



DEVELOPMENT CONSENT AUTHORITY

DARWIN DIVISION

MINUTES

PART 1 - ITEM 3

MEETING NO. 410 - FRIDAY 22 SEPTEMBER 2023 AT 10:15 AM

**BROLGA ROOM
NOVOTEL DARWIN CBD
100 THE ESPLANADE
DARWIN CITY**

MEMBERS PRESENT: Suzanne Philip (Chair) Marion Guppy Peter Pangquee, Mick Palmer and Mark Blackburn

APOLOGIES: Nil

LEAVE OF ABSENCE: Nil

OFFICERS PRESENT: Elya Sugg (Acting Secretary) and Amit Magotra (Development Assessment Services)

COUNCIL REPRESENTATIVE: Apology

Meeting opened at 10:15 am and closed at 11:45 am

ITEM 3 **CHANGES TO DP22/0123 TO ALTER THE GROUND FLOOR LAYOUT AND BUILDING FAÇADE AND CONVERT FOOD PREMISES-RESTAURANT AND OUTDOOR AREA AT LEVEL 3 TO AN OFFICE**
PA2023/0243 **UNIT 3, UNIT PLAN 97/014, LOT 6387 (68) MARINA BOULEVARD, LARRAKEYAH, TOWN OF DARWIN**

APPLICANT One Planning Consult.

Mr Tshepo Kgosiemang (One Planning Consult) and Lori Montgomery (beneficiary) attended.

In attendance via videoconference: Submitter - Mr Victor Harris, Chairperson Body Corporate Unit Plan 97/014.

Eric Withnall on behalf of KS & RRR Pty Ltd as trustee for KS & RRR Family Trust (owner of unit 3) attended.

Interested parties Brad Cunnington, Andreea Caddy and Alex Deutrom in attendance.

DAS tabled Car Parking Survey provided by the applicant and additional comments received from the submitter on the Car Parking Survey.

RESOLVED
33/23

That, the Development Consent Authority vary the requirements of Clause 5.2.4.1 (Car Parking Spaces) and Clause 5.2.5 (Loading Bays) of the Northern Territory Planning Scheme 2020, and pursuant to section 53(a) of the *Planning Act 1999*, consent to the application to develop Lot 6387 (68) Marina Bvd, Larrakeyah, Town of Darwin for the purpose of change of use of Unit 3 from office to shop (tattoo and piercing parlour), subject to the following conditions:

GENERAL CONDITIONS

1. The works carried out under this permit shall be in accordance with the drawing numbered 2023/0243/01 endorsed as forming part of this permit.
2. The owner of the land must enter into agreements with the relevant authorities for the provision of water supply, sewerage and electricity to the development/each lot shown on the endorsed plan in accordance with the authorities' requirements and relevant legislation at the time.
Please refer to notation 1 for further information.
3. Any developments on or adjacent to any easements on site shall be carried out to the requirements of the relevant service authority to the satisfaction of the consent authority.
4. The shop use (tattoo and piercing parlour) approved by this permit and as shown on the endorsed plans must not be altered without the further consent of the consent authority.

NOTES

1. The Power and Water Corporation advises that the Water and Sewer Services Development Section (waterdevelopment@powerwater.com.au) and Power Network Engineering Section (powerdevelopment@powerwater.com.au) should be contacted via email a minimum of 1 month prior to construction works commencing in order to determine the Corporation's servicing requirements and the need for upgrading of on-site and/or surrounding infrastructure.
2. Any proposed works on/over the City of Darwin property shall be subject to a separate application to the City of Darwin and shall be carried out to the requirements and satisfaction of the City of Darwin.
3. The development and use hereby permitted must be in accordance with Northern Territory legislation, including (but not limited to) the *Building Act 1993*, the *Public and Environmental Health Act 2011* and the *Food Act 2004*.
4. The applicant is advised to engage a Northern Territory registered building certifier to ensure that the intended use of any existing buildings or structures is permitted by occupancy certification in accordance with the *Building Act 1993*.

REASONS FOR THE DECISION

1. Pursuant to section 51(1)(a) of the *Planning Act 1999*, the consent authority must take into consideration the planning scheme that applies to the land to which the application relates.

The NT Planning Scheme 2020 (NTPS 2020) applies to the land and shop use requires consent under Clause 1.8 (When development consent is required). It is identified as *Merit Assessable* under Clause 1.8(1)(b)(i); therefore, zone purpose and outcomes of Clause 4.13 (Zone TC – Tourist Commercial), and Clauses 5.2.1 (General Height Control), 5.2.4 (Car Parking), 5.2.5 (Loading Bays), 5.2.6 (Landscaping), 5.5.2 (Commercial Plot Ratio) and 5.5.3 (General Building and Site Design), need to be considered.

These clauses have been considered and it is found that the proposal complies with the relevant requirements of the NTPS 2020 except Clauses 5.2.4.1 (Car Parking Spaces) and 5.2.5 (Loading Bays). The Authority notes that the use of a shop meets the purpose of the zone as it is for a commercial development that will support tourism activities and contribute to the mix of services provided in the area. There are no overlays applicable to the subject site.

2. Under Clause 1.10(3) (Exercise of Discretion by the Consent Authority), "In considering an application for consent for a use or development identified as Merit Assessable the consent authority must take into account all of the following:
 - (a) the relevant requirements, including the purpose of the requirements, as set out in Parts 5 or 6;
 - (b) any Overlays and associated requirements in Part 3 that apply to the land; and
 - (c) the guidance provided by the relevant zone purpose and outcomes in Part 4 relevant to a variation of requirements in Parts 5 or 6."

Pursuant to Clause 1.10 (Exercise of Discretion by the Consent Authority), subclause 5 of the NT Planning Scheme 2020, the consent authority may consent to a proposed development which is not in accordance with a requirement set out in Parts 3, 5 or 6 only if it is satisfied that the variation is appropriate having regard to:

- (a) The purpose and administration clauses of the requirement; and
- (b) The considerations listed under Clause 1.10(3) or 1.10(4).

In relation to car parking requirements NTPS 2020 provides:

5.2.4.1 (Car Parking Spaces)

The purpose of Clause 5.2.4.1 (Car Parking Spaces) is to *ensure that sufficient off-street car parking, constructed to a standard and conveniently located, are provided to service the proposed use of a site.*

Sub-clause 4 of Clause 5.2.4.1 requires, *use and development is to include the minimum number of car parking spaces specified in the table to this clause (rounded up to the next whole number).* Under Table to Clause 5.2.4.1, the car parking requirements for an office (not elsewhere referred to in this table) is 2.5 for every 100m² of net floor area and a shop is 6 for every 100m² of net floor area.

Schedule 2 of the NTPS 2020 defines *net floor area in relation to a building, includes all the area between internal surfaces of external walls but does not include:*

- (a) *stairs, cleaners cupboards, ablution facilities, lift shafts, escalators or tea rooms where tea rooms are provided as a standard facility in the building;*
- (b) *lobbies between lifts facing other lifts servicing the same floor;*
- (c) *areas set aside as public space or thoroughfares;*
- (d) *areas set aside as plant and lift motor rooms;*
- (e) *areas set aside for use of service delivery vehicles; and*
- (f) *areas set aside for car parking or access*

The Authority notes that Unit 3 was originally approved for office use, having a net floor area of 135m². Based on this calculation, the parking requirement for office use is 4 car spaces.

According to the amended plans for the proposed shop, the net floor area of the shop use is calculated as 122.32m². This does not include any storage, kitchenette and toilet areas provided for shop use. As such, the shop use requires 8 spaces.

Considering the parking requirement of the proposed shop use (8 car spaces) and parking generated from the existing office use (4 car spaces), the change of use generates a shortfall of 4 car spaces. As no new car parking is provided on-site, the applicant seeks a reduction under sub-clause 2 of Clause 5.2.4.1 for the shortfall.

Administratively, under sub-clause 2 of Clause 5.2.4.1, *the consent authority may consent to a use or development that is not in accordance with sub-clause 4 if it is satisfied a reduction of the number of car parking spaces is appropriate with regard to:*

- (a) *the zoning of the land, the use or development or proposed use or development of the land, and the possible future use or development of the land;*
- (b) *the provision of car parking spaces in the vicinity of the land;*
- (c) *the availability of public transport in the vicinity of the land; and*
- (d) *the potential impact on the surrounding road network and the amenity of the locality and adjoining property;*

or if the use or development relates to a heritage place and the Minister responsible for the administration of the Heritage Act 2011 supports the reduced provision of car parking spaces in the interest of preserving the significance of the heritage place.

Regarding point (a), the Authority notes the DAS report carried out the assessment based on the specific nature of the use and its operation (appointment-based). The DAS report identifies that the shop layout consists of three shop rooms designated for tattoo and body piercing services. Unlike a typical walk-in shop, the appointments-based system for the proposed shop use minimises the demand for car parking as there are intervals between clients. The assessment also notes that approximately 50% of the shop's net floor area is dedicated to a waiting area, which will only be occupied by customers waiting to be seen.

The Authority also considered comments from Mr Israel-Tshepo Kgosiemang (applicant) and Lori Montgomery (shop tenant and also a beneficiary) who attended the meeting and spoke further about the application and parking. Ms Montgomery confirmed that the business is mostly appointment-based but also occasionally accepts walk-ins, particularly if appointments have been cancelled. Piercings usually take around 30 minutes, but tattoos take longer and Saturdays tend to be the busiest days. Ms Montgomery explained that the number of artists working in the premises varies to a maximum of 4 to 5.

The Authority considered Ms Montgomery's comments regarding the operation of the proposed shop use and the DAS assessment of its specific nature and concluded that, unlike typical walk-in shops, the appointments-based system of the proposed shop minimises the demand for car parking, as there are intervals between clients.

The Authority noted the assertion by Mr Victor Harris (submitter) that the front porch area is used by shop patrons as a waiting area and should, therefore, be considered as part of the net floor area. The Authority determined that the front porch area adjoining the common property does not meet the definition of the net floor area provided in the NTPS 2020.

Regarding point (b), the Authority noted that the application relies on the off-street parking available in the vicinity of the subject site and the DAS recommendation for deferral to provide a car parking survey of all off-street car parking areas. The Authority also noted that the Cullen Bay Commercial Precinct Car Parking Policy provides guidelines on using off-site and on-street parking within the Cullen Bay Commercial Precinct.

At the hearing, Mr Kgosiemang tabled a car parking survey, which was conducted and carried out from 10am to 8pm (2 hrs intervals) for eight days (08/09/23 to

15/09/23) to determine the availability of car parking in the surrounding area. The survey covered car parks located within a 400m radius of the subject site. The counts were taken at the beginning of every 2-hour interval in accordance with the appointment blocks associated with the business. The time intervals chosen were 10am, 12 noon, 2pm, 4pm, and 6pm, which are the regular business operation times from Monday to Saturday. Mr Kgosiemang explained that the survey was conducted using a 'Fixed Period Sampling' method, which involved counting at the beginning and end of each survey interval, in this case every two (2) hours to match the appointment-based system of the proposed shop use. Mr Kgosiemang explained to the Authority that there is a total of 385 sealed car parks (on-street and off-site) within a reasonable walking distance from the subject site. The survey count shows the availability of at least 16 car parks or more in close proximity to the subject site during the start of every scheduled appointment interval associated with the proposed shop use. Mr Kgosiemang further explained that the demand is greater during the evening parking generated from the restaurants in the area.

The Authority queried the applicant about the Cullen Bay Commercial Precinct Car Parking Policy, noting the policy does not allow the use of parking bays within the road reserve or the parking area around the ferry terminal for development in the area. Mr Kgosiemang advised that all areas had been included in the car parking survey as no restrictions are displayed on the use of on-street and off-street car parking areas. Customers visiting the shop or visitors to the Cullen Bay Precinct will park in the on-street and off-street parking areas. The Authority noted that the car parking survey includes areas that cannot be included in the Cullen Bay Car Parking Policy.

During the hearing, Mr Harris raised concerns about the car parking survey alleging that it is biased as it was conducted by the applicant themselves rather than a qualified traffic engineer. Additionally, Mr Harris pointed out that the survey only covers one week and should be carried out over the entire year to provide a more accurate representation of the parking situation.

The Authority considered all comments and carefully considered the submitters' concerns. The Authority, while acknowledging that the car parking survey includes areas that cannot be included in the Cullen Bay Car Parking Policy, the result of the surveys shows that there is an availability of adequate parking within the off-street parking areas to accommodate the shortfall (4 cars spaces) resulting from the proposed use. The Authority also notes that the car parking survey tabled by the applicant includes photographic evidence to substantiate the parking survey result.

Regarding point (c), the Authority noted that bus route No.14 services the area, and the bus stop for this route is located a short walk from the site.

Regarding (d), the car parking survey (discussed above) shows the availability of adequate car parking to accommodate the shortfall; therefore, it is unlikely to impact the surrounding road network and the amenity of the locality and adjoining property. Furthermore, the site is not listed as a heritage place.

The Authority determined to grant a variation to the car parking requirement by considering the unique nature of the business. The shop operates on an appointments-based system that minimises the need for parking, and its layout restricts the number of customers who can be in the shop at once.

The Authority notes that the shop layout includes large waiting areas, which could be converted to shop rooms. The Authority determined that the approved purpose should explicitly state that the shop use is for (tattoo and piercing parlour), which is reflected on the development permit. A condition requiring not to alter the use without further consent of the Authority is also included on the permit.

5.2.5 (Loading Bays)

The purpose of Clause 5.2.5 (Loading Bays) is to *provide for the loading and unloading of vehicles associated with the use of land.*

Sub-clauses 3 and 4 of Clause 5.2.5 requires (3) *use and development is to include the provision of a minimum number of loading bays in accordance with the table to this clause (rounded up to the next whole number) and (4) a loading bay is to: (a) provide areas wholly within the site for loading and unloading of vehicles; (b) be at least 7.5m by 3.5m; (c) have a clearance of at least 4m; and (d) have access that is adequate for its purpose*

The proposal is not to be in accordance with Clause 5.2.5, as no loading bay is provided on-site.

Administratively, under sub-clause 1 of Clause 5.2.5, *the consent authority may consent to use or development that is not in accordance with sub-clauses 3 and 4 only if it is satisfied sufficient, safe and functional loading areas are available to meet the needs of the use with regard to: (a) the scale of the use and development on the site; (b) any potential adverse impacts on the local road network; and (c) any agreements for off-site loading and unloading of vehicles, such shared loading areas or approval to carry out loading activities in a laneway or secondary street.*

Given that the intended use of the space is for a tattoo and body piercing shop, and the total area is only 122.32m², it is unlikely that a loading bay will be necessary. Any deliveries that may occur are likely to be short-term visits and will probably use the existing car park. Furthermore, it is unlikely that the types of vehicles requiring access to the site will be larger trucks.

A variation to the dimension requirements for loading bays under clause 5.2.5 is considered appropriate, noting the following circumstances which have been identified:

- The loading requirements of clause 5.2.5 may not consider the development of this type and scale.
- The expected delivery needs for the proposed use can be accommodated within the existing car parking area in the road reserve and is unlikely to impact of the road network.

The NTPS 2020 require 1 loading bay for every 2000m² of net floor area used for office/shop/food premises-restaurant use. The Authority notes that the existing office use was approved without a loading bay, and the proposed change

of use does not increase the loading bay requirement provided under the NTPS 2020.

3. Pursuant to section 51(1)(e) of the *Planning Act 1999*, the consent authority must take into consideration any submissions made under section 49, and any evidence or information received under section 50, in relation to the development application.

Three public submissions (one in support and two objecting to the change of use) were received during the exhibition period under Section 49 of the *Planning Act 1999*.

The main issues raised in the submission relate to:

- Acceptance of the application without body corporate approval.
- Breach of the Unit Titles Act 1975 due to outstanding Body Corporate levies and not seeking approval.
- Details on the plans submitted.
- Discrepancies in the floor plans submitted.
- Elevation plans not provided.
- Car parking shortfall generated by the use and availability of car parking in the area.
- Application's response to Clauses 5.2.4 Vehicle Parking and 5.2.5 Loading Bays.
- No established hours or operation and noise generated by the use.
- Waste management and removal.
- Potential impact on the existing and future amenity of the area in which the land is situated.

Additional comments were received from one submitter regarding the Car Parking Survey provided by the applicant prior to the hearing. The comments were tabled by DAS at the meeting.

In addition to the written submissions received during the exhibition period and additional comments tabled at the meeting, the Authority also heard from submitters present at the meeting.

With respect to the question of landowner authorisation as required by Section 46(1) of the *Planning Act 1999*, the Authority noted that the *Planning Act 1999* must be read in conjunction with the applicable strata title legislation for the subject complex, in this case, the *Unit Title Act 1974* (UTA). On the registration of a units plan under that Act, the person who was the "proprietor" of the original parcel of land becomes possessed of an estate in fee simple in each unit; and the body corporate becomes possessed of an estate in fee simple in the common property (s23(1) UTA). A body corporate under the UTA does not fall within the phrase "the owner of land" in s46(1) of the *Planning Act 1999* in relation to a development application for a unit unless the unit is common property and therefore a body corporate asset. In any other circumstances, it would neither be appropriate nor necessary for the DCA (as a statutory authority) to require body corporate endorsement for development applications over a unit as it does not have the power to do so. The DCA does not have power to refuse to accept applications on the basis that the body corporate has not made or authorised the

application within s46(l) of the *Planning Act 1999*, because the body corporate does not fall within s46(l) of the *Planning Act 1999*.

The Authority does note that, in an unrelated application, the Development Assessment Services (DAS) requested to provide an authorisation from the Body Corporate before accepting the application, which is acknowledged to be a mistake by DAS. In this instance, DAS correctly accepted and processed the development application as only the unit owner's authorisation was required and was provided upon the application's lodgement.

The Authority notes that it is a creature of statute and its powers are granted and limited by the terms of the *Planning Act 1999* and the applicable *Planning Scheme*. Concerns regarding any ongoing disputes, as outlined in the submissions related to the tenant and the Body Corporate of Unit Plan 97/014, are matters beyond the remit of the Authority and are not planning considerations. The parties are advised to seek appropriate forums to resolve such matters.

Mr Victor Harris (Chair, Body Corporate Unit Plan 97/014) attended via video link and reiterated the points in his written submission, including that the tattoo parlour has been causing stress to residents above, inaccuracies in the plans, errors in the application, and no elevation plans included. Mr Harris explained that the plans submitted do not include the porch and rear deck included in the unit boundary. Mr Harris further explained that the front porch that adjoins the common property is right next to the entry of the residential units above. Mr Harris told the Authority that it is often seen that shop customers highly use this area and should be included in the proposed shop plan. Mr Harris expressed his disappointment with DAS for accepting an application that contained incorrect information and was submitted without elevation plans.

Mr Harris emphasised that the shop tenant has been fully aware of the obligation to comply with all Authority approvals and requirements from day one. He added that the business operated without the necessary approval from Work Health and Safety for a year until they obtained it during the planning process.

Mr Harris told the Authority that the claims made by Ms Montgomery (business owner) that the business is appointment-based only is incorrect as there is often a sign on the shop front saying 'walk-in appointments accepted'.

Mr. Harris expressed concern about customers smoking on the outdoor deck while waiting for their appointment, which was causing a disturbance to the residents above.

Mr. Harris emphasised that the illegal occupation of the shop, and specifically the type of business being conducted within the premises, has caused significant problems for all complex owners. Due to the sensitive nature of this application and the potential emotional and financial implications, it is essential to consider the application holistically, considering the specific consequences of the actual use within the complex.

Mr Eric Withnall attended the meeting on behalf of the landowner. Mr Withnall told the Authority that although the landowner has provided an authorisation for this application, the landowner is not the applicant. Mr Withnall commented that

the application is in an amended form but the Authority noted, that it is not uncommon for applications to be amended post-acceptance under section 46 and power to require further information is specifically granted under Section 46(4)(b) . Mr Withnall pointed out the comments from the applicant that the appointment-based system enables limiting the number of visits; however, it is common for customers to arrive before their scheduled appointment and have to wait in the waiting area and front porch.

Mr. Withnall pointed out that the building's insurance premium has increased due to the disturbance caused by the shop use. Furthermore, the applicant made additional changes to the application without obtaining the landowner's consent.

Mr Withnall told the Authority that as the application lodged by the applicant was incomplete and required amendment, the landowner will be commencing proceedings to terminate the lease. The Authority notes that the application was accepted under Section 46 and it was able to consider and make a determination under Section 53 of the Planning Act based on the information that has been presented to them.

Ms Kgosiemang addressed the submitters' comments by reiterating that the proposed change of use is internal to the building and is not expected to adversely impact the local amenity. The nature of the proposal is consistent with the tourist commercial opportunities of the land and is expected within the zone. Furthermore, the nature of the business is primarily appointment-based; however, walk-ins are accepted occasionally when an appointment is cancelled.

Ms Lori Montgomery (business owner) clarified the hours of operation and that the tattoo artists occasionally offer after-hours work to allow for flexibility depending on a client's roster. The services offered are mainly booked by appointment, where Saturday tends to be the busiest time. Piercings take about 30 minutes; however, tattoos take longer. The number of employees varies to a maximum of 4 to 5 people. The deck area allows employees to sit outside, have lunch, and smoke. Access to the deck is through the backroom and is not accessible to customers. Further, Ms Montgomery advised that most of the waste generated by the use is general waste; however, medical waste is dealt with separately.

The Authority has considered all comments and carefully considered the submitters' concerns. Concerns regarding any ongoing disputes, as outlined in the submission related to the tenant and the Body Corporate of Unit Plan 97/14, are a civil matter and are not planning considerations. The Authority notes that the business has obtained necessary approvals from the relevant Authority for disposing of any medical waste, and any concerns regarding mishandling of the waste should be reported to the relevant Authority. The Authority also notes that the City of Darwin has raised no concerns and requirements concerning waste management.

The Authority notes that some matters raised in the public submissions relate to building insurance and Body Corporate disputes. The Authority advises that it does act as a mediator in Body Corporate disputes and can only consider planning related matters.

Regarding the change in plans after lodgement, the applicant clarified that it is not unusual that DAS would ask for further information and more detail to conduct the application assessment. The Authority notes that Section 46(4)(b) of the Planning Act gives powers to the Authority to ask the applicant to provide additional information that the Authority considers necessary to consider the application properly. In regards to the building elevation not included in the application, the Authority notes that no changes have been proposed to the external layout of the building, and the floor plan provided is considered sufficient in the context of this application.

4. Pursuant to section 51(1)(n) of the *Planning Act 1999*, the consent authority must take into consideration the potential impact on the existing and future amenity of the area in which the land is situated.

The impact on amenity is considered in the context of the site and its surroundings. The nature of the proposal is consistent with the tourist commercial zoning of the land and is expected within the zone. Where the development does not comply with the relevant clauses of the NTPS 2020, the impact on existing and future amenity has been considered, and a variation has been supported as amenity will not unduly be impacted upon.

In relation to the public submissions received, concerns were raised regarding noise generated by the use, car parking shortfalls and waste removal. Regarding potential noise levels, any noise generated by the proposed development will need to meet the relevant noise criteria contained within the NT EPA Northern Territory Noise Management Framework Guideline, which the EPA administers. Concerns relating to waste collection and removal are a Council matter, and the City of Darwin has not raised any concerns in its comments. An assessment of Clause 5.2.4.1 (Car Parking Spaces) has been discussed above.

FOR: 5

AGAINST: 0

ABSTAIN: 0

ACTION: Development Permit and Notice of Consent

RATIFIED AS A RECORD OF ATTENDANCE AND DETERMINATIONS MADE AT THE MEETING

SUZANNE PHILIP
Chair
03 October 2023