

## **INDEPENDENT ASSESSOR**

### **Prostitution Act 1999**

BETWEEN:                                   **THOMAS ESPRESTER**

Appellant

AND:   **LOGAN CITY COUNCIL**

Respondent

### **DECISION**

- (1) That the appeal be upheld;
- (2) That the application for development approval for a material change of use for a brothel be approved and a development permit for a material change of use for a brothel be granted, subject to the following conditions, and the applicant and the Prostitution Licensing Authority be advised accordingly. The said conditions are:

1.       **SITE PLANS**

- 1.1       The development of the site shall be in accordance with Sheets 1 – 4 of Plan No. W12-1 prepared by Kodes Drafting and dated December 2003 except as altered by this approval.
- 1.2       Plans showing the architectural treatment, materials, colour scheme and entrance identification of the building shall be submitted to the Director of Development, Health and Environment for approval.

2.       **ACCESS**

- 2.1       Access to the site shall be gained from Magnesium Drive to the standards and satisfaction of the Director of Development, Health and Environment having regard to column 2 of performance criterion 3 of the code contained in schedule 3 of the *Prostitution Regulation 2000*.  
*To be complied with prior to the commencement of the use.*
- ~~2.2       The existing gate at the entrance to the site shall be removed to allow access to the site at all times.~~  
~~*To be complied with prior to the commencement of the use.*~~

3.       **CARPARK**

- 3.1       14 off-street carparking spaces laid out in accordance with Sheet 1 of 4 Plan No. W12-1 prepared by Kodes Drafting and dated December 2003 shall be provided for both customers and employees. Such spaces shall be laid out, paved, linemarked, signposted, drained and maintained in accordance with Council's Development Manual and current Local Planning Policy No 21 (Traffic Generating Developments) and Australian Standard 2890.1 and Australian Standard 2890.2  
*To be complied with prior to the commencement of use.*

- 3.2 Provision shall be made for the following:-
- 3.2.1 1 carparking space for disabled people.
- 3.2.2 carpark lighting.  
***To be complied with prior to the commencement of use.***
- 3.3 The development shall comply with Council's Local Planning Policy No 21 (Traffic Generating Developments) and Australian Standard 2890.1 and Australian Standard 2890.2  
***To be complied with prior to the commencement of the use.***
- 3.4 The staff car park shall be fenced and secured with entry available through a keyed or remote opening system to staff members only.  
***To be complied with prior to the commencement of the use.***
- 3.5 Suitable ingress and egress shall be provided to allow Council's refuse contractors provision for on-site collection to the satisfaction of the Director of Development, Health and Environment having regard to column 2 of performance criterion 3 of the code contained in schedule 3 of the *Prostitution Regulation 2000*.  
***To be complied with prior to the commencement of the use.***

#### 4 LIGHTING

- 4.1 External lighting shall:
- 4.1.1 be static;
- 4.1.2 have no characteristics indicating that the premises are used for a brothel;
- 4.1.3 facilitate surveillance;
- 4.1.4 be hooded and directed downwards.
- 4.2 All lighting shall comply with Section 11.9 (Lighting Nuisance) of Council's Planning Scheme.  
***To be complied with prior to the commencement of the use.***

#### 5 SIGNS

- 5.1 On-premises signage shall be restricted to one sign complying with the following requirements:-
- 5.1.1 the surface area of the sign shall not exceed 1m<sup>2</sup>;
- 5.1.2 the sign shall display only the name of the licensee and the registered business name of the brothel;
- 5.1.3 the sign shall not display works or images that are sexually explicit, lewd or otherwise offensive;
- 5.1.4 the sign shall be affixed to the brothel.  
***A development permit – operational works for on-premises signage shall be obtained prior to the commencement of the use and the erection of any signage on the site.***

5.2 No bunting or streamers shall be displayed on the site.

## 6 APPEARANCE

6.1 Building colours and materials shall be unobtrusive to ensure that the brothel does not have a dominant appearance and shall be approved by the Director of Development, Health and Environment having regard to performance criterion 8, column 2 of the code contained in schedule 3 of the *Prostitution Regulation 2000*.

*To be complied with prior to building works approval.*

6.2 The outdoor staff area shall be fully screened with a 1.8 metre high screen fence.

*To be complied with prior to the commencement of the use.*

6.3 Building surfaces and fencing shall be treated with anti graffiti paint. This condition is limited to that part of the building (or fencing) which faces Magnesium Drive and is limited to that part of that face of the building (or fence) below 2 metres above the surface of the ground at that point.

*To be complied with prior to building works approval..*

## 7 ENTRANCES

7.1 The client entrance to the building shall be clearly identified and a separate staff entrance shall be provided to the satisfaction of the Prostitution Licensing Authority.

*To be complied with prior to the commencement of the use.*

## 8 LANDSCAPE PLAN/WORKS

8.1 A landscape plan and documentation, prepared by a corporate member of the Australian Institute of Landscape Architects shall be submitted to Council for approval as part of a development application for Operational Works – development permit. The landscape plan and documentation shall be prepared in accordance with the provisions of Council’s Development Manual and shall include:

8.1.1 Carpark landscape works including landscape areas and shade trees in accordance with Section 2.11.5 of Council’s Development Manual.

8.1.2 Existing landscaped areas, including a landscaped area a minimum of 3 metres in width, exclusive of accessways, along the Magnesium Drive frontage of the site. Landscape works are to be at footpath level.

8.1.3 Landscape areas at natural ground level except where it is proposed to import soil with suitable retaining works.

8.1.4 An automatic inground irrigation system.

8.1.5 The retention of existing healthy trees and shrubs on the site.

8.1.6 A type 2 concrete wall, 0.15 metres minimum height, or other approved barrier erected around any landscaped area.

- 8.1.7 An outdoor recreation area for staff fully screened with a 1.8 metre high fence.
- 8.2 Landscaping along Magnesium Drive is to be located behind any solid fencing.
- 8.3 The landscape works shall be provided on site in accordance with the approved landscape plan and shall include:
- 8.3.1 Established maintenance for a minimum of 12 weeks following Practical Completion as outlined in Council's Development Manual.  
***To be complied with prior to the commencement of the use.***
- 8.4 Landscape works shall be subject to ongoing maintenance to the satisfaction of the Director of Development, Health and Environment having regard to column 2 of performance criterion 11 of the code contained in schedule 3 of the *Prostitution Regulation 2000*.
- 8.5 Footpath tree planting along the street frontage of the site shall be provided in accordance with Council's Development Manual.
- 8.5.1 All trees shall have a minimum container size of 25 litres.
- 8.5.2 Tree species shall be as approved by the Assessment Manager.
- 8.5.3 Tree guards shall be installed around trees to prevent theft, vandalism, or accidental damage.  
***To be complied with prior to the commencement of the use.***

## 9 GENERAL ENGINEERING CONDITIONS

- 9.1 The developer shall be responsible for the full cost of any alteration necessary to electricity, telephone, water mains, sewer mains, stormwater drainage systems or easements and/or other public utility installations resulting from the development or from road and drainage works required in connection with the development.

## 10 GENERAL CONDITIONS

- 10.1 Street numbers shall be displayed not less than 300mm in height. Numbers shall be illuminated.  
***To be complied with prior to the commencement of the use.***
- 10.2 The site shall be maintained in a clean and tidy state.
- 10.3 A screen fence of approved materials shall be constructed to adequately screen garbage disposal areas from public view.  
***To be complied with prior to the commencement of the use.***
- 10.4 The use shall be conducted in such a manner as not to interfere with the amenity of the neighbourhood by reason of noise, vibration, smell, fumes, vapour, steam, soot, ash, dust, waste water, waste products, grit, oil or otherwise.
- 10.5 This approval is limited to five rooms for prostitution as defined in the *Prostitution Act 1999*.

## **FURTHER ADVICE TO APPLICANT**

### **In relation to the application, the applicant be further advised.**

1. Authorised persons of the Council may enter the premises the subject of this permit at any reasonable time to ascertain whether the above conditions have been complied with (and/or whether the above requirements have been carried out).
2. The development of the site shall comply with the provision of Council's Local Laws, Local Planning Policies, Planning Scheme and Development Manual to the extent they have not been varied by this approval.
3. All site works and earth works shall be carried out in accordance with Council's Development Manual.
4. Disabled persons' access shall be in accordance with Section D3.2 of the Building Code of Australia (B.C.A.).
5. All works shall be carried out in accordance with the *Workplace Health & Safety Act 1989*.
6. Approval is required to be made for demolition of existing building work.
7. The currency period for this approval is in accordance with Section 3.5.21 of the *Integrated Planning Act 1997*.

### **The applicant and owner be further advised:**

It is the owner's and occupants responsibility under the *Environmental Protection Act 1994* to advise the Chief Executive of the Environmental Agency, of any Notifiable Activity conducted on the site or contamination or suspected contamination which may cause a hazard to human health or the environment within 30 days of becoming aware of the operation of a Notifiable Activity on the site or of any contamination or suspected contamination. The Chief Executive, pursuant to the Act, is empowered to require that the development complies with the provisions of the Act, including the preparation of site investigation reports and if necessary the remediation of the site at the owners expense.

## **FURTHER DEVELOPMENT REQUIRED UNDER IPA TO CARRY OUT DEVELOPMENT**

- Operational Work (Landscaping and Signage)
- Plumbing and Drainage
- Building Works

### **FURTHER LICENCE TO CARRY OUT THE USE:**

- A licence shall be obtained from the Prostitution Licensing Authority.

**Stephen Keim**  
**Independent Assessor under the Prostitution Act**  
**25 March 2005**

## INDEPENDENT ASSESSOR

### Prostitution Act 1999

BETWEEN:                                   **THOMAS ESPRESTER**

Appellant

AND:                                       **LOGAN CITY COUNCIL**

Respondent

### REASONS FOR DECISION

#### Steps in the assessment process

1. The appeal by Thomas Esprester (“the appellant”) was received in the appropriate form by the assessor’s registrar at the Prostitution Licensing Authority (“the Authority”) on 21 September 2004. The appeal relates to a failure to decide an application for a development permit for a material change of use for a brothel for premises located at 26 Magnesium Drive, Crestmead. Since this is an appeal against a failure to decide on the part of the Respondent local government, Logan City Council (“the respondent”)<sup>1</sup>, no issue arises with regard to the time limits for lodging an Appeal.<sup>2</sup>
  
2. By letter dated 22 September 2004, the registrar sought information pursuant to s.64O of the *Prostitution Act 1999* (“the Act”). Some difficulty occurred with letters going astray such that it was in response to a follow up letter dated 28 October 2004 that the respondent, by letter dated 2 November 2004, forwarded documents including the report of Director of Development, Health and Environment<sup>3</sup> prepared for the Committee Meeting on 17 August 2004 and the Council Meeting on 24 August 2004 (“the planning report”).

#### The appeal

3. The grounds of the appeal are expressed in the notice of appeal as follows:

“

1. The assessment manager has not decided the Applicant’s application during the decision making period or any extension of the period and there is thereby a deemed refusal of the application.
  
2. “The Assessment Manager should have approved the Applicant’s application because:
  - (a) It contained all and sufficient information to permit a decision to be made;
  - (b) A request to the applicant for additional information from the assessment manager does not alter the applicant’s rights to appeal on the basis of a deemed refusal;
  - (c) The report of the Development, Health and Environment Committee of the Logan City Council dated 17 August 2004 recommends the approval of the application subject to certain conditions;
  - (d) The aforesaid Logan City Council Development, Health and Environment Committee does not indicate the application is deficient in any respect.
  
3. The applicant has in all respects complied with the Integrated Planning Act, the Integrated Planning Regulation and the Prostitution Act and the Prostitution Regulations 2000.

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<sup>1</sup> Section 64K(1)(e) of the *Prostitution Act 1999* (“the Act”).

<sup>2</sup> Section 64K(2) of the Act. The details of when the decision was due and when the right to appeal against the deemed refusal arose are dealt with in more detail in paragraph 5, below

<sup>3</sup> The documents reveal that the Director (and author of the report) is one, Sandra Usher.

4. The applicant has not had any input as to the appropriateness of all of the conditions recommended to be made part of Council's approval in the report of the Director of Development, Health and Environment in the document dated 17 August 2004."
5. In this matter, there seems to be no dispute that the time for making a decision had expired. The acknowledgement notice is clearly to the effect that the application was code assessable. As set out below, the decision making period for the development application was extended to 16 August 2004. On 24 August 2004, the respondent local government requested further information but stated, in the resolution, that the time for making a decision had expired on 16 August 2004 and that the applicant should be advised that the request for further information did not, otherwise, affect the applicant's rights under s.64K of the Act.<sup>4</sup> This part of the resolution acknowledged that, in the absence of any further extension of time, the time within which the respondent was required to decide the application had expired on 16 August 2004. By s.4.1.28(e) IPA, an applicant may appeal against a deemed refusal at any time after the last day on which the decision was required to be made by the local government. Thus, no time limit existed for the commencement of this appeal. The appeal was lodged with the Registrar on 21 September 2004, clearly after the last day on which the decision was required to be made. I am, therefore, satisfied that the Appellant was entitled to appeal against a deemed refusal and that the appeal was lodged at a time when such entitlement had arisen.

#### **The assessment by the respondent**

6. The development application, a copy of which was received with the Notice of Appeal is dated 18 May 2004.<sup>5</sup> The application appears to have been accompanied by drawings showing location, layout (including parking) and elevations of the proposed development. The drawings are by Kodes Drafting and the four sheets are described as W12-1 to W12-4. A letter from the respondent dated 3 June 2004 (which is identified and constitutes an acknowledgement notice pursuant to Section 3.2.3 of the IPA) acknowledges that the application was accepted on 21 May 2004 by the respondent as a properly made application pursuant to the IPA. That acknowledgement notice states that assessment will be subject to code assessment against the codes specified in the respondent's Planning Scheme. The acknowledgement notice states that there is no referral agency and that no referral coordination is triggered.
7. The acknowledgement notice also contained an information request apparently pursuant to s.3.3.6 IPA. The information request was as follows:
  - “1. An amended elevation plan of the building showing treatments to the front façade of the building which comply with Acceptable Design Solution 2.2.3 of Local Planning Policy No.3 (Design Guidelines for Industrial and Commercial Development). In particular, the main entry is to be oriented towards the street and architectural features and visual elements incorporated into the front façade of the building. Consideration is to be given to locating the entrance and reception area where room 5 is shown on the floor plan. Provision is to be made for the visual surveillance of the front of the site including the car park. A copy of Local Planning Policy No. 3 is attached for your reference.
  2. Clarification of the purpose and need for the proposed covered patio area on the western side of the building. Details are also required of the type of fencing/screening proposed around the patio area, why gates are required to the patio area and the proposed interface with the adjoining land uses.
  3. Clarification of the use and large size of the proposed TV area.

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<sup>4</sup> Section 64K of the Act creates the right to appeal to the Independent Assessor under s.4.1.27 of the *Integrated Planning Act 1997* (“the IPA”) including against a deemed refusal.

<sup>5</sup> Copies were also forwarded by the respondent as part of the s.64O material.

4. Clarification is required as to why the waiting rooms are to be private.
  5. Clarification is required as to why a large storage area is required.
  6. Clarification is required as to why an ensuite is proposed in the manager's office.
  7. It appears that clients waiting do not have access to bathroom/toilet facilities.
  8. The toilet for disabled people is shown within the administration area of the development and therefore will not readily be available for use by clients.”
8. By letter dated 15 July 2004, the respondent advised that the decision making period for the development application was extended to 16 August 2004. This was necessary because, in the absence of such extension, the decision period, which had started on 20 July 2004 (the day the appellant responded to the information request as set out in the next paragraph<sup>6</sup>), expired 20 days later on 9 August 2004.
  9. By letter dated 20 July 2004, the appellant addressed the information request. The request concerning planning policy no. 3 was addressed on the basis that the requirements of the Act precluded compliance with the planning policy but that appearance from the street would be addressed by use of rendered brickwork, feature recesses and landscaping including a water feature and garden beds. The covered patio was said to constitute an area for staff outside the building. Functional reasons were given for the TV area; private waiting rooms; storage area (*inter alia*, the left over part of the building); the manager's ensuite; the client's toilet (the disabled toilet was open to all in the waiting room); and the disabled toilet (the previous answer was repeated).
  10. The planning report was considered by the respondent at its meeting of 24 August 2004. As mentioned previously, it sought further information but indicated the request did not affect the rights of the appellant. Paragraph 1 of that resolution was to the effect that the applicant be advised that the respondent had not been provided with enough information to assess the application against the code for assessment of development applications for a material change of use for a brothel in an industrial area (“the Code”) in Schedule 3 to the *Prostitution Regulation 2000* (“the PR”). Subsequent paragraphs made the further information requests although not all of them related to the Code.
  11. The appellant did not respond to the information request and proceeded to lodge his appeal to the Independent Assessor.

### **Assessing the Application for the Purposes of the Appeal**

12. The planning report sets out some history of the site. The respondent had resolved to grant a development permit for a material change of use for a brothel on 20 February 2001. On 13 February 2003, the appellant sought changes to the approval which had been granted including changing the proposed brothel area from one of two tenancies on the site to the whole building. The respondent refused this application on 18 November 2003. An appeal to the Independent Assessor on 19 December 2003 resulted in findings on 25 February 2004 that the Independent Assessor did not have jurisdiction to hear the appeal. The present application, as a fresh application for a development permit for a material change of use for a brothel had ensued (as opposed to the earlier request to modify the existing approval).

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<sup>6</sup> Section 3.5.1 IPA.

13. Making a material change of the use of premises for a licensed brothel is assessable development.<sup>7</sup> A material of change of use of premises for a licensed brothel in an industrial area or on strategic port land is code assessable.<sup>8</sup> Section 63A of the Act provides as follows:

**“63A Integrated Planning Act**

(1) This part applies despite the Integrated Planning Act.

(2) If this part is inconsistent with the Integrated Planning Act, this part prevails to the extent of the inconsistency.

(3) Further, for the application of the Integrated Planning Act to a development application, an industrial area is land, however described, that is designated in a planning scheme or other planning instrument under the Integrated Planning Act as industrial, or that is predominantly industrial in character, having regard to—

(a) dominant land uses in the area; or

(b) the relevant provisions of a planning scheme or planning instrument applying to the area.

Examples of ways of describing industrial areas—

1. heavy industry
2. commercial industry
3. light industry
4. service industry
5. general industry
6. waterfront industry.”

14. The planning report addressed the question as to whether the site comprised industrial land as that term is used in s.63A of the Act. Among other things, the site is said to be zoned “general industry” and is designated in the relevant District Strategy of the Strategic Plan for manufacturing activities which is clearly a form of industrial purposes. I am satisfied, accordingly, that the site is industrial land as set out in s.63A of the Act. It follows that the application the subject of the appeal is correctly categorised as code assessable.

15. Section 64 of the Act provides that, in certain circumstances, local governments must refuse applications for a material change of use for a brothel based on locational and other criteria. Section 64 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 200 m 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 m 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

(i) is in, or within 200 m 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

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<sup>7</sup> Schedule 8 to IPA, Clause 5.

<sup>8</sup> Schedule 1 to *Integrated Planning Regulation* 1998, (“the IPR”), clause 3.

(ii) is within 200 m 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

(b) the application land is within 100 m 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 in a straight line; or

(c) for land in a town with a population of less than 25 000—

(i) the local government for the local government area has required that all applications within the area be refused; and

(ii) the Minister has agreed that the applications should be refused; or

(d) more than 5 rooms in the proposed brothel are to be used for providing prostitution.

(2) In this section—

“**residential building**”, for subsection (1)(a)(ii) and (1)(b), means a building or part of a building used primarily for private residential use, other than a building or part of a building used only for a caretaker’s residence on land in an industrial area.

“**vehicle**” includes any type of transport that moves on wheels but does not include a train or tram.”

16. At page 4 of the planning report, Ms. Usher addressed each of the categories for compulsory refusal in s. 64 in tabular form. The planning report discloses that the site is well in excess of the 200 metres by the shortest reasonable and lawful route available from either an actual or intended residential area and from the boundary of land on which there is a residential building or any other of the uses specified in s.64. Equally, the prescribed distance of 100 metres in a straight line is satisfactorily exceeded from such areas or uses. The planning report also discloses that the population of Logan City is greater than 25,000 people so that the provisions of paragraph 64(1)(c) of the Act are not raised. The planning report also confirms what is evident from a perusal of the plans that only 5 rooms are proposed in the application to be used for providing prostitution.
17. I am satisfied, on the basis of the information in the planning report, that there is no obligation to refuse the application for a development permit for the locational and other reasons set out in s.64 of the Act.
18. As mentioned above in paragraph 10, the code for assessment of development applications for a material change of use for a brothel in an industrial area is set out in Schedule 3 to the PR<sup>9</sup>. Clause 3 of the Schedule states that the purpose of the code is to seek to ensure that a licensed brothel is compatible with the form, function and amenity of the locality in which it is located and to seek to ensure the safety and security of staff of the licensed brothel. Clause 4 of Schedule 3 provides that the code is complied with if each performance criterion in column 1 of the table is complied with for the brothel. It goes on to state that a performance criterion is complied with if the acceptable solution to the performance criterion set out in column 2 opposite the criterion is complied with or the criterion is complied with in another way. This form of drafting is consistent with most codes applicable to the IDAS assessment process. The provisions of the Schedule must, of course, also be read with those provisions of the IPA which provide for the application of code assessment. In particular, the IPA provides that an assessment manager’s decision may conflict with an applicable code if there are sufficient grounds

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<sup>9</sup> See Section 15 of the PR.

to justify the decision, having regard to the purpose of the code.<sup>10</sup> Further, the assessment manager may refuse the application only if the assessment manager is satisfied that the application does not comply with the applicable code and compliance with the code cannot be achieved by imposing conditions.<sup>11</sup> Accordingly, the Respondent as assessment manager (and the Independent Assessor standing in its shoes) has a very limited ability to refuse code assessable development.

19. It is useful, in my view, to set out the whole of the table contained in Schedule 3. It reads as follows:

**“TABLE**

<b>column 1 PERFORMANCE CRITERION</b>	<b>column 2 AN ACCEPTABLE SOLUTION</b>
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**Car parking for clients**

- |   |  |
|---|--|
| <p><b>1.</b> 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> |
|---|--|

**Car parking for staff**

- |  |  |
|--|--|
| <p><b>2.</b> 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 assessable to an entrance to the brothel, for each 2 brothel staff members at the brothel at any 1 time.</p> |
|--|--|

**Vehicular access**

- |   |   |
|---|---|
| <p><b>3.</b> The brothel is safely accessed by vehicular traffic.</p> | <p>Locate vehicular ingress and egress to allow-</p> <ul style="list-style-type: none"> <li>(a) vehicles to enter and exit the premises in forward gear; and</li> <li>(b) if the brothel shares road access, parking areas or pedestrian areas with land used for other purposes - parking, vehicle manoeuvring for the brothel to be undertaken without adversely affecting the safety of traffic using the land.</li> </ul> |
|---|---|

**Lighting**

- |  |  |
|--|--|
| <p><b>4.</b> External lighting for the brothel is designed to ensure the safety and security of brothel staff and clients without adversely affecting the amenity of adjoining premises.</p> | <p>Provide external lighting for the brothel that-</p> <ul style="list-style-type: none"> <li>(a) is static; and</li> <li>(b) has no characteristic indicating the premises are used for a brothel; and</li> <li>(c) facilitates surveillance; and</li> <li>(d) is hooded and directed downwards.</li> </ul> |
|--|--|

**Sign**

- |   |   |
|---|---|
| <p><b>5.</b> Sign for the brothel is compatible with the amenity of the locality.</p> | <p>Comply with each of the following requirements-</p> <ul style="list-style-type: none"> <li>(a) only 1 sign is displayed for the brothel;</li> <li>(b) the surface area of the sign is not</li> </ul> |
|---|---|

<sup>10</sup> Sub-section 3.5.13(2) of the IPA.

<sup>11</sup> Sub-section 3.5.13(4) of the IPA.

- more than 1 m;
- (c) the sign displays only the name of the licensee and the registered business name of the brothel;
- (d) the sign does not display words or images that are sexually explicit, lewd or otherwise offensive;
- (e) the sign is affixed to the brothel.

**Loitering<sup>12</sup>**

7. The design of the brothel discourages loitering outside the premises. Provide a reception or waiting area at the brothel for use by brothel clients.

**Appearance**

8. The brothel premises are unobtrusive in appearance. Ensure the colours and materials for the brothel premises are unobtrusive.

**Entrances – security**

9. The staff and clients of the brothel are provided with a secure environment with the brothel premises in the vicinity of each staff or client entrance to the brothel. Locate the staff and client entrances to the brothel in positions that facilitate surveillance.

**Entrance – clients**

10. The clients’ entrance to the brothel is clearly identified. Ensure the entrance to the brothel makes it clear to clients which premises to enter.

**Brothel siting and design**

11. The brothel premises are sited and designed in a way that is compatible with the character or intended character of the locality. Comply with the requirements about the character of the locality under a planning instrument, including boundary set-back, building height and bulk, and landscaping.

**Infrastructure**

12. The brothel premises are adequately serviced by infrastructure. Comply with the requirements for infrastructure under a planning instrument applying to the locality, including the requirements to connect to sewerage and water.

”

16. It is equally helpful to set out the assessment of the proposal conducted by the Director of Development, Health and Environment of the Respondent contained in the document dated 6 December 2001. This also is contained in tabular form. It reads as follows:-

“

PERFORMANCE CRITERION	AN ACCEPTABLE SOLUTION	COMMENT
<b>Car parking for clients</b> Adequate car parking is provided, or available, for brothel clients.	Provide 1 car parking space on the brothel premises for each room in the brothel.	Complies. Five car parking spaces are required because 5 rooms are proposed for prostitution. In total, nine

<sup>12</sup> The code has no item 6.

		customer car parking spaces will be provided.
<p><b>Car parking for staff</b> Adequate secure car parking is provided, or available, for brothel staff.</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.	Complies. The maximum number of staff is eight. Five secure staff car parking spaces have been provided with access to the building.
<p><b>Vehicular access</b> The brothel is safely accessed by vehicular traffic.</p>	<p>Locate vehicular ingress and egress to allow –</p> <p>(a) vehicles to enter and exit the premises in forward gear; and</p> <p>(b) if the brothel shares road access, parking areas or pedestrian areas with land used for other purposes – parking, vehicle manoeuvring and pedestrian movement for the brothel to be undertaken without adversely affecting the safety of traffic using the land.</p>	<p>Complies. The existing and approved vehicular arrangements to the site will be used.</p> <p>N/A</p>
<p><b>Lighting</b> External lighting for the brothel is designed to ensure the safety and security of brothel staff and clients without adversely affecting the amenity of adjoining premises.</p>	<p>Provide external lighting for the brothel that –</p> <p>(a) is static; and</p> <p>(b) has no characteristic indicating the premises are used for a brothel; and</p> <p>(c) facilitates surveillance; and</p> <p>(d) is hooded and directed downwards.</p>	<p>It is proposed that the car parking area will be adequately lit without highlighting the nature of the premises and external lighting will comply with the code. Conditions will be imposed to comply with this requirement.</p>
<p><b>Sign</b> Sign for the brothel is compatible with the amenity of the locality.</p>	<p>Comply with each of the following requirements –</p> <p>(a) only 1 sign is displayed for the brothel;</p> <p>and</p> <p>(b) the surface area of the sign is not more than 1 m<sup>2</sup>; and</p> <p>(c) the sign displays only the name of the licensee and the registered business name of the brothel;</p> <p>(d) the sign does not display words or images that are sexually explicit, lewd or otherwise offensive; and</p> <p>(e) the sign is affixed to the brothel.</p>	<p>The Applicant states that signage will be in accordance with the code and to Council's approval.</p> <p>A condition will be imposed to ensure compliance with this requirement.</p>

<p><b>Loitering</b> The design of the brothel discourages loitering outside the premises.</p>	<p>Provide a reception or waiting area at the brothel for use by brothel clients.</p>	<p>Two private waiting areas and a client television area have been provided.</p>
<p><b>Appearance</b> The brothel premises are unobtrusive in appearance.</p>	<p>Ensure the colours and materials for the brothel premises are unobtrusive.</p>	<p>Alterations are proposed to the external appearance of the building to replace existing windows and doors with recessed panels and lighting. Conditions are proposed to ensure that colours and materials for the brothel premises are unobtrusive and requiring plans be submitted to Council prior to making an application for a Development Permit for Building Works.</p>
<p><b>Entrances</b> The staff and clients of the brothel are provided with a secure environment within the brothel premises in the vicinity of each staff or client entrance to the brothel.</p>	<p>Locate the staff and client entrances to the brothel in positions that facilitate surveillance.</p>	<p>Separate staff and customer car parking is provided. The staff has direct access to the building from the car park. The customer entrance is readily identifiable from the car park. Security cameras will be installed to comply with the Prostitution Regulation 2000. Officers from the Prostitution Licensing Authority inspect the premises to ensure compliance with security requirements.</p>
<p><b>Brothel siting and design</b> The brothel premises are sited and designed in a way that is compatible with the character or intended character of the locality.</p>	<p>Comply with the requirements about the character of the locality under a planning instrument, including boundary set-back, building height and bulk, and landscaping.</p>	<p>The premises can comply with the Part 8 Industrial Development Controls and Local Planning Policy No. 3 (Design Guidelines for Industrial and Commercial Developments) of the Planning Scheme and is generally compatible with the character of the locality.</p>
<p><b>Infrastructure</b> The brothel premises are adequately serviced by infrastructure</p>	<p>Comply with the requirements for infrastructure under a planning instrument applying to the locality, including the requirements to connect to sewerage and water.</p>	<p>Complies. All applicable services are available.</p>

”

20. Ms. Usher concluded in the following terms:

“The location of the proposed brothel complies with the Prostitution Act and can comply with the requirements under the Prostitution Regulation 2000. It is considered that the appearance and layout of the proposed brothel is discreet and unobtrusive and would have little or no detrimental impact on the amenity of the area. Approval is recommended with relevant conditions.”

21. On the basis of the opinions and factual statements made by Ms. Usher, I am satisfied that the proposal either satisfies the requirements of the Code or may, by appropriate conditions, be made to comply. Ms. Usher’s conclusions are supported by my own observations made by reference to the appellant’s material including the plans submitted with the application for development approval. The existence of the previous approval

for a material change of use for a brothel also provides comfort in respect of these conclusions.

22. My preliminary decision in this matter was dated 9 December 2004 and issued to the parties on or about that date. My preliminary decision was to the effect that the appeal should be upheld and that the application for development approval for a material change of use for a brothel should be approved subject to certain conditions which were set out in the decision and the reasons for the preliminary decision.<sup>13</sup> I took those conditions from Ms. Usher's recommendation contained in her report. In doing so, I stated that I was aware that ground 4 of the appeal complained that the appellant had no relevant input into the conditions. I acknowledged that the content of those conditions may well be subject to submissions by the appellant, in particular, upon receiving the preliminary decision. I requested that, if there was to be a substantial dispute over aspects of the conditions, the parties have discussions about the merits of that dispute and resolve as many of those disagreements as possible. I also requested that the parties, in their respective submissions, attempt to define the issues concerning any dispute that remained. To assist that process, I included, in my preliminary decision, the following directions:
- (a) That the appellant and the respondent confer on or before 4pm on Thursday, 23 December 2004 concerning any disputes in respect of the conditions contained in the preliminary assessment decision;
  - (b) That the appellant and respondent file and serve their respective submissions in response to the preliminary decision on or before 4pm on Friday, 14 January 2005;
  - (c) That the appellant and the respondent file and serve any submissions in reply on or before 4pm on Friday, 21 January 2005.
23. I received short submissions from the appellant's solicitors dated 11 January 2005. No primary submissions were received from the respondent. There was no advice from the parties as to whether the direction to confer had been complied with nor whether the parties had managed define the differences between them at all. No submissions in reply were received from the respondent.
24. The submissions of the appellant did, however, address three aspects of the conditions set out in the preliminary decision which affected six of the conditions so proposed.

#### **Issues concerning the disputed conditions**

25. In the preliminary decision, condition 2.2 read as follows:

“2.2 The existing gate at the entrance to the site shall be removed to allow access to the site at all times.  
*To be complied with prior to the commencement of the use.*”

26. The submission of the appellant stated that removal of the gates might encourage vandalism and that other industrial buildings in the locality were not prevented from having gates in place.
27. In the light of the uncontested submission, neither performance criteria 8 (appearance) nor 11 (character) would seem to justify the condition objected to. Accordingly, I am disposed to delete it from the conditions for the purpose of my decision. Since I published the view contained in this paragraph, the appellant has indicated in

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<sup>13</sup>

The conditions were taken from Ms. Usher's draft conditions contained in her report.

correspondence a willingness to replace the existing gate with a new gate in order to obtain a better overall appearance for the premises.<sup>14</sup> It seems unnecessary to change my foreshadowed deletion of condition 2.2. The approval of the appearance of the new gate will form part of the overall approval of the appearance of the premises required by condition 6.1.

28. The second submission related to condition 6.3 which read as follows:

6.3 Building surfaces and fencing shall be treated with anti graffiti paint.  
*To be complied with prior to building works approval.*"

29. Performance criterion 8 requires that the brothel premises are unobtrusive in appearance. The prescribed acceptable solution is to ensure that the colours and materials for the brothel premises are unobtrusive. It seems to me that condition 6.3 might reasonably be seen to be part of the prescribed acceptable solution in that it is directed to **ensuring** that the colours of the brothel remain unobtrusive during the period of its operation not just when the original paint job is carried out. However, the condition may be unreasonable in its requirements if applicable to all fencing and the whole building. Accordingly, I am inclined to the solution that was put forward by both parties in *Springwood Development Pty Ltd v Logan City Council (no.1)* ("*Springwood Developments no.1*") where the parties agreed that only that part of the building which faced the road at the front of the building up to a height of 2 metres need, for the purpose of the performance criterion be painted with anti-graffiti paint. The draft condition will be amended to that extent.
30. The final submission related to conditions 2.1, 3.5, 6.1 and 8.4. Each of these proposed conditions require approval by the respondent's Director of Development, Health and Environment. The conditions relate, respectively, to suitable access from Magnesium Drive; suitable access and egress for the purpose of the respondent's refuse contractors; unobtrusive building colours and materials; and continued maintenance of landscaping. In *Springwood Developments no.1*, I considered requirements contained in conditions which included approval by officers after construction of the development. As pointed out in those reasons, one concern in respect of such conditions is the general legal requirement that conditions be sufficiently certain.<sup>15</sup> A condition will not be held to be unlawful for uncertainty if the person giving the subsequent approval is applying clear objective standards the application of which will, necessarily, achieve agreement among those who apply such standards.<sup>16</sup> In *Springwood Developments no.1*, I held that, in the case of a signage clause, a condition requiring subsequent approval of signage was authorised by the code even where it would, otherwise, be argued that the condition was uncertain. Of the conditions objected to, that concerning landscaping may be of a kind where truly objective criteria for application may not be able to be set down. The other conditions may or may not fall into that category.<sup>17</sup>
31. In my earlier version of these reasons, I gave the parties a further opportunity to confer. I was satisfied that the draft conditions addressed matters that are important to compliance with the code. However, I was concerned that they could be drafted in a way that involves a greater degree of objectivity in the subsequent approval process or,

<sup>14</sup> Letter from appellant's solicitors to respondent dated 4 February 2005.

<sup>15</sup> *King Gee Clothing Company Pty Limited v The Commonwealth* ("*King Gee*") (1945) 71 CLR 184; *Mt Marrow Blue Metal Quarries Pty Ltd v Moreton Shire Council* ("*Mount Marrow*") [1995] QPLR 182.

<sup>16</sup> *King Gee Clothing Company Pty Ltd v The Commonwealth*, above, at 198, per Dixon J.

<sup>17</sup> This is the sort of problem which was sought to be avoided by the directions requiring the parties to confer about disputed conditions to seek to narrow the issues.

at least, expressly related the subsequent approval to the code criterion to which the condition relates. I suggested that, if the parties, or failing agreement between the parties, the appellant could provide draft conditions that ensured compliance with the code but, otherwise, reduced the subjective elements of any subsequent approval process by laying down objective criteria to which the respondent's Director of Development, Health and Environment must have regard, I would consider including those draft conditions in my decision when finalising it. The four conditions upon which I sought the further input were conditions 2.1, 3.5, 6.1 and 8.4.

32. I have now received further submissions from both parties. The respondent local government submitted, generally, that the conditions should not make any reference to a requirement that council form its opinions as to the satisfaction of condition requirements on the basis of reasonableness. Accordingly, it was submitted that the conditions should remain as originally drafted.<sup>18</sup>

33. The appellant advocated an approach that arbitrariness and subjectivity in the condition could be minimised by including in the conditions a reference to the paragraph of the code in the PR to which the condition relates.<sup>19</sup> I am of the opinion that such an approach is appropriate and satisfies the concerns that moved me to raise these issues. While conditions drafted in the way suggested by the appellant do not, of themselves, meet the general agreement standards of *King Gee* and *Mount Marrow*, this failure can be seen to be authorised by the Code pursuant to which the conditions are set. I propose to adopt that approach to those conditions and have done so in the decision set out below.

34. The parties have had further discussions about the original draft condition 2.2 which

(1) That the appeal be upheld;

(2) That the application for development approval for a material change of use for a brothel be approved and a development permit for a material change of use for a brothel be granted, subject to the following conditions, and the applicant and the Prostitution Licensing Authority be advised accordingly. The said conditions are:

1. **SITE PLANS**

1.1 The development of the site shall be in accordance with Sheets 1 – 4 of Plan No. W12-1 prepared by Kodes Drafting and dated December 2003 except as altered by this approval.

1.2 Plans showing the architectural treatment, materials, colour scheme and entrance identification of the building shall be submitted to the Director of Development, Health and Environment for approval.

2 **ACCESS**

2.1 Access to the site shall be gained from Magnesium Drive to the standards and satisfaction of the Director of Development, Health and Environment having regard to column 2 of performance criterion 3 of the code contained in schedule 3 of the *Prostitution Regulation* 2000.

*To be complied with prior to the commencement of the use.*

~~2.2 The existing gate at the entrance to the site shall be removed to allow access to the site at all times.~~

~~*To be complied with prior to the commencement of the use.*~~

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<sup>18</sup> Letter dated 21 February 2005 to the Registrar.

<sup>19</sup> Submissions dated 2 March 2005.

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### **CARPARK**

- 3.1 14 off-street carparking spaces laid out in accordance with Sheet 1 of 4 Plan No. W12-1 prepared by Kodes Drafting and dated December 2003 shall be provided for both customers and employees. Such spaces shall be laid out, paved, linemarked, signposted, drained and maintained in accordance with Council's Development Manual and current Local Planning Policy No 21 (Traffic Generating Developments) and Australian Standard 2890.1 and Australian Standard 2890.2  
***To be complied with prior to the commencement of use.***
- 3.2 Provision shall be made for the following:-
- 3.2.1 1 carparking space for disabled people.
- 3.2.2 carpark lighting.  
***To be complied with prior to the commencement of use.***
- 3.3 The development shall comply with Council's Local Planning Policy No 21 (Traffic Generating Developments) and Australian Standard 2890.1 and Australian Standard 2890.2  
***To be complied with prior to the commencement of the use.***
- 3.4 The staff car park shall be fenced and secured with entry available through a keyed or remote opening system to staff members only.  
***To be complied with prior to the commencement of the use.***
- 3.5 Suitable ingress and egress shall be provided to allow Council's refuse contractors provision for on-site collection to the satisfaction of the Director of Development, Health and Environment having regard to column 2 of performance criterion 3 of the code contained in schedule 3 of the *Prostitution Regulation 2000*.  
***To be complied with prior to the commencement of the use.***

4

### **LIGHTING**

- 4.1 External lighting shall:
- 4.1.1 be static;
- 4.1.2 have no characteristics indicating that the premises are used for a brothel;
- 4.1.3 facilitate surveillance;
- 4.1.4 be hooded and directed downwards.
- 4.2 All lighting shall comply with Section 11.9 (Lighting Nuisance) of Council's Planning Scheme.  
***To be complied with prior to the commencement of the use.***

5

### **SIGNS**

- 5.1 On-premises signage shall be restricted to one sign complying with the following requirements:-
- 5.1.1 the surface area of the sign shall not exceed 1m<sup>2</sup>;
- 5.1.2 the sign shall display only the name of the licensee and the registered business name of the brothel;
- 5.1.3 the sign shall not display works or images that are sexually explicit, lewd or otherwise offensive;
- 5.1.4 the sign shall be affixed to the brothel.  
***A development permit – operational works for on-premises signage shall be obtained prior to the commencement of the use and the erection of any signage on the site.***
- 5.2 No bunting or streamers shall be displayed on the site.

## 6 APPEARANCE

- 6.1 Building colours and materials shall be unobtrusive to ensure that the brothel does not have a dominant appearance and shall be approved by the Director of Development, Health and Environment having regard to performance criterion 8, column 2 of the code contained in schedule 3 of the *Prostitution Regulation 2000*.  
***To be complied with prior to building works approval.***
- 6.2 The outdoor staff area shall be fully screened with a 1.8 metre high screen fence.  
***To be complied with prior to the commencement of the use.***
- 6.3 Building surfaces and fencing shall be treated with anti graffiti paint. This condition is limited to that part of the building (or fencing) which faces Magnesium Drive and is limited to that part of that face of the building (or fence) below 2 metres above the surface of the ground at that point.  
***To be complied with prior to building works approval..***

## 7 ENTRANCES

- 7.1 The client entrance to the building shall be clearly identified and a separate staff entrance shall be provided to the satisfaction of the Prostitution Licensing Authority.  
***To be complied with prior to the commencement of the use.***

## 8 LANDSCAPE PLAN/WORKS

- 8.1 A landscape plan and documentation, prepared by a corporate member of the Australian Institute of Landscape Architects shall be submitted to Council for approval as part of a development application for Operational Works – development permit. The landscape plan and documentation shall be prepared in accordance with the provisions of Council’s Development Manual and shall include:
- 8.1.1 Carpark landscape works including landscape areas and shade trees in accordance with Section 2.11.5 of Council’s Development Manual.
- 8.1.2 Existing landscaped areas, including a landscaped area a minimum of 3 metres in width, exclusive of accessways, along the Magnesium Drive frontage of the site. Landscape works are to be at footpath level.
- 8.1.3 Landscape areas at natural ground level except where it is proposed to import soil with suitable retaining works.
- 8.1.4 An automatic inground irrigation system.
- 8.1.5 The retention of existing healthy trees and shrubs on the site.
- 8.1.6 A type 2 concrete wall, 0.15 metres minimum height, or other approved barrier erected around any landscaped area.
- 8.1.7 An outdoor recreation area for staff fully screened with a 1.8 metre high fence.
- 8.2 Landscaping along Magnesium Drive is to be located behind any solid fencing.
- 8.3 The landscape works shall be provided on site in accordance with the approved landscape plan and shall include:
- 8.3.1 Established maintenance for a minimum of 12 weeks following Practical Completion as outlined in Council’s Development Manual.  
***To be complied with prior to the commencement of the use.***
- 8.4 Landscape works shall be subject to ongoing maintenance to the satisfaction of the Director of Development, Health and Environment having regard to column 2 of performance criterion 11 of the code contained in schedule 3 of the *Prostitution Regulation 2000*.

8.5 Footpath tree planting along the street frontage of the site shall be provided in accordance with Council's Development Manual.

8.5.1 All trees shall have a minimum container size of 25 litres.

8.5.2 Tree species shall be as approved by the Assessment Manager.

8.5.3 Tree guards shall be installed around trees to prevent theft, vandalism, or accidental damage.

*To be complied with prior to the commencement of the use.*

## 9 GENERAL ENGINEERING CONDITIONS

9.1 The developer shall be responsible for the full cost of any alteration necessary to electricity, telephone, water mains, sewer mains, stormwater drainage systems or easements and/or other public utility installations resulting from the development or from road and drainage works required in connection with the development.

## 10 GENERAL CONDITIONS

10.1 Street numbers shall be displayed not less than 300mm in height. Numbers shall be illuminated.

*To be complied with prior to the commencement of the use.*

10.2 The site shall be maintained in a clean and tidy state.

10.3 A screen fence of approved materials shall be constructed to adequately screen garbage disposal areas from public view.

*To be complied with prior to the commencement of the use.*

10.4 The use shall be conducted in such a manner as not to interfere with the amenity of the neighbourhood by reason of noise, vibration, smell, fumes, vapour, steam, soot, ash, dust, waste water, waste products, grit, oil or otherwise.

10.5 This approval is limited to five rooms for prostitution as defined in the *Prostitution Act 1999*.

## FURTHER ADVICE TO APPLICANT

**In relation to the application, the applicant be further advised.**

1. Authorised persons of the Council may enter the premises the subject of this permit at any reasonable time to ascertain whether the above conditions have been complied with (and/or whether the above requirements have been carried out).
2. The development of the site shall comply with the provision of Council's Local Laws, Local Planning Policies, Planning Scheme and Development Manual to the extent they have not been varied by this approval.
3. All site works and earth works shall be carried out in accordance with Council's Development Manual.
4. Disabled persons' access shall be in accordance with Section D3.2 of the Building Code of Australia (B.C.A.).
5. All works shall be carried out in accordance with the *Workplace Health & Safety Act 1989*.
6. Approval is required to be made for demolition of existing building work.
7. The currency period for this approval is in accordance with Section 3.5.21 of the *Integrated Planning Act 1997*.

**The applicant and owner be further advised:**

It is the owner's and occupants responsibility under the *Environmental Protection Act 1994* to advise the Chief Executive of the Environmental Agency, of any Notifiable Activity conducted on the site or contamination or suspected contamination which may cause a hazard to human health or the environment within 30 days of becoming aware of the operation of a Notifiable Activity on the site or of any contamination or suspected contamination. The Chief Executive, pursuant to the Act, is empowered to require that the development complies with the provisions of the Act, including the preparation of site investigation reports and if necessary the remediation of the site at the owners expense.

**FURTHER DEVELOPMENT REQUIRED UNDER IPA TO CARRY OUT DEVELOPMENT**

- Operational Work (Landscaping and Signage)
- Plumbing and Drainage
- Building Works

**FURTHER LICENCE TO CARRY OUT THE USE:**

- A licence shall be obtained from the Prostitution Licensing Authority.”

35. I have now concluded the matters reserved for further consideration and submission and will proceed to have these reasons and the decision published.

36. In accord with the Act,<sup>20</sup> each party to the appeal must bear its own costs and it is unnecessary to make any order in that regard.

**Stephen Keim**  
**Independent Assessor under the Prostitution Act**  
**25 March 2005**

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<sup>20</sup> Section 64R.