HIGH COURT OF AUSTRALIA

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Details of Filing

File Number:	B64/2020
File Title:	Sunland Group Limited & Anor v. Gold Coast City Council
Registry:	Brisbane
Document filed:	Form 27F - Outline of oral argument-Appellants' Outline of S
Filing party:	Appellants
Date filed:	09 Apr 2021

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

SUNLAND DEVELOPMENTS NO 22 ACN 164 903 011
Second Appellant

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and

GOLD COAST CITY COUNCIL
Respondent

20 **APPELLANTS' 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 in oral argument

The legislation and the Preliminary Approval

2. Section 286 of the Planning Act (**JBA1, p 371**) provides that the Preliminary Approval continues in effect according to its terms and conditions even if the conditions could not now be imposed. Conditions 13 to 16 are among the conditions of the Preliminary Approval which are given continuing effect. They are binding and operative. The Council is permitted and required to collect infrastructure contributions in accordance with them (**CAB p16, [26]**).

3. The Respondent contends the conditions are not to be given effect for two reasons:

   a. the conditions do no more than "*notify*" a developer of possible future obligations (**RS[26](e)**) or are so uncertain as to be an invalid exercise of the power to impose conditions (**RS[35](a)**) – so that there is nothing for s 286 to (relevantly) give effect to;

   b. even if Conditions 13 to 16 impose an obligation to pay, they are somehow overwhelmed by s 119 of the Planning Act (**RS[38]-[53]**).

4. The Court of Appeal's decision was based on two steps (**CAB, pp 37-38, [25]-[26]; pp 44-45, [51]-[52]**):

   a. *first*, Conditions 13 to 16 imposed no "*obligation to pay*" (however conditionally) but rather were clauses identifying a framework for assessment of future applications;

   b. *secondly,* that in order to impose any obligation to pay infrastructure contributions, a further development permit must not only be granted, but be made the subject of (further) conditions which themselves imposed the obligation to pay.

Notice of Appeal grounds (CAB p 57)

Construction – statutory context of Preliminary Approval

5. IPA does not draw any relevant distinction between conditions of a preliminary approval and conditions of a development permit. Conditions in a preliminary approval operate until the development is finished or the approval lapses, and later conditions cannot conflict with earlier ones: IPA s 3.5.32(1)(a) (**JBA1, p 125**).

6. IPA contains only one source of power to impose conditions about infrastructure contributions, and that power is expressed in terms of a condition *requiring* a contribution to be made in accordance with the Council policy documents: IPA s 6.1.31(2)(c) (**JBA1, p 205**). The Court of Appeal's analysis neglected this provision entirely.

7. Conversely, there is nothing in IPA which requires (or even contemplates) two sets of conditions to be imposed relating to infrastructure contributions – one in a preliminary approval and one in a development permit. Rather, a later development permit for the same development is expressly made subject to "*any conditions in the preliminary approval*" (IPA, 3.1.5(3)(b)(ii)) (**JBA1, pp 72-73**). An initial condition is enough.

8. Further, at the time the Preliminary Approval was granted (May 2007) the statutory power to impose infrastructure conditions (along with the related planning scheme polices) had a sunset date of 30 June 2008 (**CAB p 34, [8]**). The function given to Conditions 13 to 16 by the Court of Appeal (**CAB p 38, [26]**) and by the Respondent (**RS[26](e)**) cannot sensibly be reconciled with this. In an approval which had an initial term of four years (**AS[13]**), Conditions 13 to 16 would cease to have any meaning after 13 months (**Rep[4], fn 3**).

9. While treated below as "*critical to the resolution of this case*" (**CAB p 44, [50]**), s 880 of SPA (**JBA2 p 649**) has no direct application, though its terms are consistent with the Appellants' contentions (**AS[35]-[38]**). Section 880 addressed conditions requiring infrastructure contributions in approvals granted under SPA. The conditions in this case were imposed under IPA. The Preliminary Approval was continued under SPA by s 801 (**AS[35]**).

Construction – the language of Conditions 13 to 16 and resolving ambiguity

10. Conditions 13 to 16 are cast in the same mandatory language as the rest of the conditions. Adopting a practical construction, the language used is of an obligation to make contributions, albeit conditionally on some future thing, namely (at least) making applications for development permits (and their grant). The language does not refer anywhere to imposing a second condition.

11. The language also does not require a second condition, since it specifies with sufficient clarity how the contribution is to be worked out. The methodology for the calculation of the contribution is identified by reference to specific policies, consistent with IPA s 6.1.31 (**JBA1, pp 204-205**). The policies identify the contribution by reference to a measure of density (equivalent tenements or "ETs") of the development and that the "*determination of contributions*" is to be carried out by a Council employee (**JBA7, pp 1699, 1722**). This is consistent with the amount to be paid being worked out during the assessment of an application and finalised when the ETs are confirmed at the grant of the development permit.

12. The infelicities of expression within Conditions 13 to 16 are to be resolved by construction not negation (**Rep[9]**). The expression "*at the time application is made*" should be read as encompassing the process of the lodgement, consideration and decision of the application. The failure to specify a definite time for performing an obligation does not mean there is no obligation, whether the preliminary approval is a statutory instrument or not. To the extent that different constructions are open, the time which is least burdensome on the Appellants

is to be preferred (**AS[31], [42] Rep[12]**).

Construction – context of Conditions 13 to 16

13. The construction above is reinforced by the placement of Conditions 13 to 16 amongst other conditions which are plainly operative in the usual sense, and the fact that a notification or foreshadowing of future conditions could have been, but was not, placed in the "General Advice" section (**ASSBFM p 24; AS[9], Rep[5]-[6]**).

Construction – objective purpose of Conditions 13 to 16

14. The proper approach is to construe the Preliminary Approval to give it (and each of its conditions) practical effect. The Court should shy away from concluding Conditions 13 to 16 were mere surplus advice or had an operation which would become defunct during the currency of the Approval. The objectively likely and explicable purpose of Conditions 13 to 16 was (as with the balance of the conditions) to lock in specific terms on which the Lakeview at Mermaid development could be progressed. That is, to provide certainty.

Notice of Contention grounds

15. A construction of s 119 (**JBA1, p 341**) which allows double recovery by permitting the collection of infrastructure contributions under Conditions 13 to 16 in accordance with the Planning Scheme Policies, and also requiring the Council to levy the adopted charge by an infrastructure charges notice would be absurd. The Respondent, rightly, does not advance such a construction. It says rather that s119 "*prevails over*" the conditions in the Preliminary Approval (**RS[48]**).

16. That submission assumes a conflict. If there is a conflict, it is between s 119 and s 286, and s 286 should prevail as (in this context) the more specific provision concerning the preservation of approvals and their conditions (**AS[53]**).

17. But the conflict does not really arise (**AS[54]-[59]**). The s 119 obligation is conditional on an "*adopted charge*" that "*applies to providing trunk infrastructure for the development*" (s 119(1)(b)) (**JBA1, p 341**). The "*development*" in this case is the material changes of use, reconfigurations of lots, and building and other works for the Lakeview at Mermaid development. Specific provision for payments relating to infrastructure for this development is already made in the Preliminary Approval – by conditions imposed by the Council and preserved by statute. Those conditions apply and the general adopted charge does not.

Dated: 9 April 2021

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