SUPREME COURT OF QUEENSLAND

CITATION:	*Leagrove Pty Ltd & Ors v Gold Coast City Council* [2010] QSC 370
PARTIES:	**BS8678 of 2008** **LEAGROVE PTY LTD** ACN 103 669 405 **MARK FRANCIS STAFFORD** **MARGARET STAFFORD** **KATHRYN MARGARET STAFFORD** (applicants) **v** **GOLD COAST CITY COUNCIL** (respondent) **BS8929 of 2008** **ROTHMONT PROJECTS PTY LTD** ACN 098 994 453 **HOPE ISLAND PROJECTS PTY LTD** ACN 099 595 016 **FALCONREST PTY LTD** ACN 098 954 968 **FISH DEVELOPMENTS (HOPE ISLAND) PTY LTD** ACN 102 390 214 (first applicants) and **EPWY COTTONWOOD PTY LTD** ACN 102 875 552 **STEVEN WANG & GOLF CONNECTIONS AUST PTY LTD** ACN 099 013 920 (second applicants) **v** **GOLD COAST CITY COUNCIL** (respondent) **BS8930 of 2008** **NERANG PASTORAL CO PTY LTD** ACN 010 119 990 **PETER NEUMANN** **BRUCE NEUMANN** (applicants) **v** **GOLD COAST CITY COUNCIL** (respondent)
FILE NO/S:	BS8678 of 2008 BS8929 of 2008 BS8930 of 2008

DIVISION:	Trial
PROCEEDING:	Applications
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 September 2010
DELIVERED AT:	Brisbane
HEARING DATES:	29 – 30 March 2010
JUDGE:	Atkinson J
ORDER:	**The applications are dismissed.**
CATCHWORDS:	REAL PROPERTY – RATES AND CHARGES – RATING OF LAND – TYPES OF RATES – SPECIAL RATES – where respondent constructed infrastructure works and made a decision to make and levy three special charges in respect of each work pursuant to s 971 of the *Local Government Act* 1993 – where special charges were made and levied against land owned by the applicants on the basis that occupiers of the land received a 'special benefit' from these works – where applicants submitted that they did not receive any 'special benefit' from these works – where applicants applied for judicial review of the respondent's decision to make and levy the special charges – whether the applicants received a 'special benefit' from the construction of the infrastructure works – whether the respondent's decision to make and levy the special charges should be set aside ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – RELEVANT CONSIDERATIONS – where, in respect of two of the special charges, applicants sought judicial review of the respondent's decision to impose special charges against land owned by the applicants on the ground that that it failed to take into account relevant considerations, namely the respondent's planning intent – whether the respondent failed to take into account relevant considerations in making its decision to make and levy the special charges. ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – UNREASONABLENESS – where applicants sought judicial review of the respondent's decision to make and levy the special charges against land owned by the applicants on the ground that the decision was so unreasonable that no reasonable local government could have made it – whether the respondent's decision to make and levy the special charges was so unreasonable that no reasonable local government could have made it. ADMINISTRATIVE LAW – JUDICIAL REVIEW –

GROUNDS OF REVIEW – ERROR OF LAW – where applicants sought judicial review of the respondent's decision to make and levy the special charges against land owned by the applicants on the ground that the respondent's decision involved an error of law – where applicants submitted that the special charges were not authorised by s 971 of the *Local Government Act* 1993 – where applicants further submitted that the respondent had misconstrued the infrastructure works as a 'facility' for which a special charge could be levied – whether the respondent's decision to make and levy the special charges involved an error of law

Judicial Review Act 1991 (Qld) s 20
Local Authorities Act 1902 (Qld) (repealed), s 214
Local Government Act 1878 (Qld) (repealed), s 188
Local Government Act 1993 (Qld) (repealed), s 971

Australand Land and Housing No 5 (Hope Island) Pty Ltd Ors v Gold Coast City Council [2007] QCA 189; [2008] 1 Qd R 1, cited
Australand Land and Housing No 5 (Hope Island) Pty Ltd and Ors v Gold Coast City Council [2006] QSC 332, distinguished
Bankstown Municipal Council v Fripp (1919) 26 CLR 385, considered
Parramatta City Council v Pestell (1972) 128 CLR 305, considered
Severn Shire Council v North West County District Council (1974) 1 NSWLR 190, considered
Shanvale Pty Ltd v Livingstone Shire Council (1999) 105 LGERA 380, considered
Western Stores Ltd v Orange City Council (1973) 47 ALJR 118, considered

COUNSEL:

BS8678 of 2008
D R Gore QC with B G Cronin for the applicants
M D Hinson SC with A Horneman-Wren SC for the respondent

BS8929 of 2008
J Fish appeared on behalf of the first applicants
D R Gore QC with B G Cronin for the second applicants
M D Hinson SC with A Horneman-Wren SC for the respondent

BS8930 of 2008
D R Gore QC with B G Cronin for the applicants
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SOLICITORS:

BS8678 of 2008
Hopgood Ganim for the applicants
King & Company for the respondent

BS8929 of 2008
J Fish appeared on behalf of the first applicants
Hopgood Ganim for the second applicants
King & Company for the respondent

BS8930 of 2008
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King & Company for the respondent

[1] The applicants in each matter sought to review a decision made by the Gold Coast City Council ("the Council") on 19 June 2008 to make and levy special charges against land owned by the various applicants. Those special charges were purportedly made and levied pursuant to s 971 of the *Local Government Act 1993*[1] ("the LG Act"). The special charges are described as the Hope Island Recreation Special Charge ("recreation charge"), the Hope Island Canal Special Charge – Section A ("Section A charge") and the Hope Island Canal Special Charge – Lot 186 works ("Lot 186 charge").

[2] The Council's decision in respect of the special charges on 19 June 2008, was made following the consideration of two reports at the Council's Special Budget Committee meetings of 29 May 2008 and 16 June 2008. Specifically, the Council engaged Cardno Lawson Treloar ("Cardno") to report on the special benefit received by rateable land from Section A of the canal and from the Lot 186 works and John Wood Consultancy Services ("John Wood") to report on the special benefit received by rateable land in relation to the creation of Sickle Park. The Council substantially relied upon those reports as the basis for making the decision to levy the special charges.

[3] The area of land over which the charges were made was various parts of Hope Island, which is a marshy island east of the town of Coomera near the mouth of the Coomera River, much of which has now been converted to canal and other residential estates, marinas and golf courses. In particular it concerned a new island, which I will refer to as Boykambil Island, in the southern part of Hope Island created by canals or diversions in the Coomera River, which I shall refer to as the Hope Island Canal, and the area of land in the vicinity of Boykambil Island. Boykambil Island is a trapezium in shape with the Hope Island Canal dividing into two branches around it. Grant Avenue runs east to west across Boykambil Island. Section A was part of the Hope Island Canal which extended beyond Boykambil Island to the east so as to join the canal to Coombabah Creek and thence to the mouth of the Coomera River and to Moreton Bay. Lot 186 was the land through which the Council constructed the north western part of the Hope Island Canal surrounding Boykambil Island which joined it to the rest of the Hope Island Canal to the west.

[4] The grounds of judicial review essentially were that for the purposes of s 20 of the *Judicial Review Act 1991* ("the JR Act"), the making of the decision was an improper exercise of the power conferred by s 971 of the LG Act because:

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[1] From 1 July 2010 this Act has been replaced by the *Local Government Act* 2009 ("the 2009 Act"). Section 971 of the LG Act has been replaced by s 92 – s 94 of the 2009 Act and Part 6 of the *Local Government (Finance, Plans and Reporting) Regulation 2010*.

- The respondent failed to take relevant considerations into account;[2] and
- The decision was so unreasonable that no reasonable local government could have made it;[3]

and the decision involved an error of law in that it was not authorised by, and involved a misconstruction of, s 971 of the LG Act.[4]

[5] The applicant did not rely upon all of the grounds of review detailed in its application.[5] The grounds of review, as particularised, on which it did rely are set out below:

> "5. … the Respondent failed to take the following relevant considerations into account:
>
> (b) As to the Section A Charge:
>
> …
>
> (ii) Contrary to the opinion expressed in the report by Cardno (Qld) Pty Ltd (**Cardno**), which the Respondent has adopted as its opinion, lots with a frontage to the canal do not enjoy either unfettered or direct navigational access to the Coomera River, the Broadwater and Moreton Bay due to two matters, firstly restrictions imposed by the Respondent under its Specific Development Codes and Priority Infrastructure Plan in its town planning scheme and in draft Amendment Package No. 5 to the Respondent's planning scheme, which separately requires, inter alia, the dedication of land for a boardwalk along the length of the canal, and thus prevents the landowners from establishing private moorings in the canal and secondly, the exercise by the Respondent of the rights and powers available to it under the *Integrated Planning Act 1997*.
>
> *Particulars*
>
> *The Applicants say that:*
>
> *(b) Draft Amendment Package No. 5 to the Respondent's town planning scheme, dated August 2008 and endorsed by the Respondent on various dates including 17 September 2007, proposes to amend the Hope Island Local Area Plan ('LAP') by requiring that:*
>
> *(i) Public open space is provided along the waterfront and acceptable solutions of providing a minimum 8 metre wide 'Linkage Park' with 'Nodal Parks' along the entire*

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2 JR Act s 20(2)(e), s 23(b).
3 JR Act s 20(2)(e), s 23(g).
4 JR Act s 20(2)(d), (f).
5 See the applicants' outline of argument, in particular at paragraph 8.

waterfront of the Hope Island drainage canal and, where canals are adjacent to a subdivision design, providing parkland along the entire waterfront edge of the development;

(ii) Where canals are included in the subdivision design, adequate public access to the canal must be provided; and

(iii) In accordance with the Hope Island Open Space Areas map for Item 9, land abutting Hope Island Canal on canal-fronting lots, including the land identified in paragraph 3 of this Response, is designated as open space.

(c) pursuant to the Respondent's Priority Infrastructure Plan contained within the Respondent's planning scheme, section 5.6 and infrastructure map IM406, a recreation facility (either parkland or a pathway or a boardwalk or some combination of these) is identified across the entire frontage of the Hope Island Canal for development within the years 2012-2021;

(d) provisions of the Respondent's Reconfiguring a Lot Specific Development Code (PC18-PC20) effectively require development to provide the recreational facility relating to the Hope Island Canal shown on infrastructure map IM4-6.

(iv) Contrary to the opinion expressed in the report of CB Richard Ellis, which the Respondent has adopted as its own opinion, the canal fronting lots do not have either unfettered or direct access to a navigable waterway, as such access is restricted by the Respondent's town planning scheme and by the exercise by the Respondent of the rights and powers available to it under the Integrated Planning Act 1997.

(c) As to the Lot 186 Charge:

…

(ii) Contrary to the opinion expressed in the report by Cardno (Qld) Pty Ltd (**Cardno**), which the Respondent has adopted as its opinion, lots with a frontage to the canal do not enjoy either unfettered or direct navigational access to the Coomera River, the Broadwater and Moreton Bay due to two matters, firstly restrictions imposed by the Respondent under its Specific Development Codes and Priority Infrastructure Plan in its town planning scheme and in draft Amendment Package No. 5 to the

Respondent's planning scheme, which separately requires, inter alia, the dedication of land for a boardwalk along the length of the canal, and thus prevents the landowners from establishing private moorings in the canal and secondly, the exercise by the Respondent of the rights and powers available to it under the *Integrated Planning Act 1997*.

5A. Further or alternatively, in forming the opinions referred to in paragraph 3 hereof, the respondent misconstrued s.971 of the *Local Government Act 1993*;

(a) as to the recreation charge, in deciding that Sickle Park was a 'facility' 'for' which a charge under s.971(1) may be made because (as appears from the information provided in attachment 2, set out in paragraph 4 hereof) the charge was for the replacement of parkland lost due to the construction of the Hope Island Canal;

(b) as to the Section A charge, in deciding that Section A was a 'facility' 'for' which a charge under s.971(1) may be made, because:

(i) considered in isolation, Section A does not involve anything or works which would give rise to a special benefit to any land, or the occupiers of any land;

(ii) it is impossible to form a view that Section A gives rise to any of the suggested flood reduction or water quality benefits, or direct navigational access benefit referred to in the resolution without taking into account the balance of the Hope Island Canal and the benefits of the same character resulting from the construction of the entire canal;

(iii) in the result, at best for the respondent, Section A is part only of a 'facility' being part only of the Hope Island Canal;

(c) as to the Lot 186 Charge, in deciding that the Lot 186 works was a 'facility' 'for' which a charge under s.971(1) may be made because:

(i) considered in isolation, the Lot 186 works do not involve anything or works which would give rise to a special benefit to any land, or the occupiers of any land;

(ii) it is impossible to form a view that the Lot 186 works give rise to any of the suggested flood reduction or water quality benefits, or direct navigational access benefit referred to in the resolution without taking into account the balance of the Hope Island Canal and the benefits of the same character resulting from the construction of the entire canal;

(iii) in the result, at best for the respondent, the Lot 186 works are part only of a 'facility' being part only of the Hope Island Canal.

6. Accordingly, for the purpose of section 20 of the *Judicial Review Act 1991*:

(a) the making of the decision was an improper exercise of the power conferred by section 971 of the *Local Government Act 1993*, because:

(i) the Respondent failed to take relevant considerations into account;

(ii) the decision was so unreasonable that no reasonable local government could have made it;

(b) the decision was not authorised by section 971;

(c) the decision involved an error of law (namely, a misconstruction of section 971)."

[6] Grounds 5(b)(ii) and (iv) and 5(c)(ii) and (iv) are in identical terms except that 5(b) relates to Section A and 5(c) relates to Lot 186.

[7] The grounds of review in grounds 5, 5A and 6 were therefore:

1. <u>Recreation charge</u>

The Council erred in law by misconstruing s 971 of the LG Act in deciding that Sickle Park was a 'facility' 'for' which a charge under s 971(1) may be made because the charge was for the replacement of parkland lost due to the construction of the Hope Island Canal.

2. <u>Section A and Lot 186</u>

(a) the making of the decision was an improper exercise of the power conferred by s 971 because the Council failed to take account of the following relevant consideration:

that contrary to the opinions expressed by Cardno and CB Richard Ellis, which the Council adopted as its own, lots with a frontage to the canal do not enjoy unfettered or direct navigational access to the Coomera River, the Broadwater and Moreton Bay due to:

(i) restrictions imposed by the Council under its Specific Development Codes (SDC) and Priority Infrastructure Plan (PIP) in its town planning scheme and in Draft Amendment Package No. 5 to that planning scheme which separately requires the dedication of land for a boardwalk along the length of the canal and thus prevents the landowners from establishing private moorings in the canal; and

(ii) the exercise by the Council of the rights and powers available to it under the *Integrated Planning Act* (IPA).

(b) the decision involved an error of law because in forming its opinions, the Council misconstrued s 971 of the LGA in deciding

that Section A or Lot 186 was a 'facility' 'for' which a charge under s 971(1) may be made because:

(i) considered in isolation, neither Section A nor Lot 186 involves anything or works which would give rise to a special benefit to any land, or the occupiers of any land;

(ii) it is impossible to form a view that Section A or Lot 186 gives rise to any of the suggested flood reduction or water quality benefits, or direct navigational access benefit referred to in the resolution without taking into account the balance of the Hope Island Canal and the benefits of the same character resulting from the construction of the entire canal;

(iii) in the result, at best for the respondent, Section A or Lot 186 is part only of a 'facility' being part only of the Hope Island Canal.

(c) the decision was as a result so unreasonable that no reasonable local government could have made it.

[8] It is apparent from the grounds on which judicial review is sought that the exercise of power by the Council under s 971 of the LG Act as it then was is critical to the determination of this case.

[9] Section 971 of the LG Act provided as follows:

"**971 Special rates and charges**

(1) A local government may make and levy a special rate or charge on rateable land if—

(a) the rate or charge is for a service, facility or activity; and

(b) in the local government's opinion—

(i) the land, or the occupier of the land, has or will specially benefit from, or has or will have special access to, the service, facility or activity; or

(ii) the occupier of the land, or the use made or to be made of the land, has, or will, specially contribute to the need for the service, facility or activity.

Examples for subsection (1)(b)(i)—

a rural fire services charge to raise funds for a rural fire brigade to purchase or maintain equipment to service only part of the local government's area

a tourism promotion charge levied on land used for businesses that would benefit from tourism promotion in the local government's area

a recreational facilities charge levied over a 2 year period to contribute to the cost of building playground facilities and amenities in a nominated park in part of the local government's area

a cultural centre charge levied over an 8 year period to contribute to the cost of building a centre in part of the local government's area (e.g. 1 of 2 towns in the area), with construction to start within a certain number of years after the charge is first levied

a charge, levied over a 20 year period, to repay a loan for the construction of a drainage system in part of the local government's area, from which some land would commence receiving a benefit in a year and the remainder in a later year of the 20 year period

Example for subsection (1)(b)(ii)—

an entity that relies on road transport for its business specially contributes to the wear and tear on a local road adjoining its property and is likely to need a higher standard of road than the occupiers of other properties adjoining the road

(2) The special rate or charge may be made and levied on the bases the local government considers appropriate.

(2A) The local government may fix a minimum amount of a special rate.

(3) Without limiting subsection (2), the amount of the special rate or charge may vary according to the extent to which, in the local government's opinion—

(a) the land, or the occupier of the land, has or will specially benefit from, or has or will have special access to, the service, facility or activity; or

(b) the occupier of the land, or the use made or to be made of the land, has, or will, specially contribute to the need for the service, facility or activity.

(4) The local government's resolution making the special rate or charge must identify—

(a) the rateable land to which the rate or charge applies; and

(b) the overall plan for the supply of the service, facility or activity.

(4A) The overall plan must—

(a) be adopted by the local government by resolution either before, or at the same time as, the local government first makes the special rate or charge; and

(b) identify the rateable land to which the rate or charge applies; and

(c) describe the service, facility or activity; and

(d) state the estimated cost of implementing the overall plan; and

(e) state the estimated time for implementing the overall plan.

(4B) Under an overall plan, a special rate or charge may be made and levied for 1 or more years before any of the funds received by the local government from the special rate or charge are expended in implementing the plan.

(4C) If an overall plan will not be implemented within 1 year, the local government must, at or before the budget meeting for

each year of the period for implementing the overall plan, by resolution, adopt an annual implementation plan for the year.

(4D) The local government may, by resolution, at any time, amend an overall plan or an annual implementation plan.

(5) The local government may identify parcels of rateable land to which the rate or charge applies in any way it considers appropriate.

(6) Subsection (1) is taken to have been complied with if the special rate or charge is made and levied on—

(a) all rateable land that, at the time of making and levying the rate or charge, could reasonably be identified as land on which the rate or charge may be made and levied; or

(b) all rateable land on which the rate or charge may be made and levied, other than land accidentally omitted.

(7) To remove any doubt, it is declared that a local government may make and levy a special rate or charge under subsection (1) for a service, facility or activity whether or not supplied or undertaken by the local government itself, including a service, facility or activity supplied or undertaken by another local government—

(a) in the other local government's area; and

(b) under arrangements entered into, under section 59, by the local governments."

Legislative history in Queensland

[10] It would appear that the principle of requiring owners of land benefited by works carried out by public authorities to pay for the special benefit to the land originated in the *Sewers Act* passed in England in 1427 in the time of Henry VI.[6] I will omit the many legislative emanations of that principle in the centuries since and pass to its legislative expression in Queensland in the first *Local Government Act* passed in 1878 where it is found in s 188 – s 198. Section 188 of the 1878 Act provided, in part:

> "Where it appears to the council that any work improvement or undertaking which the council are authorized to do or execute is for the special benefit of any particular portion of the municipal district the council may for defraying the expenses incurred in doing or executing such work improvement or undertaking by special order distinctly defining such portion make and levy a rate herein called a 'separate rate' equally on all rateable property situated within such portion."

[11] The 1878 Act was replaced by subsequent Local Government Acts which were consolidated into the *Local Authorities Act 1902* where s 214 provided, in part:

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6 See the Hansard Debate on the second reading speech of the *Land Betterment Assessment Bill* by Treasurer, William Kidston on 17 November 1904, *Official Record of the Debates of the Legislative Council and the Legislative Assembly*, 94 at p 824.

> "For defraying the expenses incurred in the execution of a work for the special benefit of any particular part of the Area, whether of the kind specified in the last preceding section or not, the Local Authority may also make and levy a Special Rate, herein called a 'Separate Rate', equally upon all rateable land situated in such part"

The works referred to in the preceding section included:

> "(i) Constructing and maintaining any works for or relating to sewerage or drainage;
> (ii) Constructing and maintaining works for the manufacture, conservation, and supply of gas, or electricity, or hydraulic or other power;
> (iii) Watering, cleansing, or lighting roads;
> (iv) Establishing, maintaining, and managing parks, botanical and other gardens, public baths and washhouses, public libraries, or other public places of recreation or improvement under the control of the Local Authority;
> (v) The eradication of noxious weeds or plants;
> (vi) The destruction and prevention of pests."

[12] The *Local Authorities Act* was replaced by the *Local Government Act 1936* in which s 21 dealt with the capacity of a local government to make and levy a special rate. That was replaced by s 971 of the *Local Government Act 1993* which was amended in 1994, 1999 and 2003 and is the subject of these applications. From 1 July 2010 the 1993 Act was replaced by the *Local Government Act 2009*. Section 971 has been replaced by s 92 – s 94 of the 2009 Act and Part 6 of the *Local Government (Finance, Plans and Reporting) Regulation 2010*.

The case law

[13] The leading cases on the imposition of special rates and charges are *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385; *Parramatta City Council v Pestell* (1972) 128 CLR 305; *Western Stores Ltd v Orange City Council* (1973) 47 ALJR 118 (Privy Council); *Severn Shire Council v North West County District Council* (1974) 1 NSWLR 190; *Shanvale Pty Ltd v Livingstone Shire Council* (1999) 105 LGERA 380; and *Australand Land and Housing No 5 (Hope Island) Pty Ltd and Ors v Gold Coast City Council* [2006] QSC 332 which was upheld on appeal in *Australand Land and Housing No 5 (Hope Island) Pty Ltd Ors v Gold Coast City Council* [2007] QCA 189; [2008] 1 Qd R 1.

[14] *Bankstown Municipal Council v Fripp* concerned the imposition of a special rate for the removal of night soil from ratepayers' properties. The High Court adverted to the differing opinions that might be reached as to whether or not a special rate was able to be justified in the particular circumstances and concluded that that was why the legislature left it to the opinion of council.

[15] Isaacs and Rich JJ held at 403:

> "In differentiating between specific special rates which do, and those which do not, in fact, confer special benefit on a locality, and as to the extent of that locality, various opinions may be held. To prevent litigation on that question of fact (see, for instance, *Borough of Alexandria v. Cooper* 11 N.S.W.L.R. (L) 166) Parliament has

described the services which may be the subject of a local rate as those 'which in the opinion of the council' would be of such limited benefit. Provided only the service is one which is reasonably capable of being so considered, the question of whether it 'would be' of such benefit is concluded by the council's opinion. Any extra convenience or attention in the way of sanitation is reasonably capable according to circumstances of being considered a special benefit to the locality to which it is confined and therefore a local rate is possible in respect of it."

[16] In *Parramatta City Council v Pestell* the High Court considered the power of a municipal Council to levy a local rate for the executing of any work or service which in its opinion would be of special benefit to a portion of its area, defined as prescribed under s 121 of the *Local Government Act 1919 (NSW)*. The Council resolved to levy a rate for the construction of roads, kerbing and guttering, concrete footpaths, drainage and the embellishment of an area described generally by metes and bounds but from which some 90 lots described by lot or street number were excluded. The excluded lots were residential lots whilst the prescribed area contained only industrial lots. The court held that, because the Council could not reasonably form the view that the rated land enjoyed by a special benefit which was not enjoyed by excluded land, the rate was invalid.

[17] Barwick CJ held that special benefit may be a benefit particular to the land selected by the local council although not exclusively so. Because the concept of special benefit is "somewhat nebulous", the nature of the special benefit and the choice of a portion to be subject to a local rate are both matters "apt to be committed to the opinion of the local government authority." The question of whether or not the works or services were of special benefit to a local government area was, his Honour observed, "very much a matter of opinion probably involving many imponderables and a great deal of local knowledge."

[18] While the selection of the land to carry that burden was left to the opinion of the council, it was "no doubt contemplated that the burden of a local rate should be distributed over all the land which might reasonably be thought especially to benefit by the performance of the works or the rendering of the services." The council must in fact have the opinion that the portion chosen will derive special benefit and whether or not it holds the requisite opinion may be challenged in court; "but if the necessary opinion is in fact held, the correctness of the council's view in selecting the portion cannot be reviewed by the courts." However if land is excluded when there is no rational basis for considering that it will not derive like benefit while at the same time holding the opinion that included land will benefit, then the rate may not be valid. It is the land that must derive the benefit not the owner of the land.

[19] In the circumstances in *Pestell*, the Chief Justice held that whatever opinion the Council held could not have been the opinion required by the statute; the resolution to levy the rate therefore lacked the necessary statutory basis; and it was therefore ineffective to make and levy the rate charges.

[20] Menzies J held at 322-323:

"The basic principle behind this provision is, without doubt, that owners of rateable land within the defined portion of the municipal area, which would be specially benefited by the execution by a

council of proposed works or services, can be called upon to make a special contribution towards the expenses of their execution by means of the imposition of a local rate. The section, however, leaves it to council to form a binding opinion that what is to be done 'would be of special benefit to a portion of its area to be defined as prescribed'. It is rateable land within such portion that may be rated. A council must therefore form an opinion whether any and what portion of its area would specially benefited by the execution of what is proposed. This opinion determines the land that may be rated. **There is thus a correspondence, dependent upon the opinion of the council, between (1) the land to which the execution of the work will be of special benefit and (2) the land to be rated**. **If it could be shown that the portion defined included land about which the Council concerned could not in reason hold the opinion that it would be specially benefited by the execution of the works, the section would not authorize the making and levying of a local rate.** Thus, for instance, if the works to be executed were the drainage of low-lying land, a council could not, in reason, be of the opinion that high land from which water flowed freely down to low-lying land would be specially benefited by the execution of the works.

Less obviously perhaps, if the portion defined did not include land which any reasonable man, who considered the matter, must be of the opinion would be specially benefited by the execution of the works equally with the land within the portion defined, the section would not authorize the making and levying of a local rate within the portion defined. Thus, to take the same instance, if, part of the low-lying land to be drained, were to be omitted from the defined portion, that portion would not be defined as required by the section. **The section does not authorize a council to pick and choose among lands that would be specially benefited.**

Limitations of the sort just referred to are implicit in the section. The definition of the land that may be subjected to a local rate is determined by the council's justifiable opinion of special benefit so that, if the so-called opinion could not be justified on any reasonable ground, then, the requisite opinion is lacking. There is, however, a world of difference between justifiable opinion and sound opinion. The former is one open to a reasonable man; the latter is one that is not merely defensible – it is right. **The validity of a local rule does not depend upon the soundness of a council's opinion; it is sufficient if the opinion expressed is one reasonably open to a council.** Whether it is sound or not is not a question for decision by a court.

A court may interfere only when it appears that the portion defined is so obviously not the land which the execution of the works benefits specially that the court can say that the council's professed opinion that it is, is one that is not in keeping with the section so that the making and levying of a rate on the basis of that opinion is outside its power: *Bankstown Municipal Council v Fripp* (1919) 26 CLR 385; *Coal Miners Industrial Union of Workers*

of Western Australia v. Amalgamated Collieries of Western Australia Ltd. (1960) 104 CLR.

There is, however, another way of impugning the basic opinion of a council. **The opinion of a council cannot in law be formed by reference to considerations foreign to the purposes of the section.** The section indicates broadly that the council is to be concerned with special benefit to lands within the municipal area. The portion that will be benefited is to be defined as prescribed by metes and bounds. It is, therefore, at the land that the council must look, not to the circumstances of owners or occupiers of the land who will be liable to pay the rate which should be imposed. Thus, for instance, to omit from a portion all lands owned by companies and to include therein only lands owned by individuals would be to have formed an opinion of the portion to be specially benefited by reference to an irrelevant circumstance and the council's opinion would be vitiated. The principle is straight-forward and well established." (emphasis added)

[21] Gibbs J held at 327-328:

"A council may make and levy a local rate under s.121 (1) of the *Local Government Act*, 1919 (as amended) (N.S.W.) ('the Act') on the unimproved capital value or on the improved capital value of rateable land within a portion of its area, for the purpose of defraying in whole or in part the expenses of executing any work or service, if two conditions are satisfied. **The first condition is one of substance, namely, that the work or service in the opinion of the council would be of special benefit to that portion of the area within which is the land on whose value the rate is to be levied.** The second condition is one of form – the portion of the area within which the rate is to be levied must be defined as prescribed. An ordinance made under the Act (Ordinance 5, cl. 28½ (b)) prescribes, so far as is relevant to this case, that the portion shall be 'defined by metes and bounds'.

Work done in a local authority area may be of benefit only to portion of the area or it may benefit the whole area; in the latter case, all the lands in the area will not necessarily benefit in equal measure. **A work is of special benefit to a portion of a local authority area if the lands comprising that portion derive from the work a benefit which is not shared by other lands or a benefit which is additional to, or greater than, that which is derived by other lands** (cf. *Bankstown Municipal Council v. Fripp* (1919) 26 CRL 385 at 401). It may of course prove disputable whether a work benefits a particular parcel of land and, if so, whether it benefits that parcel more than another. For obvious reasons therefore, **the legislature has left it to the council to form its opinion as to whether a particular work is of special benefit to a portion of the area.** A court has no power to override the council's opinion on such a matter simply because it considers it to be wrong. However, a court may interfere to ensure that the council acts within the powers confided to it by law. **If, in purporting to form its opinion, a council has taken into account matters which the Act, upon its proper construction, indicates are irrelevant to its consideration,**

or has failed to take into account matters which it ought to have considered, the opinion will not be regarded as validly formed. Even if the council has not erred in this way an opinion will nevertheless not be valid if it is so unreasonable that no reasonable council could have formed it (see *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1K B 233 at 228-229, 233-234, and see also *Bankstown Municipal Council v. Fripp* (1919) 26 CLR at 403.

It appears from what I have already said that a council might reasonably form the opinion that one locality derives special benefit from a work, notwithstanding that another locality derives some lesser benefit from the work. However, if in the opinion of the council two parcels of land would benefit equally from a work, the council could not define a portion under s. 121 (1) so as to include one parcel and exclude the other. It could not say that, although block A and block B would equally share the benefit, only block A should bear the rate. The portion to be defined is that to which the work will in the opinion of the council be of special benefit. Such portion will not be defined if the definition excludes land which the council in fact considers, or which no reasonable council could fail to consider, would derive from the work a benefit equal to that derived by the lands within the portion.

A ratepayer who asserts that the opinion which a council has purported to form for the purposes of s 121(1) is one not reasonably capable of being held has a heavy burden, since due weight must be given to the fact that the council is a responsible elected body with a particular knowledge of local conditions." (emphasis added)

[22] Stephen J held at 331-332:

"Section 121(1) is not a sub-section conferring upon councils any broad discretionary powers; it does no more than leave to a council two questions of fact for it to determine by the formation of its own opinion, **the main fact being whether or not specified works or services are such as 'would be of special benefit to a portion of its area'.** Inherently involved in answering this main question is the need for an answer to the subsidiary question 'What portion?' The legislation leaves it to councils to form their own opinions on these questions and those opinions will be conclusive; but there are well defined limits to such conclusiveness, it is not absolute. Thus, in *Bankstown Municipal Council v. Fripp* (1919) 385 26 CLR at 203 Isaacs and Rich JJ. said that a council's opinion on the main question, which was there in issue, was conclusive so long as the work or service 'is reasonably capable of being so considered', that is to say, of being considered as of special benefit to a portion of the council area. In *K.C.R. Pty. Ltd. v Orange City Council* (1968) 16 LGRA 153 at 157, Else-Mitchell J. expressed the test negatively in denying conclusiveness where the work or service 'cannot be said to be reasonably capable of being regarded by the council as of special benefit to the particular area defined.'

Likewise, the council's answer to the subsidiary questions will not be conclusive if the portion defined by the council cannot be said to be reasonably capable, in the view of the court, of being regarded as that portion receiving special benefit from the works or services proposed. Conclusiveness will also not attach to a council's opinion if it be shown to have been formed having regard to extraneous or irrelevant matters – *Baldwin v. Orange City Council* (1964) 82 WN (PH) NSW 45 at 48 and *Alan E. Tucker Pty Ltd v. Orange City Council* (1969) 18 LGRA 314.

The reason why the courts will in such cases disturb the otherwise conclusive opinion of the council is because it will then be apparent that the council has not in fact performed the only task permitted of it and upon which alone the legislation confers conclusiveness but has embarked upon some other course unauthorised by the sub-section." (emphasis added)

[23] In *Western Stores v Orange City Council*, the Judicial Committee of the Privy Council followed *Parramatta City Council v Pestell* in holding at 120:

"What is essential, and this is common to *Tucker's* case and *Pestell's* case, is a correlation in the opinion of the council between the portion benefited and the portion rated, a correlation which, as appears from both cases, is to be judged according to the nature of the benefit alleged."

At 122 the Judicial Committee held:

"Their Lordships entirely accept, and indeed emphasize, the necessity for rate-making bodies to do so strictly and directly for the purposes for which the particular rate is authorized to be made. They affirm the proposition that the courts have the power, indeed the duty, to strike down a rate if it is shown that it has not been made for those purposes, but upon extraneous considerations."

Their Lordships expressed the opinion that the rate could be raised with respect to works already carried out.

[24] *Severn SC v NW County District Council* concerned the efficacy of a rate imposed for the purpose of rural electrification undertaken by the defendant. Mahoney J accurately and succinctly summarised the effect of *Parramatta City Council v Pestell* at 202:[7]

"An 'opinion' purportedly formed by a council as to the area specially benefited by relevant works or services is examinable by the courts, whether on the ground that the expressed opinion was not the opinion to which the Statute refers (at p. 665 per Barwick C.J., p. 671 per Gibbs J. and p. 673 per Stephen J.), or that it was an opinion formed by taking into account irrelevant factors or not taking into account relevant factors (at p. 669 per Menzies J. and p. 671 per Gibbs J.) or because the opinion was one which could not be formed by the council in the particular case (at p. 665 per Barwick C.J., p. 669 per Menzies J. and p. 671 per Gibbs J.). However, a court will

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[7] The page references are to the report of *Parramatta City Council v Pestell* found at (1972) 46 ALJR 662.

> not lightly set aside the opinion purportedly formed by a council which has adverted to the relevant considerations (at p. 671 per Gibbs J.)."

[25] In *Shanvale Pty Ltd v Livingstone Shire Council*[8] the Queensland Court of Appeal considered the effect of s 21 of the *Local Government Act 1936* (the predecessor to the section presently under consideration) to the levying of separate rates for the construction of a road. Only some of the allotments which would be benefited by the construction of the road were levied and the levy was also applied to some land which was resumed for the road.

[26] McMurdo P held at p 390 [34]:

> "… the irresistible conclusion is that all land which had primary access from Coorumburra Road would benefit from the proposed land improvements, especially in wet weather. The question is whether the improved access benefits the land not the users of the land: see *Pestell* per Barwick CJ at 315; Menzies J at 323; and Stephen J at 333.[9] The respondent, in forming its opinion on s 21 of the Act as to which land 'will benefit from, or have access to' the proposed improved road, was demonstrably wrong and irrational in determining this issue on the basis of which land brought about the need for the improved road the subject of the levy. The question for the respondent's consideration should have been which land would 'benefit from or have access to' the improved road. The levy was not imposed by the respondent as required under s 21(4A) of the Act and is outside the power conferred by the Act. The respondent's decision is therefore invalid and the primary judge erred in failing to so hold."

[27] The President also held at p 393 [47] that a levy imposed on land which was wholly resumed for road purposes must be unreasonable. Her Honour held that the levy was not otherwise unreasonable and was not imposed for an improper purpose. Derrington and Chesterman JJ agreed with the President giving separate reasons in which Chesterman J (as his Honour then was) took a wider view of the unreasonableness of the Council's decision.

[28] *Australand Land and Housing No 5 (Hope Island) Pty Ltd and Ors v Gold Coast City Council* [2006] QSC 332 concerned a special rate imposed by the respondent with regard to various infrastructure works which were treated by the respondent as one facility. The works fell into three categories:

1. the construction of the part of the Hope Island Canal which is referred to in this judgment as Section A;

2. the constructions of three bridges across the canal;

3. the acquisition of land for the construction of a new park.

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[8] (1999) 105 LGERA 380.

[9] The statute was subsequently amended so the relevant section now encompasses benefits to the users of the land as well as the land itself.

[29] There is some overlap between the works the subject of a special rate in that case and the works the subject of special rates in this case. There was however no argument raised as to issue estoppel. Rather the Council, having failed to make and levy the special rate correctly, have endeavoured to raise a special rate relating to some of the works previously the subject of the rate that was held to be invalid and some other works. It has endeavoured to do so taking account of the reasons that the trial judge and the Court of Appeal gave for holding the special rate to be invalid.

[30] Chesterman J, as he then was, examined s 971 of the LG Act and held at [39]:

> "It follows from this exposition of s 971 that an investigation whether a council which levies a special rate or charge has done so in the manner required by the Act must examine four points:
>
> 1. The service, facility or activity must be precisely identified.
> 2. The proposed rate must be 'for' that facility, i.e. the rate must be levied to defray or recover the costs of providing the facility.
> 3. The benefit which land enjoys as a consequence of the facility must be identified so that the land which enjoys the benefit may be identified.
> 4. The benefit must come from the facility, i.e. the special benefit must be a causal consequence of the facility."

It is convenient to use that fourfold test in this case, although it must be kept steadily in mind that it is the terms of the statute itself which governs the validity of the exercise of powers by the Council in this case. In particular, the third point should be expanded in accordance with the wording of s 971(1)(b)(i) and (ii) and (3). The benefit may be to the occupier of the land rather than to the land itself. It would tend to undermine consistency in decision making, which is an important element of impartial justice, if a different test, apart from the matter just referred to, were used in a later case involving similar circumstances.[10]

[31] His Honour held[11] that the evidence before him:

> "made it impossible to accept that each lot of the charged land derives a special benefit from each of the items of infrastructure work which make up the facility provided by the respondent. The categories or work are disparate. They are different in kind and in effect. The infrastructure works are not interdependent. They do not form a unified structure or facility. They are discrete parts and do not coalesce into a single, or whole, facility.
>
> The respondent was obliged to consider the proper extent of land which would obtain a special benefit from each item of the infrastructure works. Deane J pointed out in *Watson v Bankstown Municipal Council* (1977) 34 LGRA 403 at 406:
>
> > Unless the council directs its attention to determining the precise area which, in its opinion, will be specially benefited

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10 *Lewani Springs Resort P/L v Gold Coast City Council* [2010] QCA 145 at [97].

11 At [74]-[75].

> by the relevant work or service, the local rate will not be validly made pursuant to the provisions of s 121(1).
>
> These considerations lead to a finding that the statutory prerequisite for the special charge did not exist. The respondent formed the opinion required by s 971(1)(b) by reference to the wrong criterion. It considered the facility to be the 'canal system' rather than the individual works: the building of bridges, the provision of parks, and the excavation of a section of canal. The respondent, as its reports indicate, considered what benefit was conferred by the 'canal system' and not the works it actually provided."

[32] An appeal against that decision was unsuccessful in the Court of Appeal: see *Australand and Housing No. 5 (Hope Island) Pty Ltd v Gold Coast City Council* [2007] QCA 189; [2008] 1 Qd R 1. The decision of the Court of Appeal was unanimous with Jerrard JA giving extensive reasons with which the Chief Justice agreed. The President gave brief concurring reasons. No specific reference was made to the fourfold test used by Chesterman J. McMurdo P held at 11, [4] – [6]:

> "[4] The charge levied was 'to fund the cost of, and repayment of loan funds used for, construction of the Hope Island Canal Infrastructure works'. The Council described the service facility or activity for which the charge was made under s.971 as 'the construction, and funding of construction, of the new canal system and associated infrastructure works'. These infrastructure works included the Council's acquisition of land to construct the canal, to replace parkland lost due to the construction of the canal and road closure and other property costs associated with canal construction; the cost of the canal construction; and the cost of building three bridges across the canal. The Council's charge under s.971 on the respondents' canal-front land was on the basis that the land 'specially benefits and will specially benefit from, and has and will have special access to, the infrastructure works generally'.
>
> [5] Rateable land in the Hope Island area other than the respondents' land also benefited from the construction of the new canal system and the associated infrastructure works in that its drainage, developability and general amenity was very significantly improved. Some land not subject to the charge plainly obtained a greater benefit than the respondents' land from infrastructure works such as the bridges. The respondents' canal-front land did obtain a special benefit from the construction of the canal over and above the benefit obtained by neighbouring land not the subject of the charge in that it gained the amenity of being waterfront land with direct access to the canal and ultimately the Coomera River and Moreton Bay. But the Council's charge on the respondents' canal-front land was not limited to covering the cost of the Council's partial construction of the canal. It extended to other infrastructure works, including the cost of building three bridges across the canal.

> [6] *Parramatta City Council v. Pestell* and *Shanvale Pty Ltd v. Council of the Shire of Livingstone* make clear that a local government can only impose a charge of this type if it can reasonably form the view that the specially rated land enjoyed a special benefit not enjoyed by rateable land not subject to the charge. Section 971 does not make owners of rateable land achieving a special benefit from a particular service, facility or activity (here the partial construction of the canal) subsidise the cost of providing another or other associated services, facilities or activities (such as the bridges) which generally benefit the charged land but equally or further benefit rateable land not the subject of the charge. In the absence of the clearest of words to that effect, the legislature cannot have intended such an unfair consequence to flow from s.971."

[33] Jerrard JA found the following faults with the Council resolution which treated all of the works by Council as one facility:

(1) land not subject to the special rate benefited from the works;

(2) the resolution of council did not identify the relevant special benefit to the charged land;

(3) the works carried out by council were separate facilities, even though they were part of an overall project, as different parts of the works benefited different areas of land with some overlap.

[34] In this case, however, the Council did split the works into three distinct facilities: the development of Sickle Park, the construction of Section A of the Hope Island Canal which tidally connects the Hope Island Canal to the Coomera River, and the Lot 186 works which tidally connect the western portion of the Hope Island Canal to the Coomera River.

[35] Mr Darren Scott, the director of the Economic Development and Major Projects Directorate of the Council, gave evidence that after the Court of Appeal decision was handed down, he instructed his staff to commence planning for the submission to Council of a report to recover the funds required for the provision of those three facilities by way of special rate pursuant to s 971 taking into account the decision of the Court of Appeal and the decision of Chesterman J from which that appeal was brought. Mr Scott then caused two experts to be engaged on the Council's behalf, namely Cardno Lawson Treloar in relation to the construction of the Section A Works and the Lot 186 Works and John Wood Consultancy Services in relation to Sickle Park, to report on the precise nature and extent of the benefit flowing from these works to identifiable parcels of land.

[36] It follows from the authorities referred to, applied to the terms of the statute, that in addition to the four matters identified by Chesterman J in *Australand Land and Housing No 5 (Hope Island) Pty Ltd*, the following principles of law guide decision making pursuant to s 971 of the LG Act in this case:

1. The relevant opinion as to whether or not a service, facility or activity specially benefits the land or the occupier of the land, the subject of the special rate, is the opinion of council;

2. The opinion must in fact be held;

3. The opinion need not be sound but must be reasonably open;

4. To be reasonably open, the opinion must be reasonably formed;

5. The opinion cannot be reasonably formed if some land is included where the land or its occupier does not specially benefit;

6. The opinion cannot be reasonably formed if some land is excluded where the land, or its occupier, specially benefits to a similar extent as included land: the council cannot pick and choose among lands that would be specially benefited;

7. The opinion cannot be reasonably formed if the council has taken into account irrelevant considerations or failed to take into account relevant considerations;

8. The opinion cannot be reasonably formed if it is so unreasonable no reasonable council could have formed that opinion.

[37] I shall examine each of the three facilities the subject of a special rate in this case in light of the relevant statute and case law and the grounds of review to determine the challenge to the validity of the special rates imposed.

The recreation charge

The facility

[38] The facility was identified as the establishment of Sickle Park.

Rate for that facility

[39] The recreation charge was made and levied on specified lots "to defray the cost of establishing Sickle Park, by funding the repayment of a loan, interest and associated expenses, and reimbursement of incidental expenditure from the Council's own funds."

Special benefit

[40] The special benefit enjoyed by occupiers of the specified lots as a result of Sickle Park was said to be:

> "(5) The Council is of the opinion that the occupiers of the rateable land receive a special benefit from the facility because:
> (a) Hope Island Sickle Park performs a local park function;
> (b) the occupiers of the land receive a benefit from the amenity (recreational, social, health and visual) provided by Sickle Park;

(c) access to Sickle Park from the land is convenient;

(d) the land is in close proximity to Sickle Park – the majority of it is within 500m or approximately 10 minutes walking time, and in the case of the identified land at the eastern end of Grant Avenue, Sickle Park will provide the primary local park function, because it is the closest local park that is easily accessible from this locality;

(e) for these reasons, and the reasons set out in paragraph 2.4.5 of the report of John Wood Consultancy Services dated 11 February 2008, which the Council has considered and adopted as its own opinion, the rateable land is the land primarily and particularly serviced by the local park function of Hope Island Sickle Park.

(6) For those reasons, the Council is also of the opinion that the occupiers of the rateable land have or will have special access to Hope Island Sickle Park as a local park.

(7) The Council is further of the opinion that:

(a) the special benefit provided by the facility is enjoyed similarly by all of the occupiers of land proposed to be levied;

(b) the special access to the facility is enjoyed similarly by the occupiers of those lands;

(c) The most appropriate basis of apportioning the total cost of implementation of the overall plan among the identified parcels of rateable land is on a pro rata unimproved capital valuation basis (decided under the Valuation of Land Act 1994), using the valuation effective 30 June 2008. For lots in a community title scheme, the UCV is determined in accordance with sections 193 and 194 of the Body Corporate and Community Management Act 1997."

Land benefited by the facility

[41] The rateable land was described as that identified in a report to the Council by John Wood Consultancy Services dated 11 February 2008 ("the Wood Report"). Two hundred and forty nine lots were subject to the recreation charge. Of those 249 lots, 158 were also subject to the Section A charge. Of those 158 lots, 119 were also subject to the Lot 186 charge. No lots were subject only to the recreation charge and the Lot 186 charge.

[42] Paragraph 2.4.5 of the Wood Report contained a map shaded to represent the "Hope Island area to benefit most from the Sickle Avenue Local Park". The area included Boykambil Island and an area to the north of it. The reasons for the shape of the benefited area were said to be:

Locality/Street Names	**Reasons**
Area north of Hope Island Canal including Palladium Boulevard;	• Within 500 m or approximately 10 minutes walking time of Sickle Avenue

Rhodium Crescent; Osmium Lane; Ruthenium Court; Ballybunyon Crescent; Shinecock Close; and Sickle Avenue as far east as the junction with John Lund Drive	Local Park
Island area surrounded by Hope Island Canal including all streets north and south of Grant Avenue and the island portion of Sickle Avenue known as the Marina Keys precinct.	• The western portion of the island is within 500 m or approximately 10 minutes walking time of Sickle Avenue Local Park • Residents in the eastern portion of the island will use the Sickle Avenue Local Park because it is the closest local park easily accessible from this locality. Note: Residents are unlikely to allow their children to walk to parks south of Broadwater Road because of the busy road crossing required.
Sanctuary Cove area	• Excluded because this is a gated community with no convenient walking access to the Sickle Avenue Local Park across the golf course and waterways.
Area south of Hope Island Canal	• Excluded because this area has no convenient walking access across the canal to the Sickle Avenue Local Park and the Local Parks in the Cova development are likely to be more convenient.

[43] The applicant submitted that it emerged from the Council decision that the recreation charge related to the purchase of land "for the replacement of parkland lost due to the construction of the canal through Banksia and Boykambil Parks". This reflected the true position, that the charge was not "for" Sickle Park, but "for" the replacement of another park.

[44] The respondent submitted that there is a considerable difficulty with the applicants' contention that the purchase of Lots 216 and 217 to replace parkland lost by the construction of the canal through two parks, Banksia Park and Boykambil Park, was not a facility for which a special charge may be levied. The loss of parkland represented a loss to the community. The Council was under no obligation to make good that loss. The Council chose to make good that loss by acquiring two lots to be developed as a park. A park is a facility. Sickle Park did not previously exist. The Council's reasons for acquiring the land which became Sickle Park is irrelevant to the characterisation of that park as a facility. There is no sound basis upon which it can be argued that a facility must consist of something new which represents an addition to the existing stock rather than the replacement of part of the existing stock which has been lost.

[45] The evidence shows that the Council did precisely identify the facility, Sickle Park; the rate was levied to recover the costs of providing that facility; the benefit enjoyed by the land was identified; and the benefit was caused by the facility. The acquisition of land for the construction of Sickle Park was for a facility,

notwithstanding that it replaced other facilities that were lost. The Council formed its opinion as to the land benefited by the new facility, Sickle Park, on a rational basis. The Council did not err in law by misconstruing s 971 of the LG Act in deciding that Sickle park was a 'facility' 'for' which a charge under s 971(1) may be made because the charge was for the replacement of parkland lost due to the construction of the Hope Island Canal.

[46] The rate imposed pursuant to s 971 with regard to the recreation charge was therefore valid and the challenge to its imposition set out in paragraph 5A(a) of the applications must fail.

Section A charge

The facility

[47] The Council resolution which imposed the Section A charge identified the facility provided as Section A of the Hope Island Canal, which tidally connects the Hope Island Canal to the Coomera River.

Rate levied for that facility

[48] The rate was levied for that facility because it was to fund the repayment of a loan, interest and associated expenses, and reimbursement of incidental expenditure from the Council's own funds in order to defray the cost of establishing Section A of the Hope Island Canal.

Special benefit

[49] The special benefits which were said by the Council to accrue to the occupiers of the rateable land which received a special benefit from the facility were threefold: flood mitigation, water quality benefit and the ability to obtain direct navigational access to the Coomera River:

> "(4) The Council is of the opinion that the occupiers of the rateable land receive a special benefit from the facility because:
>
> (a) Section A provides a 100 year ARI **flood reduction benefit** to the land identified in Figure 3a of the report of Cardno (Qld) Pty Ltd dated 28 May 2008. That flood reduction benefit results in lower levels of fill being required for development carried out after December 2004, as shown on Figure 4 to that report (read with Figure 5).
>
> (b) Section A provides a **water quality benefit** to the land identified in Figure 7 of the report of Cardno (Qld) Pty Ltd dated 28 May 2008, in terms of removing the requirement for there to be a water quality management system in the canal.
>
> (c) Section A permits the land adjacent to the Hope Island Canal (depicted in Figure 6 of the report of Cardno (Qld) Pty Ltd dated 28 May 2008) **the ability to obtain direct navigational access to the Coomera River**.

(d) for these reasons and the reasons set out in section 3 and 4 of the report of Cardno (Qld) Pty Ltd dated 28 May 2008, which the Council has considered and adopted as its own opinion, the rateable land is the land primarily and particularly benefiting from the construction of Section A of the Hope Island Canal.

(5) The Council is further of the opinion that:

(a) the methodology recommended in the report of Cardno (Qld) Pty Ltd dated 28 May 2008 for comparatively determining the special benefit flowing from the three forms of special benefit is sound;

(b) the basis of apportioning the total cost of implementation of the overall plan among the identified parcels of rateable land recommended in the report of Cardno (Qld) Pty Ltd dated 28 May 2008 is a reasonable and appropriate basis to adopt (noting that, in the case of a lot within a Community Titles Scheme, that part of the apportionment methodology which involves UCV uses the UCV for the lot determined in accordance with sections 193 and 194 of the Body Corporate and Community Management Act 1997);

(c) after considering the advice from its consultant engineer and valuer, the reduction of nuisance flooding as a result of the construction of the facility is not an appropriate criterion for determining special benefit to land."(emphasis added)

[50] Sections 3 and 4 of the Cardno Report referred to in paragraph (4)(d) above, provide:

"**3.0 Impacts of Lower Flood Levels**

There are a number of beneficial impacts which result from lowered flood levels in this region.

Firstly, compliance with Council's Planning Scheme requires a minimum allotment level for new developments equivalent to the 100 year ARI flood level plus 300mm for residential development. LAP Map 16.5 (Flood Inundation Area) from the Hope Island Local Plan shows that the majority of eastern Hope Island, with the exception of Sanctuary Cove, is flood-prone at this nominated recurrence interval. A copy of this map is included in the reference section of this report.

All undeveloped parts of eastern Hope Island therefore will require filling to comply with the Council standard. Any reduction in designated 100 year flood level will translate into a lower final allotment level, a lesser fill volume requirement and consequently a lower construction cost. It is therefore a simple matter to quantify this benefit by determining the reduced fill volume required for each

site that has or will benefit from the works and multiplying it by an appropriate rate to supply and place such fill.

This benefit will apply to a greater or lesser degree to all sites in the benefited area, including those which directly front the canal.

This has been estimated using the Spreadsheets in Appendix A which are associated with Figures 3a and 3b. These estimates have been based on analysis using Gold Coast City Council's latest Mike 21 model of the Coomera River floodplain. The special benefit calculation has been based on the following:

(a) The area of the lot
(b) The amount of 1 in 100 year flood level reduction due to Section A as shown on Figure 3a and the amount of 1 in 100 year flood level reduction due to Lot 186 as shown on Figure 3b.
(c) The percentage of that area filled or anticipated to be filled as shown on Figure 4.
(d) The determination of whether the site could have benefited from less earthworks (ie if it was built before or after Lot 186 and Section A flood level improvements were accepted by GCCC). Cardno's estimate of lots that may not have benefited is shown on Figure 5.

It is also anticipated that there would be a general reduction in nuisance flooding for many existing lots in the area due to the works. It is not possible to ascribe a direct value to this condition. Further, areas such as Boykambil would still suffer from localised direct rainfall and high tide levels due to the low lying nature of the land and therefore these, and other lands subject to nuisance flooding, would still not meet the current Designated Flood Event (DFE) standard of lot levels at the 1 in 100 year flood level. Hence regardless of any estimated nuisance flooding improvement these lots would still be considered flood prone. For these reasons the special benefit estimate was based on Council's DFE only.

4.0 Other Benefits from Construction of the Lot 186 and Section A Works

As discussed in Section 1, there are a number of other benefits which can be identified with respect to the construction of the Lot 186 and Section A works. The first is clearly that all lots with a frontage to the canal can now enjoy unfettered navigational access to the Coomera River, the Broadwater and Moreton Bay. Without the Lot 186 and Section A works, these lots are effectively land-locked, although they do have a water outlook. In that regard, the difference in value would typically be that between a lot in a lake style development on the Gold Coast (eg Lake Hugh Muntz, Burleigh Lake, Robina) and one in any of the canal developments connecting to the Nerang River. Figure 6 can be used to assist in the identification of the navigation benefit. This figure provides two

polygons to encapsulate those lots that receive a benefit from both the Lot 186 and Section A works and those that benefit from Section A works alone.

Secondly, the construction of the Lot 186 and Section A works removes the requirement for there to be a water quality management system in the canal. In common with other lake style developments, the development without these works would require a pumped water quality circulation system to operate and in this case two systems would have been required to maintain the water bodies east of Section A and east of Lot 186. While the connection through the Lot 86 works and through Section A to the Coomera River do not confer a direct financial benefit, these works do mean that the cost of development of the remainder of the waterway system (both capital and operating cost) will be lower than it would otherwise have been.

An indicative estimate of the turnover system in the lakes east of Section A would be of the order of $2 million dollars. An estimate of the cost for a similar turnover system for the lake east of Lot 186 could be of the order of $1.1 million dollars. Spreadsheets associated with Figures 6 and 7 respectively have been included in Appendix A with an estimated distribution of the special benefit."

<u>Land benefited by the facility</u>

[51] Figure 3a of the Cardno Report showed the land which is the part of Hope Island east of Santa Barbara Road, Hope Island Road and Helensvale Road which benefits from the flood reduction caused by the Section A construction. Figure 3b showed that part of Hope Island benefited by the Lot 186 works. Both figure 3a and figure 3b showed the area benefited by 450mm flood reduction. Figure 3a also showed the land benefited by 250mm, the land benefited by 150mm, and the land benefited by 35mm. Figure 4 showed the percentage of lot fill requirements of different areas of land near to the Hope Island Canal. Figure 5 showed the areas understood to be constructed before Section A and Lot 186. Figure 6 shows the area of land which has direct canal frontage and navigational access to the Coomera River because of Section A and the area of land which has such access because of Section A and Lot 186 together. Figure 7 shows the area of land benefited by water quality improvement because of Section A alone and the area of land benefited by water quality improvement because of Section A and Lot 186 together.

[52] The land benefited by Section A is a large area consisting of Boykambil Island and land to the north, west and south of it. Seven hundred and sixty-eight lots were subject to the Section A charge. Of those 768 lots, 619 were also subject to the Lot 186 charge. Of the 768 lots subject to the Section A charge, 158 were also subject to the recreation charge. As mentioned earlier, 119 lots were subject to the Section A, Lot 186 and the recreation charge.

[53] The Cardno Report provides the following general description of land benefited by the Section A works:

"This eastern most works will provide a flood benefit to lots upstream as estimated in Section 2.0 [of the Cardno Report]. These

> works will also provide a navigational and water quality benefit to all areas of the Hope Island Canal System between Section A and Santa Barbara Road."

[54] Section 2.0 of the Cardno Report dealt with the hydraulic analysis. It also noted, importantly, that while the construction of the entire Hope Island Canal provided a flood benefit, the focus of its consideration was the differential benefit created by the Council's works alone. It also considered the effect of the Section A works and the Lot 186 works separately. It identified the areas benefited by Section A and Lot 186 and the areas outside those where the benefit was either negligible or where developments had been approved before any benefits from the Lot 186 works or the Section A works would have been available for use.

[55] The Cardno Report analysed the benefits to individual lots to quantify the cost benefits accruing to different lots as a result of:

- reduced filling costs due to flood benefit;
- navigational access improvements for lots which, as a result of the works, had direct boating access to the Coomera River;
- reduced water quality management costs.

[56] The methodology used accorded weightings to the costs according to the special benefit received by each lot as follows:

> "• Reduced filling cost estimated separately for Lot 186 and Section A based on flood level reductions provided by the Lot 186 and Section A works respectively. This enabled a higher weighting to be given to those lots that benefited from both Lot 186 and Section A works.
>
> • Navigational Access weighting was based on advice from Richard Ellis as a 33.33% increase in Unimproved Capital Value (UCV) for those benefited lots from Lot 186 and Section A works respectively. A weighting for the costs of both Lot 186 and Section A was given to lots that required both Lot 186 and Section A works to provide access.
>
> • Water quality special benefit weighting based on an apportionment of an alternative pumped arrangement system using UCV for those benefited lots. In this case the Lot 186 and Section A works were considered to benefit all in the canal area including those that benefited from lakes offstream to the canal that drew water from the canal such as the Portofino and Ilanah Aqua Developments."

Lot 186 charge

<u>The facility</u>

[57] The Council resolution which imposed the Lot 186 charge identified the facility provided as the Lot 186 works of the Hope Island Canal, which tidally connect the western portion of the Hope Island Canal to the Coomera River.

<u>Rate levied for that facility</u>

[58] The rate was levied for that facility because it was to fund the repayment of a loan, interest and associated expenses, and reimbursement of incidental expenditure from the Council's own funds in order to defray the cost of establishing the Lot 186 works of the Hope Island Canal.

Special benefit

[59] The special benefit which was said by the Council to accrue to the occupiers of the rateable land was, as was the case with the Section A works, threefold: flood reduction, water quality benefit and the ability to obtain direct navigational access to the Coomera River:

> "(4) The Council is of the opinion that the occupiers of the rateable land receive a special benefit from the facility because:
>
> (a) The Lot 186 works provide a 100 year ARI flood reduction benefit to the land identified in Figure 3b of the report of Cardno (Qld) Pty Ltd dated 28 May 2008. That flood reduction benefit results in lower levels of fill being required for development carried out after December 2004, as shown on Figure 4 to that report (read with Figure 5).
>
> (b) The Lot 186 works provide a water quality benefit to the land identified in Figure 7 of the report of Cardno (Qld) Pty Ltd dated 28 May 2008, in terms of removing the requirement for there to be a water quality management system in the canal.
>
> (c) The Lot 186 works permit the land adjacent to the Hope Island Canal (depicted in Figure 6 of the report of Cardno (Qld) Pty Ltd dated 28 May 2008) the ability to obtain direct navigational access to the Coomera River.
>
> (d) For these reasons and the reasons set out in sections 3 and 4 of the report of Cardno (Qld) Pty Ltd dated 28 May 2008, which the Council has considered and adopted as its own opinion, the rateable land is the land primarily and particularly benefiting from the construction of the Lot 186 works of the Hope Island Canal.
>
> (5) The Council is further of the opinion that:
>
> (a) the methodology recommended in the report of Cardno (Qld) Pty Ltd dated 28 May 2008 for comparatively determining the special benefit flowing from the three forms of special benefit is sound;
>
> (b) the basis of apportioning the total cost of implementation of the overall plan among the identified parcels of rateable land recommended in the report of Cardno (Qld) Pty Ltd dated 28 May 2008 is a reasonable and appropriate basis to adopt (noting that, in the case of a lot within a Community Titles Scheme, that part of the apportionment methodology which involves UCV uses the UCV for

the lot determined in accordance with sections 193 and 194 of the Body Corporate and Community Management Act 1997);

(c) after considering the advice from its consultant engineer and valuer, the reduction of nuisance flooding as a result of the construction of the facility is not an appropriate criterion for determining special benefit to land."

Land benefited by the facility

[60] The area said to benefited by the Lot 186 works and therefore subject to the special rate are Boykambil Island and land to the west of it. Six hundred and twenty lots were subject to the Lot 186 charge. Of those, only one was not also subject to the Section A charge, whereas 148 of lots subject to the Section A charge were not also subject to the Lot 186 charge.

[61] It is apparent that some land is subject to all three special charges, some to two and some to only one. The Council's Hope Island Canal Report No 98 - Hope Island Canal Special Charge noted: "Although there is some overlap, the land benefiting from Section A is markedly different from that benefiting from the Lot 186 works. The two facilities are therefore dealt with separately for the purpose of determining special benefit, and this agenda item."

[62] In spite of the way the application was originally particularised the parties at the hearing accepted that the judicial review application was not concerned with individual lots but rather the methodology by which land was subject to one or more of the special rates.

[63] I shall examine some of the planning instruments referred to before dealing with the submissions made by the parties.

Priority Infrastructure Plan

[64] A "priority infrastructure plan" ("PIP") is defined in Schedule 10 of IPA as follows:

"**priority infrastructure plan** means the part of a planning scheme that –

(a) identifies the priority infrastructure area; and

(b) includes the plans for trunk infrastructure the local government intends to supply or for which infrastructure charges will be levied; and

(c) identifies, if required by a supplier of State infrastructure with a relevant jurisdiction –

(i) a statement of intent for State-controlled roads; or

(ii) the roads implementation program under the *Transport Infrastructure Act 1994*, section 11; and

(d) states the assumptions about the type, scale, location and timing of future growth on which the plan is based; and

(e) states the desired standard of service fore ach development infrastructure network identified in the plan; and

(f) includes any infrastructure charges schedule."

[65] A PIP was developed for the Council under Ch 5 Pt 1 of the IPA. The PIP identifies a recreational facility described as a linkage park across the entire frontage of the

Hope Island Canal, to be developed in the years 2012-2021. Any development is required to pay a recreational facilities contribution. Land may be accepted in lieu of a contribution, and a land notice may be given under s 5.1.12(2) of the IPA requiring the giving of land.

Draft Amendment 5

[66] Schedule 1 of the *Integrated Planning Act 1997* (IPA) deals with the process for making and amending planning schemes. Draft Amendment 5 was a proposed amendment to the Gold Coast Planning Scheme (GCPS). Item 9 was entitled "Hope Island LAP, Open Space Areas". LAP is the acronym for Local Area Plan. It was proposed to amend Part 6, Div 2, Ch 16 of the Hope Island LAP, by including in "Section 1.0 Intention":

> "Development will facilitate the provision of a Linkage Park around the waterfront of the Hope Island drainage canal."

[67] It was also proposed to include in "Section 4.5 Open Space" the following:

> "Development will facilitate the provision of a Linkage Park around the waterfront of the Hope Island drainage canal. This Linkage Park will contribute to achieving walkable neighbourhoods and the provision of recreational facilities to meeting community needs."

[68] Performance Criteria 21 was proposed to be replaced with the following:

WALKABLE NEIGHBOURHOODS	
PC21 Public open space is provided along the waterfront to contribute to walkable neighbourhoods and the provision of recreational facilities to meet future community needs.	AS21.1 A minimum 8m wide Linkage Park with Nodal Parks is provided along the entire waterfront of the Hope Island drainage canal in accordance with Hope Island LAP Map 16.7 – Open Space Areas and the Priority Infrastructure Plan. AS21.2 Where canals are included adjacent to the subdivision design, Parkland is provided along the entire waterfront edge of the development.

[69] Draft Amendment 5 was adopted and the LAP was accordingly amended in January 2010. It provided for a linkage park along each side of the Hope Island Canal. Even before the draft amendment was incorporated into the LAP, the Council was entitled to take into account that one of its planning strategies was to plan for a linkage park to run the length of each side of the Hope Island Canal.

The applicant's submissions

[70] The applicants made their submissions about the Section A works and Lot 186 works together. The applicants correctly identified that the Council expressed the

opinion that, with respect to both Section A and Lot 186 works, occupiers of rateable land would receive a special benefit from the facility in three respects:

(a) lower levels of fill, following a flood reduction benefit;

(b) a water quality benefit, in terms of removing the requirement for there to be a water quality management system in the Canal;

(c) the ability to obtain direct navigational access to the Coomera River.

The grounds of review on which they specifically relied at the hearing in relation to these facilities were paragraphs 5(b)(ii) and (iv), 5(c)(ii) and (iv) and paragraphs 5A(b) and (c).

Failure to take account of a relevant consideration on the ability to obtain direct navigational access

[71] The applicants submitted that the difficulty with the suggested direct navigational access benefit was that the Council had not taken into consideration its own planning strategies to deny or restrict direct access to the Canal from private land. The Council's PIP shows the strip of all land fronting the Canal as part of the Recreation Facilities Network, and the Council's development code for reconfiguring a lot requires development to provide a recreation facilities contribution in accordance with the PIP. The effect of Planning Amendment 5 has already been mentioned.

[72] The respondent conceded that it is pursuing a strategy for the creation of a boardwalk or public path way on the edge of the Hope Island Canal. It accepted that the relevant planning instruments express a planning intent for the provision of a continuous canal front linkage park. Provision of that linkage will occur either by dedication of land or by payment of a contribution which can be used to acquire the necessary land. It has said, for example in response to development applications,[12] with reference to the amended Hope Island Concept Master Plan dated 12 March 2007, that it envisages an interconnected boardwalk on the edge of the canal to support the development of a walkable community. This, it says, will involve properties with frontage to the Hope Island Canal dedicating land for the purpose of a boardwalk. The Council's decision with respect to the development applications required dedication of land beside the Hope Island Canal for the construction of a boardwalk as a condition of approval or otherwise by compulsory acquisition under s 5.1.12(2)(a) of the IPA.

[73] The applicants argued that the Council could not reasonably form the opinion that an occupier of land will have a particular benefit from a particular service, facility or activity, if a planning strategy of the same Council is intended to deny or prejudice that benefit. If it formed the opinion, it had failed to take account of a relevant consideration, that is the planning intent of the Council.

[74] This argument proceeds from the two propositions which do not admit of the conclusions urged by the applicants. The first is that the Council failed to take account of the planning strategy and the second is that the planning strategy to have public land between the Hope Island Canal and the canal front properties means that the benefit said to be derived by the occupiers of the land is denied or prejudiced principally because that would prevent landowners from establishing private moorings in the canal.

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[12] Information requests from the Council to Arnold Development Consultants dated 25 May 2007.

[75] In respect of the Section A special charge and the Lot 186 special charge, the Council submitted that it formed the opinion that occupiers of the rateable land receive a special benefit from the relevant facility because, amongst other things, section A and the Lot 186 works permit the land adjacent to the Hope Island Canal depicted in figure 6 of the Cardno Report to have the ability to obtain direct navigational access to the Coomera River.

[76] The respondent submitted that the lots have the ability to obtain direct navigational access to the Coomera River because a boat can navigate from land adjacent to the Hope Island Canal to the river via the canal, which it would not be able to do without the provision of either the Lot 186 works or the Section A works or both.

[77] The evidence of Mr Scott, which I accept, shows that in order to take account of the Council's planning strategy to have a public linkage park on the banks of the canal, the wording of the Cardno Report recommendation was changed. The Cardno Report had referred to the benefit obtained by lots which fronted the canal as enjoying "unfettered navigational access to the Coomera River". The Council resolution imposing the special rate referred to the relevant benefit as permitting "the land adjacent to the canal the ability to obtain direct navigational access to the Coomera River". The planning intent of the Council was therefore taken into account.

[78] Whether or not there is a continuous canal front linkage park, the construction of a pontoon or other mooring facility in the Hope Island Canal is "tidal works" and therefore "operational works" as defined by the IPA. It is assessable development under Schedule 8 of the IPA. The history of applications made does not suggest that the proposal for a linkage park has had any impact on whether or not such proposals will or will not be approved by the Council which is the owner of the land in the canal.

[79] Mr Scott's affidavit demonstrates that a pre-lodgement meeting in respect of a proposed application for a development permit for tidal works being the construction of pontoons in the canal, was held with the Council on 12 June 2008, seven days before the resolution to make and levy the special charges. The Council, as owner of the land in the canal, had given its consent to the making of the application by Fish Developments Pty Ltd ("Fish Developments") by letter dated 19 February 2008 and had been notified by Fish Developments of its intent to investigate the possibilities of pontoons in the Hope Island Canal and submit an application for pontoons as early as 12 October 2007.[13]

[80] On 21 August 2008, Fish Developments made the application. That application and those referred to in the following paragraphs were made after the Council resolution and so are of little use in showing what the Council took into account in making the resolution imposing the special charge but are useful in confirming that the provision of a public path way beside the Hope Island Canal does not prevent applications being considered for the construction of private pontoons.[14] As pontoons and other mooring facilities are "operational works" as defined by the IPA such applications would have to be made whether or not there was a public path

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13 See Hope Island Report No. 1-2 – Pontoons.

14 It is also admissible as retrospectant evidence as to the Council's state of mind at the time of passing the resolution: *Astway Pty Ltd v Council of the City of the Gold Coast* [2008] QCA &3 at [4], [43]-[45].

way between the canal and the private properties beside the canal. The existence of the public path way does not appear to be relevant to Council's power to grant or refuse such applications.

[81] By letter dated 4 August 2008, Australand Land and Housing No. 5 (Hope Island) Pty Ltd, Australand Land and Housing No. 7 (Hope Island) Pty Ltd and Australand Land and Housing No. 8 (Hope Island) Pty Ltd wrote to Council advising that it would be making an application for jetties and pontoons to be located in the canal. By letter dated 21 August 2008, solicitors for EPWY Cottonwood Pty Ltd, Golf Connections Pty Ltd and Stephen Wang, developers of Lot 1 on SP 189389, wrote to Council advising that their clients would be making an application for jetties and pontoons to be located in the canal.

[82] On 12 December 2008 the Council resolved to "adopt a policy position in the affirmative for the application of pontoons on Council freehold land in the Hope Island Canal". The position was communicated to Fish Developments by letter dated 19 January 2009.

[83] A report to the Council dated 20 November 2008 drew attention to these proceedings and the implications of a decision one way or the other for the proceedings. It also drew attention to a statement made in May 1996 in the Hope Island Report No. 5 that the canal was intended to be "a navigable canal to enhance the value of private waterfront properties", as appeared from its design and width, rather than merely a flood mitigation drain.

[84] On 2 October 2009, the developers of the Marina Quays – Harbour Rise (Precinct 2) development lodged with Council a development application for a combined material change of use, reconfiguration of a lot and operational works – prescribed tidal works development work application, proposing a 56 berth marina in the canal. On 23 November 2009, Council resolved to offer the body corporate of Marina Quays Harbour Rise CTS 39136 a lease over that part of the Hope Island Canal to encapsulate approved marina structures and a berthing area for vessels, subject to conditions.

[85] On 30 November 2009, the Council issued the developers of the Marina Quays – Harbour Rise (Precinct 2) development a development permit, subject to conditions, for reconfiguring a lot and material change of use for the 56 berth marina in the canal. Council and the developers of the Marina Quays - Harbour Rise (Precinct 2) development have agreed to the marina head lease. An operational works approval is to be issued, subject to conditions (including a condition that the approval is issued subject to the Minister granting a ministerial exemption), to the developers of the Marina Quays – Harbour Rise (Precinct 2) development on agreement being reached on the terms of the marina sub-lease.

[86] As paragraph 41 of Mr Scott's affidavit shows, other pontoons have been constructed in the canal by the owners of land adjacent to the canal.

[87] In all of the circumstances it cannot be said that the making of the decision was an improper exercise of the power conferred by s 971 because the Council failed to take account of the consideration that land adjacent to the Hope Island Canal does not have the ability to obtain direct navigational access to the Coomera River, the Broadwater and Moreton Bay due to restrictions imposed by the Council under its planning instruments that require the dedication of land for a boardwalk along the

length of the canal and thus prevent the landowners from establishing private moorings in the canal; and the exercise by the Council of the rights and powers available to it under the *Integrated Planning Act* (IPA).

[88] It cannot be said that the Council failed to take account of its planning intent and statutory powers whether or not it is relevant to the decision. Those planning instruments and statutory powers do not, in any event, have the effect alleged by the applicants. The grounds of review set out in paragraphs 5(b)(ii) and (iv) and 5(c)(ii) and (iv) must fail.

Error of law - What is the facility?

Applicant's submissions

[89] The applicant argued that neither the Section A works or the Lot 186 works can be considered to be a facility. They submitted that, at least in respect of two of the benefits, it is impossible to say that either of them arises unless regard is had to the whole of the Hope Island Canal. Figures 6 and 7 to the Cardno Report show the lots said to benefit from direct navigational access and water quality improvements and, in each case, the applicants argued, it is apparent that no benefit arises unless the entire Canal is taken into account. This involves recognition that both Section A and the Lot 186 works are part of an indivisible whole, in terms of the function of the Canal.

[90] The applicants argued that the consequence of applying the fourfold test posited by Chesterman J to the benefits identified by the Council were that either they did not "come from" the identified "facility" (being separately, Section A and the Lot 186 works), but from the whole Hope Island Canal. They argued that each of Section A and the Lot 186 works is part only of a "facility", being part only of the Hope Island Canal.

[91] The applicants also argued that the Section A and Lot 186 Charges were not authorised by s 971 of the LGA for the followed interrelated reasons.

[92] First, the opinion formed by the Council with respect to special benefit with reference to the Cardno Report, excluded the flood benefit which resulted to a wider area than the area charged from the construction of the entire Hope Island Canal. Accordingly, the opinion infringed the rule that a Council may not pick and choose between benefits so as to limit the scope of operation of the special charge (at least where identifying the separate benefits involves dividing the indivisible, with the consequence that the opinion formed is in reality an artificial abstract).[15]

[93] Secondly, the Council wrongly identified each of the Section A works and the Lot 186 works as a separate facility, in circumstances where the degree of interrelationship between all of the works necessary to construct the canal was such that all of those works constituted a single "facility", rather than a series of individual or discrete facilities (or works).[16]

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15 *Australand Land & Housing No 5 (Hope Island) Pty Ltd v Gold Coast City Council* [2006] QSC 232 at [92]; see also *Australand Land & Housing No. 5 (Hope Island) Pty Ltd v Gold Coast City Council* [2007] QCA 189; [2008] 1 Qd R 1 at [41]-[42].

16 cf *Severn SC v North West* CDC 1974 1 NSWLR 190 at 204, 206, 207-208; *Australand Land & Housing No 5* [2007] QCA 189 at [24]-[25].

[94] Thirdly, the artificial nature of the Council's opinion is exposed by an analysis of the exercise carried out by Cardno (upon which the Council relied):

(a) in seeking to identify some separate benefit from either the Section A works or the Lot 186 works, the exercise carried out by Cardno took into account, in both the "before" and "after' cases, all of the works involved in the construction of the "balance" of the canal;

(b) the Cardno exercise excluded developments which were (or may have been) approved before any of the so-called benefits of the Section A and Lot 186 works "would have been available for use";

(c) in seeking to justify the so-called water quality benefit, the Cardno Report described the balance of the canal as a "lake style" development, but that is the first and only reference to that notion; from the beginning, the canal was intended to be a full canal system;

(d) similarly, from the beginning, the canal was intended to be a "navigable waterway", so that it is artificial to identify the so-called navigation benefit as a separate benefit;

(e) 619 lots are subject to both the Section A and Lot 186 charges, at least to the extent that these charges are based upon the water quality and navigation benefits, it is illogical (and unreasonable) that such lots should be doubly charged for a single benefit.

[95] The applicant also submitted that s 971 is a fiscal provision, and that it should be strictly construed against the revenue-collecting authority.[17]

The respondent's submissions

[96] The respondent submitted that whether or not there is benefit or special benefit can only be judged by comparing the position with the service, facility or activity the subject of the charge and the position absent that service, facility or access. The respondent submitted that the applicants' approach does not acknowledge that without the Section A and Lot 186 works there would be no canal but only a lake. In arguing that there needed to be taken into account the balance of the Hope Island Canal and benefits of the same character resulting from the entire canal, the applicants wrongly, the respondent submitted, do not accept that any benefits of a canal, as opposed to a lake, only arise because of the Section A and Lot 186 works.

[97] The applicants contend that particular parcels were filled using excavation spoil between September 2002 and 2004. The flood reduction benefit identified in the Council's resolution results in lower levels of fill being required for development carried out after December 2004.

[98] The respondent submitted that the applicants' reasoning, advanced without evidence, in this regard is flawed. Whilst it is admitted on the pleadings that canal fronting lots (but not non-canal fronting lots) were filled with spoil from the canal,[18] the flood model provided to Cardno by the Council upon which Cardno formed its

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[17] *Hepples v Federal Commissioner of Taxation* (1992) 173 CLR 492 at 510-511.
[18] Paragraph 8(a) of the Third Further Amended Points of Defence.

opinion as to the flood mitigation benefit, took into account those earlier approved development levels.

[99] For each of the Section A and Lot 186 charges the applicants contend that, contrary to the opinion expressed in the Cardno Report, the flushing effect of the works has conferred no benefit on the land charged because there was never any legal requirement or practical necessity to install a water quality management system of the kind described in the Cardno Report, and there was never any intention by the Council to impose such a requirement.

[100] The respondent submitted that the Cardno Report sought to identify the differential benefit between the case where all of the works are carried out and the case where all of the works except those carried out by the Council are carried out: see p. 2 of the report. It went on to say (at p.4) that:

> "Secondly, the construction of the Lot 186 and Section A works removes the requirement for there to be a water quality management system in the canal. In common with other lake style developments, the development without these works would require a pumped water quality circulation system to operate and in this case two systems would have been required to maintain the water bodies east of Section A and east of Lot 186. While the connection through the Lot 186 works and through Section A to the Coomera River do not confer a direct financial benefit, these works do mean that the cost of development of the remainder of the waterway system (both capital and operating cost) will be lower than it would otherwise have been.
> An indicative estimate of the turnover system in the lakes east of Section A could be of the order of $2 million. An estimate of the cost for a similar turnover system for the lake east of Lot 186 could be in the order of $1.1 million."

[101] In their February 2009 particulars the applicants say that the Council was required to take into account that at no stage during the approval process for the canal was there a requirement for a water quality management system.

[102] The respondent submitted that the applicants have missed the point which is that it is necessary to identify the special benefit from the construction of Section A and the Lot 186 works. Without those works there would not be a tidally connected canal but only a lake. The Council submitted that it did not understand the applicants to dispute that a lake would require a pumped water quality circulation system; the point the applicants make is merely a variation of the point about each of the Section A and Lot 186 works not being a separate facility, and that the facility is the whole of the Hope Island Canal.

Discussion

[103] I should first deal with the last submission made by the applicants. True it is that s 971 of the LG Act imposes a charge on land owners whose land is, in the opinion of Council, specially benefited and legislation imposing charges must clearly express that legislative intent.[19] It is also true that a court should not lightly set

[19] *Hepples v Federal Commissioner of Taxation* at 511 per Deane J.

aside an opinion purportedly formed by a council on a rational basis.[20] These are two of the particular guides to interpretation I have used in reaching my decision on this ground.

[104] In my view, the submission made by the applicants that the Hope Island Canal is the facility and that the Section A works and the Lot 186 works are not facilities is artificial and misapprehends the effect of the decision in *Australand Land and Housing No 5 (Hope Island) Pty Ltd* where the Court of Appeal took the view that the Hope Island Canal project could not be considered as one facility because different land benefited from the construction of different aspects of it: see in particular the judgment of Jerrard JA at [42].

[105] The Section A works at the eastern end and the Lot 186 works at the western end conferred different benefits. Some land was benefited by both but some by only one of them.

[106] Not only did each of the Lot 186 works and the Section A works provide different benefits to the land, and to no other land, each of them provided a benefit which would not have been provided by the rest of the Hope Island Canal if the Lot 186 works and the Section A works had not been undertaken. Further the lots benefited by the Lot 186 works and by the Section A works did not all benefit equally in terms of flood reduction, water quality or navigational access. Accordingly the Cardno Report valued the benefit to individual lots of each of the Lot 186 works and the Section A works by weighting the value of the benefit according to the special benefit each lot received: see Cardno Report 5.0; Appendix C. Such a process informed the Council's opinion as to which land was specially benefited by the facilities and to what extent and tended to demonstrate that the opinion was reasonably formed.

[107] As Mahoney J observed in *Severn Shire Council*, it is a question of fact whether or not particular works constitute a facility for the purposes of the legislation. Whether the Section A works and the Lot 186 works were separate facilities for the purposes of s 971 of the LG Act or whether they were an indivisible part of one facility, being the Hope Island Canal, is a question of fact. There are several points of distinction between the Section A works and the Lot 186 works and the rest of the canal which tend to suggest that the Section A works and the Lot 186 works were able to properly be considered as separate facilities for the purposes of s 971. Firstly, the funding of each of them was different. The Council decided only to fund and construct the Section A works and the Lot 186 works, not the rest of the Hope Island Canal. Secondly, in deciding to construct those works, the Council took into account the interests not only of those people who would be benefited by the construction of the Section A works and the Lot 186 works but also the interests of those who might be adversely affected such as the people living in Boykambil, whose village would be intersected by the Section A works. Thirdly, the Council could only impose a rate for the facility it provided. It did not provide the whole of the Hope Island Canal. The facility for which it could impose a rate was a facility provided by it which specially benefited particular privately owned land. Fourthly, each of the works provided a benefit which was essential to flood reduction, water quality and navigational access for the land which received that special benefit.

[20] *Bankstown Municipal Council v Fripp* at 403; *Parramatta City Council v Pestell* at 313, 328; *Severn SC v NW County District Council* at 202.

Fifthly, from the time of the Council's first report on the History and Implementation of the Hope Island Canal and Canal Related Infrastructure in May 1996 ("the 1996 Report"), it was apparent that the landowners who obtained special benefit from the Section A works would be required to bear the cost of those works. The Hope Island Canal Association ("the Association") was also responsible, inter alia, for advising Council on how construction of the canal through Lot 186 would be funded.

[108] Each of the Lot 186 works and the Section A works benefited different land (and the occupiers of that land) differently. Each must therefore be considered for rating purposes as a separate facility. On balance, I would regard each as a facility, distinguishable from each other and from the rest of the Hope Island Canal for the purposes of s 971.

[109] What the Council did was look at the special benefits to the land caused by each of the facilities which it constructed: the Section A works and the Lot 186 works. It identified those benefits and rates accordingly. It did not divide the indivisible. The fact that it is divisible is shown by the fact that different lots of land benefit differently from the construction of the section A works and the Lot 186 works. For example the land benefited by the flood control created by each facility was different from the land benefited by flood control created by the construction of the rest of the canal or indeed the whole canal. This is not an example of picking and choosing but a rational examination of the different benefits resulting from the two different facilities provided by the Council, the Section A works and the Lot 186 works.

[110] The applicants have not shown that the Council misconstrued s 971 of the LGA in deciding that the Section A works or the Lot 186 works were facilities for which a charge under s 971(1) may be made.

[111] The grounds of review set out in paragraphs 5A(b) and (c) are not made out and must therefore fail.

Unreasonableness

[112] The only remaining ground of review that was argued by the applicants which has not already been specifically dealt with is the ground that the decision was so unreasonable that no reasonable local government could have made it. The applicants, by their particulars delivered in February 2009, particularise the alleged unreasonableness by reference to the other grounds of review.

[113] Substantively, the applicants do not advance a case which goes to the question of unreasonableness as a separate ground of review. As the respondent submitted, they merely recast their case under a different guise. As their case on the other grounds of review fails so too does this ground of review.

Conclusion

[114] The applicants' applications to review the decision made by the respondent on 19 June 2008 to make and levy special charges pursuant to s 971 of the LG Act have been unsuccessful and should be dismissed. I will hear submissions as to costs.