David Carey
Town Planning and Development

Statement of Environmental Effects

Accompanying a development application for

Use of part of existing dwelling as a tattoo studio (home business)

At

Lot 323 DP 11603

45 Chaseling Street Greenacre

March 2023

www.dcaplanning.com.au Email: david@dcaplanning.com.au

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1. Introduction

This statement of environmental effects has been prepared by David Carey Town Planning and Development on behalf of Mr Fraser Karne to accompany a development application for the use of part of the existing dwelling at a tattoo studio at 45 Chaseling Street Greenacre. The application is being lodged under Clause 4.12 of the Environmental Planning and Assessment Act 1979.

The proposal has been designed to achieve the relevant provisions and objectives of Bankstown LEP 2015 and Clause 4.15 of the Environmental Planning and Assessment Act 1979 (as amended).

The proposed use is suitable for the existing site. The proposed development will maintain the viability of the existing dwelling and promotes economic and business activity within the local area.

The impacts of the development are minor and it will not have an adverse impact on the surrounding area. Overall, the development will have a net positive impact on the Canterbury-Bankstown LGA.

This statement has been prepared having regard to the following documentation:

- Architectural plans prepared by Dmytro Kopylov

2. Site description and analysis

2.1 Location and property description

The site consists of one torrens title lot, with a legal property description of Lot 323 DP 11603. The street address of the site is 45 Chaseling Street Greenacre.

Figure 1 – Aerial view of site (Source: Six Maps)

2.2 Site characteristics

The total site has an area of 564m^2. The existing dwelling has a floor area of 157m^2.

The site contains an existing single storey dwelling house and associated structures.

Figure 2 – View of site from Chaseling Street (Google Maps)

All services are available to the property and the dwelling has a single garage.

2.3 Surrounding development

The site is located in a residential zoned area surrounded by other residential properties.

3. Details of proposal

3.1 Proposed works

The proposed works are as follows:

- Use of part of existing dwelling as a tattoo studio (home business)

The tattoo studio will operate in the existing bedroom no. 3 of the dwelling and will be operated by the resident of the existing dwelling as a home business. There will be no other employees or workers at the site. The garage will be retained for car parking.

There will be only one customer at any given time, which will be by appointment. There will be no walk-in visits to the site.

The proposed hours of operation are 8am-5pm Monday to Friday. No operation will occur outside of these hours.

A sharps bin will be separately provided and collected by an authorised provider in addition to the existing waste bins on the site.

Customers will be able to park on the driveway of the property when they drive to the site.

No advertising signage is proposed as part of the application.

The proposed works have the consent of the owner of the dwelling.

4 Clause 4.15 -Matters for consideration

The following provides an assessment of the proposal against the provisions of Clause 4.15 of the Environmental Planning and Assessment Act (as amended).

(a) the provisions of:

(b) (i) any environmental planning instrument

Bankstown LEP 2015

The subject site is zoned R2 Low Density Residential under the Bankstown LEP 2015 The objectives of the zone are as follows:

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To allow for certain non-residential development that is compatible with residential uses and does not adversely affect the living environment or amenity of the area.*
- *To allow for the development of low density housing that has regard to local amenity.*
- *To require landscape as a key characteristic in the low density residential environment.*

The development is consistent with the above objectives as it is provides a compatible land use that meets the day to day needs of residents. The proposal would best be defined as a “home business”, which is permitted under the zoning.

The development complies with all other provisions of the LEP. There is no change to the height of the building or floor space ratio under this application.

The proposal is not a "restricted premise". There have been cases in the Land and Environmental Court involving tattoo-related developments that were not found to be restricted premises. In *Kim v City of Ryde Council [2020] NSWLEC 1340,* the Court approved a tattoo parlour at 31 Cobham Avenue Melrose Park as a "business premise". In *B.J Eldridge & M.E Vincent trading as Crossbones Gallery v Penrith City Council [2019] NSWLEC 1377*, the court provided that when a tattoo studio is not otherwise an ancillary use, it would be classified as a "business premise" (not a restricted premise). A copy of these judgments are attached in ***Appendix 1***).

The proposal is not a sex shop or anything similar in line with the definition of restricted premises.

Clause 5.4 – Controls relating to miscellaneous permissible uses

This clause provides that if development for the purposes of a home business is permitted under this plan, the carrying on of the business must not involve the use of more than 30 square metres of floor area.

The area of the dwelling to be used as the tattoo studio has a floor area of $12m^2$ and the development complies with this clause.

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

Draft Canterbury Bankstown Consolidated LEP

The site is proposed to retain the zoning of R2 Low Density Residential under the draft LEP. Home businesses are permitted under this zone. The proposed development complies with the provisions of the draft LEP.

(iii) any development control plan

Bankstown Development Control Plan 2015

Bankstown Development Control Plan 2015 is applicable to the development. As the development is a relatively minor home business, clauses of the DCP relevant to the development are minimal. The table below details compliance with relevant clauses.

Clause	Required	Proposed	Complies
8.1 General restrictions on development	Council prohibits the registration of home businesses as a factory or similar use under the requirements of WorkCover NSW.	Factory use not proposed	N/A
8.2 Floor area	Home businesses may occupy up to 30m^2 of gross floor area in an outbuilding provided the home business does not reduce the required off–street parking spaces for the dwelling.	12m^2 proposed. Car parking retained	Yes
8.3 Floor area	Home businesses may occupy up to 30m^2 of gross floor area in a dwelling provided the home business is restricted to a single room.	Yes, use restricted to a single room, 12m^2	Yes
8.4 Amenity	Council must consider the following matters to ensure home businesses have a minimal impact on the amenity of adjoining properties: (a) the likely number of vehicle, delivery, and visitor movements; (b) the size of delivery vehicles associated with the home business; (c) the siting of loading activities behind the front building line; (d) the type of equipment or machinery to be used by the home business; (e) the need for an acoustic report where the home business is likely to generate significant noise levels; (f) the need to control any odours or emissions; and (g) whether the hours of operation are within 8.00am to 6.00pm Monday to Saturday, and not at any time on a Sunday or public holiday.	These matters have been considered in the design of the development. Vehicle movements will be minimal with only one worker (already resident of dwelling) and one customer at any given time. There will be minimal delivery vehicles. No specific machinery is proposed to be used. No acoustic report is required. No specific odours of emissions to be generated and hours of operation as prescribed.	Yes
8.5 Building design (signage)	Business identification signs must comply with the following controls: (a) Council permits only one sign per allotment; (b) the total sign area must not exceed 1.2 metre x 0.6 metre; (c) the sign is to be located on or behind the building line; (d) the sign is to be located at or below the awning level. Where there is no awning to the building, the sign is solely permitted below the window sill of the second storey windows; (e) if the sign is painted or attached to a building, the sign must not screen windows and other significant architectural features of the building; (f) the sign is to be non–illuminated; (g) Council does not permit flashing signs, flashing lights, signs which incorporate devices which change colour, signs where movement can be recognised by a passing motorist, signs that are not permanently fixed to the site, and signs made of canvas, calico or the like; and (h) Council may allow standard doctors', dentists' and veterinarians' signs.	Not applicable, no signage proposed	N/A
8.6 Building	Corporate colours, logos and other graphics must achieve a high degree of compatibility with the architecture, materials, finishes	No change to the external building	N/A

design (signage)	and colours of the building and the streetscape.	design is proposed	
Part B5 2.3 Car parking	Home businesses minimum 2 car spaces per dwelling behind the front building line. Note 1: Additional car parking may be required for the proposed home business and must be made available on–site. Note 2: All loading and unloading is to be conducted onsite and an area is to be made available for this activity behind the front building line.	Three spaces available, although only one in front of the building line	No

Justification for non-compliance with the DCP

Car parking

The DCP provides that home businesses require a minimum 2 car spaces per dwelling behind the front building line. A total of three off street car parking spaces will be available on the site, although only one of these is behind the building line.

It should be noted that the current development on the site is already non-compliant with the DCP, as the house was constructed with only a single garage and approved by Council. The proposed development will result in no change, with all of the existing car parking spaces retained.

The proposed development will have only one worker, who is also already a resident of the dwelling, meaning that there will be no increase in parking demand associated with workers at the site. Similarly with customers, there will only be one customer at a time at the site and all visits will be by appointment, with no walk-in visits to the site.

The resident/business operator will park in the rear driveway space or garage, with the space available at the front of the driveway for the customer. Due to the appointment nature of customer visits, appointments will be staggered by at least 30 minutes, so there will never be more than one customer car at the premises.

The front elevation will continue to have the appearance of a garage in line with other dwellings in the immediate area. There is no increase in floor area or building footprint associated with the proposal. There are also a number of existing dwellings in the street without car parking spaces behind the building line eg. No. 54 Chaseling Street.

Based on the above, the proposed variation should be supported by Council.

(iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F

Not applicable.

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph)

Not applicable.

(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,

The proposed development will not create significant environmental impacts on the natural and built environments. The proposed development involves no significant external works and is a suitable use within the context of the existing site.

The development will have no adverse social impact on the surrounding area.

Economic benefits will occur as a result of the provision of a home business and greater business activity in the Canterbury-Bankstown LGA.

(c) The suitability of the site for the development,

The proposed development is permissible under relevant planning controls; it is compatible with surrounding land uses and supports the use of part of an existing dwelling for home business purposes.

The site is zoned for low density residential and the development is consistent with the objectives of the zoning.

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

Consideration will be given to any submissions made as a result of Council's consultation and notification processes.

(e) the public interest.

No adverse impacts relating to the public interest are expected to arise from the proposal. The proposal supports the continued use of the site for purposes consistent with the zoning and planning controls.

5.0 Other considerations

5.1 Visual Impacts

The development will have minimal visual impacts. The proposed change of use is internal to the existing dwelling.

5.2 Open Space

The development will create no additional demand for open space. The private open space to the rear will be retained for use by the resident of the dwelling.

5.3 Overshadowing and Privacy

The development will have no overshadowing or privacy impacts.

5.4 Noise

Noise impacts of the development will be minimal. The hours of operation will be limited to 8am to 5pm Monday to Friday and there will be no operation outside of these hours. As the use is limited to one worker who is also a resident of the dwelling and a maximum of one customer, noise impacts will be negligible and consistent with the existing dwelling.

5.5 Erosion Control Measures

Not applicable, all works are internal to the existing dwelling.

5.6 Economic and Social Impacts

The proposed development is likely to contribute to a range of economic benefits in the Canterbury-Bankstown local government and surrounding areas through:
• additional business opportunities within the area
• the use of the site for a home business associated with the dwelling, contributing to the ongoing maintenance and viability of the dwelling and associated structures

The development will have the beneficial social impact of providing a service for the local residents of Greenacre and surrounding suburbs.

5.7 Environmental Benefits

The proposed development will have minimal adverse impacts on the environment as no substantial external physical works are proposed.

5.8 Disabled Access

The development will comply with BCA provisions relevant to disabled access.

5.9 Security, Site Facilities and Safety

A secure entry to the site is available via the front. Building and parking areas have good passive surveillance, increasing the safety within the site. Access to the part of the dwelling to be used for the home business will be accessible via the existing pathway and via the driveway.

5.10 Waste Management

There is an existing residential waste service available to the dwelling. An additional sharps disposal bin will be provided and collected by an authorised provider.

5.11 Building Code of Australia

The development will comply with the Building Code of Australia.

5.12 Traffic

Traffic impacts of the development will be acceptable. The worker at the site is also a resident of the dwelling, meaning that there will be no parking/traffic impacts associated with employees. There will be a maximum of one customer being served, for which there is parking space available on the driveway. This will have negligible impact on the surrounding street system.

5.13 Stormwater/flooding

There will be no impact on stormwater as there are no external physical works proposed.

6.0 Conclusion

The development proposed for the subject site, located at 45 Chaseling Street Greenacre has been considered in terms of the matters for consideration that are contained within Clause 4.15(1) of the *Environmental Planning and Assessment Act 1979* ("the Act").

As indicated in Part 4 of this Statement, the proposed development is considered to be acceptable in terms of the relevant provisions of Bankstown LEP 2015, which is the principal environmental planning instrument applicable to the subject site. As such, it is considered to be acceptable in terms of Clauses 4.15(1)(a)(i) and 4.15(1)(a)(ii) of the Act.

As indicated in Part 4 of this Statement, the proposed development is considered to be acceptable in terms of all the relevant aims, objectives and standards contained within the relevant chapters of the Bankstown Development Control Plan 2015 and is therefore consistent with Clause 4.15(1)(a)(iii) of the Act.

In addition, the proposed development would have a number of positive effects on both the natural and built environments, as well as a range of social and economic benefits. It is considered unlikely that the proposed development, given its nature, scale and location, would have any detrimental impacts on the built or natural environment or any detrimental social or economic impacts on the surrounding locality. Thus, it is considered to be acceptable in terms of Clause 4.15(1)(b) of the Act.

Further, the subject site, given its location, size and features, and given it is not subject to any significant hazards, is considered to be, pursuant to Clause 4.15(1)(c) of the Act, suitable for the proposed development.

The proposed development will provide for continued use of a site within Greenacre, with the primary residential use being enriched by a home business, without having any significant adverse impacts on the surrounding area. Thus, the proposed development is clearly in the public interest, and acceptable in terms of Clause 4.15(1)(e) of the Act.

Given the above, the proposed development is worthy of approval, and it is requested that the development application to which this Statement of Environmental Effects relates be approved by Council as submitted.

Appendix 1 – Relevant Land and Environment Court Judgments

Land and Environment Court
New South Wales

Medium Neutral Citation:	**B.J Eldridge & M.E Vincent trading as Crossbones Gallery v Penrith City Council [2019] NSWLEC 1377**
Hearing dates:	2-3 July 2019
Date of orders:	16 August 2019
Decision date:	16 August 2019
Jurisdiction:	Class 1
Before:	Chilcott C
Decision:	The Court orders: (1) The appeal is dismissed. (2) The exhibits are returned, with the exception of Exhibits A and 1.
Catchwords:	MODIFICATION APPLICATION – permissible use with an ancillary use – permissible light industry use with an ancillary tattoo studio – whether modification of the consent would give rise to a prohibited independent use in the B5 zone – whether the proposed development as modified is substantially the same.
Legislation Cited:	Environmental Planning and Assessment Act 1979 Penrith Local Environmental Plan 2010
Cases Cited:	Gann v Sutherland Shire Council [2008] NSWLEC 157 Moto Projects No 2 Pty Limited v North Sydney Council [1999] 106 LGERA 298 North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; (1998) 97 LGERA 433 Penrith City Council v Konemann (2017) 225 LGERA 16; [2017] NSWLEC 79 Toner Design Pty Ltd v Newcastle City Council (2013) 198 LGERA 203; [2013] NSWCA 410 Trinvass Pty Ltd V The Council of the City of Sydney [2018]

	Thrivas Pty Ltd v The Council of the City of Sydney [2018] NSWLEC 77 Vacik Pty Ltd v Penrith City Council, unreported, 24 February 1992
Texts Cited:	Penrith Development Control Plan 2014
Category:	Principal judgment
Parties:	B.J Eldridge & M.E Vincent trading as Crossbones Gallery (Applicant) Penrith City Council (Respondent)
Representation:	Counsel: R O'Gorman-Hughes (Applicant) S Nash (Respondent) Solicitors: HWL Ebsworth Lawyers (Applicant) Penrith City Council (Respondent)
File Number(s):	2018/166861
Publication restriction:	No

JUDGMENT

1 **COMMISSIONER**: B.J Eldridge & M.E Vincent trading as Crossbones Gallery (the Applicant) has appealed the approval of their application to modify a development consent granted on 28 December 2017 by Penrith City Council (the Respondent) for DA 16/0495 (the Consent).

2 The proposed development is located at Unit 18 of 49-51 York Rd, Jamisontown (the Subject Site). Opposite the Subject Site, across York Rd, is Jamison Park, which includes the playing fields the Penrith District Netball Association.

3 The Applicant's development, for which consent was granted by the Respondent Council, is for a business which the Applicant submits is an "integrated business" with:

(1) the dominant use of the Subject Site being a specialised production facility for certain artists of Western Sydney, known as Crossbones Gallery. This area facilitates collaboration between artists and the exhibition of artworks related to the so-called 'tattoo culture'. The artists' use of the space would give rise to art in a variety of media including digital media and works on canvas and skin.

(2) an ancillary use being a tattoo studio within the Crossbones Gallery. This use occupies some 30m2 of the 330m2 area of the Subject Site.

4 The dominant, light industry, use described above at [3(1)] is permissible on the Subject Site, with consent, under the provisions of Penrith Local Environmental Plan 2010 (PLEP).

5 The tattoo studio component of the current, consented, development is only permissible, within the Subject Site's B5 zoning, as an ancillary use to the dominant light industry use. It was the agreed position of the Parties at the hearing that the tattoo

studio would otherwise be categorised as a business premises under the provisions of PLEP, and a business premises is a prohibited use of the Subject Site under its B5 zoning.

6 The Applicant's application to modify the consent granted for DA16/0495 seeks the modification or deletion of conditions referenced as Conditions 2, 3, 5, 6, 10, 13, 31 and 34.

7 The modification application was approved by the Respondent, but Condition 6, which the Applicant had sought to be deleted, was retained under that approval.

8 These proceedings relate solely to Condition 6 of the development consent for DA16/0495, which the Applicants in this appeal seek to be modified by the deletion of the condition.

9 The modification application that is the subject of this appeal was made pursuant to s 4.55(1A) (formerly s 96(1A) of the *Environmental Planning and Assessment Act 1979* (EP&A Act), and the appeal is made pursuant to s 8.9 of the EP&A Act.

10 The hearing of this appeal commenced on-site and an inspection of the Subject Site was undertaken by the Court. The site view included inspection of several of the other businesses within the light industrial complex of which the Subject Site forms a part. No objectors sought to make representations to the Court in relation to the appeal during the site view.

Statutory context

Environmental Planning and Assessment Act 1979

11 The modification application has been made under s 4.55(1A) of the EP&A Act, which provides as follows:

> (1A) Modifications involving minimal environmental impact A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if:
>
> (a) it is satisfied that the proposed modification is of minimal environmental impact, and
>
> (b) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and
>
> (c) it has notified the application in accordance with:
>
> (i) the regulations, if the regulations so require, or
>
> (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
>
> (d) it has considered any submissions made concerning the proposed

(d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1), (2) and (5) do not apply to such a modification.

12 The requirements of s 4.55(3) and s 4.55(4) are also relevant to this appeal, and provide:

> (3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.
>
> (4) The modification of a development consent in accordance with this section is taken not to be the granting of development consent under this Part, but a reference in this or any other Act to a development consent includes a reference to a development consent as so modified.

13 Section 4.15(1) of the EP&A Act requires that, 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 proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
>
> (iii) any development control plan, and
>
> (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
>
> (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
>
> (v) any coastal zone management plan (within the meaning of the *Coastal Protection Act 1979*),
>
> 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.

14 Section 4.15(3A) of the of the EP&A Act further provides that:

> If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:
>
> (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and
>
> (b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable

standards" is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

(c) may consider those provisions only in connection with the assessment of that development application.

15 Finally, s 4.3 of the EP&A Act, concerning development that is prohibited, provides:

> If an environmental planning instrument provides that:
>
> (a) specified development is prohibited on land to which the provision applies, or
>
> (b) development cannot be carried out on land with or without development consent,
>
> a person must not carry out the development on the land.

Penrith Local Environmental Plan 2010

16 Development on the Subject Site is subject to the provisions of PLEP. The following provisions of PLEP are of particular relevance in this appeal:

(1) Clause 2.1, which establishes land use zones within the area covered by the plan as provided in cl 2.2 of PLEP. The Subject Site is zoned B5 Business Development Mixed Use, and under the provisions of cl 2.3 of PLEP, the objectives of this zone are to:

• enable a mix of business and warehouse uses, and specialised retail premises that require a large floor area, in locations that are close to, and that support the viability of, centres.

• maintain the economic strength of centres in Penrith by limiting the retailing of food, groceries and clothing.

Penrith Development Control Plan 2014

17 The Penrith Development Control Plan 2014 (PDCP) has the following aims:

> "1. Review and amend the contents of Council's existing DCPs so that they reflect contemporary planning practices;
>
> 2. Incorporate the amended/updated provisions of the existing DCPs and codes together with new planning provisions on contemporary and other planning issues into a single DCP; and
>
> 3. Build upon MLEP 2011 by providing detailed objectives and controls for development."

18 The following sections of PDCP are of particular relevance in this appeal:

(a) Section C10 Transport, Access and Parking, which has the following objectives:

"a) To integrate transport planning and land use to promote sustainable development and greater use of public transport systems;

b) To minimise the impacts of traffic generating developments and manage road safety issues;

c) To ensure that access paths and driveways are integrated in the design of developments and minimise impacts on road systems;

d) To provide appropriate parking for all development whilst promoting more sustainable transport use;

e) To facilitate connections and accessibility for those using non-vehicle transport by

e) To facilitate connections and accessibility for those using non vehicle transport by providing appropriate facilities to improve amenity and safety;

f) To facilitate bicycle connections and provide appropriate bicycle facilities to improve amenity and safety; and

g) To ensure that access is provided for all people with diverse abilities."

(b) Section 10.5 deals specifically with parking, access and driveways, and has:

(i) the following additional objectives:

"a) To ensure the provision of an appropriate number of vehicular spaces having regard to the activities present and proposed on the land, the nature of the locality and the intensity of the use;

b) To require parking areas to be designed and constructed in accordance with the Australian Standards for efficient and safe vehicle circulation and parking;

c) To reduce pedestrian and vehicle conflicts on development sites.

d) To facilitate an appropriate level of on-site parking provision to cater for a mix of development types;

e) To minimise the visual impact of on-site parking;"

(ii) the following control (b) in relation to the provision of parking spaces that is of relevance in this appeal:

"For any proposed development, Council will require the provision of on-site car parking to a standard appropriate to the intensity of the proposed development as set out in Table C10.2 below."

(c) Table C10.2 provides that for an industrial premises, such as the Subject Site in this appeal, including ancillary offices, the required level of parking to be provided is:

"One space per 75m2 of gross floor area, or 1 space per 2 employees, whichever is the greater."

Contentions

19 At the commencement of the hearing, the Parties confirmed that the contentions between them in this appeal, and the key questions to be resolved, fell into two broad categories, as follows:

(1) Legal questions, in relation to which the principal questions are:

(a) is the Applicant's tattoo studio permissible?

(b) would the Applicant's tattoo studio remain permissible (ie ancillary to the gallery) if Condition 6 were deleted, as proposed by the Applicant?

(c) would the Applicant's tattoo studio remain permissible (ie ancillary to the gallery) if Condition 6 were amended as proposed by the Applicant?

(d) if the Applicant's development remained permissible with the deletion or amendment of Condition 6, would the Applicant's modification application be substantially the same development as the development for which

consent was originally granted, as required under s 4.55(1A) of the EP&A Act? and

(e) would the Applicant's modification application, if approved, have minimal environmental impact?

(2) Merits questions, in relation to which the principal question is:

(a) Does the proposed modification application satisfactorily address the applicable provisions of PDCP concerning parking?

20 I will address these questions below, *ad seriatum*.

21 The Court's consideration of these questions was assisted by the evidence of the Parties' expert planners:

(1) Mr Warwick Stimson, for the Applicant, and

(2) Ms Jane Hetherington, for the Respondent.

Is the Applicant's tattoo studio permissible?

22 The Subject Site is zoned B5 Business Development. Within this zone, the Applicant's use of the Subject Site for purposes of light industry is permissible, with consent.

23 However, development for the purposes of a business premises is prohibited. As discussed above at [5], should the Applicant's tattoo studio not be categorised as an ancillary use, it would otherwise be categorised as a business premises, and so would be a prohibited development under the B5 zoning of the Subject Site.

24 The development consent granted to the Applicant by the Respondent Council on 10 February 2017, in response to development application DA 16/0495, authorises the fit-out and use of the Subject Site for light industry purposes with an ancillary use. The

light industry component consists of a gallery within which the Applicant undertakes activities concerned with computer-based digital media, web design, business branding, signage development, and signwriting. The ancillary use is the tattoo studio.

25 The Applicant's Statement of Environmental Effects (SEE), submitted with DA 16/0495, characterises this light industry use as a specialised production facility for certain artists of Western Sydney that enables these artists to collaborate and exhibit artworks consistent with a tattoo culture theme, and in which the tattoo art is expressed through a variety of media, including both as art on canvas and art on skin.

26 The Applicant submits that the tattoo studio element is an integrated component of the broader light industry business and, as such, is ancillary to it as the creation of tattoos on skin represents one media, amongst many, through which the tattoo artists of Western Sydney express themselves.

27 In granting consent to the Applicant's DA 16/0495, the Respondent Council did so subject to conditions including, amongst other things, a condition, referred to in these proceedings as Condition 6, which limited the scale and intensity of the tattoo studio operations within the Applicant's use of the Subject Site.

28 Condition 6, when imposed by the Respondent Council, reflected aspects of the Applicant's development application. The proposed development was described within the Applicant's SEE, and that description characterised the development for which the Applicant had sought consent.

29 Given that the Respondent Council granted consent to the Applicant's light industry use of the Subject Site, the Respondent Council must have formed an opinion of satisfaction, based on its inclusion of Condition 6, that the tattoo studio use within the dominant light industry use would remain ancillary to the dominant use for which it had granted consent. I have not enquired as to the reasons relied upon by Council in reaching this opinion of satisfaction, as this was not required of me in this appeal.

30 Condition 6 of the grant of consent provides as follows:

> "The approved operating hours for the light industry component are from 7 AM to 10 PM Mondays to Sunday's.
>
> The approved operating hours for the ancillary tattooing component of the business are from 5 PM to 10 PM Mondays to Sundays.
>
> There are to be a maximum of two staff on site at any one time.
>
> There is to be a maximum of 3 to customers per day."

31 Having considered the context of the Respondent Council's grant of consent to the Applicant's development application, including the imposition of Condition 6, I am satisfied the tattoo studio component of the consented development, as conditioned, is permissible as an ancillary use to the Applicant's dominant use of the Subject Site.

Would the Applicant's tattoo studio remain permissible as an ancillary use to the gallery if Condition 6 were deleted as proposed by the Applicant?

32 As noted above, the Applicant in these proceedings has sought deletion of Condition 6 imposed by the Respondent Council as part of its grant of consent. A consequence of the deletion of Condition 6 would be that the limitations imposed upon the operation of the Applicant's tattoo studio component by the Respondent Council under its grant of consent would be removed.

33 The removal of the limitations provided by Condition 6 would enable the tattoo studio to operate in a manner that would not be limited, other than by hours of operation, with the consequence that the scale and intensity of the tattoo studio operation would increase. It was the submission of the Applicant at the hearing that its intent in seeking deletion of Condition 6 was indeed to increase the scale and intensity of the tattoo studio operation.

34 The deletion of Condition 6 would enable the operating hours of the tattoo studio to increase from five hours per day to 15 hours per day, that being the approved hours of operation available to the dominant use of the Subject Site. This would represent a threefold increase in the hours of operation for the tattoo studio.

35 The deletion of Condition 6 would also remove restrictions on both the numbers of staff that would be able to operate within the tattoo studio, and the number of customers per day that would be able to utilise its services.

36 The Respondent submitted that there are certain legal principles that should guide the Court in identifying whether the deletion of Condition 6 would cause the tattoo studio use to constitute an independent, and so prohibited, use of the Subject Site under the provisions of PLEP.

37 The Respondent drew the Court's attention to the findings of Molesworth AJ in *Penrith City Council v Konemann* (2017) 225 LGERA 16; [2017] NSWLEC 79 (at [82]) in which his Honour had described the question as to whether a use was ancillary to a dominant use as one of 'fact and degree'.

38 The Respondent also submitted that the findings of Basten JA in *Toner Design Pty Ltd v Newcastle City Council* (2013) 198 LGERA 203; [2013] NSWCA 410 (hereafter referred to as *Toner*) were of relevance in this appeal, and in which his Honour (at [10] and [11]) had said that:

> "10 … for a development to be 'ancillary to' another development it must not merely coexist with, but must serve the purposes of, the other development …",

and

> "11 … the concept of 'ancillary to' involves matters of size and scale. Thus, two developments each of which was of significant scale in its own right might not demonstrate the relevant relationship of one being dominant and the other being subservient thereto. Examples are not necessarily helpful because the factors to be taken into account will vary as between cases …"

39 In addition, during the hearing, the Parties' expert planners agreed that it was appropriate that the tattoo studio should be the subject of a condition of consent that would restrict the level of the Applicant's tattoo studio operations, to assure that it would remain an ancillary use to the dominant use of the Subject Site.

40 Having considered the submissions of the Parties and the evidence of the Parties' expert planners, together with the likely consequences of deleting Condition 6 described above at [34] and [35], I have concluded that the deletion of Condition 6, is not appropriate and should not be approved.

41 In my assessment, the deletion of Condition 6 would result in an increase in the level of operation of the tattoo studio, that could, and indeed is likely to, give rise to an independent use of the Subject Site for the purpose of a tattoo studio based on the potential scale and intensity of that use, including that the use could be for commercial rather than for artistic purposes.

42 At that point, and consistent with the findings of Basten JA in *Toner*, the tattoo studio would no longer remain ancillary to the consented light industry use of the Subject Site, that being a gallery facilitating the interactions of artists, as is required under the B5 zoning of the Subject Site. That ancillary use is otherwise assured by the Applicant's compliance with Respondent Council's imposed Condition 6.

43 Retention of Condition 6, as sought by the Respondent Council in these proceedings, would obviate this risk, and assure that the tattoo studio operation would remain an ancillary use of the Subject Site, and so it would remain permissible in the applicable land use zone.

44 The Applicant had submitted that there would be no impediment to the Court approving their modification application on the basis that it would give rise to a prohibited use, and based this submission on the finding of Lloyd J in *Gann v Sutherland Shire Council* [2008] NSWLEC 157 (*Gann*) at [18]-[19], at which his Honour held that the previous s

96 of the EP&A Act (now s 4.55) is a stand-alone provision of the Act that permits a development consent to be modified to allow development which would otherwise be prohibited (in that case, by a development standard).

45 The Applicant further submitted that the Court of Appeal had arrived at the same conclusion in *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468; (1998) 97 LGERA 433 (*Michael Standley*) at [481] when considering an application to modify a consent under the former s 102 of the EP&A Act.

46 However, I do not accept this submission from the Applicant, because the findings of both the Court of Appeal in *Michael Standley*, and his Honour in *Gann*, related to the Court's powers to grant consent to a modification application that would breach an applicable development standard within an environmental planning instrument rather than one that would consent to a development that was not permissible under the relevant zoning of the land.

47 This conclusion is confirmed by Lloyd J of *Gann* at which he provides specific examples of the development standards in the relevant local environment plan in relation to which his Honour states at [19] that there is no legal impediment to the grant of consent under a modification application made under the former s 96 of the EP&A Act. Those development standards are identified by his Honour as concerning building height, gross floor area and landscaped area.

48 In consequence, I have concluded that, consistent with the submissions of the Respondent, the deletion of Condition 6, and the removal of the restrictions within it that assures that the tattoo studio remains an ancillary use that is permissible, is not appropriate.

Would the Applicant's tattoo studio remain permissible as an ancillary use to the gallery if the Applicant's Condition 6 were amended as proposed by the Applicant?

49 As previously discussed above at [39], the Parties' expert planners agreed that it was appropriate that the tattoo studio should be the subject of a condition of consent that would restrict the level of the Applicant's tattoo studio operations, and so assure that this would remain an ancillary use to the Applicant's dominant use of the Subject Site.

50 Consistent this evidence, and in recognition of the need to consider further options should I find, as I have, that the deletion of Condition 6 is not appropriate, the Applicant has proposed an alternative to deletion of Condition 6 drafted by its expert planner, Mr Stimson.

51 The Applicant's alternative proposal is that Condition 6 be amended to read as follows:

> "The approved operating hours for the premises are from 7 AM to 10 PM Mondays to Sundays.
>
> The tattoo operations are to be limited to the tattoo area

The tattoo operations are to be limited to the tattoo area.

Tattooing is to be by appointment only. The appointments are to be stated so that a tattoo artist cannot take consecutive appointments without a 15 minute break in between.

> During Saturdays or Sundays on which any netball games are scheduled at Jamison Park there are to be a maximum of six staff on-site at any one time."

52 The expert planners differed in their evidence in relation to this proposed, amended, Condition 6, as follows:

(1) Mr Stimson supported the proposed amended Condition 6, and said that, in his opinion, the limitations provided within it were sufficient to ensure that the tattoo studio would remain an ancillary use to the Applicant's dominant use;

(2) Ms Hetherington did not agree with Mr Stimson, and said that, in her opinion:

(a) the restrictions within Condition 6, as imposed by the Respondent Council, ensured that the scale and intensity of the tattoo studio operations were a minor and insignificant component of the Applicant's use of the Subject Site;

(b) in order to ensure that the tattoo studio remained an ancillary use to the Applicant's dominant use, it was necessary to impose restrictions that should include limits to the number of appointments and customers of the tattoo studio business;

(c) it had not been demonstrated that the tattoo studio, as it would operate under the proposed amended Condition 6, would not have unacceptable impacts on other tenancies within the same complex as the Subject Site, notably in terms of use of on-site parking;

(d) the imposed Condition 6 was not onerous and had been based on information provided by the Applicant within their development application and which the Applicant had relied upon to establish that the tattoo studio was an ancillary use.

53 The Respondent submitted that it was possible that, even with the imposition of Condition 6, the tattoo studio was not an ancillary use of the Subject Site because it did not serve the Applicant's dominant light industry use of the site.

54 Having considered the submissions of the Parties, and the evidence of the planning experts, my assessment of this proposed condition, and its implications in relation to the tattoo studio, are as follows:

(1) the increase in operating hours from five hours per day to 15 hours per day would represent at least a threefold increase in the hours, and so scale, of operation of the tattoo studio;

(2) notwithstanding that the Applicant's proposed alternative condition provides that there must be a 15 minute break between appointments, the proposed condition provides no firm limitation as to the number of seats or beds that would be

provided for the application of tattoos within the tattoo studio, nor does it limit of the number of clients that would be serviced at the tattoo studio during the course of any day; and

(3) the Applicant's proposed alternative condition provides no limitation as to the number of staff that would operate within the tattoo studio.

55 Based on this assessment, and having considered the submissions of the Parties and evidence of the expert planners, consistent with the evidence of Ms Hetherington and the submissions of the Respondent, I am also not satisfied that the Applicant's proposed amended condition would be sufficient to limit the operation of the tattoo studio such that it would remain an ancillary use to the dominant light industry use approved under the consent granted by the Respondent Council.

56 Consequently, I do not accept that the Applicant's proposed amended Condition 6 should be adopted in place of the Condition 6 imposed by the Respondent Council.

Is the Applicant's modification application substantially the same development as the development for which consent was originally granted?

57 As noted previously (see above at [9]), this is an appeal against the Respondent's refusal of a modification application made pursuant to s 4.55(1A) of the EP&A Act, and under that section of the Act, the Court must be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all).

58 Satisfaction on this point enlivens the power for the consent authority, or the Court on appeal, to grant consent to the application that is the subject to the appeal.

59 The specific provisions of s 4.55(2) of the EP&A Act were provided above at [12].

60 The statutory test in s 4.55(2)(a), requiring that the consent authority be satisfied as to whether the development modification is substantially the same development as the development for which consent was originally granted, has been helpfully summarised in a recent judgment by his Honour, Moore J, in the matter of *Trinvass Pty Ltd V The Council of the City of Sydney* [2018] NSWLEC 77 (hereafter referred to as *Trinvass*).

61 The following paragraphs [22] to [28] of *Trinvass* are of greatest relevance in this appeal:

> "[22] The starting point for any consideration of whether or not a development modification will result in a development that is substantially the same is that - as discussed by Stein J in *Vacik Pty Ltd v Penrith City Council*, unreported, 24 February 1992 (*Vacik*) - his Honour observed that the Applicant for modification bears the onus of satisfying me that the proposed development as modified will be substantially the same.
>
> [23] Those remarks of his Honour are consistent with those of the Chief Judge in *Australian Protein Recyclers* to which I have earlier adverted. In *Vacik*, his Honour went on to say - and to sound the cautionary note - that it was not appropriate simply to say

on to say - and to sound the cautionary note - that it was not appropriate simply to say that the nature of the development - in that case an extractive industry - if amended would be the same use and would therefore be substantially the same development.

[24] Stein J went on to say that it was necessary to consider whether the proposed modified development would be essentially or materially or having the same essence as that which had been originally approved.

[25] These comments by his Honour in *Vacik* were endorsed by the Court of Appeal in *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 (*Michael Standley*) where the learned President endorsed, at 475, the sentiments expressed by Stein J in *Vacik*.

[26] At the same time, the President also explained - also on 475 - that the process of permitting modification of a development consent is one which should be regarded as beneficial and facultative, notwithstanding the onus of proof relying on the Applicant. Although endorsing the view of Stein J in *Vacik*, the Court of Appeal in *Michael Standley* did not in any way set any further test for assessing whether the development was substantially the same or not.

[27] However, in 1999, Bignold J gave a decision in *Moto Projects No 2 Pty Limited v North Sydney Council* [1999] 106 LGERA 298 (*Moto*), where his Honour, after dealing with the facts of the proposed modification development, went on to say, at [55] and [56]:

55 The requisite factual finding obviously requires a comparison between the development, as currently approved, and the development as proposed to be modified. The result of the comparison must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development.

I interpolate that the position now is as required by s 4.55(2)(a) that I must be satisfied that it is essentially or materially the same as the development for which consent was originally granted. That, although differing somewhat from what his Honour described, causes no particular difficulty in the present circumstances. His Honour then went on to say:

56 The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted).

> [28] That test - that is a two-stage test of considering the proposed modified development - is that which is currently required to be addressed."

62 I draw from these paragraphs that:

(1) the Applicant seeking the modification bears the onus of satisfying me that the proposed development as modified will be substantially the same (*Vacik*);

(2) the process of permitting modification of a development consent is one which should be regarded as beneficial and facultative, notwithstanding the onus of proof relying on the Applicant (*Michael Standley*);

(3) the result of a comparison between the development, as currently approved, and the development as proposed to be modified must be a finding that the modified development is "essentially or materially" the same as the (currently) approved development (*Moto*);

(4) the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being compared in their proper contexts (including the circumstances in which the development consent was granted) (*Moto*).

63 As previously noted in this judgement, the Applicant's proposed deletion or modification of condition 6 would treble the operating hours of the tattoo studio component from five hours to 15 hours.

64 Additionally, both the deletion of Condition 6, or its amendment as proposed in the alternative by the Applicant, would remove the limits currently imposed by Condition 6 in relation to staff and client numbers on any day, other than in relation to days on which netball games were scheduled for play at Jemison Park.

65 The removal of the limitations to, and the expansion of operating times for, the tattoo studio together create circumstances in which the scale of the operation of the tattoo studio would, in my assessment, undoubtedly increase.

66 However it is not clear, based on the evidence available to me during the hearing, the extent to which the operations of the tattoo studio would increase. Nor is it clear at what point the tattoo studio operation would change from and ancillary use to an independent use as the scale of the tattoo operation increased.

67 Consequently, while Applicant has confirmed that the area within which the tattoo studio operation is to be undertaken would remain unchanged from its present area of 30m², I am unable to be satisfied as to:

(1) the extent to which the tattoo operation would increase over time; and

(2) the point at which the operation of the tattoo studio would change in nature from being an ancillary use to an independent use.

68 Given these uncertainties I am unable to be satisfied that the deletion or amendment of

Condition 6, as proposed by the Applicant, would result in a development that was, from a quantitative or qualitative perspective, substantially the same as that for which consent was granted and before that proposed development modified.

69 As a consequence of my conclusion at [68], I have further concluded that, in addition to my conclusions in relation to the continuing ancillary use nature of the tattoo operation, the Court's powers to grant consent to the Applicant's modification application have not been enlivened, and I am unable to approve the application.

Conclusion

70 As stated above at [48] and [56], I have concluded that:

(1) deletion or amendment of Condition 6, as proposed by the Applicant, is likely to give rise to the use of the Subject Site that would be:

(a) independent of, and not ancillary to, its permissible, dominant, use; and

(b) not be a permissible use within the B5 zoning of the Subject Site.

71 Further, as a consequence of my conclusions above at [70], [68] and [69], I have further concluded that:

(1) I am unable to be satisfied that the proposed development would remain "essentially or materially" the same as the currently approved development on the Subject Site.

72 Consequently, the precondition within s 4.55(2) of the EP&A Act, that I be satisfied that the development as modified would be substantially the same development as the development for which consent was originally granted, is also not met.

73 I find that the Applicant's modification application should not be approved and the Applicant's appeal should be dismissed, because I have found that the development if modified:

(1) is likely to give rise to an independent and prohibited use within the zoning of the subject site; and

(2) is such that I cannot be satisfied that the proposed development would be substantially the same development as originally approved, and, as a consequence, do not have jurisdiction to grant consent to this modification application under s 4.55(2) of the EP&A Act.

74 Having reached the conclusions above at [73(1)] and [73(2)], it is unnecessary for me to consider further the remaining contentions in this appeal.

Orders

75 The orders of the Court are:

(1) The appeal is dismissed.

(2) The exhibits are returned, with the exception of Exhibits A and 1.

.....

M Chilcott

Commissioner of the Court

****

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Decision last updated: 16 August 2019

Land and Environment Court
New South Wales

Medium Neutral Citation:	**Kim v City of Ryde Council [2020] NSWLEC 1340**
Hearing dates:	20 July 2020
Date of orders:	03 August 2020
Decision date:	03 August 2020
Jurisdiction:	Class 1
Before:	Horton C
Decision:	The Court orders that: (1) The appeal is upheld. (2) Development consent is granted to Development Application No. LDA2019/78 seeking consent for the change of use of part of the ground floor of the building to a 'business premises' to accommodate a tattoo parlour at 31 Cobham Avenue, Melrose Park subject to the conditions in Annexure A. (3) All Exhibits are returned except for Exhibit A.
Catchwords:	DEVELOPMENT APPLICATION – change of use – suitability of the site for the development – objectives of the B1 Neighbourhood Centre zone – weight given to resident submissions
Legislation Cited:	Environmental Planning and Assessment Act 1979 Roads Act 1993 Ryde Local Environmental Plan 2014
Cases Cited:	New Century Developments Pty Limited v Baulkham Hills Shire Council (2003) 127 LGERA 303; [2003] NSWLEC 154 Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21
Texts Cited:	Land and Environment Court of New South Wales, COVID-

19 Pandemic Arrangements Policy, (March 2020)

LEP Practice Note 'Preparing LEPs using the Standard Instrument: standard zones'
NSW Department of Urban Affairs and Planning, Crime prevention and the assessment of development applications: Guidelines under section 79C of the Environmental Planning and Assessment Act 1979, (April 2001)
NSW Fair Trading, "Licensing information for tattooists and operators", <https://www.fairtrading.nsw.gov.au/trades-and-businesses/business-essentials/information-for-specific-industries/tattoo-parlours> accessed 21 July 2020
W G Jennings, B H Fox, D P Farrington, "Inked into Crime? An Examination of the Causal Relationship between Tattoos and Life-Course Offending among Males from the Cambridge Study in Delinquent Development" (2014) 42(1) Journal of Criminal Justice 77

Category:	Principal judgment
Parties:	Peter Kim (Applicant) City of Ryde Council (Respondent)
Representation:	Counsel: P Holland (Solicitor) (Applicant) Dr S Berveling (Respondent) Solicitors: McCullough Robertson Lawyers (Applicant) City of Ryde Council (Respondent)
File Number(s):	2019/363734
Publication restriction:	No

JUDGMENT

1 **COMMISSIONER:** This Class 1 appeal concerns a development application brought before the Court under s 8.7 of the *Environmental Planning and Assessment Act 1979* against the refusal by the City of Ryde Council of Development Application No.

LDA2019/78 seeking consent for the change of use of part of the ground floor of the building to a 'business premises' to accommodate a tattoo parlour at 31 Cobham Avenue, Melrose Park and otherwise known as Lot 162 in DP 15965 (the site).

2 The application proposes the following works:

- Change of use of part of the ground floor of the building to a 'business premises' for the purpose of a tattoo parlour.
- Proposed hours of operation 9.00am – 6.00pm Monday to Friday, and 9.00am – 4.00pm Saturday and Sunday.
- Provision of 4 staff members.
- Provision of two tattoo beds.
- Business premises floor area of 29.6m^2.
- Deletion of the door from the commercial WC that leads to the residential laundry.

3 The facts and background to the dispute are set out in the Statement of Facts and Contentions, marked Exhibit 1. In essence, the issue for the Court to determine is whether the proposed development is suitable or unsuitable for the site when having regard to the objectives of the B1 Neighbourhood Centre.

4 The Court was assisted by town planning experts Mr Mark Boutros for the Applicant and Mr Ben Tesoriero for the Respondent. Their joint expert report is marked Exhibit 3.

The site and its context

5 The site is located on the north-western corner of Cobham Avenue and Andrew Street in Melrose Park, as part of a small strip of single and two-storey shops zoned B1 Neighbourhood Centre, as identified in the Ryde Local Environmental Plan 2014 (RLEP).

6 While the site addresses Cobham Avenue, Andrew Street and Andrew Lane, the proposed change of use applies to the Andrew Street/Cobham Street frontage as the rear of the site addressing Andrew Lane consists of a dwelling and on site car parking.

7 The immediate area is predominantly characterised by low density residential accommodation, mainly consisting of single and two-storey dwellings zoned R2 Low Density Residential.

8 Figure 1 in the joint expert report identifies an area of around 800m in walking distance from the subject site, encompassing industrial land, housing and private and public recreational space.

Public submissions

9 On 18 December 2019, the matter was listed for hearing commencing on 20 July 2020. On 23 March 2020, the Court published the COVID-19 Pandemic Arrangements Policy (Pandemic Policy) on the Court's website.

10 Consistent with the Pandemic Policy, the parties consented to the hearing proceeding by MS Teams, and for public submissions to be provided in writing prior to the hearing.

11 However, in addition to written submissions, the following objectors initially sought leave to provide oral submissions to the Court at the commencement of proceedings:

- Danielle Davis (Exhibit 2, folio 53).
- Andrew Goodyer (Exhibit 2, folio 54-56).
- Mark Edwards (Exhibit 2, folio 57-63).
- Pam Smith (Exhibit 2, folio 65-66).
- Jerome Laxale (Exhibit 2, folio 67).

12 At the commencement of the hearing, the Respondent advised that the residents at [11] preferred to rely upon the written submissions which I consider in more detail at [40]-[68].

13 The Applicant submits that a number of public submissions in support of the proposed development are also a relevant consideration.

The objectives of the B1 Neighbourhood Centre

14 The objectives of the B1 Neighbourhood Centre contained in the RLEP are in the following terms:

> **1 Objectives of zone**
>
> • To provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.

- To encourage employment opportunities in accessible locations.

15 It is common ground between the parties that a tattoo parlour is a type of business premises, which is permissible in the B1 zone with consent.

16 The parties are agreed that the proposed development would, if consent is granted, encourage employment in the area and so the proposal can be said to be consistent with the second objective as it is set out in the RLEP.

17 Likewise, the parties are agreed that it is the 'first objective' of the zone with which the proposed development is said to be inconsistent and to which I must have regard when determining a development application in respect of land within the zone, pursuant to cl 2.3 of the RLEP.

18 In essence, the Respondent submits that a tattoo parlour does not serve the needs of people who live or work in the surrounding neighbourhood. In support of this view, Mr Tesoriero considers it necessary to consider how the term 'surrounding neighbourhood' may be best defined.

19 To this end, Mr Tesoriero relies on the LEP Practice Note 'Preparing LEPs using the Standard Instrument: standard zones' (LEP Practice Note), published by the NSW Department of Planning (Ref No. PN11-002) issued on March 2011 (Exhibit 2, folio 41-48).

20 Mr Tesoriero considers the overview of the intended purpose of the B1 Neighbourhood zone in Attachment A 'Overview on the General Purpose of Each Zone' (Exhibit 2, folio 44-49) to be of particular assistance. The overview provides, relevantly:

> "**B1 Neighbourhood Centre**
>
> The zone is for neighbourhood centres that include small-scale convenience retail premises ('neighbourhood shops'), 'business premises,' 'medical centres' and community uses that serve the day-to-day needs of residents in easy walking distance...This zone should not be used for single 'neighbourhood shops,' as these can generally be permitted within the residential zones. In areas where there is increasing housing density and demand for local retail and business services, a B2 or B4 zone should be considered instead of a B1 zone to cater for expansion."

21 Mr Tesoriero is of the view that the effect of the LEP Practice Note is to clarify that the words 'surrounding neighbourhood' contained in the objective may be considered to be within 'easy walking distance'.

22 Next, Mr Tesoriero applies a widely held 'rule of thumb' to overlay a distance of 800m from the site on the wider locality (Exhibit 3, Figure 1) to identify a 'catchment' of people who live or work in the area within 'easy walking distance' of the proposed development.

23 Having then assessed the range of uses in the catchment, Mr Tesoriero opines that a tattoo parlour would not serve the 'day-to-day' needs of those who live or work in the catchment. Instead, the proposed development would only serve a specific clientele

who, in his oral evidence, Mr Tesoriero defines as people who seek a tattoo.

24 Furthermore, the high number of objections to the proposed development from residents in the local area are a further indication that the needs of the community are not met by a tattoo parlour that would be better suited to a B3 Commercial Core zone.

25 In the alternative, the Applicant submits that the proper test to be applied to the proposed development is not whether it serves the 'day-to-day' needs of residents within 'easy walking distance', but whether it is consistent with the objective set out in the RLEP for small-scale business uses that serve the needs of people who live or work in the surrounding neighbourhood.

26 When considering consistency with the zone objectives, it is not necessary to show that the proposed development is compatible with the zone objectives for it to be considered to be generally consistent so long as it is not antipathetic to them as shown by Pearlman J *in Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21.

27 Furthermore, most businesses permissible within a B1 zone will attract specific clientele, as is the case with a podiatrist, dietician, medical specialist, interior designer or the like.

28 Furthermore, the objective does not stipulate that a business should serve the needs of the surrounding neighbourhood exclusively, or predominantly. If this was the intent of businesses within the B1 zone, Mr Boutros considers it reasonable that business premises, which attract commuting workers, would be prohibited and the Respondent presses no contentions in relation to traffic or carparking impacts or amenity impacts and there is a bus stop located at the shops.

29 According to Mr Boutros, the proposed development satisfies the objective because it is:

- small-scale;
- a business; and

- likely to serve the needs of the surrounding neighbourhood.

30 In support of the needs of the surrounding neighbourhood, Mr Boutros relies on a Community Survey undertaken by the Applicant (Exhibit 3, Annexure A) that attracted 73 respondents – including one participant identified as being resident at the subject site.

31 The Community Survey asked a number of questions in respect of the survey participant's attitude and interest in tattoos, tattoo parlours and awareness of tattoo artists. According to Mr Boutros, the results of the survey indicates there are people who live or work within the Ryde Local Government Area (LGA) who are interested in tattoos and may intend to get a tattoo in the future.

32 In the alternative, Mr Tesoriero is of the view that participants in the Community Survey reside outside the Ryde LGA, and as the survey was promoted on the Applicant's social media account, the participants are self-selecting with a predisposition to tattoos. This is in contrast to the 48 objections received by Council in response to public notification of the proposed development.

33 Issues identified in the public submissions objecting to the proposed development are summarised by the Respondent in par 8, Exhibit 1 as follows:

> "(a) A tattoo parlour is not in character with the area and the use is not suitable for a residential area.
>
> (b) The proposed use would have a significant adverse impact on neighbourhood amenity and drastically lower the tone of the neighbourhood.
>
> (c) There is no car parking available, and this will impact street parking which is already limited due to the bus zone and zebra crossing.
>
> (d) The approval of a tattoo parlour will increase noise levels and attract persons of bad character.
>
> (e) The impact on children who walk past the shop to go to local schools.
>
> (f) West Ryde already has a tattoo parlour there is no need for another one in Melrose Park.
>
> (g) The proposal will devalue neighbouring property and may impact securing future tenants."

34 A summary of matters raised in submissions in support of the proposed development is also prepared by the Respondent in par 8, Exhibit 1 as follows:

> "(a) Tattoos are not associated with drugs or criminal activity and the opening of the parlour will not put kids at risk or ruin the family oriented neighbourhood
>
> (b) The site is not on a quiet residential street.
>
> (c) Most people who get tattoos take public transport and the use will not result in an influx of parking issues.
>
> (d) You don't have to be part of a gang to own a business. Opening a tattoo parlour is no different to opening a corner shop.
>
> (e) As long as the operators respect the local community and operate to the regulations, I don't see why it would not work for the area."

Consideration

35 The wording of cl 2.3 of the RLEP requires that I "must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone".

36 The parties are agreed that the test to be applied in respect of the objective the subject of the contention does not require me to find that the proposed development *complies* with the zone objectives.

37 In considering the zone objective in question, the Respondent's town planning expert suggests that the Court place weight on the LEP Practice Note in order to fully comprehend the meaning of the objective. For the following reasons I find that while the LEP Practice Note is a guide, it should not carry weight in considering the zone objective:

(1) Firstly, the objective, while broadly phrased, is not, in my view, ambiguous. It can be understood on its plain meaning. By contrast, the text of the LEP Practice Note, at [20], when applied to remedy what the Respondent considers to be an ambiguity, results in what I consider to be both conflict and ambiguity;

(2) The text of the objective supports small-scale businesses to serve the needs of people who *live or work* in the surrounding neighbourhood (emphasis added). However, the LEP Practice Note appears to redefine those whose needs are to be served as "the needs of *residents* in easy walking distance" (emphasis added). In doing so, the LEP Practice Note appears to deduct the needs of those who *work* in the surrounding neighbourhood, as stated clearly in the objective itself. Therein lies the conflict;

(3) Secondly, while it is now almost universally accepted that walkable neighbourhoods are desirable for reasons of human health and sustainability, 'walking' is not an explicit or implicit element in the zone objective. Furthermore, while the expression 'easy walking distance' may be a familiar one in conversation, its meaning varies based on factors such as, but not limited to, the fitness and mobility of the individual, terrain of the path to be travelled, the frequency of, or time available in which it is to be undertaken. Consequently, the term lacks the specificity required to clarify or resolve a dispute as to the precise borders of the 'surrounding neighbourhood'; and

(4) Thirdly, the LEP Practice Note appears to define the needs of those to be served by the businesses in the B1 zone as 'day to day', whereas the zone objective itself is agnostic as to the frequency or regularity of the needs to be served. Herein lies the ambiguity. While the experts were led into an acute exegesis of

> this territory, in my view the intent of the LEP Practice Note cannot be to impose an additional test on the regularity of needs served beyond the test that appears in the zone objective.

38 Absent any weight from the LEP Practice Note, I consider the objective to which I should have regard to be that re-produced at [14], as it appears in the RLEP. In my view the zone objective, as it appears in the RLEP, is able to be understood on its face and an over-articulation of the component parts within the objective does not result in further clarity on its intent.

39 The proposed development answers the description of a small-scale business, comprising just two tattoo beds in an area of 29.6m^2. The services provided by it are likely, in my view, to find people who live or work in the surrounding neighbourhood, as well as others who may consider the business to be a 'destination' for which they would travel.

Public submissions are considered

40 In considering the public submissions in this matter, I am conscious that I hold in balance the concerns of the residents in the area, as expressed in their written objections, with the evidence before the Court in these proceedings.

41 A high number of resident submissions are included in the Respondent's bundle at Exhibit 2. The submissions inform the expert evidence of Mr Tesoriero in Exhibit 3 as summarised at [24].

42 As shown by Lloyd J in *New Century Developments Pty Limited v Baulkham Hills Shire Council* (2003) 127 LGERA 303; [2003] NSWLEC 154, at [61]:

> "… [a] consent authority must not blindly accept the subjective fears and concerns expressed in the public submissions. Whilst such views must be taken into consideration, there must be evidence that can be objectively assessed before a finding can be made of an adverse effect upon the amenity of the area [quoting Pain J in *Dixon v Burwood Council* [2002] NSWLEC 190 at [66]] (*Dixon* at [53])."

43 Later at [61], his Honour provides guidance on the weight that is appropriate to give to resident concerns where those concerns are supported by objective or observable consequences of a proposed development.

> "…whilst the court is clearly entitled to have regard to the views of residents of the area, those views will be accorded little, if any, weight if there is no objective, specific, concrete, observable likely consequence of the establishment of the proposed use."

44 I propose to assess the concerns of residents against the evidence before the Court in the relevant Exhibits, and in the evidence of the experts and, where relevant, by reference to published and accepted guidelines before deciding on the weight that should be given to those resident concerns.

45 In reading each of the submissions contained in Exhibit 2, I note that 24 of the objections are distilled to a single statement of objection, without providing grounds for the objection. I note these submissions but give them no weight as it is unclear on what basis to consider the objection in the context of the proceedings.

46 That said, a number of the objections do provide the grounds on which the objection is based. These are, in my view, adequately summarised by the Respondent at [33]-[34].

47 Three submissions are particularly deserving of attention as they cite evidence sources that have the potential to contain "objective, specific, concrete, observable likely consequences".

48 Firstly, in her submission, Ms Roslyn Wagstaff (Exhibit 2, folio 189), states that 'it is well known that tattoo parlours draw gangs and bikies – so much so that the NSW Government introduced specific legislation in an effort to control unsavoury and/or violent behaviour in tattoo parlours".

49 In support of which, Ms Wagstaff includes reference to information that appears on the website of the Office of Fair Trading at: https://www.fairtrading.nsw.gov.au/trades-and-businesses/business-essentials/information-for-specific-industries/tattoo-parlours.

50 While not assisted by submissions on this particular issue, I note that the website to which Ms Wagstaff draws the Court's attention includes particulars on the conditions on which a licence may be granted to a tattooist, including, relevantly:

> "To apply for either a tattooist or operator licence you must:
>
> • be at least 18 years of age and an Australian citizen or resident
>
> • not be a controlled member of a declared organisation
>
> • consent to a National Police Check
>
> • provide certified copies of three types of approved identification
>
> • lodge the completed licence application form and pay the prescribed fee
>
> • attend a police station to have your finger and palm prints taken, when requested.
>
> You must also provide details of your previous, current, existing or upcoming employment as a body art tattooist, including any employment as an apprentice.
>
> In addition to the above criteria, operator licence applicants must also:
>
> • provide a declaration about all close associates, including:
>
> • if a close associate is an entity or organisation, you must consider

• if a close associate is an entity or organisation, you must consider whether the individuals involved in the entity are also close associates. If they are, you must ensure you list those individuals in your declaration as well.

• provide, or have your individual close associates provide, certified copies of 3 forms of identification directly to Fair Trading

• ensure all individual close associates sign a Close Associate Consent form and consent to a National Police Check.

If an organisation has nominated you to be the premises' manager, your application form must detail the entity and the individuals involved, and include a letter which nominates you as the premises' manager."

51 I also note from the website that where a licence is granted, the following conditions apply:

"…

Operators must also:

• make business financial records available for inspection by an authorised officer when asked by written request

• notify Fair Trading of any changes in relation to their staff members, close associates or any other licence details, including if a licence has been lost, stolen or destroyed

• display the certificate of licence at the licensed premises in a visible location

• include their licence number in any advertising

• keep a log book of all procedures performed on the premises. The log book must include the:

• date/s when the procedure was performed

• full name and licence number of the tattooist who performed the procedure

• amount charged, method of payment and receipt number (if any).

• keep all records in English at the licensed premises at all times, which must be readily accessible by an authorised officer upon written notice.

The maximum penalty for not complying with a licence condition is $2,200."

52 What I understand from the link provided by Ms Wagstaff is that tattoo artists are a licenced industry, with strict reporting requirements and penalties for failing in this regard.

53 Next, in their submission, Mr Andrew and Ms Marianne Goodyer (the Goodyer's) (Exhibit 2, folios 55-56) cite the following texts to support an objection on the basis that the demographic profile of Melrose Park is unlikely to need a local tattoo service:

- Australian Bureau of Statistics, 2016 Census QuickStats for Melrose Park (Code SSC12563 (SSC)).
- Grulich AE, de Visser RO, Smith AMA, Rissel CE, Richters J. Sex in Australia: Injecting and sexual risk behaviour in a representative sample of adults. Aust N Z J Public Health. 2003;27:242– 250.
- Heywood W, Patrick K, Smith AMA, Simpson JM, Pitts MK, Richters J, Shelley JM. Who Gets Tattoos? Demographic and Behavioral Correlates of Ever Being

Tattooed in a Representative Sample of Men and Women. Ann Epidemiol. 2012 Jan;22(1):51-6.

- Makkai T, McAllister I. Prevalence of tattooing and body piercing in the Australian community. Commun Dis Intell. 2001;25:67–72.

54 In essence, the Goodyer's submission is that only a small proportion of the Australian community have a tattoo. Of those that do, most are in the 20-39 year age group, and are least represented in ages below 20, or over 40. As it is put by the Goodyer's, the age profile of residents of Melrose Park is "almost the exact opposite of this pattern". As a consequence, the tattoo parlour would not provide a "'direct and ongoing service' as intended by the zoning".

55 The reference to 'direct and ongoing service' appears to originate from a finding of the Ryde Local Planning Panel (Exhibit 2, folio 70). My reading of this finding is that the Panel appears to be describing a view of services that would be 'more aligned' with the B1 zone such as a newsagency, hairdresser or bakery.

56 In doing so, the Panel is not describing the objective of the zone. However, I choose to read into the Goodyer's submission the correct phrasing of the zone objective and understand their submission to be that the evidence is, in effect, that the needs of people who *live* in the surrounding neighbourhood would not be served by a tattoo parlour as they would by other business premises.

57 As stated at [37(2)], the zone objective to which the Court must have particular regard requires the needs of those who *live or work* in the surrounding neighbourhood to be served. The proposed development is for a tattoo parlour, not a newsagency, hairdresser or bakery.

58 In this matter, consistency with the zone objective is not a contest of interests competing for desirability but is an assessment of conformity against the objective by this application. Where the former is the aim, it is not uncommon for Council's to devise

retail attraction and activation strategies where shopfronts lie dormant and this work may be underway in the Ryde LGA to enliven the Andrew Street/Cobham Avenue shops with a newsagency, hairdresser and bakery.

59 Finally, Mr William Jones provided a link in his submission (Exhibit 2, folio 227) to a paper entitled “Inked into Crime? An Examination of the Causal Relationship between Tattoos and Life-Course Offending among Males from the Cambridge Study in Delinquent Development”.

60 While the link was not able to be accessed by the Court due to online registration requirements, an article of the same name was accessible via Journal of Criminal Justice, Volume 42, Issue 1, January–February 2014, Pages 77-84.

61 As I understand the study, a longitudinal study of more than 400 British males sought to determine if a link between tattoos and crime may in fact be causal.

62 As I understand the results, the study found that tattoos are better considered to be a symptom of other risk factors and personality traits that may overlap with tattooing and being involved in crime, rather than being a causal factor for predicting crime in an individual’s life. Put another way, the connection between tattoo’s and crime is likely correlational, not causal.

63 In summary, a majority of the public submissions state that a tattoo parlour would not serve their needs, and that its presence would represent a risk to school children and be out of character with a family-oriented neighbourhood.

64 From all the evidence before me, I cannot make a finding that the proposed development is such a risk. The industry is regulated. Tattoo artists are required to be licenced, with strict reporting requirements.

65 The Ryde Police Area Command set out, at Exhibit 2, Tab 8, an assessment of the proposed development against the Crime Prevention Through Environmental Design (CPTED) principles and conclude that, with the addition of CCTV cameras and certain external lighting, the proposed development is acceptable.

66 In respect of the needs to be served in the B1 zone, from the evidence before me, I am unable to conclude that the needs of those who live or work in the surrounding neighbourhood would not be served by the proposed development. I do not read the

text of the zone objective to require the needs to served with any regularity or frequency, and I consider the term 'surrounding neighbourhood' to be a term of such broad generality as it is not sought to be defined in the dictionary of the RLEP.

67 I do not accept the concerns found in the public submissions that a business that is limited, by virtue of the 2 tattoo beds proposed within an area of 29.6m^2, to service a maximum of two clients at a time, is likely to result in such demand as to cause nuisance or excessive demand for car parking in the area.

68 As I consider the proposed development to be consistent with the zone objective, and I find nothing in the public submissions that is likely to result in adverse environmental, social or economic impacts on the local area, I conclude that the proposed development warrants the grant of consent in accordance with s 4.16(1)(a) of the EPA Act.

The conditions are disputed

69 The Applicant disputes the need for Condition 39 as set out in the Respondent's without prejudice draft conditions of consent at Exhibit 4. The Condition as proposed by the Respondent is in the following terms:

> "**Long Service Levy.**
>
> Documentary evidence of payment of the Long Service Levy under Section 34 of the Building and Construction Industry Long Service Payments Act 1986 is to be submitted to the Principal Certifying Authority prior to the issuing of the Construction Certificate."

70 In summary, the Applicant considers the Condition irrelevant as the application is for a change of use, for which a Construction Certificate is not required.

71 According to the Respondent, in the event a Construction Certificate is not required, then the Condition is not enlivened. In the event that a Construction Certificate is required, a Levy amounting to a sum of between $16-$18 will be owed.

72 I agree with the Respondent that the Condition is self-executing and I find no purpose in its removal.

Orders

73 The Court orders that:

(1) The appeal is upheld.

(2) Development consent is granted to Development Application No. LDA2019/78 seeking consent for the change of use of part of the ground floor of the building to a 'business premises' to accommodate a tattoo parlour at 31 Cobham Avenue, Melrose Park subject to the conditions in Annexure A.

(3) All Exhibits are returned except for Exhibit A.

.....

T Horton

Commissioner of the Court

Annexure A (169539, pdf)

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Decision last updated: 03 August 2020