HIGH COURT OF AUSTRALIA

NOTICE OF FILING

This document was filed electronically in the High Court of Australia on 01 Dec 2020 and has been accepted for filing under the *High Court Rules 2004*. Details of filing and important additional information are provided below.

Details of Filing

File Number:	B64/2020
File Title:	Sunland Group Limited & Anor v. Gold Coast City Council
Registry:	Brisbane
Document filed:	Form 27A - Appellant's submissions
Filing party:	Appellants
Date filed:	01 Dec 2020

Important Information

This Notice has been inserted as the cover page of the document which has been accepted for filing electronically. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties and whenever the document is reproduced for use by the Court.

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B64 of 2020

BETWEEN: **SUNLAND GROUP LIMITED ACN 063 429 532**
First Appellant

SUNLAND DEVELOPMENTS NO 22 ACN 164 903 011
Second Appellant

10 and

GOLD COAST CITY COUNCIL
Respondent

APPELLANTS' SUBMISSIONS

Part I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: ISSUES

2. (*Appeal issue 1*) Do conditions of a development approval about infrastructure contributions impose an obligation to make those contributions, or are they mere
20 statements as to the scope of further conditions to be imposed under a future approval?

3. (*Appeal issue 2*) Should an ambiguity in the conditions about the time for payment of the contributions be resolved *contra proferentem* against the Respondent, so that the time for payment is the time of approval of a development permit (or a reasonable time thereafter)?

4. (*Notice of Contention issue*) Assuming the conditions in the development approval do impose an obligation to make contributions, does the Respondent nevertheless have an overriding statutory duty to issue an "infrastructure charges notice" (and so ignore the conditions)?

Part III: SECTION 78B NOTICE

30 5. No notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: CITATIONS

6. This is an appeal from the decision of the Queensland Court of Appeal in *Gold Coast City Council v Sunland Group Limited* [2020] QCA 89 (**CA Decision**) which granted leave to appeal, and allowed an appeal, from the decision of the Planning and Environment Court of Queensland in *Sunland Group Limited v Gold Coast City Council* [2019] QPELR 770 (**P&E Decision**).

Part V: STATEMENT OF FACTS

7. The Second Appellant (**Sunland 22**) is part of a property development group of companies which is controlled by the First Appellant (**Sunland**).

10 8. On 29 May 2015, Sunland 22 completed a $60 million purchase of a large parcel of undeveloped land located at Mermaid Beach on the Gold Coast (the **Land**),[1] within the local government area of the Respondent (the **Council**).

9. The Land was an attractive development site because it benefited from a development approval granted (by court order) in 2007.[2] The approval was a "*Preliminary Approval*" (a type of "*development approval*"[3]) granted under s.3.1.6 of the *Integrated Planning Act 1997* (Qld) (the **IPA**)[4], which approved a multi-stage residential development called "*Lakeview at Mermaid*".[5] The approval was subject to a series of stated conditions (the **Conditions**)[6] and also contained a separate "*General Advice*" section which dealt with matters expressly said not to be conditions.[7]

20 10. Four of the Conditions (numbered 13 to 16) dealt with the payment of infrastructure contributions to the Council.[8] Two of these Conditions provided for existing credits to be applied to offset the contributions payable.

11. It is sufficient to set out, as examples, conditions 13 and 15, which provide:

> 13. Contributions toward Recreational Facilities Network Infrastructure shall apply at the time application is made for a Development Permit. The

---

1 Appellants' Book of Further Materials (**ABFM**), p 41 (paragraphs 16 – 17).

2 ABFM, p 37 (paragraph 1). Like all such approvals, the Preliminary Approval runs with the Land: see *Integrated Planning Act 1997* (**IPA**), s 3.5.28; *Sustainable Planning Act* 2009 (Qld) (**SPA**), s 245; *Planning Act 2016* (Qld) (**Planning Act**), s 73.

3 IPA, Sch 10, definition of "*development approval*".

4 Core Appeal Book (**CAB**), p 8 (P&E Decision at [2]); ABFM, p 37 (paragraph 2).

5 The Preliminary Approval is at ABFM, pp 6 – 25.

6 ABFM, pp 3 – 20.

7 ABFM, pp 20 – 21.

8 CAB, p 8 (P&E Decision at [2]).

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.

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.

10 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.

12. Since the grant of the Preliminary Approval, the Planning Scheme Policies referred to in Conditions 13 to 16 have been superseded and repealed. However, the Council has continued to publish up-to-date rates for those Planning Scheme Policies, so that the current rates for those policies can be readily determined.[9]

13. The Preliminary Approval had an initial term of 4 years,[10] but as explained below, this period has since been extended by the Council on two occasions, and it remains current.

20 14. At the time Sunland 22 completed the purchase of the Land in 2015:

a. the IPA had been repealed and replaced with the *Sustainable Planning Act 2009* (Qld) (the **SPA**);

b. the Preliminary Approval had been preserved by transitional provisions in the SPA (ss 801 and 808);

c. the Council had decided, under Chapter 6, Part 8, Division 5 of the SPA, to extend the currency period of the Preliminary Approval beyond its initial 4 year term;[11]

d. the SPA had itself been amended by:

---

9 ABFM, p 38 (paragraph 5); ABFM, pp 28 – 35. And, as explained below, the Appellants have the benefit of saving provisions notwithstanding the repeal of the planning instruments referred to in the Preliminary Approval: compare *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 506.

10 IPA, s.3.5.21(1)(a).

11 ABFM, p 38 (paragraph 4); CAB, p 9 (at [4]).

i. the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act* 2011 (Qld) (**2011 Amending Act**), which changed the way infrastructure contributions were to be calculated and levied (as further explained below).[12]

ii. the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendments Act 2014* (Qld) (**2014 Amending Act**),[13] which amended certain provisions relating to giving infrastructure charges notices.

15. Prior to Sunland 22 contracting to purchase the Land (but after the 2011 Amending Act and the 2014 Amending Act had commenced), the Council had confirmed in
10 writing on two occasions the continued operation of Conditions 13 to 16 of the Preliminary Approval and the continued availability of the infrastructure credits referred to in Conditions 15 and 16.[14]

16. Subsequently:

a. between 16 December and 30 September 2016, Sunland lodged a series of development applications for the Land, and the Council decided to grant development permits in respect of those applications.[15] At the same time, the Council issued "*infrastructure charges notices*" under the SPA which did not assess infrastructure contributions (or allow credits) in accordance with Conditions 13 to 16 of the Preliminary Approval;[16]

20 b. the Council again decided to extend the currency period of the Preliminary Approval (and it remains in effect until 2023);[17]

c. on 3 July 2017 the *Planning Act* 2016 (Qld) (**Planning Act**) commenced, which repealed and replaced the SPA;

d. the Planning Act preserved the Preliminary Approval under s 286 (to which we return below).

---

12 *Gladstone Regional Council v Homes R Us (Australia) Pty Ltd* [2015] QCA 175 at [2].
13 The 2014 Amending Act commenced on 4 July 2014.
14 ABFM, pp 39 – 41 (paragraphs 13 and 15).
15 ABFM, p 41 (paragraphs 18 and 19).
16 ABFM, p 41 (paragraphs 20 and 21); CAB, p 9 (at [5]).
17 ABFM, p 38 (paragraph 4).

17. Because of the legislative changes referred to above, the statutory landscape relating to infrastructure contributions was, by the time the matter came before the Planning and Environment Court in 2019, materially different from that which applied when the Preliminary Approval was granted in 2007. By 2019, *new* development permits could no longer be made subject to fresh conditions requiring the payment of infrastructure contributions. That earlier mechanism had been replaced with a different regime of imposing "*infrastructure charges*" by giving "*infrastructure charges notices*" in accordance with a infrastructure charges resolution which provided for "*adopted charges*".[18] Despite this, both the SPA and the Planning Act expressly preserved the

10 operation of existing conditions requiring payment of infrastructure contributions. The SPA (as amended by the 2011 Amending Act) relevantly did so by s 880, which provided that the new regime "*does not stop a local government... <u>collecting</u> an infrastructure contribution payable under a condition lawfully imposed under a planning scheme policy...*".[19] The Planning Act (now in effect) does so by s 286 which provides that an existing approval (which includes a preliminary approval) "*continues to have effect according to the terms and conditions of the document, even if the terms and conditions could not be imposed under [the Planning Act]*"[20].

18. The Appellants continue to develop the Land in accordance with the Preliminary Approval, including by seeking further development permits for development

20 approved by the Preliminary Approval.[21]

19. However, the Council has stated that it will not give effect to Conditions 13 to 16 in relation to applications by Sunland under the Preliminary Approval for development permits.[22] The view it urges seems to be that it has no power to do other than impose infrastructure charges under the infrastructure charges regime which, it contends, wholly displaces the conditions with which this Appeal is concerned.

---

18 SPA, ss 630, 635, 880; Planning Act, ss 66(c)(i), 119.
19 SPA, s 880(3)(b)(ii) (emphasis added).
20 Planning Act, s 286(2).
21 ABFM, p 42 (paragraph 24).
22 ABFM, pp 41 – 42 (paragraphs 21 and 24).

Part VI: ARGUMENT

Overview

20. A preliminary approval "*approves*" but does not "*authorise*" relevant development[23] and so contemplates that further approvals ("*development permits*") will be sought by reference to the preliminary approval. However, a condition in subsequent development permit may not be inconsistent with the conditions of a preliminary approval.[24]

21. A preliminary approval thus serves the valuable function of fixing the key conditions which will govern the future development of a site, providing certainty for both the Council and a developer in relation to the matters which its conditions address.[25]

10

22. Paragraphs 13 to 16 of the Preliminary Approval are *conditions* of the Preliminary Approval (not "*General Advice*"[26]). They identify the basis on which the developer of the Land will be required to make infrastructure contributions in carrying out the Lakeview at Mermaid development for so long as the Preliminary Approval remains in effect.

23. While the drafting of the conditions leaves something to be desired, objectively the intent of the conditions is plain enough. Each is expressed in mandatory language. Each specifically states that upon making an application for a development permit, contributions "*shall apply*" under specific Planning Scheme Policies and the contribution required will be calculated at the rate current (under *that* policy) at the due date for payment. Each condition was imposed pursuant to a power which allowed the Council to "*impose a condition on the development approval requiring... a contribution towards the cost of supplying infrastructure...* ".[27]

20

---

23 IPA, s 3.1.5(1) and (5); SPA, s 241; Planning Act, s 49(2); CAB, p 35 (at [18]).

24 IPA, s 3.5.32(1)(a); SPA, s 347(a); Planning Act, s 66(2). The Planning Act further provides, in s 49(4), that a preliminary approval applies "*instead of*" a later development permit to the extent of any inconsistency, subject to limited and irrelevant exceptions.

25 Similar mechanisms exist in other States: see e.g. *Planning, Development and Infrastructure Act 2016* (SA), s 120 and *Environmental Planning and Assessment Act* 1979 (NSW), ss 4.21 to 4.24. See also *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at [36] and [41].

26 ABFM, p 25.

27 IPA, s 6.1.31(2)(c).

24. Conditions 13 to 16 are thus just what they appear to be: conditions requiring a contribution towards the cost of supplying infrastructure worked out by reference to specifically identified policy documents.

25. In overturning the P&E Decision, the Court of Appeal adopted an unconventional and incorrect approach to construing these conditions. It concluded that the conditions "*did not themselves create an obligation to pay*" infrastructure contributions[28] so that "*no infrastructure contribution was payable by force of the Preliminary Approval*".[29] Rather, the Court of Appeal held that Conditions 13 to 16 operated as mere "*clauses*"[30] which (at most) had the effect of imposing a future constraint on the *Council* in approving subsequent development permits.[31] That is, Conditions 13 to 16 were clauses which (merely) foreshadowed the future imposition of an obligation to pay when a further (real) condition was imposed upon the grant of later development permit.[32]

26. The consequence of this conclusion was that although the Preliminary Approval remains operative in all other respects, Conditions 13 to 16 have become defunct. They have become defunct because the statutory power of the Council to impose *fresh* conditions requiring the payment of infrastructure contributions when granting future development permits no longer exists.[33]

27. The Court of Appeal's conclusions ultimately involved a failure to properly give effect to the statutory context in which the Preliminary Approval was granted and the relevant transitional provisions since enacted and, ultimately, a failure to construe Conditions 13 to 16 in accordance with the applicable principles of construction governing development approvals.

Development approvals and conditions

28. The giving of approvals subject to conditions is a basic feature of Australian planning and environment legislation.[34] The conditions imposed by an approving authority,

---

28 CAB, p 38 (at [26]) and pp 44 – 45 (at [51]).
29 CAB, p 45 (at [52]).
30 CAB, pp 37 – 38 (at [25] – [26]).
31 CAB, p 38 (at [26]), pp 44 – 45 (at [51]).
32 CAB, pp 44 – 45 (at [51]).
33 SPA, s 880; Planning Act, s 66(1)(c).
34 See e.g. *Planning and Environment Act 1987* (Vic) ss 47, 61 and 62; *Environmental Planning and Assessment Act 1979* (NSW) ss 4.12, 4.16 and 4.17; *Planning, Development and Infrastructure Act 2016* (SA) ss 119, 126 and 127; *Planning and Development Act 2005* (WA) ss 99, 103, 115, 116;

provided they are for a proper planning purpose, operate to delimit the way in which a person may take the benefit of an approval.[35]

29. The process for imposing conditions and the kinds of conditions which may (and may not) be imposed by an approving authority are matters regulated by statute. It is basic to the statutory scheme governing approvals in Queensland (and elsewhere) that:

   a. the "*conditions*" of a development approval form part of the approval;[36]

   b. conditions must be "*reasonable or relevant*";[37]

   c. contravention of a condition is a "*development offence*".[38]

10 30. For the purposes of these matters, there is no distinction referable to the type of development approval given (i.e. a preliminary approval or a development permit). That is, both a preliminary approval and a development permit are "*development approvals*", and the conditions in them are equally binding.[39]

31. In terms of construction, conditions in development approvals are to be construed not as documents drafted with legal expertise, but as documents intended to achieve practical results.[40] The existence of an ambiguity in their terms does not itself result in a conclusion that the condition is invalid,[41] but where possible should be resolved against the approving authority as the drafter of the condition,[42] and so as to give it practical effect.

Land Use Planning and Approvals Act 1993 (Tas) s 51(1), (1A), (3A) and (4); *Planning Act 1999* (NT) ss 44, 46, 53, 55; *Planning Act 2016* (Qld) s 49, 51, 60(c).

35 *Lloyd v Robinson* (1962) 107 CLR 142 at 154 - 155; *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 577; *Western Australian Planning Commission v Temwood Holdings Pty Ltd* (2004) 221 CLR 30 at [46], [93].

36 IPA, s 3.5.15, Sch 10 "development approval"; SPA, s 244; Planning Act, s 49(5).

37 IPA, s.3.5.30, SPA, s 345; Planning Act, s 65(1).

38 IPA, s 4.3.3; SPA, s 580; Planning Act, s 164.

39 Reinforced, for example, in the current statutory framework by s 49(4) of the Planning Act. As to the binding effect of conditions requiring infrastructure contributions see *Montrose Creek Pty Ltd v Brisbane City Council* [2013] QPELR 47 at [26], [46] – [47] and *Sunshine Coast Regional Council v Recora Pty Ltd* (2012) 191 LGERA 1 at [11] – [13].

40 *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2006] NSWCA 245 [36] – [40].

41 *Baulkham Hills Shire Council v Ko-Veda Holiday Park Estate Ltd* (2009) 167 LGERA 395 at [98] – [99].

42 See *Ryde Municipal Council v The Royal Ryde Homes* (1970) 19 LGRA 321 at 324 (adopted in *Baulkham Hills Shire Council v Ko-Veda Holiday Park Estate Ltd* (2009) 167 LGERA 395 at [95], [113]); *Mosman Municipal Council v Denning & 2 (Ors)* [2002] NSWLEC 227 at [8]-[9]; *Mariner Construction Pty Ltd v Maroochy Shire Council* [2000] QPELR 334 at [16].

Key statutory provisions

Planning Act

32. Ultimately, the continued operation of the Preliminary Approval is governed by s 286(2) of the Planning Act. It provides that a document, including a preliminary approval[43] (emphasis added):

> ... continues to have effect according to the terms and conditions of the document, even if the terms and conditions could not be imposed under [the Planning Act].

33. This provision recognises the potential for conflict between conditions in an existing
10 development approval and the powers of a council under the Planning Act. It resolves that tension in favour of the continued operation of the conditions in the approval. In this way, Parliament has recognised, and given ongoing recognition to, the purpose of extant approvals in providing certainty about the basis on which land may be developed regardless of subsequent statutory changes. The approach embodied in s 286 is consistent also with s 49(4) of the Planning Act, which relevantly provides that:

> Subject to section 66(2), a preliminary approval that is still in effect applies instead of a later development permit for the development, to the extent of any inconsistency...

20 34. The explanatory memorandum to the Planning Act expressly records that s 49(4) reflects a recognition that a person with the benefit of a preliminary approval should have "*certainty in relation to any rights or obligations attached to the preliminary approval*".[44]

Sustainable Planning Act

35. Prior to the commencement of the Planning Act, the Preliminary Approval was given ongoing effect by ss 801 and 808 of the SPA.

36. Sections 347, 847, 848 and 880 of the SPA modified the kinds of conditions which could be included in new approvals, but this did not affect existing approvals. Those sections provided (in substance) that new approvals could only contain infrastructure
30 contribution conditions in certain circumstances. In particular, s 847 of the SPA had

---

43 Planning Act, s 286(7)(a)(iii).

44 Explanatory Notes to the *Planning Bill 2015* (Qld), p 65, see also pp 79 – 80.

the effect of giving continued operation to planning scheme policies that existed "*immediately before commencement*" of the SPA, and s 848(2)(c) permitted conditions requiring payment of infrastructure contributions referable to those policies to be imposed. But neither s 847 nor s 848 purported to regulate or affect approvals that had already been given.

37. Section 880 was introduced by the 2011 Amending Act. Section 880 undid the permissive effect of ss 847 and 848 in respect of new approvals. By s 880(2), a local government was no longer permitted to impose infrastructure conditions in such approvals as contemplated by ss 847 and 848. Critically though, s 880(3)(b)(ii) provided that another provision of the SPA "*does not stop a local government... collecting an infrastructure contribution payable under a condition lawfully imposed under a planning scheme policy to which section 847 applies*".

38. This provision did not seek to draw any distinction between conditions in a preliminary approval and conditions in a development permit. It confirmed that the removal of the power to impose fresh infrastructure contribution conditions on new development permits was not intended to interfere with existing conditions, in extant development approvals, which required the making of infrastructure contributions.

Errors in the Court of Appeal's approach

The Court of Appeal's reasons

39. The key passage of the Court of Appeal's reasons is at [25] – [26] (emphasis added):[45]

> [25] Clause 13 commenced with the statement that "Contributions toward Recreational Facilities Network Infrastructure shall apply at the time application is made for a Development Permit." For Sunland, it is submitted that this created a legal obligation to pay the contribution, which was a present obligation to pay on a future date or event. It is submitted that upon an application for a development permit being made to the Council, the relevant contribution, calculated according to the policy, must be paid in discharge of this obligation which has existed since 2007. Such an effect of clause 13 would be remarkable, because the developer would have bound itself to make payment ahead of the Council's assessment of its application for the development permit and without necessarily knowing what the outcome would be. If this is a possible interpretation of clause 13, it is not the only one. Clause 13 was not in terms which unambiguously created an obligation to pay contributions toward that

45 CAB, pp 37 – 38.

infrastructure. The language was that such contributions were to "apply" at that future time.

[26] Each of these clauses must be interpreted by reference to the purpose and effect of a preliminary approval, which was to establish the planning framework under which any development permit was to be assessed, but not to permit development to occur. The effect of these clauses was that in the assessment of an application for a development permit, a contribution for infrastructure, according to the terms of the planning scheme policy in operation at the time of that assessment, would be required. These clauses had an effect on the assessment of applications to permit development to occur, but it was at that later stage, when the relevant details of the particular development was known, that the amount to be paid could be calculated under the policy, and the developers would become obliged to pay it. The clauses did not themselves create an obligation to pay.

40. Later, McMurdo JA also said (emphasis added):[46]

[51] As I have discussed, there was no obligation to pay which was imposed by clauses 13 to 16 of the Preliminary Approval. An obligation to pay was to come from the imposition of a condition of a development permit. It was then that the amount of the contribution was to be calculated. Until the 2011 Act, contributions could have been levied by the imposition of a condition under the power given to the Council by s 848 [of the SPA]. The effect of s 880 was to "switch off" the Council's ability to impose such a condition. Absent such a condition, no amount could become payable in accordance with the planning scheme policies.

Wrong approach to resolving ambiguity in Conditions 13 to 16

41. The Court of Appeal's conclusion was driven by a perception that any construction other than the one it adopted would lead to a "*remarkable*" result (CA Decision at [25][47]), presumably meaning a result that was uncommercial or unfair to the Appellants. But that was not so.

42. Conditions 13 to 16 contain an obligation to pay, but omit to indicate the "*due date for payment*". That is, while each condition plainly contemplates that making an application for a development permit enlivens the obligation to make an infrastructure contribution and each condition also identifies the way to work out the quantum of that contribution at the due date for payment, the conditions do not clearly stipulate what the due date for payment is to be. This inelegant drafting is unfortunate, but hardly makes the conditions inscrutable: "*the words used by a local authority in imposing*

46 CAB, pp 44 – 45.
47 CAB, pp 37 – 38.

conditions are [not] to be scrutinised in the same way as the words used by a parliamentary draftsman".[48] The correct approach is to give the conditions a sensible and operative construction,[49] and to the extent necessary, to construe them *contra proferentum* – that is, in the way which places the least burden on the land owner.[50]

43. Contrary to the Court of Appeal's reasoning, Conditions 13 to 16 thus do not present a binary choice between either (i) infrastructure contributions being due and payable on the date of application for a development permit; or (ii) the conditions containing no obligation to pay at all, but merely operating as clauses about future conditions.

44. If the question of construction being asked is whether Conditions 13 to 16 impose an
10 obligation at all, the answer is plainly: Yes.

   a. In each case, the contribution is stated as one which "*shall apply at the time of application*". This is cast in mandatory terms and is not language concerned with a contribution only becoming applicable at a later time, pursuant to a future condition imposed when a further application is approved.

   b. The conditions each identify a specific, existing policy to be applied in calculating the contribution on the date for payment.

   c. The conditions contemplate a "due date for payment". This might be the date when, or a reasonable time after the date when, the Council calculates and requests or demands the payment.

20 d. However, the date selected is the due date for the calculation and payment of the infrastructure contribution which the *conditions* require to be paid for the development. The drafter of the conditions can objectively be said to have intended that the date for that calculation and payment will be a date on or after the specific development authorised by the permit (and consequently the extent of its impact on the infrastructure) has been fixed by the approval of the

---

48 *Hall and Co Ltd v Shoreham-by-sea Urban District Council* [1964] 1 All ER 1 at 5; [1964] 1 WLR 240 at 245; see also *Weigall Constructions Pty Ltd v Melbourne and Metropolitan Board of Works* (1972) VR 781 at 796.

49 *Hall and Co Ltd v Shoreham-by-sea Urban District Council* [1964] 1 All ER 1 at 5; [1964] 1 WLR 240 at 245.

50 *Matijesevic v Logal City Council* [1984] 1 Qd R 599 at 605 (Connolly J); *Hawkins v Permarig Pty Ltd* [2001] QPELR 414 at 416.

development permit.[51] Such an approach makes the securing of the development permit relevant to the identification of the due date for calculation and payment of the contributions, but does not require the imposition a yet a further condition in the development permit to give efficacy to the existing conditions.

45. Although a submission to this effect was made below,[52] it was not addressed at all in the Court of Appeal's reasons. Construing the conditions as the Appellants submit does not produce any "*remarkable*" outcome, but rather gives effect to the conditions in a practical and meaningful way.

46. It follows that the terms of Conditions 13 to 16 do not justify the Court of Appeal's decision to construe those conditions as something *other than conditions* but as (in substance) a mere notification of future conditions or of future intention by the Council.

Wrong approach to statutory framework

47. The further error made by the Court of Appeal was in its approach to the relevant statutory framework.

48. ***First***, there was, at the time the Preliminary Approval was granted, an express statutory power to impose conditions obliging a developer to make infrastructure contributions. As identified above, s 6.1.31(2)(c) of the IPA provided that a local council "*may impose a condition on the development approval __requiring__... a contribution towards the cost of supplying infrastructure...*". The Court of Appeal was referred to this provision,[53] but took no account of it in its analysis, though it was plainly part of the "*objective circumstances*"[54] providing context to the construction of Conditions 13 to 16. In construing the conditions and deciding between competing constructions, it was necessarily relevant that one construction (that the conditions operated conventionally

[51] The payment obligation depends on the number of "Equivalent Tenements" (a measure of development intensity used to indicate expected infrastructure demand) associated with the development: see for example Gold Coast City Council Planning Scheme Policy 3A – Water Supply Network Development Contributions (from Scheme Version 1.1 Amended January 2007) at section 4.0, Table 8.1 and section 9.0. It is when the development application is approved that the final Equivalent Tenements will be confirmed. That is because the Council is not bound to accept the developer's estimate of the Equivalent Tenements for the development. Compare *Fraser Coast Regional Council v Walter Elliot Holdings Pty Ltd* [2017] 1 Qd R 13 at [1], [4], [5].

[52] ABFM, p 44 (T1-24, L6 – L27); p 45 (T1-30, L23 – 30).

[53] ABFM, p 46 (T1-63, L1 – 17).

[54] *Westfield Management Ltd v Perpetual Trustee Co Ltd* [2006] NSWCA 245 at [41].

to impose a payment obligation) was directly referable to an express statutory power *requiring* a contribution, while the other construction (adopted by the Court of Appeal and embraced by the Council) was referable to no such power. The Court overlooked this factor, which pointed strongly to the conclusion that the work Conditions 13 to 16 was intended to do in the Preliminary Approval was the work of actually "*requiring a contribution*".

49. ***Secondly,*** the construction which the Court of Appeal did give to Conditions 13 to 16 was not referable to any other statutory power or process. The Court of Appeal stated that the conditions operated by providing that "*in the assessment of an application for*
10 *a development permit.... a contribution for infrastructure... would be required*" (CA Decision at [26][55]). The Court identified this would occur by the imposition of further conditions, embodying the substance of Conditions 13 to 16, in a subsequent development permit (CA Decision at [51][56]).

50. However:

   a. No provision of the IPA, the SPA or the Planning Act was identified which contemplated the imposition, as a "*condition*", of a clause which merely foreshadows a future condition rather than operating as a present condition. As above, the relevant statutory power relating to conditions about infrastructure contributions was a power to impose a condition *requiring* a contribution.

20 b. A condition of the kind contemplated by the Court of Appeal could not constrain future conditions to be imposed by the Council in approving later development permits. That is because there is no statutory provision obliging the Council to impose a later condition that has merely been embryonically foreshadowed or notified by a clause in a preliminary approval. Rather, the IPA operated by providing that conditions may not be imposed in a later approval which are inconsistent with *conditions* in an earlier approval.[57] This gives predominance to earlier conditions and proceeds on the obvious statutory assumption that the things which an earlier approval contains will be *conditions* – that is (relevant

---

55 CAB, p 38.

56 CAB, pp 44 – 45.

57 IPA, s 3.5.32(1)(a); see also SPA, s 347(a); Planning Act, s 66(2). The Planning Act further provides, in s 49(4), that a preliminary approval applies "*instead of*" a later development permit to the extent of any inconsistency, subject to limited and irrelevant exceptions.

for present purposes) something *requiring* an infrastructure contribution to be made.

51. It follows that:

    a. Conditions 13 to 16 are to be understood, conventionally, as imposing an obligation to make infrastructure contributions;

    b. The continued operation of the Preliminary Approval and the continued power of the Council to collect the infrastructure contributions was initially preserved by ss 801 and 880 of the SPA;

    c. The further operation of the Preliminary Approval is now preserved by s 286 of the Planning Act, which also emphasises that (all) the conditions of the Preliminary Approval are to have continuing "*effect*", even if they could not be imposed today under the Planning Act;

    d. The Preliminary Approval therefore achieves its purpose of identifying the key conditions which continue to govern the development of the Lakeview at Mermaid project.

The Respondent's Notice of Contention

52. By a notice of contention filed 29 October 2020, the Council seeks to contend that even if the Appellants are correct that Conditions 13 to 16 of the Preliminary Approval operate to impose an obligation to make infrastructure contributions, those conditions are nevertheless practically inoperative because the Planning Act now obliges the Council, when it approves a development permit, to give an "*infrastructure charges notice*" and this obligation prevails over adherence to the conditions in the Preliminary Approval.

53. Such a construction would mean that the Preliminary Approval would not, in fact, continue "*to have effect according to [its] terms and conditions*", as required by s 286 of the Planning Act. There would (if the Council was right) thus be a conflict between the provisions of the Planning Act on which the Council relies, and the operation of s 286. If that inconsistency were not reconcilable by the process of ordinary construction, s 286 would prevail as the more specific transitional provision which is

directly concerned with giving continuing effect to the conditions of existing approvals: *generalia specialibus non derogant*.[58]

54. However, no direct inconsistency arises when the provisions of the Planning Act relied on by the Council are properly construed.

55. The critical provision on which the Council relies is s 119 of the Planning Act, which relevantly provides:

> **Section 119 When charge may be levied and recovered**
>
> (1) This section applies if—
>
> (a) a development approval has been given; and
>
> (b) an adopted charge applies to providing trunk infrastructure for the development.
>
> (2) The local government must give a notice (an "***infrastructure charges notice***") to the applicant.

10

56. The term "*adopted charge*" is defined under s 113 of the Planning Act as follows:

> (1) A local government may, by resolution (a ***charges resolution***), adopt charges (each an ***adopted charge***) for providing trunk infrastructure for development.
>
> (3) However, a charges resolution does not, of itself, levy an adopted charge.

20

57. It is right to say that, where the preconditions in 119(1) are satisfied, the Council is obliged give an infrastructure charges notice. It is also right say that the charge imposed by an infrastructure charges notice (if validly given) is the source of a person's obligation to pay infrastructure charges.

30

58. But the second precondition, specified in s 119(1)(b), is not fulfilled in this case. Where, as here, a development permit is granted for particular development *already approved* under an extant preliminary approval, and that preliminary approval imposes obligations to make infrastructure contributions for the development, then it is each of the specific, site-related and extant conditions in the preliminary approval which "*applies*" to determine the infrastructure contribution which is payable for the

[58] *Purcell v Electricity Commission of New South Wales* (1985) 60 ALR 652 at 657.

development. That is, the (general) adopted charge is not the thing which "*applies*" to providing trunk infrastructure for the Lakeview at Mermaid development, because that development is already approved on condition that contributions be made under specific identified Planning Scheme Policies, and it is each of these Planning Scheme Policies (referred to in Conditions 13 to 16 of the Preliminary Approval) which therefore "*applies*".

59. This approach, in addition to proceeding upon a natural and common sense reading of s 119:

a. allows the harmonious operation[59] of the general "*infrastructure charges notices*" regime contained in s 119 alongside the specific transitional provisions contained in s 286 (which expressly preserve all conditions of earlier approvals); and

b. is consistent with the paramountcy otherwise given in the Planning Act to the conditions of an earlier preliminary approval (see ss 49(4) and 66(2)).[60]

Part VII: ORDERS SOUGHT

60. The appeal be allowed.

61. Orders 1 to 5 of the orders made by the Court of Appeal dated 1 May 2020 in Appeal No 5420 of 2019 and P & E Appeal No 1497 of 2017 be set aside and in their place paragraphs 1 and 2 of the Orders made by Everson DCJ on 4 April 2019 in 1497 of 2017 be substituted.

62. The Respondent pay the Appellants' costs of the proceeding in the Court of Appeal and this Court.

Part VIII: ESTIMATE OF HEARING

63. The Appellants estimates that 2 hours will be required for the presentation of the appellants' oral argument in chief plus half an hour in reply and on the Notice of Contention.

---

[59] *Project Blue Sky v Australian Broadcasting Authority* (1988) 194 CLR 355 at [70].

[60] See also the Explanatory Notes to the *Planning Bill 2015* (Qld), pp 65, 79 – 80.

Dated: 1 December 2020

S DOYLE QC
(07) 3008 3990
Email: sdoyle@level27chambers.com.au

S WEBSTER
(07) 3008 3930
Email: sjwebster@level27chambers.asn.au

B64/2020

IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B64 of 2020

BETWEEN: **SUNLAND GROUP LIMITED ACN 063 429 532**
First Appellant

SUNLAND DEVELOPMENTS NO 22 ACN 164 903 011
Second Appellant

10 and

GOLD COAST CITY COUNCIL
Respondent

ANNEXURE A

CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

Legislation	Version
Queensland	
Integrated Planning Act 1997 (Qld), ss 3.1.5(1), 3.5.15, 3.1.6, 3.5.21(1)(a), 3.5.28, 3.5.30, 3.5.31(1)(a), 3.5.32(1)(a), 4.3.3, 6.1.31(2)(c) and Schedule 10.	Reprint No 10A
Planning Act 2016 (Qld), ss 49, 51, 60(c), 65(1), 66(1)(c), 66(2), 73, 119, 164, 286	Reprint as at 9 May 2018
Sustainable Planning Act 2009 (Qld), ss 241, 244, 245, 345, 347, 580, 630, 635, 801, 808, 847, 848 and 880	Reprint as at 19 May 2017
Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act 2011 (Qld)	As enacted on 6 June 2011
Sustainable Planning (Infrastructure Charges) and Other Legislation Amendments Act 2014 (Qld)	As enacted on 19 June 2014
Gold Coast City Council – Planning Scheme Policy 3A – Water Supply	From Scheme Version 1.1 Amended January 2007

Other jurisdictions	
Environmental Planning and Assessment Act 1979 (NSW), ss 4.12, 4.16, 4.17, 4.21 – 4.24	Reprint as at 30 October 2020
Land Use Planning and Approvals Act 1993 (Tas), s 51	Reprint as at 30 November 2020
Planning, Development and Infrastructure Act 2016 (SA), s 119, 120, 126 and 127	Version 31.7.2020
Planning Act 1999 (NT), ss 44, 46, 53 and 55	Reprint as at 20 November 2020
Planning and Development Act 2005 (WA), ss 99, 103, 115, 116	Reprint as at 12 September 2020
Planning and Environment Act 1987 (Vic), ss 47, 61 and 62	Reprint as at 24 October 2020