

IN THE PLANNING AND ENVIRONMENT COURT P & E Appeal No 9 of 1997

HELD AT BRISBANE

QUEENSLAND

BETWEEN

PUSHDALE PTY LTD ACN 056 579 134

Appellant

AND

COUNCIL OF THE CITY OF TOOWOOMBA

Respondent

AND

MR J. ASPROMOURGOS

Respondent by Election

REASONS FOR JUDGMENT - QUIRK D.C.J.

Delivered the 18th day of November 1997

This rather unusual matter commenced as an appeal by a successful applicant for Town Planning Consent against certain of the conditions of approval. The appellant is the proprietor of premises which have been used as a Toowoomba hotel for many years. This use commenced prior to any formal planning control in the city and has been registered by the respondent as an existing lawful use.

For some time now the premises, operated under the name "The High Court Cafe", have provided live entertainment for patrons. Relevant controls under the Liquor Licencing legislation allow the premises to remain open until 2 a.m.

It is proposed that opening hours be extended to 3 a.m. to allow competition, on an even footing, with similar facilities, Powerhouse and Rumours, which are located in the area. These premises are owned and operated by the respondent-by-election.

Why this application for Town Planning Consent was at all necessary is not apparent. In the material put before me the suggestion was made that "the fact that

Pushdale Pty Ltd had not applied for and obtained a Town Planning Consent approval was a major factor in council objecting in the past to the extension in trading hours sought".

If this is true, it is extraordinary. Having regard to the registered existing lawful use, the council should have been well aware that the component of live entertainment, being incidental to and necessarily associated with the use of the premises as an hotel could be conducted without any need for further Town Planning Consent. No limitation in respect of operating hours is in place in respect of the existing lawful use.

However, it is unnecessary to dwell on this matter as the application has been made and has been dealt with favourably. This was certainly not surprising having regard to relevant Town Planning factors identified in the report of the appellants consultant, Rhonda Miles.

As stated, the appeal was in respect of certain conditions of approval and the appellant and respondent have resolved their difficulties in relation to those matters, being content to have the appeal disposed of in terms set out in Exhibit 3.

The respondent-by-election, having elected to be joined as a party to the conditions appeal, has indicated that he has no argument with the conditions of approval that are now agreed upon. The matter which he wishes to pursue relates to the form of the approval which is for "Indoor Entertainment, including Live Entertainment, gaming machines, Licenced Cabaret, Licenced Club and general licenced activities as per the *Liquor Act* (1992)."

It is argued that the wording could be taken to mean that the approval purports to associate with (and thereby give rights pursuant to) licences issued pursuant to the *Liquor Act* and that this would involve findings that are beyond the jurisdiction of this Court.

Whether a respondent-by-election to a conditions appeal may go beyond the conditions of approval and argue

against the essential validity of the approval was the subject of some discussion. I do not believe that this is the occasion to attempt to resolve this difficult question and I am content to maintain the view that I expressed recently in Filardi v. Logan City Council & Ors (14 November 1997) that the effect of s.7.1A(2B) may well be that because in any such case the applicant carries an onus of showing that the application should be approved, the legal validity of such an approval is open to examination.

I accept that it would not be appropriate for this Court to intrude into the area of responsibility of the statutory Liquor Licencing Authority, or, by the wording of any ruling made, be thought to be so intruding. For that reason I am prepared to alter the wording of the approval as follows.

The approval is for

"Indoor entertainment including live entertainment (as described in the material forming part of this application) being a component of (and carried on in association with other components of) the activities conducted upon the subject premises and licenced in accordance with the *Liquor Act* (1992)"

Otherwise the approval will be in accordance with the substance of Exhibit 3.

However, I believe that certain matters should be made clear to avoid the need for any further debate upon matters which are properly involved in the determination of this appeal. These are:

1. This approval indicates that, in a Town Planning sense, the use of the subject premises for the proposed activities operated for the hours specified is appropriate;
2. There are no amenity or other Town Planning considerations relevant to the proposal which would indicate otherwise;

3. What licencing arrangements should be in place to allow the proposed extension of trading hours is a matter entirely for the Liquor Licencing authority and is not one in respect of which the respondent Planning Authority or this court should, in dealing with this application, make any requirement or otherwise seek to influence.

The appeal will be allowed with the wording of the approval amended as indicated but otherwise in accordance with the substance of Exhibit 3.