HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No B64 of 2020

BETWEEN:

SUNLAND GROUP LIMITED ACN 063 429 532
First Appellant

AND

SUNLAND DEVELOPMENTS NO 22 ACN 164 903 011
Second Appellant

AND

GOLD COAST CITY COUNCIL
Respondent

RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Propositions to be advanced by the Respondent in oral argument

The role and function of a preliminary approval under Queensland legislation

2. A preliminary approval is a species of development approval. A preliminary approval approves, but does not authorise, assessable development to occur. A development permit is required to authorise such development: RS[13]. The utility of a preliminary approval is to override, or vary, a planning scheme to the extent permitted by the approval: RS[14(b)] and to establish the framework under which subsequent applications for development permits are to be assessed: RS[14(d)]. These principles are reflected by the provisions of the Preliminary Approval noted at RS[15].

3. A development approval, including a preliminary approval, attaches to the land and binds the owner, the owner's successors in title and any occupier: RS[16].

Construction of development approvals

4. The purpose of interpreting the provisions of a development approval is to ascertain, objectively, the intention of the local government. The ordinary rules of statutory construction apply: RS[17] and cases cited; RS[34] and cases cited; *Zappala Family Co Pty Ltd v Brisbane City Council & Ors*;[1] *Ashtrail Pty Ltd v Gold Coast City Council.*[2] Nevertheless, the nature of such instruments is such that a "commonsense" approach, rather than an over-technical approach, should be

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1 (2014) 201 LGERA 82 at 94-95 [52]-[55].
2 (2020) 4 QR 192 at 202 [25].

adopted to better achieve its practical operation: *Zappala Family Co Pty Ltd v Brisbane City Council & Ors;*[3] *Weigall Constructions Pty Ltd v Melbourne & Metropolitan Board of Works.*[4]

5. If the *contra proferentem* rule is still relied on by Sunland: ARS[12], it does not apply to the construction of a development approval: RS[29], cf. AS[31] and [42]. The Council accepts the correctness of the principle stated in *Ryde Municipal Council v Royal Ryde Homes*[5] (reproduced at RS[30]). But neither principle assists Sunland in this case: RS[29] and [10] below.

Proper construction of conditions 13-16

6. Sunland's submission that the reasoning of the Court of Appeal was *"unconventional and incorrect"*: AS[25], and rendered the conditions *"defunct"*: AS[26] should be rejected: RS[34]. McMurdo JA's conclusion[6] that Sunland's submission produced a *"remarkable"* outcome was correct.

7. First, conditions 13-16 do not identify, or specify, the *"due date for payment"* of the infrastructure contributions: RS[35].

8. Secondly, the *"due date for payment"* is not capable of being ascertained as a matter of interpretation of the conditions. Merely to identify a number of alternative possibilities: AS[44.c.], [44.d.], ARS[10], [11] is not sufficient: RS[35(b)].

9. Thirdly, the wording of the conditions is to be contrasted with the wording of those conditions of the Preliminary Approval which were intended to impose obligations (conditional upon the giving of a future development permit): RS[35(d)] and footnote 67. Those conditions exhibit none of the imprecision, ambiguity or uncertainty evident in conditions 13-16.

10. Fourthly, the approach to construction recognised in *Ryde Municipal Council v Royal Ryde Homes*[7] (RS[30]-[31]) does not assist Sunland because:

    (a) it cannot identify a *"due date of payment"* when no date is otherwise ascertainable: RS[35(d)];

    (b) in any event, the application of that approach would result in Sunland being relieved from the operation of the conditions, not bound by them: RS[32].

11. Fifthly, in consequence of the above and having regard to the role and function of the Preliminary Approval, the words *"shall"* and *"will"* in conditions 13-16 are, at best for Sunland, equivocal.

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3 (2014) 201 LGERA 82 at 95-96 [56]-[58].
4 [1972] V.R. 781 per Pape J at 796 l.45.
5 (1970) LGRA 321 at 324.4, cf. *Matijesevic v Logan City Council* [1984] 1 Qd.R. 599 at 605
6 Court of Appeal Reasons for Judgment at [25]. CAB at pp. 37-38.
7 (1970) 19 LGRA 321 at 324.

In context, they declare that infrastructure contributions shall be payable in consequence of the giving of development permits in the future, but do not create an obligation to pay: RS[34].

12. Finally, that conditions 13-16 do not fall under the heading *"General Advice"* in the Preliminary Approval is not determinative of their meaning. Although relevant as a contextual consideration it is not influential, given the considerations identified above: RS[36(a)].

The Notice of Contention

13. The 2011 Amending Act introduced a new statutory regime. It required infrastructure contributions to be imposed by ICNs (rather than conditions imposed on a development approval) and required such notices to be given in consequence of the approval of a development permit: RS[38].

14. The Preliminary Approval did not authorise assessable development to occur: RS[13]-[14]. Assuming (contrary to the Council's submissions) that the Conditions did create enforceable obligations, s 635(2) of the SPA and its successor, s 119(2) of the Planning Act required the Council to give Sunland an ICN in consequence of giving a later development permit.

15. Section 880(3)(b)(ii) of the SPA does not produce a different outcome: cf. ARS[13]. Section 880(3)(b)(ii) permits local governments to collect infrastructure contributions payable under conditions lawfully imposed on development approvals under the previous regime. *Ashtrail Pty Ltd v Gold Coast City Council*[8] is an example of a condition which would be subject to the operation of s 880(3)(b)(ii). But that is not this case; there can be no assessable development of the land absent a development permit: RS[43]-[44]. The same conclusion applies with respect to s 286 of the Planning Act.

16. Contrary to Sunland's submission: AS[53], [58], AR[14], any inconsistency between ss 286 and 119 of the Planning Act is to be resolved in favour of s 119. Levying infrastructure charges is the specific subject matter of s 119. Section 286 is a transitional provision of general application: RS[49], [52].

17. Alternatively, ss 119 and 286 operate concurrently. Even in that case, Sunland is not entitled to the relief it seeks: RS[50].

Dated: 9 April 2021

Graham Gibson Mitchel Batty Alexander Psaltis

[8] (2020) 4 QR 192 at 199 [13] and 201 [18].