

ATTACHMENT 3

Between

AART BRONS

Applicant

And

CAIRNS CITY COUNCIL

Respondent

Filed on 3 August 2004

Filed by: Morrow Petersen (on behalf of the Applicant)
Service Address: Ground Floor, Cairns Corporate Tower, 15 Lake Street,
Cairns 4870
Phone: 07 4052 1199
Fax: 07 4052 1711

ORIGINATING APPLICATION

Aart Brons of C/Planning Far North, Level 12, Cairns Corporate Tower, 15 Lake Street, Cairns applies to the Planning and Environment Court at Cairns, for the following declaration and orders:

1. a declaration that the development the subject of this application, namely the establishment of a licensed brothel on land described as Lot 7 on SP101286, Parish of Cairns, is code assessable development pursuant to Schedule 1 of the *Integrated Planning Regulation 1998* (the Regulation); and
2. such further or other orders as the Court may deem appropriate.

Originating Application
Filed on behalf of the Applicant
Form PEC-3

Morrow Petersen
Ground Floor, Corporate Tower
15 Lake Street, Cairns Queensland 4870
Ph: (07) 4052 1199
Fax: (07) 4052 1711

Ref: TLF:204091

The grounds relied on are:

1. By application dated 19 January 2004 the Applicant applied to the Respondent for the issue of a development permit for a material change of use for the purposes of a licensed brothel on Lot 7 on SP101286, Parish of Cairns.
2. By letter dated 26 February 2004 the Respondent issued an acknowledgment notice stating that the subject application was impact assessable and including the Prostitution Licensing Authority (PLA) as a referral agency. On the same date, the Respondent referred the subject application to the PLA.
3. By letter dated 10 March 2004 from its consultants, Planning Far North, to the Respondent, the Applicant submitted that the subject application was code assessable rather than impact assessable.
4. By letter dated 12 March 2004, the Chair of the PLA, the Honourable WJ Carter QC, wrote to the Respondent, in relation to the subject application, stating that:

"the application of Section 63A to the land in question should properly lead to the conclusion that the land is in "an industrial area" and the application is therefore code assessable".
5. By letter dated 15 March 2004, the Respondent issued an information request to the Applicant concerning the subject application.
6. By letter dated 2 July 2004 from its solicitors, Morrow Petersen, to the Respondent, the Applicant again submitted that subject application was code assessable rather than impact assessable.
7. On 22 July 2004 the Respondent at its ordinary meeting resolved that the application was impact assessable and required public notification.
8. The Applicant was notified by letter dated 26 July 2004 received on 29 July 2004 of the Respondent's decision.
9. The site of the proposed licensed brothel is in an "industrial area" as defined in section 63A(3) of the *Prostitution Act 1999*, being:

"land, however described, that is designated in the 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".*

10. Schedule 1 of Regulation provides that an application for a material change of use of premises for a licensed brothel in an industrial area requires code assessment.

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Solicitors for the Applicant
Morrow Petersen

NB. This application is to be heard by the Court at Cairns on a date during the next sittings of the Court commencing 30 August 2004/the day of 2004 at am/pm.

If you wish to be heard on this application you must within ten business days of receipt of this application, file an entry of appearance in the Registry of the Court. The entry of appearance should be in the form set out in form PEC-6 for the Planning and Environment Court.

PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Brons v Cairns City Council*

PARTIES: **AART BRONS**
(Applicant)
v
CAIRNS CITY COUNCIL
(Respondent)

FILE NO'S: 340 of 2004

DIVISION:

PROCEEDING: Application

ORIGINATING COURT:

DELIVERED ON: 10 September 2004

DELIVERED AT: Cairns

HEARING DATE: 3 September 2004

JUDGE: Skoien SJDC

ORDER: **Declaration made as sought**

CATCHWORDS: Whether proposed brothel site in an industrial area.

COUNSEL: Mr S Ure for applicant
Ms Djohan (solicitor) for respondent

SOLICITORS: Morrow Petersen for applicant
MacDonnells for respondent

- [1] This is an application for a declaration that a development application made by Mr Brons for the establishment of a legal brothel in Cairns is code assessable development.

The law

- [2] Schedule 1 of the *Integrated Planning Regulations* states that an application for a licensed brothel is code assessable if the site is in an industrial area.

- [3] "An industrial area" is defined in Section 63A(3) of the *Prostitution Act 1999* (as amended) as follows:-

"...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 in 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"*

The site

- [4] The site is a regular shaped allotment located at 11 Cava Close, Bungalow. Cava Close is a cul de sac which provides access to a fairly recently developed industrial subdivision of 14 lots of which only 3 lots have yet been built on. The site has an area of 1000 m², has frontage to Cava Close of approximately 33 metres, and is vacant. It is located close to the cul de sac head and is beside the Chinaman Creek drain along the side boundary. It is included in the light industry zone of the planning scheme and is identified for industrial purposes in the strategic plan. Under the draft Cairns Plan it is included in the industry planning area.

The locality

- [5] The site is located to the south-west of the Cairns central business district (CBD), on the fringe of the primary industrial area of Portsmith. Development in the immediate vicinity is industrial in nature.
- [6] To the north east the site adjoins a vacant allotment which is also included in the light industrial zone. To the west the site fronts Cava Close. To the east is the Cairns City Council cleansing depot and dog pound located at the eastern end of

McCoombe Street. The depot is zoned special purpose because of the Council ownership of the land. However, the use established on the site is an industrial use and it is unlikely that anything but an industrial use will ever be established there.

- [7] To the south and west, the site is adjacent to a large drainage reserve which accommodates a concrete drain which discharges into Chinaman Creek and adjacent low lying mangrove areas. In fact, there is a narrow allotment which is a reserve for local government (drainage) purposes, the trustee of which is the Council, which further separates the site from the concrete drain and the land to the south and west. There is no vehicular or pedestrian access over the drain.
- [8] Further to the south and west (that is, over the drain from the site) are large parcels of land which accommodate the Parks retirement village and the Earlville pony club, which are surrounded by undeveloped bushland and low lying areas. These two land uses, whilst being proximate to the site are physically separated from the site (and hidden from it) by bushland and the large concrete drain. In addition, the retirement village and pony club are orientated toward and have pedestrian and vehicular access to and from Telford Street/Ishmael Road, Earlville, that is, away from the site. There is no opportunity for direct pedestrian or vehicular access to the site from the retirement village or the pony club
- [9] To the north west a large site contains the Australian Post business centre which is in effect, a freight depot. The centre is currently zoned Special Facilities for its site specific use. Its current use could be said to be light industrial and it is proposed to be included in the Industry Planning Area under the draft Cairns Plan.
- [10] On a wider perspective, land to the north and east is predominantly developed for industrial purposes or is covered by mangroves and creek systems. Land to the west and south has been developed for a mix of commercial and residential uses.
- [11] The locality is unusual in that of the relevant local roads, McCoombe Street, Scott Street and Marshall Street are not "through" roads, because of constraints imposed by creeks, drains and swamps. Therefore vehicular access in and out of the area which I have described is limited to McCoombe Street and Dalton Street, with McCoombe Street being the most direct route and carrying the largest volumes of

traffic. McCoombe Street has a 40 metre wide road reserve which can readily accommodate the industrial and commercial traffic frequenting the area.

- (12) The unformed part of Scott Street will ultimately be constructed and provide a connection to McCoombe Street. Scott Street is identified on the road hierarchy overlay map of the draft Cairns Plan as a collector road with future connection between McCoombe Street and the consolidated industrial area to the north east. This connection will ultimately allow direct access to this industrial section of McCoombe Street (and the site) from Scott Street and the adjacent industrial area and from the CBD located further to the north east. No date has been set for that roadwork to occur.

The Planning Scheme for part of the City of Cairns

- (13) Under the Strategic Plan the site and surrounding area is included in the industry preferred dominant land use designation.

"This designation includes those areas which are used or intended to be used for industrial purposes. The major industrial area is located at Portsmith, generally to the south of Spence Street and includes all Port facilities except those related to tourist ferry vessels and cruise liners.

It is intended that the areas designated for industry should be used primarily for industrial purposes and that the development of commercial and retail uses within these areas should be limited."

- (14) Under Development Control Plan 2 the site and surrounding area is identified within Precinct 8, which includes, primarily, all land zoned for industrial purposes. Under Development Control Plan 5 – Cairns Port and Major Industrial Area, the site is identified in the light/service industry designation. Development within this designation is intended to provide a transition area between the commercial uses located adjacent to Mulgrave Road and the more heavy industrial uses located to the south of Hartley Street.

Zoning

- (15) The site is included in the light industry zone. The intent of the light industrial zone states:

"The intent of the light industry zone is to provide for localized, small scale and non-offensive industrial activities which can be located in proximity to commercial or business uses and which generally do not require large sites and can provide a buffer to other industrial zones where the scale of industrial activity is of a greater magnitude "

- [16] I accept the view expressed by the applicant's consultant town planner, Ms Taylor that in town planning a licensed brothel is more appropriately located in a light industrial area, as opposed to a heavy industrial area where permitted land uses can include large scale, often noisy activities such as concrete batching plants, electric welding works, a foundry, panel beaters, saw mills, etc.

The Draft Cairns Plan

- [17] Under the draft Cairns Plan the site is included in the Inner Suburbs District and the site and the surrounding area are included in the Industry Planning Area.
- [18] The Australia Post business centre and a large vacant block adjoining it to the west have also been included in the Industry Planning Area, thereby consolidating the industrial land use designation around the site.
- [19] The boundary of the Inner Suburbs District is close to the site and is adjacent to the eastern boundary of the Council cleansing depot site. The adjacent district is in the Portsmouth – Woree Industrial District.
- [20] I accept Ms Taylor's view that when viewed together the two District Plans clearly identify the extent of the major industrial area of Cairns. The site of the proposed licensed brothel is within this industrial area made up by the entire suburb of Portsmouth and part of the suburbs of Bungalow and Woree.

Area

- [21] On 18 October 2002 His Honour Judge White heard an application for a declaration in the same terms as that before me. Although the *Prostitution Act* had by then been amended to include s 63A (para [3] above). Section 142 of the *Prostitution Act* required him to decide the application on the law as it stood before the amendment. So, while His Honour made some remarks on the possible meaning of the s 63A.

they were of course *obiter dicta* and I would think made without the benefit of hearing considered argument on it by counsel.

- [22] His Honour, importantly, had before him no statutory definition of "industrial area" and thus looked at the question on first principles. In doing that he was prepared to take into account the presence of residences to the west of the site in McCoombe Street and the effect of brothel vehicular traffic on them. While he did not use the expression "area of influence" it seems to me that his decision (against making the declaration) was based on a conclusion that the residences would lie within the area of influence of the brothel at least from the effect of the traffic on the amenity of the residential area. As the law then stood I would not be critical of that conclusion of fact.
- [23] However in my opinion the inclusion in the *Prostitution Act* of s 63A has made an important change to the central questions in this application. There are three questions to be answered. The first is, is the site of the proposed brothel designated as industrial in a planning scheme or other planning instrument under IPA? The answer to that, here, is clearly "yes". Although the current designation was conferred by a pre-IPA scheme, that scheme continues to have effect as an IPA scheme (see IPA, s 6.1.4(1)). The second question is whether there is a relevant tract of land which is designated as industrial (or is predominantly industrial in character) and which is of sufficient size as to constitute, as a matter of fact, an industrial area. The third question is whether, as a matter of fact, the site is in, forms part of, that industrial area.
- [24] The second question is not one which involves question of the effect which the proposed development may have on the amenity of a nearby residential area. It is simply a matter of fact which can be answered by looking at maps forming part of the planning scheme. The answer to the second question is that there is a relevant industrial area, the area which I have identified in paras [5]–[7], [9]–[10].
- [25] The third question again does not raise questions such as the amenity of a nearby residential area. It involves a study of the site and its locality to determine whether the site can truly be said to be "in an industrial area" as Schedule 1 of IPA Regulations requires. This necessitates a decision, as a fact, whether the site is

sufficiently within the boundaries of the industrial area which I have identified as to be clearly in that industrial area. Even though a site is actually within the boundaries of the overall identified industrial area, it could be that it lies in an identifiable discreet area which has a dual character, part residential, part industrial. In that case the further decision would have to be made whether the area was "predominantly industrial in character". (see s 63A).

- [26] At the outset, I dismiss any suggestion that the relevant area in which the brothel site stands includes the retirement village or the pony club. They are admittedly quite close to it as the crow flies. The nearest boundary of the land on which the retirement village stands is a little less than 100 metres from the site; the nearest boundary of the pony club is a little less than 200 metres from the site. But as a matter of fact the concrete drain presents as an impassable barrier to vehicles and pedestrians. The heavy vegetation acts as a complete visual barrier. The village and the club face away from the site.
- [27] On the site side of the concrete drain there is no residence, nor land used for residential purposes, within 300 metres of the site as the crow flies. That is the distance from the site of the closest residence in McCoombe Street. Within that radius there is no realistic prospect of land being used for other than industrial purposes. The planning scheme instruments to which I have referred designate all of this area as industrial. The current zoning, the current strategic plan and the proposed Cairns Plan make that clear. And to the north east, east and south east are much larger stretches of land which is industrial now and/or will be industrial. The only residential land relevant to the identification of the relevant area of the proposed brothel is that in McCoombe Street.
- [28] Does the residential area of McCoombe Street form part of the area of the site? If it did, then I would have to decide the predominant character of that area. As the crow flies the residential area of McCoombe Street begins more than 300 metres to the west of the site. On my estimate, by most direct road access, the distance is about 500 metres. The site itself would not be visible to users of McCoombe Street as it lies, I estimate about 200 metres from the intersection of McCoombe Street and Cava Close. So there is a considerable physical separation of the brothel site from the closest McCoombe Street house.

[29] I am unable to conclude that the area of the brothel site extends to include any residence in McCoombe Street. Indeed, I think it is helpful to ask myself, would the residents of McCombe Street, if asked to describe the "area" in which they live, have mental reference to the obvious industrial area commencing about 300 metres to the east and to the industrial traffic that passes them to and from that area, and answer "we live in an industrial area"? I think not.

[30] My decision on the third question is therefore that the relevant area which contains the site is not, even in part a residential area. It is an industrial area, appropriately designated by the planning instruments.

[31] I should record that I was told that some residents of McCoombe Street make use of some of the vacant industrial land near the site as a recreational area. That does not convert industrial land into a residential area or part residential area. It simply means that the residents are making opportunistic use of land which happens to be vacant but which is, undeniably, industrially designated land.

Conclusion

[32] I declare that the development the subject of this application, namely the establishment of a licensed brothel on land described as Lot 7 on SP 101286, Parish of Cairns, is code assessable development pursuant to Schedule 1 of the *Integrated Planning Regulation 1998* (the Regulation).