# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Gold Coast City Council v Sunland Group Limited & Anor* [2020] QCA 89 |
| PARTIES: | **GOLD COAST CITY COUNCIL**<br>(applicant)<br>**v**<br>**SUNLAND GROUP LIMITED**<br>ACN 063 429 532<br>**SUNLAND DEVELOPMENTS NO 22 PTY LTD**<br>ACN 164 903 011<br>(respondents) |
| FILE NO/S: | Appeal No 5420 of 2019<br>P & E Appeal No 1497 of 2017 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | Application for Leave *Planning and Environment Court Act* |
| ORIGINATING COURT: | Planning and Environment Court at Brisbane – [2019] QPEC 14 (Everson DCJ) |
| DELIVERED ON: | 1 May 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 12 November 2019 |
| JUDGES: | Sofronoff P and Philippides and McMurdo JJA |
| ORDERS: | **1. Grant leave to appeal.**<br>**2. Allow the appeal.**<br>**3. Set aside the orders made by the Planning and Environment Court on 4 April 2019.**<br>**4. Dismiss the Originating Application filed in the Planning and Environment Court.**<br>**5. Order the respondents to pay the appellant's costs of the appeal and of the proceeding in the Planning and Environment Court.** |
| CATCHWORDS: | APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – OTHER CASES — where one of the respondents purchased land at Mermaid Beach – where the land was then subject to a preliminary approval which had been granted by the Planning and Environment Court under the now repealed *Integrated Planning Act* 1997 (Qld) ("the IPA") in 2007 – where the preliminary approval made provision for the development of the land by a multi-stage residential development – where |

the preliminary approval made provision for contributions to the cost of relevant infrastructure to be paid by developers to the applicant – where those contributions were to be made under planning scheme policies which had been made by the applicant under a regime set out in the IPA – where those planning scheme policies were expressed to be temporary measures – where under the statute which now governs the development of this land, namely the *Planning Act* 2016 (Qld) ("the Planning Act"), there is no provision for a local government to make any further planning scheme policy for infrastructure – where the respondents say that the only infrastructure charges which can be levied and become payable on the occasion of any development permit issued for this land, are charges calculated by reference to the planning scheme policies – where the applicant says that infrastructure charges must be levied and paid, not according to the policies, but pursuant to the regime for the giving of an infrastructure charges notice under s 119 of the Planning Act – where the Planning and Environment Court made declarations in the respondents' favour – whether the primary judge erred in finding in favour of the respondent

STATUTES – ACTS OF PARLIAMENT – INTERPRETATION – INTERPRETATION ACTS AND PROVISIONS – where the primary judge found that the preliminary approval imposed a present obligation to pay contributions at a later date – where, in 2011, amendments to the *Sustainable Planning Act* 2009 ("the SPA") introduced a new regime for local governments to recover from developers their contributions towards the cost of infrastructure which would be used by their development – where s 880 of the SPA stated that a local government must not levy certain infrastructure charges or impose a condition under a planning scheme policy to which s 847 applies – whether the effect of s 880 of the SPA was to prevent the Council from collecting the contributions under the preliminary approval – whether the primary judge erred in interpreting the preliminary approval and s 880 of the SPA

*Integrated Planning Act* 1997 (Qld), s 3.1.5, s 6.1.20
*Planning Act* 2016 (Qld), s 119
*Sustainable Planning Act* 2009 (Qld), s 635, s 847, s 880

COUNSEL: G Gibson QC, with M Batty, for the applicant
S L Doyle QC, with S J Webster, for the respondents

SOLICITORS: HopgoodGanim Lawyers for the applicant
Holding Redlich for the respondents

[1] **SOFRONOFF P:** I agree with McMurdo JA.

[2] **PHILIPPIDES JA:** I agree with the orders proposed by McMurdo JA for the reasons given by his Honour.

[3] **McMURDO JA:**

**The case in outline**

The question in this case is: under what law must contributions for infrastructure for a certain development of the respondents' land be levied and paid? The applicant ("the Council") says that it is the legal regime under Chapter 4 of the *Planning Act* 2016 (Qld) ("the Planning Act"). The respondents, to which I will refer as "Sunland", say that contributions must be levied and paid according to planning scheme policies, made by the Council under the now repealed *Integrated Planning Act* 1997 (Qld) (the "IPA").

[4] In 2015, one of the respondents, Sunland Developments No 22 Pty Ltd, purchased this land which is at Mermaid Beach. The land was then subject to a preliminary approval which had been granted by the Planning and Environment Court under the IPA in 2007 ("the Preliminary Approval"), which provided for the development of the land by a multi-stage residential development called "Lakeview at Mermaid". By 2015, the IPA had been repealed, but the Preliminary Approval had continued in force as a preliminary approval taken to have been granted under the (now repealed) *Sustainable Planning Act* 2009 (Qld) ("SPA"),[1] and it has an ongoing effect under the Planning Act.[2]

[5] The Preliminary Approval made provision for contributions to the cost of relevant infrastructure to be paid by the developer to the Council. There were four types of infrastructure, for which provision was made by four clauses in relevantly identical terms.[3] It is sufficient to set out one of them:

> "13 Contributions toward Recreational Facilities 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 16 – Policy for Infrastructure Recreation Facilities Network Developer Contributions.
>
> Contributions shall be calculated at rates current at due date of payment."

[6] The policy referred to in clause 13, and the three other policies which were the subject of clauses 14, 15 and 16 of the Preliminary Approval, were planning scheme policies which had been made by the Council under a regime set out in the IPA. Each provided for the assessment and levying of contributions to be made by developers as a condition of a development approval, with the expressed object of the developer paying relevant and reasonable costs towards the cost of the infrastructure to meet the demand placed upon it by the development.[4]

[7] Under the statute which now governs the development of this land, namely the Planning Act, there is no provision for a local government to make any further planning scheme policy for infrastructure. And even under the IPA, the regime under which infrastructure contributions were made by reference to planning

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1 Section 801 of the SPA.
2 Section 286 of the Planning Act.
3 Clauses 13 to 16 of the Preliminary Approval.
4 By paragraph 2.0 of each policy.

scheme policies was expressed to be a temporary one. By s 6.1.20(4) of the IPA, planning scheme policies such as these were to cease to have effect on 30 June 2008, or a later date nominated by the relevant Minister.[5] By Division 4 Part 1 of Chapter 5 of the IPA, there was to be a new regime for infrastructure contributions, by which a local government would levy a charge for supplying "trunk" infrastructure (which is the type of infrastructure which is relevant to this case) by giving what was called an "infrastructure charges notice", as a result of a development approval or in certain other circumstances.[6]

[8] This phasing out of the regime for contributions according to planning scheme policies continued under the SPA. Section 847 of the SPA provided that planning scheme policies for infrastructure would expire on 30 June 2010, or such later date nominated by the Minister.[7] And the transition was taken further by certain amendments to the SPA made in 2011.[8] Importantly for this case, those amendments introduced s 648F (later, after some amendment, renumbered to s 635) and s 880 of the SPA.

[9] The Planning Act provides for what is called an "adopted charge" for trunk infrastructure, to be levied by a local government giving an infrastructure charges notice under s 119. That section provides that if a development approval has been given, and an adopted charge applies to providing trunk infrastructure for the development, the local government must give such a notice to the applicant for the approval, and if the local government is the assessment manager for the development application, that notice must be given at the same time as, or as soon as practicable after, the development approval is given.[9] Where that infrastructure charge applies to an application for a material change of use, the charge becomes payable when that change happens.[10]

[10] The respondents say that the only infrastructure charges which can be levied and become payable on the occasion of any development permit issued for this land, are charges calculated by reference to these planning scheme policies.

[11] The Council says that infrastructure charges must be levied and paid, not according to the policies, but pursuant to the regime for the giving of an infrastructure charges notice under s 119 of the Planning Act.

[12] Sunland applied to the Planning and Environment Court, seeking declaratory relief in order to resolve this dispute. Declarations were made in its favour as follows:[11]

1. The Council has power to collect infrastructure contributions under and in accordance with conditions 13 to 16 of the Preliminary Approval for infrastructure for development which is "authorised by future permits given for applications referred to in conditions 13 to 16" of the Preliminary Approval.

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5 That date was extended by the Minister to 30 June 2009.
6 Section 5.1.8 of the IPA.
7 That date was extended by the Minister to 31 December 2011.
8 Effected by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act* 2011 (Qld).
9 Section 119(2), (3).
10 Section 122(1)(c) of the Planning Act.
11 *Sunland Group Limited & Anor v Gold Coast City Council* [2019] QPEC 14 ("Judgment").

2. The Council has no power to issue an infrastructure charges notice under s 119 of the Planning Act for infrastructure for development authorised by such future permits.

[13] Sunland had applied for further declaratory relief, to the effect that the Council was bound to charge for infrastructure according to what was said to have been an infrastructure agreement made pursuant to s 677 of the SPA. Sunland's case in that respect was rejected by the primary judge,[12] and Sunland does not pursue that relief.

[14] The Council seeks leave to appeal against the declarations which were made, on the grounds of legal errors said to have been made by the primary judge in construing the terms of the Preliminary Approval and the relevant legislation. For the reasons that follow, the primary judge erred in preferring Sunland's case and in making the declarations, so that leave to appeal should be granted and the appeal allowed.

**The Preliminary Approval**

[15] The IPA provided for two kinds of "development approval", namely a preliminary approval and a development permit.[13] By s 3.1.5(1), a preliminary approval approved development, but did not authorise assessable development to occur. By s 3.1.5(3), the only authority for assessable development to occur came from a development permit. Section 3.1.5(2) provided that there was no requirement to get a preliminary approval for development.

[16] In essence, the utility of a preliminary approval was that it could vary the operation of a local planning instrument for a proposed development, so as to affect the consideration of applications for development permits over what might be a lengthy period during which a large and staged development, such as this one, would occur. The variation of a local planning instrument, as it would apply to the development, was the subject of s 3.1.6, which provided that where the development involved a material change of use of land, a preliminary approval might state that the development was to be assessed in a certain way[14] and according to certain codes.[15] To the extent that the preliminary approval, by making those provisions, had a different effect to that of the local planning instrument, it was the preliminary approval which prevailed.[16]

[17] By s 3.5.28, a development approval attached to the land, and bound the owner, the owner's successors in title and any occupier of the land.

[18] A preliminary approval approved development subject to the conditions in that approval.[17] A development permit authorised assessable development to occur to

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12 Judgment [24].

13 The terms "development approval" was defined by Schedule 10 to mean:

> "a decision notice or a negotiated decision notice that –
>
> (a) approves, wholly or partially, development applied for in a development application (whether or not the approval has conditions attached to it); and
>
> (b) is in the form of a preliminary approval, a development permit or an approval combining both a preliminary approval and a development permit in the one approval."

14 As assessable development (requiring code or impact assessment), as self-assessable development or as exempt development.

15 Section 3.1.6(2), (3), similar provision was made for development not involving a material change of use: s 3.1.6(4), (5).

16 Section 3.1.6(6).

17 Section 3.1.5(1).

the extent stated in the permit, subject to both the conditions in the permit and "any preliminary approval relating to the development the permit authorises, including any conditions in the preliminary approval."[18]

[19] In essence, a preliminary approval established the framework under which applications for development permits for the land were to be assessed.

[20] The Preliminary Approval was expressed to approve all of the variations to the planning instrument which the applicant had sought, which were identified by reference to a certain plan and code which had been proposed for the development. It recorded that the Council's planning scheme, other than those approved variations, should be the planning instrument against which future development applications for the site were to be assessed. It stated that the Preliminary Approval comprised certain plans and codes as well as "the conditions of this Preliminary Approval". There were several clauses, under the heading "Assessment Framework", which included the following:

> "4. The conditions of this Preliminary Approval shall establish the planning framework for future development on the site. Future applications for Development Permits pursuant to this Preliminary Approval shall be subject to the level of assessment set out in the Table of Development within the approved "Lakeview at Mermaid Plan".
>
> 5. This Preliminary Approval is not for the detailed design or layout of the development. The detailed design and layout shall be determined following the submission of additional information with future development applications."

[21] The critical clauses for this case, clauses 13 to 16, appeared under the heading "Infrastructure Charges". Each of them referred to a certain planning scheme policy.[19] The policies had a statutory effect according to s 6.1.20, which relevantly provided as follows:

> "**6.1.20 Planning scheme policies for infrastructure**
>
> (1) This section applies if—
>
> (a) a local government has an IPA planning scheme; and
>
> (b) the local government prepares a planning scheme policy about infrastructure.
>
> (2) The planning scheme policy must state each of the following—
>
> (a) a contribution (an *infrastructure contribution*) for each development infrastructure network identified in the policy;

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18 Section 3.1.5(3).

19 Clause 14 referred to "Planning Scheme Policy 19 – Policy for Infrastructure Transport Network Developer Contributions", clause 15 referred to "Planning Scheme Policy 3A – Policy for Infrastructure Water Supply Network Developer Contributions" and clause 16 referred to "Planning Scheme Policy 3B – Policy for Infrastructure Sewerage Network Developer Contributions."

(b) the estimated proportion of the establishment cost of each network to be funded by the contribution;

(c) when it is anticipated the infrastructure forming part of the network will be provided;

(d) the estimated establishment cost of the infrastructure;

(e) each area in which the contribution applies;

(f) each type of lot or use for which the contribution applies;

(g) how the contribution must be calculated for—

(i) each area mentioned in paragraph (e); and

(ii) each type of lot or use mentioned in paragraph (f).

…

(2C) The infrastructure contribution required under the policy may be calculated—

(a) in the way permitted under the repealed Act[20]; or

(b) as if it were an infrastructure charge under this Act.

…

(3) However, if the local government has an infrastructure charges plan, an infrastructure charges schedule or a regulated infrastructure charges schedule, the planning scheme policy must not deal with the same matters as the infrastructure charges plan, the infrastructure charges schedule or the regulated infrastructure charges schedule.

…

(4) This section ceases to have effect, in relation to the planning scheme, on—

(a) 30 June 2008; or

(b) if the Minister, by gazette notice, nominates a later day for the planning scheme—the later day."

[22] In sub-section (3) of that provision, "an infrastructure charges plan, an infrastructure charges schedules or a regulated infrastructure charges schedule" were, in essence, references to the new regime, introduced by the IPA for the levying of charges for the use of infrastructure. That new regime, most particularly by s 5.1.4, was relevantly the same as the present regime under the Planning Act which the Council contends must now be applied to this development.

[23] As can be seen from s 6.1.20(4), the regime by which contributions could be required as conditions of a development approval, and calculated by reference to planning scheme policies made by local governments, was given a limited life.

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20 The repealed *Local Government (Planning and Environment) Act* 1990 (Qld).

[24] There is a substantial issue in this case as to the meaning and effect of the terms of clauses 13 to 16. To discuss that issue, again it is necessary to refer only to the terms of clause 13.

[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 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.

**The Preliminary Approval under the SPA**

[27] The SPA made substantially the same provision for preliminary approvals. It provided for the same categories of a development approval, namely a preliminary approval, a development permit or an approval which combined both.[21] By s 241 of the SPA, a preliminary approval approved development, but did not authorise assessable development to take place. By s 242, a preliminary approval might affect a local planning instrument, in the way which had been allowed by s 3.1.6 of the IPA. And again, it was only a development permit which authorised assessable development to take place.[22]

[28] By s 801 of the SPA, a development approval under the repealed IPA, which was in force immediately before the commencement of the SPA, continued as a development approval under the SPA. More particularly, s 808 of the SPA continued the operation of a preliminary approval such as this one, and s 808(2) provided that the preliminary approval was taken to be a preliminary approval to which s 242 of the SPA applied.

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21 It also provided for a deemed approval, which is not presently relevant. SPA Schedule 3.

22 Section 241(1), s 243 of the SPA.

[29] Another transitional provision was s 847, which dealt with the subject of planning scheme policies for infrastructure. It relevantly provided as follows:

> "**847 Planning scheme policies for infrastructure**
>
> (1) This section applies if, immediately before the commencement, a local government has an existing planning scheme that includes a planning scheme policy about infrastructure prepared under repealed IPA, section 6.1.20.
>
> …
>
> (4) The infrastructure contribution required under the policy may be calculated—
>
> (a) in the way permitted under the repealed LGP&E Act;[23] or
>
> (b) as if it were an infrastructure charge under this Act.
>
> …
>
> (6) However, if the local government has an infrastructure charges plan, an infrastructure charges schedule or a regulated infrastructure charges schedule (a *relevant instrument*) and there is an inconsistency between the planning scheme policy and a relevant instrument, the relevant instrument prevails to the extent of the inconsistency.
>
> …
>
> (8) A planning scheme policy mentioned in subsection (1) ceases to have effect on—
>
> (a) generally—30 June 2010; or
>
> (b) if the Minister, by gazette notice, nominates a later day for the planning scheme—the later day.
>
> (9) Despite subsection (8), a requirement under this section about an infrastructure contribution required under the planning scheme policy before the day it ceases to have effect continues to apply."

[30] It can be seen that the terms of this provision broadly corresponded with those of s 6.1.20 of the IPA. However, the SPA made no provision for the formulation of new planning scheme policies for infrastructure. At the same time, s 847 preserved the operation of a planning scheme policy about infrastructure, which was within a planning scheme existing at the commencement of the SPA. The subject policies were within that description, so that s 847 applied.

[31] Section 848(2) of the SPA applied if a local government was deciding an application under an existing planning scheme[24] and the local government had a planning scheme policy about infrastructure prepared under s 6.1.20 of the IPA.

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23 The repealed *Local Government (Planning and Environment) Act* 1990 (Qld).

24 Meaning a planning scheme made under the repealed IPA: SPA s 765, s 778(1).

Section 848(2) provided that a local government might impose a condition on the development approval requiring land, works or a contribution towards the costs of supplying infrastructure under the planning scheme policy. However by s 848(3)(b), that applied only until 30 June 2010 or such later date fixed by the Minister.

[32] Important amendments were made to the SPA by the *Sustainable Planning (Housing Affordability and Infrastructure Charges Reform) Amendment Act* 2011 (Qld) ("the 2011 Act"). A new Chapter 8, part 1, division 2A was inserted to provide for what was described as an "adopted infrastructure charge" for trunk infrastructure. By what became s 630 of the SPA, a local government might resolve to "adopt" charges for providing trunk infrastructure for development, subject to the constraints of a "State planning regulatory provision," which might impose a maximum charge which can be adopted.[25] By what became, at any relevant time for this case, s 635, a local government was required to give an infrastructure charges notice under that section if a development approval had been given and an adopted infrastructure charge applied for the provision of trunk infrastructure for the development. The evident intention of the 2011 Act was that it would be by this new regime that local governments would recover from developers their contributions towards the cost of infrastructure which would be used by their development.

[33] Section 880 of the SPA was critical to this transition to the new regime, from two other regimes. One regime involved the imposition of a condition under a planning scheme policy, for which s 847 of the SPA had made provision. The other involved the local government levying an infrastructure charge or regulated infrastructure charge under chapter 8, part 1, division 4 or 5 of the SPA.

[34] Section 880 provided as follows:

> "**880 When local government must not levy particular charges for infrastructure**
>
> (1) This section applies—
>
> (a) on the day a State planning regulatory provision (adopted charges) first has effect; and
>
> (b) until the day the State planning regulatory provision ceases to have effect.
>
> (2) A local government must not—
>
> (a) levy an infrastructure charge or regulated infrastructure charge under chapter 8, part 1, division 4 or 5; or
>
> (b) impose a condition under a planning scheme policy to which section 847 applies.
>
> (3) Subsection (2)—
>
> (a) applies despite chapter 8, part 1, division 4 or 5 and sections 847 and 848; and

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25 s 629 of the SPA.

(b) does not stop a local government—

(i) collecting an infrastructure charge or regulated infrastructure charge lawfully levied by the local government; or

(ii) collecting an infrastructure contribution payable under a condition lawfully imposed under a planning scheme policy to which section 847 applies; and

(c) does not stop a local government giving a new notice under section 185(8) or 364; and

(d) does not affect a right or liability, or action that can be taken, under this Act in relation to a charge or infrastructure contribution mentioned in paragraph (b)."

[35] The Explanatory Notes for the 2011 Act said this about s 880:

> **"Section 880 (When local government must not levy particular charges for infrastructure)** extends the effect of section 847(8), dealing with the payment of contributions levied through a condition of a development approval in accordance with a planning scheme policy.
>
> Subsection 2 effectively "switches off" the ability to impose a condition under a planning scheme policy to which section 847 applies … from the day the SPRP[26] establishing an adopted infrastructure charge takes effect, until the SPRP expires or is repealed. Subsection (3) confirms that rights, liabilities and actions in relation to a charge or contribution already levied or imposed at the time the SPRP takes effect are not affected."

[36] As I will discuss, the primary judge interpreted s 880 in a way which favoured Sunland's case. His Honour rejected the Council's argument, which it maintains in this Court, that s 880 put paid to the power of the Council to require the payment by Sunland of contributions under the planning scheme policies. In his Honour's view, the effect of s 880(3) was to give a continuing effect to clauses 13 to 16 of the preliminary approval.[27]

**The Planning Act**

[37] The Preliminary Approval continued to operate under the Planning Act, by s 286 of the Planning Act which relevantly provided as follows:

"**286 Documents**

(1) This section applies to a document under the old Act[28] that is in effect when the old Act is repealed.

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26 State planning regulatory provision.
27 Judgment [10]-[11].
28 The SPA.

(2) Subject to this part, the document continues to have effect according to the terms and conditions of the document, even if the terms and conditions could not be imposed under this Act.

(3) This Act applies to the document as if the document had been made under this Act.

(4) To remove any doubt, it is declared that the document took effect or was made, given or received when the document took effect or was made, given or received under the old Act.

(5) The name of the document does not change unless subsection (6) applies to the document.

(6) If a document stated in column 1 of the following table is in effect when the old Act is repealed, the document is taken to be the document stated in column 2 of the table.

| Column 1<br>Old name | Column 2<br>New name |
|---|---|
| a compliance certificate for a subdivision plan given under the repealed *Sustainable Planning Regulation 2009*, schedule 19 | an approval made under a regulation for section 284(2)(b) |
| a compliance permit | a development permit |
| a designation of land for community infrastructure | a designation |
| a notice under the old Act, section 97, about a request to apply a superseded planning scheme | a decision notice under section 29(7) |
| a preliminary approval to which the old Act, section 242 applied | a variation approval |
| a statement by the Minister under the old Act, section 255 | a decision of the Minister under section 48(7) |

(7) In this section—

*document*—

(a) includes—

…

(iii) an approval (a development permit or preliminary approval, for example), … and

…

(xi) a planning instrument (a State planning policy, regional plan, planning scheme, planning scheme

> policy, or temporary local planning instrument, for example)…"

[38] As noted earlier, the Planning Act did not provide for the making of any further planning scheme policy for infrastructure contributions, or for the amendment of an existing policy. And nor did it contain a saving provision such as s 847 of the SPA.

[39] Sunland's argument is dependent upon s 286 of the Planning Act. Sunland contends that the Preliminary Approval, as "a document" under s 286, continues to have effect according to its original terms and conditions, even if those terms and conditions could not be imposed (as clearly they could not be) under the Planning Act,[29] and those terms and conditions include clauses 13 to 16.

[40] The Council's case is based upon s 119 of the Planning Act, which relevantly is as follows:

> "**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.
>
> …
>
> (3) The local government must give the infrastructure charges notice—
>
> (a) if the local government is the assessment manager—at the same time as, or as soon as practicable after, the development approval is given …".

[41] By s 120(1), a levied charge may only be for the extra demand placed on trunk infrastructure that the development will generate.

[42] By s 122(1)(c), a levied charge becomes payable, if the charge applies for a material change of use, when the change happens.

[43] By s 66, a development condition must not, other than under chapter 4, part 2 or 3, require a monetary payment for the establishment, operating or maintenance costs of works to be carried out for (amongst other things) infrastructure.

[44] Sections 119, 120 and 122 are within chapter 4, part 2.

**The Judgment**

[45] The primary judge noted that the parties agreed on the relevant facts. The currency period of the Preliminary Approval, having twice been extended, had effect until 2023. His Honour also noted that the Council had continued to publish up-to-date

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[29] Section 286(2).

rates for the planning scheme policies referred to in clauses 13 to 16, which he described as "the infrastructure conditions".[30]

[46] The primary judge referred to events in 2015 and 2016, in which Sunland lodged a series of development applications, in response to which the Council granted development permits for the development of parts of the subject land. His Honour noted that the Council had then issued what purported to be infrastructure charges notices to Sunland in respect of each of those applications. The charges were not in accordance with the infrastructure conditions.[31]

[47] His Honour said that the first issue for determination was whether the Council was required to recover contributions (and recognise identified credits) in accordance with the infrastructure conditions.[32] But his Honour did not specifically consider whether those charges were validly levied.[33]

[48] He summarised the submissions made by Sunland, which had referred to s 286 of the Planning Act and s 801 and s 808 of the SPA. His Honour then summarised the Council's arguments, which had relied upon s 880 of the SPA.

[49] His Honour's resolution of these arguments was explained within these paragraphs of the judgment:

> "[11] The difficulty with the Council's submission is that s 880(3) appears to preserve the lawful effect of the infrastructure conditions. To overcome this difficulty the Council submits that the preliminary approval did not levy infrastructure charges, rather it was worded such that this was left to the development permit stage. I reject this argument. The infrastructure conditions were in mandatory terms. Each contribution was obliged to be paid at a clear point in time (at the time application is made for a development permit). Each contribution is to be calculated in accordance with identified Planning Scheme Policies at the rates current at the due date of payment. The fact that these Planning Scheme Policies have now apparently been repealed is of no consequence in circumstances where, it is uncontentious that the Council continues to publish up-to-date rates for them.
>
> [12] There is a further difficulty with the Council's contention that while the preliminary approval has continuing effect under SPA, the infrastructure conditions do not. There is no provision of SPA which expressly purports to preserve some parts of a preliminary approval and not others. Given the general effect of s 801, and more specifically, the effect of s 808 of SPA in preserving preliminary approvals, clear words would be required to bring about the outcome contended for by the Council. On the contrary s 880(3)(b) and (d) expressly preserved the infrastructure conditions and the rights and

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30 Judgment [4].
31 Judgment [5].
32 Ibid.
33 Apparently because they were the subject of another challenge by Sunland, in a different case: see [58] below.

obligations pertaining to them. Upon the commencement of the PA they were in turn preserved pursuant to s 286 thereof.

[13] It follows that the Council can and is obliged to recover infrastructure contributions (and recognise identified credits) in accordance with the infrastructure conditions."

**The effect of s 880 of the SPA**

[50] Critical to the resolution of this case is the effect of s 880 of the SPA, which I have set out at [34]. By s 880(2)(b), the Council was precluded from imposing a condition under a planning scheme policy to which s 847 applied. Section 847 applied to these policies, as I have said earlier.[34]

[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. The effect of s 880 was to "switch off"[35] 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.

[52] Section 880(3) clarified, rather than qualified, the effect of s 880(2). It preserved the Council's position where there was an infrastructure contribution already *payable* under a condition lawfully imposed under a planning scheme policy to which s 847 applied. It provided that s 880(2) did not prevent the Council from *collecting* such a contribution. As was said in the Explanatory Note, sub-section (3) confirmed that "rights, liabilities and actions in relation to a charge or contribution already levied or imposed at the time the SPRP takes effect are not affected." But because no infrastructure contribution was *payable* by force of the Preliminary Approval, s 880(3) did not apply.

[53] I respectfully disagree with his Honour's reasoning that, by force of the Preliminary Approval, "each contribution was obliged to be paid ….", and it is that interpretation which led his Honour to the erroneous conclusion that s 880(3) was inconsistent with the Council's case.

[54] Consequently, on the commencement of the 2011 Act, the Council became precluded from imposing a condition that payment be made under any of these planning scheme policies. Without that power, the Council could not otherwise make the developer liable to make a payment calculated under the policies.

[55] Undoubtedly, the 2011 Act thereby affected the planning framework according to the Preliminary Approval. But the Parliament's clearly expressed object by that Act was to have infrastructure contributions levied and paid only under the regime which it then introduced in 2011.

**The effect of s 286 of the Planning Act**

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34 At [30].

35 As the Explanatory Note described it.

[56] The effect of s 286 of the Planning Act must then be considered, with an understanding of the effect of the Preliminary Approval immediately before the repeal of the SPA.[36] By sub-section (2), "the document", namely the Preliminary Approval, was to have a *continuing* effect. By then, its effect had been qualified by the 2011 Act. It could not be thought that s 286(2) restored the effect of the Preliminary Approval, as it had been prior to 2011. What continued to have effect was the Preliminary Approval, according to its terms and conditions as it was on the repeal of the SPA. Consequently, the Planning Act does not confer a power to require the payment of contributions for infrastructure according to these planning scheme policies.

[57] Consequently, there is no tension between, on the one hand, the terms of s 66 and provisions of Chapter 4, part 2, and on the other hand, s 286. Section 286 does not have the effect which the argument for Sunland attributed to it, and what remains are the unambiguous terms of those other provisions. In particular, by s 119, the local government *must* give an infrastructure charges notice in the case of a development permit which is issued under the planning scheme, as still varied by the Preliminary Approval.

**Conclusion and Orders**

[58] The Judgment made declarations about the Council's present powers, without declaring anything specifically about the validity of the infrastructure charges notices which the Council issued to Sunland in 2016. Those notices were held by another judge in the Planning and Environment Court to be invalid for non-compliance with s 637(2) of the SPA.[37] This Court allowed the Council's appeal against that judgment.[38] Neither side seeks to have decided, in this appeal, any other question of the efficacy of those particular notices. The declarations made by the primary judge in this case were to resolve the parties' dispute as to their respective positions under the Planning Act.

[59] For the above reasons, the declarations were wrongly made. The case brought by Sunland should have been dismissed in its entirety. I would order as follows:

1. Grant leave to appeal.
2. Allow the appeal.
3. Set aside the orders made by the Planning and Environment Court on 4 April 2019.
4. Dismiss the Originating Application filed in the Planning and Environment Court.
5. Order the respondents to pay the appellant's costs of the appeal and of the proceeding in the Planning and Environment Court.

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36 The old Act referred to in s 286 being the repealed SPA: s 285(1) of the Planning Act.
37 *Sunland Group Limited & Anor v Gold Coast City Council* [2018] QPEC 22.
38 *Gold Coast City Council v Sunland Group Limited & Anor* [2019] QCA 118.