

Planning & Environment Update

May 2018

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VALIDITY OF INFRASTRUCTURE CHARGES NOTICES



A recent decision of the Planning and Environment Court may have implications for the validity of Infrastructure Charges Notices (ICNs) issued by Council under the *Sustainable Planning Act 2009* (SPA), and, to a lesser extent, the *Planning Act 2016* (PA). On 4 May 2018, Her Honour Judge Kefford DCJ published her decision in *Sunland Group Ltd & Sunland Developments No.22 Pty Ltd v Gold Coast City Council* [2018] QPEC 22.

In these proceedings, Sunland Group Ltd and Sunland Developments No.22 Pty Ltd (**Sunland**) sought declarations regarding the validity of five ICNs issued to Sunland Group Ltd, which notices were issued contemporaneously with decision notices granting development permits for material change of use and reconfiguration of a lot.

Each ICN included a section entitled “*Information Notice*”, which included the following text:

“DECISION TO GIVE AN INFRASTRUCTURE CHARGES NOTICE

Council of the City of Gold Coast has issued this Infrastructure Charges Notice as a result of the additional demand placed upon trunk infrastructure that will be generated by the development.”

The Issue

The primary issue in this case was whether that information notice satisfied the requirements of section 637(2) of SPA; and whether failure to comply with that section renders an Infrastructure Charges Notice invalid.

Section 637(2) of SPA provides: “*The Infrastructure Charges Notice must also include, or be accompanied by, an information notice about the decision to give the notice*”.

The Decision

Her Honour was satisfied the Court had jurisdiction to make the declarations sought, and declared that each ICN did not comply with section 637(2) of the SPA; and is not an Infrastructure Charges Notice under the SPA.

The Court is to hear from the parties about any consequential orders that should be made arising out of those declarations, in the context of the current appeal.

What is an Information Notice?

“*Information Notice*”, about a decision, is defined in section 627 of the SPA to mean a notice stating **the decision and the reasons for it**; that its recipient may appeal against the decision; and how the recipient may appeal.



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VALIDITY OF INFRASTRUCTURE CHARGES NOTICES

What are “Reasons”?

“Reasons” is not defined in the SPA. However, section 27B of the *Acts Interpretation Act 1954* (AIA) states:

“If an Act requires a tribunal, authority, body or person making a decision to give written reasons for the decision (whether the expression ‘reasons’, ‘grounds’ or another expression is used), the instrument giving the reasons must also-

- (a) set out the findings on material questions of fact; and*
- (b) refer to the evidence or other material on which those findings were based.”*

Sunland submitted that the use of the term “reasons” in the definition of “information notice” under the SPA invokes section 27B of the AIA.

Council relied on section 4 of the AIA and submitted that section 27B of the AIA is displaced by a contrary intention appearing in the SPA as to the requirements of an ICN and an Information Notice.

Section 4 of the AIA states “*The Application of this Act may be displaced, wholly or partly, by a contrary intention appearing in any Act*”.

In that submission, Council argued that:

- sections 627 and 637 of the SPA descend into specific detail about the requirements of an ICN and as such there is a contrary legislative intention expressed by necessary implication;
- it can be readily inferred that the information listed in section 637 of the SPA is specifically referenced as that is the information that is required in order to permit a recipient of such a notice to decide whether or not to appeal;
- it is difficult to see what legislative purpose would be served by local governments being required to provide specific findings on material questions of fact and also to refer to evidence on which those findings were based in issuing an ICN.

Her Honour agreed that section 637(1) provides a detailed list of information required to be included in an ICN. However, Her Honour was of the view that the reasons required in the information notice are to go beyond a mere explanation of how the charge has been worked out, given that information is already required to be provided under section 637(1) of the SPA.¹

Her Honour held that the term “reasons” in the definition of “information notice” invokes section 27B of the AIA. Further, Her Honour was not satisfied that the information notices attached to the ICNs contained reasons that are adequate for the purpose of section 627 of the SPA, regardless of whether those reasons are required to address the matter referred to in section 27B of the AIA.²

How to Comply With Section 637(2) of the SPA

The Judgment provides the following guidance regarding the level of detail required to be included in an information notice in order to satisfy section 637(2) of the SPA, ie the information notice should:

- include sufficient information to allow a recipient to understand the basis of a local government’s decision and decide

Planning & Environment Update

May 2018

p&e Law

planning, environment & native title law

VALIDITY OF INFRASTRUCTURE CHARGES NOTICES

whether to make submissions about the original notice under section 641 of the SPA or appeal the charge in the notice, including the following examples of findings on material questions of fact:

- ◇ a finding about whether, and on what basis, the use that is the subject of the development is for a particular use (in this case, a two bedroom or a three bedroom dwelling);
- ◇ a finding about whether trunk infrastructure that is the subject of a “*necessary infrastructure condition*”, services or is planned to service premises other than the subject premises and the basis of the assessment of the cost of that infrastructure;
- ◇ a finding about whether there is an existing lawful use of the premises or a previous lawful use;
- ◇ a finding that whether there is other development that may be lawfully carried out without the need for a development permit and if so, the demand generated by such development;
- include Council’s reasons for:
 - ◇ deciding that an adopted charge applied, including details of the charges resolution that Council applied;
 - ◇ deducting an “*applied*” credit, including reasons as to why the credit was applied in each case and how it was calculated;
 - ◇ deciding that there was additional demand placed on trunk infrastructure by each development for which a development permit was sought;
- address any representations made by an applicant relating to matters that may affect the ICN (in this case, representations) that because the related development applications for development approval were made under a preliminary approval, infrastructure contributions were to be imposed under the preliminary approval and by reference to planning scheme policies.³

Invalidity of the ICN

As to whether failure to comply with section 637(2) of the SPA results in invalidity of the ICNs, the reasons for judgment state as follows:

“94 Taking account of the matters referred to above, it is my opinion that it was a purpose of the legislation that a document given in breach of section 637 of the Sustainable Planning Act 2009 should be invalid.

95 In my view, the documents titled “infrastructure charges notice” given by Council failed to comply with section 637 of the Sustainable Planning Act 2009 and are therefore invalid.”

Discretionary Considerations

Her Honour also considered whether discretionary considerations warranted treating the ICNs as valid, notwithstanding the findings described above.

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VALIDITY OF INFRASTRUCTURE CHARGES NOTICES

Council submitted that Her Honour should, in the exercise of Her discretion, decline to make the declarations sought by Sunland on the following grounds:

- Sunland has not suffered any prejudice by reason of any non-compliance with the requirements for an information notice, meaning that Sunland has commenced appeals and declaratory proceedings challenging the ICNs on numerous detailed grounds and it could not therefore be contended that it does not understand the reasons for the Infrastructure Charges Notices;
- Sunland is seeking to circumvent the limited nature of the statutory appeals process with respect to ICNs under section 478 of the SPA.

Her Honour did not accept either of those submissions and noted that *“Sunland has been denied the opportunity to articulate the grounds of appeal on the basis that Council has failed to take a relevant matter into consideration or has taken into consideration an irrelevant matter”*.⁴

Implications for ICNs issued under the SPA, ie prior to commencement of the PA on 3 July 2017

An ICN issued by Council under the SPA, which does not comply with the requirements of section 637(2) of the SPA or other requirements of the SPA with respect to an ICN, is not automatically invalid following the Judgment.

A developer or land owner may file an originating application in the Planning and Environment Court, seeking declarations regarding the validity of an ICN. However, even in those circumstances, discretionary factors may weigh against the granting of declarations, depending on the facts (eg a delay in bringing those proceedings).

As ICNs are no longer issued under the SPA, Council does not need to take any action with respect to its template documents produced under the SPA. However, it would be prudent for Council to identify any ICNs that were issued under SPA and are currently the subject of representations or an appeal process/declaratory proceeding (including an appeal in respect of development to which an ICN relates).

Implications for ICNs issued under the PA, ie from 3 July 2017

Section 121(3) of the PA requires an ICN to include, or be accompanied by, a decision notice about the decision to give the notice.

“Decision Notice” about a decision, means a notice that states-

- “(a) the decision; and
- (b) the reasons for the decision if the decision is-
 - (i) to refuse an application or request wholly or partly; or
 - (ii) a decision of a tribunal; or
 - (iii) a decision of a chief executive under section 243(1) or (3); and
- (c) the day on which the decision was made; and
- (d) any appeal rights that the recipient of the notice has in relation to the decision.”

Planning & Environment Update

May 2018

p&e Law

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VALIDITY OF INFRASTRUCTURE CHARGES NOTICES

Accordingly, the decision notice forming part of or accompanying the ICN is not required to include reasons for the decision, unless (b)(i) applies.

“Request” is not defined in the PA and that word is not used in section 125 (*Representations about infrastructure charges notice*).

Pending judicial interpretation, it is at least arguable that Council’s decision not to agree with any of the representations made to Council about an ICN, pursuant to section 125(6) of the PA, is a decision to refuse a request wholly, in which case reasons for the decision would be required.

Accordingly, it would be prudent for Council to include reasons for a decision in those circumstances.

It would also be prudent for Council to review its template ICN to ensure compliance with other relevant provisions of the PA and to include “reasons”⁵ in the report to Council.

Footnotes

¹Paragraphs 42 and 43 of the Judgment

²Paragraphs 48 and 68 of the Judgment

³Paragraph 45, 62, 66 and 67 of the Judgment

⁴Paragraph 66 of the Judgment

⁵Reasons that comply with section 27B of the AIA

If you would like more information on the above topic or advice generally,

Freecall 1300 303 866

please do not hesitate to contact

Lestar Manning (Sunshine Coast Office)

Andrew Williams (Sunshine Coast Office)

Tanya Knauer (Cairns Office) 07 4041 7622

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