PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Urban Strategies Pty Ltd v Gold Coast City Council* [2008] QPEC 98
PARTIES:	**URBAN STRATEGIES PTY LTD (ACN 064 941 591)** Appellant v **GOLD COAST CITY COUNCIL** Respondent
FILE NO/S:	1940 of 2008
DIVISION:	Appellate
PROCEEDING:	Appeal under s 4.1.36 of the *Integrated Planning Act* 1997
ORIGINATING COURT:	Brisbane
DELIVERED ON:	17 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2008
JUDGE:	Robin QC DCJ
ORDER:	To be formulated – issues determined as indicated in paragraph [18] below
CATCHWORDS:	*Integrated Planning Act 1997* s 4.1.36 – appellant alleges error in Council's calculation of charge in infrastructure charge notice under the Priority Infrastructure Plan & Infrastructure Charges Schedule (PIP) – notice issued in conjunction with approval of a material change of use allowing expansion of bottle shop activities of an established hotel – PIP authorised charging on basis of the higher of Council's "planned demand" and the actual Proposed Application Demand, except in a Special Case (relevantly an MCU relating "to only part of an existing building or structure") – appellant established a Special Case by retention of sufficient of the principal building on its site – appellant fails to establish a credit for existing lawful use rights, held to be available (relevantly) only for residential use.
COUNSEL:	Mr Gore QC for the Appellant Mr Houston for the Respondent

SOLICITORS: Mullins Lawyers for the Appellant

Corrs Chambers Westgarth for the Respondent

[1] The Gold Coast City Council has adopted as part of its planning scheme a ground breaking Priority Infrastructure Plan & Infrastructure Charges Schedule (PIP). Version 1.1 amended January 2007 records that infrastructure planning has been undertaken for the Transport, Stormwater and Recreation Facilities Networks, that amendments covering Water Supply and Sewerage Networks will be added in the future. This appeal challenges the Council's Infrastructure Charge Notice (ICN) issued to the appellant on 20 June 2008 in respect of components under PIP of:

(a) $272,069.51 for Recreation Facilities and Network Infrastructure (called PIPREC);

(b) $49,800.72 for Transport Network Infrastructure, Coastal Corridor (local) (PPTRLO); and

(c) $24,845.14 for Transport Infrastructure Coastal Core (State) (PIPTSSCR).

[2] The appeal lies under s 4.1.36 of the *Integrated Planning Act* 1997 (IPA), based on alleged "error in the calculation of the charge": sub-section (4)(b). Although s 4.1.50 contains nothing to say who must prove the case, in principle, it would be for the appellant to establish "error".

[3] Mediation before the Registrar resolved the appeal in relation to (b) and (c) and produced agreement on components that potentially ought to go into the calculation of (a), depending on the court's decision in the appeal.

[4] The appellant's site has a street address given as 47 Lenneberg Street, Southport. There is a second street frontage to Queen Street, on the corner of which is located the Angler's Arms Hotel.[1] A planning approval from 1969 is in evidence; the business may have been in operation much earlier. At present, there are motel rooms at the rear of the site (which contains five separate parcels), a liquor barn and drive-through bottle shop accessed from Lenneberg Street and a beer garden/gaming area nestling behind a high fence along the Queen Street frontage beside the hotel proper. The appellant proposes that it (or its skeleton) be retained, but refurbished in a redevelopment which would see the other buildings demolished, the motel operation cease and a large Dan Murphy's Bottle Shop established on Queen Street, expanding the bottle shop use from 452 m^2 to 870 m^2 GFA. Parking provision facing Lenneberg Street will be expanded.

[5] The Dan Murphy's aspect is probably sufficient explanation for the appellant's making an IDAS form 1 development application for a material change of use (MCU) for "extension to tavern" on 19 November 2007 – which Council approved on 30 June 2008. The subsequent decision notice advised in item H that it was accompanied by the ICN.

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1 I include the apostrophe in deference to the work of KP Architects, exhibited to the affidavit of Mr Mummery, although there is a disposition generally in the documents to omit it.

[6] It may be accepted that a sum of the order of $270,000.00 may be appropriate were the site developed for 7 levels of residential use, which planning arrangements were said to permit. The PIP authorises the Council to charge for demands on the recreation facilities network on a basis other than whatever demand may be generated by a development proposal for the relevant site. The PIP provides in s 13:

> "**13.0 IMPLEMENTATION**
> **13.1 Overview**
>
> Total Infrastructure Contributions for a development application is the sum of:
>
> - PIP Infrastructure Charges for the Transport Network, Stormwater Network and Recreation Facilities Network, and
> - Planning Scheme Policy 3A charges for the Water Supply Network, and
> - *Planning Scheme Policy 3B charges for the Sewerage Network*, and
> - Any Infrastructure requirements included as conditions on the assessment Decision Notice.
>
> Calculation of PIP Infrastructure Charges will generally be triggered by assessable development. Triggers include:
>
> - Reconfiguring of Lot (ROL)
> - Material Change of Use (MCU)
> - Operational Works (OPW)
> - Building Application (BA)
> - any combination of these
> - or any other development.
>
> Calculation of PIP Infrastructure Charges takes into account:
>
> - the level of infrastructure demand
> - any infrastructure credits for the development site
> - rebates if applicable
> - the applicable charge areas (and therefore charge rates) for the development site.

Refer to *Clause 14.0 How to Calculate Infrastructure Charges For A Development Application* for further details."

There has been much discussion about the relationship of clauses 13 and 14, particularly as to which, if there is inconsistency, may have primacy.

[7] At this point, brief reference may be made to the IPA provisions about infrastructure planning and funding in Pt 1 of ch 5 of the IPA, whose purpose includes to:

"5.1.1 **Purpose of pt 1**

The purpose of this part is to –

…

(c) establish an infrastructure funding framework that is equitable and accountable; and …

Division 3 Trunk Infrastructure

5.1.3 Priority infrastructure plans for trunk infrastructure

Each priority infrastructure plan[2] must be prepared as required by guidelines prescribed under a regulation.

5.1.4 Funding trunk infrastructure for certain local governments

(1) Under this Act, a local government may levy a charge for supplying trunk infrastructure under either –

(a) an infrastructure charges schedule; or

(b) a regulated infrastructure charges schedule.[3]

…

Division 4 Trunk infrastructure funding under an infrastructure charges schedule

5.1.5 Making or amending infrastructure charges schedules[4]

(1) Despite section 2.1.5, an infrastructure charges schedule must be prepared or amended as required by –

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2 See section 2.1.3(1)(d) (Key elements of planning schemes).

3 See the *Local Government Act* 1993, chapter 14 (Rates and charges), part 2 (Making and levying rates and charges) for a local government's power to levy rates and charges in other ways.

4 It was not contended that anything of relevance in the appeal flowed from recent amendment of this section.

(a) guidelines prescribed under a regulation; and

(b) the process stated in schedule 1.

(2) The schedule, or an amendment of the schedule, has effect on and from –

(a) the day the adoption of the schedule, or the amendment of the schedule, is first notified in a newspaper circulating generally in the local government's area; or

(b) if a later day for the commencement of the schedule, or the amendment of the schedule, is stated in the schedule, or the amendment – the later day.

(3) The Minister may seek advice or comment from the Queensland Competition Authority about –

(a) the consideration of State interests under schedule 1, section 11; or

(b) another matter relating to an infrastructure charges schedule.

(4) However, the seeking of advice or comment under subsection (3) does not stop the process under schedule 1.

5.1.6 Key elements of an infrastructure charges schedule B

(1) An infrastructure charges schedule must state each of the following –

(a) a charge (an ***infrastructure charge)*** for each trunk infrastructure network identified in the schedule;

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

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

(d) the estimated establishment costs of the infrastructure;

(e) each area in which the charge applies;

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

(g) how the charge must be calculated for –

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

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

(2) An infrastructure charge may also apply to trunk infrastructure –

(a) despite section 2.1.2 – that is not within, or completely within, the local government's area; or

(b) that is not owned by the local government, if the owner of the infrastructure agrees; or

(c) supplied by a local government on a State-controlled road.[5]

(3) For subsection (1)(a), an infrastructure charge may be stated as –

(a) a monetary amount; or

(b) a number of units (***charge units*****).**

(4) If an infrastructure charge is stated as a number of charge units, the local government must set the amount for each charge unit by resolution.

(5) The current amount for a charge unit must be stated in the local government's infrastructure charges register.

(6) The method for indexing the amount for a charge until and the indices used in setting the amount for the charge unit must be identified in the infrastructure charges schedule.

5.1.7 Infrastructure charges

(1) The infrastructure charge –

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5 See the *Transport Infrastructure Act 1994,* sections 32 and 41.

(a) must be for a trunk infrastructure network that services, or is planned to service, premises and is identified in the priority infrastructure plan; and

(b) must not be more than the proportion of the establishment cost of the network that reasonably can be apportioned to the premises for which the charge is stated, taking into account –

(i) the usage of the network by the premises; or

(ii) the capacity of the network allocated to the premises.

(2) Also, if the infrastructure charge is levied for an existing lawful use, it must be based on the current share of usage of the network at the time the charge is levied.

(3) Subsection (2) does not apply if the local government and the owner of the land to which the charge relates otherwise agree in writing.

(4) However, an infrastructure charge must not be levied for a work or use of land authorised under the *Mineral Resources Act 1989, the Petroleum Act 1923* or the *Petroleum and Gas (Production and Safety) Act 2004.*

5.1.8 Infrastructure charges notices

(1) A notice requiring the payment of an infrastructure charge (an ***infrastructure charges notice***) must state each of the following –

(a) the amount of the charge;

(b) the land to which the charge applies;

(c) when the charge is payable;

(d) the trunk infrastructure network for which the charge has been stated;

(e) the person to whom the charge must be paid.

(2) If the notice is given as a result of a development approval, the local government must give the notice to the applicant –

(a) if the local government is the assessment manager – at the same time as the approval is given; or

(b) if any other case – within 10 business days after the local government receives a copy of the approval.

(3) If the notice is not given as a result of a development approval, the local government must give the notice to the owner of the land.

(4) The charge is not recoverable unless the entitlements under the approval are exercised.

(5) The notice lapses if the approval stops having effect.[6]

5.1.9 When infrastructure charges are payable

An infrastructure charge is payable –

(a) if the charge applies to reconfiguring a lot that is assessable development – before the local government approves the plan of subdivision under chapter 3, part 7; or

(b) if the charge applies to building work that is assessable development – before the certificate of classification for the building work is issued; or

(c) if the charge applies to a material change of use – before the change happens; or

(d) if paragraphs (a), (b) and (c) do not apply – on the day stated in the infrastructure charges notice.

5.1.10 Application of infrastructure charges

(1) An infrastructure charge levied and collected –

(a) for a network of trunk infrastructure, must be used to provide infrastructure for the network; or

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6 See section 3.5.21 (When approval lapses if development not started).

(b) for works required for the local function of State-controlled roads, must be used to provide works on the State-controlled roads.

(2) However, if the local government and the State infrastructure provider for State-controlled roads agree, the infrastructure charge may be used to provide works for the local government road network.

5.1.11 Accounting for infrastructure charges

(1) An infrastructure charge levied and collected for local works on State infrastructure must be separately accounted for.

(2) To remove any doubt, it is declared that an infrastructure charge levied and collected by a local government need not be held in trust.

5.1.12 Agreements about, and alternatives to, paying infrastructure charges

…

5.1.13 Local government may supply different trunk infrastructure from that identified in a priority infrastructure plan

A local government may supply different trunk infrastructure from the infrastructure identified in the priority infrastructure plan if the infrastructure supplied delivers the same desired standard of service for the relevant network.

5.1.14 Infrastructure charges taken to be a rate

(1) An infrastructure charge levied by a local government is, for the purposes of recovery, taken to be a rate within the meaning of the *Local Government Act 1993.*

(2) However, if the local government and an applicant enter into a written agreement stating the change is a debt owing to it by the applicant or person, subsection (1) does not apply.

Mr Gore referred to the summary of infrastructure charging arrangements found in the report of *Hickey v Gold Coast City Council* [2005] QPELR 597 at 618-20.

[8] Returning to the PIP, in the first of the two provisions requiring interpretation and application in the appeal, clause 13.2.2 provides:

> "**13.2.2. Material Change of Use (MCU)**
>
> MCU Applications will have the infrastructure demand assessed as either the GCCC Planned Demand, or the Proposed Application demand, whichever is the greater, except in the following Special Case:
>
> - MCUs relating to part of an existing Building/Structures
> - For MCUs which relate to only part of an existing building or structure.
>
> For these types of applications, PIP Infrastructure Charges will be assessed on the basis of the Proposed Application Demand only (ie not compared with the GCCC Planned Demand)."

The parties are in dispute as to whether there is a Special Case here.

[9] Clause 13.3 is:

> "**13.3 Calculation steps**
>
> Calculation of Infrastructure Charges varies for each Network and for different types of Development Applications, but follows a common format as follows:
>
> Step 1 Determine Assessable Demand
>
> Step 2 Deduct Credits to Determine Chargeable Demand
>
> Step 3 Determine Calculation Rates and Rebates
>
> Step 4 Calculate Infrastructure Charges
>
> **13.3.1 Determining Assessable Demand**
>
> Assessable Demand is used as the basis for infrastructure charging and represents the demand for Trunk Infrastructure relating to a development.
>
> The Assessable Demand will be the **GCCC Planned Demand** for the size and location of the development site unless the demand arising from the **Proposed Application** is higher, in which case the Proposed Application demand will be used.
>
> In cases where there is a site-specific constraint (other than two-dimensional physical site constraints relevant to determining the Net

Developable Area) Council may agree to adjust the GCCC Planned Demand for this calculation step. Examples of this would be where GCCC Planned Density for the site cannot be achieved due to height-related provisions such as overshadowing or car parking. However, Council would not agree to this adjustment where an applicant simply chooses one form of development over another because of personal, market or economic reasons.

Table 2-24 GCCC Planned Demand Per Hectare - DOMAINS* should be used for all sites not located within a *Local Area Plan (LAP) or Emerging Communities Domain Structure Plan.* For sites located within *LAPs* or the *Emerging Communities Domain Structure Plans*, refer to the table in Appendix A.

…

[The site is within the Southport LAP.]

Proposed Application Demand Conversion Rates are determined using Demand Conversion Rates for each network, as listed in *Table* 2-25.

Table 2-25 Proposed Application Demand Conversion Rates

Network	Proposed Application Demand Conversion Rates
…	…
Recreation Facilities	Demand conversion rates are shown in *Table 2-20 SDU Conversion Rates for Different Development Types*

13.3.2 Determining Infrastructure Credits

An infrastructure credit may be recognised for the amount of actual or imputed infrastructure contributions arising from:

- Previous Payments made under a Policy or PIP; or
- Existing Lawful Use Rights.

No imputed credit will be applied where existing lawful use rights apply to a site but the use has not been established. The only exception to this will be in relation to residential lots on which no dwelling has been constructed, in which case a credit of equivalent to 1 detached dwelling (e.g. 6.5 Trip Ends, 1 ET) will be allowed.

Credits are expressed in the same units as Assessable Demand for the network. Once any credits are determined, these are deducted from the Assessable Demand for the network that are calculated in Clause 14 Step 1, to arrive at **Chargeable Demand**.

13.3.3 Determining Calculation Rates (Charge Rates and Rebates)

One or more Charge Rates may apply for a network's infrastructure. The charge rates relate to the particular charge area in which the development site is located and are shown in the ICS for each Network.

Charges quoted in the PIP are as at June 2005 and will be indexed to date of charge payment, using relevant indexes. Administration on-costs of 1.5% will be included in charge rates.

…

13.3.4. Calculating Infrastructure charges

To calculate each Network Infrastructure charge, calculate as follows:

Network Chargeable Demand x Network Charge Rate = Network Infrastructure Charge

Total each Infrastructure Charge to arrive at the Total Infrastructure Charge.

…"

Clause 13.3.2 is the second key provision in the appellant's case, as the source of the credit described in the second dot point.

[10] The Council argues that no credit is available. It relies on clause 14, which, oddly, reproduces much of what is already covered by clause 13:

"**14.0 HOW TO CALCULATE INFRASTRUCTURE CHARGES FOR A DEVELOPMENT APPLICATION**

This section provides a step-by-step guide to calculating Infrastructure Charges for the Transport Network, Stormwater Network and Recreation Facilities Network.

Infrastructure Charge Schedules for the Water Supply and Sewerage Networks will be included in the PIP in a future amendment. Until that time, the Water Supply and Sewerage Networks will continue to charge for infrastructure under the existing Planning Scheme Policies 3A and 3B.

The following steps are used to calculate the Infrastructure Charges for a Development application:

Step 1 – Determine Assessable Demand

Step 2 – Deduct Credits to Determine Chargeable Demand

Step 3 – Determine Calculation Rates

Step 4 – Calculate Infrastructure Charges

14.1. Step 1 – Determine Assessable Demand

14.1.1 Reconfiguring Of Lot (ROL) Application

Except in the circumstances explained in "Special Case ROLs" below, the "Assessable Demand" is the higher of "GCCC Planned" and "Proposed Application" demand.

Determine "GCCC Planned Demand"

Network	Calculation Area	GCCC Planned Demand/Ha from Table 2-24			GCCC Planned Demand
…					
Recreation Facilities	Net Developable Area	x	ETs per Ha for the Domain	=	_____ ETs*

*Round Down the resulting ETs to whole numbers.

Determine "Proposed Application Demand"

Network		Demand Measure			Proposed Application Demand
…					
Recreation Facilities	Number of Development units for Each Development Type from Table 2-20	x	Conversion Rates from Table 2-20	=	_____ ETs

For Mixed Use, add together the demand from all development types.

Determine "Assessable Demand"

Assessable Demand = Greater of GCCC Planned or Proposed Application above	Assessable Demand
Recreation Facilities Network Assessable Demand	_____ ETs

Special cases ROLs …

14.1.2. Other Development Application types

Except in the circumstances explained in *Special Case Other Applications* below, the "Assessable Demand" is the higher of "GCCC Planned" and "Proposed Application Demand".

Determine "GCCC Planned Demand"

Network	Calculation Area		GCCC Planned Demand/Ha from Table 2-24		GCCC Planned Demand
Transport	Net Developable Area	X	Trip Ends per Ha for the Domain	=	_____ Trip Ends
Stormwater	Developable Area	X	Fraction Impervious for the Domain	=	_____ Imp Ha
Recreation Facilities	Net Developable Area	X	ETs per Ha for the Domain	=	_____ETs*

* Round Down the resulting ETs to whole numbers for MCU applications with a Detached Dwelling use only

Determine "Proposed Application Demand"

Network		**Demand Measure**			**Proposed Application Demand**
Recreation Facilities	Number of Development units for each Development Type from Table 2-20	X	Conversion Rates from Table 2-20	=	_____ Total ETs for all Development Types

For Mixed Use, add together the demand from all development types in this application.

Assessable Demand = Greater of GCCC Planned Demand or Proposed Application Demand (calculated above)	**Assessable Demand**
Transport Network Assessable Demand	_____Trip Ends
Stormwater Network Assessable Demand	_____ Imp Ha
Recreation Facilities Network Assessable Demand	_____ ETs

Special Case Other Applications

<u>MCUs relating to part of an existing Building/Structures</u>

For MCUs which relate to only part of an existing building or structure – use the Proposed Application Demand as Assessable Demand (i.e. not compared against GCCC Planned Demand). …

14.2 Step 2 – Determine Chargeable Demand

Transport Network credits granted by Council may result from:

i. Previous Payments for the Transport Network

ii Existing Lawful use Rights:

a. Use established: Non-Residential lots – based on Evidence provided by the applicant; Residential lots – 6.5 trip ends unless evidence provided by the applicant to support higher credit

b. Use not established: a nominal credit of 6.5 Trip Ends per residential lot

Stormwater Network Credits granted by Council may result from:

i. Previous Payments for the Stormwater Network.

ii Existing Lawful Use Rights based on:

a. Property data held by GCCC

b. Evidence provided by the applicant

c. A nominal credit of 0.03 Ha (300 m^2) impervious area for each existing lot.

Recreation Facilities Network Credits granted by Council may result from:

i. Previous Payments for the Recreation Facilities Network

ii Recreational Facilities Dedication

iii Existing Lawful use Rights (residential only):

a. Use established – A nominal credit of 1 ET per each existing residential lot; or per evidence provided by the applicant

b. Use not Established – 1 ET per existing residential lot.

…

Credits …

	Credits
Recreation Facilities Credits	_____ ETs

Chargeable Demand = Assessable Demand minus Credits

	Chargeable Demand
Recreation Facilities Network Chargeable Demand	_____ ETs

14.3 Step 3 – Determine Charge Rate/s

Determine Charge Rate/s

Network	**Charge Area Name**	**Charge Type**	**Charge Rate/s**
…			
Recreation Facilities	From Table 2-21 _____	Recreation Facilities	$_____ per ET from table 2-21

Determine Rebates

Rebates may apply for the Transport and Stormwater Networks for some Not-For-Profit Community Groups…

…

14.4 Step 4 – Calculate Infrastructure Charges

Multiply the Chargeable Demand by the Charge Rate and deduct any rebates if applicable, to determine the Infrastructure Charges for the development.

Network	**Chargeable Demand**		**Charge Rates**			**Infrastructure Charge Before Rebates**	**Less Rebate**		**Infrastructure Charges**
Transport		:	Local Government Roads	$	=	$			$
		:	State Controlled Roads	$	=	$			$
	_____ Trip Ends								
Stormwater		:	Quantity	$	=	$		:	$
		:	Quantity	$	=	$		:	$
	_____ Imp Ha								

Recreation Facilities	_____ ETs	:	Recreation Facilities	$				:	$

[11] There may be tension involving 13.3.2's treatment of potential credits for existing lawful use rights, which is of importance on the appeal, as any existing lawful use rights of the appellant are not residential. Whereas the Council says that 14.2 in clause 14 (which shows how infrastructure charges are to be calculated) exhaustively describes the credits that may be available, Mr Gore QC, for the appellant, says that clause 13.3.2 establishes a credit for existing lawful use rights in general, and this is not to be cut down by clause 14; he submits that clause 14 is of lesser status, as a self-proclaimed "step-by-step guide", in which (without legal consequence) there is an obvious omission in 14.2 in relation to Recreation Facilities Network credits; (iii) relates to "residential" use rights, there must have been inadvertently omitted (it is said) a paragraph (iv) dealing with other kinds of existing lawful use rights, by reference to (ii) immediately above (in respect of Stormwater Network credits) and (ii) immediately above that in relation to Transport Network credits. (The availability of the site for residential use is of no assistance here to the appellant, as that use has not been established in practice.)

[12] The provision in clause 14.2 is of more utility than that in clause 13.3.2, as the latter does not provide any way of calculating the credit; the two clauses (13 and 14) contain numerous references to each other. In the end, I think 14.2 has an appearance of being carefully drawn, and that the court ought not lightly determine that something important has been left out, and that the omission can in some way be made good by the court. In my view, Mr Houston (for the Council) is right and (where clause 13.3.2 makes no provision capable of application) one turns to 14.2 to understand what Existing Lawful Use Rights are intended to be identified. Clause 13.3.2 refers in a clumsy way to "Clause 14 Step 1", but clause 14 deals with credits in 14.2. Reference was made to well known decisions identifying approaches to the construction of planning schemes, as to their requiring to be read as a whole, not treated as a drawn with the strictness of an Act of parliament, and the like. I do not think there is any legitimate approach which would add a new class of credit to clause 14.2. If this accords 14.2 some primacy over 13.3.2, that, in my view, is the meaning of the planning scheme, the PIP in particular.

[13] The clause 13.2.2 issue is the more difficult one, and involves large financial consequences. (The Council will not be prejudiced if in the future there is some development of the site generating something like the "GCCC Planned Demand" on the recreation facilities network: at that stage, an ICN can be issued imposing the appropriate charge. Lack of success by the Council in this appeal will not preclude that.) Agreement reached at mediation on 9 September 2008 was that for recreation facilities Proposed Application Demand was 2.111523, as opposed to the Council's Planned Demand of 63.75 for 150 "ETs per hectare" – a rate specified for the Southport Local Area Plan (LAP) in PIP table 2 – 27 (p 148 of 152). The conversion rate, to be found in table 2-20 (see clause 14.1.2) is 0.1301, which applies as the rate for "Commercial ETs per 100 m^2"for Southport: PIP p 111 of 152.

[14] The conclusion seems inescapable that some error is to blame for there being two "dot points" in 13.2.2, that the first should not be there. In use of capital letters and

inconsistency in number (the grammatical concept) it shows signs of not having been checked – it is worse than in "BAs to Alter or Extend an Existing Building/Structure" in 13.2.4 (with its equivalent in 14.1.2)[7]. Further, its meaning is indistinguishable from that of the second dot point. The second dot point is in the same terms in 14.1.2 ("MCUs which relate to only part of an existing building or structure"). The use of "only" adds nothing. One may speculate that the drafter could have said "relates only to part …", which may well have changed the meaning.

[15] I think that there is no justification for re-writing an expression used at least twice in the PIP in that fashion. The clumsy drafting may create other problems. What happens if the MCU relates to the whole of the existing building or structure? If a problem, this is one for another day. One would think the argument for a Special Case stronger if the whole of an existing building was to be used – for related reasons of respecting what exists already and the likelihood that retention makes it less likely that the most intensive use of a site (which presumably has much to do with the setting of the GCCC Planned Demand) will not be achieved.

[16] Mr Gore was at pains to establish that "relates to", "relating to", "in relation to" and the like are words of wide import and essentially bear the same meaning. He referred to *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat & Livestock Corp* (1980) 29 ALR 333, 343 and *Perlman v Perlman* (1984) 155 CLR 474, 484 and 489. On one approach, a MCU relates to an existing building even if it is to be completely removed to make way for the MCU. Here it was common ground that the import of "relates to" was that implementation of the proposal would involve retention and use of some part of the existing building or structure. I agree.

[17] The parties' difference concerns whether, on the facts, the MCU related to part of the existing hotel building in this sense. The Council says that nothing of it is being retained for the MCU, or alternatively, so little as to make it inappropriate to say that any part is utilised. The PIP offers no guidance as to what constitutes "part" for present purposes. I accept that if, say, a single staircase or a section of wall were retained, it could be said that did not represent part of the building for PIP purposes, whatever may be the logical, scientific or literal answer. Mr Houston for the Council says that this is the present situation. He refers to a "Demolition Plan (not for construction)" Drawing 0564 DD02 Issue A showing in heavy black "existing wall/items to remain" and dotted "existing wall/items to be demolished" which gives the appearance that in the key corner building, only two short sections of external wall along Lenneberg Street will remain, only one section in Queen Street, plus four pillars around the corner proper. Much is to be demolished to make available areas where the new kitchen, toilets, store, keg room, freezer and cold room will go, and, generally, all existing internal walls and fixtures. The external cladding on the street frontages will be replaced, presenting a modernised, slightly more lofty exterior but one redolent of the existing Angler's Arms Hotel, if I may be permitted an architectural judgment. I would expect patrons who yearn for some continuity to accept that it is achieved here. What is to remain in the part of the building used by patrons is the floor, the framing and the roof framing, which may be seen as the skeleton of that large and dominant section of the most significant of the existing buildings on the site. I prefer the appellant's contention that this

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7 The same words appear in the heading following the table in 14.1.2

constitutes "part" for clause 13.2.2 purposes, to the Council's contention that it does not. There is no need to say anything here about the implications of preserving a bare façade, which may be of cultural or heritage value, as in the Myer Centre in Brisbane. Here I think more is being preserved to make a substantial contribution to the MCU.

[18] The consequence, under clause 13.2.2, is that the court holds the present is a Special Case and should rule in favour of the appellant in respect of paragraph 20.1 of the agreement reached at the mediation:

> "**AGREEMENT REACHED AT MEDIATION HELD ON 9 SEPTEMBER 2008**
>
> 1. The existing and proposed net developable area = 0.4250 square metres.
>
> 2. The proposed Total Use Area (TUA) = 1328 square metres.
>
> 3. The proposed GFA = 1623 square metres.
>
> 4. The existing GFA for the motel = 594 square metres.
>
> 5. The existing GFA for the hotel and bottle shop = 1651 square metres.
>
> 6. The total existing GFA = 2245 square metres.
>
> 7. The total existing TUA (for the hotel and bottle shop) = 1421 square metres.
>
> **Transport – Planned Demand**
>
> 8. The trip ends per hectare = 600
>
> 9. The Planned Demand trip ends = 255
>
> **Recreation Facilities – Planned Demand**
>
> 10. The ETs per hectare = 150.
>
> 11. The Planned Demand = 63.75.
>
> **Transport – Proposed Application Demand**
>
> 12. The net new trips per day = 40.
>
> 13. The Proposed Application Demand = 531.2.
>
> **Recreation Facilities – Proposed Application Demand**
>
> 14. The conversion rate = 0.1301.

15. The Proposed Application Demand = 2.111523

Transport Assessable Demand

16. Transport Assessable Demand = the greater of the Planned Demand or Application Demand, therefore = 531.2.

17. For credits, multiply the TUA 14.21 x 40 = 568.4.

18. Therefore, credits outweigh demand and the charge is nil.

Recreational Facilities Assessable Demand

19. The Council asserts:

    19.1 That the Recreational Assessable Facilities Demand is the greater of the Planned Demand or Application Demand, therefore = 63.75.

    19.2 There are no credits to be applied.

    19.3 If credits were to be applied (which the Council disputes) the calculation is (1651 square metres/100 x 0.1301) + (594/100 x 0.0723) = 2.147 + 0.429 = 2.576.

    19.4 Therefore, if credits were to be applied (which the Council disputes) credits outweigh demand and the charge, based on application demand, is nil.

    19.5 Therefore, if credits were to be applied (which the Council disputes) the charge, based on planned demand, is 61.174.

20. The appellant asserts that:

    20.1 Recreational Assessable Facilities Demand is based on the Proposed Application Demand, therefore = 2.111523.

    20.2 A credit for the existing use should be applied. The appellant accepts the Council's calculation of credits at 2.576.

    20.3 Therefore, credits outweigh demand and the charge is nil.

The appellant fails on 20.2 and accordingly on 20.3. The parties should now be able to agree upon a form of order to give effect to the court's opinion.

[19] In the end, there is no occasion here for resorting to doctrines advanced by Mr Gore to the effect that:

> (a) Any ambiguity in the planning approval should be resolved in favour of the land owner (Matijesevic v Logan City Council [1984] 1 Qd R 599, 605)[8];
>
> (b) A revenue statute should be strictly construed against the revenue-collecting authority (*Hepples v FCT* (1992) 173 CLR 492, 510-11;
>
> (c) In revenue cases, in valuing property, doubts should be resolved in favour of the land owner by making a more conservative estimate (*Boland v Yates Property Group Pty Ltd* (1999) 74 ALJR 209, 279 [356])[9].
>
> (d) Ambiguity in a planning scheme should be resolved in favour of the land owner: re *LDCM Investments Ltd* (1975) 8 OR (2d) 504; 54 DLR (3d) 76, a notion to which the court was said to remain potentially receptive[10].

[20] I do not find in the PIP as it has to be applied here any ambiguity which those doctrines would help to resolve. I think that the appellant unduly strains the wording of the PIP in contending for a rebate outside the context of residential use, and that the Council does so by contending that:

> "12. The existing building is being comprehensively, if not completely, demolished.
>
> 13 The material change of use does not relate to "only part" of an existing building. It relates to the new building/buildings on the site, which replaced the previous buildings. It can not sensibly be said that the use for which approval is sought relates to "part of" an existing building.

Mr Gore is correct that, even if the Council is not contending that the clause 13.2.2 Special Case is confined to one where nothing new is constructed, in addition to the MCU relating to part only (not the whole) of an existing building or structure, its argument appears to treat the clause as if "only part" means or reads "part only".

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8 This may be more appropriate in a dispute between the owner and the Council than in a dispute involving the interests of neighbours.

9 A less conservative estimate would be adopted if the authority were compulsorily acquiring the property. My impression is that, in recent times, the universal tendency is towards trying to identify a single value figure, whatever the purpose: witness the closing of the gap between traditional Valuer General valuations and market values.

10 See Delfin GC Pty Ltd v Gold Coast City Council [2006] QPELR 429, 433 and Karreman Quarries Pty Ltd v Esk Shire Council [2006] QPELR 481, 487. In this context, the observation in note 8 above bears repeating.