our Kelli Adair that this credit will be honoured in the context [of] applications lodged in accordance with the existing preliminary approval.

At today's meeting it became apparent that Councils [sic] preferred option is that we lodge a permissible change to the existing preliminary approval instead of lodging impact assessable applications under the preliminary approval.

If we went down this path the approved density would not be exceeded and the overall impact would be to shift density around the site and get increased building heights.

The prerequisites to this option from the client's perspective is that the existing infrastructure credits continue to apply to a revised development concept achieving the same yield under a permissible change process.

If an undertaking to this effect can't be provided by Council then this option wouldn't be able to be pursued by Sunland.

When you get a chance would you be able to confirm if Council would be willing to honour the existing infrastructure credit for the site under a permissible change scenario seeking the same density?

If you are agreeable would it be possible for you to modify and resend the previous letter you sent to Kelli Adair to confirm this.

As the infrastructure credit is very large it is essential to the purchase of the site and Sunland would not be keen to proceed with the purchase if there is any risk of the infrastructure credit not being applied to the development on the site."

[20] In response, the Council provided a second letter, dated 24 September 2014, which was in materially the same terms as the letter sent on 12 September 2014, save that:

(a) it included the following text:

"I refer to our telephone conversation of this date and your previous e-mails requesting clarification of the application of available credits pertaining to the Lakeview at Mermaid site, particularly in light of a proposed Permissible Change Application being lodged.

…

Council is of the view that a Permissible Change Application which merely repositions certain components of the development but maintains existing approved densities and equivalent tenement demands would remain under the "umbrella" of the original approval and maintain those established credits."

(b) it was signed by David Lohoar on behalf of the "*Chief Executive Officer*".

**Was there an Infrastructure Agreement?**

[21] Following the Council's letter dated 24 September 2014, Sunland almost immediately proceeded to contract to purchase the Land for some $60 million, signing the contract of sale on 3 October 2014.[14]

[22] Essentially it is submitted that the correspondence referred to above is such that the court should declare that Sunland and the Council have entered into an infrastructure agreement under s 677 of SPA which is preserved as a consequence of s 157(1) of the PA which states that to the extent of any inconsistency, an infrastructure agreement applies instead of a development approval or an infrastructure charges notice.[15] It is true that in defining an infrastructure agreement the legislature did so in very broad terms, s 627 of SPA merely defined an agreement as "an agreement in writing" and defined an "infrastructure agreement" as "see section 670". In turn s 670 of SPA merely noted that an infrastructure agreement "is an agreement, as amended from time to time", mentioned in a number of provisions of SPA. Taking advantage of this looseness in legal drafting, Sunland submits that the conduct of the parties makes it clear that there is evidence of a concluded bargain about infrastructure charges owing in the event the land were to be developed in accordance with the preliminary approval, based on ordinary principles of contractual formation. In particular it is emphasised that the letters from the Council contain promissory statements which were intended to have legal effect.

[23] There is however, a difference between the making of a representation which is relied upon and legally capable of being enforced against a party in a proceeding based in estoppel (which does not lie within the jurisdiction of this court) and the parties entering into an agreement which is a creature of statute, the obligations under which have ramifications beyond the parties themselves. For example, it is intended that a local government must keep an infrastructure agreement available for inspection (and produce a copy on request).[16] The correspondence between the parties is not what is contemplated by such provisions.[17] It is one thing for a Council officer to make a representation about infrastructure credits, it is quite another to demonstrate that the officer had authority to enter into an "infrastructure agreement". It is clear from a

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14 Ibid paras 11-16.
15 PA s 157(1).
16 Sections 724(1)(u) and s 729(1)(i).
17 See SPA Chapter 8, Part 4.

reading of the relevant provisions of SPA as a whole, that an exchange of correspondence in the context of negotiations to purchase the land, while arguably giving rise to legal remedies outside the jurisdiction of this court, did not constitute an infrastructure agreement as contemplated by SPA.

[24] Accordingly I find that, on the facts before me, Sunland and the Council did not enter into an infrastructure agreement pursuant to s 677 of SPA.

**Conclusion**

[25] I will therefore grant Sunland the primary relief sought in the relevant terms of the amended originating application.

[26] I declare that the respondent has power to collect the infrastructure contributions calculated under and in accordance with conditions 13 to 16 of the preliminary approval dated 3 May 2007 for infrastructure for development authorised by future permits given for applications referred to in conditions 13 to 16 of the preliminary approval.

[27] I further declare that the respondent has no power to issue an infrastructure charges notice under s 119 of the *Planning Act* 2016 for infrastructure for development authorised by future permits given for applications referred to in conditions 13 to 16 of the preliminary approval.