APPENDIX 4:

LEGAL ADVICE FROM BRIAN PRESTON SC.

PLANNING LAWS AND BROTHELS:

CONSOLIDATED MEMORANDUM OF ADVICE

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INTRODUCTION

1. This consolidated advice concerns the current position of environment and planning law in New South Wales with respect to the use of premises as brothels. It provides an analysis of relevant provisions of the *Environmental Planning and Assessment Act 1979* (NSW) ("**EPA Act**"), environmental planning instruments created under that Act, the *Disorderly Houses Act 1943* (NSW) ("**DH Act**"), and decisions of the Land and Environment Court ("**LEC**") and Court of Appeal.

2. In particular, it considers the following issues:
   (1) definitions of prostitution and brothel;
   (2) evidentiary requirements for establishing that a brothel is in breach of the EPA Act;
   (3) evidentiary requirements for establishing that a brothel is in breach of the DH Act;
   (4) drafting of LEPs to achieve better the objectives of the DH Act and desirable planning outcomes; and
   (5) drafting of conditions of development consent to secure conduct of business in "a discreet, unobtrusive and inoffensive manner".

3. The primary aim is to provide a review of current laws in relation to the regulation and control of brothels, in particular the relationship between, and respective evidentiary requirements of the EPA Act and the DH Act. The advice analyses current approaches to regulating the use and controlling the illegal use of premises as brothels. It suggests practical ways in which consent authorities might utilise the current planning regime in order to permit, to permit with conditions or not permit the use of premises as a brothel. It is intended as a "stand alone" advice which can be used as a toolkit by councils in dealing with brothels within the relevant local government area.

DEFINITIONAL ISSUES

Brothel

4. Proof of the carrying out of development for the purpose of a brothel will depend upon the particular definition of "brothel" in the relevant environmental planning instrument. In the Parramatta local government area, Parramatta Local Environmental Plan 1997 (Brothels) defines "brothels" to mean "premises habitually used for the purpose of prostitution or that are designed for the purpose. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution": see clauses 5-9. This definition is similar to that in section 2 of the DH Act. Section 2 contains the following definition of brothel:

   ***"brothel** means premises habitually used for the purposes of prostitution, or that have been used for that purpose and are likely to be used again for that purpose. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution."*

5. Such a definition requires proof that the premises have not only been used for the purpose of "prostitution", but that such use is habitual.

Prostitution

6. The DH Act contains no definition of prostitution. In *Polnibs Pty Limited v Bankstown City Council* (LEC 6 May 1997) a "point of law" arose in the hearing by an assessor of an appeal against council's refusal of a Development Application ("**DA**") in respect of the use of commercial premises as a "therapeutic massage centre" on the grounds of "an adverse impact on the amenity of the surrounding neighbourhood". It was argued before the assessor that the council would have a responsibility "to ensure that the

premises (if approved as a therapeutic massage centre) were not utilised for other purposes, in particular as a place for prostitution".

7. The question of law was whether the activities proposed to be carried out pursuant to the DA contravened section 16 of the *Summary Offences Act* 1988 and, if so, whether the court was obliged to have regard to such contravention in determining the DA. Section 16 of the *Summary Offences Act 1988* provides:

> "*Prostitution or soliciting in massage parlours etc.*
> *16. A person shall not use, for the purpose of prostitution or of soliciting for prostitution, any premises held out as being available:*
> *(a) for the provision of massage, sauna baths, steam baths or facilities for physical exercise; or*
> *(b) for the taking of photographs; or*
> *(c) as a photographic studio,*
> *or for services of a like nature."*

8. According to Sheahan J, the answer to the question of whether the activities of the "therapeutic massage centre" contravened section 16 was founded on a definition of "prostitution" appropriate to today's circumstances. Such definition could be gleaned from recent authority or from such dictionaries "as are perceived to be most apposite to the era." The description of certain conduct or events as "prostitution" depended clearly on the precise facts in each case. In *Samuels v Bosch* (1972) 127 CLR 517 the High Court made it clear that "sexual intercourse", either as commonly defined, or as defined in s 61H of the *Crimes Act 1900 (NSW), is* not a fundamental prerequisite of "prostitution" (per Barwick CJ at 518, Gibbs J at 524). In *Poiner v Hannes; Ex parte Poiner* [1987] 2 QdR 242 the court held (at 246) that "the aspect of sale or gain is central" and that the word "prostitution" connotes "an aspect of indiscriminate or public offering".

9. In *Polnibs* case above, Sheahan J also referred to the South Australian decisions of *Neilson v S A Police* (1994) 62 SASR 583 and *Begley v Police* (unreported, 24 October 1996) *("Begley No 2"),* an unsuccessful appeal from a decision dismissing an appeal against conviction for prostitution/brothel

offences ((1995) 78 A Crim R 417 *("Begley No 1")).* These cases concerned so-called Thai massage, and whether or not the rubbing of a naked body in a sensual manner against the naked body of a male person, for a fee, and not necessarily involving ejaculation, constituted prostitution. In *Neilson's case,* Matheson J decided (at 590) that the premises were used for the purpose of prostitution: "*[P]rostitution includes the activity with which this case is concerned. It was the offering of a women of herself for a fee as a participant in physical acts of indecency for the sexual gratification of a man.*"

10. In *Begley No 1,* the facts of which involved nude massage and, on occasion masturbation by an employee, Lander J found that an act of prostitution involves the indiscriminate or common offering of the body for the sexual gratification of another for reward. An act of sexual indecency was not required, but there must be physical contact between the person offering the body and the person paying the fee. In line with *Neilson's* case, Lander J held that as "Thai massage" involved naked body contact, it was an "act of prostitution". In the Full Court of the Supreme Court, Doyle CJ held that "the essence of prostitution is the offering of the body for hire for the gratification or satisfaction of sexual appetites".

11. Accordingly, it does not follow that any conduct likely to cause sexual gratification of any type is prostitution; for example, the performance of an erotic striptease or allowing an indecent film of oneself to be exhibited for payment. However in the case of *Polnibs Pty Limited v Bankstown City Council* (above), the combination of the presence in person of the masseuse, physical contact with the client, and physical contact being a significant part of the whole process satisfied Sheahan J that the nude Thai massage in evidence was an act of prostitution.

12. In relation to "habitual", this is an ordinary English word which means "commonly used": see Macquarie Dictionary. Clearly more than a one-off use

of the premises for prostitution is required. There needs to be some regularity or continuity in the use of the premises for prostitution.

THE REGULATORY FRAMEWORK OF THE EPA ACT AND BROTHELS

Introduction

13. Within the environmental planning regime under the EPA Act, a range of environmental planning instruments are available for the regulation of the use of premises as a brothel. Part 3 of the EPA Act contains a series of provisions concerning the making of environmental planning instruments. In section 4 "Environmental planning instrument" is defined as:

> "*a State environmental planning policy, a regional environmental plan, or a local environmental plan, and except where otherwise expressly provided by this Act, includes a deemed environmental planning instrument*".

State Environmental Planning Policies

14. Division 2 of Part 3 of the EPA Act contains provisions concerning the making of a State Environmental Planning Policy ("**SEPP**"). Pursuant to section 37(1), the Director-General of the Department of Urban Affairs and Planning ("**the Director**") may prepare a draft SEPP with respect to "such matters as are of significance for environmental planning for the State", and submit such draft SEPP to the Minister. Alternatively, the Minister may, pursuant to section 37(2), cause a draft SEPP to be prepared by the Director. A SEPP is made by the Governor in accordance with a recommendation of the Minister (section 39(4)).

15. At present, there is no SEPP concerning the use of premises as brothels in New South Wales. It is noteworthy, however, that the phrase "of significance for environmental planning for the State" is a wide concept. There are no matters which the Minister is expressly required to take into consideration when forming his or her opinion: *Leichhardt Municipal Council v Minister of Planning (* 1992) 77 LGRA 402 at 414. Moreover, the Court of Appeal has

found that a SEPP may be limited to a very small area of the State: *Save the Showground for Sydney Inc v Minister* (1996) 92 LGERA 283.

16. The concept of "environmental planning" must, however, relate to the physical environment and the development or conservation of the physical environment. The object of the EPA Act is "to create a system of environmental planning under which decisions on land use and resource management are made within the physical capacity of the environment in order to promote the economic and social welfare of the people in New South Wales": second reading speech of the Hon D P Landa delivered in the Upper House in relation to the EPA Act Bill, *Hansard,* 21 November 1979, Legislative Council, 3345 at 3346.

17. The EPA Act is not a social welfare statute:

> *"The reference in s 5(a)(i) of the Act to the promotion of "the social and economic welfare of the community" is not in itself an object of the Act. Rather it is the desired consequence intended to result from the development with which the objects of such Act are concerned. Such words relate to the betterment of the community as a whole which is to flow from the sound development and planning required by the Act. "*
>
> *Meriton Apartments Pty Ltd v Minister for Urban Affairs and Planning & Or* (2000) 107 LGERA 363 at 374, para 33, per Cowdroy J.

18. Environmental planning certainly involves the laying out of urban areas with due care for the health and comfort and amenity of inhabitants and for efficiency of industrial, commercial and other economic uses: M Wilcox, *The Law of Land Development,* Law Book Company 1967, p 175. This involves ensuring that incompatible uses are separated and compatible uses are grouped together. Hence, industrial uses are usually separated from residential uses. The means is usually by zoning. Issues in relation to zoning are addressed below. At this stage it suffices to say that a concern to ensure compatibility of uses are grouped together is one of environmental planning. Hence, a SEPP could legitimately regulate the zoning and the permissibility

and impermissibility of uses in zonings, being matters that relate to environmental planning. The concern to ensure compatibility of uses can also be of significance for the State. This might be because there is a recurrent problem throughout the State or because particular areas of significance for the State are affected.

19. Hence, it would be permissible for a SEPP to be made to ensure that the use of land and buildings throughout the State for the purposes of a brothel is carried on in a location and in a manner that is compatible with other proximate uses and is not otherwise carried out. This could be done by specifying that brothels are a permissible use with consent in a zone which is considered suitable (such as an industrial or commercial zone) and are prohibited in a zone which is considered unsuitable (such as a residential zone). The SEPP could override any other inconsistent environmental planning instruments, including local environmental plans.

20. There are numerous examples of SEPPs adopting this approach. SEPP 5 permits development for the purpose of any form of housing for older people or people with a disability, despite the provisions of any environmental planning instrument which might have otherwise prohibited such development: cl 10 of SEPP 5. SEPP 45 made mining permissible in certain circumstances, despite provisions in environmental planning instruments which would otherwise have had the effect of prohibiting mining unless certain provisions were satisfied: cl 5 of SEPP 45. Project specific SEPPs, such as SEPP 3 (Castlereagh Liquid Waste Depot), SEPP 7 (Port Kembla Coal Loader), SEPP 31 (Sydney (Kingsford Smith) Airport), SEPP 38 (Olympic Games and Related Projects), SEPP 41 (Casino Entertainment Complex), SEPP 43 (New Southern Railway), SEPP 47 (Moore Park Showground), SEPP 51 (Eastern Distributor) and SEPP 54 (Northside Storage Tunnel), all have the effect of making permissible projects which might otherwise have been

prohibited by other environmental planning instruments, especially local environmental plans.

21. The advantage of this approach in relation to brothel planning would be the promotion of consistency throughout the State.

Regional Environmental Plans

22. Division 3 of Part 3 of the EPA Act contains provisions concerning the making of a Regional Environmental Plan ("**REP**"). Pursuant to section 40(1), the Director may prepare a draft REP "in respect of a region or part of a region" and with respect to such matters as are "of significance for environmental planning for the region ... or ... part [of the region]". Alternatively, the Minister may cause a draft REP to be prepared by the Director, pursuant to section 40(2). Before preparing a draft REP or during the course of its preparation, the Director is required to prepare an environmental study of the land to which the draft REP is intended to apply: section 41. In the preparation of the environmental study and the draft REP, the Director is required to notify each council whose area or part of whose area is situated in the region or part of the region to which the study or draft plan applies, the Local Government Liaison Committee, and such other public authorities as the Director determines: section 45(1). Persons so notified may comment to the Director within 28 days: section 45(4).

23. When a draft REP has been prepared, there follows a period of public exhibition in accordance with section 47. During the period of public exhibition, any person may make a submission in writing to the Director: section 48. The Director is required to cause all submissions to be considered (section 49(1)); and may direct an inquiry to be held by a Commission of Inquiry appointed in accordance with section 119, amend the draft REP, publicly exhibit the amended draft REP with reasons for any alterations, or

cause public notice to be given, during which period public submissions may be made: paras 49(1)(a)-(d). Pursuant to section 50, the Director then submits the draft REP with any amendments to the Minister. Pursuant to section 51, the Minister may make a REP in accordance with the draft submitted, or with such alterations as the Minister thinks fit; require public exhibition where alterations have been made; or decide not to proceed with the draft REP.

24. REPs have been used to address issues such as urban growth, commercial centres, extractive industries, recreational needs, rural lands and heritage and conservation. In principle, a REP could be used in a similar fashion to a SEPP to bring consistency to a particular region, such as the Greater Metropolitan Sydney Region. However, planning for brothels appears to be a State-wide issue. In these circumstances, a SEPP may well be a more appropriate planning instrument than a number of REPs for different regions.

Local Environmental Plans

25. Local Environmental Plans ("**LEPs**") made pursuant to Division 4 of Part 3 of the EPA Act have been increasingly in New South Wales used to regulate the use of premises as a brothel. In particular, since 1996 numerous of Sydney-based local councils have introduced provisions in their LEPs to deal with the positioning of new brothels: see A Ratcliff, "No Sex Please: We're Local Councils!!"(1999) 4 *Local Government Law Journal* 150.

26. Pursuant to section 54 of the EPA, a council may decide to prepare a draft LEP in respect of the whole or any part of the land within its area. Alternatively, pursuant to section 55, the Minister may direct a council to prepare a draft LEP. Where a council decides to prepare a draft LEP, or is so directed by the Minister, the council can prepare an environmental study of the land to which the draft LEP is intended to apply (section 57), but is not required to do so if the draft LEP is to amend an existing LEP, unless the Director directs to the

contrary: section 74(2)(b). In the preparation of any environmental study and the draft LEP, the council is required to consult with public authorities or bodies which may be affected by the plan and, where the draft LEP applies to land adjoining another council's area, that council: section 62.

27. A copy of the draft LEP and a list of the authorities, bodies and other persons consulted is sent to the Director. The Director may issue a certificate that the plan proceed to public exhibition, or direct the council to amend the draft LEP to enable a certificate to be issued: section 65. Where the council receives a certificate pursuant to section 65, there follows a period of public exhibition. During the period of public exhibition, any person may make a submission, and the council may arrange a public hearing in respect of the submission: sections 67 and 68(1).

28. The council is required to take into account all submissions and reports of public hearings, and make alterations it considers necessary to the draft LEP: section 68(3). The council then decides whether to continue with the draft LEP. Despite the seemingly mandatory language of section 68(4), the council may decide not to submit the draft LEP to the Department: *Noroton Holdings Pty Ltd v Friends of Katoomba Falls Creek Valley Inc* (1996) 98 LGRA 335 at 342, 352. If the council decides to continue, it submits to the Director details of all submissions; reports of public hearings; the draft LEP with reasons for any alterations; and a statement as to public involvement, consideration of environmental planning instruments and directions (with reasons for any inconsistency), and reasons for the exclusion from the draft LEP of any matters requiring further consideration but which should not prejudice consideration of the draft LEP, as submitted, by the Director and Minister: section 68(4).

29. At this stage, control of the draft LEP shifts to the Department. Pursuant to section 69, the Director is required to furnish a report to the Minister as to

inconsistency with other environmental planning instruments or ministerial directions, compliance with sections 66, 67 and 68 in relation to public involvement, and any other matters the Director thinks appropriate. Pursuant to section 70, after considering the Director's report the Minister may make a LEP in accordance with the draft submitted, or with alterations relating to matters of significance for State or regional environmental planning, require public exhibition where alterations have been made pursuant to section 68, or decide not to proceed with the draft LEP.

30. A review of recent decisions of the LEC reveals that LEPs concerning, or containing provisions concerning the regulation of brothels have been adopted by *inter alia* Blacktown City Council, Campbelltown City Council, Parramatta City Council, South Sydney City Council and Tweed Shire Council.

31. Whilst LEPs can provide a valuable instrument for regulating the use of premises as a brothel, councils do not have unlimited discretion in relation to the form and content of LEPs. The form and content are governed by the Act. In particular, LEPs may be made for the purposes of achieving any of the objects of the Act (section 24), but not for extraneous objects: *Meriton Apartments Pty Ltd v Minister for Urban Affairs and Planning & Or* (2000) 107 LGERA 363, Cowdroy J. LEPs must also not be inconsistent with other SEPPs or REPs expressed to be paramount, or with Ministerial directions under section 117. There are requirements for public submissions, hearings and consultation with public authorities and other councils, and the consideration by the council in the preparation of the draft LEP. In particular, the Minister has what amounts to an effective veto over the making of an LEP (although the Minister must give directions to the council in relation to a decision not to proceed with a draft LEP: section 70(6)).

Development Control Plans

32. If a council considers it necessary or desirable for one of the reasons specified in section 72(1) of the EPA Act, it may prepare or cause to be prepared a development control plan ("**DCP**"). Those reasons include, *inter alia,* providing more detailed provisions than are contained in the LEP or draft LEP.

33. The format, structure, subject-matter and procedures for the preparation, public exhibition, approval, amendment and repeal of the DCP are as prescribed: sub-section 72(2) of the EPA Act. The prescriptions are in Part 3 of the *Environmental Planning and Assessment Regulation 2000.* Clause 17 of that Regulation states that a DCP may provide for any matter for which a LEP may provide. A LEP may provide for the matters in sections 24 and 26 of the EPA Act. The matters in section 24 relate to achieving any of the objects of the EPA Act. The matters in section 26 include "controlling (whether by the imposing of development standards or otherwise) development' (para 26(1)(b)). The width of these provisions enable a DCP to be made to control development for the purpose of a brothel on land.

34. A DCP must generally conform to the provisions of the LEP or draft LEP which applies to the land to which the DCP applies: section 73(3). However, this does not mean that the DCP cannot provide more detailed provision by regulating development of a certain kind on identified land. In *North Sydney Council v Ligon 302 Pty Ltd [No 2]* (1996) 93 LGERA 23 the relevant LEP, North Sydney Local Environmental Plan, permitted a certain type of development, residential flat buildings, on land with certain zones, special use zones, but contained no development standards with which such development needed to comply, such as a specified numbers of storeys, wall heights, ridge heights, site coverage, availability of sunshine and privacy and floor space ratio. The DCP, however, made such development standards applicable to residential flat buildings in the special uses zone. The Land and Environment Court had held that the DCP was invalid in that it did not conform to the LEP because

the DCP included development standards which the LEP had not included. The Court of Appeal reversed the LEC's decision. Cole JA (with whom Abadee AJA and Meagher JA agreed) held at 30-31 :

> *"The content of development control plans is addressed by s 72. It is to contain 'the more detailed provisions' than are contained in the North Sydney Local Environmental Plan, which council regards as necessary or desirable (s 72(1)J. Generally the development control plan must conform to the North Sydney Local Environmental Plan (s 72(3)). However that does not mean that where a use is permissible with consent under a North Sydney Local Environmental Plan, 'more detailed provisions' regarded as desirable or necessary and specified in a development control plan may not regulate the circumstances in which a use is permissible with consent. There is no reason in principle why those 'provisions' would not have the character either of a 'prohibition' unless certain criteria are satisfied, or of a 'development standard, which permits a development only on satisfaction of certain criteria. The manner in which the requirement regarded as necessary or desirable by the council is expressed in a Development Control Plan does not determine the validity or invalidity as being within or without power. Content, not form, is to be looked at. To say that a particular use, here residential flat development in a special uses zone, is permissible only if it meets a certain developmental standard, or is prohibited if it does not is, in substance, the same. A particular provision, such as cl 14A North Sydney Local Environmental Plan, may not be a development standard within the meaning of that expression in the State Environmental Planning Policy No 1, as Manoh held, but it does not follow that such a height restriction may not be a 'detailed provision' within the meaning of that expression in s 72 of the Environmental Planning and Assessment Act and thus may be contained in a development control plan.*
>
> *Nor is there any disconformity within the meaning of s 72(3) of the Environmental Planning and Assessment Act between a provision permitting a use with consent in a zone specified in a North Sydney Local Environmental Plan and a provision in a Development Control Plan imposing criteria which must be met before the postulated consent may be granted. A provision in a Development Control Plan which says that a consent may be granted only if certain conditions are satisfied, or a consent may not be granted if certain conditions are not satisfied, simply specifies more detailed criteria or provisions which must be met before the development which may be permitted with consent under the North Sydney Local Environmental Plan can be granted. It follows that there is no reason in principle why a Development Control Plan may not, in specifying detailed provisions, incorporated by reference provisions found in the appropriate North Sydney Local Environmental Plan but applicable to a different zone, as being necessary requirements before the permitted consent under the North Sydney Local Environmental Plan will be granted. "*

35. There is, therefore, considerable scope for a DCP to make more detailed provisions regulating development for the purposes of a brothel, indeed even

prohibiting it in certain circumstances. However, provisions of a DCP do not have the same consequences as provisions of an LEP. Development must conform to provisions of an LEP, by statutory mandate: see sections 76A and 76B EPA Act. Provisions of a DCP are but matters to be taken into consideration in determining a development application: see section 79C(1)(a)(iii). Nevertheless, the consideration has to be proper, genuine and realistic. Taking the relevant matters of the DCP into consideration involves more than simply adverting to them. There has to be an understanding of the matters and the significance of the decision to be made about them, and a process of evaluation, sufficient to warrant the description of the matters being taken into consideration: *Weal v Bathurst City Council* (2000) 111 LGERA 181 at 185 per Mason P, at 201 per Giles JA with whom Priestley JA agreed at 189; *North Sydney Council v Ligon 302 Pty Ltd [No 2] (1996) 93* LGERA 23 at 28 per Cole JA, with whom Abadee AJA and Meagher JA agreed.

36. In *Zhang v Canterbury City Council* [1999] NSWLEC 209 (at paras 85-90 below) Talbot J considered the weight to be given to the provisions of a DCP in the consideration of a DA pursuant to section 79C of the EPA.

37. A review of recent decisions of the LEC reveals that DCPs concerning the regulation of brothels have been adopted by *inter alia* Blacktown City Council, Campbelltown City Council, Canterbury City Council, Marrickville Council, Parramatta City Council and Tweed Shire Council.

The relationship between SEPP 1 (Development Standards) and LEPs

38. In several decisions the LEC has considered the relationship between State Environmental Planning Policy No 1 - Development Standards ("**SEPP 1**") and matters relating to the use of premises as a brothel sought to be regulated through an LEP. SEPP 1 is intended to make development standards more flexible, by allowing councils to approve development proposals that do not

comply with a set standard where this can be shown to be unreasonable or unnecessary. A person intending to carry out development might make a written objection that compliance with a development standard was unreasonable or unnecessary in the circumstances of the case (clause 6). Council might grant development consent despite the development standard if the objection is well founded and the grant of consent consistent with the aims and objectives of SEPP 1. The expression "development standards" is defined in section 4 of the EPA Act as follows:

> "*development standards*" *means provisions of an environmental planning instrument in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are faced in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of subparas (a) to (o)].*"

39. Paragraphs (a) to (o) of the definition in section 4 address a number of matters, including (a) "*... the distance of any land, building or work from any specified point*"; and (c) *the ... location, siting ... of a building or work*".

40. *Vassallo v Blacktown City Council* [1999] NSWLEC 267 was an appeal brought by the council under section 56A of the *Land and Environment Court Act 1979* against a decision of Commissioner Watts granting conditional approval to a brothel. The ground of appeal was that the commissioner had erred in law in determining that cl 42A(1) (d) of Blacktown LEP 1988 was a development standard and not a prohibition upon development for the purposes of a brothel (unreported, LEC, 18 August 1999). Clause 42A(l)(d) of the LEP provided: "*42A(1) Despite any other provision of this plan, development for the purpose of a brothel must not be carried out if the relevant premises are: ... (d) within 100 metres from a road zoned Special Uses - Arterial Road and Arterial Road Widening or Special Uses - Local Road and Local Road Widening*."

41. The commissioner had held that cl 42A(l)(d) was a development standard, and thus amenable to an objection under SEPP 1. He found that the objection was well founded and the standard unnecessary or unreasonable in the

circumstances of the case. On appeal, Pearlman J found that the commissioner had not committed any error in holding that cl 42A(l)(d) was a development standard:

> *"23 ... It sets, as a standard against which the development is to be measured, a requirement that the development be located, sited or distanced not less than 100 m from an arterial road or a local road. It does not prohibit the use of identified land for a purpose which would otherwise be permissible under the zoning table (cf Clarke JA in North Sydney Council v Mayoh at p 235), that is, it is not a provision relating to whether development may be carried out at all. Rather, it operates to set a standard in relation to the siting, or location, or distance from a specified point of the proposed development. These particular matters relate, not to whether the development may be carried out at all, but to an aspect of the development when it is being carried out.*
>
> *24. Furthermore, as Mahoney JA pointed out in North Sydney Council v Mayoh at p 232, some support may be gained from reference to the matters listed in subparas (a) and (c) of the definition of "development standards", which comprise the particular matters I have referred to in par 23 above.* "

42. The same principle was applied, although a SEPP 1 objection was rejected, in *Weynton v Rockdale City Council* (1999) 106 LGERA 213. In that case, Pearlman J was concerned with a class 1 appeal against council's refusal to grant development consent for a therapeutic massage parlour and brothel. The proposed brothel was situated on the first floor of premises on land zoned 3 (a) Business General under the *Rockdale Planning Scheme Ordinance* ("**PSO**"). In accordance with clause 46B(l)(b) of the PSO, use for the purpose of a brothel was permissible with consent, if the premises were not located within 50 metres walking distance from certain specified land. Applying *Vassallo's case,* Pearlman J held that on its proper construction cl 46B(l)(b) was a development standard, the purpose of which was to protect sensitive uses from the potential impact of a brothel. In the circumstances, however, her Honour was not satisfied that the applicant's SEPP 1 objection was well founded, nor that compliance with cl 46B(1) (b) was unreasonable or unnecessary. Accordingly, development for the purpose of a brothel on the site in question was prohibited and the DA determined by refusal of consent.

Provisions of environmental planning instruments in the nature of prohibitions

43. Notwithstanding the characterisation by the LEC of the relevant planning instruments in *Vassallo's case* and in *Weynton's case* as development standards to which SEPP1 applied, it should be possible for a council to draft a provision regulating brothels not as a development standard but as a prohibition. A provision which absolutely prohibits a form of development in a specified locality or on land with a specified characteristic is not a development standard. Such provision stands in contrast to a provision which permits a form of development to be carried out in a particular way or to a particular extent: see *North Sydney Municipal Council v Mayoh [No 2]* (1990) 71 LGRA 222 at 234, 236. In *Mayoh's case,* the form of development of a residential flat building was prohibited on land in a particular zone if any principal building on adjoining land was less than three storeys. Permissibility - the power of the council to grant consent - depended on whether the factual precondition concerning minimum height of adjoining buildings was satisfied or not.

44. So, too, could a council establish a factual pre-condition to permissibility in relation to brothels. A provision in an environmental planning instrument which stated that brothels shall not be carried out on land in a particular zone (for example, a residential zone), or on land in any zone if a particular form of use (of a sensitive kind such as a church or school) is carried out on adjoining land, would be a prohibition. A provision which required the consent authority to satisfy itself that a particular fact will or will not exist before it can exercise the power to grant consent to a development application for a brothel will also establish a prohibition and not a development standard: see the type of facts established as jurisdictional pre-conditions in *Clifford v Wyong Shire Council* (1996) 89 LGERA 240; *Currey v Sutherland Shire Council* (1998) 100 LGERA 365; *Franklins v Penrith City Council* [1999] NSWCA 134, 13 May 1999;

and *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

45. In drafting a prohibition which will not, on its proper construction, be found to constitute a development standard, the challenge for councils is to avoid making the carrying out of development for the purposes of a brothel permissible on the land but then seeking to set aside a standard against which the development is to be measured, such as the location or siting of the building on the land, or the location or siting of the room or suite of rooms used for a brothel within a building on the land, or the distance of the land or a building on the land from a specified point such as a school or church or dwelling house on other land. Such provisions are of a form which provides: *"On such land development may be carried out in a particular way or to a particular extent": North Sydney Municipal Council v Mayoh Pty Ltd [No 2]* (1990) 71 LGRA 222 at 234 per Mahoney JA. See also at 236 per Clarke JA. Such provisions will be development standards, and hence will be amenable to the dispensation power under SEPP 1.

46. Rather, the provisions must be of the form which provides: "*On land of characteristic X no development* [of a particular kind] *may be carried out": North Sydney Municipal Council v Mayoh Pty Ltd [No* 21(1990) 71 LGRA 222 at 234 per Mahoney JA. Such a provision does not fix requirements to be complied with in carrying out development of that particular kind on the identified land; it prohibits the carrying out at all of that particular development on the identified land. It is not a development standard.

EVIDENTIARY REQUIREMENTS FOR ESTABLISHING THAT A BROTHEL IS IN BREACH OF THE EPA ACT

47. Planning laws operate so as to regulate the types of development that may be carried out in particular zones. In general, development for the purpose of a

brothel is only permissible with consent in business or industrial zones. In other zones, such as residential, development for the purpose of a brothel is generally prohibited.

Operating where prohibited or, where consent is required, without development consent: Proceedings pursuant to section 123 EPA Act

48. If development for the purpose of a brothel is carried out in a zone where it is prohibited or in a zone in which it is permissible with consent but the necessary consent has not first been obtained, the development will be illegal, being in breach of section 76B or 76A of the EPA Act respectively. The relevant consent authority (local council) or indeed any other person could take proceedings in the LEC pursuant to section 123 of the EPA Act, to remedy or restrain the breach of the EPA Act. There is nothing unusual in this course of action; councils and citizens regularly take such action to remedy or restrain a breach of the Act caused by the carrying out of development that is prohibited or that requires consent where such consent has not been obtained. The fact that the particular illegal use is a brothel, rather than any other type of development, is irrelevant.

49. The LEC has a wide discretion to grant such order as it thinks fit to remedy or restrain the breach: see section 124 of the EPA Act and paragraphs 121-126 below. A usual order would be to restrain the carrying out of the development. The Court also has a discretion to postpone the operation of any injunctive relief, if the justice of the situation so demands: see paragraph 126 below. A situation where it might be appropriate to postpone injunctive relief is where development for the purpose of a brothel is being carried out in a zone in which such use is permissible with consent but the necessary consent has not been obtained. If the person carrying out the development submits a DA for the development, the Court may postpone the operation of any order enjoining the carrying out of the development until such time as the consent

authority determines the DA and any appeal to the LEC is determined. Obviously, if consent is granted to the development, it would be inappropriate to restrain the development because of the past breach. However if consent were not to be granted either by the council in the first instance or the Court on appeal, then it would be appropriate for the development to be restrained. The council or citizen bringing the action pursuant to section 123 of the EPA Act, if successful in establishing a breach and obtaining relief to remedy or restrain that breach, would ordinarily be entitled to the costs of the proceedings.

50. The applicant in proceedings brought to restrain an illegal development for the purpose of a brothel would need to show:
    (a) the respondent is the person carrying out the development or the owner or occupier of the land who has sufficient control over the person carrying out the development (as to an owner or occupier of land being responsible for illegal acts on the land even though the owner or occupier does not personally do the acts, see *Holroyd City Council v Murdoch (1994)* 82 LGERA 197 at 201-203 (Stein J), upheld by the Court of Appeal in *Murdoch v Holroyd City Council,* unreported, CA No 40184 of 1994, 20 November 1996 (Cohen AJA with whom Priestley and Sheller JJA agreed); and *South Sydney City Council v Spanos Enterprises Pty Ltd,* unreported, LEC, Pearlman CJ, 9 December 1994, upheld by Court of Appeal in *Spanos Enterprises Pty Ltd v South Sydney City Council,* unreported, CA No 40580 of 1998, 8 March 2000;
    (b) the applicable environmental planning instrument and the zoning of the land, so as to be able to establish that development for the purpose of brothel is either prohibited or requires development consent on the land;
    (c) the land is used for the purpose of a brothel; and
    (d) such use is in breach of either section 76A or section 76B of the EPA Act, there being no applicable development consent or existing use rights authorising the development.

Documentary evidence

51. In bring proceedings pursuant to section 123, the applicant would be able to prove the relevant environmental planning instrument and zoning map by a certified copy of the instrument and the map being tendered pursuant to section 150 of the EPA Act. The zoning of the land pursuant to that instrument would be able to be established by a certificate under section 149. Proof of ownership of the land would be able to be established by one of the methods of proof enumerated in section 151.

"Brothel"

52. As noted at paras 4-5 above, proof of the carrying out of development for the purpose of a brothel will depend upon the particular definition of "brothel" in the relevant environmental planning instrument. For example, in the Parramatta local government area, Parramatta Local Environmental Plan 1997 (Brothels) defines "brothels" to mean "premises habitually used for the purpose of prostitution or that are designed for the purpose. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution": see clauses 5-9. This definition is similar to that in section 2 of the DH Act: see paragraph 4 above. Such a definition requires proof that the premises have not only been used for the purpose of "prostitution", but that such use is habitual. In relation to what constitutes "prostitution", see paragraphs 6-11 above. In relation to "habitual", this is an ordinary English word which means "commonly used": see Macquarie Dictionary. Clearly more than a one-off use of the premises for prostitution is required. There needs to be some regularity or continuity in the use of the premises for prostitution: see paragraphs 12 above.

Direct evidence

53. Evidence to establish that the premises have been habitually used for prostitution can be by way of direct evidence or circumstantial evidence. Direct evidence is evidence of the facts in issue while circumstantial evidence is evidence of other facts from which facts a rational inference can be drawn as to the facts in issue.

54. Direct evidence that the premises are habitually used for prostitution could be from persons who have used the services of prostitutes on the premises. This may be from customers of the brothel or could be from a private investigator who is employed for the purpose of obtaining such evidence. Direct evidence could also be obtained from the prostitutes who work at the brothel. It is possible (although unlikely) that prostitutes who work or have worked at the brothel might be prepared to provide a statement. Alternatively, those persons could be subpoenaed to give evidence at the trial of the enforcement action. They would be required to give evidence on oath. Direct evidence could also be obtained by way of admissions which could be found in letters to the council or to other persons or in record of interviews.

Circumstantial evidence

55. Circumstantial evidence could also be important, particularly in establishing that the use for the purposes of prostitution is habitual. Persons who reside or work in the neighbourhood of the premises could give evidence of their observations of people regularly coming and going from the premises, particularly prostitutes who regularly work at the premises. The number of employees and the description of the employees could be given. The hours of operation could be noted.

56. Oral, documentary and photographic evidence could be adduced of notices, signs, red lights or other advertisements on the premises notifying of the use

of the premises for the purpose of a brothel. There may be advertisements placed in the printed media, such as in the personal notices section of local newspapers, in advertising directories such as the yellow or white pages, or on the internet. Documentary evidence of such advertising could be given.

57. The brothel may have a business name which is registered and the address for the registered business name is the address of the premises at which the brothel is carried out. There may be business cards which state the name, address, contact numbers and services provided. Evidence could be given from persons who ring advertised telephone numbers to make an appointment as to what was said in relation to the provision of services at the premises and what appointments were made.

58. Documents could be subpoenaed such as appointment books, the customer data base, and accounting information including primary documents, invoices, cheques, cheque books, accounts, bank statements, ledgers and tax returns, all of which may contain information relevant to establishing that the premises are used for prostitution and on a habitual basis.

59. Evidence could be given by witnesses who have visited the premises of the physical layout and arrangement of the premises, the furniture, equipment, tools of trade and other articles in the premises, from which evidence inferences could be drawn as to the use of the premises as a brothel. Evidence could also be given of any related activities that are carried on at the premises.

60. Considered together, the circumstantial evidence may establish facts from which the Court would be asked to conclude, as the only rational inference, that the premises are used habitually for the purposes of prostitution: see *Chamberlain v The Queen [No 2]* (1984) 153 CLR 521 at 536.

REGULATING THE USE OF PREMISES AS A BROTHEL THROUGH CONDITIONS IMPOSED ON DAs PURSUANT TO SECTION 79C OF THE EPA ACT

Matters for consideration under section 79C

61. Planning controls available to consent authorities include not only environmental planning instruments, considered at paragraphs 13-46 above, but also the conditions imposed following the approval, pursuant to section 79C of the EPA Act, of a DA for the use of premises as a brothel.

62. In determining a DA, the consent authority is required to take into consideration those matters specified in subsection 79C(1) which are of relevance to the development the subject of the application. Section 79C, which was inserted as part of the integrated development reforms introduced by the *Environment Planning and Assessment Amendment Act* 1997 (No 152) and replaces former section 90 of the EPA Act, provides:

> "*(1)* ***Matters for consideration – general***
>
> *In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:*
> *(a) the provisions of:*
> *(i) any environmental planning instrument, and*
> *(ii) any draft environmental planning instrument that is or has been placed on public exhibition and details of which have been notified to the consent authority, and*
> *(iii) any development control plan, and*
> *(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), that apply to the land to which the development application relates,*
> *(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
> *(c) the suitability of the site for the development,*
> *(d) any submissions made in accordance with this Act or the regulations,*
> *(e) the public interest.*

63. The matters enumerated in section 79C(1) do not provide an exhaustive list of the considerations which a consent authority may take into account. The consent authority may also take into account matters not listed in section 79C(1), including, in the public interest, any matter which relates to the objects of the Act set out in section 5: *Carstens v Pittwater Council* (1999) 111 LGERA 1 at 12, para 25, per Lloyd J. Section 79C represented a "streamlining and rationalisation of the criteria" in former section 90 of the Act; ibid, para 23, quoting part of the second reading speech of the Bill which introduced section 79C (see reference at para 16 above).

64. The Department's Guide to section 79C sets out potential matters for consideration under each of the generic categories of considerations under section 79C(1). Under the heading "(b) - the likely impacts of that development" the following primary matters and specific considerations, *inter alia,* are listed:

"Primary Matters	*Specific considerations*
Context and setting	*What is the relationship to the regional and local context in terms of:* • *the scenic qualities and features of the landscape?* • *the character and amenity of the locality and streetscape?* • *the scale (bulk height, mass), form, character, density and design of development in the locality?* • *the previous and existing land uses and activities in the locality?* *What are the potential impacts on adjacent properties in terms of:* • *relationship and compatibility of adjacent land uses?*
	...
Access, transport and traffic	**...**
Public domain	*...*
...	*...*
Social impact on the locality	*What would be the social benefits and costs of the development in terms of:* • *social cohesion?* • *community structure, character, values and beliefs?* • *a sense of place and community?* *...* • *social change management?*
Economic impact on the locality	*What would be the economic benefits and costs of the development in terms of:* • *employment generation?* • *economic income?* • *existing and future businesses?* • *property values as indicator of environmental impact?*
Site design and Internal design	**...**
...	*...*
Cumulative impacts	*Would any impacts have potential to act in unison in terms of:* • *repetitive, often minor impacts eroding environmental conditions (nibbling effects)?* • *different types of disturbances interacting to produce an effect which is*

greater or different than the sum of the separate effects (synergistic effects)?"

65. Under the heading "(c) - the suitability of the site for the development" the following primary matters and specific considerations, *inter alia,* are listed:

"Primary Matters	***Specific considerations***
Does the proposal fit the locality?	• *Are the constraints posed by adjacent developments prohibitive?* • *Would development lead to unmanageable transport demands and are there adequate transport facilities in the area?* ... • *Are utilities and services available to the site and adequate for the development?* ..."

66. Under the headings "(d) - any submissions made in accordance with this Act or the regulations" and "(e) - the public interest" the following primary matters and specific considerations, *inter alia,* are listed:

"(d) - any submissions made in accordance with this Act or the regulations

Primary Matters	***Specific considerations***
Public submissions	• *Are the issues raised relevant to the development application?* • *Are all relevant issues raised in submissions being considered?*
Submissions from public authorities	• *Are there any general terms of approval from state agencies?* • *In what ways will issues raised in submissions be resolved?*

(e) - the public interest

Primary Matters	***Specific considerations***
Federal, State and local government interest and community interests? Public	• *Do any policy statements from Federal or State Governments have any relevance?* • *Are there any relevant planning studies and strategies?* • *Is there any management plan, planning guideline, or advisory document that is relevant?*

- *Are there any credible research findings which are applicable to the case?*

...

- *Have there been relevant issues raised in public meetings and inquiries?*

..."

Relationship between current section 79C and former section 90

67. There is substantial overlap between the matters enumerated in paras 79C(1)(b), (c) and (e) for consideration in determining a DA and those specified in former subsection 90(1), in particular in the following paragraphs:

> "*90(1) ...*
>
> *(c) the effect of that development on the landscape or scenic quality of the locality;*
> *(d) the social effect and the economic effect of that development on the locality;*
> *(e) the character, location, siting , bulk, scale, shape, size, height, density, design or external appearance of that development;*
> *(f) the size and shape of the land ... the siting of any building or works thereon ..;*
> *to) the existing and likely future amenity of the neighbourhood;*
> *(p) any submission made under section 87;*
> *(q) the circumstances of the case;*
> *(r) the public interest."*

Interpretation of former section 90: *Croucher v Fairfield City Council*

68. A principal authority on the interpretation of former section 90 of the EPA Act is the decision of Talbot J in *Croucher v Fairfield City Council* (LEC, unreported, 2 July 1997). That case concerned an appeal against a council's deemed refusal of a DA for the establishment of a brothel within premises on land zoned 3(a) Sub-Regional Centre under the provisions of Fairfield LEP 1994. The objectives of the 3(a) zone are:

> "*(a) to provide for and encourage the development of business activities which will contribute to economic and employment growth within the City of Fairfield;*
> *(b) to encourage comprehensive development and growth which will reinforce the role of the Fairfield Town Centre as a sub-regional centre and the dominant business centre in the City of Fairfield; and*
> *(c) to provide for residential development to support business activity in the centre.*"

69. In considering the appeal against the council's deemed refusal of the DA, his Honour considered the following matters:

Adverse effect on existing and likely future amenity of the neighbourhood

70. Talbot J noted that the premises fronted on to a lane "unremarkable in terms of amenity and character". The immediate environs were dominated by rear entrances to commercial properties and a car park. In the absence of any evidence of observable activities associated with the operation of a brothel, it was difficult to appreciate how the development would have an adverse effect on the existing and likely future amenity of the neighbourhood.

Compatibility with existing development

71. Talbot J noted that the council's draft DCP No 23/97 "Brothel Control" provided that brothels were to be located discreetly; not within 100 metres of a school, a church, any place regularly frequented by children for recreation or cultural educational activities, or any residential zone; and, in town centres, not at ground floor level. His Honour concluded that, the location was discreet:

> *"[T]here is nothing outwardly offensive or incongruous manifested by the use of the premises. In my opinion, in the absence of any sign, the doorway and stairwell leading to the upper level will not enter into the consciousness of any passer by other than the innately curious. Any question of or relating to the display of the signs on the exterior of the premises remains within the control of council."*

Adverse social effect

72. Talbot J affirmed that the LEC is not a court of morals: *Dennis v Parramatta CC* (1981) 43 LGRA 71. He noted that questions of morality do not arise directly out of the planning and environmental matters required to be considered under section 90. Nevertheless, issues relating to general or particular

community standards of morality might in some circumstances, arguably, be relevant and taken into account under paras 90(1)(d), (o), (p) or (r). Where that was the case, the Court must be careful not to allow its own views or morality to interfere with an objective assessment:

> *"It is not appropriate, in my opinion, for the Court to consider the wider general issue of social conscience and morality regarding the establishment of brothels where the Parliament has already dealt with the matter. …The Court accepts that there are members of the community who regard brothels with total repugnance on moral grounds and those views are respected. Where persons holding those views are likely to be confronted by a relevantly proximate, extravagant and audacious display as a consequence of a proposed development, such as a brothel, then questions of morality may arise for consideration under s90. "*

73. Talbot J concluded that in the present case, a casual observer would be unaware that the subject premises were being used for the purpose of a brothel. Different considerations might apply if the subject premises were to be presented in an unambiguous way.

Detrimental economic effect

74. The issue of detrimental economic effect was said to arise in the context of the objectives of the business 3(a) zone stated in the LEP. However, the evidence was not based on any survey, observation or study. Accordingly, there could be no suggestion that the approval of the development together with other approved brothels in the vicinity could be regarded as establishing a precinct notorious for that type of activity. Ultimately that question might have to be addressed if proliferation increased, but there was no evidence that such time had arrived.

Public interest

75. Talbot J was not satisfied that the granting of development consent would be against the public interest.

Liu, Lonza & Beauty Holdings Pty Limited v Fairfield City Council

76. A further principal authority on the interpretation of former section 90 is the decision of Murrell AJ in *Liu, Lonza & Beauty Holdings Pty Limited v Fairfield City Council* (LEC, unreported, 23 December 1996). The applicant Liu had lodged a DA seeking to use as a brothel premises formerly utilised as a motorbike shop. The objectors to Liu's application included the president of a primary school parents and friends association and the principals of two local schools, who opposed brothels on moral grounds. The applicant Beauty Holdings Pty Limited had lodged a DA seeking to use as a brothel premises formerly utilised for "stress management and reflexology". The objectors included a principal and a relieving principal of a local high school. Some objections were based on grounds that brothels may expose school students to immorality. The applicant Lonza had lodged a DA for the conversion of a former home improvement store to an "adult swingers club".

77. In each of the matters, the applicant appealed against the council's deemed refusal of the DA. In each, the following question of law was referred to a judge for determination:

> "*Whether ... in an appeal ... relating to a development application seeking development approval for the use of premises as a brothel, the Court must, once raised, consider as a relevant consideration the relevant community standards and views of the morality of the proposed use?*"

78. Murrell AJ rejected a submission on behalf of the council that community standards and views on the morality of brothels were a relevant matter for the council to consider in determining a DA. On behalf of the council, it had been submitted that morality, whilst not expressly mentioned, fell within the following heads of consideration enumerated in former section 90(1): (g) the social effect and the economic effect of that development on the locality; (o) the existing and likely future amenity of the neighbourhood; (q) the circumstances of the case; and (r) the public interest.

Social and economic effect

79. In relation to section 90(1)(d) concerning the social and economic effect of the development, Murrell AJ noted that the head of consideration extended the scope of what were traditionally regarded as planning considerations:

> "*However, this head of consideration is not open-ended. Rarely, if ever could material establishing personal upset and offence, or the fears that some individuals may hold about a potential for moral corruption demonstrate that a particular development in a particular locality would have a detrimental social effect. The situation may be different where, by expert or other evidence, antagonism between a particular development and the religious or cultural values of an immediately affected and identifiable group can be demonstrated.*"

80. While morality per se was irrelevant, "the demonstrable social effect of a particular brothel use" was a relevant consideration under section 90(1)(d). (See now the Department's Guide to section 79C, extracts of which are quoted above, concerning the social impact on the locality.) Murrell AJ noted that the distinction between mere beliefs or fears of potential social effects and demonstrable social effects was also discussed in *Newton v Wyong Shire Council* (LEC, unreported, 6 September 1983, McLelland J) and in *Jarasius v Forestry Commission of New South Wales [No 11* (1988) 71 LGRA 79 at 93. In each case, it was held that mere excited opposition or mistaken beliefs as to impacts of a development are not matters which a consent authority should take into account.

Neighbourhood amenity

81. Her Honour noted that the neighbourhood amenity referred to in section 90(1)(o) comprises "those aspects of the physical surroundings which give pleasure":

> "*I agree with the approach of Talbot J in Henderson v Sydney City Council (8 May 1995) that amenity includes such matters as aesthetics and the physical impact of noise or smell. The "amenity" of a neighbourhood must relate to*

physical attributes of the environment rather than to claimed circumstances which lack a physical manifestation.

. . .

A diminished enjoyment of the perceived moral environment (as opposed to the general moral environment) is not a matter which may properly be taken into account pursuant to s90(1)(o) of the Act. "

Circumstances of the case

82. Her Honour noted that the reference to the "circumstances of the case" in section 90(1)(q) was a reference to the distinguishing circumstances of a particular case, rather than to general matters affecting all such cases: "*General community standards of morality in relation to brothels could not fall within the s90(1)(q) head of consideration*. "

Public interest

83. In relation to the consideration of public interest required by section 90(1)(r), her Honour noted that:

> "*Section 90(1)(r) must be read in the context that other s90(1) heads of consideration are environmental and planning considerations. The appropriate legal vehicle for any regulation of morality is the criminal law. In New South Wales both prostitution and brothel operation have recently been "decriminalised". It could not be in the public interest that local councils or this court now assume the mantle of moral arbiter.*"

84. It is noteworthy that the Court of Appeal refused an application for leave to file a summons out of time from the decision of Murrell AJ (unreported, NSWCA, 17 February 1997). Mason P noted, however, that the ultimate question of the relevance of community standards and views of the morality of the proposed use was "one of some significance and the proper case would give rise to a grant of leave".

Zhang v Canterbury City Council

85. *Zhang v Canterbury City Council* [1999] NSWLEC 209 concerned an appeal against a decision of Commissioner Brown upholding an appeal against council's refusal of a DA for the use of part of a building as a brothel. Clause 4 of the relevant DCP contained standards directed to the control of development legalised by State Parliament under the *Disorderly Houses (Amendment) Act 1995*. It provided: "*(a) brothel should not be located adjoining or within 200 m walking distance of any place of worship, school, community facility, childcare centre, hospital, rail station, bus stop, taxi stand, or any place regularly frequented by children for recreational or cultural pursuits* ".

86. The commissioner referred to the decisions of the LEC in *Croucher v Fairfield City Council* and *Liu, Lonza & Beauty Holdings Pty Ltd v Fairfield City Council, supra,* and observed:

> "*The general thrust of these decisions is that any impacts must be demonstrable. It is not enough to simply rely on a brothel's presence to justify its unacceptability, irrespective of its location and neighbours. The evidence presented at the hearing, in my view, was not of sufficient severity to suggest that the brothel should not be granted approval, although for the reasons set out later in the judgment I am not convinced that it should be unlimited.*"

87. While the evidence did not suggest any problems of a severity that would warrant refusal, the commissioner accepted that there was a "fundamental incompatibility with a brothel and those land uses set out in DCP 23". Further, the absence of any evidence on number of clients, peak times and operating conditions placed doubt on any reliance on previous operations to support the current proposal. For this reason, the commissioner determined that a 12 month limit be placed on any approval.

88. On appeal, Talbot J considered the weight which the commissioner ought to have given to the DCP. His Honour referred to the decision of the Court of Appeal in *North Sydney Council v Ligon 302 Pty Ltd [No 2]* (1996) 93 LGERA 23 at 28, in which Cole JA said:

> "*[I]n truth, his Honour did not give any real consideration to or have regard for the provisions of the Development Control Plan (Parramatta City Council v Hale*

(at 339)). There has not been a "proper genuine and realistic consideration" of the application having true regard to the Development Control Plan (Broussard v Minister for Immigration & Ethnic Affairs (1989) 98 21 FCR 472 at 483 per Gummow J; Turner v Minister for Immigration & Ethnic Affairs (1981) 55 FLR 180 at 184 per Toohey J.) It follows, in my view, that the reconsideration by the Land and Environment Court was not in accordance with the order of this Court made 28 July 1995 that the matter be determined by the Land and Environment Court in accordance with the decision of this Court which made clear that consideration of the development control plan was required by s 90(1) of the Act."

89. On a proper reading of the DCP, consent ought not to have been granted to a brothel proposed to be located contrary to the provisions of cl 4 unless there were circumstances which rendered compliance with the standard irrelevant. The commissioner appeared to have accepted the view that, because any impact was not "demonstrable" and the evidence did not show sufficient severity to justify refusal, the standard in the DCP could be ignored. In deciding to allow the development on a site immediately adjacent to a place of public worship without explaining the grounds for the variation of the standard, the commissioner did not have proper regard to the provisions of the DCP. He did not give any real consideration to the provisions of the DCP, in the same way as Cole JA found in *Ligon [No 2].* He incorrectly applied the relevant test by determining that the council had not demonstrated sufficient severity of impact rather than requiring the applicant to provide reasons why the standard should be varied. In asking himself the wrong question, the commissioner fell into error.

90. In relation to the 12 month limit placed on the approval, Talbot J held that notwithstanding that a condition of consent may be imposed limiting the period during which development may be carried out pursuant to section 80A(1)(d) of EPA, the commissioner's reasons demonstrated that he failed to take into consideration the likely impacts of the development and the suitability of the site for the development as required by paras 79C(l)(b) & (c). The court was required to give consideration to the likely impacts at the date of determination. Instead, this matter was left in abeyance. By effectively

postponing determination of an essential matter for one year, the commissioner fell into legal error: *King v Great Lakes Shire Council and Anor* (1986) 58 LGRA 366 at 384-5.

Decisions of commissioners in relation to section 97 appeals

91. In numerous decisions, commissioners of the LEC have upheld appeals pursuant to section 97 of the EPA Act from decisions of councils refusing consent to a DA for the use of premises as a brothel, and instead approved the DA subject to conditions: for example *Gohaze Pty Limited v Parramatta City Council* (Commissioner Hussey, 4 February 1999); *Yiek NG v Marrickville Council* (Commissioner Hussey, 24 February 1999); *Kim Than Trinh v Campbelltown City Council* (Commissioner Murrell, 9 March 1999); *The Firm (Australia) Pty Limited v South Sydney City Council* (Commissioner Hoffman, 16 March 1999); *Hughes Emporium v South Sydney City Council* (Commissioner Hussey, 6 July 1999); *Vassallo v Blacktown City Council* (Commissioner Watts, 18 August 1999); and *Turnbull Group Pty Limited v Mosman Municipal Council* (Commissioner Bly, 8 December 1999).

92. Significantly, in *Turnbull Group Pty Limited v Mosman Municipal Council* (above) Commissioner Bly held that the amenity impacts of a brothel in Spit Junction Town Centre were of little significance. The premises the subject of the DA were also proposed to be used for private parties for sexual activities between up to 12 people. The commissioner imposed conditions to limit the impact of these private parties to within acceptable limits. The commissioner was not satisfied as to the existence of clear evidence in relation to the extent of use of the area by children such as to show that children would be adversely affected by the proposal. And in *Hughes Emporium v South Sydney City Council* (above) in weighing the public interest in refusing a DA, Commissioner Hussey gave diminished weight to objections where the

objectors had not given their names and there was no evidence before the court as to fear of reprisals.

93. Until recently, commissioners had dismissed section 97 appeals against a council's refusal of a DA for the use of premises as a brothel in only a small number of decisions. *Elizabeth Consultants Pty Limited v South Sydney City Council* (Commissioner Murrell, 25 November 1999) concerned a proposal to extend a brothel in an area zoned "mixed use" under the South Sydney LEP 1998. The objectives of the zone include:

> "*To create a single zone which recognises areas with a capacity to accommodate a variety of compatible land uses while retaining the unique urban character and identity and to ensure that the nuisance generated by non-residential development such as is caused by the operating hours, noise, loss of privacy is controlled so as to preserve the quality of life for residents in the area.*"

94. Commissioner Murrell found that the planning intent was "*to encourage medium density urban housing and a range of compatible, vibrant, nonresidential uses such as shops, professional offices and studio type workshops*". The commissioner was not satisfied that noise or persons coming or going from the premises warranted refusal in the inner-city location. Nor was there a great deal of evidence expressing complaint. Nonetheless, the commissioner concluded that the proposed extension represented a proliferation of brothels in the area contrary to council's planning regimes and policies.

Perry Properties Pty Ltd v Ashfield Municipal Council

95. The recent decisions of Commissioner Bly and Justice Bignold in *Perry Properties Pty Ltd v Ashfield Municipal Council* suggest that widespread adverse community reaction might in some cases constitute an adverse social impact warranting, in the public interest, refusal of a DA. In *Perry Properties,* the commissioner dismissed a section 97 appeal from a decision of council refusing a DA for development consent for the establishment of a brothel at premises at Parramatta Road, Ashfield (Commissioner Bly, 7 April 2000).

Commissioner Bly was not satisfied that the brothel was located too close to any place frequented by children for recreation or cultural activities. However, there was little doubt given the extent of objections that the proposed brothel had caused "an *adverse widespread community reaction*" and "*great offence*". The commissioner could "*understand the concerns and offence felt by the local community as well as the concerns expressed for example by the school leaders*". Accordingly, despite his earlier findings in relation to amenity, the commissioner accepted that there were likely to be "*adverse social impacts of sufficient magnitude to warrant, in the public interest, the refusal of the application*". Referring to an adverse widespread community reaction to the proposed brothel, he concluded: "*Hence, without delving into the moral aspects of brothels, it is not difficult, despite the lack of determinative amenity impacts ... to understand the likely social impact of the proposal. (para* 50)

96. Commissioner Bly's original decision refusing development consent was the subject of a successful appeal to Cowdroy J, who held:

> *"20 . . . There was nothing in the Commissioner's finding beyond the existence of such fear to support the 'widespread adverse community reaction' to the brothel.*
>
> *21....[T]he specific location of the proposed brothel was not found to be unsuitable. Nor is there any finding to suggest that offence has been caused to any particular section of the community. There is no finding that the proposed brothel, or its patrons would be atypical. The determinative finding is the existence of a nebulous fear of inappropriate or anti-social behaviour. The Commissioner has already found that such behaviour was not typically associated with this type of development.*
>
> *22. A fear or concern without rational or justified foundation is not a matter which, by itself can be considered as an amenity or social impact pursuant to s79C(1)(b) of the EPA Act. "*
>
> *Perry Properties Pty Ltd v Ashfield Council (No 2)* [2000] NSWLEC 188 (21 September 2000)

97. The proceedings were then remitted to Commissioner Bly for determination in accordance with the judgment of Cowdroy J. On the remitted proceedings, the commissioner granted development consent subject to conditions. The

commissioner's decision was again appealed, and on appeal Bignold J again set aside the determination of Commissioner Bly and remitted the proceedings for redetermination in accordance with his reasons for judgment: see *Perry Properties Pty Ltd v Ashfield Council (No 2)* [2001] NSWLEC 62 (4 April 2001). In so doing, Bignold J held that it was clearly established that the concept of "amenity" in a town planning context was a concept that "*transcends merely physical content*". Bignold J relied upon *Broad v Brisbane City Council* (1986) 59 LGRA 296 as amply demonstrating the width of the concept "amenity" in a town planning context. In the decision of the Queensland Supreme Court in *Broad's case,* Thomas J (at 298-299) concluded that:

> "*The wide-ranging concept of amenity contains many aspects that may be very difficult to articulate. Some aspects are practical and tangible such as traffic generation, noise, nuisance, appearance, and even the way of life of the neighbourhood. Other concepts are more elusive such as the standard or class of the neighbourhood, and the reasonable expectations of a neighbourhood.... [I]t is necessary to recognise that some matters in this area, although intangible and difficult to articulate, may be real and may properly be taken into account.* "

98. As Bignold J noted, passages from *Broad* were adopted and applied by the Full Court of the South Australian Supreme Court in *Novak v Woodville City Council* (1990) 70 LGERA 233 at 236-237 where Jacobs J said, in rejecting an argument that resident objectors' disapproving of the activities of an escort agency was "*purely a subjective response*":

> "*[M]any planning judgments, not least those which have to assess a planning proposal in terms of its impact upon the amenity of a particular locality, necessarily involve a subjective element, leaving room for opinions to differ in weighing the same objective criteria.... It is no doubt correct to say, as Cripps J said in Venus Enterprises Pty Ltd v Parramatta City Council (1981) 43 LGRA 67, that the Court ought never to allow its own personal view of matters of taste or sexual morality to be a substitution for the evidence, or to fill a vacuum left by the evidence but heeding that warning, it does not mean that matters of taste and morality must necessarily be put to one side when determining whether or not a development is appropriate.*
>
> *It must always be a question of fact whether the amenity of a neighbourhood will be or is likely to be adversely affected by a development. It is not difficult to envisage a development which may cause such great offence to a significantly large part of a community that for that reason it ought not to be permitted on town planning g rounds."*

99. Accordingly, Bignold J concluded that the "*very wide concept of 'amenity' expounded in cases like Broad applied with even greater force in a statutory scheme like the EPA Act, s 79C which in par (b) gives effect to the widest conceivable scope of "likely impacts*" of a proposed development, including environmental, economic and social impacts, without employing the term "*amenity*" (para 64). This means that under section 79C(1)(b) of the EPA Act, a consent authority has a wider scope to consider the social impacts in the locality and is not limited to those impacts which adversely affect the amenity of the neighbourhood.

Summary of decisions in relation to former section 90 and current section 79C

100. A review of the decisions in relation to former section 90 and current section 79C confirms the need for specific evidence of an adverse impact in the locality. In this regard, the change of words between section 90 and 79C of the EPA Act has had no apparent effect on the Court's view that the council must prove significant detrimental social impact to prevent development consent being granted to a brothel: see for example, *Liu, Lonza & Beauty Holdings Pty Limited* followed by the commissioner in *Zhang v Canterbury City Council*.

101. Generally, the LEC has confirmed that it is not a court of public morals, and declined to extend the its discretionary powers into "*foreign fields of public policy in the general public and moral sense": Pitt-Mullis v Sydney City Council* [1964] 10 LG1RA 242 at 245. It is noteworthy, however, that whilst the Court of Appeal refused an application for leave out of time from the decision of Murrell AJ in *Fairfield City Council v Liu, Lonza & Beauty Holdings,* Mason P noted in relation to former section 90 that the ultimate question of the relevance of community standards and views of morality was "*one of some significance and the proper case would give rise to a grant of leave*": unreported,

Court of Appeal, 17 February 1997. Thus, the relevance or otherwise of these matters in the interpretation of section 79C can not be considered to be beyond doubt.

102. The more recent approach of Commissioner Bly and Bignold J in *Perry Properties* appears to represent a softening of the approach in *Liu, Lonza & Beauty Holdings Pty Limited* and in *Zhang v Canterbury City Council* that adverse social impact must have a physical manifestation and not merely be internal and personal to individuals, groups and the community. Such softening of approach was evident in the recent decision of *X L Mao v Hornsby Shire Council* (LEC No 11167 of 2000, 26 April 2001) in which Commissioner G T Brown held that in cases in which there was strong community concern over the location of a brothel, it should not have to be necessary "*to have to show actual instances of harm to substantiate its unsuitability*". A "*general sense of uneasiness or discomfort rather than a concern over actual physical harm*", a "*concern that deals with a more intangible impact*" was not to be "*so easily dismissed, especially where children are involved*". Commissioner G T Brown also found that the proposed brothel would also have an adverse economic impact on the locality.

103. It might be argued that this more recent approach accords better with the Department's Guide to section 79C, quoted at paras 64-66 above, which requires consideration of matters that are internal and make the community what it is, including social cohesion, community structure, values and beliefs, and a sense of place and community.

DRAFTING CONDITIONS OF DEVELOPMENT CONSENT TO ENSURE CONDUCT OF BUSINESS IN "A DISCREET, UNOBTRUSIVE AND INOFFENSIVE MANNER"

104. It is difficult, if not impossible, to identify *in abstracto* a core of conditions that might uniformly be imposed on all development consents to the use of premises as a brothel. Much will depend upon the particular locality and the specific operations proposed. As discussed at paragraphs 68-75 above, the principal authority on conditions of development consent is that of Talbot J in *Croucher v Fairfield City Council* (LEC, unreported, 2 July 1996). As noted above, this concerned an appeal against a council's deemed refusal of a DA for the establishment of a brothel within premises on land zoned 3(a) sub-regional centre under the provisions of Fairfield LEP 1994.

105. Talbot J concluded that nothing had been shown to the court which would justify a finding that brothels should in all cases be prohibited in or within proximity to shopping centres. Instead, the approval of the development provided "***an opportunity for conditions of consent to be imposed for the purpose of ensuring that the business is conducted in a discreet, unobtrusive and inoffensive manner***" (emphasis added). If such controls proved to be ineffective and the council received sufficient complaints, it would be open for it to make an application pursuant to section 17 of the DH Act. Then the matters referred to in section 17(5) would be taken into account by the court.

106. His Honour was not satisfied that a discreetly and properly conducted brothel in that location would discourage people from attending the commercial centre of Fairfield. Nor was he disposed to give a limited approval so that the development could be reassessed in twelve months. He was satisfied that the development could be approved subject to conditions including provision for parking and prohibition of any signs which overtly refer to the nature of the business. Accordingly, development consent was granted, subject to conditions concerning *inter alia* car parking; hours of operation; clients to make telephone bookings and no clients to be admitted without an appointment; no display of goods, services or products associated with the activity to any public place or the general public; no advertising signs

or structures without consent of council; the operation of the Spa Pool; compliance with the requirements of the *Public Health Act,* education of sex workers; and sanitary facilities and ventilation.

107. Whilst it is not possible to distil a template set of conditions to be imposed on all development consents, it is tolerably clear that conditions which aim to ensure that the brothel is conducted in a discreet, unobtrusive and inoffensive manner are likely to be upheld. Such conditions include those relating to:

- provision for telephone bookings and for admission of clients by
- appointment only;
- restrictions on public display of goods, services or products associated
- with the brothel;
- restrictions on advertising signs and structures;
- external lighting;
- size of the brothel;
- number of persons working in the brothel;
- hours of operation;
- provision of suitable waiting areas;
- provision off-street parking;
- provision of vehicular and pedestrian access
- provision of a management plan;
- security arrangements;
- restrictions on the sale of alcohol;
- occupational health and safety standards;
- hygiene standards;
- sanitary control;
- waste management; and
- restrictions on related activities such as live music and strip-shows.

108. There are ordinarily two approaches to the drafting of conditions in order to achieve a desired objective, such as in this case the objective of discreet, unobtrusive and inoffensive brothels. The first approach is to draft the conditions in a prescriptive manner; the conditions would prescribe the particular acts, matters or things that must be done in carrying out the development. Prescriptions could include precise specification of the matters referred to in para 107 above. This approach assumes that if development is carried out in accordance with the prescriptions, the objective of having a discreet, unobtrusive and inoffensive brothel will result. This requires the consent authority to have extensive knowledge and experience of regulating development for the purpose of brothels so as to be able to specify all of the prescriptions that to its knowledge and experience are needed to achieve the objective. If a consent authority does not have the necessary knowledge and experience, this approach lacks efficacy. This approach also lacks flexibility; there is no capacity, without changing the consent, for different means of achieving the objective to be adopted.

109. The second approach is to draft the conditions so as to specify performance standards. The performance standards can be general, such as the development shall be carried out in such a manner as not to cause interference with the amenity of the neighbourhood, or particular, such as the development shall not generate noise levels greater than a prescribed level above a background noise level measured at the boundary of the nearest residential dwelling. The means by which these performance standards may be achieved is left to the person carrying out the development. This allows flexibility, without compromising the objectives sought to be achieved by the performance standard. Often, a consent authority will opt for a mixture of each type of condition: fix some general and particular performance standards as well as some prescriptions. This is usually a sensible approach.

REGULATION OF BROTHELS AND ZONING

110. A particular issue arises as to the circumstances in which a permissible use of premises as a brothel within an industrial zone might be illegal under the EPA Act. Before addressing this question specifically, it is necessary to make some general comments on the relationship between LEPs, SEPPs and zoning.

Zoning, LEPs and drafting provisions

111. Increasingly, councils have used LEPs to zone out brothels from residential and other areas by limiting them to industrial zones: Ratcliff *supra* at 153. By way of summary, it is apparent that that there are several ways in which councils might draft LEPs to achieve better the objectives of the DH Act and desirable planning outcomes:

(a) draft provisions in LEPs regulating brothels not as development standards but as prohibitions; for example, as noted at paragraphs 43-46 above, stating that brothels shall not be carried out on land in a particular zone (for example, a residential zone) or on land adjacent to which is carried out specified sensitive uses (using the formula in *Mayoh's case)* would be a prohibition.

This requires attention to drafting prohibitions to avoid them being considered as development standards: see discussion in paras 45-46 above.

(b) draft zoning provisions in LEPs specifying that brothels are a permissible use with consent in a zone considered suitable (such as an industrial or commercial zone). Thus, a provision in an LEP could state that consent should not be granted unless the consent authority is satisfied that certain factual pre-conditions designed to ensure that the operation of the brothel will be discreet, unobtrusive and inoffensive have been or will be met (using the jurisdictional pre-conditions formula in the cases of *Clifford v*

Wyong Shire Council; *Currey v Sutherland Shire Council*; *Franklins v Penrith City Council*; and *Corporation of the City of Enfield v Development Assessment Commission*: see para 44 above).

This approach envisages the introduction into LEPs of provisions concerning brothels analogous to section 17 of the DH Act, thus requiring councils to consider, as pre-conditions to the exercise of powers to determine development applications, matters such as distance from churches, hospitals, schools and other community facilities, parking, access, size, interference with the amenity of the neighbourhood etc.

LEPs and paramount environmental planning instruments

112. As discussed at paragraph 31 above, a difficulty with regulating brothels through LEPs is that such regulation is liable to be overruled by other environmental planning instruments expressed to be paramount. For example, in its original form, SEPP 22 "Shops and Commercial Premises" made permissible with consent the change of use of premises in a business zone from one type of commercial use to another type of commercial use, notwithstanding that the proposed change of use is prohibited in that business zone by the relevant LEP. SEPP 22 provided:

> *"6(1) A person may, with the consent of the consent authority, change the use of a building in a business zone -*
> *(a) that is being lawfully used for a particular kind of commercial premises to another kind of commercial premises or to a shop;*
> *or*
> *(b) that is being lawfully used for a particular kind of shop to another kind of shop or to commercial premises,*
> *even though the proposed change of use is prohibited in that zone under another environmental planning instrument.*
>
> *(2) A consent authority shall not grant its consent to a proposed change of use pursuant to subclause (1) unless it is satisfied that the proposed change of use will not have more than a minor environmental effect and is in keeping with the objectives (if any) of the zone.*[1]

113. As was held in *Mavrik Pty Limited v Tweed Shire Council* (LEC, unreported, 5 December 1996), a brothel was one type of commercial use. Hence, SEPP 22 in its original form was able to be used to make permissible a change of use from one type of commercial use to a brothel, even though the relevant LEP prohibited brothels as a use in the business zone. A business zone is a zone identified in an environmental planning instrument as being a business or commercial zone. SEPP 22 would not have this effect in zones other than a

[1] Contrast clause 6 of SEPP 22 "Shops and Commercial Premises" and clause 7 of SEPP 4 "Development without Consent". SEPP 4, cl 7 "Shops and commercial premises etc" allows one kind of commercial premises to be changed to another kind without development consent even if the LEP would otherwise have required consent; for example, change from an office to a brothel. Thus, whereas SEPP 4 assumes that both kind of commercial uses would be permissible, SEPP 22 recognises that the new use may be prohibited.

business or commercial zone. A residential or industrial zone would not be a business zone.

114. This problem was addressed by legislative amendment of SEPP 22 so as to add a new sub-clause to clause 6:

> *"(3) This Policy does not permit the use of a building as a brothel and, accordingly, a consent authority must not grant its consent to a proposed change of use as a brothel.*
>
> *This subclause extends to development applications made but not finally determined before the date of commencement of this subclause.* "

115. Whilst this amendment solved the problem, the history of SEPP 22 does illustrate the difficulty that LEPs can be overridden by other environmental planning instruments, such as SEPPs, expressed to be paramount.

Zoning and SEPPs

116. The difficulty referred to in the preceding paragraphs could be overcome by making a SEPP regulating brothels which, in the event of inconsistency, would prevail over all other environmental planning instruments, including SEPPs. Such an approach would introduce certainty and consistency throughout the State. A SEPP regulating brothels could specify that brothels shall not be carried out in particular zones, such as residential zones, or on land adjacent to which is carried out specified sensitive uses. The SEPP could similarly specify that brothels are a permissible use with consent in other zones, such as industrial or commercial zones. The SEPP could specify factual pre-conditions which must be satisfied prior to the exercise of the power to determine development applications for brothels, as has been discussed above.

Brothels in a business or commercial zone

117. As discussed at paragraphs 43-46 above, there is nothing to prevent a planning authority from introducing into a planning instrument a provision making brothels a nominated prohibited use in business or commercial zones.

118. In the absence of an express prohibition, whether or not a brothel can be established in a business or commercial zone will depend on the terms of the particular planning instrument. In *Liu v Fairfield City Council* (unreported, LEC, 10 January 1997) Assessor Roseth stated that the exclusion of brothels from areas zoned for commercial use would be tantamount to banning them altogether from Fairfield. Accordingly, a brothel was permitted on the fringe of the Fairfield CBD on a site zoned "3 (b) sub-regional business centre" in the Fairfield LEP 1984, notwithstanding the proximity of an adult migrant education centre, a child care facility, a nursing home and several schools. Permission to develop was justified on the basis that the brothel would operate discreetly, it being identified only by its address, its entrance facing a carpark, and entry being by telephone appointment only. See to similar effect *Beauty Holdings Pty Ltd v Fairfield City Council* (13 June 1997); and *Lemmorth Pty Ltd v Liverpool City Council* (unreported, LEC7 17 June 1997).

Brothels in residential zones

119. As discussed at paragraph 111 above, nor is there anything to prevent a planning authority from introducing into a planning instrument a provision expressly prohibiting brothels in residential zones. Generally speaking, the LEC has regarded the classification of brothels as "commercial premises" as prohibiting their establishment in a residential zone: *Southside Business Centre Pty Ltd v Rockdale City Council* (unreported LEC, Pearlman J, 2 September 1996). However, in the absence of an express prohibition, it will be necessary to examine the terms of the particular planning instrument to determine

whether or not a brothel can be established in a residential zone. For example, in *East Sydney Neighbourhood Association Incorporated v South Sydney City Council* (unreported, LEC, 19 August 1990) consent had been sought to use as a brothel a house in Liverpool Street, Darlinghurst situated within Zone no 2(c) (Residential "B") pursuant to the relevant LEP. Only "limited intensity small scale, non residential development" was permitted in the zone "to serve the local population". His Honour found that the evidence did not justify a finding that the brothel was other than of limited intensity and small scale. It was, by virtue of its type, function, scale, services provided or the nature of the environment, consistent with the objectives of the zone.

Brothels in industrial zones

120. It arises next to consider the circumstances in which a permissible use of premises as a brothel within an industrial zone might be illegal under the EPA Act. There are three situations in which the use of premises as a brothel in an industrial zone might be illegal:

(a) where there is a prohibition of various uses including "commercial premises" in the relevant industrial zone. *Walsh v Bankstown City Council* (1997) 96 LGERA 62 arose from council's refusal of a DA for premises to be used for the purposes of a brothel in an area zoned General Industrial 4(a). In that zone, there was a prohibition of various uses including "commercial premises other than rag collecting and dealing". Cowdroy J found that the proposed brothel constituted "commercial premises" and was consequently prohibited.

The difficulty which arose in *Walsh' case* could be overcome by specifically nominating the operation of a brothel in the relevant industrial zone as a permissible, separate use to general commercial premises. A nominate, permissible use of brothel would prevail over an innominate,

impermissible use of general commercial premises, and thus ensure the permissibility of the brothel in the zone: *Friends of Pryor Park Inc v Ryde Council* (unreported, LEC, 25 September 1995, Bignold J, pp 6-7) and *Pilley v Maitland City Council* (unreported, LEC, 21 October 1996, Pearlman J). A similar result could be achieved by the adoption of a SEPP regulating brothels.

(b) where the operations of the brothel in the industrial zone are inconsistent with the provisions of another environmental planning instrument or with a jurisdictional pre-condition to permissibility (in the sense of *Clifford v Wyong Shire Council, Currey v Sutherland Shire Council, Franklins v Penrith City Council* and *Corporation of the City of Enfield v Development Assessment Commission* cases, discussed at paragraph *44 supra).*

(c) where the use as a brothel is a permissible use with consent in the zone under relevant environmental planning instruments, but consideration of council plans (such as development control plans) or policies or the merits of the development dictate refusal of consent. Such a decision would mean that operation of the brothel without the necessary consent would be illegal. *Amorgas Holdings Pty Limited v Marrickville Council [1998]* NSWLEC 172 provides an illustration of this situation.

In *Amorgas Holdings,* the applicant had sought development consent to use a three storey industrial commercial factory or warehouse building as a brothel. The site was zoned Industrial 4(a) - Industrial General under the Marrickville PSO 1972, as amended. Relevant to the application were two DCPs regarding parking strategy and the regulation of brothels. After the council issued consent subject to conditions, the applicant made an application seeking modification of two conditions. That application was refused. The issues before the court were hours/amenity, parking/traffic and the floor space ratio. In relation to permitted hours, Sheahan J

considered twenty-four hour, seven day operation to be appropriate in the location subject to appropriate safeguards, including a security guard between 11 pm and 6 am. In relation to car parking, his Honour was in no doubt that at most times of the day clients would find plenty of parking nearby. In relation to the ground floor, His Honour considered the council to be justified in seeking to restrict the possibility of a non-complying use in conjunction with the brothel operations upstairs. He stated that the use of the area should be seriously restricted. In particular, he saw no justification for leaving open the possibility of live music, strip shows etcetera.

INJUNCTIVE POWERS OF THE LEC PURSUANT TO SECTION 124(1) OF THE EPA ACT TO CLOSE ILLEGAL BROTHELS

Introduction

121. Section 124 (1) of the EPA Act provides:

> "*Where the Court is satisfied that a breach of this Act has been committed or that a breach of this Act will, unless restrained by order of the Court, be committed, it may make such order as it thinks fit to remedy or restrain the breach.*"

122. This power is wide: *F. Hannan v Electricity Commission of New South Wales [No 3]* (l985) 66 LGRA 306 at 313; *Warringah Shire Council v Sedevcic* (1987) 10 NSWLR 335 at 339-341.

The leading case: *Fairfield City Council v Taouk*

123. The leading case on the injunctive powers of the LEC to close an illegal brothel is *Fairfield City Council v Taouk* (unreported, LEC, 24 June 1998). In that case, the council sought an injunction pursuant to section 123 to restrain the respondents from using premises for the purpose of a brothel in breach of section 76(3) of the EPA Act (carrying out of development exempt

development). In relation to the court's discretion pursuant to section 124(1), Lloyd J held:

> *"The discretion of the Court under this section is unfettered: Warringah SC v Sedevcic (1987) 10 NSWLR 335 per Kirby P at 339. Relevant factors for the Court's consideration in this case include whether the breach complained of is purely technical; any delay in instituting the proceeding; the necessity of upholding the integrated and coordinated nature of planning law; whether the application for enforcement of the Act is made by a public authority; and whether the application of these general factors will produce an unjust result in the circumstances of the particular case (Sedevcic at 339-341)."*

124. While the EPA Act was the relevant statute, the factors mentioned in the DH Act could properly be considered by the court in the exercise of its discretion under section 124 of the EPA. The DH Act was a "brothel specific statute" which operates in a complementary way to the EPA.

125. As already been seen, section 17(3) of the DH Act requires sufficient complaints to have been made by residents who live in the brothel's vicinity; by residents who use, or whose children use facilities in the brothel's vicinity; or by occupiers of premises situated in the vicinity of the brothel. In *Fairfield City Council v Taouk,* council would have had difficulty in demonstrating the sufficiency of complaints as these were few in number and did not specifically relate to any adverse effect of the operation of the brothel. The considerations listed in section 17(5) of the DH Act include whether the brothel operates near a church, hospital, school or any place likely to attract children; whether the brothel creates a disturbance in the neighbourhood; whether the brothel has sufficient offstreet parking; whether there is suitable access to the brothel; or whether the brothel interferes with the amenity of the neighbourhood. In *Fairfield City Council v Taouk,* there was no evidence of the business causing any disturbance in the neighbourhood. It was not located near a church or school or area where children would be likely to visit for a recreational or cultural purpose. Nor was there evidence of any impact on the amenity of Fairfield. There was evidence of access to ample off-street parking, with

access either from the public laneway at the rear or from an unobtrusive entrance via a single doorway.

126. Thus, if the application in *Taouk* had been made under the DH Act there would have been little chance of obtaining an order restraining the premises from being used as a brothel because: (a) insufficient complaints had been received from the nominated classes of people; and (b) the brothel in question satisfied almost all criteria established under subs (5). The "overriding consideration" was that the brothel operates "in a discreet manner consistent with the amenity of the neighbourhood." *(Hansard, p* 1188).

Postponing the effect of the injunctive relief

127. The discretion under section 124 of the EPA Act permits the court to soften, according to the justice of particular circumstances, the application of rules which, though right in the general, may produce an unjust result in the particular case: Kirby P in *Warringah City Council v Sedevcic* at 341. Sometimes this "softening" can be achieved by postponing the effect of injunctive relief. Accordingly, in *Fairfield City Council v Taouk* Lloyd J postponed the effect of the injunctive relief granted by 18 months in order to allow the respondents sufficient time to relocate their business to an area zoned for the purpose of a brothel.

Costs of the proceedings

128. In *Rockdale City Council v Kim Maxy Jin* (unreported LEC, 13 August 1999) the council sought an injunction against the occupier of premises restraining her from using the premises as a brothel without consent. At the time of hearing the application for an injunction, there was no longer any foundation for believing or holding that the premises were being used for the purpose of a brothel or were likely to be so used in the future. Hence, there was no legal

or factual foundation for granting any injunctive relief in respect of the former use of the premises as a brothel, either under the EPA Act or the DHA. Since there was now no breach of the planning law or any violation of the DHA, the only realistic relief was that the proceedings be dismissed.

129. In relation to costs, however, the council relied upon the provisions of Part 15 Rule 7 of the *Rules of the Land and Environment Court* which empower the LEC to order a respondent to pay the costs of the proceedings where the respondent satisfies or causes to be satisfied the claim of the applicant after the proceedings have been commenced. Bignold J noted that that power is often invoked in circumstances where class 4 proceedings by way of civil enforcement are taken in the court, but before they come on for hearing, the breach of the Act is terminated. On the evidence, Bignold J was satisfied that the unauthorised use of the premises for the purpose of a brothel was terminated only because the council had commenced the class 4 proceedings. Accordingly, the council was entitled to the costs orders claimed against the respondents.

Suspension of orders restraining use

130. In *Bankstown City Council v Attallah* (unreported LEC 25 September 1998) the council sought declarations and orders to restrain the use of premises for the purpose of prostitution. The premises were located within Zone 4(a) - Industrial General "A" under the Bankstown PSO. Within this zone, commercial purposes other than rag collecting and dealing were prohibited. Specifically, the use of a brothel was prohibited within the zone pursuant to clause 77D, inserted in the PSO in consequence of the gazettal in April 1998 of Bankstown LEP No 201.

131. In June 1998, the council adopted DCP 37 for the Regulation of Brothels within Bankstown City. This regulated the activity of brothels within the

industrial area of Bankstown City, and specified locations where brothels were permitted. Evidence adduced in support of the council's application established that the premises were being used for the purposes of prostitution. Pursuant to clause 4(1) of the PSO, such use rendered the premises a "brothel" and therefore a prohibited use. The respondents did not challenge the use but sought a suspension of any order restraining the use. The respondents placed before the court a detailed submission revealing that the premises were located approximately 50 metres north of the approved zone for brothels. They submitted that the council could amend the existing LEP to include the premises. For this reason, a suspension for a period of forty-five days of any orders restraining the prohibited use was sought. The respondents also relied upon the absence of any evidence of complaints concerning the conduct of the illegal use.

132. Cowdroy AJ referred to the detailed analysis of the exercise of the court's discretion by the Court of Appeal in *Warringah Shire Council u Sedevcic* (1987) 10 NSWLR 335 at 339-341, and in *Fatsel Pty Limited v ACR Trading Pty Limited & Another* (1987) 64 LGRA 177. Although the power conferred by section 124 of the EPA Act is wide, care must be taken in the exercise of such power. Clearly, the court had no power to direct a council to effect changes to the LEP of the type sought by the respondents, and it was not for the court to speculate upon the likely outcome of such application. However, the fact that the application had been made, combined with the absence of any evidence of detriment to the public, warranted a short period of suspension to enable council to express its decision in answer to the submission. In the circumstances, a suspension for a period of one month was adequate. In allowing this period, Cowdroy JA was mindful that council had known of the activity since at least March 1998 and had not sought any urgent relief.

THE DH ACT AND APPLICATIONS FOR AN ORDER THAT PREMISES ARE NOT TO BE USED OR ALLOWED TO BE USED AS A BROTHEL

Introduction

133. Section 17 of the DH Act provides for an application to the LEC by a local council for premises not to be used as a brothel. In accordance with section 17(2), the council must not make an application unless it is satisfied that it has received sufficient complaints about the brothel to warrant the making of the application. The application must state the reasons why the council considers that the operation of the brothel should cease based on one or more of the considerations referred to in paras (5) (a), (b), (c), (d), (e) or (f):

"17. Application to Land and Environment Court for premises not to be used as a brothel

(1) The Land and Environment Court may, on application by a local council, make an order that an owner or occupier of premises that are a brothel and that are situated within the area of the council is not to use or allow the use of the premises for the purpose of a brothel.

(2) The local council must not make an application in relation to a brothel unless it is satisfied that it has received sufficient complaints about the brothel to warrant the making of the application.

(3) The complaints must have been made by:

(a) residents of the area in which the brothel is situated who live in the vicinity of the brothel, or
(b) residents of the area in which the brothel is situated who use, or whose children use, facilities in the vicinity of the brothel; or
(c) occupiers of premises that are situated in the area in which the brothel is situated and in the vicinity of the brothel.

(4) The application must state the reasons why the local council is of the opinion that the operation of the brothel should cease based on one or more of the considerations referred to in subsection 5 (a), (b), (c), (d), (e) or (f).

(5) In making an order under this section the Land and Environment Court is to take into consideration only the following:
(a) whether the brothel is operating near or within view from a church, hospital, school or any place regularly frequented by children for recreational or cultural activities,

(b) whether the operation of the brothel causes a disturbance in the neighbourhood when taking into account other brothels operating in the neighbourhood or other land use within the neighbourhood involving similar hours of operation and creating similar amounts of noise and vehicular and pedestrian traffic,
(c) whether sufficient off-street parking has been provided if appropriate in the circumstances,
(d) whether suitable access has been provided to the brothel,
(e) whether the operation of the brothel causes a disturbance in the neighbourhood because of its size and - the number of people working in it,
whether the operation of the brothel interferes with the amenity of the neighbourhood,
(g) any other matter that the Land and Environment Court considers is relevant.

(5) This section extends to premises within an area that is not a local government area and in that case a reference to a local council is to be read as a reference to the prescribed authority for that area.

(6) In this section, church, hospital and school have the same meanings as in the Summary Offences Act 1988. "

134. In an application for an order pursuant to section 17, sub-section (2) places the onus upon the council to be satisfied as to the existence of sufficient complaints from:

- residents of the area in which the brothel is situated who live in the vicinity of the brothel;
- residents of the area in which the brothel is situated who use, or whose children use, facilities in the vicinity of the brothel; or
- occupiers of premises that are situated in the area in which the brothel is situated and in the vicinity of the brothel.

"Sufficient complaints"

135. There does not appear to be any case law on what constitutes "sufficient complaints" for the purposes of section 17(2). Nor does there appear to be any other statutory regime which employs the phrase "sufficient complaints". The adjective "sufficient" is defined in the *Macquarie Dictionary* (3rd ed.) as "1. *That suffices; enough or adequate*". In *Ex parte Delaney* [1962] NSWR 1404 the Full Court of the Supreme Court of New South Wales considered the meaning of

"sufficient" in the phrase "any objection ... which appears to the licensing court or magistrate to be sufficient." Sugerman J, delivering the judgment of the court, stated (at 1406):

> "'*Sufficient*' *is a relative term. It requires reference to some end or purpose or some measure or standard which, if not explicitly stated, must be gathered from the context.* '*Sufficient*' *in the present context imports that the objection should be of sufficient consequence .. of sufficient moment .. that his objection is neither vexatious or frivolous. . .* "

136. It is arguable that "sufficiency" contains a quantitative as well as a qualitative element. First, the quantitative element. Ordinarily, an isolated single complaint would not be sufficient. Having regard to the nature of the use, even a discreet, unobtrusive and inoffensive brothel may attract the occasional complaint. This would not be sufficient for the purposes of section 17(2) of the DHA. Some repetition or continuity of complaint would ordinarily be expected. However, there could be exceptions. If the one complaint establishes, on good evidence, problems of the kind enumerated in section 17(5) of the DHA, sufficiency might be established and there ought be no need to await further complaints before seeking an order pursuant to section 17. Second, the qualitative element. The council is required to have received sufficient complaints about the brothel "*to warrant the making of the application*". The council's application will fail if it is not based on one or more of the considerations referred to in paras (5) (a), (b), (c), (d), (e) or (f). That is, irrespective of the quantity of complaints received, an application by council for premises not to be used as a brothel will fail where it is made on grounds extraneous to those enumerated in section 17(5) or without cogent evidence establishing those grounds. The dicta of Sugerman J quoted above is apposite.

OBTAINING EVIDENCE TO ESTABLISH THAT A BROTHEL IS OPERATING IN BREACH OF THE DH ACT

137. The question of evidence required to establish that a brothel is in breach of the DH Act concerns the evidence to establish that premises are being used for the purposes of prostitution. The requisite evidence depends to a significant extent upon the activities regarded by the court as constituting prostitution. As noted at para 4 above, section 2 of the DH Act contains the following definition of brothel:

> ***"brothel** means premises habitually used for the purposes of prostitution, or that have been used for that purpose and are likely to be used again for that purpose. Premises may constitute a brothel even though used by only one prostitute for the purposes of prostitution. "*

138. The DH Act contains no definition of prostitution: see discussion of the definition of prostitution at paras 6-12 above. In addition to evidence of use of the premises for prostitution in the sense discussed, in an application under the DH Act a council will be required to adduce evidence in relation to the following matters:

(1) complaints about the brothel made by persons in one of the classes referred to in section 17(3), namely:

- residents of the area in which the brothel is situated who live in the vicinity of the brothel;
- residents of the area in which the brothel is situated who use, or whose children use, facilities in the vicinity of the brothel; or
- occupiers of premises situated in the area in which the brothel is situated and in the vicinity of the brothel;

(2) evidence of one or more of the matters referred to in section 17(5) (a), (b), (c), (d), (e) or (9, namely:

- the proximity of the brothel to, or its visibility from a church, hospital, school or place frequented by children for recreational or cultural activities;

- disturbance caused by the brothel, taking into account other brothels in the neighbourhood and other land use within the neighbourhood involving similar hours, noise and vehicular and pedestrian traffic;
- disturbance caused by the brothel because of its size and the number of people working in it;
- the sufficiency of off-street parking;
- the suitability of access to the brothel; and
- interference with the amenity of the neighbourhood.

139. Depending on the circumstances of the particular brothel and particular application, evidence of many of the matters referred to in section 17(5) may be capable of being adduced in the form of reports of town-planners, social planners, engineers and/or acoustic engineers, plans, diagrams and photographs. Such matters include local land use, off-street parking, access to the brothel etc. Other matters, such as interference with the amenity of the neighbourhood, will be most appropriately proven through statements of local residents, frequent visitors to the local area, local business-persons, and occupiers of local premises, including commercial premises, churches, hospitals, schools and places frequented by children.

RELATIONSHIP BETWEEN THE EPA ACT AND THE DH ACT IN CONTROLLING THE USE OF PREMISES AS A BROTHEL

140. It remains to consider the relationship between the EPA Act and the DH Act in controlling the use of premises as a brothel. The Minister's second reading speech on the *Disorderly Houses Amendment Bill 1995* provides *inter alia*:

> "*It is not our intention with the introduction of these measures to limit those applications appropriately based on planning controls vested under the Environmental Planning and Assessment Act 1979. The only change to existing*

> *law to be effected by this proposal will be regarding the basis for, and the jurisdiction of; applications under the Disorderly Houses Act to close a brothel which is not otherwise disorderly.*
>
> *Section 20 of the Land and Environment Court Act 1979 is amended to include applications under proposed new section 17 of the Disorderly Houses Act 1943 in class 4 of the jurisdiction of the Land and Environment Court which deals with environmental planning protection, among other things. This jurisdiction is also used for applications to close brothels which are based on planning controls under the Environmental Planning and Assessment Act. " Hansard,* pp 1188-1189

141. In the early decision of *Southside Business Centre Pty Ltd v Rockdale City Council* (unreported, LEC, 2 September 1996), Pearlman J also considered the relationship between the DH Act and the EPA Act. That case concerned an appeal under section 56A of the *Land and Environment Court Act 1979* against an assessor's decision to dismiss a class 1 appeal against council's refusal to grant development consent in respect of a brothel. The grounds of appeal were *inter alia* that the assessor had erred in law in failing to have regard to the DH Act. Her Honour noted that the factors set out in section 17(5) of the DH Act are required to be taken into account in making an order on an application by a local council after it has received sufficient complaints from specified persons. By contrast, the class 1 appeal brought against council's refusal to grant development consent for a brothel was not such an application. Her Honour found the class 1 appeal to bear none of the characteristics of a section 17 DH Act application. It was not brought by the council, but by the applicant. Its purpose was not to obtain an order that the premises not be used as a brothel, but to appeal against the refusal of a DA. According to her Honour, the second reading speech, far from requiring consideration of the factors set out in section 17(5) in the hearing of a planning appeal, recognised the distinction between an application under section 17 and such a planning appeal.

142. Referring to the decision of Talbot J in *Croucher v Fairfield City Council,* her Honour noted that the factors set out in section 17(5) DH Act are planning

issues which may "*so far as they are relevant to the subject matter of the development application ... be taken into consideration as matters arising under relevant heads in s 90(1) of the EP&A Act.*'' However, the assessor was not bound to take-into account those factors, and did not commit an error of law by not doing so. He was bound to take into account those matters in section 90(1) of relevance to the development the subject of the DA, but only if the proposed use was permissible with consent. As the assessor had found that the proposed use was prohibited under the relevant statutory controls, no section 90(1) considerations arose.

143. More recently in *Fairfield City Council v Taouk* (LEC, unreported, 24 June 1998), Lloyd J held that that the two Acts were designed to work in a complementary fashion, and that the criteria in section 17 of the DH Act were a relevant factor to take into account in the exercise of the court's discretion pursuant to section 79C of the EPA. In so holding, his Honour concluded that there was sufficient absurdity or unreasonableness in the operation of Part 3 of the DH Act to permit the court to have recourse to extrinsic materials, in particular the Minister's second reading speech, pursuant to section 34(1)(b) of the *Interpretation Act 1987.* Lloyd J found the Minister's second reading speech to evince a clear intention that the only change to the current law effected by Part 3 of the DH Act relates to applications under that Act. Parliament's intent in enacting Part 3 of the DH Act was to leave unaffected the regime for applications for relief against brothels by councils under the EPA. His Honour concluded (at para 29) that the two Acts can operate without inconsistency:

> "*The activity with which the two Acts are concerned is different. The Environmental Planning and Assessment Act is concerned with brothels which breach relevant planning laws, while the Disorderly Houses Act is concerned with brothels which breach the various criteria established in s 1 7(5J. It is therefore clear, with the aid of the Minister's second reading speech, that the Parliament intended that the Acts operate together and that they are complementary in their operation.*"

144. Thus, it is tolerably clear that the DH Act and EPA Act provide complementary regimes which can be used in conjunction to regulate and control the inappropriate use of premises as a brothel. The LEC has placed beyond doubt that the two Acts were designed to work in a complementary fashion, and that the criteria in section 17 of the DH Act are also relevant in the exercise of the Court's discretion pursuant to section 79C of the EPA.

145. Clearly, however, there are different evidentiary requirements in relation to each regime. One pertinent distinction for councils considering pursuant to which Act to take action is the requirement of section 17(3) of the DH Act of sufficient complaints made by residents who live in the brothel's vicinity; by residents who use, or whose children use facilities in the brothel's vicinity; or by occupiers of premises situated in the vicinity of the brothel. No such requirement arises in connection with action brought under the EPA Act. As seen at para 125 above, in *Fairfield City Council v Taouk*, had the action been brought pursuant to the DH Act, the council would have had difficulty in demonstrating the sufficiency of complaints as these were few in number and did not specifically relate to any adverse effect of the operation of the brothel. Similarly, the considerations listed in section 17(5) of the DH Act include whether the brothel operates near a church, hospital, school or any place likely to attract children; whether the brothel creates a disturbance in the neighbourhood; whether the brothel has sufficient off-street parking; whether there is suitable access to the brothel; or whether the brothel interferes with the amenity of the neighbourhood. As noted, in *Fairfield City Council v Taouk* there was no evidence of the business causing any disturbance in the neighbourhood. Thus, if the application in *Taouk* had been made under the DH Act there would have been little chance of obtaining an order restraining the premises from being used as a brothel because: (a) insufficient complaints had been received from the nominated classes of people; and (b) the brothel in question satisfied almost all criteria established under subs (5). The LEC has established that where an action is brought under the EPA Act, the

"overriding consideration" is whether the brothel operates "in a discreet manner consistent with the amenity of the neighbourhood." (*Hansard*, p 1188).

CONCLUSIONS: HOW THE USE OF PREMISES AS A BROTHEL MAY BE VALIDLY REGULATED

Introduction

146. A range of environmental planning instruments are available to regulate the use of premises as a brothel: see paras 13-38 above. There is at present no State Environmental Planning Policy concerning the use of premises as brothels in New South Wales. However, it would be permissible for a SEPP to be made to ensure that the use of land and buildings throughout the State for the purposes of a brothel is carried on in a location and in a manner compatible with other proximate uses, and is not otherwise carried out: see paras 19-21 above. In principle, a Regional Environmental Plan could also be used to bring consistency in brothel planning to a particular region. However, a State-wide approach to brothel planning may well be more appropriate than a number of REPs for different regions: paras 21, 24 above.

LEPs

147. Local Environmental Plans provide an instrument to be used by councils to regulate the use of premises as brothels: paras 25ff above. Thus, an LEP could provide that consent not be granted unless the consent authority is satisfied that certain factual pre-conditions designed to ensure that the operation of the brothel will be discreet, unobtrusive and inoffensive have been or will be met (using the jurisdictional preconditions formula in the cases of *Clifford v Wyong Shire Council; Currey v Sutherland Shire Council; Franklins v Penrith City Council;* and *Corporation of the City of Enfield v Development Assessment Commission):* see para 44 above. This approach

envisages the introduction into LEPs of provisions concerning brothels analogous to section 17 of the DHA, thus requiring councils to consider, as pre-conditions to the exercise of powers to determine development applications, matters such as distance from churches, hospitals, schools and other community facilities, parking, access, size, interference with the amenity of the neighbourhood etc: see para 111 (b) above.

148. Councils do not, of course, have unlimited discretion in relation to LEPs. The form and content of LEPs are governed by the Act. LEPs must also not be inconsistent with SEPPs or REPs expressed to be paramount, or with Ministerial directions under section 117. There are requirements for public submissions, hearings and consultation with public authorities and other councils. The Minister has what amounts to an effective veto: para 31 above. A particular difficulty with regulating brothels through LEPs is that these can be overridden by a paramount planning instrument: para 31 above.

149. SEPP 1 (Development Standards) is an example. SEPP 1 allows councils to approve development proposals that do not comply with a set development standard where this can be shown to be unreasonable or unnecessary: paras 38ff above. It is significant to recall, however, that provisions of environmental planning instruments regulating brothels can be prepared not as development standards but as prohibitions. A provision which absolutely prohibits a form of development in a specified locality or on land with a specified characteristic is not a development standard: para 43 above. Where properly drafted, such provisions would not be considered as development standards, rather as prohibitions, and would therefore not be subject to being overridden by SEPP1: see paras 45-46 above.

DCPs

150. Councils may also prepare Development Control Plans containing more detailed provisions than those in an LEP. These are required to conform with the provisions of the relevant LEP or draft LEP. There is considerable scope permitted for DCPs to regulate development, including inserting specific criteria with which development ought to comply, notwithstanding the silence of the LEP with respect to such criteria: see paras 32-35 above.

Conditions of consent: "discreet, unobtrusive and inoffensive"

151. The evaluation of development applications under section 79C of the EPA Act provides a further mechanism for consent authorities to regulate the operation of brothels. In considering a DA, the consent authority is required to take into consideration relevant matters specified in section 79C. The matters enumerated in section 79C(1) are not exhaustive of the considerations which a consent authority may take into account. Other matters include, in the public interest, any matter which relates to the objects of the Act set out in section 5. Potential matters for consideration under section 79C include (see paras 61-63 above):

- the likely impacts of that development, involving considerations such as context and setting; access, transport and traffic; public domain; social impact on the locality, that is, social benefits and costs in terms of social cohesion, community structure, character, values and beliefs, a sense of place and community and social change management; economic impact on the locality; site design and internal design; and cumulative impacts, including nibbling effects and synergistic effects;

- the suitability of the site for the development;

- any submissions; and

- the public interest.

152. The principal authority on conditions of development consent is *Croucher v Fairfield City Council,* in which Talbot J held that approval of development provided an opportunity for imposing conditions of consent for the purpose of ensuring that a business is conducted in "a discreet, unobtrusive and inoffensive manner": see paras 68-75 above. In a decision declining special leave to appeal from the decision of Murrell AJ in *Liu, Lonza & Beauty Holdings Pty Limited v Fairfield City Council* Mason P in the Court of Appeal noted that the question of the relevance of community standards and views of morality was "one of some significance and the proper case would give rise to a grant of leave": para 84 above. The recent decisions of Commissioner Bly and Bignold J in *Perry Properties Pty Ltd v Ashfield Municipal Council* suggests that widespread adverse community reaction might in some cases constitute an adverse social impact warranting, in the public interest, refusal of a DA: paras 95-99 above.

153. It is difficult to identify *in abstracto* a core of conditions that might uniformly be imposed on all development consents to the use of premises as a brothel. Much will depend upon the particular locality and specific operations proposed. It is, however, tolerably clear that conditions which aim to ensure that the brothel is conducted in a discreet, unobtrusive and inoffensive manner are likely to be upheld. Such conditions include those relating to provision for telephone bookings and for admission of clients by appointment only; restrictions on public display of goods, services or products associated with the brothel; restrictions on advertising signs and structures; external lighting; size of the brothel; number of persons working in the brothel; hours of operation; provision of suitable waiting areas; provision off-street parking; provision of vehicular and pedestrian access provision of a management plan; security arrangements; restrictions on the sale of alcohol; occupational health and safety standards; hygiene standards; sanitary control; waste management;

and restrictions on related activities such as live music and strip-shows: para 102 above. Conditions may be drafted as specific performance standards or prescriptions, or both, with which the development must comply: see paras 108-109 above.

CONCLUSIONS: PREVENT1NG THE ILLEGAL, USE OF PREMISES AS A BROTHEL

154. In conclusion, two avenues of recourse are available to councils in relation to the illegal use of premises as a brothel: (a) pursuant to the EPA Act: and (b) pursuant to the DH Act.

Applications pursuant to section 17 DH Act

155. Section 17 of the DH Act provides for an application to the LEC by a local council for premises not to be used as a brothel. In accordance with section 17(2), the council must not make an application unless it is satisfied that it has received sufficient complaints about the brothel to warrant the making of the application. The onus is on the council to be satisfied as to the existence of sufficient complaints from residents of the area in which the brothel is situated who live in the vicinity of the brothel; residents of the area in which the brothel is situated who use, or whose children use, facilities in the vicinity of the brothel; or occupiers of premises that are situated in the area in which the brothel is situated and in the vicinity of the brothel (section 17(3)): para 134 above. It is arguable that "sufficiency" contains a quantitative as well as a qualitative element. In relation to the quantitative element, an isolated single complaint would ordinarily not be sufficient. However, there could be exceptions. In relation to the qualitative element, the council's application will fail if it is not based on one or more of the considerations referred to in paras (5) (a), (b), (c), (d), (e) or (f): para 136 above.

156. To establish that premises are being used for the purposes of prostitution, council requires evidence of:

- activities regarded by the court as constituting prostitution (paras 612 above);
- complaints about the brothel made by persons in one of the classes referred to in section 17(3) (para 138 above); and
- evidence of one or more of the matters referred to in section 17(5) (a), (b), (c), (d), (e) or (fl, namely:
  - the proximity of the brothel to, or its visibility from a church,
  - hospital, school or place frequented by children for recreational or
  - cultural activities;
  - disturbance caused by the brothel, taking into account other
  - brothels in the neighbourhood and other land use within the
  - neighbourhood involving similar hours, noise and vehicular and
  - pedestrian traffic;
  - disturbance caused by the brothel because of its size and the
  - number of people working in it;
  - the sufficiency of off-street parking;
  - the suitability of access to the brothel and
  - interference with the amenity of the neighbourhood (paras 138
  - above).

Proceedings pursuant to section 123 EPA Act

157. If development for the purpose of a brothel is carried out in a zone where it is prohibited or in a zone in which it is permissible with consent but the necessary consent has not first been obtained, the development will be illegal, being in breach of section 76B or 76A of the EPA Act respectively. The local council, or any other person, could take proceedings in the LEC pursuant to section 123 of the EPA Act, to remedy or restrain the breach. The LEC has a

wide discretion to grant such order as it thinks fit to remedy or restrain the breach: section 124 of the EPA Act and paragraph 121ff above. A usual order would be to restrain the carrying out of the development. The Court also would have a discretion to postpone the operation of any injunctive relief, if the justice of the situation so demands: paragraph 127.

158. The applicant in the proceedings brought pursuant to section 123 of the EPA Act to restrain an illegal development for the purpose of a brothel would need to show:

(a) the respondent is the person carrying out the development or the owner or occupier of the land who has sufficient control over the person carrying out the development;

(b) the applicable environmental planning instrument and the zoning of the land, so as to be able to establish that development for the purpose of brothel is either prohibited or requires development consent on the land;

(c) the land is used for the purpose of a brothel; and

(d) such use is in breach of either section 76A or section 76B of the EPA Act, there being no applicable development consent or existing use rights authorising the development.

159. The relevant environmental planning instrument and zoning map would be able to be proved by a certified copy of the instrument and of the map being tendered pursuant to section 150 of the EPA Act. The zoning of the land pursuant to that instrument would be able to be established by a certificate under section 149 of the EPA Act. Proof of ownership of the land would be able to be established by one of the methods of proof in section 151 of the EPA Act. As elaborated at paras 53-54 above, direct evidence that the premises are habitually used for prostitution could be obtained in various ways from various sources. Circumstantial evidence could be important, particularly in establishing that the use for the purposes of prostitution is habitual. Circumstantial evidence may establish facts from which the Court would be

asked to conclude, as the only rational inference, that the premises are used habitually for the purposes of prostitution.

160. The injunctive powers of the court pursuant to section 124(1) of the EPA Act provide a further means to deal with illegal brothels. The powers of the court pursuant to section 124 are wide. The discretion under section 124 of the EPA Act also permits the court to soften the application of rules which might otherwise produce an unjust result in the particular case. This "softening" has been achieved by postponing the effect of injunctive relief: paras 127 above. Further, the court has shown a willingness to order costs against a respondent where although the breach is terminated before proceedings for injunctive relief come on for hearing, the unauthorised use was terminated only because the council had commenced proceedings: paras 128-129 above.

The different regimes under the DH Act and the EPA Act

161. It is clear that different evidentiary requirements exist in relation to the different regimes under the DH Act and the EPA Act. One pertinent distinction is the requirement of section 17(3) of the DH Act of sufficient complaints" para 125 above. No such requirement arises in connection with action brought under the EPA Act. As seen at para 126 above, in *Fairfield City Council v Taouk*, had the action been brought pursuant to the DH Act, the council would have had difficulty in demonstrating the sufficiency of complaints. Similarly, the considerations listed in section 17(5) of the DH Act include whether the brothel operates near a church, hospital, school or any place likely to attract children; whether the brothel creates a disturbance in the neighbourhood; whether the brothel has sufficient off-street parking; whether there is suitable access to the brothel; or whether the brothel interferes with the amenity of the neighbourhood. As noted, in *Fairfield City Council v Taouk* there was no evidence of the business causing any disturbance in the neighbourhood.

Thus, if the application in *Taouk* had been made under the DH Act there would have been little chance of obtaining an order restraining the premises from being used as a brothel because the brothel in question satisfied almost all criteria established under subs (5). In an action under the EPA Act, the "overriding consideration" is whether the brothel operates "in a discreet manner consistent with the amenity of the neighbourhood."

B J Preston SC
S E Pritchard

Selborne Chambers
23 May 2001