SUPREME COURT OF QUEENSLAND

CITATION:	*Trevorrow v Council of the City of the Gold Coast* [2018] QCA 19
PARTIES:	**RUSSELL JOHN TREVORROW** (appellant) **v** **COUNCIL OF THE CITY OF THE GOLD COAST** (respondent)
FILE NO/S:	Appeal No 2365 of 2017 SC No 7348 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 12
DELIVERED ON:	2 March 2018
DELIVERED AT:	Brisbane
HEARING DATE:	3 August 2017
JUDGES:	Sofronoff P and Philippides JA and Douglas J
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – CONSENTS, APPROVALS, PERMITS AND AGREEMENTS – WHAT CONSTITUTES CONSENT – whether pursuant to the *Sustainable Planning Act* 2009 (Qld) a registered proprietor of a lot of freehold land is liable to the local council for an infrastructure charge, raised upon a decision notice approving an application for a development permit for a material change of use, where the application is made by a third party with the proprietor's consent ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – GENERAL MATTERS – PLANNING SCHEMES AND INSTRUMENTS – POWERS WITH RESPECT TO PLANNING SCHEMES – whether there is an obligation upon a registered proprietor which could engage the operation of s 639 of the *Sustainable Planning Act* 2009 (Qld) where an infrastructure charge is raised upon a decision notice approving an application for a development permit for a material change of use, where the application is made by a third party with the proprietor's consent *Integrated Planning Act* 1997 (Qld), s 3.2.1(3), s 3.2.1(3)(a), s 3.5.28, s 5.1.1, s 5.1.4, s 5.1.6, s 5.1.7, s 5.1.7(1)(a),

s 5.1.7(1)(b), s 5.1.7(2), s 5.1.7(3), s 5.1.8, s 5.1.8(1), s 5.1.8(2), s 5.1.8(3), s 5.1.8(4), s 5.1.9, s 5.1.9(c), s 5.1.12, s 5.1.12(1), s 5.1.12(1)(d), s 5.1.12(2), s 5.1.12(4), s 5.1.14(1), s 5.2.1, s 5.2.5, Sch 10, Ch 5 Pt 1
Local Government Act 1993 (Qld), s 94, s 95, s 95(6), s 96, Sch 4(a)(i)
Local Government Regulation 2012 (Qld), r 104, r 127, r 132, r 134
Sustainable Planning Act 2009 (Qld), s 245, s 263(1)(a), s 623(3), s 633, s 633(2), s 633(3), s 634, s 637, s 637(1)(d), s 639, s 639(1), s 639(2), s 660, s 663, s 664, 764, 833, s 978(1), Ch 8
Sustainable Planning and Other Legislation Amendment Act 2012 (Qld), s 85
Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act 2014 (Qld), s 18

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26, considered
Hunter Douglas Australia Pty Ltd v Perma Blinds (1970) 122 CLR 49; [1970] HCA 63, cited
Sushames v Pine Rivers Shire Council [2007] 1 Qd R 382; [2006] QCA 171, considered
Western Australia v Olive (2011) 57 MVR 269; [2011] WASCA 25, cited

COUNSEL: P J Dunning QC, with G Radcliff, for the appellant
R C Bain QC, with S P Fynes-Clinton, for the respondent

SOLICITORS: Cooper Maloy for the appellant
Corrs Chambers Westgarth for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Philippides JA and with the order her Honour proposes.

[2] **PHILIPPIDES JA:**

The issue

[3] The appellant seeks to appeal from the decision[1] of Jackson J, the primary judge, dismissing its application for declaratory relief. That application and this appeal concern whether, pursuant to the *Sustainable Planning Act* 2009 (Qld) (the SPA), a registered proprietor of a lot of freehold land is liable to the respondent, the Council of the City of the Gold Coast, for an infrastructure charge, raised upon a decision notice approving an application for a development permit for a material change of use, where the application is made by a third party with the proprietor's consent. The issue turns on the proper construction of s 639 of the SPA,[2] now located (with minor irrelevant amendments) in s 664 of the SPA. A related matter raised by the appellant concerns the operation of s 5.1.8 (2) of the *Integrated Planning Act* 1997 (Qld) (the IPA) and whether there was an obligation upon the appellant thereunder which could engage the operation of s 639 of the SPA.

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1 *Trevorrow v Council of the City of the Gold Coast* [2017] QSC 12.
2 All references to the SPA are to the Act as in force before the 2014 amendments.

The facts

[4] The relevant factual background is uncontroversial. The appellant is the administrator for Barry Clark, who, from 2000 to 2016, was the registered proprietor of land situated at 22 Rudman Parade, Burleigh Heads. From about 2006 to 2016, Pro Skips Pty Ltd (Pro Skips) was Mr Clark's tenant.

[5] On 19 October 2006, Pro Skips applied to the respondent, under the IPA, for a development permit for assessable development for a material change of use of the land for use as a refuse transfer station. Because Pro Skips was not the owner of the land, the written consent of the proprietor, as owner of the land within the meaning of the IPA, was required.[3] That consent was given at the time of the application and subsequently confirmed.

[6] In 2008, two years after the application was made, the respondent gave Pro Skips a decision notice which granted the approval upon certain terms and conditions. That decision notice was accompanied by an infrastructure charges notice dated 2 November 2008 that levied an amount under the respondent's Priority Infrastructure Plan. The decision notice was appealed by Pro Skips on 17 December 2008. On 12 November 2009, a negotiated decision notice was issued by the respondent to Pro Skips, attaching a second infrastructure charges notice, in substitution for the previous notice. It was in the sum of $356,718.84 and due and payable "prior to use commencing". (In fact, the use had commenced before the application for the material change of use was made.) The second infrastructure charges notice was not paid by Pro Skips. Neither the 2008 decision notice, nor the 2009 negotiated decision, was given to Mr Clark. That was not required under the IPA. On 22 May 2013, the respondent issued a rates notice for the sum of $400,574.94 to Mr Clark, as registered owner, which included the amount for the unpaid infrastructure charges.

The decision of the primary judge

[7] At first instance, the appellant argued that the only source of the obligation of the proprietor to pay the infrastructure charge was s 639(1) of the SPA and that the operation of that provision, properly construed, did not extend to an owner who was not the applicant for the development permit in question. In considering that argument, the primary judge had regard to the IPA, the SPA and the *Local Government Act* 1993 (Qld) (the LGA).

The IPA

[8] It was common ground at first instance[4] that, when the infrastructure charge was levied, it was the IPA that provided the statutory authority for the second infrastructure charges notice to levy the infrastructure charge. Although the IPA was repealed as of 18 December 2009 by the SPA,[5] a transitional provision in s 833 of the SPA specified that an infrastructure charge, payable under an infrastructure charges notice under the IPA before the commencement of the SPA, was "taken to be" an infrastructure charges notice under the SPA.[6] It was also common ground

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3 Section s 3.2.1(3)(a) of the IPA.
4 Reasons at [17].
5 *Sustainable Planning Act* 2009 (Qld), s 764.
6 Reasons at [17].

that, as of 17 December 2009, an infrastructure charge was payable under an infrastructure charges notice under the IPA. The primary judge proceeded on the basis that the SPA operated thereafter in relation to the second infrastructure charges notice levied at the time of the issue of the negotiated development permit.[7]

[9] Although the decision turned on the operation of s 639 of the SPA, it was relevant to consider the provisions that operated under Ch 5 Pt 1 of the IPA. His Honour found that the second infrastructure charges notice was one given under the repealed IPA for the purposes of s 833 of the SPA and that the second infrastructure charges notice was taken to be an infrastructure charges notice under the SPA, which determined its effect.[8] In so finding, his Honour had regard to Pt 1 of Ch 5 of the IPA containing provisions relating to infrastructure[9] planning and funding.

[10] Section 5.1.1 of the IPA provided that the purpose of that part was to integrate land use and infrastructure plans, establish an infrastructure planning benchmark as a basis for an infrastructure funding framework, establish an infrastructure funding framework that was equitable and accountable and to integrate State infrastructure providers into that framework. Section 5.1.4 provided that, under the IPA, a local government may levy a charge for supplying the trunk infrastructure[10] under either an infrastructure charges schedule or regulated infrastructure charges schedule. Section 5.1.6 provided that such a schedule was required to state, *inter alia*, a charge for each trunk infrastructure network identified in the schedule and information about the area in which the charge applied, the type of lot or use for which the charge applied and how the charge was calculated.

[11] Section 5.1.7 contained restrictions to making an infrastructure charge. Section 5.1.7(1)(a) required that an infrastructure charge be for a trunk infrastructure network that serviced, or was planned to service, premises and is identified in the priority infrastructure plan.[11] By s 5.1.7(1)(b), it was not to be more than the proportion of the establishment cost of the network that reasonably could be apportioned to the premises for which the charge was stated. If the infrastructure charge was levied for an existing lawful use, it was to be based on the current share of usage of the network at the time the charge was levied (unless the local government and the owner of the land to which the charge related otherwise agreed): see s 5.1.7(2) and (3).

[12] Section 5.1.8(1) specified that an "infrastructure charges notice" was required to state the amount of the charge, the land to which it applied, when it was payable, the trunk infrastructure network for which it had been stated and the person to whom the charge must be paid. Section 5.1.8(2) specified that the respondent give the infrastructure charges notice to the applicant where the notice was given as a result of a development approval. Otherwise, by s 5.1.8(3), the notice was required to be given to the owner of the land. The charge was not recoverable unless the entitlements

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7 Reasons at [19].

8 Reasons at [31].

9 "Infrastructure" was defined in the Dictionary in Sch 10 of the IPA to include land, facilities, services and works used for supporting economic activity and meeting environmental needs.

10 "Trunk infrastructure" was defined to mean development infrastructure identified in a priority infrastructure plan as trunk infrastructure.

11 A "priority infrastructure plan" was defined to mean part of a planning scheme that identifies an area, includes the intended plans, identifies and states other matters such as the plans and the assumptions on which they are based and includes an infrastructure charges schedule.

under the approval were exercised: s 5.1.8(4). Section 5.1.9(c) provided that an infrastructure charge for a material change of use was payable before the change happened. Section 5.1.12(1) provided that, despite s 5.1.8 and s 5.1.9, "a person to whom an infrastructure charges notice had been given" and the infrastructure provider could, subject to certain conditions, enter into a written agreement about paying infrastructure charges. Sections 5.1.12(2) and (4) made reference to "the person" giving land to the local government and provided that the applicant must comply with such a notice.

[13] Section 5.1.14(1) of the IPA, the predecessor to s 639 of the SPA, provided that an infrastructure charge levied by a local government was, for the purposes of recovery, taken to be "rates" within the meaning of the LGA. Since that provision was repealed, effective 18 December 2009 by the SPA, the dispute was not whether the effect of *that* provision was that a non-applicant owner was subject to a liability to pay an infrastructure charge levied by the local government, but rather the equivalent provision in s 639 of the SPA.

The SPA

[14] The primary judge had regard[12] to Ch 8 of the SPA dealing with "Infrastructure." His Honour observed that those provisions (as they were before some 2014 amendments) broadly corresponded for the purposes of the present case to those in the IPA. The relevant provisions were substantially relocated in 2014 by s 18 of the *Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Act* 2014 (Qld). However, it was the SPA before the 2014 amendments, referred to by the primary judge as the "unamended Act", that regulated the present case.[13]

[15] Section 639 of the SPA as originally enacted provided:

> "**Infrastructure charges taken to be rates**
>
> (1) An infrastructure charge levied by a local government is, for the purposes of recovery, taken to be rates within the meaning of the Local Government Act.
>
> (2) However, if the local government and an applicant or person who requested compliance assessment enter into a written agreement stating the charge is a debt owing to it by the applicant or person, subsection (1) does not apply."

[16] Section 639 of the SPA was amended by s 85 of the *Sustainable Planning and Other Amendment Act* 2012 (Qld), effective 17 February 2012, to omit the words "within the meaning of the Local Government Act".

[17] Section 633 of the SPA, in the unamended Act, corresponded to s 5.1.8 of the IPA and provided:

> "**633 Infrastructure charges notices**
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> (1) A notice requiring the payment of an infrastructure charge (an ***infrastructure charges notice***) must state each of the following—

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12 Reasons at [32]-[34].

13 Section 978(1) of the 2014 Act provides that the unamended Act continues to apply to an infrastructure charge payable under the unamended Act.

(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;

(f) the number of units of demand charged for;

(g) the charge rate, stated in the infrastructure charges schedule, for the charge; and

(h) if the charge rate has been adjusted for inflation—

(i) details of how it was adjusted; and

(ii)the adjusted charge rate; and

(i) the number of units of demand for which a credit has been given.

(2) **If the notice is given as a result of a development approval or compliance permit, the local government must give the notice to the applicant** or the person who requested compliance assessment—

(a) if the local government is the assessment manager or compliance assessor—

(i) at the same time as the approval or permit is given; or

(ii)for a deemed approval for which a decision notice has not been given—within 20 business days after receiving the deemed approval notice; or

(b) otherwise—

(i) within 10 business days after the local government receives a copy of the approval or permit; or

(ii)for a deemed approval for which a decision notice has not been given—within 20 business days after receiving a copy of the deemed approval notice.

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

(4) **The charge is not recoverable unless the entitlements under the development approval or compliance permit are exercised.**

(5) The notice lapses if the development approval or compliance permit stops having effect." (emphasis added)

[18] His Honour observed[14] that the references to "the applicant" and "the owner" in s 633(2) and s 633(3) were similar to the provisions of s 5.1.8(2) and s 5.1.8(3) of the IPA and, similarly, s 634 of the unamended Act corresponded broadly to s 5.1.9 of the IPA and s 637 of the unamended Act corresponded to s 5.1.12 of the IPA.

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14 Reasons at [37]-[38].

[19] His Honour observed that s 639(1) did not expressly address whether the person who was liable to pay an infrastructure charge under that section was the "owner" of the land, but considered[15] that the effect of providing that the infrastructure charge levied was "taken to be rates" invited attention to who was liable to pay rates.

The LGA

[20] In that respect, his Honour observed[16] that, at the time when the SPA was enacted and afterwards, the LGA governed the subject of rates for the City of the Gold Coast. The power of each local government to levy general, special and separate rates derived from s 94 of the LGA. Section 95 of the LGA, which applied "if the owner[17] of rateable land owes a local government for overdue rates and charges", provided that "overdue rates and charges are a charge on the land" that was registrable. Section 95 did not limit any other remedy that the local government had to recover the rates including selling the land: s 95(6).

[21] Section 96 of the LGA provided that a regulation may provide for any matter connected with rates including the process for recovering overdue rates and charges, including by sale of the land. Regulation 127 of the *Local Government Regulation* 2012 (Qld) (the LGR) stated, in part:

> "(1) Subject to section 163, the following persons are liable to pay rates and charges—
>
> (a) for rateable land—the **current owner of the land**, even if that owner did not own the land during the period to which the rates or charges relate; …" (emphasis added)

[22] His Honour referred to the following provisions of the LGR:

(a) Reg 132 which provided that overdue rates or charges include, *inter alia*, rates or charges that are not paid by the due date for payment stated in a rates notice.

(b) Reg 104 which provided that a local government may levy rates only by a rate notice.

(c) Reg 134 which provided that a local government may recover overdue rates or charges by bringing court proceedings for a debt against a person who is liable to pay the rates.

The primary judge's determination

[23] In reaching his determination, his Honour made three primary findings.

[24] Firstly, his Honour held[18] that, if an infrastructure charge were taken to be "rates" under s 639 of the SPA, a registered proprietor of freehold land would have been liable for the charge by virtue of s 96 of the LGA and reg 127 of the LGR, subject, possibly, to compliance with the provisions of regs 104 and 132.

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15 Reasons at [38].
16 Reasons at [39], [40].
17 Schedule 4(a)(i) of the LGA provided that "owner" of land means a registered proprietor of freehold land.
18 Reasons at [45].

[25] Secondly, his Honour held[19] that the purpose of s 639 of the SPA was the recovery of an infrastructure charge by a local government and that, for that purpose, s 639 appeared to have been intended to clothe the charge with the character of being rates by the words in the text that the charge was "taken to be" rates. His Honour observed[20] in that regard that there was nothing untoward in the Parliament seeking to pick up the provisions of one Act relating to one subject matter "by providing in another Act that another subject matter is to be taken to be the first subject matter for a stated purpose". In so finding, his Honour adopted the following statement:

> "The words 'is to be taken to be' are a reasonably common drafting device in modern statutes enacted by the parliament of this state. They are a form of deeming provision. See, in relation to the proper approach to the construction of deeming provisions, *Hunter Douglas Australia Pty Ltd v Perma Blinds* (1970) 122 CLR 49 at 65–7..."[21]

[26] Thirdly, his Honour held[22] that, on the applicant's argument, the operation of s 639(1) of the SPA would operate as though the words "Where the applicant is the owner of the land…" introduced and qualified the operation of s 639(1). However, the text and context indicated that, to the contrary, the provision was intended to make the proprietor liable to pay the infrastructure charge, at least after service of a rate notice that included that charge.[23]

Did the primary judge err?

The distinction between "owner" and "applicant" in the legislation

[27] The appellant took issue with those findings, contending that the primary judge failed to address the significance of the fact that the infrastructure charges notice in the present case was not, and could not, be given to the "owner", but rather only to the "applicant", being Pro Skips. The appellant contended that since the concept of "applicant" and "owner" of land remained distinct throughout both the IPA and SPA, the statutory language in both Acts was reflective of the "applicant" being the focus of attention in relation to the recovery of infrastructure charges, in contra-distinction to an owner *qua* the capacity as owner. In that respect, reference was made to s 5.1.7(3) and s 5.1.8(3) of the IPA and the corresponding provisions of the SPA, being s 623(3) and s 633(2) and (3). The distinction was said to be reinforced in s 5.1.12(1)(d) of the IPA (corresponding to s 637(1)(d) of the SPA).

[28] This argument is without substance. The primary judge was alive to the distinction in the legislation between "owner" and "applicant". Indeed, his Honour rightly considered it to be a factor indicative of the lack of contextual support for the restrictive operation of s 639(1) of the SPA for which the applicant contended. As the primary judge stated at [55]:

> "… at a general level, the SPA distinguished between an applicant for a development permit (or a person who requests a compliance assessment) on the one hand and an owner on the other. There was no requirement that an application for a development permit be made by an owner. Instead, an applicant was required to obtain the

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19 Reasons at [47].
20 Reasons at [46].
21 Reasons at [45], citing *Western Australia v Olive* (2011) 57 MVR 269 at 292 [121].
22 Reasons at [53].
23 Reasons at [48].

> owner's consent to lodge the application. This distinction was recognised in some of the sections in ch 8 pt 1 of the SPA, as previously mentioned."

[29] Moreover, far from supporting the appellant, s 637(1)(d) of the SPA undercut the appellant's argument. As the primary judge stated at [56]:

> "Particularly, s 637(1)(d) expressly referred to a case where 'the infrastructure [was] land owned by the applicant'. Although the context there was different, the paragraph shows that the drafter of the SPA, where relevant, did refer to a case where an applicant owned land that was relevant to the operation of a particular provision."

The proper construction of s 639(1) of the SPA

[30] The appellant further argued that the primary judge's construction of s 639(1) of the SPA was erroneous on two grounds. The first ground concerned his Honour's analysis of the provisions of the LGA.[24] It was submitted that an infrastructure charges notice given to a non-landowner applicant under s 5.1.8(2) of the IPA could not come within the description of any species of "rates" in s 94 of the LGA and, so where the infrastructure charge was not already an obligation of the landowner as the person liable under the IPA or SPA, it could not be rateable against an owner's land. The second ground was an allied argument that the primary judge's construction of s 639(1) of the SPA permitted a "double deeming", which was inconsistent with its text and context.

[31] The appellant acknowledged that, pursuant to s 127 of the LGR, unpaid rates under the LGA were payable by and recoverable from the owner of the land from time to time, regardless of whether the owner at the time of recovery was the person on whom the rates were initially levied by a rates notice. But it was argued that s 639(1) of the SPA, by its terms, only permitted the recovery of an infrastructure charge as a charge over the land of an applicant.

[32] The appellant accepted that s 639(1) of the SPA was apt to deem an unsecured obligation of a person liable on an infrastructure charges notice to be rates and thereby apt to secure an otherwise unsecured obligation of that person under the rating regime in respect of that person's land. However, it was argued that, on the primary judge's construction, there was a preceding and additional "deeming" that s 639(1) was not apt to achieve; it was not apt to deem a non-applicant owner, otherwise under no obligation under an infrastructure charges notice, to be liable for its payment. The crux of the appellant's argument was thus that s 639(1) did not create a fresh obligation on a non-applicant owner to pay the infrastructure charge the subject of the infrastructure charges notice where none already existed.

[33] That submission was premised on the proposition that an infrastructure charges notice only obligated the applicant making the development application (whether that person be the owner or not). This was said to follow from the fact that the person to whom the infrastructure charges notice was required to be given where it resulted from a development application was "the applicant": see s 5.1.8(2) and s 5.1.8(3) of the IPA and s 633(2) and s 633(3) of the SPA. At the heart of the

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24 Reasons at [40]-[44].

appellant's case, accordingly, was the contention that the primary judge erred at the point of holding that an infrastructure charges notice given to a non-owner applicant was able to render the obligation thereunder that of the owner by virtue of the deeming provision.

[34] The appellant's argument must be rejected. Its defect lies in the failure to comprehend that what s 639(1) of the SPA does by its terms is to characterise an infrastructure charge in a particular manner, that is, as "rates" (irrespective of who has made the application). However, that characterisation applies only for a specified purpose, the purpose being that of "recovery" of the infrastructure charge by a local government. As the primary judge explained, referring to *Hunter Douglas Australia Pty Ltd v Perma Blinds*,[25] there is nothing untoward in the Parliament using a deeming provision in that fashion. By providing that, for the purpose of recovery, an unpaid infrastructure charge is taken to be "rates", s 639(1) had the result that that charge was deemed to be a charge payable by the owner of the land from time to time, if the rights under the development approval were exercised.

[35] A further criticism made by the appellant concerning the primary judge's reasoning[26] was the emphasis placed on the finding that, because no application for a development permit could be made without the owner's consent, whether an infrastructure charge was levied was a matter within the control of an owner of land, at least to some extent. It was argued that the only statutory involvement with the application the landowner had was in consenting to the making of the application, which occurred at a time before it was known whether there would be an infrastructure charge, and if so, how much it would be. That matter was, therefore, no pointer to a legislative intention that non-applicant landowners should be caught by the operation of s 639 of the SPA, a better guide to legislative intent was said to be s 5.1.8(2) of the IPA, which pointed to the opposite conclusion. Section 5.1.8 of the IPA does not provide the support claimed by the appellant. It merely indicates that the applicant is the recipient of a notice which is the result of a development approval.

[36] As the respondent submitted, the obligation to construct infrastructure (and the rights of setoff) bound an owner under s 3.5.28 of the IPA and s 245 of the SPA, if development was undertaken. The respondent thus submitted, referring to *Sushames v Pine Rivers Shire Council*,[27] that, although prior to the grant of a development approval, the right to make and prosecute the application for approval was a right personal to the applicant, upon approval being granted, the approval (encompassing both the right to carry out new development and the obligations to be performed consequently upon the carrying out of that development) attached to the land and bound the owner, not merely the applicant personally.[28]

[37] Further, although in a development application context, as the application proceeded to assessment and decision, the non-applicant owner had no direct role to play, an application for material change of use could not proceed to assessment and decision unless made with the consent of the owner.[29] As the respondent submitted, that

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25 (1970) 122 CLR 49 at 65-67.
26 Reasons at [61].
27 [2007] 1 Qd R 382.
28 IPA, s 3.5.28; SPA, s 245.
29 IPA, s 3.2.1(3); SPA, s 263(l)(a).

consent amounted to a consent to the undertaking of a statutory process, which may result in the conferral of new development rights, which benefitted the land by being available to the owner of the land (for the duration of the approval), coupled with the imposition of development-related obligations (under conditions of development approval) which must be performed by the person, including the owner of the land who was not an applicant, who seeks to use the benefit of that approval.

[38] These considerations, correctly pointed to as relevant by the respondent, support and accord with the primary judge's conclusion. As the primary judge stated, unless bargained away, an owner controlled the use of the land and an infrastructure charge for a material change of use was not payable until the change of use began. Given the aspect of control exercisable by the owner, the owner was also placed in a position to protect its interests by appropriate avenues of recourse to the applicant for unpaid infrastructure charges.

[39] Section 639(2) of the SPA was relied upon by the appellant as providing support for its contention as to the scope of s 639(1). The appellant submitted that s 639(2) was consistent with a construction of the section as only applicable to an owner-applicant, who was a ratepayer, and thus obliged on the infrastructure charges notice and able to negotiate its terms, including as to whether the statutory security might be engaged. However, as the respondent rightly argued, if an agreement was made under s 639(2) or its predecessor in the IPA, it would be an infrastructure agreement referred to in s 660 of the SPA or s 5.2.1 of the IPA. The terms of that agreement may or may not result in the agreed (alternate) obligations running with the land, depending on whether or not s 663 of the SPA or s 5.2.5 of the IPA is invoked. Under both provisions, an agreement ran with the land and bound the owner from time to time, provided, that the owner (at the time the agreement was made) gave its consent to the agreement. The owner thus remained free to decide, as it did at the development application lodgement stage, whether its land would be fixed with the burdens of infrastructure charging or provision which flow from approval of development on particular land.

[40] There is no basis for the argument that the primary judge erred in concluding[30] that the construction contended for by the appellant involved reading s 639 of the SPA as though it contained extra words. Nor do the authorities relied on by his Honour undermine his conclusion. The appellant submitted that the principle in *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*,[31] referred to by the primary judge, that the language of a statutory provision was to be given its ordinary meaning was conditioned on the statutory language being clear and unambiguous, but the primary judge had not been satisfied that the condition had been met.[32] The submission misstates his Honour's finding, which was rather that s 639(1) did not "expressly" address whether "the person who is liable to pay an infrastructure charge under that section is the 'owner' of the land". While not expressly dealt with, the primary judge found that the statutory language was clear and unambiguous as to whether a non-applicant owner was liable to pay an infrastructure charge the subject of an infrastructure charges notice.

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30 Reasons at [53] and [66].
31 (1981) 147 CLR 297 at 305 referred to Reasons [65].
32 Reasons at [38].

[41] The construction of s 639(1) of the SPA adopted by the primary judge reflected the plain meaning of the words used and was entirely harmonious with the statutory scheme for assessment and approval of development. There is no merit in the appellant's appeal.

Order

[42] The order I propose is that the appeal be dismissed with costs.

[43] **DOUGLAS J:** I agree with Philippides JA.