SUPREME COURT OF QUEENSLAND

CITATION:	*13 Investment Company Pty Ltd & Ors v Sunshine Coast Regional Council* [2020] QCA 120
PARTIES:	**13 INVESTMENT COMPANY PTY LTD** ACN 601 472 119 (first applicant) **CEMONE LEITH TIRA** (second applicant) **PRICELESS AND UNIQUE ENTERPRISES PTY LTD** ACN 142 329 020 (third applicant) **SHUKRY SAHHAR** **HELEN SAHHAR** (fourth applicants) **JAMES WILLIAM BROWN** (fifth applicant) **GRAHAM IAN POWLEY** (sixth applicant) **GARY WAYNE JONES** **LEE MARGARET JONES** (seventh applicants) **v** **SUNSHINE COAST REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 14160 of 2019 P & E No 9 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Planning and Environment Court Act*
ORIGINATING COURT:	Planning and Environment Court at Maroochydore – [2019] QPEC 52 (Cash QC DCJ)
DELIVERED ON:	5 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	15 May 2020
JUDGES:	Sofronoff P and Morrison JA and Boddice J
ORDER:	**Application for leave to appeal refused, with costs.**
CATCHWORDS:	ENVIRONMENT AND PLANNING – COURTS AND TRIBUNALS WITHIN ENVIRONMENT JURISDICTION – QUEENSLAND – SUPREME COURT – ERROR OF LAW – where in 2003 Pelican Waters Resort Pty Ltd applied to the respondent for a development approval – where the respondent gave approval to a material change of use for the purpose of "a Hotel, Motel, Function Rooms, Restaurant and

Multiple Dwelling" – where the resort was constructed in accordance with approved plans which were attached to the respondent's decision notice – where the learned primary judge held that the 102 units on levels 2-4 are restricted by the terms of the approval to accommodation on a temporary basis and for travellers – where the applicants apply to this Court for leave to appeal against that decision, contending that the learned primary judge erred in his construction of the approval and the relevant planning instrument – whether the 102 units can be used for accommodation otherwise than on a temporary basis and for travellers, i.e. for permanent residents

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the conditions attached to the approval referred to the 102 units in slightly differing terms – where the approved plans also made reference to the 102 units – where there are various definitions in Section 9.2 of the Planning Scheme which appear to recognise that the use "Hotel" is distinct from the use "Motel" – where the approval referred to the development application as being "to establish a Hotel/Motel (102 suites), Function Rooms, Restaurant and Multiple Dwelling (62 units) …" – whether the phrase "Hotel/Motel (102 suites)" was the way in which the development application itself phrased the intended development – whether the phrase means the Hotel and Motel will be run in conjunction with another – whether that construction was what was sought in the development application, and what was approved

ENVIRONMENT AND PLANNING – ENVIRONMENTAL PLANNING – PLANNING SCHEMES AND INSTRUMENTS – QUEENSLAND – GENERALLY – where the applicants placed considerable reliance upon the fact that the use definition of "Hotel" contained no restriction as to the type of accommodation or residential use that might be involved – where the use is defined by reference to premises "specified in a General Licence granted under the Liquor Act" – whether the *Liquor Act* grants land use rights – whether the *Liquor Act* operates to authorise uses under the development approval

Liquor Act 1992 (Qld), s 3, s 3A, Part 4, s 58, s 58A, s 61A

Sunshine Coast Regional Council v D Agostini Property Pty Ltd and Others [2019] QPEC 52, cited

COUNSEL: A Skoien for the applicants
C L Hughes QC, with H Stephanos, for the respondent

SOLICITORS: P&E Law for the applicants

[1] **THE COURT:** In 2003 Pelican Waters Resort Pty Ltd applied to the Sunshine Coast Regional Council,[1] for a development approval for a material change of use. In essence the application was to establish a resort which had a number of components which can be summarised as: basement carparks; on the first level, restaurants, function rooms and kitchens; on levels 2-4, 102 units, each one-bedroom and with a kitchenette; and on levels 5-12, 62 residential units of varying layouts.

[2] On 17 October 2003 the Council gave approval to a material change of use for the purpose of "a Hotel, Motel, Function Rooms, Restaurant and Multiple Dwelling".

[3] The resort was constructed in accordance with approved plans which were attached to the Council's decision notice.

[4] Now, more than 16 years later, a dispute has arisen between the Council and the applicants as to whether the 102 units on levels 2-4 can be used for accommodation otherwise than on a temporary basis and for travellers, i.e. for permanent residents. The Council contends that the units are restricted by the terms of the approval to accommodation on a temporary basis and for travellers. The applicants, who constitute seven of the 46 owners who together own the 102 units, contend that there is no constraint upon the type of accommodation for which those units can be used, and in particular they can be used for permanent residential occupation.

[5] The Council's contention was upheld by the learned primary judge.[2] The applicants now apply to this Court for leave to appeal against that decision, contending that the learned primary judge erred in his construction of the approval and the relevant planning instrument.

The approval

[6] The Council's decision in the approval notice stated:[3]

> "The Development Application for Material Change of Use to establish … a Hotel/Motel (102 suites), Function Rooms, Restaurant and Multiple Dwelling (62 units) … was approved with conditions on 16 October 2003 …"

[7] The approval referred to some conditions concerning a variation to car parking requirements, namely a reduction of the number of spaces required by the planning scheme, from 242 to 214. The approval stated in that respect:[4]

> "it is considered that the Applicant, has demonstrated compliance with the variation criteria specified in Section 3.1(5) of the Transitional Planning Scheme with the site being part of a larger complex which includes residential and recreational uses which have the capacity to cater for any additional over flow parking. **In**

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1 Then known by its former name, Caloundra City Council.
2 *Sunshine Coast Regional Council v D Agostini Property Pty Ltd and Others* [2019] QPEC 52.
3 Appeal Book (**AB**) 263.
4 AB 265; emphasis added.

> **addition, because of the nature of the use and the international nature of the proposed Motel many of the guests will arrive as part of organised coach tour groups** and therefore, the overall demand for individual parking spaces will be reduced …"

[8] The approval notice then referred to the application for material change of use as being "to establish a Hotel/Motel (102 suites), Function Rooms, Restaurant and Multiple Dwelling (62 units) …".[5]

[9] Condition 1 of the approval required the site to be developed "in accordance with the approved plans". Those plans were annexed to the approval notice. Condition 4 required that "the use of the premises shall at all times accord with the provisions contained within Section 2.6 (Table of Development) of the Planning Scheme".[6]

[10] Condition 5 of the approval referred to Section 9.2 of the Planning Scheme which contains "Use Definitions" in respect of the uses referred to in the Table of Development and other parts of the Planning Scheme. It said:[7]

> "the use of the premises for the purpose of a Hotel, Motel, Function Rooms, Restaurant and Multiple Dwelling shall at all times accord with the criteria set out within the Hotel, Motel, Function Room, Restaurant and Multiple Dwelling definitions in Section 9.2 of the Planning Scheme".

[11] The conditions attached to the approval referred to the 102 units in slightly differing terms:

(a) first as "Hotel/Motel (102 suites)" in the decision notice itself;[8]

(b) as a "proposed Motel" in the section dealing with relaxation of car parking requirements;[9]

(c) "Hotel suites" in condition 25 dealing with the requirement to provide a Community Titles Management Statement;[10]

(d) as "Hotel Rooms", in the tables of contributions for Headworks;[11] and

(e) as part of "all habitable Dwelling Units".[12]

The approved plans

[12] The approved plans also made reference to the 102 units. On the locality plan, under the heading "PROJECT SUMMARY", the plan recorded "102 KEY HOTEL MADE UP OF: 96x 2 KEY ROOMS + 6x 1 KEY ROOMS".[13] The approved plans also show the detail of the service areas, restaurants and function rooms on level 1

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5 AB 265.
6 AB 265.
7 AB 266.
8 AB 263.
9 AB 265.
10 AB 269.
11 AB 271.
12 In the property notes warning of the impact of biting insects at AB 272.
13 AB 279.

and the presence of a service lift originating in the car park level, going through level 1 and onto level 4.[14]

[13] Finally, the development application plan showed the general layout and landscaping, referring to "Proposed Hotel".[15]

The planning instruments

[14] Section 9.2 of the Planning Scheme provides a number of "Use Definitions", which relate to the uses in the Table of Development and other parts of the Planning Scheme. There are several which are relevant to the resolution of the issue before this Court.

[15] The definition of the "Hotel" use is "… any premises specified in a General Licence granted under the Liquor Act 1992. The term also includes a Totalisator Administration Board agency when operated as an ancillary use. The term does not include a Shop."[16]

[16] The "Motel" use is defined as "… premises used or intended for the temporary accommodation of travellers, where such accommodation is provided in serviced guest rooms or suites, each containing its own bathroom. The term includes an ancillary Caretaker's Residence, office and Restaurant."[17]

[17] The "Function Room" use is defined as "… any premises used or intended for functions or receptions. The term does not include a Hotel, Indoor Entertainment, Nightclub or Restaurant."[18]

[18] The "Multiple Dwelling" use is defined as:[19]

> "… premises used or intended for residential use comprising 3 or more attached dwelling units on one allotment.
>
> The term does not include Cluster Development or an Accommodation Building, Aged Persons' Home, Host Farm, Hotel, Motel, Relocatable Home Park or Retirement Community."

[19] The "Restaurant" use is defined to mean:[20]

> "…premises used or intended for preparing and serving of meals and refreshments for consumption on the premises and includes the ancillary provision of:
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> (a) entertainment or dancing; and
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> (b) sale of takeaway food.

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14 The lift has an overrun onto level 5, but that is not accessible from that level.
15 AB 300.
16 AB 416.
17 AB 420.
18 AB 414.
19 AB 421.
20 AB 426.

> The term does not include Food Outlet, Hotel, Indoor Entertainment, Nightclub or Shop."

[20] There are various definitions in Section 9.2 which appear to recognise that the use "Hotel" is distinct from the use "Motel". For example, in the definition of "Accommodation Building", "Holiday Cabin Accommodation", and "Multiple Dwelling", the relevant definition does not include "Hotel, Motel". That is not surprising given that there are separate use definitions for each of "Hotel" and "Motel".

[21] Section 9.1 of the Planning Scheme contains explanatory definitions. These are definitions of words used in the Planning Scheme but "which do not have a specific land use meaning in the Tables of Development or other parts of the Planning Scheme".[21] One of those definitions is of "Residential Use", defined to mean:[22]

> "… use of premises for an Accommodation Building, Aged Persons Home, Caravan Park, Camping Ground, Caretaker's Residence, Duplex Dwelling, Dwelling House, Holiday Cabin Accommodation, Multiple Dwelling, Relocatable Home Park, Retirement Community or the accommodation component of a Hotel."

Proper construction of the approval

[22] The approval referred to the development application as being "to establish a Hotel/Motel (102 suites), Function Rooms, Restaurant and Multiple Dwelling (62 units) …". It is reasonable to draw the inference that the phrase "Hotel/Motel (102 suites)" was the way in which the development application itself phrased the intended development. One view of the way in which that is phrased is that it means the Hotel and Motel will be run in conjunction with one another. As will appear, that is, in our view, the correct construction of what was sought in the development application, and what was approved.

[23] That the Motel use was intended to be for temporary accommodation only is supported by the explanation for giving a relaxation on car parking requirements. As noted above one reason was that because of the nature of the use and the international nature of the proposed Motel, "many of the guests will arrive as part of organised coach tour groups".[23] In that sentence the reference to "use" is plainly a reference to the use defined as "Motel". Thus, the relaxation was given because of the nature of a Motel use, and the international nature of the Motel itself. That reason provides support for the conclusion that what was intended by approval for a Motel was for a Motel within the definition of the use, namely "for the temporary accommodation of travellers".

[24] Condition 5 did not use the formulation "Hotel/Motel (102 suites)". It referred to use of the premises "for the purpose of a Hotel, Motel, Function Rooms, Restaurant and Multiple Dwelling", requiring each of those uses to accord with the use definitions in Section 9.2 of the Planning Scheme. The requirement is, in our view, unambiguous. If part of the premises was to be used as a Motel, then it had to be on the basis that it was reserved for temporary accommodation for travellers.

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21 AB 402.
22 AB 408.
23 AB 265.

[25] The applicants placed considerable reliance upon the fact that the use definition of "Hotel" contained no restriction as to the type of accommodation or residential use that might be involved. Thus, it was contended, because it did not do that the 102 suites on levels 2-4 formed part of the Hotel, and could be occupied on a permanent basis.

[26] For a number of reasons that contention should be rejected.

[27] First, the use definition of "Hotel" makes no reference to a residential aspect of the use. The use is defined by reference to premises "specified in a General Licence granted under the Liquor Act". Reference to the *Liquor Act* reveals that it is an Act "to regulate the sale and supply of liquor and the provision of adult entertainment".[24] In s 3 the objects of the Act provide (relevantly) for the provision of a system for regulating the liquor industry.[25]

[28] Section 3A provides that the underlying principle of the Act in relation to the sale and supply of liquor is that a person may obtain a licence to sell or supply liquor as part of conducting a business, and liquor may only be sold or supplied, on the licensed premises. The definition of "licensed premises" is "premises to which a licence relates, and includes premises approved under section 125 for sale of liquor": s 4.

[29] Part 4 of the *Liquor Act* provides for the various licenses and permits which may be granted and held under the Act. The two which are relevant are a General Licence and a Residential Licence: s 58(1)(a)-(b). Only one licence may be granted or held for premises: s 58(2). When one turns to the provisions relating to a General Licence and a Residential Licence, differences appear. The primary purpose of a business conducted under a General Licence is "the sale of liquor for consumption on the premises, or on and off the premises, together with the provision of meals and accommodation as required under the licence": s 58A(1). The Act declares it to be inconsistent with the primary purpose of a business conducted under a General Licence to only sell liquor for consumption off the premises: s 58A(3).

[30] By contrast, the primary purpose of a business conducted under a Residential Licence is the provision of accommodation: s 61A(1). The authority under a Residential Licence to sell or supply liquor does not apply under such a licence unless a business is conducted on the licensed premises with the primary purpose of providing accommodation: s 61A(2).

[31] In the Planning Scheme the Hotel use relates only to premises specified in a General Licence, and not a Residential Licence. Once the nature of the licenses is understood, it becomes clear that the development application was for two distinct uses to run in conjunction. One was the Hotel which, on the approved plans, comprised the liquor supply area and associated restaurants on level 1. The other consisted of the Motel, namely the 102 suites, which could be serviced by the hotel below.

[32] Secondly, the application was not made on the basis that the Motel use could be held in reserve in some way, in the sense that it would only be brought into operation if the Hotel's licence did not provide for permanent accommodation in the 102 suites. That was the contention advanced by the applicants in an attempt to reconcile how the approved uses were intended to operate. In our respectful view,

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24 The long title to the *Liquor Act*.

25 Section 3(c)-(g).

that contention is misconceived. The application was for both a Hotel and a Motel, the uses as defined by Section 9.2 of the Planning Scheme, to operate in conjunction with one another.

[33] Thirdly, there are features of the approved plans which support the connection between the Hotel and the Motel component, consisting of the 102 suites on levels 2-4. As the plans reveal, a service lift operates between the car park level and level 4, permitting pedestrian access at each of those levels. The lift overrun extends to level 5, but not in a way which permits access to the lift. Plainly the overrun is for mechanical reasons to do with the operation of the lift mechanism. Significantly, the lift does not extend beyond level 4 and thereby does not service any of the residential units on levels 5-12.

[34] The applicants pointed to the fact that the conditions attached to the decision notice referred at times to the units on levels 2-4 as "Hotel Suites" or "Hotel Rooms".[26] We do not consider that those two references overcome the express words of condition 5, namely that each of the uses must "at all times accord" with the use definitions in Section 9.2. Condition 25 was part of the set of conditions to do with environmental health, requiring the provision of a Community Titles Management Statement or another document which limited the hours of use of the tennis courts. The tables of Headworks calculations were in a section headed "Advice to Applicant" and are not part of the actual conditions of approval.

[35] Similarly, the reference on the first of the approved plans, under the heading "Project Summary", to the 102 suites as "102 key Hotel" does not advance the applicant's cause. Once again, that reference cannot override the express wording of condition 5. It was, no doubt, wording selected by the maker of the plan, rather than the Council.

[36] Fourthly, in our view, to approach the construction of the approval in a way for which the applicants contend is to give no effective work to the approved use "Motel". That use was the subject of the application for material change of use, and was included in what was approved by the Council. The Motel use, confined as it was to temporary accommodation for travellers, was a key component in obtaining the relaxation for car parking. As noted earlier, that lends weight to the conclusion that the phrase "Hotel/Motel (102 suites)" was intended to mean that the use as a Hotel would run in conjunction with the use of levels 2-4 as a Motel.

[37] Finally, the definition of the use "Hotel" by reference to premises "specified in a General Licence" does not provide support for the applicants' contentions. The *Liquor Act* does not grant land use rights and does not operate to authorise uses under the development approval. Approval for a material change of use to encompass use of the land as a Hotel cannot, of itself, grant a liquor licence for the Hotel. As the respondent contended, the logical steps are for a developer to obtain the approval for material change of use as the first step in the process to obtaining a liquor licence. However, the Hotel use is defined by reference to the premises "specified in a General Licence". Thus, if the 102 suites were not specified in the General Licence for this Hotel, they could not be considered to be part of the Hotel's premises. On this question there is an uncomfortable silence, in that no evidence was adduced as to the terms of the General Licence. One cannot doubt

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26 Clause 25 at AB 269, and the Headworks tables at AB 271.

that had the General Licence referred to the 102 suites, that evidence would have been forthcoming.

[38] The applicants' contentions also confront this difficulty. If it is true to say that the Hotel use authorises both temporary and permanent residential accommodation, there was no necessity for the developer to apply for approval to authorise the Motel use.

[39] These considerations indicate that what was applied for was separate uses, albeit that they were to be operated in conjunction with one another.

Conclusion

[40] For the reasons set out above the conclusion reached by the learned primary judge was, in our respectful view, correct. There was no error of law and the application for leave to appeal should be refused, with costs.