SUPREME COURT OF QUEENSLAND

CITATION:	*Bowyer Group Pty Ltd v Cook Shire Council & Anor* [2018] QCA 159
PARTIES:	**BOWYER GROUP PTY LTD** **ACN 600 221 976** **(applicant)** **v** **COOK SHIRE COUNCIL** (first respondent/not a party to the appeal) **DAVID ORIEL INDUSTRIES PTY LTD** **ACN 001 571 544** (second respondent)
FILE NO/S:	Appeal No 10395 of 2017 P & E Appeal No 160 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Cairns – Unreported, 25 August 2017 (Morzone QC DCJ)
DELIVERED ON:	6 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	1 May 2018
JUDGES:	Fraser and Morrison JJA and Bowskill J
ORDERS:	**1. The application for leave to appeal is granted.** **2. The appeal is dismissed with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – DEVELOPMENT CONTROL – APPLICATIONS – FORM AND CONTENTS OF APPLICATION – CONSENT AND IDENTITY OF OWNER – where the second respondent was granted development approval for a material change of use of land for an extractive industry – where the applicant, an owner of adjoining land, commenced an appeal against the decision to grant the approval in the Planning and Environment Court – where the applicant contended, as a preliminary issue, that the development application was not a properly made application as it was not accompanied by the consent of the holders of a Crown lease of the land – where the Planning and Environment Court found the application was properly made, being accompanied by the consent of the State as the owner of the land – consideration of the meaning of the word "owner" in the phrase "owner of the land the subject of an application" in s 263(1) of the *Sustainable Planning Act* 2009 – whether the holders of a rolling term lease for pastoral

purposes under the *Land Act* 1994 are "owners" of the relevant land within the meaning of that provision

Land Act 1994 (Qld)
Sustainable Planning Act 2009 (Qld), s 260, s 261, s 263(1)

Bartlett v Brisbane City Council [2004] 1 Qd R 610; [2003] QCA 494, considered
BMG Resources Ltd v Pine Rivers Shire Council [1989] 2 Qd R 1, considered
Petrie v Burnett Shire Council [2001] QPELR 510; [2001] QPEC 47, considered
Pike v Tighe (2018) 92 ALJR 355; (2018) 352 ALR 569; [2018] HCA 9, considered
Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council (1980) 145 CLR 485; [1980] HCA 1, considered
Queensland Construction Materials Pty Ltd v Redland City Council (2010) 175 LGERA 52; [2010] QCA 182, considered
Spurling v Development Underwriting (Vic) Pty Ltd [1973] VR 1; [1973] VicRp 1, applied
Stradbroke Island Management Organisation Inc v Redland Shire Council [2002] QPELR 121; [2001] QPEC 57, considered
Sydney City Council v Ipoh Pty Ltd (2006) 68 NSWLR 411; [2006] NSWCA 300, considered
Wik Peoples v Queensland (1996) 187 CLR 1; [1996] HCA 40, considered

COUNSEL: R Traves QC, with P Djohan, for the applicant
G Newton QC, with S Russell, for the second respondent

SOLICITORS: Origin Lawyers for the applicant
Kelly Legal for the second respondent

[1] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Bowskill J. I agree with those reasons and with the orders proposed by her Honour.

[2] **MORRISON JA:** I agree with the reasons of Bowskill J and the orders her Honour proposes.

[3] **BOWSKILL J:** The second respondent, David Oriel Industries Pty Ltd, applied to the Cook Shire Council for development approval for a material change of use of certain land, for an extractive industry. The Council approved the application. The applicant, Bowyer Group Pty Ltd, an owner of adjoining land, has commenced an appeal against the Council's decision in the Planning and Environment Court. The appeal has not yet been determined in a substantive way. Bowyer raised two preliminary issues, contending that the development application was not a properly made application as it was not accompanied by the consent of the holders of a Crown lease of the land, and was not properly notified. For reasons given on 25 August 2017, the Planning and Environment Court (Morzone QC DCJ) determined both preliminary issues favourably to the second respondent.[1]

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[1] *Bowyer Group Pty Ltd v Cook Shire Council & David Oriel Industries Pty Ltd*, delivered on 25 August 2017 (AR pp 458-480) (**Reasons**).

[4] The applicant seeks leave to appeal part of that decision, namely the finding that the development application made by the second respondent was properly made, as it was accompanied by the necessary owner's consent, being the consent of the Department of Agriculture and Fisheries on behalf of the State of Queensland,[2] and did not require the consent of the Crown lessees.[3]

[5] The second respondent contends the decision was correct, although for different reasons from those of the learned primary judge. The first respondent, the Council, did not actively participate in the hearing of the preliminary issues below, or in this Court.

[6] The appeal concerns the meaning of the phrase "owner of the land the subject of an application" in s 263(1) of the *Sustainable Planning Act* 2009 (Qld).[4] For the following reasons, in my view leave to appeal should be granted, but the appeal ought to be dismissed.

The land

[7] The land the subject of the development application is lot 4 on survey plan 104555, described as Wolverton Station.[5] The application sought a development permit for a material change of use for:

> "Sand and Gravel screening and extraction from existing tailings and sediment basin fill on alluvial tin mining operation on granted ML 20633. To be used for maintenance and development of Peninsula Development Road and rural construction..."[6]

[8] The whole of the land is subject of a rolling term lease for "pastoral" purposes, granted under the *Land Act* 1994 (Qld) to William, Kevin and Neville Jackson on 1 July 1998 for a term of 23 years and nine months. It was originally due to expire on 31 March 2022, but was extended to 31 December 2045.[7]

[9] There is also a mining lease, ML 20633, over part of the land, held by the second respondent.[8] A sales permit under the *Forestry Act* 1959 (Qld), for getting quarry material located on part of ML 20633, was granted to the former holder of the mining lease, and later transferred to the second respondent.[9]

[10] The applicant is the owner of adjoining land, on which the Archer River Quarry is situated.

Sustainable Planning Act – requirement for owner's consent

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2 Provided on 24 August 2015, see AR pp 90-91.
3 Reasons at [11], [26] to [28].
4 Now repealed and replaced by the *Planning Act* 2016 (Qld); see s 311 of the *Planning Act* 2016 as to the continued operation of the repealed Act. An equivalent provision to s 263(1) appears in s 51(2) of the *Planning Act* 2016, albeit by reference to the "owner of the premises".
5 See the application at AR pp 48 and 57 (where the land (premises) is described by reference to street address, lot on plan description, and coordinates).
6 AR p 55.
7 AR p 39.
8 AR pp 218 to 222.
9 AR pp 249 to 257.

[11] Making a material change of use of premises is one of the forms of development for which approval is required under the *Sustainable Planning Act*.[10] In schedule 3 to the Act, "premises" is defined to mean:

(a) a building or other structure; or

(b) land, whether or not a building or other structure is situated on the land.

[12] Section 263(1)(a) of the *Sustainable Planning Act* provides that "[t]he consent of the owner of the land the subject of an application is required for its making if the application is for … a material change of use of premises…".

[13] Section 260(1)(e) provides that an application for development approval must contain or be accompanied by the owner's written consent, if such consent is required under s 263. By s 261, an application is a "properly made application" only if, relevantly, the application complies, among other things, with s 260(1).

[14] The word "owner" is defined in schedule 3 as follows:

> "***owner***, of land, means the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent."

[15] Section 13(j) provides that, in a provision of the Act about a development application, a reference to "the land is a reference to the land the subject of the application".

[16] Separately, "land" is defined in schedule 3 to include:

> "(a) any estate in, on, over or under land; and
> (b) the airspace above the surface of land and any estate in the airspace; and
> (c) the subsoil of land and any estate in the subsoil."

[17] The applicant contends that the definition of "owner" is capable of referring to more than one class of owner, and includes both the State and the Crown lessees (as the latter would be entitled to receive the rent if they were to sublease the Crown lease). Alternatively, if the definition permits of only one class of owner, the applicant submits the Crown lessees ought to be regarded as the owner, because it is their interests which would more likely be affected by the activities proposed by the second respondent as a consequence of the application for development approval.

[18] The second respondent submits "the land the subject of an application" is the physical property, identified by the lot details, and not some legal or equitable estate or interest in it. The second respondent contends there can be only one class of owner of the land, for the purposes of this provision, which in this case is, relevantly, the State, as the entity actually entitled to receive the rent for the land. The word "or" in the definition is to be construed as having its ordinary, disjunctive meaning – as an alternative, referring to the suppositious person entitled to receive the rent for the land, where there is no person actually entitled (because there is no lease). The second respondent submits that a person(s) liable to pay the rent for the

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[10] See s 7 (meaning of "development") and s 10(1) (meaning of "material change of use") of the *Sustainable Planning Act*.

land (as the Crown lessees are) is not the person(s) entitled to receive the rent for the land.

Relevant Land Act provisions

[19] Section 15(2) of the *Land Act* 1994 empowers the Minister to lease unallocated State land,[11] either for a term of years or in perpetuity.

[20] A lease of Crown land is a creature of statute, and as such the rights and obligations that accompany such a lease derive from the statute.[12] The grant gives the lessee such possession as is required for the occupation of the land for the purposes of the grant – here, pastoral purposes. But it does not confer exclusive possession.[13]

[21] The State does not, upon the grant of a lease of Crown land, acquire a reversionary interest in the land, as that is understood in the common law sense.[14] Upon the grant of a lease, the land is no longer "unallocated", and is therefore not otherwise available for grant. However, during the term of the grant the State may deal with the land to the extent it is authorised by statute, or the terms of the grant, to do so:[15] for example under the *Forestry Act* 1959 (as expressly recognised in the special conditions of the lease in this case)[16] and under the *Mineral Resources Act* 1989. Once the grant comes to an end, the State may deal with the land as authorised by statute.

[22] A lease must state the purpose for which it is issued (s 153). Land which is leased for pastoral purposes may be used only for agricultural or grazing purposes, or both (s 199A(3)).

[23] A lease for a term of years, which is used for agriculture, grazing or pastoral purposes, may, as in this case, be identified as a rolling term lease (ss 164 and 164A). There are special provisions in the *Land Act* dealing with extensions of rolling term leases. Unless there has been an agreement to surrender the lease (s 164D) or for some other reason the lease has been brought to an end during the term of it (s 164F(3)), the Minister must grant an extension of the term of a rolling term lease, if such an extension is applied for (s 164C(1)), and the term of the lease may be extended regardless of how many times it has previously been extended (s 164F(4)).

[24] The *Land Regulation* 2009 contains provisions dealing with, inter alia, payment of rent by the lessee of a term lease, including a rolling term lease for pastoral purposes.[17]

[25] The lessee of a term lease under the *Land Act* may enter into a sublease. Section 332 of the *Land Act* contains the requirements for subleases, as follows:

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11 See the definition of "unallocated State land" in schedule 6 to the *Land Act*.

12 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 75 per Brennan CJ, at 112, 115, 122, 132 per Toohey J, at 149 per Gaudron J, at 189-190, 198 per Gummow J, at 244, 246, 247 per Kirby J.

13 *Wik Peoples* at 122 per Toohey J, at 154-155 and 166 per Gaudron J, at 195, 204-205 per Gummow J, at 233, 244, 246-247 per Kirby J; cf at 78, 80-81, 84 per Brennan CJ.

14 *Wik Peoples* at 128-129 per Toohey J, at 155 per Gaudron J; at 189-190 per Gummow J, at 244 per Kirby J; cf at 89, 91, 92 and 93 per Brennan CJ (with whom Dawson J, at 100, and McHugh J, at 167, agreed).

15 *Wik Peoples* at 128 per Toohey J.

16 See AR p 42.

17 See s 448(3) and schedule 1B of the *Land Act*, and part 4 of the *Land Regulation* 2009 (for example, ss 28, 40G).

"(1) A lease issued under this Act may be subleased only –

(a) if–

(i) the Minister has given written approval to the sublease; or

(ii) the lessee holds a general authority to sublease; or

(iii) a stated mandatory standard terms document forms part of the sublease; and

(b) to a person who is eligible to hold the sublease under this Act."

[26] The *Land Act* does not contain any express provision entitling a lessee of a lease that is sublet to rent. The lessee and sub-lessee, subject to the provisions of the *Land Act*, would be free to determine the terms and conditions of the sublease.[18] However, the lessee of a lease that is sublet continues to be liable for all the conditions to which the lease is subject (s 337) – including the rent for the land.

The primary judge's decision

[27] The learned primary judge identified the critical question as "whether the Crown Lessees as 'owners' are 'entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent' within the definition of 'owner' under SPA" (at [19]).

[28] His Honour referred to s 332 of the *Land Act* and then said (at [21]):

> "There is no evidence that any of those prerequisites apply here – the Minister has not provided any approval; the lease does not provide any general authority; and no form of sublease has been tendered. It must follow that the Crown Lessees do not have any demonstrated entitlement to sublet or receive rent."

[29] Noting that consent to the making of the application had been provided by the Department of Agriculture and Fisheries, the learned primary judge concluded that the development application was properly accompanied by the necessary owner's consent, and that it did not require the consent of the Crown Lessees (at [28]).

[30] The learned primary judge did not determine the preliminary issue on the basis that the Crown lessees could not be "owners" within the meaning of that word in the *Sustainable Planning Act*. His Honour appears to have proceeded on the basis of an assumption that they could be; but, as a matter of fact, they had not demonstrated an entitlement to receive the rent for the land under a sublease. It appears this was consistent with the manner in which the point was argued before his Honour;[19] although in this Court the second respondent contends the Crown lessees are not "owners" within the meaning of the definition, in any event.

What is the proper construction of the phrase "owner of the land" in this context?

[31] As recently reiterated by the High Court:

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18 *Keswick Developments Pty Ltd v Keswick Island Pty Ltd* [2012] 2 Qd R 114 at [83] and [90] per Muir JA.

19 Applicant's reply submissions at [2].

> "… statutory construction involves attribution of meaning to statutory text. The task of construction begins, as it ends, with the statutory text. But the statutory text from beginning to end is construed in context, and an understanding of context has utility 'if, and in so far as, it assists in fixing the meaning of the statutory text'."[20]

[32] The relevant context includes the statutory purpose, as the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation.[21]

[33] The words used in the statute are, as far as possible, to be given their natural and ordinary (grammatical) meaning.[22]

[34] In *Bartlett v Brisbane City Council* [2004] 1 Qd R 610 this Court considered the meaning of the equivalent provision in the *Integrated Planning Act* 1997 (s 3.2.1(3)). At [23] Jones J (with whom McPherson JA and Holmes J, as her Honour then was, agreed) said of that provision:

> "The purpose of s 3.2.1 of the IPA is limited. It simply identifies the requirements for the first stage in the IDAS process referred to in ch 3 of the Act. The relevance of these requirements and the need for proper identification of the relevant land and its owner are explained in the remarks of Stephen J in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council*[23] where his Honour said:
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> > 'In any such scheme for the control of land use the two critical integers, land and use, each involves a question of definition, what land and what use? The intending user of land will, in his application for consent, have to specify these two integers, but it will be one of them, the integer of use, that will dictate the precise identity and extent of the other integer, the land the subject of the application. This is a necessary consequence of the fact that the consent being sought is consent to use for a particular purpose. The land is merely the passive object which is being used; the active integer, use, will determine its extent.'"

[35] In *Pioneer Concrete* Stephen J also said (at 509):

> "'The land to which the application relates or applies' means simply the land which is to be devoted to the proposed purpose of use and may be greater or less than a particular title holding or allotment, so long as it includes all land proposed to be so used."[24]

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20 *SZTAL v Minister for Immigration and Border Protection* (2017) 347 ALR 405 at [37], referring to *Thiess v Collector of Customs* (2014) 250 CLR 664 at [22] and *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at [39]; see also *Project Blue Sky Inc v Australian Broadcasting Authority* (1988) 194 CLR 355 at [78].

21 See s 14A(1) of the *Acts Interpretation Act* 1954 (Qld); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]-[44].

22 *SZTAL v Minister for Immigration and Border Protection* (2017) 347 ALR 405 at [38]-[39], referring, inter alia, to *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at [66].

23 (1980) 145 CLR 485 at 501.

24 See also to similar effect at 498-499 per Gibbs J (with whom Stephen J agreed on this point) and at 511 per Wilson J (who also agreed with Gibbs J on this point); although Gibbs J (and Aickin J) dissented as to the issue which determined the appeal.

[36] To the same effect, more recently, in *Pike v Tighe* (2018) 352 ALR 569 the High Court, construing the phrase "the land the subject of the application" in s 245(1) of the *Sustainable Planning Act*, said that the focus of concern of s 245(1) is "upon land as the physical subject of use and occupation rather than the more abstract issue of the quality of a registered proprietor's title to a lot" (at [38]).

[37] These authorities support the conclusion that, for the purposes of s 263(1) "the land the subject of [the] application" is the physical property comprising the land the subject of the application for development approval. That may, or may not, be confined to a specific lot;[25] it is the use of the subject land that will determine the extent of the subject land. Here, "the land the subject of [the] application" was identified in the application by reference to a street address, lot on plan description and coordinates (which the form suggests is "appropriate for development in remote areas, over part of a lot or in water not adjoining or adjacent to land").[26] The requirements of the application form, for identifying the premises (land) the subject of the application, is consistent with the authorities referred to, in that it is concerned to identify the physical extent of the land.

[38] As Jones J observed in *Bartlett* the purpose of a provision such as s 263(1), requiring the consent of the owner of the land the subject of the application, is limited. All that the giving of consent does is to permit the application to go forward, so that the planning authority can assess it on its merits.[27] The rationale for requiring consent of the owner of the land was explained by Skoien SJDC in *Petrie v Burnett Shire Council* [2001] QPELR 510 at 511 [9] on the basis that the non-owner making the application should have the actual consent of the owner so that the council (assessing authority) has the assurance that the proposed development is realistically proposed and that the application is not just an academic exercise which could put the Council to considerable wasted effort and expense. In *Sydney City Council v Ipoh Pty Ltd* (2006) 68 NSWLR 411 at [5] Hodgson JA described the requirement of consent of the owner as:

> "a means of supporting the objects and the functioning of [the] legislative scheme; for example by ensuring that consent authorities are not troubled by applications that are pointless because title requirements for carrying them out will not be satisfied, and by ensuring that owners are not prejudiced by having development consents associated with their land which cause unwelcome increases in the value of land and thus in rates and taxes payable on it".

[39] Having regard to the purpose of the requirement, the right of veto which is effectively given to an "owner" is appropriately limited.

[40] Returning to the definition of "owner":

> "***owner***, of land, means the person for the time being entitled to receive the rent for the land or would be entitled to receive the rent for it if it were let to a tenant at a rent."

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25 See the definition of "lot" in s 10(1) of the *Sustainable Planning Act*.

26 AR p 57.

27 See also *Sydney City Council v Ipoh Pty Ltd* (2006) 68 NSWLR 411 at [6].

[41] As a matter of construction of the words used, the "owner", of land, under either limb is the same person (or persons or entity[28]). The word "or" should be given its ordinary, disjunctive meaning. There is no reason, having regard to the context in which the provision appears, or the purpose of s 263(1), why "or" should be read conjunctively.[29]

[42] The natural and ordinary meaning of the language used in the definition of "owner" is that the owner is the person (or persons or entity) who is (currently) entitled to receive the rent for the land, or (where the land is not, currently, let) who would be entitled to receive the rent for the land, if it were let to a tenant at a rent.

[43] In the present case the State (the Crown) is entitled to receive the rent for the land, from the lessees under the rolling term lease. Even if those lessees were to obtain approval for, and enter into a sublease of the rolling term lease, the State would still be entitled to receive the rent for the land – from the lessees. The lessees may, depending upon the terms of any agreement they enter into with a sub-lessee, recover a form of rent from the sub-lessee. But the lessee remains liable to pay the rent for the land to the State.

[44] Having regard to the purpose of s 263(1), there does not appear to be any reason why "owner" should be interpreted in an expansive way, so that it might include any person, in addition to the person principally entitled to receive the rent for the land (either actually or suppositiously), who may be or become entitled to receive a payment by way of rent, for example from a sub-lessee, or even a sub-sub-lessee. On the applicant's analysis not only would the Crown lessees be "owners", but potentially numerous sub-lessees as well.[30] There is no reason, having regard to the context and purpose of the provision, and the language used, why a lessee, or sub-lessee, of land, should have a right to veto the making of a development application in respect of land in which they have a limited interest. That right appropriately rests with the "owner", in the sense of the person principally entitled to receive the rent for the land. Others, including those with an *interest in* the land, or who occupy the land, or own or occupy adjacent land, may be submitters, and object to the development proposal on its merits – but do not have a right to veto the making of the application.

[45] This was the conclusion reached by McLaughlin QC DCJ in *Stradbroke Island Management Organisation Inc v Redland Shire Council* [2002] QPELR 121 at [18]: that the apparent intent of the definition of "owner" (in the equivalent *Integrated Planning Act* provision) was to denote a person who is entitled to the possession of land without having to pay rent for it.

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28 See s 32C (words in the singular include the plural) and s 32D(1) (a reference to a person generally includes reference to a corporation (which includes a body politic or corporate) as well as an individual) of the *Acts Interpretation Act* 1954.

29 It may be noted that, in the *Planning Act* 2016, "owner" is defined in schedule 2 in almost identical terms, but with the two limbs separated into subparagraphs (a) and (b) – once again with the disjunctive "or", as follows:

> "***owner***, of land, premises or a place, means the person who –
>
> (a) is entitled to receive rent for the land, premises or place; or
>
> (b) would be entitled to receive rent for the land, premises or place if the land, premises or place were rented to a tenant."

30 See s 334A of the *Land Act*, the ability, with approval, to sublease under s 332 applies also to a sublease of a lease issued under the Act.

[46] It was also the conclusion reached by Stephen J, whilst a member of the Supreme Court of Victoria, in *Spurling v Development Underwriting (Vic) Pty Ltd* [1973] VR 1,[31] in considering an equivalent requirement under the *Town and Country Planning Act* 1961 (Vic). Regulations made under that Act required that an application for a permit by an applicant who is not the owner of the relevant land must be accompanied by the concurrence in writing of the owner. "Owner", in respect of any land, was defined to mean "the person for the time being entitled to receive or who if the same were let to a tenant at a rack-rent would be entitled to receive the rack-rent thereof". "Land" was defined to mean "land of any tenure and includes works, buildings and parts of buildings whether the buildings are divided horizontally or vertically or in any other way".[32]

[47] The argument in *Spurling* was that the application was required to be accompanied by the written consent the City of Essendon, as the owner of the freehold tenure comprising the land, and also its tenant, as the owner of a leasehold tenure who would, if there had been a sublease at a rack-rent, be entitled to receive the rack-rent.[33]

[48] Stephen J said he did not think it correct to apply the definition of "owner" otherwise than as involving two limbs strictly alternative, the one to the other. He said (at 19-20):

> "I think that once a person is found who is entitled to receive a rack-rent, that is to say if there is a person who by virtue of having leased land is entitled to such a rent therefor, then the definition of 'owner' is exhausted and the second limb cannot then be relied upon; only when there has been no leasing of land at a rack-rent can the second limb be relied upon.
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> …
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> In my view, the proper approach to the matter is, first, to treat the definition of 'owner' as comprising two 'distinct limbs' one only of which can in any particular case be applied, so that if there is a letting at a rack-rent then the first limb applies and there is no room for the operation of the second limb; if, on the contrary, there is no existing lease at a rack-rent then the first limb is inapplicable and the second limb will apply. This is not, of course, to say that land the subject of a permit application may not as to portion fall within the first limb and as to another portion fall within the second limb. Secondly, the words 'any land' in the definition of 'owner' are not, I think, concerned with estates or interests in land as distinct from the concept of land as a tangible area, the definition of 'land' itself points in this direction in so far as it refers to 'works buildings and parts of buildings'. The legislation is, as its title would suggest, concerned with land use and the planning of that use, that is to say use of actual tangible land and not use of particular estates or interest in land. The reference to 'land of any tenure' in the definition of 'land' operates to include as land subject to the provisions of the Act all

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31 Which counsel for the applicant appropriately drew to this Court's attention.

32 *Spurling* at 18.

33 *Spurling* at 19.

> areas of land in Victoria, however held but does not, in my opinion, involve the concept of there being, for any purpose of the Act, several 'lands' represented in fact by the one tangible area of land but treated as having distinct owners because there exist in respect of it several estates, both freehold and leasehold."[34]

[49] The definition under consideration in *Spurling* is relevantly analogous to the definition of "owner" in the *Sustainable Planning Act*. Having separately considered the context in which that word is used, in s 263(1), the purpose of the provision, and the natural and ordinary meaning of the language used, I consider that the analysis of Stephen J is persuasive and it accords with my view as to the proper construction of the meaning of the phrase "owner of the land the subject of the application".[35]

[50] The Crown lessees are not "owner[s] of the land the subject of [the] application", within the meaning of that phrase in the *Sustainable Planning Act*.

[51] This conclusion is consistent with the conclusion reached by the Full Court in *BMG Resources Ltd v Pine Rivers Shire Council* [1989] 2 Qd R 1, on which the applicant relied. In this case it was held that where land owned by the Crown was reserved and set apart for a public purpose under s 334 of the *Land Act* 1962, and placed under the control of a trustee, the relevant "owner" of the land for the purpose of service of notice of an application for consent to use adjoining land, under the *Local Government Act* 1936, was the trustee and not the Crown. The definition of "owner" in that context was:

> "The person other than Her Majesty who for the time being is entitled to receive the rent of any land or who, if the same were let to a tenant at a rack rent, would be entitled to receive the rent thereof."

[52] Quite apart from the express exception (in relation to which there had been decisions to the effect that, despite the exception, an applicant was obliged to serve the Crown if it is the owner of adjoining land), the Court held that, in terms of the definition of "owner", it was the trustee (in that case the Council) and not the Crown that was the owner, because it was the trustee and not the Crown which for the time being would, if the land were let, be entitled to receive the rent for the land. That flowed from the provisions of the *Land Act* 1962 under which the land had been, by order in council, reserved and set apart for the public purpose of park and recreation, and vested in the Council as trustee. The trustee had control of the land, including power to make by-laws regulating the use and enjoyment of the land. With the consent of the Minister, the land could be leased by the trustee, and any rents received in respect of such a lease were to be applied solely for the purposes of the trust. Once reserved, and vested in the trustee, the land was not available for grant or lease by the Crown to any other person. In those circumstances, the Crown was not the person who, for the time being, was entitled to receive the rent for the land; nor was it the Crown who would, if the land were let to a tenant, be entitled to receive the rent – it was the trustee.[36]

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34 Underlining added.

35 The parties did not refer to, and my own research has not revealed, any subsequent decisions in which this aspect of the decision in *Spurling* has been the subject of subsequent judicial consideration.

36 *BMG Resources* at 3 and 5 per McPherson J, with whom Andrews CJ and Demack J agreed.

[53] The applicant also relied upon an *obiter* comment in *Queensland Construction Materials Pty Ltd v Redland City Council* (2010) 175 LGERA 52 at [48] that the entitlement (to receive notice of an application, and to refuse consent for an application) conferred on an "owner" under the equivalent provisions in the *Integrated Planning Act* is conferred upon freehold and leasehold owners of the land, because both are entitled to receive rent for the land. The issue for determination in the case was, however, very different from the present case – namely, whether native title claimants were to be regarded as "owners" of the land the subject of an application. That issue was determined adversely to the native title claimants, in part on the basis that they were claimants only, and no attempt had been made to prove, even on a provisional or interlocutory basis, what their rights in relation to the land might be (at [40], [42] and [45]). In this regard Chesterman JA and Applegarth J said, at [41]:

> "The IPA is concerned with the state of ownership when an application is made. Notice must be given to owners not to those who might or might not become owners in the future. Consent is required from those who are owners, not some indeterminate class of persons, who, depending on time and circumstance, may become owners."

[54] The Court in *Queensland Construction Materials* did not engage in a detailed analysis of the meaning of "owner", it not being necessary in the circumstances of that case to do so. The comment at [48] does not support a different conclusion in this case.

[55] Finally, for completeness, I record that both parties made reference to the legislative history preceding s 263(1) and the meaning of "owner", each contending that for various reasons that history supported their analysis. It is apparent that, in earlier legislation, Crown lessees were expressly included within the defined category of persons from whom consent for an application was required (not necessarily as "owners", but as a "prescribed person"[37]). That was not the case after 1990, when the *Local Government (Planning & Environment) Act* 1990 was enacted, which included a definition of "owner" in terms similar to that which later appeared in the *Integrated Planning Act* and then the *Sustainable Planning Act*. I do not consider the legislative history prior to 1990 to be of assistance in determining the proper construction of the phrase "owner of the land the subject of the application" in the present case.

[56] The construction of "owner" which I consider applies does not result in prejudice to persons in the position of the Crown lessees, in terms of their right to object to a development application on the merits. It simply means they do not have a right to veto the making of the development application. The proposed development is impact

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[37] See, for example, s 33(6A)(b)(iii)(A) of the *Local Government Act 1936-1985* which required an application for rezoning to be accompanied by the consent in writing of the "prescribed person", where that was not the applicant; with "prescribed person" defined to include, in the case of an application to re-zone land held from the Crown upon a leasehold tenure, the registered lessee of that land (s 33(6A)(h)(ii)). Cf the separate definition of "owner" in this Act, also expressly including a lessee from the Crown, and which applied for the purposes of the requirement under s 27 for service of a rate note on the "owner" and also for the purpose of the requirement under s 33(18)(a)(v)(B) to serve an application for consent to use land, on the owners of adjoining land (the provision considered in *BMG Resources Limited v Pine Rivers Shire Council* [1989] 2 Qd R 1 at 2).

assessable.[38] Notices were given to adjoining land owners, including the applicant,[39] and also to the Crown lessees.[40] The Crown lessees provided a submission to the Council objecting to the application,[41] as did the applicant.[42] It would have been open to the Crown lessees, as submitters, to appeal on the merits from the decision of the Council to approve the development application, or participate in the appeal commenced by the applicant.[43] It may be correct to say that the Crown lessees are not required to be given notice under s 297(1)(c) of the *Sustainable Planning Act* (which requires notice to be given to owners (as defined in s 297(4)) of all land adjoining the land the subject of the application); but even in a case where they were not directly notified (as here), the requirement for notices to be placed on the land would be expected to bring such an application to their attention.

Orders

[57] I would grant the application for leave to appeal, but dismiss the appeal, with costs, on the basis that the conclusion of the learned primary judge was correct – that the development application was a properly made application, as it was accompanied by the necessary owner's consent – albeit that my reasons for that conclusion are different from those of the learned primary judge.

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38 AR p 55.
39 AR p 148.
40 AR p 145.
41 AR pp 152-154.
42 AR pp 156-158.
43 See ss 305 (making submissions about an application) and 462 (appeals by submitters).