

HUTT CITY COUNCIL

HEARINGS PANEL

Date: Wednesday 7 December 2016
Time: 9.00am
Venue: The Dowse Art Museum, James Coe Room 1, 45
Laings Road, Lower Hutt

MINUTE ITEM ATTACHMENTS

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**IN THE MATTER OF
AND**

Sections 104, 104B, 104D and 108 of the Resource Management Act 1991

**IN THE MATTER OF
AND**

Section 15 of the Prostitution Reform Act 2003

IN THE MATTER OF

A resource consent application by Venus 1 Limited to operate a brothel and sell alcohol between 10:00am and midnight with up to seven staff, including a manager, receptionist and a driver, at 23 Pharazyn Street, Lower Hutt.

(Legally described as Lot 2-3 DP 2153; WN404/97)

Council Reference RM 160192

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1. DECISION

- 1.1 In accordance with a delegation by Hutt City Council ("**HCC**"), pursuant to the provisions of Section 34 of the Resource Management Act 1991 ("**RMA**"), as there were not less than three members present, the Hearings Committee had power to act in determination of the following proceedings. This decision represents the Council's resolution on the resource consent application.
- 1.2 That the Hearings Committee, acting under delegated authority from Council and pursuant to sections 104, 104B, 104D, and 108 of the Resource Management Act 1991, **GRANTS CONSENT subject to the conditions in Schedule 1**, to the resource consent applications made by Venus 1 Limited ("**Applicant**"), to operate a brothel and sell alcohol (subject to approval under the Sale and Supply of Alcohol Act 2012 ("**SASA Act**")) at 23 Pharazyn Street, Lower Hutt.
- 1.3 The reasons for the decision on the application are set out below.

2. THE APPLICATION

- 2.1 Full details of the proposal are contained in the Section 42A Council Planner's Report and in the application.¹ A summary of the key aspects of the application are set out below.
- 2.2 The Applicant applied for resource consent to change the use of a building at 23 Pharazyn Street, from residential to commercial. The Applicant proposes to operate a brothel and supply alcohol to customers at the site.
- 2.3 It is proposed to expand the existing brothel business to four sex workers plus three other workers (manager, receptionist and driver); a maximum of seven staff on-site at any one time. The proposed hours of operation of the brothel are 10:00am to midnight seven days per week.²
- 2.4 The brothel business is proposed to operate by appointment only, with no signage at the site to identify the business. There would be a maximum number of 20 customers per day, with a maximum of four customers on site at any one time. The proposal also seeks to enable private functions which may have up to six customers. Such private functions would only occur up to twice each calendar month, and no other customers would be on site during a private function.
- 2.5 There was some confusion as to whether a resource consent to enable, under the RMA, for an on-licence to sell alcohol to customers in a residential zone was also being applied for. In closing submissions, the Applicant made it clear that it still sought resource consent under the District Plan, subject to approval under the SASA Act, to sell alcohol to customers.³

¹ A number of submitters felt this was an application by stealth, and that once granted, changes could occur. The consent granted is for this particular activity only and the conditions imposed in Schedule 1 apply. Any new proposal beyond what has been granted in this case would require a fresh resource consent application.

² The original application sought the hours of 8am to 10pm. This timing was changed prior to notification and the hours of 10am to midnight were used in the application.

³ The original application was silent on this point but the application as notified sought consent for an on licence to sell alcohol to customers. The SASA Act is a separate process to this resource consent. See paragraph 8.1 below and also paragraph 2.4 of the reporting officer's evidence.

3. THE EXISTING BROTHEL ACTIVITY

- 3.1 Since August 2016,⁴ a brothel business has operated from the premise as a permitted home occupation under the Hutt City District Plan ("**District Plan**"),⁵ with three sex workers. Its hours of operation are 10:00am to 8:00pm. This activity forms part of the existing environment for our assessment under the RMA.

4. THE SITE AND LOCALITY

- 4.1 The application site is 23 Pharazyn Street, Melling.⁶ The site of 1548m² contains a large two storey dwelling to the rear. It has established trees and grounds with a gravel driveway extending from the south-western corner of the site to behind the house. There is parking within the site for a total of eight cars.
- 4.2 The dwelling was built in 1929. While its most recent use has been residential it has been commercially fitted out and used in the past as a restaurant, a small hotel and as the residence for the South African Embassy. It is clear from google street view⁷ that old signs (with lights) were used as part of previous activities.⁸
- 4.3 The site is within a narrow general residential zone between the Hutt River to the east and the Melling Railway Line and State Highway 2 to the west. The zone is bookended to the south and north by general business zones. The southern end of Pharazyn Street passes under the Normandale Road overbridge and contains a well-known group of hotels, with the Fernhill Motor Lodge immediately next door to the site. The Fernhill Motor lodge advertises that it has a 'low-key' restaurant, and the Champers Motor Inn advertises a restaurant and bar (which holds an on-licence until 1:00am). As you travel north up Pharazyn Street, past the next area of general business zone, there is another pocket of general residential zone which includes a number of preschools and dwellings of varying densities. At the northern end of Pharazyn Street is the Melling Train Station and Melling Bridge.
- 4.4 Submitters, and in particular Mr Read, provided a detailed description of the neighbourhood. During our site visit, and in listening to submissions and the evidence from the Applicant, we found the neighbourhood to be one of mixed uses which included some commercial activities (in particular the motels), individual residential dwellings, and multi-unit dwellings on variously sized sites.
- 4.5 Pharazyn Street is classified as a local distributor road and, due to its north-south orientation, provides a local north-south connection through Melling. From our site visit, and the submissions and evidence we heard, it is a well-used local road.
- 4.6 The site is located in the General Residential Activity Area of the District Plan. The site is also located in the Wellington Faultline Special Study Area however as no buildings are being constructed the provisions are not triggered. There are no other special notations or restrictions in the District Plan that may affect the proposal.

⁴ Some submitters referred to July 2016 but Mr Johnstone informed us that the brothel commenced operation in August.

⁵ Rule 4A 2.1(b).

⁶ Legally described as Lots 2-3 DP 2153 contained within certificate of title WN404/97.

⁷ Dated October 2013.

⁸ However, the structures of those old signs were not viewed during our site visit.

5. SUBMISSIONS

- 5.1 The application was limited notified on 28 September 2016 to 74 property owners and occupiers for 54 properties. Nineteen submissions were received, all in opposition.⁹
- 5.2 In advance of the hearing we read all the submissions and have had regard to them all as part of our evaluation of the proposal and in making our decision. During the hearing we heard from seven submitters who canvassed the issues in detail.

6. THE HEARING

6.1 The hearing was held at The Dowse Art Museum, Lower Hutt on Wednesday 7 December 2016, and adjourned to allow for the commissioners to deliberate on Thursday 8 and Friday 9 December. The hearing was closed on Friday 9 December 2016.

6.2 The following persons presented submissions and evidence to the Hearing:

(a) Applicant:

- (i) Mr Paul Cheug, Legal Counsel;
- (ii) Ms Megan Young, Legal Counsel;
- (iii) Ms Chun Yan Mao, Director for the applicant;
- (iv) Ms Gina Abraham, Manager for the applicant;
- (v) Ms Catherine Healy, expert witness for the applicant; and
- (vi) Mr Jordan Todd, Law Clerk, observing;

(b) Submitters:

- (i) Mr Bruce Read;
- (ii) Mr Connor Duffy;
- (iii) Ms K & Mr C Dravitzki;
- (iv) Ms Christine Massof;
- (v) Mr Chris Mathieson; and
- (vi) Mr Holona Lui-Fakaotimanava; and

(c) Reporting Officers:

- (i) Ms Peri Zee, Resource Consents Planner;
- (ii) Mr Tim Johnstone, Team Leader Resource Consents; and
- (iii) Mr Bradley Cato, City Solicitor.

⁹ The Applicant supplied written approvals from three parties, two of which were subsequently withdrawn.

- 6.3 A section 42A officer's report was prepared by Ms Peri Zee. We were assisted in an administrative capacity by Mrs Heather Clegg, Hearings Administrator for HCC and Ms Susan Haniel, Committee Advisor for HCC. We thank them, and the Council staff, in particular Ms Zee, for their assistance.
- 6.4 All of the material presented by the above parties is held on file at HCC. For the sake of brevity, we have not produced that material verbatim in this decision. We do however refer to relevant matters raised in the material in subsequent parts of this decision. In making our decision we have considered all of the matters presented to us, both during the hearing and in submissions.
- 6.5 As stated at the end of the hearing we were impressed with the effort and approach of all the parties in preparing and presenting their submissions. While submissions were passionately expressed, and a significant difference in opinions existed, the presentations were respectful and focused on the issues of relevance. That enabled us to gain a robust understanding of the issues which we have to determine. We again thank all the parties for the efforts they made and the manner in which the hearing was conducted.
- 6.6 We undertook a site visit on Monday 5 December 2016. We visited the site, were shown around the premises and drove around the local area.

7. CONSENTS SOUGHT

- 7.1 The site is within the General Residential Activity Area and the relevant rules are contained within chapters 4A and 14.
- 7.2 Brothels and on-licences are not listed as permitted, controlled, restricted discretionary or discretionary activities within Chapter 4A of the District Plan. They are therefore non-complying activities under rule 4A 2.5(a). No party argued an alternative activity status.

8. STATUTORY PROVISIONS

RMA

- 8.1 This application (for both the brothel and on-licence) falls to be considered as a non-complying activity under section 104D of the RMA. We repeat our comments above that this application, and our decision, in relation to the sale of alcohol relates solely to an assessment of RMA matters under the District Plan. It is not an approval for an on-licence. Should the Applicant wish to proceed to sell alcohol, compliance with the SASA Act is required. Any decision under the SASA Act would be made by the District Licencing Committee through a separate hearing process.
- 8.2 As a non-complying activity, the application must first pass the two-step gateway tests of section 104D of the RMA. Only if the application satisfies one or other of those two tests can it then proceed to be fully assessed on its merits against the other provisions of section 104 of the RMA (which is subject to Part 2 of the RMA).

8.3 Section 104D states:

- (1) *Despite any decision made for the purpose of section 95A(2)(a) in relation to minor effects, a consent authority may grant a resource consent for a non-complying activity only if it is satisfied that either—*
- (a) *the adverse effects of the activity on the environment (other than any effect to which section 104(3)(b) applies) will be minor; or*
 - (b) *the application is for an activity that will not be contrary to the objectives and policies of—*
 - (i) *the relevant plan, if there is a plan but no proposed plan in respect of the activity; or*
 - (ii) *the relevant proposed plan, if there is a proposed plan but no relevant plan in respect of the activity; or*
 - (iii) *both the relevant plan and the relevant proposed plan, if there is both a plan and a proposed plan in respect of the activity.*

8.4 In undertaking our assessment of the proposal against these tests we have assessed the effects as mitigated by the conditions we have imposed in Schedule 1.¹⁰

8.5 The first gateway test, section 104D(1)(a), requires us to consider *only* the adverse effects of the activity on the environment. The benefits are not a relevant consideration - they belong to the subsequent section 104 assessment. Furthermore, in considering whether the adverse effects on the environment are *minor*, the effects to be considered are as proposed to be remedied or mitigated by conditions under section 108.

8.6 Turning to the second test, s104D(1)(b), we are required to consider whether the activity is contrary to the relevant objectives and policies of the operative District Plan. In undertaking this assessment, we are mindful that "*contrary to*" means "*repugnant to*" and is more than "*somewhat inconsistent with*".¹¹ We are also mindful that relevant objectives and policies should be read as a whole with a decision made on an overall basis.¹²

8.7 If the proposal passes either of the two above gateway tests, it then falls to be considered under section 104 of the RMA. Consent can be granted, subject to conditions under section 108 of the RMA, or declined.

¹⁰ We consider this approach consistent with case law, see for example *Bethwaite v Christchurch City Council* C085/93, at Page 8, *Baker Boys Limited v Christchurch City Council* [1998] NZRMA 433, at 96 and *Stokes v Christchurch City Council* C08/99.

¹¹ *NZ Rail Limited v Marlborough District Council* [1994] NZRMA 70 (High Court) and *Re P & I Pascoe Limited* [2014] NZEnvC 255 at [122].

¹² *Re P & I Pascoe Limited* [2014] NZEnvC 255 at [123].

PERMITTED BASELINE

8.8 Section 104(2) states:

"...when forming an opinion for the purpose of subsection 1(a), a consent authority may disregard an adverse effect of the activity on the environment if a national environmental standard or the plan permits an activity with that effect."

8.9 Under section 104D(2) the permitted baseline may also be applied to our section 104D assessment.

8.10 Put simply, the permitted baseline enables decision-makers to ignore adverse effects which are permitted by the District Plan and focus solely on the additional effects beyond those permitted. The permitted baseline for this proposal consists of the residential use of the site and a brothel operating as a home occupation with not more than three persons working at any one time (and one living at the site). Visitors to the site for a home occupation are restricted to 7:00am to 8:00pm but there is no restriction on the number of visitors to the site per day or at any one time.¹³

8.11 As mentioned above, this is the position under which the brothel currently operates. We have decided to apply the permitted baseline assessment and do so as relevant in our consideration below. We note that the permitted baseline test cannot apply to the sale of alcohol.

PRA

8.12 Uniquely to a hearing for a resource consent for a brothel, section 15 of the PRA also requires:

- "(1) When considering an application for a resource consent under the Resource Management Act 1991 for a land use relating to a business of prostitution, a territorial authority must have regard to whether the business of prostitution—*
- (a) is likely to cause a nuisance or serious offence to ordinary members of the public using the area in which the land is situated; or*
 - (b) is incompatible with the existing character or use of the area in which the land is situated.*
- (2) Having considered the matters in subsections (1)(a) and (b) as well as the matters it is required to consider under the Resource Management Act 1991, the territorial authority may, in accordance with sections 104A to 104D of that Act, grant or refuse to grant a resource consent, or, in accordance with section 108 of that Act, impose conditions on any resource consent granted.*
- (3) Subsection (1) does not limit or affect the operation of the Resource Management Act 1991 in any way, and it may be overridden, with respect to particular areas within a district, by the provisions of a district plan or proposed district plan."*

8.13 Section 15 of the PRA provides two additional requirements that we must have regard to in making our decision in addition to the requirements of the RMA.¹⁴ In having regard to these matters we may

¹³ Chapter 4A 2.1.1 of the District Plan, Permitted Activity conditions.

¹⁴ *Mount Victoria Residents Association Inc v Wellington City Council* High Court Wellington, CIV-2008-485-1820, 5 March 2009, Dobson J at paragraph [10].

decide to decline the consent application based solely on our consideration of section 15 of the PRA.¹⁵

9. ISSUES IN CONTENTION

9.1 The s42A report helpfully summarised the key RMA issues as:

- (a) visual amenity effects;
- (b) light spill effects;
- (c) noise effects;
- (d) privacy effects;
- (e) residential character effects;
- (f) traffic and parking effects; and
- (g) social effects.

9.2 The s42A report listed a number of 'other' effects.¹⁶ Where relevant we address these matters, such as precedent effect, in our decision. However, we agree with the s42A report that most of these matters are not relevant.¹⁷ One matter we briefly mention, as it was a common theme in submissions, was the effect on property values.¹⁸ We agree with the s42A report that property prices are an indirect, or derivative, effect reflecting those effects listed above (and addressed below), as opposed to a direct effect itself. We were also not presented with any evidence as to whether such effects existed,¹⁹ and the expert opinion of Ms Healy for the Applicant was that in her nearly three decades of work in the sector she is not aware of any instances of adverse effects on house prices.

9.3 The s42A report summarised the key PRA issues as:

- (a) offence, including:
 - (i) inappropriateness of activity in area with family homes, motels and kindergartens/schools;
 - (ii) immorality of prostitution;
 - (iii) betrayal of family values;
 - (iv) repugnance at nature of business;
 - (v) attracting "undesirables";

¹⁵ Ibid, at paragraph [32] and section 15(2) of the PRA.

¹⁶ At pages 6-7 of the s42A report.

¹⁷ As set out in sections 6.12 to 6.26 of the section 42A report and as per *Foot v Wellington City Council* W73/98 at [254] and [255].

¹⁸ This was closely aligned with another common theme being damage to the reputation of Pharazyn Street. Again we also see this as an indirect effect. We were also not provided with probative evidence as to the existence of such an effect.

¹⁹ Mr O'Reilly in his submission referenced a survey, from an Australian website, claiming that 33% of people would not buy a property within 2km of a brothel but provided no further information as to the detail of the survey and its relevance to NZ and whether the proposal would actually affect property prices.

- (b) nuisance, including:
 - (i) increased pedestrian and vehicle traffic;
 - (ii) increased disturbance and noise on street;
 - (iii) increase in people with undesirable characters in area
 - (iv) nuisance from noise;
 - (v) nuisance from light; and
- (c) Incompatibility with the existing character and use of the area (including family homes, motels and kindergartens/schools).

9.4 These issues are all addressed below in light of the statutory provisions set out in Section 8 above.

10. SECTION 104D(1)(A) ASSESSMENT

VISUAL AMENITY EFFECTS

- 10.1 When considering the effect on amenity values we assessed the existing environment (in section 4 above) and analysed how the proposal may affect this. The existing building is residential in appearance, has been altered for commercial purposes, and is set back from the road on a large section with mature trees and grounds. The proposal does not involve any changes to this building or the site, and does not include signage of any form. The section is well screened from the road and from our site visit looks like a well-cared for, large, residential dwelling. The areas for car parking are also screened from the road and given the size of the site we do not consider that on-site parking will have any visual effects.
- 10.2 To the immediate south of the site is the Fernhill Motor Lodge which is also set back from the road with a large paved parking area facing the street, with very little vegetation. It has a large sign at its entry and a smaller sign at its roadside corner immediately beside the site. Across the street are some well-cared for dwellings with, to the south, Champers Motor Inn and to the north Motel 22, both with extensive buildings, paved areas, and large street front signs.
- 10.3 To assist in the site retaining its outward residential appearance the Applicant accepted, and we have imposed, conditions in Schedule 1 that include no signage, that the grounds be maintained, and no new (including coloured) outside lighting be installed. With this mitigation we find the visual amenity effects of the proposal to be less than minor.

LIGHT EFFECTS

- 10.4 This effect is closely aligned to the visual amenity effects above. Several submitters raised concerns over the potential for lighting to cause a nuisance at adjacent properties. We agree with the s42A report that in order to cause a nuisance, lighting would need to be exceptionally bright (above the District Plan's permitted threshold) or cause nuisance through moving or flashing. No evidence was provided to support claims that there were likely to be light spill effects.

- 10.5 The application excludes the provision of any signage and the applicant has agreed not to include any additional lighting. We have imposed conditions to ensure both of these provisions are met (including no coloured lighting) and, on that basis, we consider light effects to be less than minor.

NOISE EFFECTS

- 10.6 The potential for noise effects was raised in a number of submissions relating to onsite noise, offsite noise and traffic noise.

ONSITE NOISE

- 10.7 In relation to onsite noise, the Applicant confirmed that the activity will comply with the permitted activity general residential noise standards. Ms Abraham stated that music will only be played on small stereos in each of the rooms rather than loud music playing across multiple rooms. The Applicant confirmed during the hearing that no amplified music would be able to be heard off the site. In order to ensure onsite noise from music is appropriately managed, we have specified a noise condition that no outside amplified music be played, or outside speakers be installed, at the premises. We have also imposed conditions as to hours of operation, and a limit as to the number of customers (as proposed by the applicant), which will also mitigate the potential for onsite noise.
- 10.8 In terms of the provision of alcohol to customers we were told by Ms Abraham that it would be limited to the supply of a one or two complimentary drinks to customers only. It would not be a bar type operation whereby extra onsite noise may be an issue. Further, the Applicant's proposed restriction on the numbers of customers on-site at any one time (a maximum of four) and our decision to require customers to leave by 10:00pm and decline the 'private function' events with up to six people (see below), further reduces the potential for onsite noise effects associated with the proposal.
- 10.9 We are mindful that the building is sited well back on the property, and that the area backs onto the state highway, and has a train line to the rear. Pharazyn Street is a Local Distributor road, and as such, carries more than the expected normal traffic flows for a residential environment during the day.²⁰ The adjacent motels also operate 24 hours a day.
- 10.10 We therefore consider that, with the conditions imposed as set out in Schedule 1, onsite noise effects will be less than minor.

OFFSITE NOISE

- 10.11 In terms of offsite noise by visitors the evidence on behalf of the Applicant was that customers are discrete and quiet as to their use of the site. Submitters' also raised the issue of boyfriends/partners of the staff walking/driving through the local area to access the brothel.
- 10.12 In terms of the provision of alcohol submitters were concerned as to potential noise effects associated with intoxicated persons. As above, alcohol would be limited to the supply of one or two complimentary drinks to customers only and would not be a bar type operation. Further, the Applicant's proposed restriction on the numbers of customers per day (a maximum of 20) and on-site

²⁰ And as Mr Read and Ms Niemand stated in their submissions the street does sometimes have a night time boy racer noise problem.

at any one time (a maximum of 4) and our decision to decline the 'private function' events with up to 6 people, further reduces the potential for offsite noise effects associated with the proposal.

- 10.13 The brothel has been operating since August 2016 and we were not informed of any noise issues or complaints. Again, the site is surrounded by motels that operate 24 hours a day and include restaurants and a bar. We have imposed conditions as to hours of operation, a limit as to the numbers of customers and staff (as proposed by the Applicant) and a requirement that any staff onsite after 10:00pm are to drive, or be driven from, the site. We consider that, with the conditions in Schedule 1 imposed, offsite noise effects will be less than minor.

TRAFFIC NOISE

- 10.14 Traffic noise is closely related to offsite noise and the level of traffic movement effects is discussed below. Pharazyn Street is a Local Distributor road and has a corresponding traffic flow.
- 10.15 Potential traffic noise effects are mitigated by the conditions imposed, such as to hours of operation, numbers of guests and staff (per day and on-site at any one time). With the conditions in Schedule 1 imposed we consider that traffic noise effects associated with the proposal will be less than minor and within the level of traffic noise associated with the neighbouring motels and the existing environment.

TRAFFIC EFFECTS

CAR PARKING

- 10.16 Submitters raised concerns about an increase in traffic and insufficient parking on site. The proposal has been assessed by the Council's Consultant Traffic Engineer, Bill Barclay, who provided an assessment attached to the s42A report of both the traffic and parking effects.
- 10.17 Mr Barclay commented that the provision of eight parks on site can be expected to cover actual demand. Mr Barclay concluded that he would anticipate any parking shortfall to be small with no more than minor adverse effects. We agree with Mr Barclay's assessment.²¹ We also note that the application includes an on-call driver and Ms Abraham's evidence was that a driver is often used to pick up staff, and sometimes customers, which further reduces the demand for parking, and that about five per cent of customers arrive on foot.
- 10.18 Several submitters raised concerns over customers parking on street and walking to the site, increasing demand for on-street parking (and pedestrian traffic). Mr Dravitzki informed us that strangers parking within the area are noticeable, as in this area of Pharazyn Street residents and their visitors tend to be the only people parking on the street. Mr Mathieson informed us that this part of Pharazyn Street is not used for commuters parking while they take the train to Wellington City, as parks are available closer to each train station.
- 10.19 While it may occur that some customers park on street and walk, consistent with Ms Abraham's evidence, we would expect the majority of customers to use the on-site parking or the driver/taxi. We also consider that the increase in demand for street parking could be considered to be comparable to

²¹ Mr Barclay's assessment noted that a site plan has not been provided showing layout of car parks. We have imposed a condition that all car parks onsite be in accordance with AS / NZS 2890.1-2004.

a permitted home occupation with no limit to the number of customers. Further, the site is surrounded by motels.

10.20 We consider such a small potential increase in on-street parking of customers associated with the proposal to be easily accommodated by the surrounding area where on-street parks do not appear, from the evidence and our site visit, to be at a premium.²² Therefore, with the conditions in Schedule 1 imposed, we find the effect of the proposal on car parking to be less than minor.

TRAFFIC MOVEMENTS

10.21 Mr Barclay's assessment also estimated a total of 64 movements per day when the maximum number of customers (20 customers per day) visit the site. Mr Barclay concluded that this level of traffic movements is well within the capacity of Pharazyn Street - a Local Distributor road. The traffic movements estimated by Mr Barclay are based on maximum numbers and the general day to day traffic movements are likely to be less.

10.22 Noting the Local Distributer status of Pharazyn Street, the presence of other businesses with higher levels of traffic movements including the motels, which operate at all hours, and the permitted activity provisions for home occupations, we consider the effects of traffic movements associated with the proposal, with the conditions imposed in Schedule 1, to be less than minor.

PRIVACY

10.23 Privacy was raised as an issue by Mr Duffy who provided a photograph of the view to the application site from a second storey window and presented his case to the Hearing. Mr Duffy was concerned at the potential for people at 23 Pharazyn Street to see into his dwelling, notably the office and toilet.

10.24 Mr Duffy's dwelling is separated from the application site by an adjoining property; the distance from the windows of his dwelling to the dwelling at 23 Pharazyn Street is approximately 40m.

10.25 The existing lawful brothel operation has no controls on the number of visitors to the site within its 10:00am to 8:00pm operating timeframe. In terms of operating later into the evening, the Applicant has installed frosted glass on the lower pane of all the external windows (which we have required to be maintained as a condition of consent) and curtains are drawn (which Ms Abrahams accepted be closed at night). From our site visit it was clear that the rooms are internally focused and views outside are blocked by the frosted glass, curtains and reduced by the layout of the rooms. As we have explained above the site is also well screened by vegetation.

10.26 We therefore consider that, with the conditions in Schedule 1 imposed, any privacy effects on neighbouring properties, including on Mr Duffy's dwelling, are less than minor.

RESIDENTIAL CHARACTER AND SOCIAL EFFECTS

10.27 We consider that these effects are inextricably linked and have therefore assessed them under the one heading. That also better fits with the objectives and policies of Chapter 4A of the District Plan as addressed in Sections 11 and 12 below. Many submitters raised concerns that the proposal was

²² Similarly, a small increase in pedestrian traffic associated with car parking is likely to be indiscernible from the level of ordinary pedestrian movements in the street.

inconsistent with the residential character of the area and, justifiably given the zoning, expressed their concerns on the social and well-being effects of the proposal on the fabric of residential and family life.

10.28 Under the RMA, environment is defined as follows:

- "(a) Ecosystems and their constituent parts, including people and communities; and*
- (b) All natural and physical resources; and*
- (c) Amenity values; and*
- (d) The social, economic, aesthetic, and cultural conditions which affect the matters stated in paragraphs (a) to (c) of this definition or which are affected by those matters."*

10.29 "Amenity values" are defined as:

"those natural and physical qualities and characteristics of an area that contribute to people's appreciation of its pleasantness, aesthetic coherence and cultural and recreational attributes."

THE APPLICANT'S POSITION

10.30 The Applicant focused on the existing character of the area, including on the 24-hour nature of the motels (in particular in relation to ferry sailings and the restaurant/bar facilities) and the traffic and outsiders associated with them. The Applicant also addressed the proposed limitation on the number of customers per day and at any one time. We also asked the Applicant if they had received any complaints in relation to their existing operation. The answer was no.

10.31 The expert evidence of Ms Healy for the applicant included that:

- (a) customers of brothels do not draw attention to themselves and do not linger near the location of the brothel (and this especially applies to appointment only type brothels that typically attract quieter people);
- (b) much foot traffic associated with the proposed activity is unlikely (Ms Abrahams' evidence was that around five per cent of customers arrive on foot); and
- (c) links to organised crime is a misconception not borne out by evidence.

10.32 We also heard from the applicant that they wish to accommodate 'private functions' for up to six customers at a time. These would only occur up to twice per calendar month and no other customers would be onsite at the same time. Upon questioning, it was clear to us that the Applicant had not fully assessed this part of the proposal, and could not provide us with a clear case of what a 'private function' would entail and its potential effects, including in terms of the provision of alcohol. What was described to us during the hearing were a number of options including friends 'shouting' another friend time with a girl while they talked and drank downstairs and a group of friends or colleagues watching a sports game on TV with the girls present and drinking alcohol over an evening or a number of hours.

SUBMITTERS' POSITIONS

10.33 The submitters were very clear in their submissions that, despite the hotels and nature of the surrounding area, this was still a family area. Common concerns of submitters regarding the ongoing operation of a brothel were summarised by Mr Lui-Fakaotimanava in the following ways:

- (a) the stress and fear of strangers in the area with different values;
- (b) the 'rhythm' of the street has changed; and
- (c) the feeling of safety, security and risk in the street has changed.

10.34 As mentioned, all submitters emphasised the family nature of the zone. Concerns, which were presented in a genuine and heartfelt manner included, fears for safety, vulnerability and security, effects related to families and children associated with the activity and with having 'undesirable' people in the neighbourhood (and the simple presence of a brothel in the neighbourhood), people getting the wrong address,²³ and the abhorrence of the activity being such that people altered their daily activities (for example walked on the other side of the road).

10.35 We asked submitters during the hearing about differences in residential character and social effects for activities associated with the proposal after 8:00pm and until midnight.²⁴ Submitters were clear that they were opposed to the existence of the brothel per se. However, in relation to effects after 8:00pm, the evidence of submitters²⁵ was that, despite the hotels operating 24 hours a day, the rhythm of Pharazyn Street changes in the evenings, particularly after 10:00pm, with fewer cars and people on the street, and lower noise and activity levels. Submitters' concerns as to social effects (for example those associated with vulnerability and safety) also increased later into the night and with the provision of alcohol associated with the activity (which is not a permitted activity).

10.36 Finally, submitters opposed the provision of 'private functions' for up to six people.

10.37 The s42A report considered the social effects "finely balanced",²⁶ and that, subject to further evidence at the hearing, could be 'more than minor'.

FINDINGS

10.38 In assessing residential character and social effects of the proposal under the RMA, we have focused on the evidence before us.

10.39 The existing environment surrounding the site is, as described above, one of mixed uses, with Pharazyn Street characterised by residential (single dwellings to multi-unit developments), commercial and industrial uses. We agree with the Applicant that the existing character of Pharazyn Street is both residential and commercial. However, the zoning of the area is general residential and many families live within the area. The Applicant has made a decision to locate its business in this area knowing its residential zoning and residential population.

²³ Although we heard no evidence that this had occurred to date for this operation.

²⁴ As Mr Read stated such activities go beyond what is permitted and in his view should therefore be avoided.

²⁵ For example, Mr and Mrs Dravitzki and Mr Mathieson.

²⁶ At paragraphs 7.32 and 11.4.

- 10.40 We consider the permitted baseline, and the existing environment of the current brothel operation, to be important in terms of social effects. As already stated the present permitted activity provisions in the District Plan enables three workers to work from 7:00am (although the brothel operates from 10:00am) to 8:00pm seven days a week. There are no limits as to customers onsite at any one time, nor on the number of customers per day during those times.
- 10.41 It is on this basis that the current operation has been running with only one complaint²⁷ to the Council relating to a car leaving the site after 8:00pm. Also, all the submitters we asked said that they became aware of the existence of the brothel at the time of receipt of the notification of this proposal.²⁸ We conclude that there was no discernible change to the residential character of the neighbourhood with the permitted home occupation in operation.²⁹
- 10.42 The issue then turns to potential residential character and social effects associated with the changes provided by the proposal including, one extra sex worker and three staff members onsite, operating after 8:00pm at night, and the provision of alcohol. We have already set out the existing environment of the area and are mindful of the effects of the four motels in terms of numbers of visitors, traffic, and noise on the residential environment.
- 10.43 We accept the evidence of Ms Healy relating to behaviours of those people likely to visit the brothel and that links to criminal behaviours are not supported by any evidence of which she is aware.³⁰
- 10.44 However, in relation to residential character and social effects we agree with the submitters that the majority of non-residential activities occurring in this neighbourhood have ceased operation by 10:00pm and at that time the 'rhythm' (or amenity values as defined above) of the area changes. This includes the commercial and industrial businesses (which primarily operate normal business hours) and the motels which although operate 24hrs a day, on the evidence of submitters the number of movements decreases in the evening, especially after 10:00pm. We also accept that the social conditions relating to amenity values changes into the evening. We are also mindful of Ms Massof's submission which stated the weekends are noticeably quieter than during the week.
- 10.45 We consider that the existence of four motels in close proximity to the application site and the local distributor status of the road provides some basis to accept hours of operation outside the permitted baseline of 8:00pm. However, given the location away from commercial zones with night operations (such as restaurants and bars)³¹ and the evidence of submitters, it is our view that this street quietens down and returns to a more residential character after 10:00pm at night.
- 10.46 We are aware that with a maximum of four workers on site a large number of customers could be accommodated between 8:00pm and midnight. In particular, it could result in a number of customers after 10:00pm. The evidence of Ms Abraham was that the busy time would be 8:00pm - 10:00pm with, under the Applicant's proposal, the last customer booked for 10:30pm to allow for clean up time. We find that the potential to have such a number of customers and staff, and activity associated with

²⁷ From a resident. Another complaint occurred from a competing business.

²⁸ Mr Lui-Fakaotimanava stated that before notification of the proposal he saw a limousine at the site and wondered what activity was occurring.

²⁹ This is consistent with comments from the Prostitution Reform Bill Select Committee at page 32.

³⁰ This is consistent with the findings of the Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003, section 11.2.

³¹ Recognising the two local motel restaurants and one bar.

the proposal, including the provision of alcohol, after 10:00pm to have residential character and social effects that would be more than minor. We agree with Mr Mathieson, when he stated the concentration of business could be in the evening hours, and that to have a high number of visitors to the site in the evenings would be out of character with the residential environment.

10.47 On the evidence we heard, we consider having a closing time of 10:00pm (with all staff offsite by 10:30pm and those onsite after 10:00pm to drive or be driven from the site) reflects the residential character of the area and will mitigate residential character and social effects to a level whereby they will be no more than minor. As set out in Sections 11 and 12 below, we also consider this timing reflects the clear intent of the objectives and policies for the general residential zone to maintain and enhance the residential character and amenity values of the zone.

10.48 In relation to the proposed 'private functions', including the provision of alcohol during those functions, as mentioned above the evidence from the Applicant was scant as to detail. On the basis of the evidence we received we consider that it is a fundamentally different type of activity to that otherwise proposed. In particular, the focus is on groups of people. We agree with the s42A report that allowing private functions would result in the brothel being materially different in nature than the scale of the brothel being considered in all other respects. This is especially so when it is proposed (subject to SASA Act approval) for alcohol to be provided during such functions. We find such a scale of activity to be out of character with the nature of the area and to have the potential for residential character and social effects which are more than minor.

10.49 Finally, in terms of submitters concerns that the proposal is objectionable or unacceptable, from a moral point of view, in the case *McQueen v Waikato District Council*³² the Planning Tribunal stated:

"In our opinion, the fact that some residents of the neighbourhood of an activity find that activity embarrassing, objectionable or unacceptable does not necessarily amount to an effect of the activity on the social or cultural conditions which affect the community (within the definition of the term 'environment'); nor does it amount to an effect on the 'amenity values' of the area in the defined sense of that term...if the practice of nudity on the applicant's own private property in circumstances where it is not displayed to others is embarrassing or objectionable to residents of the locality, or to others in the vicinity, any adverse social effects of that may be the result of those attitudes, rather than an effect of the nudity."

10.50 In this case, the proposal is for all commercial sexual service activities to occur inside the house and we have imposed a condition to such effect. To the degree submitters find prostitution embarrassing, objectionable or unacceptable we find, that even if it were an effect under the RMA,³³ it is within the permitted baseline and forms part of the existing environment.

10.51 Overall, we find that with the proposed mitigation as set out in the imposed conditions in Schedule 1, including hours of operation, numbers of customers (per day and onsite at any one time) and not allowing 'private functions' for up to six people, the adverse residential character and social effects of the proposal will be no more than minor.

³² A045/1994. This case involved an appeal against the grant of a land use consent for recreation facilities for a nudist club.

³³ Recognising the PRA, reviewed in Section 13 below, contains different statutory requirements.

OVERALL CONCLUSION ON SECTION 104D(1)(A)

10.52 Overall, we consider that with the conditions in Schedule 1 imposed, the adverse effects of the proposal will be less than minor. The proposal therefore passes the first of the 'gateway' tests.

11. SECTION 104D(1)(B) ASSESSMENT

11.1 There was no argument in submissions or at the hearing regarding which objectives and policies were relevant to the proposal. The s42A report helpfully addressed the key objectives and policies for a non-residential activity in the general residential activity area and how they relate primarily to residential character and amenity values and the management of non-residential activities.

11.2 Under 4A 1.1.1 Residential Character and Amenity Values, the relevant objective and policies are:

"Objective

To maintain and enhance amenity values and residential character of the General Residential Activity Area of the City.

Policies

(b) To restrict the range of non-residential and commercial activities to those which will not affect adversely the residential character or amenity values.

(d) That adverse effects arising from noise, dust, glare, light spill and odour be managed.

(e) That vegetation and trees which add to the particular amenity values of the area be retained where practicable."

11.3 With regards to Policy (b) we find the proposal, subject to the conditions we have imposed in Schedule 1, will not adversely affect the residential character or amenity values of the area as detailed in section 10 above. The conditions imposed in Schedule 1 are important to our decision that the residential character and amenity will be maintained by the proposal.

11.4 For the reasons set out in in Sections 10 and 12, we find the proposal, subject to the conditions we have imposed, appropriately manages noise and light spill and is consistent with policy (d).

11.5 The proposal will retain all site planting and areas of vegetation which have died/been removed will be replanted which will assist in avoiding and mitigating any visual amenity effects as to the residential character of the site. We have imposed conditions relating to landscaping and maintaining the outward residential appearance of the building and site. We find the proposal is consistent with policy (e).

11.6 Under 4A 1.1.4 Non-Residential Activities, the relevant objectives and policies are:

"Objective

To ensure that any adverse effects of non-residential activities on the character and amenity values of surrounding residential areas are avoided, remedied or mitigated.

Policies

- (a) *To ensure that any adverse effects caused by the size, scale and nature of non-residential activities, and any associated storage of hazardous substances, light spill, noise, glare, vehicle and pedestrian activity upon surrounding residential properties, are avoided, remedied or mitigated.*
 - (b) *To control the number of signs, and ensure that any adverse effects of sign location and appearance on surrounding properties, are avoided, remedied or mitigated.*
- ..."

- 11.7 For the reasons set out in Sections 10 and 12 we find that the adverse effects of the proposal on the character and amenity effects of the area have, with the conditions imposed, been appropriately avoided, remedied or mitigated. We consider that the proposal is not contrary to Policy (a).
- 11.8 As set out above, the Applicant does not propose any signage and we have imposed a condition to implement that. Therefore, the proposal is not contrary to Policy (b).
- 11.9 We find that with the conditions imposed in Schedule 1 the proposal will be consistent with, and not contrary, to the relevant objectives and policies of the General Residential Activity Area chapter. Our conclusion is consistent with the s42A report and the evidence of the reporting officer during the hearing. The proposal, subject to the conditions we have proposed, therefore meets the second section 104D 'gateway' test.

12. SECTION 104 ASSESSMENT

- 12.1 Under section 104, subject to Part 2, we are to have regard to, as relevant for this matter:
- (a) The actual and potential effects on the environment of allowing the activity;
 - (b) The relevant provisions of the District Plan.
- 12.2 As for the section 104D assessment, we may disregard the adverse effects of the activity if the plan permits an activity with that effect (the permitted baseline).

POSITIVE EFFECTS

- 12.3 Little was made in the application, evidence or submissions by the Applicant as to the positive effects of the proposal. We consider the positive effects to be:
- (a) enabling the applicant to operate a business and generate a profit from their investment in the site;
 - (b) providing for the efficient use of the house at the site (in particular given its previous conversion to commercial uses);
 - (c) providing a service used by, on the evidence of Ms Healy, a very wide cross section of our society for which there is, obviously, demand; and
 - (d) providing greater health, safety and security for the girls working on the site compared to other options (such as working on the street).

ADVERSE EFFECTS

- 12.4 We have already addressed the potential adverse effects of the proposal in Section 10 above and have set out the relevant objectives and policies in Section 11 above.
- 12.5 As is evident from Section 11, the District Plan's objective and policy focus for the general residential zone is to maintain and enhance amenity values and residential character and to ensure that adverse effects on them are avoided, remedied and mitigated.
- 12.6 In relation to potential visual amenity, light, noise, traffic and privacy effects addressed in Section 10 above, we find the relevant objectives and policies in Chapter 4A of the District Plan to be of considerable assistance in making our decision. We consider that they support our findings as to the effects of the proposal, and in particular the conditions we have imposed, in Schedule 1, including those related to signage, lighting, grounds maintenance, noise, hours of operation, number of customers (per day and at one time).
- 12.7 In relation to residential character and social effects, addressed in Section 10 above, the objectives and policies in Chapter 4A are also highly relevant. While the District Plan does not define 'residential character' it is clear that the residential nature of residential zone is important and is to be protected from non-residential activities that do not maintain or enhance the existing residential character and amenity values of the area. We find that the residential character and social effects of allowing the proposal to operate beyond 10:00pm (in relation to customers) to be inappropriate and inconsistent with the objectives and policies of the District Plan.
- 12.8 In relation to the provision of alcohol in association with the brothel activity, for the reasons we have expressed in Section 10 above, and having regard to the relevant objectives and policies in Chapter 4A, we consider that allowing the sale of alcohol after 10:00pm at night to be inappropriate in terms of residential character and social effects and inconsistent with the objectives and policies of Chapter 4A of the District Plan.
- 12.9 We have therefore imposed conditions as to numbers of customers and staff onsite and requiring the last customer booking to be made for 9:00pm, with all customers off the site by 10:00pm. All staff are to leave the site by 10.30pm and, if working after 10pm, are to drive, or be driven, from the site (and not walk from the site or be collected from the street).
- 12.10 In relation to 'private functions', as set out in Section 10 above we consider that the scale and character of such functions with up to six people (especially with the supply of alcohol subject to compliance with the SASA Act) to be out of character with the nature of the area and to have the potential for residential character and social effects which are inappropriate and inconsistent with the objectives and policies of the District Plan.

PRECEDENT EFFECT

- 12.11 Submitters and the s42A report raised the issue of precedent effect (and effects on the integrity of the District Plan). We agree that a precedent effect is a relevant issue for us to address in this case. Granting a resource consent for a non-complying activity can be seen to cause issues of precedence where it will provide for other similar activities to be allowed in sufficiently identical circumstances.

- 12.12 We have set out the context of the site and area in detail above. In summary, while this proposal is located within a residential zone it is a unique area in the city being a pocket of residential zone with general commercial zoning to the north and south, the Hutt River to the east and the Melling railway line and State Highway 2 to the west. Within this zone Pharazyn Street is a local distributor road that in effect links the two ends of Melling. The area of Pharazyn Street around the site is known as a motel hub within the district.
- 12.13 In addition, the site is large, with the building well set back. It has been modified for, and previously used for, various commercial activities. It has large grounds and is well screened and able to accommodate the scale of activities without, in our findings, more than minor effects (after mitigation has been imposed).
- 12.14 We also heard evidence from Ms Healy that the numbers of brothels are decreasing, due largely to the effect of the internet and the ability for sex workers to 'cut out the middleman'. We also heard evidence from Ms Healy that the type of operation being run in this case is high end and many submitters questioned if it was sustainable.
- 12.15 For these reasons we agree with the s42A report that it is *"very unlikely that a similar proposal would be considered with sufficiently identical factors given the unique nature of the activity and [its] location."*³⁴
- 12.16 We also consider, as set out in Sections 11 and 12 above, with the mitigation imposed through the conditions in Schedule 1, that the proposal is consistent with the relevant objectives and policies of the District Plan.
- 12.17 For these reasons we do not consider that granting consent to this proposal will create precedent effects or undermine the integrity of the District Plan. We note that this is the same conclusion as that reached in the s42A report.

13. PROSTITUTION REFORM ACT 2002

- 13.1 As mentioned in Section 8 above, section 15 of the PRA is relevant to this proposal and sets out two criteria to which we must have regard in making our decision.
- 13.2 Considerable attention was paid to the provisions of section 15 of the PRA in submissions and during the hearing. As far as we are aware there is no case law that considers section 15 of the PRA in relation to resource consents. We therefore set out our approach and reasoning on this issue in some detail.
- 13.3 The purpose of the PRA is set out in section 3 as:

"The purpose of this Act is to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that—

(a) safeguards the human rights of sex workers and protects them from exploitation:

(b) promotes the welfare and occupational health and safety of sex workers:

³⁴ At paragraph 9.13.

(c) is conducive to public health:

(d) prohibits the use in prostitution of persons under 18 years of age:

(e) implements certain other related reforms."

- 13.4 During the passage of the Prostitution Reform Bill ("**Bill**"), both through the Select Committee process and in Parliamentary debate, there was considerable argument as to its morality and potential for societal effects.
- 13.5 In relation to what is now section 15 of the PRA, the Select Committee's³⁵ report noted that the Bill was silent on planning matters relating to the sex industry. The majority considered that the provisions of the RMA were adequate to enable territorial authorities to control "undesirable prostitution activity and planning matters related to the sex industry."³⁶ The majority therefore did not recommend that the Bill contain provisions to limit the conduct and location of prostitution.³⁷ The minority opposed this position and sought amendments to allow communities, through territorial authorities, to have the ability to limit the conduct and location of prostitution, including through the RMA process.³⁸
- 13.6 During the second reading of the Bill in Parliament, the then Minister of Justice, the Hon Phil Goff, introduced an amendment to the legislation that included the ability for local authorities to create bylaws as to the location of brothels and, importantly for this case, included what became section 15 of the PRA. In doing so, while focused on the provision for bylaws, the Hon Phil Goff stated:
- "The second major provision on my Supplementary Order Paper is to allow territorial authorities to make bylaws prohibiting brothels in certain areas. I believe that although most New Zealanders would agree that criminalisation of prostitution is futile and probably counter-productive, most would also clearly desire, in the event of decriminalisation, some controls to prevent the establishment of places of prostitution where they are offensive or inappropriate. Most of us would not want to see brothels established in residential areas or adjacent to preschools or schools. My amendment would allow the local territorial authorities, the councils, to prohibit the establishment of, or to order the removal of, a brothel in an area where it would cause nuisance or serious offence to ordinary member of the public. That would not enable territorial authorities to place a general ban on brothels. There are clearly commercial areas where the establishment of such a place of prostitution would not cause local offence."³⁹*
- 13.7 This quote, and others made during the passage of the Bill through Parliament, were provided to us in a number of submissions⁴⁰ and the s42A report.
- 13.8 Hutt City Council has not passed a bylaw limiting the location of brothels in the District. While we were referred to Upper Hutt City Council's Brothels Bylaw 2003, which prohibits brothels in residential zones, or within 200m of certain activities (including schools)⁴¹ this bylaw is not relevant to our

³⁵ Justice and Electoral Select Committee *Prostitution Reform Bill* (29 November 2002).

³⁶ At page 14.

³⁷ This related to both the RMA and bylaws under the Local Government Act 2002.

³⁸ See pages 15 and 31.

³⁹ Hansard, 606 NZPD 3619, 19 February 2003.

⁴⁰ For example, Mr Mathieson.

⁴¹ At clause 4(a).

consideration except insofar as Hutt City Council has decided not to pursue a bylaw approach to prohibit brothels in residential areas.

- 13.9 However, rather than a bylaw approach, following the passage of the PRA Hutt City Council initiated a District Plan review to manage the location of the brothels in the district. The Council considered this to be a more appropriate approach. This review culminated in Plan Change 5 to the District Plan. In relation to "*All Residential Activity Areas*", the District Plan Committee commented on the proposed plan change in the following way:

"At present resource consent is required for brothels and commercial sexual services to be established in all Residential Areas unless they fall within the ambit of home occupation. No changes are proposed to be made to the District Plan as brothels and commercial sexual services operating outside the ambit of home occupations may have adverse effects on the amenity values of residential activity areas (such as traffic generated, noise, disturbance to the neighbourhood, and safety concerns). However, small-scale brothels operating from dwelling houses as home occupations are unlikely to be noticeable from other types of home occupations and adverse effects are likely to be minor."⁴²

- 13.10 During the Plan Change 5 process, a number of submitters sought various controls over the establishment of brothels including that all brothels be banned in residential areas, requiring certain setback distances from various other activities, zones or sensitive sites, requiring notification and requiring residents' approval. These submissions were all rejected on the basis that the Council could fully assess such applications on a case by case basis and the existing home occupation conditions "*ensure that home occupations have environmental effects that maintain amenity values*".⁴³
- 13.11 Having read the Plan Change 5 decision, we are clear that the assessment of a brothel within a residential zone that exceeds the home occupation permitted activity standards to be assessed on a case by case basis. The Council's District Plan Committee rejected the approach to prohibit brothels in residential zones or to impose setback requirements within the zone.
- 13.12 We agree with the s42A report, and the submissions by the Applicant, that this background is relevant when assessing section 15 of the PRA. In particular, it shows that within Hutt City the Council has chosen not to prohibit brothels within the residential zone but rather to permit them within the home occupation permitted activity provisions and have them carefully considered on a case by case basis beyond that. On that basis we do not consider that brothel activity per se in a residential zone could be said to be likely to cause nuisance or serious offence to ordinary members of the public using the area in terms of Section 15(1)(a), or be incompatible with existing character or use of the area in terms of Section 15(1)(b).⁴⁴
- 13.13 Having set out the background we turn now to the provisions of section 15 of the PRA. First we note that we must have 'regard to' the provisions. This does not require us to 'give effect to' them but rather that we must give them genuine attention and carefully consider them before deciding what

⁴² At page 9 of the decision.

⁴³ At pages 11 and 37.

⁴⁴ This position is akin to, and consistent with, the permitted baseline position applied above.

weight, if any, we are to give to them.⁴⁵ In assessing the matters below we are, obviously, having regard to the business of prostitution.⁴⁶

13.14 Finally, in undertaking our assessment under section 15 of the PRA, we have assessed the proposal by applying the mitigated level of effects as imposed through the conditions and not the unmitigated effects of the proposal. We consider that this is an appropriate and realistic approach.

NUISANCE AND SERIOUS OFFENCE

13.15 The key words relating to the first consideration are:

- (a) 'Likely' - we agree with the Applicant that this is a high test and means more than may and is aligned with probable (or to be reasonably expected);⁴⁷
- (b) 'Nuisance' is not defined in the PRA. The s42A report referenced legal advice received by the Council that nuisance should be interpreted in its ordinary legal sense, such that it requires "*unreasonable interference with either the comfort and convenience of a section of the public (public nuisance) or with an individual's right to the use and enjoyment of an interest in land (private nuisance).*" The legal advice rejected applying the ordinary definition of nuisance as in "*mere annoyance, inconvenience, trouble or bother.*" The Applicant supported this position. While not cited, the legal advice received by Council is similar to that used in the common law nuisance case *Thompson-Schwab v Costaki*⁴⁸ which related to prostitutes and their clients entering and leaving a premise. The Court in that case noted that regard also had to be had to the character of the neighbourhood (see below).
- (c) 'Serious offence' is also not defined in the PRA. Again, the s42A report refers to legal advice which considered a number of cases. This included *Brooker v Police*⁴⁹ where behaviour that was 'offensive' was defined as "*capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable*⁵⁰ *person*" In *Auckland Council v Erotica Expo Limited*⁵¹ the District Court held that it was not offensive per se for a woman to be topless. Relying on those cases, and on the Parliamentary debates (including the quote set out above, the s42A report concluded that under the PRA prostitution itself is not offensive but in particular contexts or circumstances it may be. The High Court in a broadcasting standards case regarding an investigation into unlicensed brothels, *Television New Zealand Ltd v KW*,⁵² commented that offensive may convey varying degrees from "*hurtful, harmful or injurious*" to "*displeasing, annoying, insulting*".⁵³ The Court held that since any intrusion in the nature of prying was inherently displeasing and annoying that in the context of the Code the more serious definition was to be applied. Certainly "serious offense" has to be at the higher end of "*hurtful, harmful or injurious*".

⁴⁵ See for example *NZ Fishing Industry Association Inc v Ministry of Agriculture and Fisheries* [1998] 1 NZLR, 554 (CA).

⁴⁶ And therefore our assessment does not relate to the resource consent relating to the on-licence for the sale of alcohol.

⁴⁷ This is consistent with the definition in the Shorter Oxford English Dictionary, 6th edition, 2007 and also *Beacon Media Group Ltd v Waititi* [2014] NZHC 281.

⁴⁸ [1956] 1 All ER 652, at 654 (CA).

⁴⁹ [2007] 3 NZLR 91.

⁵⁰ See comments below on the 'ordinary' person.

⁵¹ District Court, Auckland, CRI-2008-004-001938, 19 August 2008, Judge Nicola Mathers, at [44].

⁵² High Court, Auckland, CIV-2007-485-001609, Courtney J, 18 December 2008.

⁵³ *Ibid*, at [68].

- (d) 'Ordinary' member of the public. An 'ordinary' member of the public is a lesser test than a 'reasonable' member of the public. As to who is an 'ordinary' member of the public we adopt the quote below from the decision of the High Court in *Television New Zealand Ltd v KW*.⁵⁴

"Ordinary" in relation to people means "average, without exceptional knowledge or experience". In contrast, "reasonable" means "having sound judgment, sensible". One would therefore expect that an "ordinary" person may be more easily hurt than a "reasonable" one, who might be expected to exhibit a degree of analysis and judgment of the conduct in question."

- (e) Using the area in which the land is situated. The ordinary member of the public must be using that area in which the brothel is located. The extent of the area is not indeterminate and we consider must relate to the local area. In this case we consider it aligns with the area included in the limited notification notice.

13.16 Both submitters and the planning officer in her s42A report, split out the assessment under section 15(1)(a) of the PRA under the separate heads of nuisance and serious offence. We find it useful to take the same approach.

NUISANCE

13.17 In relation to nuisance, we had some concern in applying a common law meaning of nuisance as opposed to a broader meaning. However, in the context of the use of the word, applying the ordinary meaning in relation to a brothel activity would set the bar unrealistically low and provide limited assessment of any weight for us to have regard too. In particular, this applies given there being no bylaw or rule in the District Plan prohibiting brothels in the general residential zone. Also, there was no argument by any party against the common law approach. We therefore have applied an assessment under this criterion as relating to (in a common law of nuisance sense) those matters likely to cause unreasonable interference with either:

- (a) the comfort and convenience to an ordinary member of the public using the area covered by the limited notification; or
- (b) an individual's right to the use and enjoyment of an interest in land covered by the limited notification area.

13.18 In relation to nuisance, the s42A report listed the issues as relating largely to 'tangible' matters such as increased pedestrian and vehicle traffic, increased disturbance⁵⁵ on the street, nuisance from light and noise as well as the more intangible increase in 'unsavoury' people. This list was consistent with the issues raised under the same head by submitters who also included car-parking, the area becoming a hub for late night activities and a reduction in personal security.⁵⁶

13.19 We have already considered effects relating to traffic, parking, noise, light spill, and privacy in Section 10 above and do not consider, for the reasons given above, that with the conditions imposed

⁵⁴ Ibid.

⁵⁵ We note that the s42A report and submitters included issues related to alcohol under this head and that of being a late night hub. In our opinion application of section 15 of the PRA only applies to issues associated with the business of prostitution and not wider issues.

⁵⁶ See for example the submission on behalf of the Pharazyn Street Collective.

in Schedule 1 that such issues associated with the proposal (being the business of prostitution) are likely to cause a nuisance (as defined above) to an ordinary member of the public using the area. Also, as noted above, submitters became aware of the activity only after notification so it cannot be argued that the home occupation level of activity was causing nuisance issues under this criterion. Our focus therefore was on potential effects related to the increase in scale and hours of operation.

- 13.20 We have also considered the likelihood of extra pedestrians, disturbance and 'unsavoury' people in the area and have accepted the evidence of Ms Healy that customers of the brothel do not tend to loiter in the local area. We have also accepted the expert evidence of Ms Healy that links to criminal behaviours are not supported by the evidence of which she is aware. However, in a residential zone, later into the evening, we accept the evidence of submitters that nuisance effects for the ordinary person using the area have a greater potential to arise, in particular after 10:00pm. This potential increases for 'private functions'.
- 13.21 We do not consider that, with the conditions imposed in Schedule 1, the brothel will become a late night hub in the area.
- 13.22 We have had regard to the nuisance criterion under section 15(1)(a) of the PRA. What is clear to us is that the conditions we have imposed in Schedule 1, including in relation to all customers leaving the premises by 10:00pm and staff by 10.30, and our rejection of 'private functions', are important in our decision that the proposal appropriately addresses, in the circumstances of this case, the nuisance criterion under section 15(1)(a) of the PRA.

SERIOUS OFFENCE

- 13.23 In relation to the serious offence criterion under section 15(1)(a) of the PRA, we have applied our assessment as being whether the brothel is likely to cause serious hurt, harm or injury to an ordinary member of the public using the area covered by the limited notification.
- 13.24 Under this criterion the s42A report listed the location/context of the brothel, including in relation to residential dwellings, motels, schools and pre-schools. The s42A report also listed issues such as immorality of prostitution, people acting furtively on the street, betrayal of family values and repugnance as to the nature of the business. Submitters were consistently clear that they considered the presence of the brothel to be highly offensive and a betrayal of family and moral values. There was much argument as to the need for the Council to protect the morality of the community. Mr Duffy was clear in his views as to the damage to be caused to the nuclear family and also that the greater the scale of the activity the greater the damage.
- 13.25 As stated above, we do not accept in the Hutt City context of no bylaw prohibition and a permitted activity status for home occupation of brothel activities that the mere presence of a brothel in a residential zone can be considered immoral, a betrayal of family values or repugnant, such as to be seriously offensive (as defined above) in this case. For the reasons set out above, and the evidence of the reporting officer,⁵⁷ we consider that can change into the evening beyond the permitted activity hours, especially after 10:00pm, to the point where we consider the business of prostitution is likely to cause serious offence to ordinary members of the public using the area.

⁵⁷ Evidence of Ms Zee at paragraph 6.9 (and paragraph 8.33 of the s42A report).

- 13.26 We also consider, for the reasons given above and in the reporting officer's evidence,⁵⁸ that 'private functions' of up to six people are also likely to cause serious offence to ordinary members of the public using the area.
- 13.27 We have had regard to the serious offence criterion under section 15(1)(a) of the PRA. What is clear to us is that the conditions we have imposed in Schedule 1, including in relation to all customers leaving the premises by 10:00pm and staff by 10.30 and our rejection of 'private functions', are important in our decision that the proposal appropriately addresses, in the circumstances of this case, the serious offence criterion under section 15(1)(a) of the PRA.
- INCOMPATIBILITY WITH THE EXISTING CHARACTER OF THE AREA**
- 13.28 For our assessment under section 15(1)(b) of the PRA we agree with the Applicant that 'incompatible' means 'inconsistent'. We also agree with the Applicant that the aspects of the "*existing character or use of the area*" aligns with an RMA assessment (as we have undertaken above), while recognising that the issues to be considered under the PRA assessment are broader in nature. We record again in this respect that the Applicant focused on the mixed uses of this area, in particular the surrounding motels, the adjacent Melling Train line and State Highway 2, that the site is set up for commercial use (and has in the past been so used) and that the building is ideally discrete (being well setback from the road).
- 13.29 In relation to this assessment the s42A report considered the context of the area, including in relation to locations to schools and pre-schools, the scale of the activity (over what is permitted) and the hours of operation (over what is permitted). Again this was largely consistent with submitters who also included issues such as damage to reputation of the area and that the business of prostitution (and the proposal) is completely out of character with a peaceful residential street with families. Issues such as strangers in the area (especially seeking sex), vulnerability, safety and security, along with family values and issues children, all within a residential zone, were also raised.
- 13.30 We have addressed the context of the area in detail above and found that it is an area of mixed uses, with the surrounding zones and activities (road, rail and the Hutt River), the Local Distributer classification of Pharazyn Street, and the motels in particular set the area aside from other residential areas in Lower Hutt City. However, it is still a residential area and contains a large number of families. We have found that the existing character and use of the area changes through the day and have accepted submitters' evidence that after 10:00pm the 'rhythm' of the street and area changes. We consider that this change is amplified when considering broader issues under the PRA.
- 13.31 The s42A report sets out distances to schools and pre-schools. Submitters commented on children walking to and from school. We note that those issues occur now with the lawful brothel operation.
- 13.32 We also consider, for the reasons given above, that 'private functions' of up to six people are incompatible with the existing character of the area.

⁵⁸ Evidence of Ms Zee at paragraph 6.11 (and paragraph 8.34 of the s42A report).

13.33 We have had regard to the incompatibility of the proposed brothel (as the business of prostitution) on the existing character or use of the area in which the land is situated. What is clear to us is that the conditions we have imposed in Schedule 1, including in relation to all customers leaving the premises by 10:00pm and staff by 10.30pm and our rejection of 'private functions' are important in our decision that the proposal appropriately addresses, in the circumstances of this case, issues of incompatibility with the existing character and use of the area under section 15(1)(b) of the PRA.

OVERALL

13.34 Overall, for the reasons we have given above, and with the conditions in Schedule 1 imposed, we consider that, having regard to the requirements of section 15 of the PRA, that the proposal is appropriate.

14. PART 2 OF THE ACT

14.1 Part 2 sets out the purpose and principles of the RMA (section 5); matters of national importance the consent authority must recognise and provide for when determining a resource consent (section 6); other matters the consent authority must have particular regard to (section 7); and the principles of the Treaty of Waitangi that must be taken into account (section 8).

14.2 We agree with the s42A report that there are no relevant section 6 matters. We also agree with the s42A report that in relation to section 7 we are to have particular regard to the following relevant matters:

- "(b) The efficient use and development of natural and physical resources:*
- (c) The maintenance and enhancement of amenity values:*
- (f) Maintenance and enhancement of the quality of the environment:"*

14.3 We agree with the s42A report that the proposal is consistent with these provisions. In particular, the proposal is an efficient use of a large house that has been altered to accommodate (and has accommodated in the past) commercial activities. With the conditions imposed, for the reasons set out above, the proposal will maintain amenity values and the quality of the local environment.

14.4 No section 8 matters or issues were raised in submissions, the s42A report,⁵⁹ nor during the hearing. We find that the proposal is consistent with section 8 of the RMA.

14.5 The purpose of the Act as set out in section 5 is to promote *"the sustainable management of natural and physical resources while managing the use, development, and protection of natural and physical resources in a way, or at a rate, which enables people and communities to provide for their social, economic and cultural wellbeing and for their health and safety while... avoiding, remedying, or mitigating any adverse effects of activities on the environment"*.

14.6 We find that, subject to the conditions we have imposed, the proposal:

- (a) enables the applicant (and its staff) to operate a business and generate a profit from their investment in the site;

⁵⁹ Beyond that the site is not adjacent to any Port Nicolson Block Settlement Trust land and that the site is not identified in the District Plan as containing any wāhi tapū or sites of significance to Māori.

- (b) provides for the efficient use of the house of the site (and its previous conversion to commercial uses);
- (c) provides a service used by, on the evidence of Ms Healy, a very wide cross section of our society for which there is, obviously, demand;
- (d) provides, to a limited degree providing greater safety and security for the girls working at the site; and
- (e) appropriately avoids and mitigates adverse effects from the activity.

14.7 Overall we find that granting consent for the proposal, with the conditions we have imposed in Schedule 1, will promote the sustainable management purpose of the RMA.

15. CONCLUSION AND DECISION

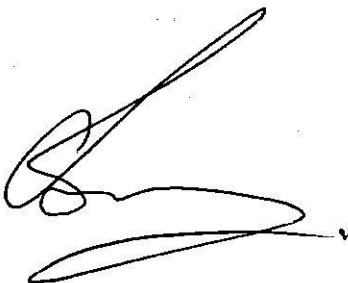
15.1 Having considered the relevant matters under the RMA, and under section 15(1) of the PRA, acting under delegated authority from Council and pursuant to sections 10, 104B, 104D, and 108 of the Resource Management Act 1991, we **GRANT CONSENT subject to conditions in Schedule 1**, to the non-complying resource consent application made by Venus 1 Limited, to operate a brothel and sell alcohol (subject to approval under the Sale and Supply of Alcohol Act 2012) at 23 Pharazyn Street, Lower Hutt.



Mr David Allen, Independent Commissioner (Chair)



Councillor Lisa Bridson, Independent Commissioner



Councillor Campbell Barry, Independent Commissioner

Dated this 19th day of January 2017

SCHEDULE 1 - CONDITIONS

General

1. That the activity is carried out substantially in accordance with the information submitted with the application and held on file at Council.
2. The activity is restricted to bookings only (i.e. no "walk-up customers") and the address will not be published by the consent holder in any medium.
3. The hours of operation shall be:
 - (a) 10:00am to 10:00pm, seven days a week for customers; and
 - (b) 10:00am to 10:30pm, seven days a week for staff.
4. The maximum number of staff on site at any one time is seven. This includes a manager, receptionist, driver and a maximum of four sex workers.
5. The existing frosted glass on all windows shall be maintained such that at least the lowest pane on every window is frosted. After 8:00pm all rooms used for commercial sex activities are to have the curtains drawn.
6. There shall be no more than four customers at the site at any one time with no more than 20 customers per day.

Note: This consent does not include a provision for parties of up to six customers up to twice a calendar month.

7. The consent holder must undertake daily hourly records detailing the numbers of staff and customers on site. Such records to be available for inspection by the Team Leader, Resources Consents on request.

Landscaping and lighting

8. The landscaping around the periphery of the site shall be retained. This includes retention and maintenance of all existing fencing. Any removal of shrubs or trees around the periphery of the site greater than 2.0m tall shall be replaced with an appropriate species that will grow to a similar expected height as to the species removed.
9. The site and grounds are to be kept in a tidy state of repair at all times, to the satisfaction of the Team Leader, Resources Consents.
10. There is to be no additional exterior lighting installed. Existing lighting shall be maintained to existing levels and shall be white light only.
11. There shall be no signage at the site advertising the business and activity.

Traffic and Parking

12. A minimum of eight car parking spaces shall be provided on the site, with four at the rear of the site being clearly designated for the use of customers.

13. The layout of all car parks shall comply with the requirements of AS/NZ 2890.1-2004 and a site plan showing this shall be submitted to the Team Leader, Resource Consents for approval.
14. All workers onsite after 10:00pm are to leave, or to be collected from, the site in a vehicle and not on foot.

Noise

15. There shall be no outdoor amplification of music, or outdoor speakers, in relation to the activity. All noise at the site must comply with the District Plan permitted activity standards.
16. A designated outside smoking area is to be located at the back of the site facing the train track with a plan for this location being submitted to the Team Leader, Resource Consents for approval.
17. No commercial sexual services shall occur outside the building on the site. This includes on the first-floor balcony.

Complaints Procedure

18. The consent holder shall keep a record of all complaints received relating to the exercise of, and compliance with, its consents. It shall provide the Team Leader, Resources Consents with a copy of any complaints, and its response to them, within five days of the complaint being made.

Review

19. Hutt City Council may, under Section 128 of the Act, initiate a review of the Conditions of this resource consent every year commencing 1 March 2018 for the purposes of:
 - (a) avoiding, remedying or mitigating any more than minor unanticipated adverse effects on the environment, arising from the exercise of the consent; and
 - (b) responding to any issues raised in complaints to the consent holder.

Advice Notes

- The applicant for resource consent, consent holder or any person who made a submission on the application may also appeal this decision to the Environment Court within 15 working days of notice of the decision being received.
- This resource consent is subject to payment of a Development Contribution Fee under the Council's Development and Financial Contributions Policy.
- In accordance with section 125 of the Resource Management Act 1991, the consent lapses if not given effect to within five years from the date of the application being granted.
- This resource consent is specific to the application received by Council. Any changes to the proposal may require a new resource consent and additional application fee.
- Plans submitted with the application have only been checked for compliance with the City of Lower Hutt District Plan.

- Any building work associated with the proposed activity should not commence until a building consent has been obtained under the Building Act 2004.
- The consent holder is reminded that this resource consent is not a licence to create adverse effects. All District Plan noise controls for the residential activity area must be complied with at all times. You still have a duty under the Act to avoid, remedy or mitigate adverse effects. Notwithstanding any resource consents held, section 17 of the Act continues to apply and will take enforcement action where necessary.
- Council may issue an abatement notice if the conditions of this resource consent are not complied with. Contravention of an abatement notice may incur a fine up to \$300,000 or two years' imprisonment for a natural person and a fine of up to \$600,000 to a person other than a natural person.