SUPREME COURT OF QUEENSLAND

CITATION:	*Urban Properties Centenary Pty Ltd v Cairns Regional Council* [2019] QSC 160
PARTIES:	**URBAN PROPERTIES CENTENARY PTY LTD ACN 169 863 987** (Plaintiff) **v** **CAIRNS REGIONAL COUNCIL** (Defendant)
FILE NO/S:	No 117 of 2019
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	26 June 2019
DELIVERED AT:	Cairns
HEARING DATE:	28 May 2019, 29 May 2019
JUDGE:	Henry J
ORDERS:	**1. It is declared that pursuant to clause 6.3 of the parties' agreement, the requirement for payment of:** **(a) adopted infrastructure charges notice Council reference 8/7/3305 (5028457) (the first notice referred to in schedule 3 of the agreement) is partly waived so that $322,548.96, of the charged total of $851,120.52, is not required to be paid;** **(b) adopted infrastructure charges notice Council reference 8/30/160 (5369780) (the second notice referred to in schedule 3 of the agreement) is wholly waived;** **(c) adopted infrastructure charges notice Council reference 8/13/2039 (5409183) (the third notice referred to in schedule 3 of the agreement) is wholly waived;** **(d) infrastructure charges notice Council reference 8/30/246 (5633901) (the fourth notice referred to in schedule 3 of the agreement) is wholly waived;**

(e) infrastructure charges notice Council reference 8/13/2128 (5755524) is not waived;

(f) infrastructure charges notice Council reference 8/13/2152 (5787991) is not waived.

2. I will hear the parties as to costs, if costs are not agreed in the interim, at 9.15 am 17 July 2019.

CATCHWORDS: ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – INTERPRETATION AND CONSTRUCTION – PARTICULAR CASES – where the applicant developer and respondent Council entered into an infrastructure agreement – where the agreement waived the requirement for payment of certain infrastructure charges, to which the agreement referred, in the event the applicant met various development obligations – where the development obligations were met – where the applicant and respondent dispute which infrastructure charges were accordingly waived under the agreement – where the applicant and respondent each seek declarations from the Court as to which infrastructure charges have been waived

Planning Act 2016 (Qld) ss 49, 61, 113, 119, 121, 122, 123, 144

Sustainable Planning Act 2009 (Qld) ss 7, 10

Amcor v CFMEU (2005) 222 CLR 241

Gladstone Regional Council v Homes R Us (Australia) Pty Ltd (2015) 209 LGERA 302

Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181

Mulgrave Shire Council v Red Hills Pty Ltd (1994) 83 LGERA 323

COUNSEL: MA Jonsson QC for the plaintiff
RS Litster QC with MR Wylie for the defendant

SOLICITORS: Miller Harris Lawyers for the plaintiff
MacDonnells Law for the defendant

[1] The applicant ("the developer") and respondent ("the Council") each seek declarations in connection with infrastructure charges on a land and residential development in suburban

Cairns known as Village Edge. At issue is whether certain infrastructure charges are due and payable by the developer or have been waived by the Council.

Background

[2] Infrastructure charges are levied upon development by local Councils as part of the development assessment process, ostensibly to help fund the provision of Council's trunk infrastructure networks such as water supply, waste water, stormwater, transport, public parks and land for community facilities. In the present case the Council had an infrastructure charges incentive programme calculated at encouraging local construction work valued greater than $15 million and using an 80 per cent local workforce.

[3] Against that background, Council entered into an infrastructure agreement ("the agreement") with the developer, waiving the requirement for payment of certain infrastructure charges associated with the development in the event the developer met its so-called "development obligations" under the agreement. Those obligations required the provision of records demonstrating the developer had expended more than $15 million on the development by a so-called "sunset date", namely 30 June 2018.

[4] The agreement's waiver clause provided:

> "6.3 Waiver
>
> (1) Provided that the satisfaction of the Development Obligations occurs prior to the Sunset Date, Council will and does hereby permanently waive the requirement for payment of Infrastructure Charges associated with the development that is completed by the Sunset Date."

[5] Clause 6.2 in effect deferred the requirement to pay the relevant infrastructure charges until the sunset date.

[6] The developer met its development obligations by the sunset date. Clause 6.3(1) therefore operates to waive the requirement for payment of the infrastructure charges to which the clause refers. The determinative question is, what are the infrastructure charges to which the clause refers?

[7] The term "infrastructure charges" is defined by the agreement as follows:

> "**Infrastructure Charges** means the Infrastructure Charges associated with the Development Permits levied via infrastructure charges notices contained in Schedule Number 3, as increased by any reassessment under clause 5.4."[1]

[1] The above definition's reference to clause 5.4 appears to be an error and was presumably intended to refer to clause 6.5 of the agreement, that being the clause of the agreement which deals with the reassessment of infrastructure charges. Clause 6.5 unhappily perpetuates the erroneous numbering by referring to clauses 5.2, 5.3 and 5.4 when such references should obviously have been to clauses 6.2, 6.3 and 6.4.

[8] The word "levied" in the above definition of infrastructure charges obviously relates to the levying of infrastructure charges. There are four infrastructure charges notices listed in schedule 3 of the agreement.

[9] The agreement provides the following definition of development permits:

> "**Development Permits** means the development permits issued to the Proponent as set out in Schedule 1".

Schedule 1 lists four development permits.

[10] Clause 6.3 refers to "the requirement for payment of the Infrastructure Charges associated with the development that is completed by the Sunset Date". The agreement defines development as follows:

> "**Development** means the proposed development as described in the Development Permits."

[11] Council contends the infrastructure charges referred to in the waiver are only the infrastructure charges listed in schedule 3 and any updated versions of them. The developer contends the waiver's reference to "infrastructure charges" should be given an ambulatory interpretation, to embrace charges associated with development under successors to or variants of the schedule 1 development permits obtained prior to the sunset date.

[12] The conflict in the parties' interpretations became apparent in exchanges of correspondence in the days following the sunset date.[2] The need to resolve their dispute became more pressing as a result of Council not endorsing its approval on the developer's final lodged survey plan, SP302226. That was because of the non-payment of certain infrastructure charges notices, which the developer asserts were waived pursuant to clause 6.3.

[13] The relief sought by the developer, initially by application but eventually by claim, includes declarations that the infrastructure charges in respect of the whole of the lot initially constituting the area of the development are permanently waived and that it is not liable for any infrastructure charges payable with respect to the reconfiguration of lots the subject of survey plan SP302226. The developer also seeks an order requiring Council to endorse its approval upon survey plan SP302226.

[14] Council resists those orders and, by counterclaim, seeks declarations that four specified infrastructure charges notices, which it argues are not waived under the terms of the infrastructure agreement, are due and payable. It accepts the requirement to pay two other infrastructure charges notices[3] has been waived by operation of clause 6.3.

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2 Ex 1 pp 192-194.

3 The below-discussed second and third permits.

[15] The resolution of the determinative question will largely resolve the controversy between the parties. However, before that determination, it is useful to review the context giving rise to some of the concepts to which the agreement relates. After determining the correct interpretation it will be necessary to apply it to the facts to decide what orders should be made.

Context

The nature of the infrastructure agreement?

[16] Council did not concede the agreement was a contract but conceded it was bound by the agreement on the basis it was made under the *Planning Act 2016* (Qld) ("the Act").

[17] The Act provides that Councils "may" enter into agreements referred to in ss 67, 123, 131(2), 135(3), 144(2), 149(2) and 158 of the Act. Such agreements are described in Part C in Chapter 4 of the Act as infrastructure agreements. An infrastructure agreement is not, per se, made "under" the Act. Rather, the Act's operation and processes are subject to a range of agreements, collectively described as infrastructure agreements. Part C in Chapter 4 of the Act regulates some (not all) aspects of the creation and application of such agreements. Of the agreements referred to in the aforementioned sections, an agreement of the kind referred to in s 123 or s 144(2) is the closest type of agreement to the agreement in this case.

[18] Section 123 of the Act provides that the local government and the recipient of the infrastructure charges notice may agree about whether the levied charge may be paid other than as required by s 122, which is the section dealing with when such charges are payable. Section 144(1) provides that for the purpose of recovery of the levied charge, it is taken to be rates. However, s 144(2) provides that s 144(1) "is subject to any agreement between the local government and the applicant". Sections 123 and 144(2) do not expressly refer to an agreement to waive payment of the charge. However, the agreement in the present case is implicitly an agreement to depart from payment as required by s 122 – a departure implicitly authorised by s 123 – and to depart from the charge being recoverable per s 144(1) as rates – a departure implicitly acknowledged as permissible by s 144(2).

[19] The foregoing analysis demonstrates the present agreement is of a kind recognised and partly regulated by the Act but is not itself a creation of the Act. The preferable view is the agreement is a contract, with consideration for Council's waiver being the developer's expenditure of more than $15 million on this local development by the sunset date.[4] Nonetheless the agreement refers to concepts that are creations of the Act, from which it follows the Act informs the interpretation of the agreement. To put it, as Kirby J did in *Amcor v CFMEU*,[5] the provisions of the Act constitute the legislative background against which the agreement was made, a background which was part of the common knowledge attributable to the parties to the agreement.

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[4] Compare *Mulgrave Shire Council v Red Hills Pty Ltd* (1994) 83 LGERA 323, 327, where the "quid pro quo" there giving rise to contractual obligations derived from the granting of an approval pursuant to statute.

[5] (2005) 222 CLR 241, 261. Also see *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181, 188.

[20] In interpreting the agreement its references to concepts and processes which are creations of the Act should therefore carry the meaning they carry in the Act, unless the words of the agreement suggest a different meaning. Should there be an inconsistency in meaning then clause 2.2 of the agreement is relevant. Clause 2.2 provides, amidst some typographic error:

> "2.2 Agreement to prevail
>
> (1) This agreement will prevail the Planning Act to the extent that it is inconsistent with the any Permit, Further Permit and/or subsequent approvals in relation to the Development."

This confirms the meaning given to words in the agreement should prevail in the event that meaning is inconsistent with their meaning in the Act.

Infrastructure charges?

[21] Infrastructure charges are a creature of the Act. Section 113 of the Act provides a local government may, by resolution, adopt charges for providing trunk infrastructure for development. Pursuant to s 119, if a development approval has been given and an adopted charge applies to providing trunk infrastructure for the development, the local government must give an infrastructure charges notice to the applicant for the development approval. Section 119 permits the issue of an amended infrastructure charges notice in replacement of an infrastructure charges notice, in the event a change application or extension application is approved in respect of the development approval. Section 121 stipulates the content of an infrastructure charges notice, including what must be stated in respect of the charge it levies. Section 122 provides for when the levied charge is payable.

[22] As already mentioned, the agreement defines infrastructure charges by reference to infrastructure charges notices contained in the agreement's schedule 3. That schedule's content is dealt with later.

Development permits?

[23] The agreement's definition of infrastructure charges refers to the infrastructure charges "associated with the Development Permits".

[24] Development permits are also a creature of the Act. Section 49 of the Act defines development permits as constituting one of two forms of development approvals, the other being a preliminary approval. Section 49 relevantly provides:

> "**49 What is a *development approval*, *preliminary approval* or *development permit***
>
> (1) A ***development approval*** is –
>
> (a) a preliminary approval; or
>
> (b) a development permit; or
>
> (c) a combination of a preliminary approval and development permit.
>
> (2) A ***preliminary approval*** is the part of a decision notice for a development application that –

(a) approves the development to the extent stated in the decision notice; but
(b) does not authorise the carrying out of assessable development.

(3) A ***development permit*** is the part of a decision notice for a development application that authorises the carrying out of the assessable development to the extent stated in the decision notice. …"

[25] The Act defines development broadly, as follows:

"**development** means –
(a) carrying out –
(i) building work; or
(ii) plumbing or drainage work; or
(iii) operational work; or
(b) reconfiguring a lot; or
(c) making a material change of use of premises."

[26] Section 63 of the Act allows for decision notices to vary development approvals, in response to applications which include variation requests.

Answering the determinative question

[27] The determinative question in the case is, what are the infrastructure charges to which clause 6.3 refers?

[28] As earlier mentioned, the developer contends for an ambulatory interpretation to embrace charges associated with development under "any successors to or variants of" the schedule 1 development permits, obtained prior to the sunset date. An apparent constraint on that contention is that the agreement's definition of development permits confines them to the development permits "as set out in Schedule 1".

[29] Further, that schedule uses very specific identifying language, namely:

"**SCHEDULE 1**
Development Permits

CRC[6] Reference	**Decision Date**	**Permit type**	**Description**
8/7/3305 (#5028457)	26 February 2016	Development Permit	Material Change of Use – Permissible change (52 x Multiple dwellings)
8/30/160 (#5369780)	1 March 2017	Preliminary Approval and Development Permit	Part A. (Development Permit) Stage 1a – 1 Lot into 8 Lots

[6] Cairns Regional Council.

			Stage 1b – 1 Lot into 4 Lots Part B. (Preliminary Approval) Stage 2 – 52 Lots
8/13/2039 (#5409183)	11 April 2017	Development Permit	Reconfiguration of a Lot (23 Lots)
8/30/246 (#5633875)	15 December 2017	Development Permit	Reconfiguration of a Lot (1 into 2 Lots)"

[30] Another apparent constraint on the interpretation urged by the developer is that the words "Infrastructure Charges" are defined not merely by reference to their association with the development permits but also by them being charges "levied via infrastructure charges notices contained in schedule 3, as increased by any reassessment". Schedule 3 provides:

> "**SCHEDULE 3**
> **Adopted Infrastructure Charges notices and Infrastructure Charges Decision Notice**
> 8/7/3305 (#5028457)
> 8/30/160 (#5369780)
> 8/13/2039 (#5409183)
> 8/30/246 (#5633901)"[7]

[31] The inclusion in the agreement's definition of infrastructure of the words "as increased by any reassessment" provides some support to the developer's argument, in that the words suggests a degree of ambulatory reach. It is in the nature of development approvals under the Act that variation requests may prompt variation of the approval.[8] It follows, that there may sometimes be more than one iteration of an infrastructure charges notice, with a reassessment resulting from the variation approval. The definition of infrastructure charges allows for that possibility, inferentially including re-assessed versions of infrastructure charges notices listed in schedule 3, associated with variation approvals of the development permits listed in schedule 1. However, the way in which the definition is anchored to charges levied in the four infrastructure charges notices listed in schedule 3 tells against extending its reach to any greater degree than that. There remains a need for the relevant infrastructure charge notice and development permit to be a version, even if varied, of one of the notices and permits listed in the agreement's schedules.

[32] There were aspects of the developer's argument which seemed to assume that, as the permitted stages of the development progressed and further development permits issued, there was some replication of the development required so that subsequent infrastructure charges notices levied charges in respect of work previously permitted, effectively

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[7] The four sets of numbers listed in the schedule are Council's reference numbers for the issued notices. The first three of those sets of numbers correspond with the reference numbers for the first three development permits listed in schedule 1. The fourth set of reference numbers in schedule 3 are not the same as those for the fourth development permit listed in schedule 1 but nothing turns upon that difference.

[8] See s 61 of the Act.

levying repeat charges for the same development work. The below discussion of the development permits and infrastructure charges notices do not support that categorisation. There was an inevitable geographical overlap in the location of some work but the facts do not support the conclusion that the works required for the various permitted stages were the same works.

[33] At a superficial level the words "associated with the development" in clause 6.3 could suggest the waiver is of all infrastructure charges associated with the development completed by the sunset date. Why, it might be asked, would those words otherwise be included? Why not just leave them out and end the clause after the words "Infrastructure Charges"? The answer lies in the prospect that some of the development approved by development permits in schedule 1 of the agreement may have been completed by the sunset date and some may not have been. It will be recalled development is defined by reference to the "proposed development as described in the Development Permits". The language of clause 6.3 allows for those components of the infrastructure charges relating to the completed components of development described in the development permits to be waived. In that situation the clause would operate in a logical and fair way so as to waive only that extent of the amounts charged in the relevant infrastructure charges notices as relates to the completed components of development described in the development permits.

[34] Council submitted such reference to what has been completed ought be confined to which of the development permits has had the described development completed, making it an all or nothing equation regarding each permit. However, the clause's words give no cause for such confinement. If some components of the work described in one development permit in schedule 1 have been completed and some not completed, the terms of clause 6.3 would operate to waive any infrastructure charges specifically associated with the completed components of the described development.

[35] Further, bearing in mind the agreement's definition of "development", the clause's reference to "the development that is completed" places its operative focus not on abstract considerations but on whether development "as described in" the development permits has actually been completed. This is, by implication, a reference to physical development. Such an interpretation is consistent with the agreement's clear purpose of inducing expenditure "on the development".

[36] This focus upon the occurrence of expended development tells against the relevance of Council's emphasis in submissions on the fact that development for a reconfiguration is only regarded as completed on registration of a survey plan and development for a material change of use is only regarded as completed when the change of use has occurred in respect of every lot. It is not to the point when the development might be legislatively or bureaucratically deemed to be completed, for the agreement's terms are obviously meant to focus upon the extent of actual physical completion of the development described in the development permits. The Act's definition of development does not advance matters because the agreement is more specific than that definition in identifying the nature of the development it is referring to.

[37] A development permit here in issue permits a material change of use by which 52 dwellings may be constructed. The permit's most recent iteration imposes a condition

that upon "completion of the development in its entirety" written notice must be given to council that the development complies with the permit.[9] Council would apparently have it that the development has not occurred until it has been completed in entirety. The relevant infrastructure charges notice calculates the charges proportionately, by a charge applicable to each dwelling. Applying Council's interpretation, the fact that some (but not all) of those dwellings had been constructed by the sunset date would not result in a proportionate waiver of the total charged amount. Such a conclusion is at odds with the inclusion in the waiver clause of the words "the development that is completed". It will be recalled "development" is defined as "the proposed development as described in the development permits". Clause 6.3's use of the words "the development that is completed" thus contemplates the waiver may apply to such of the proposed development described in the development permits as has been completed.

[38] Other permits here in issue permit reconfiguring a lot. Council emphasises that reconfiguring a lot involves creating lots by subdividing another lot[10] which, as was observed in *Gladstone Regional Council v Homes R Us (Australia) Pty Ltd*,[11] "occurs upon registration of a plan of subdivision, which can occur only after the plan of subdivision is approved by the local government". Thus, Council would have it that entire process must be completed for the development referred to in the agreement to have been completed. However, as already explained, the agreement's language is referable not to completion in the abstract but to completion of the proposed development as described in the development permits. That development, as is explained below, involved the civil construction works necessary for the reconfiguration.

[39] Clause 2.2 of the agreement fortifies my conclusion that the agreement's requirement for completion of development described in the permits relates to the physical development described in the permits, and not the permits' merely procedural completion conditions. It is clear from that clause that the agreement will prevail in the event of an inconsistency between its terms and that of a permit or approval under the Planning Act.

[40] Applying the agreement's definitions the correct interpretation of clause 6.3 is: Clause 6.3 waives the requirement for payment of such infrastructure charges as are associated with the schedule 1 development permits (or approved variations of those permits) and are levied via the schedule 3 infrastructure charges notices (or reassessment versions of those notices) to the extent the charges are associated with the physical development that is described in the schedule 1 development permits (or approved variations of those permits) and is completed by the sunset date.

[41] Before applying that interpretation of the waiver to the infrastructure charges in issue it is helpful to first review the effect of the four development permits described in the agreement's schedule 1.

The development permits

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9 Ex 3 p 210 [4].
10 See schedule 2 of the Act and *Sustainable Planning Act 2009* (Qld) ss 7, 10.
11 (2015) 209 LGERA 302, 307 [13].

[42] I will for convenience refer to the four permits sequentially listed in schedule 1 as the first, second, third and fourth development permits respectively.

First permit

[43] The first development permit took the form of a decision notice dated 26 February 2016 with annexures. The decision notice details included:

> "**REAL PROPERTY DESCRIPTION**
> Lot 1 on RP 167068
>
> **PROPOSAL**
> Multiple dwelling to 52 x Multiple Dwellings …
>
> **TYPE**
> Material Change of Use (Development Permit)"[12]

[44] The annexures to this material change of use ("MCU") decision notice included approved drawings of "proposed residences". The "assessment manager conditions" in the decision notice details require the assessment manager to "carry out the approved development generally in accordance with the approved drawing(s) and/or document(s)" and in accordance with the specifications, facts and circumstances set out in the application submitted to Council, as well as various conditions of approval also included in the decision notice. It is readily apparent from the content of the decision notice that the proposed development as described in the development permit involved the construction of multiple dwellings, some 52 in all.

[45] Other conditions in the decision notice details included requirements as to minimum building setbacks, site coverage, amenity, vehicle crossover, water supply and sewerage works internal, damage to infrastructure, landscaping plan, fencing, existing creek and drainage systems, lawful point of discharge, minimum fill and floor levels, air-conditioning, plant and machinery screens, noise, sediment and erosion control, ponding and/or concentration of stormwater and electrical supply. The conditions also included the following as to staging of the development:

> "**Staging**
>
> 6. Unless otherwise agreed to by the Chief Executive Officer, staging of the development must be carried out in accordance with the table below:

Stage	No. of Lots	Lots
Stage 1	18	3-13, 35-41
Stage 2	17	14, 23-29, 42-50
Stage 3	17	16-21, 3034 (sic – 30-34), 51-56"

[46] The undisputed evidence is that construction of dwellings on Lots 3 to 14 and 35 to 43, that is a total of 21 lots, of the development had been completed by the sunset date.[13] Of

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[12] Ex 3 p 142.
[13] Ex 2 [6], where I infer the lots were listed inclusively.

those, two, namely lots 3 and 4, were three bedroom dwellings and the 19 others were two bedroom dwellings.[14]

[47] Further, by the sunset date construction had commenced but not completed on Lots 2, 15, 22 to 24, 27, 28, 31 to 33, 44, 45, 48, 49, 53 and 54, a total of 16 lots.[15] Of those, Lots 2 and 15 were not among the lots to which the permit related and the remaining 14 were two bedroom dwellings.[16]

Second permit

[48] The second development permit took the form of a decision notice dated 1 March 2017 with annexures.[17] The decision notice details included:

> "**REAL PROPERTY DESCRIPTION**
> Lot 1 on SP 167068
>
> **PROPOSAL**
> A. Stage 1a – 1 Lot into 8 Lots
> Stage 1b – 1 Lot into 4 Lots
> B. Stage 2 – ~~7 Lots into~~ 52 Lots …
>
> **TYPE**
> A. Stage 1 – Reconfiguring a Lot (Development Permit)
> B. Stage 2 – Reconfiguring a Lot (Preliminary Approval)"[18]

[49] It follows from s 49 of the Act that the decision notice was a development approval, part of which was preliminary approval and part of which was a development permit. The decision notice included as "plan(s) and document(s)" approved for the development permit a staging plan for lot reconfiguration. That plan identified the lots of the developer's property pertaining to "stage 1a" and "stage 1b".[19]

[50] The "assessment manager conditions" in the decision notice details require the assessment manager to "carry out the approved development generally in accordance with the approved drawing(s) and/or document(s)" and in accordance with the specifications, facts and circumstances set out in the application submitted to Council, as well as various conditions of approval also included in the decision notice. Other conditions in the decision notice details included requirements as to street layout and design, general external works, street lighting, electrical and telecommunications, water supply and sewerage master plan, water supply works external, water supply and sewerage works internal, inspection of sewers, damage to infrastructure, sewer easement, reserves over creeks and streams, lawful point of discharge, drainage master plan, temporary vehicle turnaround, pest management plan, sediment and erosion control, stockpiling and

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[14] See, e.g., Ex 3 p 115.
[15] Ex 2 [6].
[16] Ibid.
[17] Ex 3 pp 86-100. An earlier version of this decision notice was issued by covering letter dated 25 May 2016 – Ex 3 p 69.
[18] Ex 3 p 87.
[19] Ex 3 p 99.

transportation of fill material, storage of machinery and plant, and existing and new services.

[51] It is readily apparent from the development permit part of the decision notice, that the proposed development as described in the development permit involved the civil construction works necessary for the reconfiguration in stage 1a of one lot into eight lots and stage 1b of one lot into four lots. I adopt the term "civil construction works" to distinguish such work from that relating to dwelling construction. In so doing I am conscious it may have been work also requiring an Operational Works approval but that does not detract from its character as work described in the permit.

[52] The civil construction work was apparently completed prior to the sunset date. For example, Mr Fennell of the developer deposes:

> "The circular layout of the development meant that in order for the proposed lots to have access and services, the whole of the roads and services infrastructure, and all associated earthworks to construct the lots had to be completed early in the construction of the project, because any incomplete part of the road or services network would mean that none of it would function".[20]

The fact that the works were approached in that integrated way makes it understandable why the developer seeks to extend the reach of clause 6.3 beyond the infrastructure charges notices to which it refers so as to waive all infrastructure charges associated with lot reconfiguration.

Third permit

[53] The third development permit took the form of a decision notice dated 11 April 2017 with annexures.[21] The decision notice details included:

> "**REAL PROPERTY DESCRIPTION**
> Lot 1 on RP 167068
>
> **PROPOSAL**
> ~~Reconfiguring a Lot (3 lots into 23 Lots)~~
> A. Stage 2A: Lots 3-14 and Lots 35-43
> B. Stage 2B: Lots 44-45 …
>
> **TYPE**
> ~~Reconfiguration of a Lot (Development Permit)~~
> A. Stage 2A: Reconfiguring a Lot (Development Permit
> B. Stage 2B: Reconfiguring a Lot (Development Permit)"[22]

[54] The "approved drawing(s) and/or document(s)" attached to the decision notice in appendix 1 was an "approved plan of proposed lots 3-14 and 35-45 (stage 2) 3-14 and 35-

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[20] Ex 2 [3].
[21] Ex 3 pp 253-261.
[22] Ex 3 p 254.

43 (stage 2A) and 44-45 (2B)". The approved plan identified the aforementioned 23 lots consistently with the permit being for reconfiguring a lot.

[55] The "assessment manager conditions" in the decision notice details require the assessment manager to "carry out the approved development generally in accordance with the approved drawing(s) and/or document(s)", and in accordance with the specifications, facts and circumstances as set out in the application submitted to Council, as well as various conditions of approval included in the decision notice. Other conditions in the decision notice details included requirements as to water supply and sewerage works internal, inspection of sewers, damage to infrastructure, sewer easement, lawful point of discharge, electrical and telecommunications, existing services.

[56] It is apparent from the content of the decision notice that the proposed development, as described in the development permit, involved the civil construction works necessary for the reconfiguration pertaining to the aforementioned lots.

[57] As already mentioned, the works of that kind were completed prior to the sunset date.

Fourth permit

[58] The fourth development permit took the form of a decision notice dated 14 December 2017 with annexures.[23] The decision notice details included:

> "**REAL PROPERTY DESCRIPTION**
> Lot 700 on SP 256180
>
> **PROPOSAL**
> Reconfiguring a Lot (1 Lot into 2 Lots) & Material Change of Use (Dwelling House) …
>
> **TYPE**
> Reconfiguring a Lot (Development Permit)
> Material Change of Use (Development Permit)"[24]

[59] It is noteworthy that the description given to this development permit in schedule 1 of the agreement was "reconfiguration of a lot (1 into 2 lots)" yet the decision notice matching the schedule 1 Council reference for the fourth permit alludes to two types of development permits, namely for reconfiguration of a lot and material change of use.

[60] The annexures to the decision notice include annexed "approved drawing(s) and/or document(s)" for "part A: reconfiguring a lot (1 lot into 2 lots)" as well as "approved drawing(s) and/or document(s)" for "part B: material change of use (for a dwelling house on each approved lots 44 and 45)". The attachment for "reconfiguring a lot (1 lot into 2 lots)"[25] contains a plan of the development identifying the two lots resulting from the reconfiguration. On the other hand, the annexed approved drawings and documents for

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[23] Ex 3 pp 264-292.
[24] Ex 3 p 265.
[25] Ex 3 p 274.

"part B: material change of use (for a dwelling house on each approved lots 44 and 45)" are drawings of the proposed residences, detailing two bedrooms in each.

[61] The "assessment manager conditions" for the reconfiguration of a lot component of the decision notice details require the assessment manager to "carry out the approved development generally in accordance with the approved drawing(s) and/or document(s)" and in accordance with the specifications, facts and circumstances as set out in the application submitted to Council, as well as various conditions of approval also included in the decision notice. Other conditions in this component of the decision notice include requirements as to water supply and sewerage works internal, damage to infrastructure, lawful point of discharge, existing and new services, sediment and erosion control, ponding and/or concentration of stormwater, and electricity and telecommunications supply.

[62] The "assessment manager conditions" in the decision notice details for the material change of use component are in the same terms as those for the reconfiguring a lot component. However, the other conditions for the reconfiguring a lot component of the notice are different and include minimum building setbacks, site coverage, amenity, vehicle crossover, damage to infrastructure, landscaping plan, fencing, lawful point of discharge, minimum fill and floor levels, air-conditioning plant and machinery screens and noise.

[63] It is thus apparent from the content of the decision notice that the proposed development as described in the development permit for reconfiguring a lot involved civil construction works, whereas the proposed development is described in the development permit for material change of use involved the construction of two dwellings.

[64] As already discussed, by the sunset date the civil construction works component of the entire development had been completed, however the construction of dwellings on Lots 44 and 45 had been commenced but not completed.[26]

Which infrastructure charges are subject to the waiver?

[65] It is convenient to now deal with each of the potentially relevant infrastructure charges to determine whether, and if so to what extent, the requirement to pay them is waived by clause 6.3.

First infrastructure charges notice in schedule 3

[66] The first infrastructure charges notice specified in schedule 3 relates to Council reference 8/7/3305 (#5028457).

[67] It is an adopted infrastructure charges notice issued by a covering letter dated 26 February 2016.[27] Its Council reference numbers correspond to the aforementioned first development permit sent by Council on the same date. A notice in identical terms was

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[26] Ex 2 [6].
[27] Ex 3 pp 172, 173.

also issued by a covering letter dated 6 November 2015.[28] It related to an earlier version of the first development permit.[29]

[68] There were two further versions of the first development permit issued after 26 February 2016: one issued by covering letter dated 31 May 2016,[30] the other by covering letter dated 18 May 2018.[31] They each attached identical copies of the adopted infrastructure charges notice already issued by the covering letter dated 26 February 2016, indeed they re-enclosed copies of that covering letter.[32]

[69] The adopted infrastructure charges notice[33] imposes a total charge of $851,120.52. The notice lists the date payable as:

> "MCU – Before the change occurs".

[70] Self-evidently, the above reference to "the change" is to a material change of use. The adopted infrastructure charges notice lists fresh charges for the "proposed land use", consisting of a use charge of $14,869.40 per dwelling in respect of 48 multiple dwelling two bedroom dwellings totalling $713,731.17 and a use charge of $20,015.18 with respect to eight multiple dwelling three or more bedroom dwellings totalling $160,122.42. The total to which this gives rise, of $873,852.59, is reduced to a total of $851,120.52 by the amount of $22,732.07 which is listed as the existing land use charge for one dwelling house three or more bedroom dwelling.

[71] Those charges are associated with the first development permit, which was the material change of use permit relating to the construction of multiple dwellings, some 52 in all. Development attracting the charges was part completed by the sunset date. Construction of dwellings on 21 lots was wholly completed. Construction of dwellings on 14 lots had commenced but had not been completed.

[72] I have already found that the proposed development, as described in the first development permit, involved the construction of 52 dwellings. The more recent iterations of the first development permit do not alter that categorisation of the development. Because construction of 21 of those dwellings was completed by the sunset date, it is clear the waiver in clause 6.3 should operate to reduce the aforementioned infrastructure charges by at least the amount attributable to that quantity. Two of the completed dwellings, those on Lots 3 and 4, were three bedroom dwellings, each of which attracted a charge of $20,015.18, a subtotal of $40,030.36. The remaining 19 completed dwellings were two bedroom dwellings, each of which attracted a charge of $14,869.40, a subtotal of $282,518.60. This gives rise to a total waiver of $322,548.96 of the amount charged in the infrastructure charges notice that is attributable to the completed construction of dwellings.

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[28] Ex 3 pp 138, 139.
[29] Ex 3 pp 103-137.
[30] Ex 3 p 174.
[31] Ex 3 p 206.
[32] Ex 3 pp 205-205, 240-241.
[33] Ex 3 p 173.

[73] The thornier question is whether there ought also be a reduction in respect of the construction of dwellings which had commenced but not been completed by the sunset date. At first blush the developer's position seems supported by the fact the adopted infrastructure charges notice describes the "date payable" as being "before" the material change of use occurs. The argument would be that the requirement to pay, which has been waived, was a requirement to pay before the change occurred. Thus, once the change commenced, so long as it commenced prior to the sunset date, the charge relating to it was waived. However, such an interpretation is inconsistent with a material change of use occurring at the start of a new use of premises.[34] Partial construction of a dwelling is hardly a use of the dwelling. The interpretation is also inconsistent with the words of clause 6.3. If it were correct, the relevant words of clause 6.3 would refer to the Infrastructure Charges associated with the "development that is commenced by the sunset date". Instead, clause 6.3 refers to the infrastructure charges associated with "the development that is completed by the Sunset Date". In this instance the proposed development as described in the relevant development permit was the construction of dwellings on the relevant lots. The terms of the waiver only apply to dwellings, the construction of which "is completed" by the sunset date.

[74] It follows the waiver applies to reduce the requirement to pay the total infrastructure charge of $851,120.52 by the abovementioned amount of $322,548.96.

Second infrastructure charges notice in schedule 3

[75] The second infrastructure charges notice specified in schedule 3 relates to Council reference 8/30/160 (#5369780).

[76] It is an adopted infrastructure charges notice issued by a covering letter dated 1 March 2017.[35] Its Council reference numbers correspond to the aforementioned second development permit sent by Council on the same date (it will be recalled the decision notice containing the second development permit also contained a preliminary approval). Other iterations of the same infrastructure charges notice were issued by covering letters dated 14 May 2015,[36] 28 July 2015[37] and 23 May 2016.[38]

[77] Consistently with the second development permit relating to reconfiguring a lot, the adopted infrastructure charges notice lists various charges for water, wastewater, transport, drainage, public park and community land and other contributions (specifically, public art contribution). The total of those charges is $264,854.62.

[78] The infrastructure charges being associated with the second development permit, that is a development permit in schedule 1 of the agreement, are deemed waived by clause 6.3 of the agreement to the extent that the development described in the development permit was completed by the sunset date. As explained earlier, the works described in the second development permit were civil construction works and were completed by the sunset date.

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[34] *Jerry v Maroochy Shire Council & Anor* [2005] QPELR 666, 676.
[35] Ex 3 pp 101, 102.
[36] Ex 3 pp 17, 18.
[37] Ex 3 pp 33, 34.
[38] Ex 3 pp 67, 68, 84, 85.

It follows, pursuant to clause 6.3 of the agreement, that the requirement for payment of the whole of the second infrastructure charges notice in schedule 3 is waived.

Third infrastructure charges notice in schedule 3

[79] The third infrastructure charges notice specified in schedule 3 relates to Council reference 8/13/2039 (#5409183).

[80] It is an adopted infrastructure charges notice issued by covering letter dated 11 April 2017.[39] That letter's Council reference numbers correspond to the aforementioned third development permit sent by Council on the same date.[40] Another iteration of the same notice was sent by letter dated 1 March 2017.[41]

[81] The adopted infrastructure charges notice imposes a total charge of $536,468.27. It itemises a "use charge" of $23,324.71 per dwelling in a quantity of 24, giving rise to a charge of $559,792.98. That amount is reduced by a quantity of one, there having been a reconfiguration, to give rise to a total charge in an amount of $536,468.27.

[82] It will be recalled the development described in the third development permit was the civil construction works necessary for the reconfiguration of the lots and those works were completed by the sunset date. It follows the requirement for payment of the whole of the third infrastructure charges notice in schedule 3 is waived.

Fourth infrastructure charges notice in schedule 3

[83] The fourth infrastructure charges notice in schedule 3 is identified by Council reference 8/30/246 (#5633901). That infrastructure charges notice was sent by covering letter dated 14 December 2017,[42] which is the same date as the letter sending the fourth development permit, which permitted both reconfiguration of a lot and material change of use.

[84] The charge levied in the notice is $47,157.39 and relates to a "use charge" of $23,578.70 for a quantity of two. The use is described as "dwelling house – three or more bedroom dwelling".

[85] Consistently with the fourth development permit, the type of development approval mentioned in the first page of the infrastructure charges notice is "reconfiguring a lot (1 lot into 2 lots) and material change of use (dwelling house)".[43] It will be recalled schedule 3 of the agreement only described the reconfiguration of a lot component of this permit.

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[39] Ex 3 pp 262, 263.
[40] Curiously the file number on the notice is different than the file number on the letter attaching it but no issue was taken about that.
[41] Ex 3 pp 251, 252.
[42] Ex 3 pp 293-297.
[43] Ex 3 p 295.

[86] Appendix A to the notice, which actually calculates the levied charge, describes the "Development Type" as ROL, an abbreviation for reconfiguration of a lot.[44] This reveals the calculation of the levied charge relates to reconfiguring a lot, which was the relevant description of the fourth permit in schedule 3. I have already found the proposed development as described in that part of the permit pertaining to lot reconfiguration was civil construction work (as distinct from dwelling construction) and that work was completed by the sunset date.

[87] It follows, pursuant to clause 6.3, that the requirement for payment of the whole of the fourth infrastructure charges notice in schedule 3 is waived.

Infrastructure charges notice Council reference 8/13/2128 (5755524)

[88] By letter of 17 May 2018 file reference 8/13/2128 (5755524) Council issued an infrastructure charges notice levying a charge of $447,995.24.[45] The charge was a "use charge" of $23,578.70 in a quantity of 19. The nominated use was "dwelling house – three or more bedroom dwelling". The "Development Type" was described in the notice as "ROL", that is, reconfiguration of a lot. This infrastructure charges notice is not listed in schedule 3 and Council contends it is not waived by clause 6.3.

[89] On the same date as its issue of this infrastructure notice, Council also issued a decision notice giving a development permit.[46] The decision notice included the following particulars:

> "**REAL PROPERTY DESCRIPTION**
> Lots 6 and 8 on SP 284412 and Lots 23 and 24 on SP 256179
>
> **PROPOSAL**
> Reconfiguring a Lot (4 lots into 19 Lots plus balance lot) …
>
> **TYPE**
> Reconfiguration of a Lot (Development Permit)"

[90] The reconfiguration cancelled Lots 23 and 24 and Lots 6 and 8, giving rise to Lots 17 to 20, 23, 24, 27, 28, 31 to 34, 46 to 49, 53, 54, 56 and Lot 100 as the so-called "balance lot".

[91] The decision notice annexed an approved preliminary survey plan and siting plan. The notice's conditions required this assessment manager to "carry out the approved development generally in accordance with the approved drawing(s) and/or document(s)" and in accordance with the specifications, facts and circumstances as set out in the application submitted to Council as well as other conditions of approval. Those conditions included requirements as to the building envelope plan, water supply and sewerage works internal, landscape plan, damage to infrastructure, lawful point of discharge, electrical and telecommunications, and existing services.

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[44] Ex 3 p 297.
[45] Ex 3 pp 375-385.
[46] Ex 3 pp 360-374.

[92] None of the development described by this permit is development described in the four development permits listed in schedule 1 of the agreement. The developer emphasises this permit introduced for the first time, compared to previous permits, a requirement for a building envelope plan. That point might have been relevant if such a requirement was merely added as a variation to a development permit listed in schedule 1 of the agreement. But this permit is not a variation to those permits.

[93] Three of the schedule 1 permits (the second, third and fourth) relate to reconfigurations of lots. That, at least, is something they share with this permit. But they are not reconfigurations of the lots described by this permit. It is true that there is a geographic overlap between the location of the lots described in this permit and earlier permits, such as the second development permit which involved more generalised lot reconfigurations. However, the evidence does not suggest the development required was identical or overlapped to such an extent that development required in respect of one development permit was, within the meaning of clause 6.3, "associated" with development described in the other. It is not to the point the civil construction works required for this reconfiguration was completed by the sunset date. It was not development associated with the development described in the development permits in schedule 1.

[94] In addition, the fact the infrastructure charges notice now under discussion was not levied via the infrastructure charges notices listed in schedule 3 further distances it from the reach of the waiver. The waiver in clause 6.3 has no application to the requirement to pay this infrastructure charges notice.

Infrastructure charges notice Council reference 8/13/2152 (5787991)

[95] By letter dated 22 June 2018, Council reference 8/13/2152 (5787991) Council sent an infrastructure charges notice for $235,786.97.[47] The charge was constituted by a so-called use charge of $23,578.70 in a quantity of 10. The use was described as "dwelling house – three or more bedroom dwelling". The notice described the "development type" as "ROL", that is, reconfiguration of a lot. It related to the reconfiguration of Lot 100 into 10 lots, a development permit for which was also given in a letter of 22 June 2018 enclosing the associated decision notice.[48]

[96] The decision notice annexed approved preliminary survey plans relating to the reconfiguration. The notice's conditions required the assessment manager to "carry out the approved development generally in accordance with the approved drawing(s) and/or document(s)" and in accordance with the specifications, facts and circumstances as set out in the application submitted to Council, as well as other conditions of approval. Those conditions included requirements relating to the building envelope plan, water supply and sewerage works internal, landscape plan, damage to infrastructure, lawful point of discharge, electrical and telecommunications, and existing services.

[97] As with the development permit just discussed, the lots being reconfigured pursuant to this permit were not lots which were also reconfigured pursuant to any of the four development permits listed in schedule 1 of the agreement. Once again, the only

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[47] Ex 3 pp 425-428.
[48] Ex 3 pp 410-424.

connection is mere geographic overlap, not identical or materially overlapping development.

[98] The reasoning just explained in respect of infrastructure charges notice Council reference 8/13/2128 (575524) applies in the same way to this infrastructure charges notice. The requirement to pay it is not waived by clause 6.3 of the agreement.

Conclusion

[99] The parties each seek declaratory relief to resolve their controversy. In light of my findings it is the only form of relief required. I will make declarations reflecting my findings.

Orders

[100] My orders are:

1. It is declared that pursuant to clause 6.3 of the parties' agreement, the requirement for payment of:

   (a) adopted infrastructure charges notice Council reference 8/7/3305 (5028457) (the first notice referred to in schedule 3 of the agreement) is partly waived so that $322,548.96, of the charged total of $851,120.52, is not required to be paid;

   (b) adopted infrastructure charges notice Council reference 8/30/160 (5369780) (the second notice referred to in schedule 3 of the agreement) is wholly waived;

   (c) adopted infrastructure charges notice Council reference 8/13/2039 (5409183) (the third notice referred to in schedule 3 of the agreement) is wholly waived;

   (d) infrastructure charges notice Council reference 8/30/246 (5633901) (the fourth notice referred to in schedule 3 of the agreement) is wholly waived;

   (e) infrastructure charges notice Council reference 8/13/2128 (5755524) is not waived;

   (f) infrastructure charges notice Council reference 8/13/2152 (5787991) is not waived.

2. I will hear the parties as to costs, if costs are not agreed in the interim, at 9.15 am 17 July 2019.