SUPREME COURT OF QUEENSLAND

CITATION:	*Bad Girls Maroochy P/L v Chief Executive of Dept of Tourism, Racing & Fair Trading & Anor* [2004] QCA 45
PARTIES:	**BAD GIRLS MAROOCHY PTY LTD** ACN 097 130 419 (appellant/appellant) **v** **CHIEF EXECUTIVE OF THE DEPARTMENT OF TOURISM, RACING & FAIR TRADING, INCLUDING LIQUOR LICENSING** (first respondent/first respondent) **LIQUOR APPEALS TRIBUNAL** (second respondent) **MAROOCHY SHIRE COUNCIL** (third respondent/second respondent)
FILE NO/S:	Appeal No 6129 of 2003 SC No 10253 of 2002
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2003
JUDGES:	McMurdo P, Davies JA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	LIQUOR LAW – LICENSING – APPLICATION FOR NEW LICENCE – HEARING OF APPLICATION – MATTERS FOR CONSIDERATION – REQUIREMENTS OF NEIGHBOURHOOD OR LOCALITY – where chief executive refused application for adult entertainment permit under *Liquor Act* 1992 (Qld) – where appeal to Liquor Tribunal and to Supreme Court failed – whether open to Tribunal to find that character of locality would be substantially affected by granting of one adult entertainment permit – whether open to find public perceptions may determine amenity of locality – whether open to Tribunal to decide that objectors' concerns were reasonably based under s 119(4) of the Act

Liquor Act 1992 (Qld), s 3, s 103E, s 107A, s 119
Liquor (Approval of Adult Entertainment Code) Regulation 2002 (Qld), s 3

Broad v Brisbane City Council and The Baptist Union of Queensland [1986] 2 QdR 317, applied
Novak v Woodville City Corporation (1990) 70 LGRA 233, applied
Perry Properties v Ashfield Council (No 2) (2001) 113 LGERA 301, cited

COUNSEL: D R Gore QC for the appellant
A J MacSporran for the first respondent
G J Gibson QC for the second respondent

SOLICITORS: Hynes Lawyers for the appellant
Crown Solicitor for the first respondent
King and Company as Town Agents for Legal Services, Maroochy Shire Council for the second respondent

[1] **McMURDO P:** Bad Girls is a night club owned and run by the appellant at 19 Ocean Street, Maroochydore with an on-premises (cabaret) licence under the *Liquor Act* 1992 (Qld) ("the Act"). This licence permits live entertainment, including table-top dancing and strip-tease but does not allow the dancers to expose their genitalia.[1] On 30 July 2001, the appellant applied for the grant of an Adult Entertainment Permit (AEP) for the premises under Div 13A of Pt 4 of the Act. Such a permit would allow live entertainment of an explicitly sexual nature, including the exposure of genitalia.[2] The Chief Executive of the first respondent refused that application. The appellant appealed to the Liquor Appeals Tribunal ("the Tribunal") which dismissed the appeal on 14 October 2002. The appellant then appealed to the Trial Division of the Supreme Court under s 24(1) of the Act which allows an appeal on an error of law. That appeal was dismissed on 11 June 2003 and the appellant now appeals from that decision.

The relevant legislation

[2] The objects of the Act include to facilitate and regulate the optimum development of the tourist, liquor and hospitality industries of the State having regard to the welfare, needs and interests of the community and the economic implications of change;[3] to regulate the provision of adult entertainment[4] and to provide revenue for the State to enable the attainment of the objects of this Act and for other purposes of government.

[3] Section 107A(1) of the Act relevantly provides:

> "The chief executive may grant an application for an adult entertainment permit only if the chief executive is satisfied that –
> …
> (b) after considering that, if the application were granted, the combined total of licensed brothels and premises permitted to

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1 See the decision in this matter of the Liquor Appeals Tribunal, para 24.
2 Above, para 32 and s 103E(2) of the Act.
3 Section 3(a) of the Act.
4 Section 3(e) of the Act.

> provide adult entertainment in the locality in which the relevant premises are situated would not substantially affect the character of the locality; and
> *Example of character of locality being substantially affected –*
> Locality becoming a 'red light district'.
> … ."

[4] Section 119 deals with objections to the grant of such applications and sub-s (4) provides:

> "The grounds on which an objection about an application for an adult entertainment permit may be made are that, if the application were granted –
> (a) undue annoyance, disturbance or inconvenience to persons who reside, work or do business in the locality, or to persons in, or travelling to or from, an existing or proposed place of public worship, hospital or school or other facility or place regularly frequented by children for cultural or recreational activities is likely to happen; or
> (b) the amenity, quiet or good order of the locality concerned would be lessened in some way."

[5] "Adult entertainment" has the meaning given by s 103E(2) of the Act:[5]

> "live entertainment that may be performed for an audience, by a person performing an act of an explicit sexual nature ('**adult entertainment**'), … ."

[6] The *Liquor (Approval of Adult Entertainment Code) Regulation* 2002 includes the Adult Entertainment Code and specifies that "adult entertainment" does not include performance of sexual intercourse, masturbation or oral sex.[6]

The Tribunal's decision

[7] The Tribunal excluded objections based on moral grounds as irrelevant[7] but noted that it received at least 500 or more valid public objections to the granting of the AEP.[8] In determining whether the character of the locality under s 107A(1) of the Act was affected, the Tribunal treated "character" as close to "amenity" in meaning.[9] The Tribunal observed that Bad Girls in its present form as a strip-tease venue already compromised to a limited extent the character of the locality as a "family friendly" precinct. The Tribunal examined the substance of the valid objections and found that a significant number of these objectors genuinely believed that if sexually explicit entertainment were introduced to Bad Girls, the objectors' perception of those premises, and almost inevitably their perception of the character of the locality in which Bad Girls is situated, would profoundly change from being a "people friendly" locality to one which many of them would be inclined to avoid.[10] It determined that this perception was reasonably based and existed even though the external appearance of the building in which Bad Girls was situated remained unchanged.[11] The public perception of the character of the locality will change if

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5 See s 4 of the Act.
6 Cl 2.
7 Section 119(3) of the Act.
8 Above, para 28.
9 Above, paras 12-16.
10 Above, para 30.
11 Above, para 32.

members of the local community know that entertainment of the most sexually explicit character lawfully permitted other than in a brothel is permitted to take place there, giving the premises an unmistakeable "air" or "feel", which is likely to materially adversely affect the character of the locality where no other similar activities take place.[12] The Tribunal determined that it was satisfied the character of the locality would be substantially affected by the grant of the appellant's application; a locality could be substantially affected by just one premises with an AEP. As a result, the Tribunal held that the appeal must be dismissed.

[8] The Tribunal then went on to consider s 119(4) of the Act and determined that the granting of the application would be unlikely to cause undue annoyance, disturbance or inconvenience to persons who reside, work or do business in the locality or travel to facilities in the locality under s 119(4)(a) of the Act.[13] The amenity of the locality would, however, change in a materially adverse way for the same reasons that the character of the locality would be substantially affected by granting the application. The Tribunal found that the objections were made out under s 119(4)(b) of the Act.[14]

The appeal to the Supreme Court

[9] The learned primary judge concluded that it was open to the Chief Executive, if the facts supported such a conclusion, to decide that the character of the locality would be substantially affected by the granting of just one AEP, even though there were no licensed brothels or other AEPs already in the locality. His Honour found, however, that the Tribunal misconstrued s 107A(1)(b) of the Act in holding that "character" was equivalent to "amenity"; character of a locality is a more limited concept than amenity.[15] His Honour found that nevertheless the Tribunal properly considered the established principles relating to amenity and it was open to it to conclude that the objections raised under s 119(4) of the Act were reasonably based.[16] That finding, that the objections as to amenity were properly upheld, was, alone, a proper ground for refusing the application under s 119(4)(b) of the Act.[17]

The appellant's contentions

[10] The appellant claims that the learned primary judge erred, first, in concluding that the Tribunal was entitled to find that public perceptions may determine the amenity of a locality and that it was reasonably open for the Tribunal to decide that objectors' concerns were reasonably based under s 119(4) of the Act, and, second, in concluding that it was open for the Tribunal to decide that the character of the locality would be substantially affected by the granting of only one AEP under s 107A(1)(b) of the Act.

Section 119(4)(b) of the Act

[11] It is sensible to first determine whether his Honour was correct in concluding that the Tribunal was entitled to find that the objection under s 119(4)(b) of the Act was made out, namely that the amenity of the locality would be lessened in some way. If the appellant fails in this contention then its appeal fails because, regardless of

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12 Above, para 32.
13 Above, para 42.
14 Above, paras 43-44.
15 Reasons for judgment, para [19].
16 Above, para [23].
17 Above, para [24].

whether the Chief Executive may grant the AEP under s 107A(1) of the Act, the objection under s 119(4)(b) has been made out.

[12] The decision of the Tribunal, upheld by the learned primary judge, was that the objectors' perception of Bad Girls with an AEP and, hence, their perception of the amenity of the locality in which Bad Girls is situated, would be detrimentally affected, even though there were no physical facts to support that perception.

[13] The appellant has referred us to a number of cases which turn on their own facts and legislative scheme;[18] none is authority for the proposition put forward by the appellant that public perception alone, without objective physical phenomena, cannot establish a loss of amenity.

[14] The words and form of s 119(4) of the Act clearly contemplate that even where, as here, the matters referred to in its subsection (a), which focus on the effect of specified matters on people, are not made out in an objection, the objection will nonetheless be successful if the matters made out in its subsection (b), which focus on the locality, are established.

[15] The Tribunal was careful to exclude objections which were merely moral objections and therefore irrelevant.[19]

[16] "Amenity" is not defined in the Act. Its dictionary definition includes:

> "1. the quality of being pleasant or agreeable in situation, prospect, disposition, etc; pleasantness: the amenity of the climate."[20]

[17] In *Broad v Brisbane City Council and The Baptist Union of Queensland*,[21] this Court determined that the concept of amenity is wide and flexible and may embrace not only the physical effect of a place on the senses but also the residents' subjective perception of the locality. Thomas J, (as he then was), (with whom Connolly J agreed), observed that reference to valid perceptions, not simply as those of an individual, but as valid perceptions likely to be held by an ordinary person in the neighbourhood, does not reveal regard to any improper subjectivity.[22] His Honour continued:

> "The wide-ranging concept of amenity contains many aspects that may be very difficult to articulate. Some aspects are practical and tangible such as traffic generation, noise, nuisance, appearance, and even the way of life of the neighbourhood. Other concepts are more elusive such as the standard or class of the neighbourhood, and the reasonable expectations of a neighbourhood. The creation of an institution within a neighbourhood is in my view capable of altering its character in a greater respect than can be measured by the additional noise, activity, traffic and physical effects that it is likely to produce. All counsel agreed that the provision of a funeral parlour was a good example of an institution which, whilst discreet in its conduct and relatively small in its production of physical

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18 *Perry Properties Pty Ltd v Ashfield MC (No 1)* (2000) 110 LGERA 345, *Venus Enterprises Pty Ltd v Parramatta CC* (1981) 43 LGRA 67; *Novak v Woodville CC* (1989) 68 LGRA 387; on appeal, (1990) 70 LGRA 233; *Dixon v Burwood Council* (2002) 123 LGERA 253.

19 Above, para 27 and cf s 119(3) of the Act.

20 The Macquarie Dictionary, Federation edition, Macquarie Library, 2001.

21 [1986] 2 QdR 317.

22 At 319.

> consequences, would be likely to have an effect in the way of 'atmosphere'. Whether this is described as prejudice or otherwise does not matter. It is a recognisable and normal enough perception of the ordinary resident.
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> These remarks are not intended to encourage resort to vague statements as justification for an irrational conclusion. But it is necessary to recognise that some matters in this area, although intangible and difficult to articulate, may be real and may properly [be] taken into account."[23]

[18] de Jersey J, (as he then was), with whom Connolly J also agreed, observed that objectors other than Mrs Broad were able to point to concrete factual reasons for their objection, whereas Mrs Broad referred to "the feeling of the street" being affected by "the air of an institution". de Jersey J found that the use of this evidence to uphold the objection did not involve any error of law:

> "… such a subjective view need not necessarily be disregarded. Very often, of course, the evidence of such a view would be accorded little if any weight. In forming his own view on the likely effect of a proposed development on the amenity of an area, a Judge would I think ordinarily prefer views from residents which find justification in specific, concrete likely effects of the proposed development.
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> But as I have said I would not exclude evidence of more subjectively based views as being necessarily irrelevant, although in the end a Judge may well accord them little weight. In light of that view, the Council has not in my opinion established an error of law, whatever the extent to which his Honour's decision was in fact influenced by Mrs Broad's evidence.
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> …
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> There is no doubt that the concept of amenity is wide and flexible. In my view it may in a particular case embrace not only the effect of a place on the senses, but also the resident's subjective perception of his locality. Knowing the use to which a particular site is or may be put may affect one's perception of amenity."[24]

[19] Thomas and de Jersey JJ's observations were approved in *Novak v Woodville City Corporation*[25] where Jacobs J, with whom Cox and Prior JJ agreed, added:

> "many planning judgments, not least those which have to assess a planning proposal in terms of its impact upon the amenity of a particular locality, necessarily involve a subjective element, leaving room for opinions to differ in weighing the same objective criteria."[26]

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23 319-320.
24 325-326.
25 (1990) 70 LGRA 233.
26 236.

[20] They were also approved in *Perry Properties v Ashfield Council (No 2).*[27]

[21] The fact-finding process of determining whether objections establish that the amenity of a locality would be lessened involves the application of these principles but sometimes differing conclusions may be open on the same material. The Tribunal was a specialist body. It determined that the perceptions of the objectors were that the amenity of the neighbourhood would be lessened by the granting of the AEP to Bad Girls and that those were valid perceptions which an ordinary person in the neighbourhood would be likely to hold. That reasoning was consistent with the established principles set out earlier. Consistent with *Broad*, it may be a valid and reasonably held perception that the amenity of a locality with an AEP licensed nightclub, where entertainment of the most sexually explicit character lawfully permitted other than in a brothel occurs, is less than the amenity of a locality with that nightclub merely providing cabaret entertainment without exposure of the genitals, even though there is no difference to the physical environment of the locality. The Tribunal was entitled to consider the reasonably held perceptions of the 500 or so objectors in concluding that Bad Girls with an AEP would lessen the amenity of the locality even though the objections were not sustainable under s 119(4)(a) of the Act.

[22] His Honour rightly concluded that there was no error in the Tribunal's reasons for finding that the objectors' perceptions alone may determine the amenity of a locality and that the amenity of the locality here would be lessened if Bad Girls were granted an AEP. It follows that the appeal must be dismissed.

ORDER:

Appeal dismissed with costs to be assessed.

[23] **DAVIES JA:** I agree with the reasons for judgment of McMurdo P and with the order she proposes.

[24] **MULLINS J:** I agree with the reasons for judgment of and the order proposed by McMurdo P.

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[27] (2001) 113 LGERA 301, 317-319.