

**INDEPENDENT ASSESSOR**

**Prostitution Act 1999**  
**Number 001 of 2003**

BETWEEN:                   **ALBERT PODESTA**

Appellant

AND:                       **BRISBANE CITY COUNCIL**

Respondent

**DECISION**

The decision of the Independent Assessor is as follows:

1. The appeal is dismissed;
2. The decision of the respondent appealed against is confirmed.

**Stephen Keim**  
**Independent Assessor**  
**26 November 2003**



4. In making those directions and relying on the information received as a result, I have been satisfied that considering this material in addition to the materials made available to the respondent as assessment manager would help me decide the appeal.<sup>3</sup> Also, in making the directions, I considered it appropriate to allow more time than the Act provides for the taking of the various steps referred to in the directions.<sup>4</sup> Prior to delivering these reasons, I inspected the proposed site. (The parties were agreeable to this process and that it take place in the absence of the parties). The need for this step and competing demands on a part-time assessor have led to my extending the time deciding the appeal after receipt of the last submission from the parties.<sup>5</sup>

### **Steps in the Process**

5. On 4 August 2003, the Registrar wrote to the respondent requesting provision of documents pursuant to s.64O of the Act. On 19 August 2003, accompanied by a letter dated 18 August 2003, the respondent forwarded documents in apparent compliance with s.64O of the Act.
6. The documents reveal that the appellant's application was received on 30 April 2003.<sup>6</sup> The documents include an acknowledgement notice (pursuant to s.3.2.3 of the *Integrated Planning Act* 1997 ("the IPA"). This showed that the application included an application for a material change of use – development permit for the purpose of a brothel. The notice indicated that the respondent intended to assess the application using Code assessment procedures and that no public notification was required, apart from a requirement, pursuant to the assessment of Brothels Planning Scheme Policy (City Plan) that the adjourning owners be notified in writing and copy submitted to Council. No referral agencies were involved.
7. A document headed "Decision by Delegate" indicated that the delegate of the Council was a Ms Heinke and that the decision was dated 17 June 2003.<sup>7</sup>

### **Information on which the respondent acted**

8. A summary of the information on which the respondent acted is contained in a document headed "Development Assessment Committee Presentation" which is dated 8 May 2003. It indicated that the site in question was located at 1 Tate Street, Albion and is 402 m<sup>2</sup> in area. It indicated that the Area Classification of the site is "light industry area".<sup>8 9</sup>
9. The summary concludes with a recommendation that the application be refused as the proposed site is within 200 metres of an area regularly frequented by children. The document seems to suggest that the distance between the boundary of the application land and the property boundary of Crosby Park located in Fox Street, Albion is some 55 metres. The document goes on to describe the current uses of Crosby Park as including the Queensland Cricketers Club, Brothers Old Boys Rugby Union, Red Socks Softball Club, Meals on Wheels and public park users. The

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<sup>3</sup> See s.64T of the Act.

<sup>4</sup> Section 64Q of the Act.

<sup>5</sup> Section 64S of the Act.

<sup>6</sup> The appellant raised in his submissions an issue that an earlier application by him was not willingly withdrawn by him and that that earlier application should have been processed to a conclusion by the respondent. I have no jurisdiction to deal with those matters.

<sup>7</sup> The time within which an appeal must be started is 20 business days after the decision notice is given to the applicant. See s.64K of the Act. If the appellant is right in stating that the decision notice was received by him on 26 June 2003, his appeal lodged on 18 July 2003, was well within the 20 business days allowed by that section.

<sup>8</sup> This would seem to satisfy the provisions of s.63A(3) of the Act which provides that, for the application of the IPA to a development application, an "industrial area" is land, however described, that is designated in a planning scheme or other planning instrument under the IPA as "industrial". The section goes on to set out further bases on which land may qualify as an "industrial area".

<sup>9</sup> As it turned out, the respondent had, inadvertently failed to forward two documents: report and recommendation of Margaret Orr dated 4 June 2003 and decision of delegate also dated 4 June 2003.

document also states that only 6 car parks are provided when 8 are required as an acceptable solution under the *Prostitution Act*.<sup>10</sup>

10. It is clear, both from the decision documents and the summary recommendation document, that the respondent has relied upon s.64 of the Act in making the decision which is subject to the appeal. Section 64 reads as follows:

**“64. When Assessment Manager must refuse application**

(1) The Assessment Manager must refuse a development application if –

(a) the application land –

(i) is in, or within 200 metres of the closest point on any boundary of, a primarily residential area or an area approved for residential development or intended to be residential in character; or

(ii) is within 200 metres of the closest point on any boundary of land on which there is a residential building, place of worship, hospital, school, kindergarten, or any other facility or place regularly frequented by children for recreation or cultural activity; measured according to the shortest route a person may reasonably and lawfully take, by vehicle or on foot, between the application land and any other land; or

(b) the application land is within 100 metres of the closest point on any boundary of land on which there is a residential building, place of worship, hospital, school, kindergarten, or any other facility or place regularly frequented by children for recreation or cultural activities, measured in a straight line or

....”

### **The Evidence Before The Assessor**

#### **Brisbane Dance Institute**

11. The business known as the Brisbane Dance Centre (“the Centre”) is located at 31-33 Collingwood Street, Albion. Essentially, it is at the far end of Tate Street from the proposed site for the brothel and one building block from that corner into Collingwood Street. According to the statutory declaration of Margaret Orr, the Assessment Manager, the distance between the proposed brothel site and that of the Centre by the shortest route a person may reasonably and lawfully take on foot (being along Tate Street into Collingwood Street) is 115.6 metres. The most detailed information with regard to the relevant operations of the service is contained in a statutory declaration provided by one, Barbara Eversen, who is the owner and director of the Centre. Ms Eversen stated that the Centre officially commenced operations on Monday, 28 April 2003. This was two days before the appellant lodged his application with the respondent for the Development Permit.<sup>11</sup>

12. Relevantly, Ms Eversen’s declaration reveals the following. There are 26 full-time students of the Centre, who are aged between 14 and 17 years. There are also approximately 120 part-time students aged between 3 and 17. The full-time students attend from Monday to Friday, between the hours of 8am and 4pm. The part-time students attend between 8.40am and 4.30pm on Saturdays, and 80 of them have additional lessons at some time in the period between Monday and Thursday and between 4pm to 8pm on those days. The part-time students who have additional lessons are aged from 8 to 16. There is also a class for very young children on Thursday mornings from 9.45am to 10.30am. These children are aged from 2½ to 5 years and there are approximately 7 or 8 of these children.

<sup>10</sup> This seems to be a reference to performance criteria 1 and 2 (and their acceptable solutions) in the IDAS Code for Development Applications mentioned in Part 4 of the Act which is Schedule 3 to the *Prostitution Regulation 2000* (“the PR”). It is not clear from the summary document which car parks are intended to be for staff and which are intended to be for clients of the proposed brothel. As mentioned above, it has not been necessary to consider this aspect of the matter.

<sup>11</sup> It appears to be this fact that has caused the appellant to raise the currency of his earlier application which had, apparently, been withdrawn.

13. Apart from the operations conducted by the Centre itself, the Commonwealth Society of Teachers of Dance conducts classes at least every second Sunday. These classes involve 125 students, all of whom are under the age of 18 and most of whom are aged 9 to 12.
14. The appellant provided a statutory declaration by one, Royston Walker. Mr Walker made observations between the period from Monday 13 October to Saturday 25 October 2003. Apart from Mr Walker's statement that there are days when no children are seen and that there appear to be very few children under the age of 13, his observations do not contradict Ms Eversen's statements as to when children attend at the Centre for dance lessons. In any event, I prefer the more precise information of Ms Eversen to the extent that Mr Walker's observations purport to contradict it.
15. In applying the above facts to the statutory restriction contained in s.64 of the Act, one obtains assistance from a decision of Balmford J in *Mornington Peninsula Shire Council v. Payne* [2001] VSC 337 (12 September 2001). Balmford J was considering a similar phrase: "Any other facility or place regularly frequented by children for recreation or cultural activities", where it appears in s.74(1)(c) of the *Prostitution Control Act 1994* (Victoria). After reviewing the way in which the phrase had been treated in the Victorian Civil and Administrative Appeals Tribunal and consulting meanings given for the particular words contained in the phrase set out in the third edition of the Macquarie Dictionary, published in 1997, Balmford J, at paragraph 36, expressed his conclusions as follows:
 

"That view leads me to adopt the second meaning of 'regularly' cited ... above, rather than the first, so that 'a place regularly frequented by children' would come to mean 'a place which children visit often, or go to often, or where children are often found, and where this occurs according to plan or custom'."
16. It seems to me that the number of children visiting the Centre for dance lessons, combined with the frequency of the visits is sufficient to constitute children visiting or attending often. Because they attend for regularly scheduled lessons, there is also no problem in the modifier 'regularly' being satisfied. It also seems to me that, although opinions may vary, as to whether dance classes are recreation or hard work, that the concepts of both "recreation" and "cultural activity" are satisfied by the activities for which children visit the Centre.
17. Therefore, by reference to the activities at the Centre, alone, the prohibition in s.64 is activated and neither the respondent nor the independent assessor, standing the shoes of the respondent, may do anything but refuse the appellant's development application.

Crosby Park (The Brothers Lease)

18. Ms Orr measured a straight line along Elliott Street (the proposed site for the brothel is on the corner of Tate and Elliott Streets) to the edge of Crosby Park and attained a distance of 60m. I find that this is a correct measurement and that the closest point on the boundary of the land known as Crosby Park, measured according to the shortest route a person may reasonably and lawfully take, by vehicle or on foot, from the application land is less than 200m.
19. For present purposes, I have excluded from my consideration the activities conducted in the part of the Crosby Park leased by the Queensland Cricket Association Limited. I have done this because that land is the subject of a separate lease. I have done this because, in my opinion, there is some ambiguity in the phrase "any boundary of land". In the usual case "boundary of land" would be expected to mean the boundary of a lot as that term is defined in Schedule 2 of the *Land Title Act 1994*. The definition of "lot" in the Schedule to that Act reads as follows:

"... A separate, distinct parcel of land created on –

- (a) the registration of a plan of subdivision; or
- (b) the recording of particulars of an instrument; and includes a lot under the *Building Units and Group Titles Act 1980*."

20. However, it also seems to me that, where the particular location that is regularly frequented by children for recreation or cultural activities is a localised part of a lot, there may be other bases for locating “any boundaries of [that] land”. An obvious example is where the particular locality is the subject of a lease such that the boundary of the land, the subject of the lease, may in fact constitute a boundary of the land for the purpose of s.64 of the Act. It is not necessary, because of my findings with regard to Brisbane Dance Centre and because of my findings set out below, to determine that point finally in these reasons.<sup>12</sup>
21. Damien O’Mara provided a statutory declaration showing the limits of Crosby Park and the leases held in respect thereof. Brothers Old Boys Rugby Club (“Brothers”) holds a 20 year lease of an area covering the majority of the park (“the Brothers leased area”) and including the point on the eastern boundary thereof, which is the point closest to the proposal land. There is another smaller area immediately to the south, along Fox Street, of the area leased by Brothers. This contains basketball courts, a concrete cricket practice wicket and a tennis practice wall. I will also disregard the activities carried out on that area because, arguably, there is a different distance, not defined in the material, to the boundary of that area.
22. Part of the information with regard to the Brothers’ leased area comes from one, Paul Mills, the rugby manager and head coach of Brothers. In his statutory declaration, Mr Mills states that the leased area contains two ovals and two sets of children’s swings as well as a number of specified buildings. He states that, as well as Brothers, Brothers Junior Rugby Club (“the Junior Club”) also operates from the leased area. He states that the Junior Club has approximately 480 playing members between the ages of 5 and 16, approximately 360 of whom are in the Under 6 to Under 10 age groups, being under the specified age as at 1 January of the development year.
23. Mr Mills states that the Junior Club’s activities commence with sign-on days in early to mid February; the training starts almost immediately thereafter and continues throughout the football season and is conducted twice per week on Wednesday and Friday nights. He says that pre-season trial matches are held on Saturday and Sunday mornings from the second week after sign-on until the start of the regular competition which commences in late March and finishes in September with matches being conducted also on Saturday and Sunday mornings. He states that, on some weekends, matches are held all day Saturday and all day Sunday (presumably, not the one match) and that there is a two week mid-season break for school holidays. He states that, during the mid-season break, coaching clinics are conducted for juniors for one of the two weeks. These clinics attract about 180 children. At the end of the season, there is a trophy presentation day, which is a family day attracting over 2,000 people.
24. Mr Mills also states that, once the junior competition has concluded, a social rugby competition for the Under 17 age group commences, involving two matches on each Friday night for eight weeks from the end of the junior competition in September. Mr Mills also states that the fields and swings are used most days on an informal basis by children, of all ages, and for recreation activities such as kicking balls, throwing frisbies, throwing tennis balls and general recreation. He states that, during school holidays, teenage children of various ages use the ovals for privately arranged games of touch football and similar activities. He states that, during the year, there are a number of family days occurring on the ovals, including the Rail, Tram and Bus Union Family Day; the Fiji Community Sevens Tournament; and the Tonga Community Sevens Tournament. Each of these activities attract over 500 people.

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<sup>12</sup> However, the information before the assessor does not indicate the distance from the proposal site to the nearest point on the land leased by the Queensland Cricket Association in the event that the boundary of the leased land were a relevant “boundary”. (This point was not an issue raised in the preliminary decision. Accordingly, there is no aspersion cast on the parties for not providing this particular piece of data.)

25. Deborah McColm is the treasurer of Red Socks Softball Inc (“Red Socks”). She states, relevantly, that the bulk of the Red Socks activity is conducted during a summer season between August and the following March. She says that Red Socks has 95 members who are under 18 years of age and play in this competition. The ages of these players range from 4 to 17 years. She says that these players train on Monday afternoons and Monday evenings and use the Brothers’ leased area at Crosby Park for this purpose. Fixture games are played elsewhere. During the off season, between March and July in each year, a men’s team plays and, accordingly, conducts their training on Monday nights between 6pm and 8.30pm. There are three players in this team who are under 18 years of age.
26. The respondent also provided a statutory declaration by Bruce Barbour, the Director of Activities at St Margaret’s Anglican Girl School (“the school”). Relevantly, Mr Barbour advises that there are 300 students in the years from Prep to Grade 7 in the primary part of the school. These junior school girls have their sporting activities at Crosby Park and, in fact, predominantly use the bottom or lower oval which is that part of the Brothers’ leased area which is closest to Fox Street and, therefore, closest to the proposed site for the brothel. Mr Barbour advises that the activities include cross country training which takes place from February to May on two mornings per week, and involves approximately 75 students between the ages of 10 and 13. Another activity is touch football. Touch football games are played two mornings and one afternoon a week from March to August. Approximately 60 students between the ages of 10 and 13 participate. Athletics activities take place one morning and two afternoons per week in May and June. Approximately 62 students between the ages of 9 and 13 participate in these activities. The junior students also play softball and T-ball during the months of August to October and Wednesday afternoons and Friday mornings. Approximately 63 students between the ages of 10 and 13 take part in these sports.
27. Mr Barbour also refers to Friday afternoon sport, which involves various activities which are played every Friday afternoon between 1.30pm and 2.45pm from February to November. He states that approximately 144 students between the ages of 8 and 13 participate in these activities. Mr Barbour also refers to an inter-house cross country carnival, which occurs on a school day in late May. The whole school, including 930 students from the senior school, as well as the junior girls take part in this activity. This activity uses the whole of Crosby Park, including the area leased by the Queensland Cricket Association.
28. In response to the information provided by Mr Mills and McColm and Mr Barbour, the appellant relies on some further observations by Mr Walker. Mr Walker states that he was also able, during the period from 13 to 25 October 2003, to observe the activities taking place on the Brothers’ leased area of Crosby Park. His observations, to a considerable degree, confirm the material deposed to by those witnesses whose declarations were provided by the respondent.<sup>13</sup> For example, on Monday 13 October, 25 children, from ages 3 and upwards, trained for softball. Again, on Wednesday, 15 October, approximately 30 children between the ages of 8 and 18 practised softball as part of a contingent from the school. Mr Walker concluded that approximately 88 children from age 3 upwards were present on the Brothers’ leased area for a period, he stated, took up to approximately 4 hours.
29. Despite the significant area of agreement between Mr Walker’s observations and the statutory declarations from Mr Mills, Ms McColm and Mr Barbour, I prefer the material provided by the latter three declarants as providing a more complete and, overall, a more accurate view of the extent to which children participate in activities in the Brothers’ leased area.
30. It seems to me, that both individually and taken as a whole, the activities carried out by the Junior Club; the school; and Red Socks are sufficient to trigger the requirement to refuse the

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<sup>13</sup> Although the numbers observed are less than stated in, for example, Ms. McColm’s declaration.

development application set out in s.64 of the Act. It seems to me that the visits of the respective groups of children are often enough to satisfy the concept of “frequenting” and are also sufficient to satisfy the requirement of regularity including Justice Balmford’s concept of “regularity” as involving an occurrence which takes place according to plan or custom. Taken together, the activities cover the whole year. However, even the individual types of activity which are seasonal in nature, involve sufficiently long seasons so as to not to detract in any way from those activities satisfying the concept of “regularly frequenting”.

31. It seems to me that all of the activities described in the statutory declarations as taking place on the Brothers’ leased area of Crosby Park comprise “recreational activity”. It depends on one’s philosophical attitude to sporting activity whether they also amount to cultural activities. It is unnecessary to decide that question.
32. As stated above, because of my findings with regard to the Brothers’ leased area and with regard to the Dance Centre, it is unnecessary to consider the activities taking place at other parts of Crosby Park.
33. On the basis of the above analysis, pursuant to s.64 of the Act, the respondent, as Assessment Manager, was subject to an obligation to refuse the development application which is the subject of this appeal. The independent assessor, on appeal, is in no different situation and is obliged, pursuant to s.64U of the Act, to confirm the decision appealed against.

**Stephen Keim**  
**Independent Assessor**  
**26 November 2003**