SUPREME COURT OF QUEENSLAND

CITATION:	*Liquorland (Aust) P/L v Gold Coast CC & Anor* [2002] QCA 248
PARTIES:	**LIQUORLAND (AUSTRALIA) PTY LTD** ACN 007 572 414 (applicant/applicant/appellant) v **GOLD COAST CITY COUNCIL** (respondent/first respondent) **PERRY DAVIES** (co-respondent/second respondent)
FILE NO/S:	Appeal No 2754 of 2002 P&E Appeal No 5404 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Integrated Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Southport
DELIVERED ON:	19 July 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 June 2002
JUDGES:	Davies, Williams and Jerrard JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Application for leave to appeal granted.** **2. Appeal dismissed.** **3. Appeal to the Planning and Environment Court against the decision of the Council on 21 September 2001 dismissed.** **4. Appellant pay respondents' costs of this appeal.**
CATCHWORDS:	ENVIRONMENT AND PLANNING - DEVELOPMENT CONTROL - CONSENTS, APPROVALS AND PERMITS - CONDITIONS - GENERALLY - where the Council approved a development with conditions - where the Council subsequently approved a second development in respect of the subject land with conditions - whether a condition in the second approval was inconsistent with a condition of the earlier approval still in effect for the development - whether s 3.5.32 of the *Integrated Planning Act* 1997 (Qld) applies ENVIRONMENT AND PLANNING - DEVELOPMENT CONTROL - CONSENTS, APPROVALS AND PERMITS - CONDITIONS - GENERALLY - where the Council

approved the development of a hotel with conditions - where the Council subsequently approved development in the hotel - whether there was an invalidating inconsistency between a condition in the approval for the hotel and the approval for the development in the hotel

ENVIRONMENT AND PLANNING - DEVELOPMENT CONTROL - CONSENTS, APPROVALS AND PERMITS - CONDITIONS - GENERALLY - where two development applications made to the Council - whether the applicant to the Council should have applied for the entire proposed use in one application - whether the development approval was piecemeal - whether the principle in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council* should be applied

Integrated Planning Act 1997 (Qld), s 3.5.32, s 6.1.23

Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council (1980) 145 CLR 485, distinguished

COUNSEL: P J Lyons QC for the applicant/appellant
R S Litster for the first respondent
N M Cooke QC, with W L Cochrane, for the second respondent

SOLICITORS: McCullough Robertson for the applicant/appellant
McDonald Balanda & Associates (Surfers Paradise) for the first respondent
Hickey Lawyers (Bundall) for the second respondent

DAVIES JA:

1. This appeal and the questions in issue

[1] The applicant ("Liquorland") seeks leave to appeal against a judgment of the Planning and Environment Court given on 11 February 2002. Liquorland had appealed against a decision of the respondent Council ("the Council") on 21 September 2001 to grant a development approval to the second respondent ("Davies") for the conduct of "Indoor Recreation (Gaming Machines) in association with an approved Hotel" on land at West Burleigh, subject to conditions. Liquorland had been a submitter for that development application.[1] In its notice of appeal to that Court it raised a number of points which another judge had ordered, on 7 December 2001, to be tried as preliminary points. In the judgment the subject of the application before this Court the learned primary judge effectively determined those points and it is against that determination that this application is brought.

[2] On the hearing before the learned primary judge it was agreed by all parties that the determination of those points, either way, would resolve the appeal and that remains the position. Accordingly it was agreed in this Court that, if leave were granted to appeal and any of the points summarized at [5] were decided in favour of Liquorland, the appropriate orders would be that the appeal be allowed and the application by Davies dated 10 June 2001 be dismissed; and that, if all were decided against Liquorland, those orders would be that both the appeal to this Court

1 *Integrated Planning Act* 1997 (Qld), s 4.1.28.

and the appeal to the Planning and Environment Court against the Council's decision on 21 September 2001 be dismissed.

[3] There does not seem to be any dispute or any doubt, that the points to which I have referred and which I state more specifically below, are questions of law, the relevant facts not being in dispute. Moreover they appear to be questions the answers to which will have a general application. Accordingly I would grant leave to appeal. It was agreed that, in that event, this Court should proceed to determine those questions and to make whichever of those orders followed from that determination.

[4] The preliminary points taken by Liquorland were articulated in the notice of appeal to the Planning and Environment Court in the following paragraphs:

> "(a) The Proposed Development was in conflict with the Court Order of her Honour Chief Judge Wolfe of this Honourable Court dated 5 March 2001 in the Planning and Environment Appeal 246 of 1999 ('the Court Order') which gave a Development Approval to permit the development of the land for the purposes of an Hotel;
> (b) Condition 1 of the Court Order requires that the 'development shall be generally in accordance with the approved plan attached hereto, namely plan no. 98435D-Sheet 1C dated 26 February 2001 drawn by Hooker Design Consultants' ('the Approved Plan'), and such Approved Plan shall only be altered or modified by further Order of the Court';
> (c) The application for the Proposed Development was a piecemeal application and did not include all the uses required to be applied for to permit the Proposed Development;
> (d) The Development Permit does not authorise the development of an Hotel and Indoor Recreation (Gaming Machines);
> …"

These were further expanded upon by paragraphs 1 to 9 of further and better particulars filed by Liquorland on 18 December 2001.

[5] These points, as argued before this Court, can be summarized as:

1. whether a condition in the development approval of 21 September 2001 was inconsistent with a condition of an earlier approval still in effect for the development; that was an argument which depended on the correct construction of s 3.5.32 of the *Integrated Planning Act* 1997 (Qld) ("the Act");
2. if not, whether on some broader basis, because the approval of 21 September 2001 was one which was granted in a hotel, there was some invalidating inconsistency between it and the hotel approval;
3. whether the approval was piecemeal within the meaning of that term in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council*.[2]

2. The two relevant approvals

[6] The legal nature of the approval of 21 September 2001, a question central to a determination of those points, depends on its relationship, if any, to an earlier approval. This earlier approval resulted from an application on behalf of a company, in respect of the subject land, made on 2 November 1998. Liquorland

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2 (1980) 145 CLR 485; see example at 504.

was a submitter for that application as it later was for this one. The Council approved the application subject to conditions and Liquorland appealed. That appeal was settled by the making of a consent order, on 5 March 2001, approving the development of the land for a hotel, incorporating a tavern, restaurant and bottle shop subject to conditions which included the following:

> "1. The development shall be generally in accordance with the Approved Plan attached hereto, namely Plan No. 98435D-Sheet 1C, dated 26 February 2001 drawn by Hooker Design Consultants ('the Approved Plan'), and such Approved Plan shall only be altered or modified by a further order of the Court.
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> 2. The maximum size of the area designated for bottle shop use shall be 33.3 m^2 as shown on the Approved Plan. The maximum area of the tavern and bottle shop (including 5 m^2 gaming area) shall be 332 m^2 with a maximum combined Total Use Area of 280 m^2.
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> 3. The 5 m^2 gaming machine area shall be located to comply with Gaming Machine Regulations and the requirement of the Queensland Office of Gaming Regulation."

[7] The application which resulted in the decision giving rise to the present application was made by Davies in respect of the same land, dated 10 June 2001 but received by the Council on 5 July, and described as an application for "Indoor Recreation (Gaming Machines)". Notwithstanding Liquorland's submission, it was, as I have said, approved by the Council, subject to conditions, on 21 September 2001. It was described in the approval as a "Development Permit for Material Change of Use for Indoor Recreation (Gaming Machines) in association with an approved Hotel".

[8] The only condition of that approval which appears to be relevant to the resolution of the issues in this Court appears to be condition 1 which was in the following terms:

> "The development shall be carried out generally in accordance with Drawing No. 21576L, dated 28/06/01, and Plan No. 98436D approved by Court Order dated 5 March 2001, drawn by Hooker Design Consultants the approved plans and details submitted to council stamped and returned to the applicant with this decision notice."

[9] Plan number 98436D is, of course, the plan referred to in condition 1 of the earlier approval. It had marked on it an undelineated five square metre gaming machine area in the north-western corner of the proposed development though condition 3 of the conditions of the consent order of 5 March 2001, set out above, provided that it be located to comply with Gaming Machine Regulations and the requirement of the Queensland Office of Gaming Regulation. It was common ground that five square metres as a gaming area would accommodate no more than four gaming machines.

[10] Drawing number 21576L shows two areas for gaming machines; one, situated approximately in the position of the area just referred to but substantially increased in area and delineating 20 gaming machines; the other area, adjacent to the cold room, delineating another five gaming machines. The total of the two areas is 30 square metres.

3. The application to those facts of the relevant legislative scheme

[11] It is an offence to carry out assessable development without a development permit[3] and so a development permit is necessary for assessable development.[4] Such a permit authorizes assessable development to occur to the extent stated in the permit and subject to the conditions in the permit.[5] Such a permit was necessary for the purpose of the development of the land for indoor recreation because that development was an assessable development within the meaning of par (b)(i)(A) of the definition of that term in s 6.1.1 of the Act. It was an assessable development within that meaning because, under the *Local Government (Planning and Environment) Act* 1990 (Qld) ("the repealed Act") it would have required application to be made for a continuing approval within the meaning of s 6.1.23(1)(b) of the Act. That is, in turn, because, in the commercial industry zone in which the subject land was situated under the City of Gold Coast Planning Scheme ("the planning scheme"), indoor recreation was a development which might be undertaken with the consent of the Council and a permit issued pursuant to s 4.13(12) of the repealed Act. A hotel, by contrast, was a prohibited use in that zone and was an assessable development because it would have required an application to be made for rezoning under s 4.3(1) of the repealed Act.[6]

[12] Under the planning scheme "HOTEL" is defined as:

> "Any premises which are used or intended for use for purposes to which any of the following licences under the Liquor Act are applicable:
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> (i) general licence; or
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> (ii) special facility licence.
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> The term includes guest rooms or suites and the use of part of the premises as a Totalisator Administration Board agency.
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> The term does not include an international hotel or resort hotel as defined in this Scheme;"

[13] "INDOOR RECREATION" is defined as:

> "Any premises used or intended for use for any one (1) or more of the following purposes where the activity is primarily conducted indoors:
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> '…
>
> (vii) premises containing more than four (4) poker or gaming machines or entertainment machines required to be licensed by the State Government;'
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> … "

There is no dispute that gaming machines are required to be licensed by the State government under the *Gaming Machine Act* 1991 (Qld).

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3 Section 4.3.1.

4 Section 3.1.4. A decision notice approving a development takes effect as a development permit after approval, the time depending, amongst other things, on whether there is an appeal against the decision: s 3.5.19.

5 Section 3.1.5(3).

6 See para (b)(i)(B) of the definition of assessable development in s 6.1.1 of the Act.

[14] The application dated 10 June 2001 was one for development making a material change of use of premises.[7] The material change of use sought was the start of a new use of the premises,[8] namely indoor recreation,[9] a use for which such an application was not only permissible but necessary because such a use was an assessable development.

4. The first point: the relevant application of s 3.5.32

[15] Section 3.5.32 provides that a condition in a development approval must not be inconsistent with a condition of an earlier development approval still in effect for the development.[10] Two relevant questions therefore arise under this section. The first is whether the approval dated 5 March 2001 was an earlier development approval still in effect for the development the subject of the present application. And the second is, if it is such an approval, whether condition 1 contained in the conditions of approval of the Council in its decision of 21 September 2001 is inconsistent with conditions 1, 2 or 3 of that earlier approval.

[16] The learned Planning and Environment Court judge resolved that first question in favour of Davies by holding that the earlier development approval was for a different development from that the subject of the second. The first was, he said, an approval for the development of a hotel; the second for use of part of the hotel premises for indoor recreation (gaming machines). It would follow from that conclusion, if correct, that the earlier development approval was not one which was still in effect for the development the subject of the second approval and consequently, as his Honour held, no question arose as to any conflict between conditions pertaining to the two approvals.

[17] The application approved by consent by the Planning and Environment Court on 5 March 2001 for a material change of use for a hotel was not also one for the installation of gaming machines and, as appears from what I have already said, it did not need to be. There was no intention then to install more than four gaming machines. Had that been the applicant's intention it would have been necessary to apply for two uses, a hotel and indoor recreation. The development approval contained in the judgment of the Planning and Environment Court of 5 March 2001 approved that application, described as an application for a hotel, subject to conditions.

[18] It was only in the conditions of approval of that application that a gaming area was referred to. The approved plan referred to in condition 1 of the conditions of approval and conditions 2 and 3 all referred to a five square metre undelineated gaming area and, although the approximate position of that area was shown on the plan, condition 3 of the approval provided that it be located "to comply with Gaming Machine Regulations and the requirement of the Queensland Office of Gaming Regulation". Given that no approval was required under the relevant

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7 Section 1.3.2(e).

8 Section 1.3.5, definition of "material change of use" par (a). The learned primary judge found a fact that the application did not seek a material change in the intensity or scale of the use of the premises (par (c) of the definition) and that finding was not questioned on this appeal.

9 See par (vii) of the definition of indoor recreation set out above.

10 Section 3.5.32(1)(a).

legislative scheme for the gaming area referred to in the conditions, those conditions should be construed, so far as they refer to that area, as requiring only that any such area be located so as to comply with the Gaming Machine Regulations and the requirements of the relevant authority thereunder.

[19] The approval of 5 March 2001 was not an earlier development approval still in effect for the development the subject of the approval of 21 September 2001, within the meaning of s 3.5.32. It was one for a quite different development, namely a hotel.[11] Mr Lyons QC, for Liquorland, whilst conceding that the phrase "for the development" means "for the same development", sought nevertheless to construe it to mean "with respect to the land the subject of the same development". In my opinion there is no justification for such an artificial construction.

[20] It follow that the learned Planning and Environment Court judge was correct in the way he resolved this question. Section 3.5.32 therefore had no application in this case.

5. The second point: whether there is otherwise an invalidating inconsistency between the approvals

[21] Mr Lyons QC appeared to put his alternative proposition in the following way:

1. the subject approval is of development in a hotel;
2. a condition of that approval is inconsistent with a condition of the hotel approval;
3. therefore the approval with that condition is beyond the power of the Council and therefore invalid.

It is difficult to see how this proposition is different from his argument with respect to s 3.5.32. Nor is it at all clear that it was advanced before the Planning and Environment Court. Nevertheless I shall consider it separately.

[22] Mr Lyons QC conceded that it did not follow from the hotel approval that there could never be approval for 25 gaming machines in that hotel. However he submitted that the only way in which that could be achieved was by obtaining a fresh approval for a hotel to include an appropriate area for that number of gaming machines. No provision of the Act or of the repealed Act or of the planning scheme is relied on for this proposition. Nor was any authority cited in support of it. On the contrary it is inconsistent with the legislative scheme in which "hotel" and "indoor recreation" are, for different reasons, separate assessable developments requiring approval and the issue of a development permit.

[23] Even if a development making a material change of use to indoor recreation (gaming machines) involved a change in or cancellation of conditions imposed on an earlier approval, that would not prevent its approval and the issue of a permit under this legislative scheme. That is because the only relevant limitation upon the conditions which may be imposed on a development approval is that which is imposed by s 3.5.32.[12] However, as mentioned earlier, the reference to a gaming

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[11] A development approval still in effect for the development is a development approval which has been granted for the same development; for example a preliminary approval for that development. See Explanatory Notes to the Integrated Planning Bill 1997 at 124.

[12] Section 3.5.33 provides for change or cancellation of a condition where no assessable development would arise from that change or cancellation.

area in the conditions of the approval for a hotel on 5 March 2001 was not a limitation on the number of gaming machines which might be installed in consequence of the approval for a hotel - that limitation was imposed by the planning scheme - but a requirement only that any gaming machines which were installed, consistently with approval for a hotel, be located so as to comply with the gaming machine regulations and the requirements of the relevant gaming authority.

6. The third point: whether the application was piecemeal

[24] This point seeks to apply to this case the decision of the High Court in *Pioneer Concrete (Qld) Pty Ltd v Brisbane City Council*.[13] The ratio of that case, stated in its headnote, is that an applicant to a local authority for consent to use land for a particular purpose must apply at the outset for the entire proposed use. In that case the applicant applied to the Council and obtained approval for the use of land as a quarry but failed to seek approval for the access route which it intended to use for the purpose of working the quarry. The court held that the application was defective in failing to include the proposed access route.

[25] In my opinion that principle has no application here. In the first place, there is nothing to indicate that, when the applicant in the application of 2 November 1998, who was not Davies, applied for development approval for a hotel on the land, it intended also to use the land for Indoor Recreation (Gaming Machines). Indeed the proper inference is to the contrary. Secondly the application of 10 June 2001 was one for a later and different, albeit additional, use on the same land. The *Pioneer* principle does not require that two different uses be contained in one application.[14]

Orders

1. Application for leave to appeal granted.
2. Appeal dismissed.
3. Appeal to the Planning and Environment Court against the decision of the Council on 21 September 2001 dismissed.
4. Appellant pay the respondents' costs of this appeal.

[26] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of Davies JA. I agree with all that he has said, and with the orders proposed.

[27] **JERRARD JA:** I have read the reasons for judgment of Davies JA. I respectfully agree with those and with the orders proposed.

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13 See fn 2.

14 *BCC v Cunningham & Anor*; *Eastern Suburbs Leagues Club Ltd v Cunningham & Anor* [2001] QCA 294; Appeal No 6745 of 2000 and Appeal No 6784 of 2000, 27 July 2001 at [11].