HIGH COURT OF AUSTRALIA

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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

and

GOLD COAST CITY COUNCIL
Respondent

APPELLANTS' REPLY

Part I: Certification

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

Part II: Argument in Reply

The purpose of inclusion of Conditions 13 to 16 in the Preliminary Approval

2. Conditions 13 to 16 are in the Preliminary Approval for a reason. The Council submits that the reason is (merely) to "*notify*" the developer of its "*future obligations in respect of infrastructure contributions*" (RS[26](e)). The Appellants accept that a function of Conditions 13 to 16 is to notify the developer of the obligations it has in progressing the Lakeview at Mermaid development. But the notification function is achieved by the Conditions operating as conditions (that is, as expressing, conditionally, the obligations).

3. By contrast, the Council's approach makes the inclusion of Conditions 13 to 16 pointless – even as a notification. The Council does not explain how Conditions 13 to 16 "*notify*" the developer of its future obligations if (as suggested) Conditions 13 to 16 do not "*entrench*" the application of the identified Planning Scheme Policies (RS[27]). If the Conditions impose no obligation (however conditionally) and entrench nothing then they cannot meaningfully notify a developer of anything – rather they misinform the developer by suggesting that specific Planning Scheme Policies will apply when (on the Council's case) that is not so.

4. Further and contrary to RS[27], the inclusion of Conditions 13 to 16 where there was a fast approaching statutory end-date for the Planning Scheme Policies reinforces that the Conditions were to preserve the application of those Policies for this development.[1] The

[1] If the named Planning Scheme Policies were not to be entrenched, Conditions 13 to 16 would simply have been omitted, or the specific reference of the Planning Scheme Policies omitted.

entrenchment of specific planning scheme policies in a preliminary approval by way of conditions is orthodox and controlled: (i) the Preliminary Approval was for only 4 years (after which it would lapse unless the developer had commenced the new use);[2] and (ii) any extension of the term of the Preliminary Approval was a matter for the Council. In deciding whether to extend the currency period for the approval, the Council was entitled to decline to renew if it was concerned that the Conditions departed from current laws and policies relating to infrastructure contributions.[3] In this case, however, the Council twice decided to extend the currency period of the Preliminary Approval.[4]

Context

5. The Council's suggestion that Conditions 13 to 16 should "*perhaps*" have been put in the general advice section of the Preliminary Approval, but that their inclusion among other conditions is irrelevant (RS[36](a) must be rejected. It is essentially a submission that context does not matter in construction.

6. Further, if as the Council elsewhere submits (RS[29]), the Preliminary Approval is a statutory instrument,[5] then the general interpretative provisions of the *Acts Interpretation Act 1954* (Qld) (**Acts Interpretation Act**) apply,[6] including section 14, so that headings in the Preliminary Approval form part of the Preliminary Approval and must be taken into account in the construction of the Conditions.[7]

Ambiguity, uncertainty and the exercise of power to impose conditions

7. Ultimately, the Council's approach is to urge the Court to look past: (i) the context in which the Conditions appear; (ii) the use of mandatory language; (iii) the statutory context provided by IPA s 6.1.31(2)(c); and (iv) the lack of purpose for "*conditions*" that fail to operate as conditions – because of some awkward drafting (on the Council's part) relating to the timing of the calculation and payment of the contributions. These contentions should be rejected.

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

3 IPA, 3.5.23(1)(a). The statutory context was thus one in which despite a sunset provision for the policies, preliminary approvals could include conditions requiring payment under those policies (effectively extending those policies for a particular approved development) and the preliminary approvals themselves then had a limited life, but were renewable if the Council thought the conditions remained appropriate.

4 CAB, p 9 at [4]. It also consented to an order for a permissible change to the Preliminary Approval which re-stated Conditions 13 to 16: Respondent's Book of Further Materials (**RBFM**) at 6, 10-11.

5 The suggestion is one newly made and the reasoning is not explained. If reliance is placed on the last category in s 7(3) of the *Statutory Instruments Act* 1992 (Qld), that involves accepting that a development approval is a "*document of a public nature*". While in one sense a public document, a development approval is given to a particular person instead of being promulgated as statutory instruments usually are.

6 *Statutory Instruments Act 1992* (Qld), s 14 and Schedule 1.

7 Section 14A would also apply, which has the effect of requiring a purposive construction.

8. The Council now seems to suggest that the awkward wording of the Conditions means they are infected by such uncertainty that their inclusion amounted to a failure (by the Council) to exercise its power to impose the Conditions: see RS[19], [35](a), (c) and (d). This is a development on (indeed a departure from) the way the Council has previously advanced its case:

   a. The pleadings at first instance did not identify any issue about the time at which Conditions 13 to 16 required infrastructure contributions to be made (or calculated) or about a lack of certainty;[8]

   b. The Council at first instance disavowed the submission that Conditions 13 to 16 were inoperative because they were uncertain or ambiguous;[9]

   c. The Respondent's draft grounds of appeal in the Court of Appeal (for which leave to appeal was granted) did not refer to any issue of uncertainty, ambiguity or the timing of the calculation or payment of contributions under Conditions 13 to 16;[10]

   d. An issue about the timing of the calculation and payment of contributions under Conditions 13 to 16 was raised, for the first time, in one subparagraph of the Council's written outline in the Court of Appeal (RBFM, p 75 at [15](d)). The Respondent did not state that the conditions were an invalid exercise of power.

9. Properly understood, there is no uncertainty such as to render the imposition of the Conditions an ineffective exercise of power. Ambiguity is properly to be resolved by construction,[11] not by concluding the Conditions are invalid as not the proper exercise of power, or that they do not operate as conditions.[12] The opening words of each of Conditions 13 to 16 identify that contributions shall apply "*at the time application is made for a Development Permit*". Applying the principles set out at AS[31] and [42], it

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8 No party pleaded that Conditions 13 to 16 required payment (or calculation) at any particular time or that uncertainty in the timing of calculation or payment rendered the Conditions inoperative or invalid.

9 Appellants' Supplementary Book of Further Materials (**ASBFM**), pp 6 – 8 (commencing on Line 11 on p 6). The Council's written submissions at first instance also advanced no argument that the timing of the calculation or payment of the contributions was a factor of concern or relevance or that the Conditions were inoperative because uncertain.

10 CAB, pp 26 – 27.

11 Compare *Fawcett Properties Ltd v Buckinghamshire County Council* [1961] AC 636 at 678; *Weigall Constructions Pty Ltd v Melbourne & Metropolitan Board of Works* [1972] VR 781 at 796. As an example of reading a condition without a stated time for compliance as implicitly requiring compliance in a reasonable time, see eg *Donnelly v Solomon Islands Mining NL* (2002) 121 LGERA 264 at [73].

12 *King Gee Clothing Company Pty Ltd v The Commonwealth* (1945) 71 CLR 184 at 197; *Cann's Pty Ltd v Commonwealth* (1945) 71 CLR 210 at 228 (Dixon J). These conditions are distinguishable from the exercise of a regulatory power where some element of discretionary allowance or the like. Nothing in *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA Trans 367 affects this approach. A submission to this effect was made below: ASBFM, p 10 (Lines 34 – 41).

is not necessary to read the words "*at the time*" as fastening on the date an application for development permit is lodged (and requiring payment or calculation on that date). Rather, the words "*at the time application is made*" may readily be understood as referring to the application process, which includes the Council's assessment of the application, and which is concluded by the giving of a development permit.[13]

10. Conditions 13 to 16 are thus read as obliging the payment of infrastructure contributions upon the finalisation of the application process: either upon the grant of a development permit or a reasonable time thereafter. This alternative construction was one urged by the Appellants before the Court of Appeal[14] but was not dealt with by the Court. The fact that the alternative construction was advanced orally is explained by the context referred to at [8] above (not reflected at RS[21] – [23]), and does not mean the submission could be ignored, particularly given the critical significance which McMurdo JA ultimately gave to the question of the timing of payment (CA Decision at [25] – [26][15]).

11. Finally, if the Preliminary Approval is a statutory instrument (RS[29] and fn 39) then to the extent there is any uncertainty about the time for payment (or calculation), s 38(4) of the Acts Interpretation Act applies[16] so that the payment (or calculation) must be made "*as soon as possible*". What that phrase means in a particular context is a question of fact[17] but cannot detract from the status of Conditions 13 to 16 as operative conditions.

Contra proferentum or the like

12. Whatever label is used, and whatever the status of development approvals as statutory instruments,[18] the principle that ambiguities in development approvals are to be resolved favourably to the developer and against the interest of the local authority is well established, logical,[19] and applicable here in construing Conditions 13 to 16. The proper application of the principle of construction in the present case does not involve

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13 McMurdo JA in fact adopted a similar approach, because his Honour reasoned that the effect of the clauses was not that something would occur on the date of lodgement of an application but "*in the assessment of an application*" and by "*the imposition of a condition of a development approval*": CA Reasons at [26] and [51] (CAB at 38 and 44).

14 AS[45]; AFBM, pp 44, 45.

15 CAB, pp 37 – 38.

16 By virtue of s 14 and Schedule 1 of the *Statutory Instruments Act 1992* (Qld).

17 *Registrar of Motor Vehicles v Vu* (2013) 115 SASR 385 at [15] and [19].

18 See footnote 6 above.

19 See *Ryde Municipal Council v The Royal Ryde Homes* (1970) 19 LGRA 321 at 324 and *Mariner Construction Pty Ltd v Maroochy Shire Council* [2000] QPELR 334 at [16].

reading the Conditions so as to deprive them of operative effect (cf RS[29] and [32]),[20] but so as to resolve the relevant ambiguity in the way least burdensome to the developer and least favourable to the Council. The construction at [9] to [10] above resolves the relevant ambiguity (the date on which contributions become due and payable) consistently with this interpretative principle, and accommodates the infelicities in the Council's drafting of the Conditions without undue violence to the text.

Notice of Contention

13. There is a significant tension in the Council's position at RS[4] and [43]. The premise of the Notice of Contention is that Conditions 13 to 16 do "*impose an obligation to pay infrastructure contributions*" (RS[4]). That being so, s 880(3)(b)(ii) of the SPA permitted collection of those contributions (even if the contributions were payable only in the future and conditionally). Section 286 of the Planning Act continues to preserve the operation of the Preliminary Approval and Conditions 13 to 16. The fact that further development permits must be sought to progress the development cannot logically cause s 880(3)(b)(ii) of the SPA (or s 286 of the Planning Act) not to apply to Conditions 13 to 16.

14. The suggestion that the obligation to give an infrastructure charges notice under s 119 of the Planning Act is "*unqualified*" (RS[39]) is wrong. There are express preconditions to giving such a notice: AS[57] – [58]. The Council's construction at RS[50] must likewise be rejected. Where, as here, provision has been made in an approval for the calculation of infrastructure contributions for a particular development in a particular way, the terms of that approval must "*apply*", particularly reading that expression in s 119 with s 286 of the Planning Act. The Council's construction undermines the operation of s 286 in explicitly preserving the operation of conditions imposed under earlier statutory regimes – specifically where (as here) there have been statutory changes such that those conditions could no longer be imposed.

Dated: 2 February 2021

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[20] To construe a condition as inoperative and ineffective because of ambiguity would be directly contrary to the general approach to construction of approvals summarised in *Cann's Pty Ltd v Commonwealth* (1945) 71 CLR 210 at 228 (Dixon J).

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ANNEXURE A

CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

Pursuant to paragraph 3 of Practice Direction No. 1 of 2019, the Appellants set out below a list of provisions not previously referred to by the Appellants.

Legislation	**Version**
Queensland	
Integrated Planning Act 1997 (Qld) s 3.5.23(4)	Reprint No 10A
Acts Interpretation Act 1954 (Qld), ss 14, 14A, 38(4).	Reprint as at 1 January 2021
Statutory Instruments Act 1992 (Qld), ss 7(3), 14, Schedule 1.	Reprint as at 1 January 2021

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