

6. In the material provided by the assessment manager,⁴ were two documents relating to the decision to refuse, namely, a “Report and Recommendation on Development Application” and a “Decision by Delegate”. The former document contains the following discussion:

- “(a) The subject lot being Lot 1 is part of the Community Management Scheme land (“Scheme land”) on Building Unit Plan 11447 and is inseparable from the Scheme land, as the common property in the Scheme provides access for vehicles, pedestrians, and utilities and services between the street and the subject lot. Accordingly, the subject land for the development application is deemed to include the common property in the Scheme.
- (b) As submitted by the applicant, the subject land (including the common property in the Scheme) is 181.052m from the closest residential property at 68 Meadow Avenue, Coopers Plains, measured according to the shortest route a person may reasonably take by vehicle or on foot between the closest points on any boundary of the subject land and the mentioned residential property (Refer to attachment).
- (c) Notwithstanding the above consideration, the subject lot including the car parking spaces (that are within the common property, assigned for use by occupants of the subject lot and forming part of the application land) is approximately 199m from the residential property at 68 Meadow Avenue, Coopers Plains, measured according to the shortest route a person may reasonably and lawfully take by vehicle or on foot between the closest points on any boundary of the subject land and the mentioned residential property.
- (d) The development application therefore meets the criterion in Section 64(1)(a)(ii) of the *Prostitution Act 1999*, in that the subject site is within 200m of the closest point of any boundary of land which there is a residential building, and the Assessment Manager must refuse the application.”

7. In the “Decision by Delegate” document, the decision maker said:

“Having considered the application detailed above, I am not satisfied that the application accords with the relevant standards, the *Integrated Planning Act 1997*, and the *Prostitution Act 1999* where applicable and as such refuse the application on the following grounds:-

- The development application meets the criterion for refusal in Section 64(1)(a)(ii) of the *Prostitution Act 1999*, in that the subject site is within 200m of the closest point of any boundary of land where there is a residential building (68 Meadow Avenue, Coopers Plains) and the Assessment Manager must refuse the application.”

8. The grounds of the appeal are more in the form of a chronology than a set of grounds. However, at paragraph 11, the following is set out:

“The Respondent’s decision to refuse the Application is erroneous, unreasonable and unlawful, particularly having regard to the following:

- (a) The proposed development is not in conflict with section 64(1)(a)(ii) of the *Prostitution Act 1999*;
- (b) The distance from the application land to 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 recreational or cultural activities is greater than 200 metres.

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See s.64O of the Act. The material which the assessment manager is required to provide includes “all documents, including plans and specifications, about the aspect of the development application being appealed”.

(c) The [closest] point of land on which there is a residential building (68 [M]eadow Avenue, Coopers Plains) is 205.4 metres, measured according to the shortest route a person may reasonably take, by vehicle or on foot, between the Application land and other land.

(d) The proposed development complies with the applicable codes, and if there is any conflict, which is not admitted, there are sufficient grounds to justify approval of the Application despite any conflict.”

9. Section 64(1)(a) of the Act, if the minimum separation distance is not achieved, does, indeed, constitute a complete prohibition binding on the Council’s delegate as assessment manager and on the Independent Assessor in deciding this appeal. The section provides 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 200m 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 200m 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 recreational or cultural activities; measured according to the shortest route a person may reasonably and lawfully take, by vehicle or on foot, between the application land and the other land; or

...” (Emphasis added.)

10. It may be thought surprising that strongly differing statements of fact and law could be made when, as I understand the parties’ positions, they were essentially “using the same tape measure”.⁵
11. The appellant’s surveyor, Bruce Thompson of Axis Surveys, provided a report dated 4 April 2007. The report incorporates a number of diagrammatic representations of lot 1 and its vicinity including down to 68 Meadow Avenue.
12. The following factual matters emerge from the factual material which has been provided. Accordingly, I make the following findings:
- (a) The building at 32 Meadow Avenue, Coopers Plains is an industrial building. At its Meadow Avenue end, it is located on the western side of the allotment and is set some 21.48 metres back from the frontage boundary with the Meadow Avenue road reserve.
- (b) The industrial building has been strata titled under the *Building Units and Group Titles Act* 1980.⁶ The subject site for the application for material change of use is lot 1 on Building Units Plan 11447. Lot 1 is the front unit of the industrial building (that is, closest to the Meadow Avenue road frontage).

⁵ Developments, subsequent to the commencement of the appeal, have led to a closer set of positions on relevant measurements.

⁶ This Act has since been renamed as the *Body Corporate and Community Management Act* 1997 (“the BCCM Act”).

- (c) It is clear from the Building Units plan documents provided that the limits of lot 1 are co-terminous with the limits of the building and that the land outside the edges of the building forms part of the common property for the purpose of the building units plan.
- (d) A row of 5 carparking spaces has been designated along the southern (Meadow Avenue frontage) edge of lot 1 (and the building as a whole). Pursuant to a resolution without dissent passed by a meeting of the body corporate passed on 20 February 1992, the exclusive use and enjoyment of those 5 carparks was granted to the proprietor for the time being of lot 1.
- (e) Another 5 carparking spaces are designated in a row closer to the Meadow Avenue frontage. Those 5 spaces have been variously allocated to the exclusive use and enjoyment of proprietors of other lots in the building units plan.
- (f) The nearest relevant facility or place for the purpose of paragraph 64(1)(a)(ii) of the Act is a house located at 68 Meadow Avenue.⁷ The distance between the two nearest points of 32 and 68 Meadows Avenue property boundaries, respectively, is 181.05 metres. The distance from the south-east property boundary of 32 Meadows Avenue (closest point to number 68)⁸ to the south-east corner of the industrial building (the closest point of lot 1) is 24.4 metres. This makes the distance between the closest point of lot 1 to the closest point of the property boundary number 68 some 205.452 metres, clearly enough, outside the 200 metres minimum imposed by paragraph 64(1)(a)(ii) of the Act.
- (g) The nearest point of the 5 carparking spaces which have been designated by the body corporate as for the exclusive use and enjoyment of the proprietor of lot 1, by the shortest possible pedestrian route, is 199.49 metres from the nearest point of number 68. If that measurement is the relevant measurement for the purpose of paragraph 64(1)(a)(ii) of the Act, then the material change of use may not, properly, be approved. The distance of 199.49 metres is a composite of 181.05 from property boundary to property boundary and 18.44 metres being the length of a bee line from the south-east corner of the nearest car park and the south-east property boundary of 32 Meadow Avenue.⁹ However, following that bee line involves traversing the corner of a landscaped garden area which runs along the eastern boundary of the property at number 32 and meets the road reserve. The parties agree and I find that such a course (that is, traversing a constructed garden bed located in the common property of Community Management Scheme land) is not a “reasonable route” as that term is used in s.64 of the Act.
- (h) The bee line (from the nearest corner of the nearest car park to the corner of the property boundary) discussed in the preceding sub-paragraph of these reasons is designated in Axis Surveys Plan N/188/A as measurement a. Measurement b is the bee line from the nearest point of the carparking spaces to the point where the south-western corner of the landscaped garden area meets the road reserve.

⁷ The distances referred to are shown on an aerial photograph marked up by Mr. Thompson as indicating his measurements.

⁸ That is, the point where the south and east boundaries of the property meet and which is co-terminous with road reserve.

⁹ This measurement was carried out by Axis Surveys as a result of some further directions issued by me on 7 November 2007. These measurements are accepted by both parties.

Measurement b forms part of the shortest route from the carparking spaces to the closest point on 68 Meadow Avenue without traversing the garden area. The whole of that distance comprises measurement b (17.9 metres) plus the distance from the point where the south-western corner of the landscaped garden area meets the road reserve to the south-east property boundary of 32 Meadow Avenue (1.3 metres, effectively, the width of the garden bed) plus the distance between the closest points of the property boundaries of 32 Meadow Avenue and 68 Meadow Avenue (181.05 metres). This gives a total distance of 200.25 metres. This measurement falls outside the 200 metres minimum imposed by paragraph 64(1)(a)(ii) of the Act.

- (i) Axis Surveys have measured two other routes, designated measurements c and d, respectively. Measurement c involves a bee line to the edge of the constructed concrete footpath in Meadow Avenue, closest to number 68. Measurement d involves a bee line to the centre of that concrete footpath. Both these measurements involve a longer distance from the nearest point of the car parking spaces to 68 Meadow Avenue than the journey which included measurement b. It is unnecessary to make a finding as to which route satisfies the description of “the shortest route a person may reasonably and lawfully take, by vehicle or on foot, between the application land and the other land”. I find, however, that the “shortest lawful route” must be, at least, slightly longer than 200.25 metres, the route including measurement b. This is because, once having reasonably avoided the garden bed, one would have to travel at least some distance from the property boundary line into the road reserve in order to avoid, in this case, one’s left shoulder or hip coming into continual contact with the fences and other structures built by householders on the boundary between their properties and the road reserve as well as contact with overhanging trees, footpath gardens, et cetera. There would also be some distance to traverse at 68 Meadow Avenue from one’s reasonable line of travel on the footpath back to the point where the south-west (and nearest) corner of 68 Meadow Avenue meets the road reserve.
- (j) I am, therefore, satisfied that, whether the “application land” comprises the limits of lot 1 or the limits of the carparks allocated to the exclusive use of lot 1, the distance to the closest point on lot 68 exceeds the minimum of 200 metres which would otherwise mandate refusal of the application.
- (k) I turn to consider the concept of “application land”.

“Application Land”

13. The determination of what is “application land” in this appeal raises questions arising under both the Act and the BCCM Act. It is to those Acts, in the first instance, that one must turn in order to decide what is “application land” and, therefore, the relevant distance for the purpose of paragraph 64(1)(a)(ii) of the Act.

14. In schedule 6 to the BCCM Act defines “lot” in the following terms:

lot means—

- (a) a lot under the Land Title Act, but if the lot is included in a community titles scheme other than a basic scheme, the lot could be another community titles scheme; or

(b) for chapter 5, part 3, see section 220.”¹⁰

15. Provision for the making of exclusive use and enjoyment by-laws is set out in s.170 BCCM Act in the following terms:

¶170 Meaning of *exclusive use by-law*

(1) An *exclusive use by-law*, for a community titles scheme, is a by-law that attaches to a lot included in the scheme, and gives the occupier of the lot for the time being exclusive use to the rights and enjoyment of, or other special rights about—

- (a) common property; or
- (b) a body corporate asset.

(2) If an exclusive use by-law attaches to a lot that is another community titles scheme, the exclusive use or other rights are for the benefit of the other scheme.”

16. On my reading of s.170 BCCM Act, the section does not attempt to make that part of the common property or the body corporate assets (made the subject of exclusive use of a particular lot holder) part of the lot. Therefore, for present purposes, the carparking spaces, the subject of the 1992 resolution without dissent, have not ceased to be part of the common property. The carparking spaces have not become part of lot 1. All that has happened is that the proprietor of lot 1 has been granted certain extra rights with regard to those spaces. That is, the proprietor can direct, exclusively, who can or cannot use those carparking spaces. The spaces remain, however, something separate to lot 1 and remain part of the common property of the body corporate.

17. In the development application; the acknowledgement notice; the decision notice; and the appeal, the land the subject of the application has been referred to as having an address of unit 1, 32 Meadow Avenue, Coopers Plains and a property description as lot 1 on building unit plan 11447. These documents have been, variously and respectively, written by the applicant and the assessment manager respondent in this appeal. This gives a prima facie indication that it is to and from the boundary of lot 1 and not to and from the boundary of some carparking spaces over which the proprietor of lot 1 has certain exclusive use and enjoyment rights that distance should be measured for the purpose of paragraph 64(1)(a)(ii) of the Act.

18. Section 64 of the Act is part of part 4 of the Act and, therefore, draws upon the definitions set out in s.62 of the Act as follows:

¶62 Definitions for pt 4

In this part—

application land means land the subject of a development application to which this part applies.

code assessable development application means a development application to which this part applies, if the application is required to be the subject of code assessment under the Integrated Planning Act.

development application means an application for a development approval under the Integrated Planning Act.”

¹⁰

The reference to s.220 BCCM Act is irrelevant for present purposes.

19. The definition of “application land”, when read with the development application; the acknowledgement notice; and the decision notice, strongly, suggests that the land relevant for paragraph 64(1)(a)(ii) of the Act is lot 1 and not lot 1 together with the carparking spaces nearby.

20. The *Prostitution Regulation 2000* (“the Regulation”) contains in schedule 3 thereto an IDAS Code for the purpose of assessing a development application for a material change of use for a brothel where the proposed brothel is located in industrial land as that land is defined in s.63A(3) of the Act.¹¹ That code makes provision for a number of matters going to the functioning and appearance of the brothel, including carparking. The first two performance criteria deal with carparking. They provide as follows:

Performance Criterion	Acceptable Solution
<p>Car parking for clients 1 Adequate car parking is provided, or available, for brothel clients.</p>	<p>Provide 1 car parking space on the brothel premises for each room in the brothel.</p>
<p>Car parking for staff 2 Adequate secure car parking is provided, or available, for brothel staff.</p>	<p>Provide 1 car parking space on the brothel premises, that is well lit and directly accessible to an entrance to the brothel, for each 2 brothel staff members at the brothel at any 1 time.</p>

21. By a joint memorandum of the parties dated 27 September 2007, the parties set out the way in which it is proposed that performance criteria 1 and 2 would be satisfied by the proposal the subject of the appeal. The memorandum provides as follows:

- “1. In relation to Performance Criterion 1 of the Code, the proposal complies with the Acceptable criterion in column 2. It is proposed that 5 car parking spaces adjacent to Unit 1 be provided for the exclusive use of brothel clients. That is, 1 car space for each room in the brothel. [The plan attached to the memorandum shows these 5 spaces as the spaces adjacent to the southern wall of unit 1 as discussed in paragraph 12 above]; and
2. In relation to Performance Criterion 2 of the Code, the proposal can comply with the Acceptable Solution in column 2 based upon the addition of two tandem staff car parks behind the currently proposed staff parking in accordance with [a plan which shows the 5 staff car parks within the limits of unit 1], on the basis that a condition of approval is imposed limiting staff numbers at the brothel to ten staff at any one time.

¹¹ See *Integrated Planning Regulation 1998* (“the IPR”), schedule 1, part 3, table 2, item 2.

3. Conditions could be imposed requiring all car parking spaces to be clearly identified as being reserved for 'Staff parking' or 'Client parking'.
 4. Staff parking is to be located within the brothel premises and will therefore be well lit and directly accessible to the entrance to the brothel."
22. The memorandum was provided in response to comments made in my preliminary assessment in this appeal which indicated that, because the application had been refused (by reference to s.64 of the Act) without detailed assessment, the material before the Independent Assessor did not make it clear whether Performance Criteria 1 and 2 were capable of being complied with. Having considered the joint memorandum, I accept that the proposed arrangements as set out in the memorandum do indicate the capacity of the application to achieve compliance with the two performance criteria. It is important to observe, however, that the statement in paragraph 1 of the memorandum assumes a question to be determined in this appeal. Acceptable Solution 1 talks of providing car parking spaces "on the premises". While I am satisfied that the proposal for car parking spaces satisfies the requirement to provide adequate car park spaces for brothel clients (that is, it provides a satisfactory alternative way of satisfying Performance Criterion 1), whether the 5 spaces are on or off the brothel premises appears to be a question closely related to the question whether the car parks form part of the "application land".

Analogous Case Law

23. The issue as to whether "application land" includes carparking spaces designated for use by "brothel clients" recalls a perennial problem in planning law, namely, what land must be designated and advertised as the land the subject of a planning application. The leading case is *Pioneer Concrete (Qld) Proprietary Limited v. Brisbane City Council* (1980) 145 CLR 485 ("*Pioneer Concrete*") in which the High Court held that an access road over private land for the primary use of a quarry should have been treated as part of the land subject to the planning application in that case.
24. As the details of planning legislation have changed, the direct applicability of the decision in *Pioneer Concrete* has diminished. In *Gibway Pty. Ltd. v Caboolture Shire Council* [1987] 2 Qd R. 65 ("*Gibway*"), the Court of Appeal distinguished *Pioneer Concrete* in a case where land was to be used for access purposes for a proposed shopping centre. The point of distinction in *Gibway* was the fact that the access road was to be dedicated as public road and, thereby, had no need for a planning designation.
25. The more specific issue of applying planning legislation to the intricacies of land subject to the BCCM Act was considered by Robin J. in *Davis v Miriam Vale Shire Council* [2006] QPEC 064 ("*Davis*"). The case involved a material change of use of lots under the BCCM Act from a restaurant use to a more intensive "catering premises and accommodation building". The case, particularly, concerned the more intensive use, for access purposes, of common property already used for access purposes. At paragraph 15, after mentioning both *Pioneer Concrete* and *Gibway*, Robin J. said:

“I do not think there is room for any blanket rule that the common property need not be included where a development application, on its face, relates to some particular lot(s). It may be that associated use of facilities on common property, such as a garden, barbeque area, swimming pool or toilets will be an important part of the proposed use, in which case they are part of the land the subject of the application. Use of common property for its established function of providing access has been held not to require its inclusion as part of the land. It would seem undesirable to depart from decisions in the court to that effect. It is not a concern in the present proceeding, but it could well be that even use of common property as access amounted to a use on its own, if the proposal were to run a fleet of taxis or rental vehicles from a lot, for example. I do not think the likely heavy use of driveways in common property during construction, being temporary, would be put in that category: it would be part of the burdens the common property is expected to bear. Reference to the cases discussed in Fogg, Meurling and Hodgetts, *Planning Law in Queensland* 304ff shows that the extent to which the judges have tried to apply a practical, commonsense approach to “Pioneer” issues.”

26. It appears, from Robin J.’s reasoning, that whether or not common property land should be considered as part of the land subject of a planning application is a matter of fact and degree in respect of which the existing use of the common property land and the changed use are both relevant. I see no reason why those principles should not be applied to the question under the Act whether land designated for brothel clients’ car parking spaces is to be treated as “application land”.
27. In determining that question in the negative, I am influenced by the fact that the land is already designated as for the exclusive use of lot 1 and it is already designated to be used for car parking purposes. While the use for car parking may be more intensive under the proposed use than under previous industrial uses of lot 1, even this is by no means certain. Some brothel clients may, for purposes of anonymity, choose to park their vehicles some distance from their ultimate destination.
28. In considering whether the term “application land” includes carparking spaces designated for use by “brothel clients”, I have also been assisted by the discussion in *Rathera Pty. Ltd. v Gold Coast* (“*Rathera*”) [2000] QCA 506 although *Rathera* involves something of an obverse example. In *Rathera*, which concerned the requirements of “an accurate description of the land, the subject of the application” in s.3.2.1(3) of the *Integrated Planning Act* 1997 (“the IPA”)¹², the land was not strata titled but broken up into tenancies. The use that was the subject of the application comprised a restaurant and a tavern and bottle shop, which were, respectively, to be located in tenancies 3 and 4 of a five tenancy local business centre together with some open land between the two tenancies. The Court held that, in that case, that “the required description of the land is the whole of the parcel of the land on which the proposed development is to occur and not the various parts of the parcel which the development and the ancillary services are likely to affect”.¹³ In the present appeal, the proponent has availed of the much more precise lot designation under the BCCM Act to describe the “application land” and the carparking spaces to be provided in

¹² It would appear that no party has any concern that the descriptions, by reference to lot 1 in the application and subsequent documents has been other than “an accurate description of the land, the subject of the application”.

¹³ See paragraph 32, per Jones J. (with whom McPherson JA and White J. agreed).

accord with the code in the Regulation, may, properly, be regarded as falling outside the application land.

29. Counsel for the respondent referred me to decisions of the Planning and Environment Court in *Leach v Gold Coast City Council* [2001] QPELR 139 and *Brons v Cairns City Council* [2005] QPELR 172. While both decisions concerned applications for development approval for a brothel, the decisions concerned different issues to those relevant to the present appeal. In particular, it does not appear evident from the reasons that either decision concerned the correct approach to determining what is “application land” when the application relates to a lot under the BCCM Act.
30. On my understanding of the submissions, neither party suggested that the application land should extend to areas of the common property outside the car parking spaces specifically designated for exclusive use by brothel clients.

Conclusions as to “Application Land” and Minimum Separation Distances

31. For the reasons set out in the preceding paragraphs, I have concluded that the “application land” in this appeal is restricted to the limits of lot 1 on building unit plan 11447 which is also the limits (to the south) of the building constructed at 32 Meadow Avenue.
32. Accordingly, the distance between the closest point of the application land to the closest point of the property boundary number of the nearest sensitive use at 68 Meadow Avenue, by the shortest route a person may reasonably and lawfully take, by vehicle or on foot exceeds 205.452 metres, clearly enough, outside the 200 metres minimum imposed by paragraph 64(1)(a)(ii) of the Act.
33. However, the distance from the closest point of the areas designated for car parking spaces for brothel clients, were that to be the boundary of the application land, to the closest point of the property boundary number of the nearest sensitive use at 68 Meadow Avenue, by the shortest route a person may reasonably and lawfully take, by vehicle or on foot exceeds 200.25 metres, also outside the 200 metres minimum imposed by paragraph 64(1)(a)(ii) of the Act, if only by a small margin.
34. It follows that, whether I am correct in concluding that the application land is limited to lot 1 or whether the respondent is correct in suggesting that the application land includes the designated car parking spaces, the 200 metres minimum imposed by paragraph 64(1)(a)(ii) of the Act is achieved.
35. It also follows that the respondent assessment manager was in error in concluding that it was precluded from granting the application for development permit on the grounds that the 200 metre minimum separation limit required by s.64(1)(a)(ii) had been breached on the facts of this case.

Orders

36. Accordingly, the appeal should be upheld.

37. The orders that may be made on an appeal to the independent assessor are provided for in s.64U as follows:

64U Appeal decision

- (1) In deciding an appeal the independent assessor may make the orders the independent assessor considers appropriate.
- (2) Without limiting subsection (1), the independent assessor may—
 - (a) confirm the decision appealed against; or
 - (b) change the decision appealed against; or
 - (c) set aside the decision appealed against and make a decision replacing the decision set aside.
- (3) If the independent assessor acts under subsection (2)(b) or (c), the independent assessor's decision is taken, for this Act (other than this division) and the Integrated Planning Act to be the decision of the assessment manager that made the decision appealed against.
- (4) The assessor's registrar must give all parties to the appeal and the Authority notice of the independent assessor's decision and the reasons for the decision.
- (5) The independent assessor's decision can not be appealed against under this Act or the Integrated Planning Act."

38. While I have decided to uphold the appeal, I am not in a position to prescribe what conditions should be imposed to ensure appropriate compliance with all of the requirements of the code contained in schedule 3 to the Regulation.¹⁴ Accordingly, I propose to delay making a decision replacing the decision appealed against. I propose that the respondent prepare a draft substitute decision imposing the necessary conditions and that the parties confer in accord with the directions which follow. I will take steps to make the replacement decision when that process is complete.

Directions

39. I make the following directions:

- (1) That the respondent prepare and serve on the applicant and file a draft replacement decision including a draft set of conditions to ensure compliance by the proposed brothel use with the IDAS Code in schedule 3 to the *Prostitution Regulation* 2000 ("the Regulation") on or before 4.00 pm on Friday, 8 February 2008;
- (2) That the parties conduct discussions in respect of the draft replacement decision prepared by the respondent such discussions to be completed on or before 4.00 pm on Friday, 29 February 2008;
- (3) That on or before 4.00 pm on Friday, 7 March 2008, the parties file a joint memorandum setting out, either:
 - (i) An agreed draft replacement decision; or
 - (ii) A joint memorandum setting out those aspects of the draft replacement decision which are agreed, those aspects which are

¹⁴ I have been assisted by the parties in respect of performance criteria 1 and 2. See paragraphs 21 and 22 above.

in dispute and the parties' respective submissions concerning those aspects which are in dispute.

Stephen Keim SC
Independent Assessor
15 January 2008