New South Wales Land and Environment Court

CGEA Transport Sydney Pty Ltd and Anor v Sydney City Council [2002] NSWLEC 54 (3 May 2002)

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NEW SOUTH WALES LAND AND ENVIRONMENT COURT

CITATION: CGEA Transport Sydney Pty Ltd and Anor v Sydney City Council [2002] NSWLEC 54 revised - 19/06/2002

PARTIES:
APPLICANTS
CGEA Transport Sydney Pty Ltd and Anor

RESPONDENT
Sydney City Council

CASE NUMBER: 20013 of 2000 and 40046 of 2002

CATCH WORDS: Appeal

LEGISLATION CITED:
Darling Harbour Authority Act 1984 s 23J(2)
Land and Environment Court Act 1979 s 18, s 20, s 22
Local Government (Rates and Charges) Regulation 1999 cl 11
Local Government Act 1993 s 532, s 535, s 611, s 729
Transport Administration Act 1988

CORAM: Pearlman J

DATES OF HEARING: 21/03/2002, 22/03/2002

DECISION DATE: 03/05/2002

LEGAL REPRESENTATIVES

APPLICANTS
Mr D J Hammerschlag SC with Ms S A Duggan (Barrister)
SOLICITORS

Piper Alderman

RESPONDENT
Mr S D Rares SC with Mr C J Leggat (Barrister)
SOLICITORS
Abbott Tout

JUDGMENT:

IN THE LAND AND 20013 of 2000 and 40046 of 2002
ENVIRONMENT COURT Pearlman J
OF NEW SOUTH WALES 3 May 2002

CGEA TRANSPORT SYDNEY PTY LTD and
CGEA TRANSPORT MANAGEMENT SYDNEY PTY LTD

Applicants

v

SYDNEY CITY COUNCIL

Respondent

JUDGMENT

Introduction

1. These proceedings involve an appeal brought by CGEA Transport Sydney Pty Ltd and CGEA Transport Management Sydney Pty Ltd against certain annual charges levied under s 611 of the Local Government Act 1993 by Sydney City Council in respect of the Sydney monorail.

Background

2. CGEA Transport Sydney Pty Ltd acquired the assets of the Sydney monorail in August 1998. CGEA Transport Management Sydney Pty Ltd is the manager of the monorail business.

3. The charges that are challenged by the applicants are:

(a) a charge of $550,000 levied on 12 April 2000 described in the relevant invoice as being *"1998/1999 & 1999/2000 charges for monorail structure on Council land for a distance of 1540 metres";*

(b) a charge of $275,000 together with GST of $27,500 (amounting to $302,500) levied on 26 February 2001 described in the relevant invoice as being *"2000-01 charge for monorail structure occupying Council land for a distance of 1540 metres".*

4. There are, in effect, three annual charges, for the years 1998/1999, 1999/2000 and 2000/2001. I shall refer to them collectively as "the impugned charges". It is, however, agreed between the parties that the last charge should correctly apply to the period of six months ending 31 December 2000, because, as a result of amendments to the Transport Administration Act 1988, which came into effect

on 1 January 2001, the monorail became exempt as a light rail system within s 611(6)(d).

The competing cases

5. The applicants challenge the impugned charges in two respects. First, the applicants challenge the validity of each of the impugned charges, and, secondly, they challenge the quantum of each of the impugned charges.

6. With respect to the attack on the validity of each of the impugned charges, the applicants claim:

· there was no draft management plan and public notice as required by s 532 of the Local Government Act 1993 ("the LG Act");

· there was no resolution as required by s 535 when read with s 611 of the LG Act. The purported resolution relied upon by the council related only to 1998/1999 and was not in respect of an annual charge on "the person", and there was no resolution for the subsequent years;

· the applicants were exempt from the impugned charges as a consequence of the Darling Harbour Authority being the Crown and the operation of s 23J(2) of the Darling Harbour Authority Act 1984 and s 611(6)(a) of the LG Act;

· the impugned charges were incompetent as the council purported to charge for the use of the airspace envelope and not for the rail itself;

· the council did not make the impugned charges on the basis of the nature and extent of the benefit enjoyed by the applicants as required by s 611 and took into account an extraneous and irrelevant matter;

· the notices levying the impugned charges did not meet the requirements of cl 11 of the Local Government (Rates and Charges) Regulation 1999 ("the Regulation").

7. As to quantum, the applicants claim that, if the council's value of $17 per cubic metre of area occupied is adopted, the proper annual charge is $13,004.32 per annum, because the total cubic metres occupied by the rail itself is derived from a distance of 1,366 metres by a width of 0.7 metres and a height of 0.8 metres, yielding a total of 761 cubic metres. Alternatively, the applicants claim that the council should have calculated the quantum of the impugned charges based on *"the Glebe method"* being the method adopted in *Australian Gas-Light Company v Glebe Municipal Council* (1922) 6 LGR 39.

8. The council denies each of the grounds of invalidity asserted by the applicants, and claims that the quantum of the impugned charges is correct. However, by notices of motion, it also raises two other defences. First, it claims that the Court has no jurisdiction to determine the validity of the impugned charges because those claims are raised in class 2 proceedings which are limited to an appeal in relation to quantum. Secondly, it claims that the challenge to validity of the impugned charges is precluded by the operation of the privative provision contained in s 729 of the LG Act.

9. It seems to me to be convenient to deal with these competing claims in the following way:

(a) to consider whether or not the Court has jurisdiction to entertain the challenges to the validity of the impugned charges;

(b) if the Court has jurisdiction, then to consider the proper construction and operation of s 729;

(c) if the challenges are not precluded by s 729, then to consider each of the grounds of invalidity; and

(d) finally, if the impugned charges are valid, to determine what is their proper quantum.

Does the Court have jurisdiction?

The Class 2 proceedings

10. Section 611(4) provides that, if a person is aggrieved by the amount of the annual charge, that person may appeal to this Court and the Court may determine the amount. Such appeals fall within class 2 of the Court's jurisdiction by virtue of s 18 (a) of the Land and Environment Court Act 1979 ("the Court Act").

11. In response to the council's claim that the Court's jurisdiction in these class 2 proceedings is limited to the determination of quantum, the applicants commenced class 4 proceedings, and sought to have the class 2 and the class 4 proceedings heard together. In the alternative, they claimed that the Court had jurisdiction to dispose of the substance of the dispute raised between the parties in the class 2 proceedings.

12. There is no argument that the Court has jurisdiction to hear and determine the challenges to the validity of the impugned charges in proceedings in class 4 of its jurisdiction. Section 611 falls within ch 15 of the LG Act, with respect to which the Court is vested with appropriate jurisdiction pursuant to s 20(2) and (3) of the Court Act. Nor was there any submission that the council would be prejudiced if the class 4 proceedings were to be heard and determined with the class 2 proceedings, the council having appeared ready to answer all the applicants' claims.

13. In these circumstances, and especially having regard to the absence of prejudice, I proceeded to hear evidence and submissions on all the issues in dispute between the parties, and it is in my view now appropriate to determine all those issues. That will effectively determine both the class 2 and the class 4 proceedings, a course in conformity with s 22 of the Court Act, which is designed to ensure that all matters in controversy between the parties are determined, and all multiplicity of proceedings avoided.

The s 729 issue

14. Section 729 of the LG Act provides:

729 The validity or effectiveness of a decision of a council may not be questioned in any legal proceedings on the ground that, in making or purporting to make the decision, the council failed to comply with a procedural requirement of this Act or the regulations (including a requirement as to the giving of notice) unless the proceedings are commenced within 3 months after the date of the decision.

15. Mr Hammerschlag SC, appearing for the applicants, submitted that s 729 does not operate to preclude the challenge to the impugned charges. In his submission, all of the grounds of challenge go to substantive matters rather than procedural requirements.

16. I agree with this submission. Perhaps with the exception of the cl 11 notice issue, each of the grounds deals with a matter that goes to the foundation for the exercise of the power of the council to levy the impugned charges. Thus, it is said that the council was not empowered to make the impugned charges in the absence of a draft management plan, public notice, and adequate resolutions. It is said that the council failed to comply with the basis of charging as stipulated in s 611 in that it failed to make the charge "on the person", it failed to make the charge on the rail itself, and it failed to base the impugned charges on the nature and extent of the benefit enjoyed by the applicants. Mr Hammerschlag drew the Court's attention to a passage from the judgment of Lehane J in the Federal Court in *Sipad Holdings ddpo and Anor v Popovic and Ors* (1994) 61 FCR 205 at 219, where, in dealing with alleged breaches of the Corporations Law, his Honour said:

... the problem is not that parties have attempted to do something which the Law permits but failed to do it effectively because of a procedural failure or omission; it is that they have tried to do something which the Law does not authorise.

17. All the grounds of challenge (except that relating to cl 11 which is expressly exempted from s 729) are of the nature alluded to by his Honour – they allege that the council tried to do something which s 611 does not authorise. I take the view therefore that s 729 does not preclude the Court from considering and determining each of the grounds of challenge to the validity of the impugned charges.

The statutory context

18. Before proceeding to deal with each of the alleged grounds of invalidity, it is convenient to set out s 611 in full and to outline the relevant statutory context.

19. Section 611 provides in full as follows:

*611(1) **[Under or over public place]** A council may make an annual charge on the person for the time being in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on, under or over a public place.*
*(2) **[Treated as a rate]** The annual charge may be made, levied and recovered in accordance with this Act as if it were a rate but is not to be regarded as a rate for the purposes of calculating a council's general income under Part 2.*
*(3) **[Based on benefit]** The annual charge is to be based on the nature and extent of the benefit enjoyed by the person concerned.*
*(4) **[Appeal against amount]** If a person is aggrieved by the amount of the annual charge, the person may appeal to the Land and Environment Court and that Court may determine the amount.*
*(5) **[Error of law]** A person dissatisfied with the decision of the Court as being erroneous in law may appeal to the Supreme Court in the manner provided for appeals from the Land and Environment Court.*
*(6) **[Section does not apply]** This section does not apply to:*
(a) the Crown; or
(b) the Sydney Water Corporation, the Hunter Water Corporation or a water supply authority; or
(c) Rail Infrastructure Corporation; or
(d) the owner or operator of a light rail system (within the meaning of the Transport Administration Act 1988), but only if the matter relates to the development or operation of that system and is not excluded by the regulations from the exemption conferred by this paragraph.

20. Section 491 provides that a council may derive income from, amongst other things, rates, charges and fees. Section 611 is found within pt 10 of ch 15 of the LG Act. Part 10 is headed *"Fees"* and all sections within that part, other than s 611, directly concern fees. The provisions of the LG Act that concern rates and charges are predominantly found in pt 1 to pt 9. In particular:

· sections 494 and 495 provides that a council must make and levy an ordinary rate for all rateable land, and it may make and levy a special rate on specified rateable land;

· sections 496 and 501 outline the services in respect of which a council can impose an annual charge, being domestic waste management services, water supply services, sewerage services, drainage services and waste management services;

· section 502 provides that a council may make a charge referred to in s 496 or s 501 according to the actual use of the service;

· section 503 provides that a charge may be made in addition to an ordinary rate or in addition to or instead of a special rate;

· section 505 defines "*general income"* for the purpose of pt 2 (dealing with the limit of annual income from rates and charges) as including ordinary rates, special rates and annual charges, other than, amongst others, annual charges under s 611.

21. Part 4 of ch 15 deals specifically with the "*Making of Rates and Charges".* Part 4 includes s 532, which provides for the provision of public notice of a draft management plan, and s 539, which outlines the criteria for determining the amount of a charge for a service. Those criteria include the purpose for which the service is provided, the nature, extent and frequency of the service, the cost of providing the service, the categorisation for rating purposes of the land to which the service is provided, the nature and use of premises to which the service is provided and the area of land to which the service is provided.

22. Part 5 of ch 15 deals with the levying of rates and charges. In particular, s 546 provides that a rate or charge is levied *"on the land"*.

23. Part 7 of ch 15 deals with the payment of rates and charges. In particular, s 574 deals with the availability of an appeal on a question of whether land is rateable or subject to a charge. It provides, in the case of a charge, that an appeal may be made to this Court against the levying of the charge on the ground that the land is not subject to any charge or is not subject to the particular charge.

24. I turn now to consider each alleged ground of invalidity.

No draft management plan and no public notice

25. Section 532 provides as follows:

532 A council must not make a rate or charge until it has given public notice (in accordance with section 405) of its draft management plan for the year for which the rate or charge is to be made and has considered any matters concerning the draft management plan (in accordance with section 406).

26. Mr Hammerschlag submitted that, with respect to all the impugned charges, there was no draft management plan or public notice as required by s 532. To support this submission, he referred the Court to some of the council's corporate plans, none of which, he contended, met the requirements for a draft management plan stipulated in s 404.

27. On behalf of the council, Mr Rares SC submitted that s 611 is a particular and unique provision that contains its own source of power. This power is limited only by the fact that s 611(4) confers a special right of appeal to this Court in relation to the amount of the charge. In his submission, the provisions of the LG Act that relate to charges in general, such as s 532, do not apply to the exercise of the particular power under s 611.

28. I agree with Mr Rares' submission that s 611 is a particular provision that contains its own source of power, and, furthermore, that a charge levied under s 611 is not required to comply with s 532. I derive that conclusion from the purpose of s 611 and its context. The language of s 611 indicates that the legislative intention was to permit a council to receive an annual charge for the use by a person of a rail, pipe, wire, pole, cable, tunnel or structure that utilises public land. That is to be contrasted with the charges that a council is entitled to make and levy under ss 496 and 501, which relate to services provided by the council. Furthermore, s 611 appears in pt 10, which is concerned with fees, and s 608 entitles a council to charge and recover a fee for any service it provides, other than a service provided under ss 496 or 501.

29. Furthermore, there are to my mind critical distinctions between the provisions contained in ch 15 which relate to charges generally, and s 611. Thus, in pt 1, which provides an overview of rates and charges, s 502 provides that a council may make a charge for a service referred to in ss 496 or 501

according to the actual use of the service. Section 611 contains no such requirement, but rather, in accordance with s 611(3), the annual charge is based upon the nature and extent of the benefit enjoyed by the person concerned. A similar contrast is found in s 505, which includes charges in the general income of a council, but specifically excludes charges made and levied under s 611. Section 539 outlines criteria for determining the amount of a charge for a service, which is again contrary to s 611 (1). Another critical distinction is to be found in the requirement that charges generally are levied *"on land"* pursuant to s 546(1), whilst under s 611(1) the charge is levied *"on the person"*. There are differences, too, in the nature of appeals. Under s 574, an appeal in the case of a charge is confined to the ground that the land is not subject to any charge or to a particular charge. Section 611(4) confines an appeal to the amount of the charge levied under s 611.

30. I have considered two matters that might at first glance cast some doubt upon the conclusion I have reached. The first is that the impost raised by s 611 is called a *"charge"*. I do not think the name is determinative in itself, in circumstances where, as I have shown, there are critical distinctions between a *"charge"* generally under ch 15 and a *"charge"* imposed by s 611.

31. The second is the provision in s 611(2) which I repeat for convenience:

611(2) ***[Treated as a rate]*** *The annual charge may be made, levied and recovered in accordance with this Act as if it were a rate but is not to be regarded as a rate for the purposes of calculating a council's general income under Part 2.*

32. The first matter to notice about s 611(2) is that it is discretionary. The council has a discretion whether or not to treat the annual charge as a rate, so that the council is not obliged to comply with provisions such as s 532. The second matter to notice is the provision that the annual charge may be made, levied and recovered *"as if it were a rate"*. If an annual charge were truly a charge within the general provisions of ch 15, there would be no need for s 611(2) because, for example, the provisions concerning the levying of rates under div 1 of pt 5 apply to charges as well as rates, as do the provisions for the payment of rates under pt 7. I think that s 611(2) operates to permit a council to adopt and apply in respect of an annual charge under s 611 the procedural or machinery provisions for the making, levying and recovery of rates, such as, for example, the date by which a rate must be made (s 533) or requirements about instalments, due dates and notices in s 562.

33. I conclude for these reasons that the first ground of challenge to the validity of the impugned charges in this case must fail, because s 532 does not apply to the making of a charge under s 611.

No resolutions and not "on the person"

34. The procedure that the council adopted in making and levying each of the impugned charges was as follows:

· On 25 May 1998, the council considered a memorandum from the general manager which relevantly stated as follows:

It has been brought to my attention that while Council currently receives an annual charge from AGL for the use of its pipes under Council roads, Council has not levied this charge with any consistency on other organisations. This is a matter which should be rectified ...

...

In order to pursue this matter as expeditiously as possible it is recommended that the Council delegate to the General Manager the authority to levy a s611 charge on all organisations who are in possession, occupation or enjoyment of a rail, pipe, wire, pole, cable, tunnel or structure laid, erected, suspended, constructed or placed on/over or under a public place and to pursue recovery of that revenue should it remain unpaid.

· On the same day, the council resolved relevantly as follows:

(A) Council agree, as a matter of principle, that service authorities which are users of Council's air space and ground space, should be levied a charge under s611 of the Local Government Act.

The council also resolved to delegate to the general manager an authority in terms of the recommendation made to it.

· On 27 July 1998, the general manager presented a memorandum to the council, making reference to its resolution of 25 May 1998 whereby it had resolved, as a matter of principle, that users of the council's airspace and ground space should be levied a charge under s 611. The general manager recommended the making of charges under s 611 as set out in a document entitled *"Attachment B"*. That attachment, entitled "Draft Schedule of Fees and Charges – 1998/1999", relevantly provided as follows:

Rails/poles/supporting columns/tunnels or structures, laid erected, suspended, constructed or placed on, over or under a public place

Per cubic metre of area occupied $17.00

· On the same date, the council resolved that it would *"make the charges under Section 611 as set out in Attachment B to the subject Memorandum by the General Manager"*. By the same resolution, the council delegated to the general manager the authority to levy the charge;

· In respect of the year 1999/2000, the council resolved, on 28 June 1999, to fix the fees and charges indicated in its corporate plan, and it produced a schedule of fees and charges for that year, in which appeared the following charge:

Rails/poles/supporting columns/tunnels or structures laid erected

Per cubic metre of area occupied $17.00

· In respect of the year 2000/2001, the council resolved, on 5 June 2000, again to fix the fees and charges indicated in its corporate plan, and again it produced a schedule of fees and charges for that year, in which appeared the following charge:

Rails/poles/supporting columns/tunnels or structures laid, erected suspended, constructed or placed on over or under a public place

Per cubic metre of area occupied

Fee $17.00 GST $1.70 Fee (GST included) $18.70

(I infer that the schedule of fees and charges is part of the corporate plan, and is the subject of each of the resolutions of 28 June 1999 and 5 June 2000. I draw that inference from the fact that a schedule of fees and charges is referred to, (as a separate document), in the copies of the corporate plans that were tendered in evidence, and from the fact that each of those resolutions are part of a set of resolutions dealing with the relevant corporate plan).

· Included amongst the written delegations to the general manager (presumably for the relevant periods, although that is somewhat unclear from the evidence) was the authority to *"levy a s611 charge"* and that authority was delegated by the general manager to the deputy general manager.

· On 12 April 2000 and 26 February 2001 respectively, the council issued invoices for the impugned

charges to CGEA Transport Sydney Pty Ltd as I have set out in par 3.

35. In the light of the foregoing circumstances, the applicants claim that the impugned charges are defective in two respects. First, they claim that there was insufficient compliance with s 535 of the LG Act, which requires that rates and charges be made by resolution. They point to the fact that, although there was a council resolution in respect of the 1998/1999 year, there were no council resolutions in respect of the remaining years. This defect is not cured, in the applicants' contention, by the delegation to the general manager, because the power to *"make"* (as distinct from *"levy"*) cannot, by virtue of s 377(1), be delegated. Secondly, they claim that the impugned charges fail to comply with the requirement in s 611(1) that they be made upon a *"person"*; rather, they were made by the adoption of a flat rate for structures above and below a public place, lumping together rails, poles, supporting columns, tunnels and structures laid or erected.

36. In my opinion, the applicants' claims must fail. As I have set out in pars 28 – 33 above, s 611 is an independent source of power for the making of the particular charge, and the council is not obliged to comply with any other part of ch 15 of the LG Act, unless it exercises its discretion under s 611(2) to make, levy and recover the charge *"as if it were a rate"*. Accordingly, the absence of specific council resolutions making each of the impugned charges is not fatal.

37. Nevertheless, despite the absence of specific resolutions for each year, there was a series of resolutions that, read together, signify that the council did in fact resolve to make the impugned charges under s 611 for each relevant year. The resolution of 25 May 1998 underpinned the making of the impugned charges each year, because it constituted council's decision to make an annual charge on users under s 611. Each resolution thereafter fixed the amount of the annual charge thereby made on the respective users. That series of steps is *"... the expression of the liability which* [the council] *intended thereby to impose ..."* and constituted the making of the annual charge in each year (see *Beach Tramway Subdivisions Pty Ltd v City of Sandringham* (1935) 52 CLR 399 at 414).

38. Similarly, the series of resolutions, read together, demonstrate that the impugned charges in each relevant year were levied *"on the person"*. The council's resolution of 25 May 1998 clearly indicated that the charge was to be made on the person – it followed the general manager's memorandum which was explicit on that subject, and it stated expressly that *"... service authorities which are users of Council's air space and ground space, should be levied a charge under s611 ..."*. The fact that it was made *"as a matter of principle"* does not derogate from that conclusion. Rather, it supports it, because it indicates that the principle that the council was adopting was a charge on the persons who were "*users"* of the relevant items. Thereafter the council implemented that resolution by its resolutions to fix charges in accordance with the relevant corporate plan, incorporating the relevant schedules of fees and charges.

Exemption

39. The applicants claim that they are exempted from liability for the impugned charges. That claim is based on the following propositions:

(1) Section 16A(1) of the Darling Harbour Authority Act 1984 ("the DHA Act") empowers the Darling Harbour Authority ("the Authority") to grant leases or licences to operate any transport facility constructed for the purpose of providing transport to, from or within an area called *"the Development Area"* being the area defined in the DHA Act. The monorail is such a transport facility;

(2) By an agreement dated 24 January 1986, the Authority granted to TNT Bulkships Ltd ("TNT") a licence, expressed to be under s 16A of the DHA Act (cl 2.5) to operate the monorail transport system (cl 4.1);

(3) By an agreement dated 10 August 1998, TNT (whose name had changed to "TNT Shipping and Development Ltd") assigned (cl 3.1) all its legal and beneficial right, title and interest in a number of

agreements, including the agreement mentioned in (2) above to CGEA Transport Sydney Pty Ltd (one of the applicants);

(4) Accordingly, CGEA Transport Sydney Pty Ltd is the licensee of the Authority;

(5) Section 6(2)(a) of the DHA Act provides that the Authority is deemed to be a statutory body representing the Crown;

(6) Section 23J(2) of the DHA Act provides as follows:

23J(2) Any liability of a lessee or licensee in respect of land the subject of a lease or licence granted pursuant to section 16A for rates payable under the Local Government Act 1919 ... shall be the same as if the Authority were the lessee or licensee, as the case may be, of the land.

(7) Section 611(6)(a) provides that s 611 does not apply to the Crown.

(8) Hence CGEA Transport Sydney Pty Ltd is exempt from the impugned charges.

40. Mr Rares submitted that this argument cannot be made good by reason of the fact that s 23J(2) operates only in relation to *"rates"* payable under the LG Act, and the impugned charges are not rates but are charges. I agree with this submission.

41. Section 23J(2) operates, in effect, to deem a liability of a licensee under s 16A of the DHA to be the liability of the Authority. It specifies, however, that the liability to which it relates is *"for rates payable under the Local Government Act 1919 ..."*. Section 611(6) operates only in relation to any charge imposed under that section. The effect of s 611(6)(a) is that the Authority itself would be exempt from such a charge, but CGEA Transport Sydney Pty Ltd is not the Authority, it is a licensee, and the deeming provisions of s 23J(2) relate only to rates not charges. For these reasons, this ground of challenge must fail.

A charge for the airspace and not the rail

42. The applicants' claim on this ground has two parts. First, they claim that s 611 does not permit a charge to be made in respect of *"air space"*. Secondly, they claim that the council was in error in its calculation of the area occupied by the monorail.

43. As to the first part of their claim, the applicants point to the council's resolution of 25 May 1998 which referred to a charge on the users of *"air space"*. The applicants claim that this is impermissible in terms of s 611 itself, because, in the case of the monorail, s 611 is directed to the possession, occupation or enjoyment of the rail itself, and not the airspace envelope.

44. I cannot accept the first part of this claim because I think that it is contrary to s 611 read as a whole. Section 611 empowers the making of a charge, not on the rail, but on the applicants, by reason of their possession, occupation or enjoyment of the rail. But, the basis for the charge, as s 611(3) specifies, is the nature and extent of the benefit enjoyed by the applicants. Having regard to s 611 read as a whole, I consider that the extent of the benefit enjoyed by the applicants' occupation of the rail is not confined to the rail itself, but can extend beyond the rail to the airspace surrounding it.

45. The point was, I think with respect, made by Pike J in *Australian Gas-Light Company v Glebe Municipal Council* in the following passage at p 45:

What I have to consider first of all is the nature and extent of the benefit enjoyed by the Gas Company. The nature of the benefit is the occupation of the public places of the council by their mains and service pipes, and the extent of that benefit is ***the extent to which they occupy them***. (my emphasis)

46. Mr Rares drew the Court's attention to a passage from the judgment of Blackburn J in *The Pimlico, Peckham and Greenwich Street Tramway Company v The Assessment Committee of the Greenwich Union* (1873) LR 9 QB 9 at 14 where the value of the occupation of the tramway was said to be *"... the power of carrying on the traffic upon it"*. In circumstances where the charge is not made on the rail itself, but is based on the nature and extent of the benefit to the user, it seems to me, with respect, that the comment of Blackburn J is apposite. It is not the rail which is the critical element in determining the nature and extent of the benefit, but the space occupied by the applicants in using the rail for their purposes. That imports the notion of the airspace surrounding the rail. The council was not in error, therefore, in purporting to make a charge in respect of the *"air space"*.

47. The second part of the applicants' claim raises an issue as to what part of the airspace can be said to represent the extent of the benefit enjoyed by the applicants. Is it, as the applicants contend, the space occupied by the rail itself, which has a length of 1,366 metres, a width of 0.7 metres, and a depth of 0.8 metres? Is it instead, as the council contends, the area occupied by both the rail itself and the carriages travelling upon it, which involves the same length, but a width estimated at 3 metres and a height estimated at 3.5 metres? In my opinion, this matter goes to the issue of quantum, and not the issue of validity, and I refrain from dealing with it at this point.

The nature and the benefit enjoyed

48. The applicants claim that the council did not base the impugned charges upon the nature and benefit enjoyed by the applicants, but instead based them on commercial values, and in doing so took into account an irrelevant and extraneous matter, being the rate of return on rental values of adjoining floor space.

49. The council officers took into account a valuation of Australia Pacific Valuations (NSW) Pty Ltd ("APV") which amounted to $275,000 per annum, and they calculated $17 as the rate per cubic metre by dividing the amount fixed by the valuers by the cubic metres of space estimated to be occupied by the monorail. The approach which APV took in deriving a fair charge was to measure the airspace *"in commercial terms"* by attributing a capital value to the area of the airspace by reference to the rental value of adjoining properties, and then by applying a rate of return to that capital value.

50. Having regard to these circumstances, the applicants claim that the council's approach was defective in three ways – it considered a return on the value of office space, applied a flat rate across the board without regard to the actual use by the applicants, and calculated the charge, not on the nature and extent of the benefit enjoyed by the applicants, but on the concept of a property value of the monorail.

51. These matters, it seems to me, do not relate to the validity of the impugned charges. They relate to a method of quantifying the impugned charges. Profit derived by the applicants is a basis for determining the nature and extent of benefit (see *Australian Gas-Light Company v Glebe Municipal Council* at p 45). The calculations of APV and the council officers was a method of quantification based on profit, that is, a return on capital value. Whether or not it is the correct method is a question of quantification not validity.

Regulation 11

52. The applicants claim that the impugned charges do not comply with cls 11(a), (b), (o) and (p) of the Regulation. Those provisions are as follows:

11 A rates and charges notice must contain the following information:

(a) the land to which it relates;

(b) the land value of the land to which it relates and the base date of the general valuation from which the land value is derived;

(o) a statement that if payment is not made on or before the due date or dates interest accrues on the overdue amount;

(p) a statement as to how to make inquiries about the notice.

53. This claim was but faintly pressed by Mr Hammerschlag. Indeed, in the light of the findings I have already made, it is untenable. That is because cl 11 relates to a "*rates and charges notice"* which finds its statutory basis in s 546(1).

54. Section 546(1) provides as follows:

546(1) A rate or charge is levied on the land specified in a rates and charges notice by the service of the notice.

55. The first point to note is that s 546(1) applies to a rate or charge levied "*on the land"*, whereas s 611 relates to a charge levied on the person in possession, occupation or enjoyment of the specified item. Secondly, as I have set out in pars 28 - 33, s 611 contains its own independent source of power and the exercise of that power is not dependent on compliance with other provisions in ch 15 of the LG Act. Thirdly, s 611(2) enables a council to levy the charge as if it were a rate, but it has a discretion to do so, not an obligation. Fourthly, the matters required by cls 11(a) and (b) are plainly irrelevant in the case of a charge levied, not on land, but on the user of the stipulated items. The matters required by cls 11(o) and (p) may be desirable, but they are not mandated by the operation of s 546(1) in the case of a charge made under s 611. For these reasons, this claim must also fail.

The quantum issue

56. This issue involves the determination of the most appropriate method to calculate the charge under s 611, which, as s 611(3) requires, involves a quantification of the nature and extent of the benefit enjoyed by the applicants in their use of the monorail.

57. Three alternative methods were put before the Court. It is convenient to describe them separately.

Return on notional rental value

58. This was the method actually adopted by the council in making the impugned charges. I have referred to it in par 49, but at this point it is relevant to note that APV was concerned to calculate an appropriate charge by measuring "*the air space envelope in commercial terms by direct comparison with the current value of Floor Space Rights of adjoining properties and thence to an appropriate rental value".* The steps it took in carrying out that measurement were as follows:

(a) It calculated the value per square metre of the length of the monorail by reference to the floor space value of adjoining buildings;

(b) It then adjusted that figure by a factor of 3 to take into account the estimated width of the airspace of 3 metres;

(c) By this method, it calculated a total capital value of the airspace occupied by the monorail;

(d) It then applied to that total capital value a rate of return of 7% which yielded a figure of $275,000.

59. As I have earlier pointed out, the charge per cubic metre was derived by council officers by dividing the figure of $275,000 by the figure which they calculated to be the total airspace occupied

by the monorail, and this yielded a rate of $17 per cubic metre.

The percentage of revenue method

60. The council tendered a report from Mr J H Banks, an accountant who is a consultant to the firm of KPMG. He calculated a charge that in his opinion would be an appropriate charge under s 611 by basing it on a percentage of the applicants' revenue from the monorail. The approach he took involved the following:

(a) He formed the opinion that the charge should be made on revenue rather than operating profit, because revenue is more readily determined and *"more easily subjected to independent review",* whilst operating profit is *"a reasonably subjective figure";*

(b) For the purpose of calculating a reasonable percentage to apply to the applicants' revenue, Mr Banks considered, first, the fee paid to the government by the operator of the Sydney Harbour Bridge Climb as a percentage of the operator's revenue; secondly, the rent paid for land used for business premises as a percentage of turnover; and, thirdly, royalties paid by franchisees as a percentage of their revenue. He derived a range of percentages in each of these three cases and, applying the mid-point of the ranges in each case to the revenue stated in the applicants' financial statements for relevant years, he derived a charge respectively of $432,245, $211,424 and $549,702.

The Glebe method

61. In *Australian Gas-Light Company v Glebe Municipal Council,* Pike J was required to determine the quantum of an annual charge made under s 171 of the Local Government Act 1919 (the predecessor to, and in substantially similar terms as, the current s 611) made on the appellant in respect of gas mains and pipes laid under streets and other public places.

62. His Honour said at p 45:

Now, in estimating what is a fair annual charge based on the nature and extent of this benefit, I think the principal matter to be considered is what profits are, and are likely to be, obtained by the Company from this use and occupation in their business of making and vending gas. There is no doubt in my mind that any person bargaining for an occupation similar to that enjoyed by the company would primarily consider what profit he was going to make through obtaining such occupation.

63. His Honour's preliminary conclusion was that the charge should be an amount of about 6% of the net annual profit of the appellant averaged over five years. He was, however, *"strenuously pressed"* (p 46) by the respondents to make the charge based on gross receipts. His analysis led him to conclude that a charge of 6% of net annual profit averaged over five years correlated in the appellant's case to a charge based on 0.75% of gross receipts. His ultimate decision, therefore, was to calculate the charge on the latter basis, but without laying down *"any principle"* and he was prepared to *"favourably consider"* an approach to the court if that basis yielded more than 7% or less than 5% of net annual profit over the set five year period (p 47).

64. Ms T Lindsay, who is an accountant and a director of Horwath (NSW) Pty Ltd, furnished a report calculating the charge using the Glebe method. She averaged the total of both passenger revenue and advertising revenue for the immediately preceding five years, and applied 0.75% to that average. She apportioned the resulting figure by the percentage (38.92%) which the length of the monorail within the council's area (1,366 metres) bears to the total length of the monorail (3,509.75 metres). Due to the uncertainty in information relating to advertising revenue, Ms Lindsay calculated figures on two different scenarios, and she also adopted alternative revenue figures for the period ending 31 December 2000. However, ultimately there was no dispute between the parties that, if the Glebe method was to be adopted, then the figures calculated for the first scenario and the first alternative

were the appropriate charges. They were as follows:

For the year ended 30 June 1999 $23,734

For the year ended 30 June 2000 $24,939

For the 6 months ended 31 December 2000 $12,620

What is the appropriate method?

65. Each method has uncertainties. However, doing the best I can, I have determined that the Glebe method is the most appropriate method for the calculation of a charge under s 611. Its main uncertainty is the percentage rate. Pike J gave no reason for adopting a rate of 6% which correlated to 0.75% when applied to gross revenue. Mr Banks, who carried out a critique of Ms Lindsay's calculations, without departing from them in any material respect, was of the opinion, taking into account the licence fee payable to the Authority by the applicants as a percentage of their revenue, that the percentage to be applied to revenue in order to derive a charge under s 611 ought to be *"in excess of 0.75%"*.

66. However, the Glebe method has the advantage of adoption by a judicial valuer, and it was followed 25 years later by Sugerman J in *Australian Gas Light Co v Annandale Municipal Council and Ors* (1947) 16 LGR 173. It is simple to calculate, and is based on a percentage of revenue, which Mr Banks considered to be more appropriate than a percentage of operating profit. Furthermore, it is consistent with the principle, recognised by Pike J in the passages of his judgment I have quoted in pars 45 and 62 above, that, in determining a charge based upon the nature and extent of the benefit enjoyed by the user, consideration of revenue (as an indication of profit) derived by the user from its occupation of the item in question is the appropriate approach.

67. The method the council adopted departs from that principle. Although, as I have pointed out in par 51, it is one way of approaching a quantification of profit, it is not reflective of the actual occupation of the monorail by the applicants, which is, as I have indicated in pars 44 - 46, the occupation of the airspace for the purpose of conveying passengers in the monorail carriages. Furthermore, this approach to quantifying the nature and benefit of the applicants' enjoyment was put at nought by the frank admission of Mr F W Egan, a valuer called on behalf of the council, that office commercial space is not comparable to the use of the monorail.

68. Mr Banks' method has the advantage of being based on revenue rather than operating profit, which is the approach that was urged upon and adopted by Pike J in *Australian Gas-Light Company v Glebe Municipal Council* (see par 63 above), but it fails, in my opinion, because it is based on a percentage derived from the Sydney Harbour Bridge Climb, or business rentals, or royalties payable by franchisees. None of those operations is, to my mind, comparable to the monorail enterprise. The one that comes closest is, perhaps, the Sydney Harbour Bridge Climb, because a public place is used to carry out that operation. However, the fee paid by that operator to the government is a negotiated fee for the use of the bridge for what is essentially a tourist enterprise. In contrast, what must be ascertained in this case is a charge to be paid for the applicant's use for transport purposes of that part of the monorail which passes over public land. To my mind, there is no appropriate comparison between the two.

Conclusion and orders

69. For the foregoing reasons, I conclude, in summary, that the impugned charges are valid, but that the quantum of those charges should be derived by adoption of the Glebe method, which will result in charges of $23,734, $24,939, and $12,620 respectively. Accordingly, the class 4 application must be dismissed, and the class 2 appeal must be upheld.

70. My formal orders are as follows:

In class 2 proceedings no 20013 of 2000, I make the following orders:

(1) The appeal is upheld:

(2) I determine the amount of charges payable by the applicants to the respondent pursuant to s 611 of the Local Government Act 1993 as follows:

For the year ended 30 June 1999 $23,734

For the year ended 30 June 2000 $24,939

For the six months ending 31 December 2000 $12,620

In class 4 application no 40046 of 2002, I make the following order:

The appeal is dismissed.

In both proceedings, I make the following orders:

(1) I dismiss the respondent's notices of motion both dated 21 March 2002.

(2) I reserve the question of costs.

(3) The exhibits may be returned.