

J12 JACKSON, F. Sex and the city.

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I INTRODUCTION

Sex workers are as confused as councils. They worry that knee jerk-reaction bylaws will again drive the industry underground, defeating the purpose of the Prostitution Reform Act, passed in Parliament by a one-vote margin.¹

In June 2003 the Prostitution Reform Bill 2000 was passed into New Zealand legislation. The Bill was aimed at the decriminalisation of prostitution, providing legal protections for sex workers and improving the overall health and safety of the sex industry.

The Prostitution Reform Act 2003 ("the Act") also contains sections that enable territorial authorities to enact bylaws that regulate the location and signage of brothels. The use of this power to promulgate bylaws pursuant to the Act carries the threat of undermining the purposes of the Act. This essay seeks to determine the extent to which the legal effect and the purpose of the Act are undermined by local council bylaws regulating the location of brothels.

In the first section, the legal history of prostitution is discussed and this is followed by an examination of the rationale for the enactment of the Act.

Next, there is a brief analysis of the Act outlining the legal effects of the Act. The sections of the Act that delegate legislative power to territorial authorities are then discussed, and following on from this is an examination of the use of similar delegated power in other jurisdictions. The focus of the discussion on the powers conferred by the Act will be on the power to enact bylaws regulating the location of brothels rather than on the regulation of signage. This is because the

power to regulate location has more far-reaching consequences for sex workers than the power to regulate signage.

The next part of the essay examines the implementation of bylaws pursuant to the Act. The discussion will be amongst the major centres of New Zealand, top tourist spots and a rural locality to gauge an idea of how New Zealand as a whole has responded to the Act. The major centres will be discussed because as they are the most populated cities of New Zealand they are likely to have the highest concentration of brothels, and the tourist spots will be discussed because both New Zealanders and overseas tourists frequently visit these places. Lastly, a rural locality is examined to get a representative view of New Zealand and to see how a rural district has responded to the Act. At this point the content and legal effect of the bylaws implemented is discussed.

Following on from the discussion of the bylaws implemented under the Act is an examination of whether these bylaws have undermined the purpose and effect of the Act. I argue that not all of the bylaws made pursuant to the Act are in accordance with the purposes of the Act, meaning that these bylaws have in fact undermined the purpose and effect of the Act. It is important that bylaws made pursuant to the Act are consistent with and do not undermine the purpose of the Act, otherwise the Act itself has no purpose and the objectives of Parliament cannot be fulfilled.

II RATIONALE FOR REFORM

¹ Rosaleen MacBrayne "Councils Wary of Brothel Law" (2 August 2003) *The New Zealand Herald* Auckland 9.

Prostitution is notorious for being the world's oldest profession, which makes it surprising that it was not until June 2003 that New Zealand finally made it possible for the sex industry to operate legally. However, few would doubt that the illegality of prostitution has ever prevented the sex industry from operating. The New Zealand Prostitutes Collective (NZPC) has noted the resilience of the sex industry previously, and they have drawn attention to the fact that the industry is capable of adapting to legal restraints and controls.²

Prior to the Act the sex industry was governed by sections of the Massage Parlours Act 1978 and the Crimes Act 1961. Whilst the law did not prohibit the sale of sex itself, various aspects inevitably associated with the sale of sex were, such as soliciting and brothel keeping.³

Before the Act there was in essence a legal form of prostitution in massage parlours. Tim Barnett recognised that the state had previously turned a blind eye to prostitution without providing those servicing the industry with any legal basis or protection. "The state licenses massage parlours, knowing that they are fronts for prostitution."⁴ Tim Barnett saw this inconsistency as one of the reasons for the promulgation of the Act.

Tim Barnett introduced the Prostitution Reform Bill as a Private Member's Bill in October 2000. In the first reading of the Prostitution Reform Bill, Tim Barnett spoke of the need to reform the injustices that the prostitution law of the time was

² Submission of the NZPC on the Auckland City Isthmus District plan, 12 November 1997, 4, cited in Caroline Hicks "The Proposed Variation of the Auckland Isthmus District Plan: A Report for the NZPC" (1998).

³ Crimes Act 1961, s148(b), s147.

⁴ Tim Barnett (25 June 2003) 609 NZPD 6586.

creating.⁵ The injustices that he was referring to were the abuse of sex workers, the public health issues and the stigma that the law places on prostitutes. Other reasons that he offered to support decriminalisation of prostitution were that the law was unenforceable, it was implemented inconsistently and it was out of line with other jurisdictions.⁶ He argued that good law (relating to prostitution) would be “non-judgemental, predictable and thus implemented consistently.”⁷ This idea links in with the notion that the purpose of making legislation regarding prostitution was so that the sex industry could operate legally, and any attempts to undermine this purpose would undermine the legislation.

III THE PROSTITUTION REFORM ACT

A Analysis of the Act

The stated purpose of the Act is to decriminalise prostitution,⁸ and it has the underlying objectives of the aims that are listed below.

The Explanatory Note to the Prostitution Reform Bill states that the aims of the Bill are to decriminalise prostitution, to safeguard sex workers and protect them from exploitation, to promote the health and safety of sex workers in an environment that is conducive to public health, and to protect children from exploitation in relation to prostitution.⁹

The Act contains provisions that address the concerns prior to the Act about the health and safety of sex workers by

⁵ Tim Barnett (11 October 2000) 588 NZPD 6090.

⁶ Tim Barnett (11 October 2000) 588 NZPD 6090.

⁷ Tim Barnett (11 October 2000) 588 NZPD 6090.

⁸ Prostitution Reform Act 2003, s3.

⁹ Prostitution Reform Bill 2000, 66-1 (Explanatory Note) 1.

forcing brothel operators to comply with minimum health and safety requirements.¹⁰ The Act prohibits persons under the age of 18 from providing commercial sexual services and makes it an offence to be a client of an underage prostitute.¹¹ This counters one of the anomalies that existed before the Act, which was that it was only the service provider who was breaking the law whilst the client was not.

The Act also sets up a Prostitution Law Review Committee who have the task of assessing and reporting to the Minister of Justice any prescribed issues relating to sex workers and the sex industry in New Zealand. The Committee must also review the operation of the Act and assess the impact of the Act in order to determine whether any amendments or changes to the law governing sex workers are necessary.¹²

'Brothel' is defined in the Act as any premises that are used for the purpose of prostitution.¹³ How a brothel is defined is important as this affects whom this legislation and any relevant bylaws extend to. There is an additional definition that defines a brothel where 4 or less prostitutes work as a "small owner-operated" brothel.¹⁴ This separate definition acknowledges that there is a difference in those types of brothels, and the implication may be drawn that the Act intended these brothels to be treated differently from other brothels.

¹⁰ Prostitution Reform Act 2003, s8, 9, 10 and s16, 17.

¹¹ Prostitution Reform Act 2003, s20, 23.

¹² Prostitution Reform Act 2003, s42(1)(b). This is similar to the responsibility that was designated to the Brothels Task Force of NSW by the Attorney General in 2001. Their role was to monitor brothels regulation by local councils, and in doing so were to assess whether the objectives of their brothels legislation (The Disorderly Houses Amendment Act 1995) were being achieved by the actions of local councils.

¹³ Prostitution Reform Act 2003, s4(1).

¹⁴ Prostitution Reform Act 2003, s4(1).

There is concern by members of the NZPC that if home operators are subject to local council bylaws prohibiting brothels in residential areas then these workers will return to their old ways and will continue to work in these areas as an illegal brothel.¹⁵ It was noted by Bernadine Bryant of the New Zealand Prostitutes Collective that home operators tended to conduct their business in a subtle manner and generally went unnoticed.¹⁶ The fact that small owner-operated brothels generally go unnoticed should be justification for those brothels being treated differently from other brothels.

The Prostitution Reform Bill when originally introduced contained no provision delegating the responsibility for regulating the location of brothels. This delegated power was added following the concern expressed by some councils that the location of brothels would otherwise go largely unregulated.¹⁷

Before the Prostitution Reform Bill was passed, the Justice Minister Phil Goff promoted a Supplementary Order Paper. The change promoted by the Supplementary Order Paper was to allow local councils to control the location of commercial sex premises, a change that was welcomed by many territorial authorities.¹⁸

The Act contains sections, resulting from the change promoted by the Supplementary Order Paper, that allow local

¹⁵ Bernadine Bryant of the New Zealand Prostitutes Collective was quoted as saying: "If you outlaw privates it will push them further underground". "Warning on Hamilton Prostitute Restriction" (3 March 2004) *The New Zealand Herald* Auckland 7. Her references to pushing home operators underground means forcing them to operate as an illegal business.

¹⁶ "Warning on Hamilton Prostitute Restriction" (3 March 2004) *The New Zealand Herald* Auckland 7.

¹⁷ See for example Christchurch City Council "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill", Auckland City Council "Submissions to the Justice and Electoral Select Committee on the Prostitution Reform Bill".

¹⁸ See for example Auckland City Council, <<http://www.aucklandcity.govt.nz/bylaw>> (last accessed 21 July 2004).

councils to enact bylaws (in accordance with the Local Government Act 2002) regulating the location of brothels, and also to control signage relating to the advertising of sexual services.¹⁹

It is this power given to the territorial authorities that has the ability to undermine the effect of the Act, if not used in accordance with the purposes of the Act. The scope of this power will be examined in the following section.

B Scope of Delegated Legislation

1 The use of delegated authority under the Act

It is important to note that the power to enact bylaws is for the purposes of regulating brothels; this is not a power to prohibit brothels completely. When seeking public views on the areas where brothels should be permitted councils have recognised that an outright ban would be unlawful.²⁰ The Act does not empower territorial authorities to deal with street prostitution.

Any bylaw has to be made in accordance with the provisions in the Local Government Act 2002, which states that prior to starting the bylaw process the council must first determine whether or not a bylaw is the most appropriate way of addressing the situation. Once the drafting process has commenced it is for the council to determine if their proposed bylaw is the most appropriate form of bylaw, and whether or not the bylaw may give rise to issues relating to the New Zealand Bill of Rights Act 1990, as the bylaw cannot breach

¹⁹ Prostitution Reform Act 2003, ss12, 13, 14.

²⁰ See for example Lower Hutt City Council "The Prostitution Reform Act 2003: A Discussion Document" <[http:// www.huttcity.govt.nz](http://www.huttcity.govt.nz)> (last accessed 1 July 2004).

rights conferred under this Act. Once the council makes the decision to proceed with the bylaw it is required to follow the procedure for public consultation.

A bylaw can be challenged on grounds of reasonableness, and if found to be unreasonable the bylaw can be declared invalid by the courts.²¹ In determining whether a bylaw is unreasonable, much depends on the nature of the bylaw and the rights affected by it. If the rights affected are important there will be a lower threshold to show that the bylaw is unreasonable.²² It is likely that because of the nature of brothel bylaws there would be a high threshold to show that the bylaw is unreasonable, as the rights affected by brothel bylaws are not considered to be fundamental or important rights.

2 *The use of delegated authority in other jurisdictions*

Other jurisdictions that have delegated to local authorities the power to regulate the location of commercial sex premises have had mixed results. For example in Victoria, Australia the Prostitution Control Act 1994 legalised licensed commercial sex premises with the local councils overseeing the licensing of these premises. The laws in Victoria governing the sex industry have been acknowledged as a failure.²³

The first reason is that local councils had control over the licensing of commercial sex premises, and showed a reluctance to do so. The prices of licences were inflated as a result of this reluctance meaning that many operators could

²¹ Kenneth Palmer *Local Government Law in New Zealand* (2ed, The Law Book Company, Auckland, 1993) 423.

²² Palmer, above n 21, 438.

not afford the price of the licence and were therefore led to operate as illegal brothels. The inflated cost of licences meant there were a limited number of brothels operating legally. The limited number of legal brothels meant that the owners of such businesses gained a greater degree of power over their workers, which led to abhorrent working conditions.²⁴

As a result of these factors the objectives of the legislation to regulate the sex industry failed as a result of local council action.

Another State to delegate responsibility for the regulation of the location of brothels was in New South Wales (NSW).²⁵ In 2001, a report was prepared for the Attorney-General by the Brothels Task Force. The report was done in order to monitor the regulation of brothels by local councils, and in doing so, to assess whether the objectives of their brothels legislation were being achieved by the actions of local councils.

The Brothels Task Force recognised that if the planning controls regarding brothels were overly restrictive it could be difficult for brothel owners to operate within the law, which could be contrary to the objectives of the legislation. The report also pointed out the undesirable consequences of the continuance of illegal brothels, such as the encouragement of street work and the lack of compliance with health and safety requirements.

The Brothels Task Force expressed concern over the treatment of small owner-operated brothels and encouraged

²³ Hicks, above n 2.

²⁴ Hicks, above n 2.

²⁵ After the introduction of the Disorderly Houses Amendment Act 1995.

councils to consider the range of brothel types when deciding location and planning controls.

The experiences of other jurisdictions can indicate to local authorities in New Zealand how the power delegated through the Act should be used. The NSW report noted that if the power is used too restrictively then it becomes difficult for brothels to be operated within the law. The same report also encouraged that when implementing location controls, local councils should take into account the different types of brothels that exist.

The failures in Victoria highlight some of the problems that can arise from local council regulation of brothels, and the undesirability of the continuance of illegal brothels was highlighted by the NSW report. For the objectives of the Act to be fulfilled it is imperative that local council action in New Zealand does not replicate the problems experienced in other jurisdictions.

IV PURPOSE AND IMPLEMENTATION OF BYLAWS

There was concern prior to the Act that the number of brothels would increase dramatically. This concern is based on the assumption that the illegality of brothel keeping prior to the Act was the only thing that prevented more brothels being operated. This clearly is not true, as it was stated previously, illegality has never prevented the sex industry from operating. Experience in other jurisdictions does not suggest that decriminalisation leads to more prostitution.²⁶

²⁶ See for example Victoria and New South Wales as was discussed in Section III B 2 above.

By regulating the location of brothels, local councils can limit the number of new brothels that can be lawfully established by the insertion of a clause in their bylaw stating that brothels cannot be established within a certain distance of an existing brothel. Many councils have opted to insert such clauses.²⁷

Not all councils are taking a uniform approach to the Act. In fact, out of the 74 territorial authorities only eight councils have enacted a bylaw pursuant to the Act, with a further four councils in the promulgation process.²⁸ However, most of the major centres have taken action to regulate the operation of brothels in their areas.

The major centres of New Zealand will be examined to gauge what responses they have taken as the bigger cities have a higher concentration of brothels.²⁹ Some of New Zealand's popular tourist locations will also be examined as well as a rural locality in order to get a representative view of how New Zealand as a whole has responded to the legislation. The reasons that councils have provided to support the promulgation of their bylaws will be looked at, along with the reasons of councils that have decided not take action pursuant to the Act.

²⁷ See for example Rotorua District Council Prostitution Bylaw 2003, Auckland City- Brothels and Commercial Sex Premises Bylaw 2003.

²⁸ Those with places in force in accordance with the Act are: Auckland City, Rotorua District, Queenstown-Lakes District, Tauranga, Christchurch City, Timaru, Upper Hutt, and Nelson City. Hamilton City has a draft bylaw, which was supposed to come into force on the 1 September 2004. Far North District has a draft bylaw for which a hearing is proposed to take place on 28 July. Rodney also has a bylaw currently in the promulgation process. Lower Hutt City is currently seeking public views on the Act. Manakau City Council is the first council trying to ban street prostitution but their bylaw has been put on hold as they believe it may conflict with the Bill of Rights Act 1990 and be contrary to the spirit of the Act <http://www.manakau.govt.nz> (last accessed 1 July 2004).

²⁹ Christchurch supposedly has the second largest concentration, behind Auckland, of the sex industry in New Zealand, see Tim Barnett "Submission to the Justice and Electoral Committee on the Prostitution Reform Bill".

The analysis of the bylaws made pursuant to the Act will first look to whether the bylaw draws a distinction between small owner-operated brothels and other types of brothels. Secondly, there will be an examination of the limitations that are imposed on where brothels may be located, and whether the bylaw makes any provisions for existing brothels. Finally, the analysis will examine whether the bylaw imposes any licensing requirements, followed by brief concluding remarks on the bylaw. The discussion of the implications of these bylaws will be explored in greater detail in the following section.

A New Zealand's Major Centres

This section will focus on what are considered to be the five major centres of New Zealand: Auckland City; Hamilton; Wellington City; Christchurch and Dunedin. Auckland and Christchurch have enacted bylaws in accordance with their powers under the Act, and Hamilton has a bylaw in the promulgation process. Wellington has opted to stay with the bylaws that they had in force prior to the Act, as they are still relevant, and Dunedin City Council has taken no action at all pursuant to the Act.

1 Auckland City

Auckland City was one of the first councils to promulgate a bylaw in accordance with the Act.³⁰ On 28 December 2003 Auckland City's bylaw- the Brothels and Commercial Sex Premises bylaw- came into force. The purpose of the bylaw is to "manage the potential impacts of brothels and commercial sex premises on sensitive

activities".³¹ Even though the Act draws a distinction between small owner-operated brothels and other brothels, the definition of a "brothel" in the Auckland bylaw extends to small owner-operated brothels.

The effect of the bylaw is to prevent the establishment or operation of brothels within residential zones, within 75 metres of existing brothels, or within 250 metres of a residential zone, a school, place of worship, community facilities or a major public transport interchange.³²

Auckland City Council claims to have received complaints for a number of years about the location of commercial sex premises near schools and in residential areas.³³ Hence the prohibitions on brothels being located in these areas are as a result of these past complaints.

The other prohibited areas of the bylaw are not mentioned as being the subject of complaints (such as places of worship). However, it seems that Auckland's prohibited areas are derived from section 17 of the Disorderly Houses Amendment Act 1995 of New South Wales, which lists a set of criteria that must be considered before establishing a brothel.³⁴ Section 17 requires consideration of whether the brothel is near or within the view of a church, hospital, school, or other place frequented by children. Also to be considered is whether the brothel causes any disturbance to the neighbourhood, whether there is sufficient off-street parking

³⁰ Jennifer Caldwell "Bylaws- Regulating the Sex Industry" (May 2004) in *Auckland Women Lawyer's Association Newsletter* 2.

³¹ Part 30- Brothels and Commercial Sex Premises Bylaw, Explanatory Note.

³² Part 30 Brothels and Commercial Sex Premises Bylaw, 30.3 Location of Brothels, Isthmus.

³³ David Haigh "Controlling the Location of Brothels in Auckland City" (2003)

<<http://www.aucklandcity.govt.nz>> (last accessed 1 July 2004).

³⁴ Auckland City Council "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill" states that should the power be given to local authorities, Auckland would consider using similar requirements to the Disorderly Houses Amendment Act 1995.

and suitable access to the brothel. As the Act was based on the New South Wales legislation the prohibited areas where brothels may not be established or operated seems justifiable.

The Auckland City bylaw provided that any brothels that were already operating in the prohibited area were exempt from the location controls of the bylaw until the 30 June 2004. After this date all offending brothels were required to relocate, or cease operation. This date has now passed, which means that brothels in the prohibited areas should by now have relocated.

By not providing all existing brothels with an indefinite exemption from the location controls the bylaw is again pushing the sex industry towards illegality. This is because the brothels may have opted against relocating and instead decided to remain where they were and operate as a covert and illegal operation.

As the home operators are caught by the definition of brothels they are subject to the location controls, and therefore by the blanket prohibition of brothels in residential zones and all the other prohibited areas. Home operators are most likely to be based in a residential area, meaning they either have to relocate or continue their business as an illegal brothel.

In Auckland alone the estimated number of small owner-operated brothels in residential zones and inner-city apartments is 150.³⁵ The danger is widely recognised that attempts to force small owner-operated brothels out of residential areas exposes the risk that these operators will

³⁵ Haigh, above n 33.

continue to operate illegally, or worse still force them to work on the street.³⁶

This result would clearly be contrary to the purposes of the Act. Firstly, the main purpose of the Act was to decriminalise prostitution. This purpose is undermined if there are brothels or prostitutes operating illegally. Secondly, the safeguards that are made available by the Act do not protect workers that operate illegally, and working on the street or in an illegal brothel may not be conducive to public health.

The Auckland bylaw requires that brothels be licensed in accordance with the bylaw.³⁷ When examining the use of delegated legislation in other jurisdictions the dangers of licensing were canvassed, such as the inability of small brothels to afford licences, and the excessive power this gives those who own licensed brothels. The NZPC have also noted that licensing takes power away from sex workers and empowers the operators,³⁸ which is undesirable as one of the aims of the Act was to safeguard the rights of sex workers and one of the effects of licensing may be to put these rights in jeopardy.

The bylaw in force in Auckland is quite restrictive in terms of where a brothel may be established or operated, which makes it difficult for sex workers to operate within the confines of the law. The restrictiveness of the bylaw in Auckland could result in the operation of a number of illegal brothels and more sex workers working on the street, which as mentioned earlier is contrary to the purposes of the Act. The licensing requirement of the Auckland bylaw is another area

³⁶ Haigh, above n 33.

³⁷ Brothels and Commercial Sex Premises Bylaw 2003, Part 30.6.

where the purposes of the Act may be undermined for the reasons stated above.

2 Hamilton

Pursuant to their powers under the Act, the Hamilton City Council has proposed a bylaw to control the location and signage of prostitution in their area.³⁹

The Hamilton bylaw, unlike the Auckland bylaw, makes a distinction between parlour brothels and private sex workers. This distinction recognises that in general home-operated brothels are subtler than larger brothels, and also that private sex workers service clients who would not wish to venture into a commercial brothel.⁴⁰

Hamilton City Council seems to be more open to the notion that prostitution is a business with high demand, and their bylaw reflects this. Some of the stated objectives of their bylaw are to support the purpose and intent of the Act and to enable the industry to meet the demands for the service. Hamilton City Council wants to achieve these objectives whilst at the same time addressing community concerns and sensitivities.

The bylaw has a defined "permitted parlour area"⁴¹ prohibiting parlour brothels from being located closer than 100 metres to any sensitive site.⁴² A sensitive site is defined as

³⁸ New Zealand Prostitutes Collective "Submission to the Justice and Electoral Select Committee on the Prostitution Reform Bill".

³⁹ The Hamilton City Council bylaw was due to come into force on the 1 September 2004, however at a recent council meeting one councillor changed their mind on the draft bylaw, meaning the bylaw no longer has the support it required to come into force. Susan Pepperell "Pickle over parks and prostitutes" (15 August 2004) *Sunday Star Times* Auckland A11.

⁴⁰ "Warning on Hamilton Prostitute Restriction" (3 March 2004) *The New Zealand Herald* Auckland 7.

⁴¹ See map 1.

⁴² Hamilton City Council Proposed Prostitution Bylaw 2004, 3.1.

a school or early childhood centre, a place of worship or a marae. These sites are "sensitive" as a result of the *Community Opinion Survey*, which found that respondents were of the view that it would be unacceptable to allow brothels to be located near places frequented by children.⁴³

The bylaw prohibits the operation of "private sex work residences" between the hours of 10.00pm and 7.00am.⁴⁴ In order to qualify as a Private Sex Work Residence the sex worker who provides the service must also reside at the location.⁴⁵ An entrance to a Private Sex Work Residence cannot be located within 50 metres of any sensitive site,⁴⁶ but providing that all of the other conditions are met they are permitted to provide their services throughout the city.

3 Wellington City

The Wellington City Council has not promulgated a bylaw in response to the Act. In September 2001 Wellington enacted a bylaw regulating the sex industry and has opted to stay with that.⁴⁷

The bylaw bans all commercial sex premises from being established in the "Courtenay Precinct", which is the main nightclub/ bar area of Wellington city. The "Courtenay Precinct" encompasses the area of Courtenay Place from Cambridge Terrace to Taranaki Street, and includes Blair Street and Allen Street. This bylaw is still relevant even after

⁴³ Strategic Planning and Policy Co-ordination Committee Council Report to Hamilton City Council (25 June 2004) "Prostitution Reform Act- Policy Response Options" <<http://www.hcc.govt.nz>> (last accessed 20 August 2004).

⁴⁴ Hamilton City Council Proposed Prostitution Bylaw 2004, clause 4.4.

⁴⁵ Hamilton City Council Proposed Prostitution Bylaw 2004, clause 4.3.

⁴⁶ Hamilton City Council Proposed Prostitution Bylaw 2004, clause 4.2.

⁴⁷ Part 17A Commercial Sex Places. Exempt from the bylaw is any commercial sex premises located within the prohibited area if they were there prior to the enactment of the bylaw providing that they do not change in scale or character.

the passing of the Act; it prohibits commercial sex premises from where the council do not want them to be operated without being overly restrictive. The bylaw ostensibly is doing the same job as that of bylaws made pursuant to the Act.

Wellington's bylaw prohibiting the establishment of commercial sex premises in the Courtenay Precinct was made in response to the opening of the Mermaid Strip Club and Massage Parlour on Courtenay Place, which the Council had no power to prohibit.⁴⁸ Mayor Blumsky stated that he did not want Courtenay Place to become the next King's Cross,⁴⁹ and that the bylaw was promulgated in response to the significant public concern shown at the opening of the strip club on Courtenay Place.⁵⁰

The Wellington City Council does not have any other prohibitions on location or signage of brothels. The sex industry does not have the blanket prohibition that other major centres have given the industry, and there is no licensing requirement under Wellington's bylaw, so the law as it stands in Wellington is conducive to giving full effect to the Act.

4 *Christchurch City*

The Christchurch City Brothels (Location and Signage) Bylaw 2004 came into force on 7 July 2004, with the object of regulating location of brothels within the city and to control the advertising signage of the industry.⁵¹

⁴⁸ See the Wellington City Council news website, "Mayor proposes bylaw ban on Courtenay Place sex-bars" (12 April 2001) <<http://www.wcc.govt.nz>> (last accessed 30 August 2004).

⁴⁹ "Mayor proposes bylaw ban on Courtenay Place sex-bars", above n 48.

⁵⁰ "Bylaw sex change protects Courtenay Place" (11 July 2001) <<http://www.wcc.govt.nz>> (last accessed 30 August 2004).

⁵¹ Christchurch City Brothels (Location and Signage) Bylaw 2004, clause 3.

“Brothel” is given the same definition as in section 4(1) of the Act. This means that the general term “brothel” encompasses both ordinary brothels and small owner-operated brothels. So, although the Christchurch bylaw applies the definition contained in the Act, it fails to draw the distinction that is made in the Act.

Christchurch has designated areas where brothels may be operated.⁵² The areas in which brothels may be operated are in the CBD of Christchurch, but brothels may not be operated between Gloucester Street and Hereford Street, which includes Cathedral Square and Worcester Street. Cathedral Square is considered to be the most important public place in Christchurch, and Worcester Street is the city’s heritage precinct where the Cathedral is located, hence the prohibition on brothels in these areas.⁵³

The bylaw has made provision through the second schedule of the bylaw for three existing brothels that would otherwise be unlawful due to their location to be exempt from the bylaw.⁵⁴ Allowing those three brothels to be exempt prevents them from being forced to relocate or to operate in the same place as an illegal brothel, while at the same time preventing more brothels from being established in those areas. In other words, the Council is effectively controlling where brothels are located from now on while not being overly restrictive on the sex industry.

5 *Dunedin City*

⁵² These are the areas highlighted on the map, the areas between Gloucester Street and Hereford Street are prohibited. See map 2.

⁵³ Christchurch City Council media release, Councillor Wells, 16 December 2003 <<http://www.localeye.info/pages>> (last accessed 26 August 2004).

⁵⁴ Christchurch City Brothels (Location and Signage) Bylaw 2004, clause 7(1).

The Dunedin City Council has taken no action in response to the Act. The current feeling in Dunedin is that the sex industry is adequately discreet and there are no problems in relation to the industry.⁵⁵

The current District Plan in Dunedin enables prostitutes to work as home operators and no consent is required to do so.

The situation as it currently exists in Dunedin is conducive to giving full effect to the purposes of the Act.

B Other Places of Interest

Other places of interest for the purposes of this essay are three of New Zealand's top tourist locations: Queenstown-Lakes District; Rotorua and Tauranga, which have all enacted bylaws in response to the Act. The Far North District will also be discussed to compare the response of a rural district with small to medium sized towns.

1 Tourist spots

It is understandable that the top tourist spots of New Zealand do not want the sex industry to be the most visible attraction in their region, but as with everywhere else in New Zealand, if the councils are overly restrictive then they may be acting contrary to the purposes of the Act. This section will focus on those tourist spots that have enacted bylaws pursuant to the Act, exploring their content and reasons for promulgation.

(a) Rotorua

⁵⁵ As per Dunedin City Council Resource Consents Manager, Bruce Richards,

Rotorua is another place where a licence is required to operate a brothel and no brothel may be operated or established outside of the Rotorua CBD. The council will not grant a licence for a brothel that will be located within 150 metres of a school, any other educational establishment, a church, or any other building used habitually for religious purposes.⁵⁶ A licence will also not be granted if the brothel will be within 150 metres of a bank, post office, hotel, motel, local or central government office; if it will be within 150 metres of an existing commercial sex premises, or if the brothel will be located at ground level.⁵⁷

Exempt from the Rotorua bylaw is any brothel, which had resource consent when the bylaw came into force or if a person operates the brothel with a licence under the Act.⁵⁸

The Rotorua bylaw seems to be very restrictive and may in fact be too restrictive. The definition of brothel includes home operators and their location controls force those operators to operate in the CBD if they want to be in compliance with the law. Representatives of the Prostitutes Collective have stated that clients of home operators do not want to go to a commercial brothel in town and neither do the prostitutes, which is likely to lead to these types of brothels being operated illegally.⁵⁹

Concern has also been reported that although the CBD is the only place where a brothel can be established, the other distance restrictions imposed may make it impossible for a

<<http://www.dunedin.govt.nz>> (last accessed 1 July 2004).

⁵⁶ Rotorua District Council Prostitution Bylaw 2003, clause 2.4(a).

⁵⁷ Rotorua District Council Prostitution Bylaw 2003, clause 2.4(b), (c), (d).

⁵⁸ Rotorua District Council Prostitution Bylaw 2003, clause 2.7.

⁵⁹ "Warning on Hamilton Prostitute Restriction" (3 March 2004) *The New Zealand Herald* Auckland 7.

new brothel to be set up in the CBD.⁶⁰ It must be remembered that the main purpose of the Act was to decriminalise prostitution; if the council is making it difficult for the sex industry to operate within a legal regime then surely they are acting contrary to the purposes of the Act.

The licensing requirement of the Rotorua bylaw could be considered to be in contravention of the purposes of the Act as the rights of sex workers may be jeopardised.

(b) *Tauranga*

Tauranga recently enacted a bylaw that regulates the location of brothels. Brothels are confined to operating in the Commercial/Industrial/Business areas of Tauranga, Mount Maunganui and Greerton.⁶¹ All brothels are required to have premises consent (under clause 2 of the bylaw) in order to operate. The Council cannot grant consent if the brothel will be located within 100 metres of a school, other educational or childcare establishment, a church or other building used habitually for religious purposes.⁶²

Brothels that held resource consent prior to the bylaw or hold a certificate under the Act are exempt from the bylaw.⁶³

The Tauranga bylaw does not apply to an individual offering sex services from their own residence, which means that as long as there is only one operator in their own residence they are free to conduct their business wherever

⁶⁰ "New Rotorua bylaw could block city centre brothels" (26 February 2004) *The New Zealand Herald* Auckland 8.

⁶¹ See maps 3-10.

⁶² Tauranga City Council Prostitution Bylaw 2004, clause 2.3.

⁶³ Tauranga City Council Prostitution Bylaw 2004, clause 2 1.2.

their residence may be.⁶⁴ The Tauranga City Council is acting in accordance with the purpose of the Act and in allowing small owner-operated brothels to be exempt from the bylaw, it appreciates the demand for these workers and recognises their subtlety.

(c) *Queenstown-Lakes District*

The bylaw of this tourist location does not differentiate between home-operators and other brothel workers. The bylaw prohibits brothels from being established or operated in the Queenstown or Wanaka Town Centre Zone if that brothel will be within 100 metres of a residential zone, or a schooling facility.⁶⁵ A brothel cannot be established or operated in either of the town centres if it will be within 100 metres of a place of worship, or community facilities or reserves, within 75 metres of an existing brothel, at ground level or beneath ground level on any site.⁶⁶

The purpose of the bylaw is to manage potential impacts of commercial sex premises on sensitive activities.⁶⁷ The Queenstown-Lakes District Council seems to be assuming that following the decriminalisation of prostitution there may be a dramatic increase in the number of commercial sex premises, creating the need to enact a bylaw. The Queenstown-Lakes bylaw is premised on a false assumption, and because of the restrictiveness of the bylaw it may be undermining the purpose of the Act.

2 *Rural localities*

⁶⁴ Tauranga City Council Prostitution Bylaw 2004, clause 2, 1.1.

⁶⁵ Queenstown-Lakes District Council Brothel Control Bylaw 2003, clause 2.2, although brothels that were established prior to bylaw being in force which have resource consent or hold a certificate issued under the Act are exempt.

⁶⁶ Queenstown-Lakes District Council Brothel Control Bylaw 2003, clause 2.2.

The Far North District is considered to gauge the response of a rural district in New Zealand.

Although not yet in force, the Far North District has a bylaw in the promulgation process. The bylaw does not differentiate between types of brothels.

Their draft bylaw proposes to restrict the location of brothels to the Commercial and Industrial zones of the Far North District as they are defined in the Council's District Plan.⁶⁸ The bylaw also plans to prohibit the establishment of commercial sex premises within a specified distance of schools, churches and early childhood centres. These prohibitions are to limit the potential conflicts that might otherwise arise because of the nature of these places.⁶⁹

This draft bylaw is similar to those in operation throughout most major centres and tourist spots of New Zealand. The Far North District's failure to differentiate between types of brothels exposes that Council to the same risks that other councils have, that is, the continuance of illegal brothels, which for reasons stated earlier is contrary to the purpose of the Act.

V EFFECT OF BYLAWS

The previous section outlined some of the bylaws made pursuant to the Act. This section will examine the implications

⁶⁷ Queenstown-Lakes District Council Brothel Control Bylaw 2003.

⁶⁸ Far North District Council General Bylaws; Control of Brothel Premises Location and Advertising Signs.

⁶⁹ Environmental Services Manager "Submission on the Control of Brothel Premises Location and Advertising Signs Bylaw- Draft".

of local council actions on the Act, home operators and the sex industry as a whole.

As noted earlier, the stated purpose of the Act is to decriminalise prostitution, but it also serves the purpose of promoting the health and safety of sex workers and safeguarding their rights. This essay seeks to determine whether or not local council bylaws have undermined these purposes.

A Home Operators

Of the bylaws that are currently in force pursuant to the Act only two make the distinction between small owner-operated brothels and other brothels.⁷⁰ All of the other bylaws subject small owner-operated brothels to the same constraints as ordinary brothels.

Bernadine Bryant of the NZPC has stated that home operators generally go about their work unnoticed.⁷¹ She also pointed out the danger in subjecting them to the same location restraints as other brothels by saying that “it will push them further underground”,⁷² meaning that it will force them into operating illegally as they were prior to the Act. This result is clearly contrary to the purposes of the Act.

The NZPC were not the only ones to point out the importance of differentiating between small owner-operated brothels and other brothels. The Brothels Task Force of NSW also recognised the importance of acknowledging that there

⁷⁰ Tauranga City Council Prostitution Bylaw 2004, and Timaru District Council Bylaw. Of those in the promulgation process the Hamilton and the Rodney District Council propose to make the distinction.

⁷¹ “Warning on Hamilton Prostitute Restriction” (3 March 2004) *The New Zealand Herald* Auckland 7.

⁷² “Warning on Hamilton Prostitute Restriction”, above n 72.

are different types of brothels and that different types of brothels require different treatment by the law.

The bylaws that require brothels to be licensed are liable to cause problems for home operators, as many home operators may not be able to afford the license fee.

Of the other councils discussed in this essay, the Wellington and Dunedin City Councils also make it possible for small owner-operated brothels to operate in residential areas.

The reluctance of private operators to relocate out of the residential areas was already highlighted in this essay.

It can be considered probable that in those districts where a small-owner operated brothel is considered a "brothel" for the purposes of the bylaw, and they are prohibited from operating in residential areas that these operators will revert back to the way they worked prior to the Act, as an illegal brothel. This is contrary to the purposes of the Act.

B The Sex Industry as a Whole

Bylaws that impose restraints that are too strict will lead to prostitutes reverting back to working illegally, and this is contrary to the purposes for a number of reasons. First, as mentioned previously the Act was to decriminalise prostitution and prostitution operating illegally would surely be contrary to this purpose. Following on from this point the operation of illegal brothels would not be conducive to public health. Not only would the health and safety requirements of the Act be unenforceable in an illegal brothel, but also safe sex

practices may be discouraged in an illegal brothel because in the past safe-sex products have been used as evidence that a brothel is being kept.⁷³

Rotorua is an example of such a council. They do not distinguish between types of brothels, the danger of which was highlighted in the previous section. Because of the strict restrictions the bylaw places on where a brothel may be established in Rotorua it may be difficult for any new brothels to be established. Any existing brothel wishing to relocate in order to operate lawfully, may find it difficult to re-locate and operate in accordance with the bylaw. This leaves the workers involved with no realistic choice but to operate unlawfully, and this is contrary to the purposes of the Act.

Auckland provides another example of a bylaw seemingly in conflict with the purpose of the Act. Along with the strict requirements of where a brothel may be located, Auckland required existing brothels to relocate and they impose the extra requirement that all brothels be licensed in accordance with the Act. The Auckland bylaw also does not differentiate between types of brothels. All of these requirements leave little room for operating within the law, and as long as there is demand for the service, the sex industry will remain in operation regardless of the legality. The purpose of the Act was to enable the legal operation of the sex industry, however the Auckland and Rotorua bylaws seem to undermine this purpose.

The licensing requirements imposed in the Auckland and Rotorua bylaws pose potential problems for the sex industry. Victoria, in Australia had similar licensing

⁷³ Tim Barnett (11 October 2000) 588 NZPD 6090.

requirements, and home operators or small brothels could not afford these licences. This led to a limited number of legally operated brothels and gave the managers of these brothels a higher degree of power over the workers. Heightened power led to abhorrent working conditions and many workers reverted back to street work. This scenario would clearly undermine the purposes of the Act, as the Act was aimed at safeguarding the rights of sex workers, improving the health and safety of the industry and most importantly, the Act was aimed at allowing the sex industry to operate legally. None of these aims would be achieved if the situation in Victoria were to be repeated here.

The effect of bylaws made pursuant to the Act on the industry as a whole is not as significant as the effect they have on home operators. A majority of brothels exist in the areas that are designated in bylaws as legitimate areas to work, therefore the Act and the bylaw allow them to operate legally which is in accordance with the purposes of the Act.

Christchurch exempted the three existing brothels that were located in the prohibited areas from their bylaw, therefore affording these brothels the opportunity to operate lawfully. This exemption is consistent with the purposes of the Act.

The councils that have not distinguished between types of brothels and therefore not taken into account the difference between them have not acted consistent with the purpose of the Act and can therefore said to be undermining the purpose and the effect of the Act in that regard.

Wellington and Dunedin have not enacted bylaws pursuant to the Act. The bylaw operating in Wellington that

regulates the location of brothels does not undermine the purpose of the Act. The prohibited area where brothels may not be established in Wellington is relatively small, and there is no blanket prohibition that other major centres have put on the industry. Dunedin has no bylaw regulating the sex industry. The status quo in both these areas is conducive to giving full effect to the purpose of the Act.

VI CONCLUSION

This essay has examined the Prostitution Reform Act 2003, and the implications of the sections that allow territorial authorities to enact bylaws regulating the location of brothels with the objective of determining whether or not local council action has undermined the purpose of the Act.

The legal history of the sex industry prior to the Act was discussed to see what the rationale for reform of the prostitution laws was. Next, there was a brief analysis of the Act and a discussion of the legal changes flowing from the legislation.

Subsequently, the sections of the Act that enabled territorial authorities to enact bylaws were discussed and then there was an analysis of two other jurisdictions that have delegated similar powers. The failures of other jurisdictions were highlighted in order to show how the use of delegated power could undermine the legislation.

The implementation of bylaws was then explored. Here, the focus was amongst the major centres of New Zealand, some tourist spots and a rural locality to gauge a representative view of New Zealand's response to the Act. Auckland and Rotorua's bylaws were highlighted as being

inconsistent with the purpose of the Act as they make it difficult operate or establish brothels lawfully in their areas.

Following on from the examination of the bylaws was a discussion of the effects of these bylaws on home operators, and the sex industry as a whole. It was concluded here that the failure to differentiate between types of brothels was potentially undermining the purpose of the Act. Also, the licensing requirements of the Auckland and Rotorua bylaws jeopardise the rights of sex workers that were supposed to be safeguarded by the Act.

The effect on the sex industry as a whole is not as dramatic as the effect on small owner-operated brothels but some bylaws are undermining the purpose of the Act.

The Act was a controversial piece of legislation that was supposed to enable the sex industry to operate within the law and within the protection of the law. The Act was also supposed to improve the health and safety of the sex industry. These objectives cannot be achieved with the bylaws enacted by some councils, especially the Auckland and Rotorua bylaws; hence the purposes of the Act have been undermined.

The failures of local councils to implement bylaws consistent with the purpose of the Act mean that the legislative reform of the laws governing the sex industry is a failure and the objectives of Parliament cannot be achieved. An Act of Parliament has failed because of the actions of local councils.

The bylaws that are inconsistent with and undermine the Act need to be reviewed, and should be rewritten in order to

APPENDIX ONE

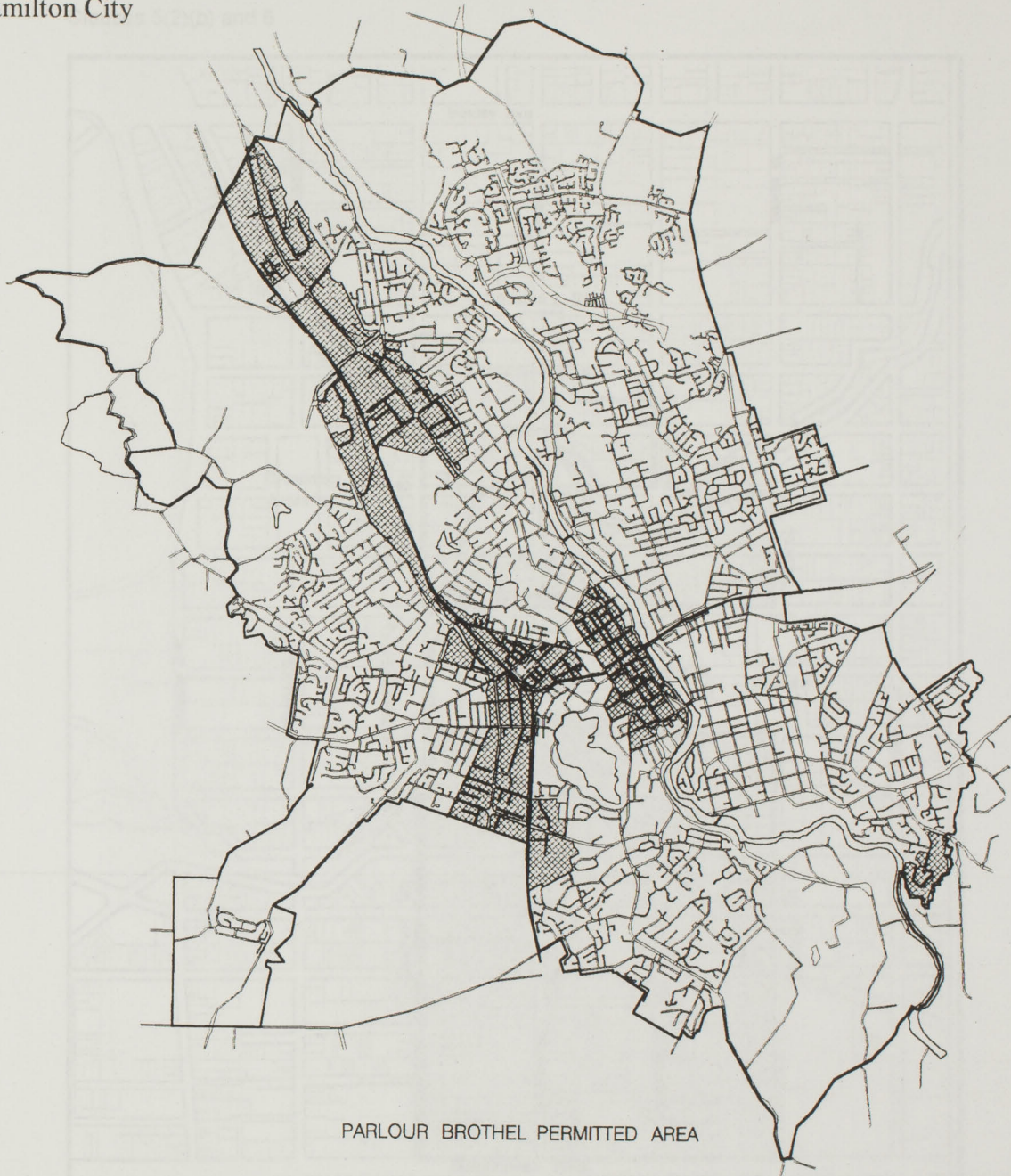
Hampton City

be consistent with the purpose of the Act. Otherwise the Act itself serves no purpose.



APPENDIX ONE AREAS WHERE BROTHELS ARE PERMITTED

Hamilton City



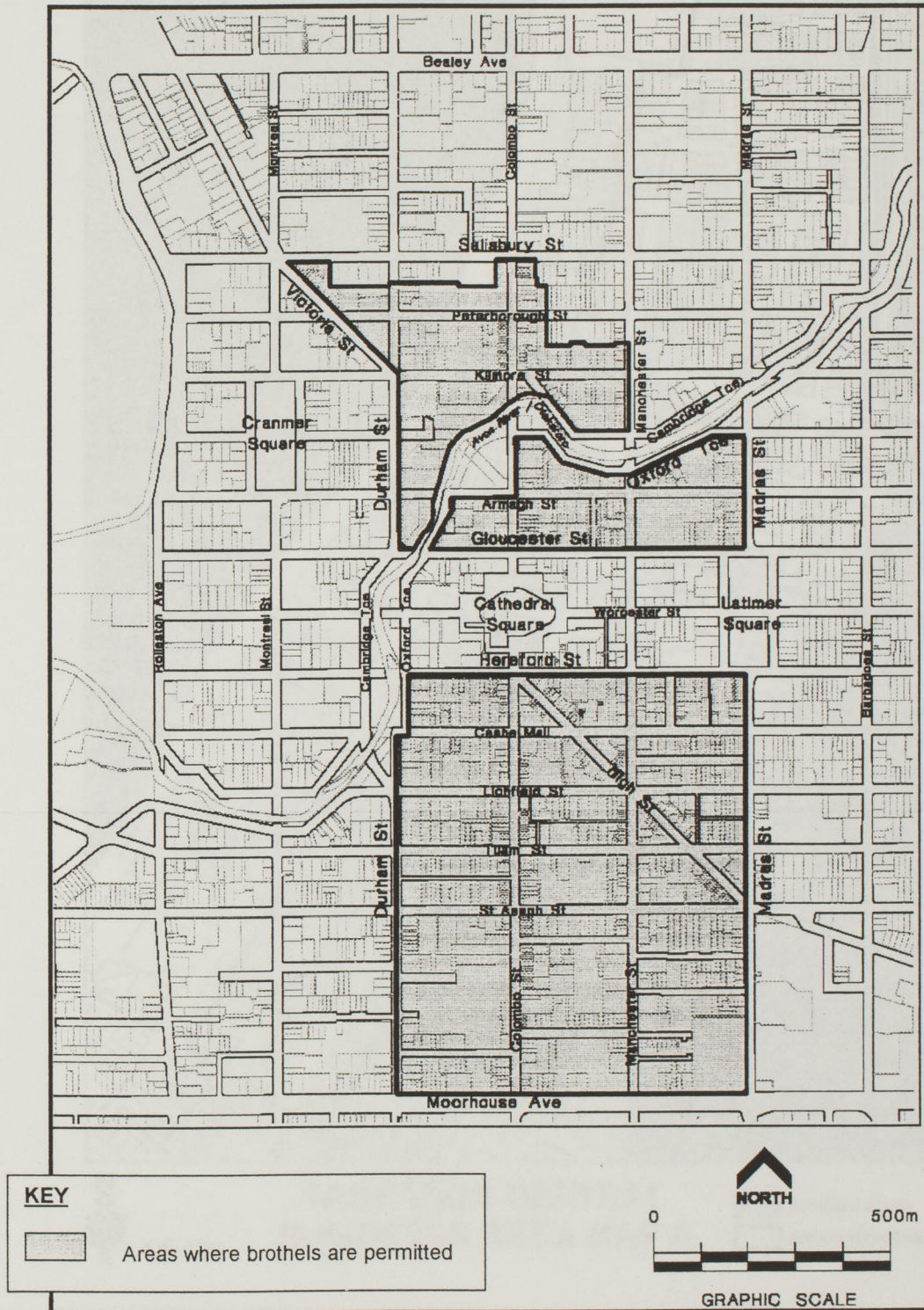
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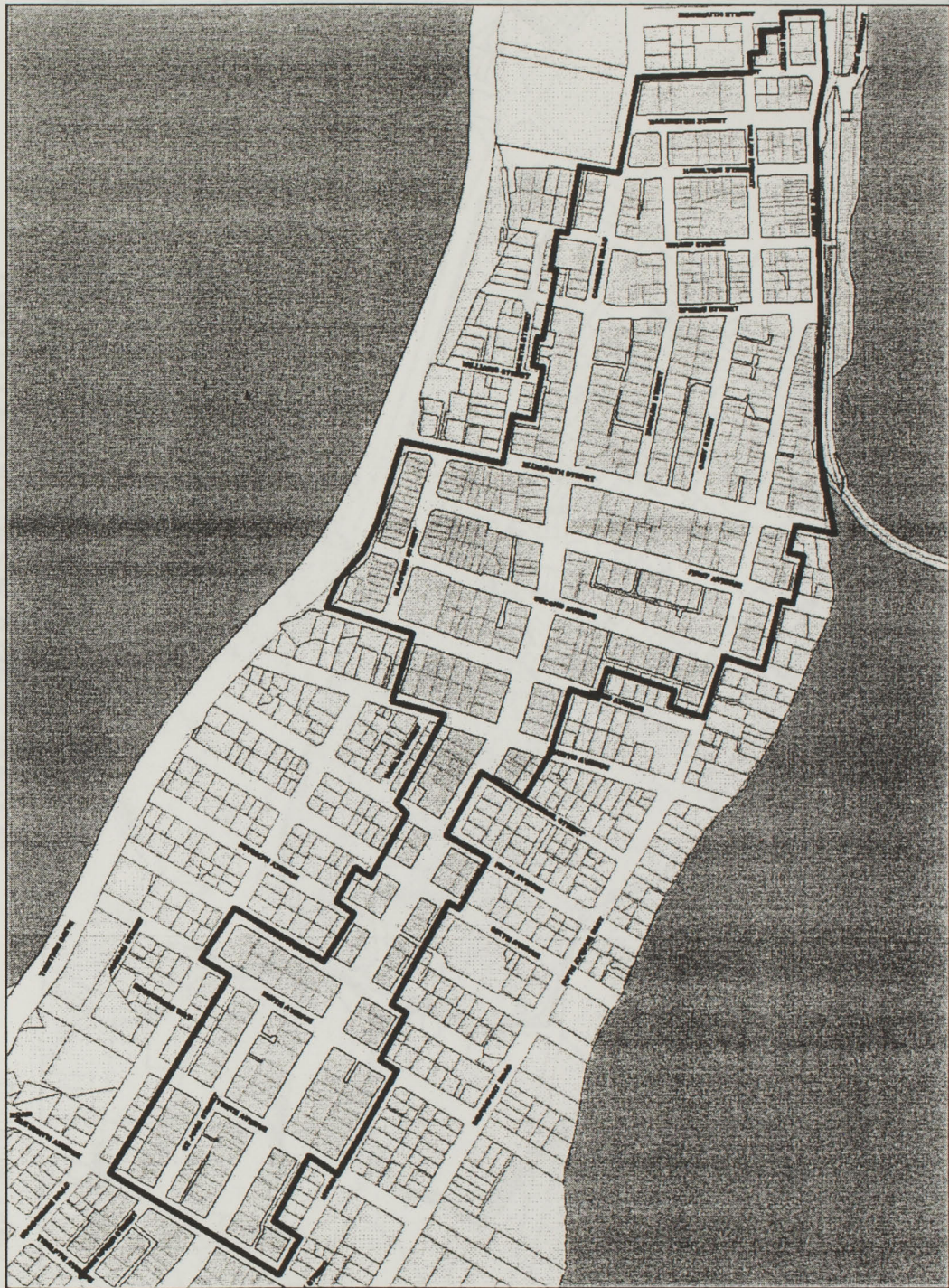
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
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**TAURANGA CENTRAL
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-  AREA FOR BROTHEL LOCATION

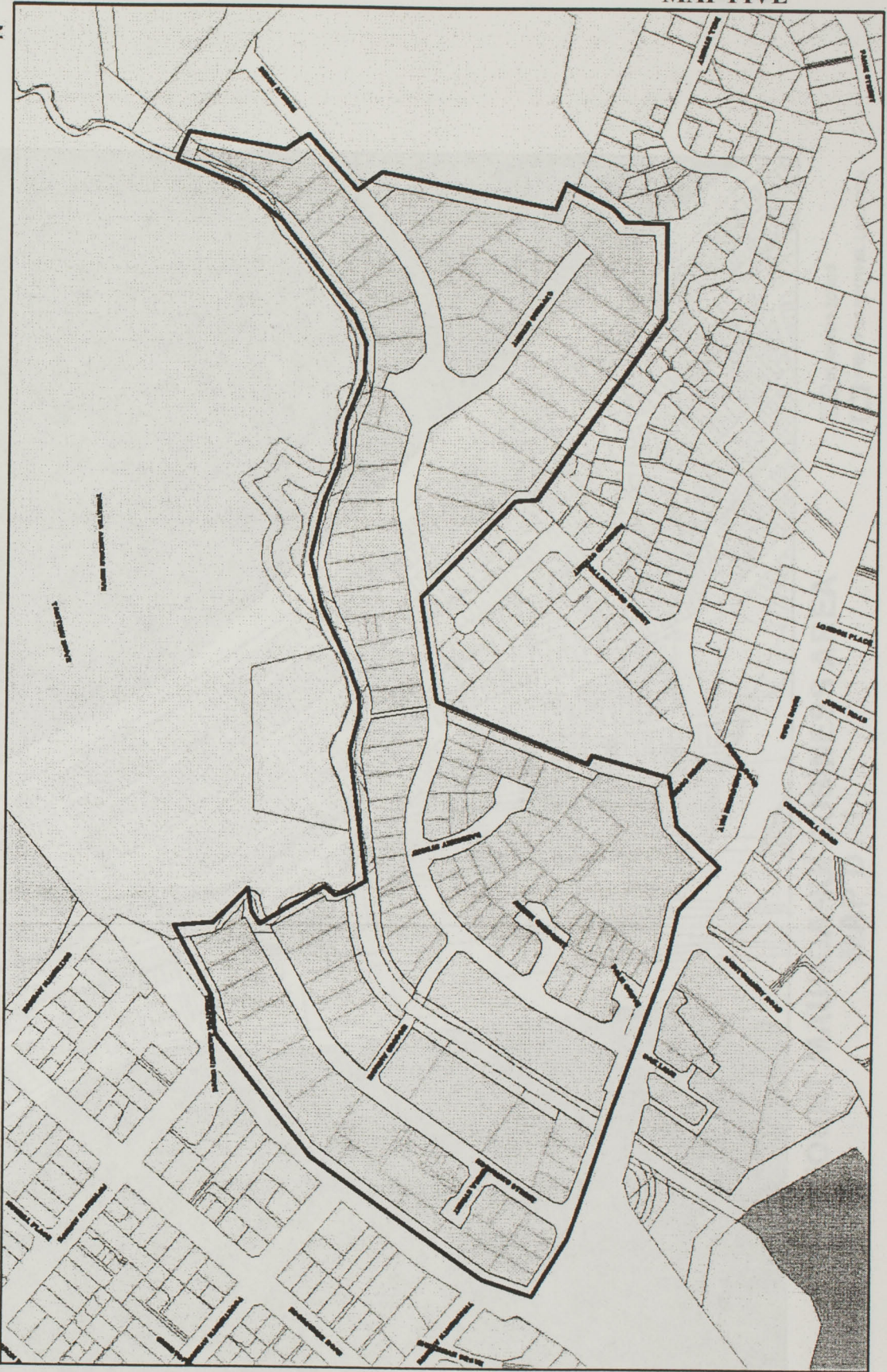


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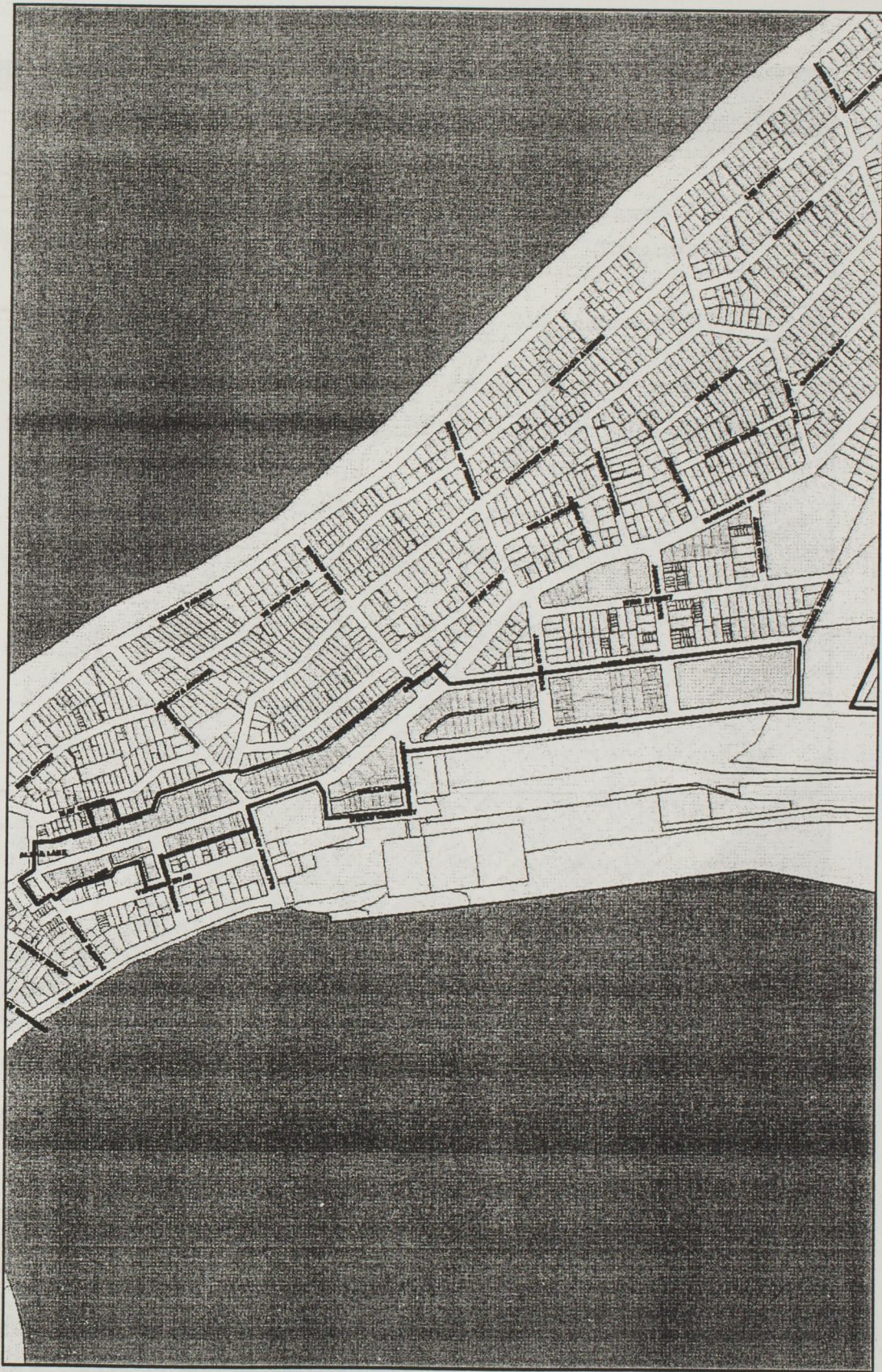
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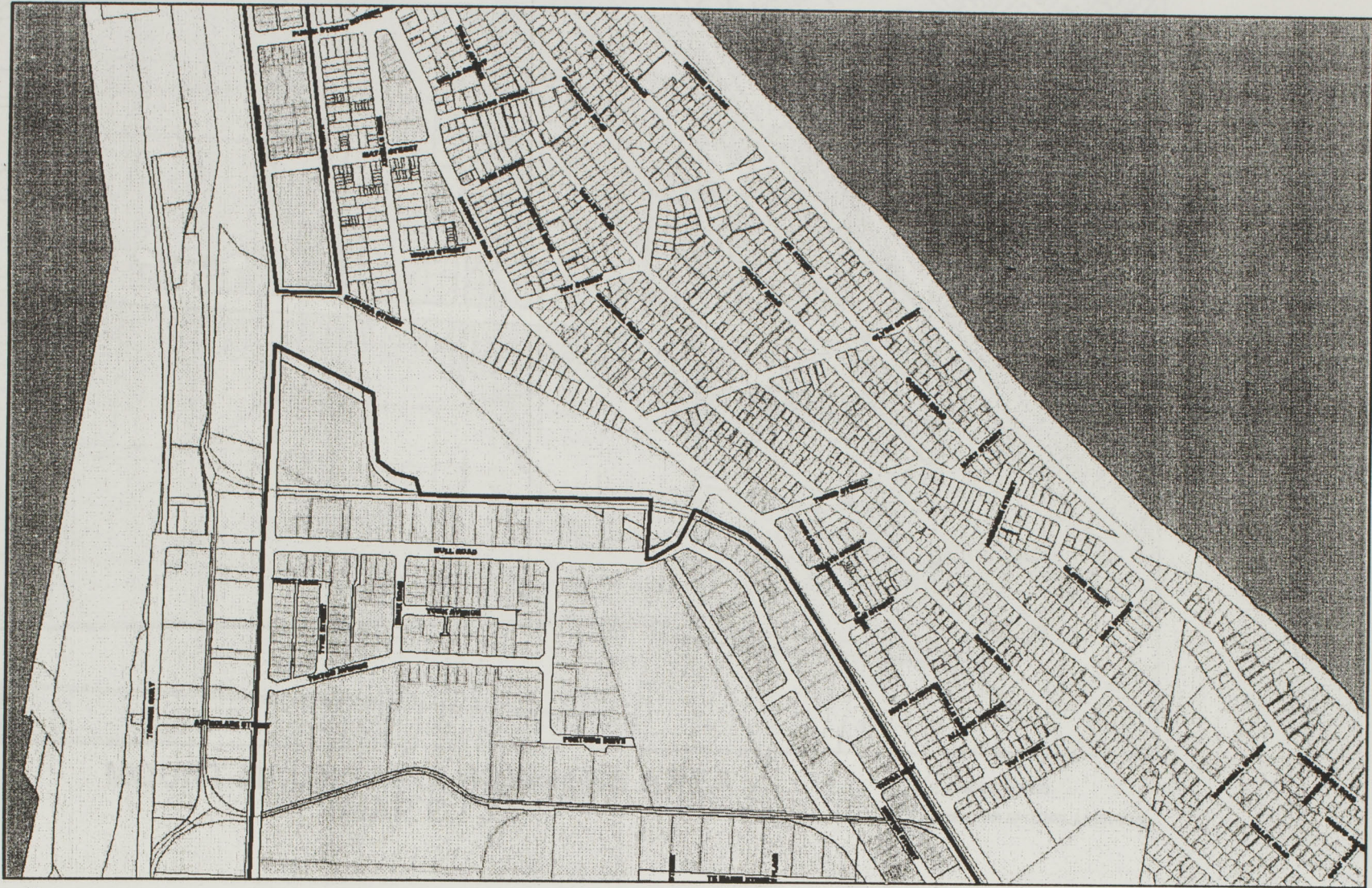
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BUSINESS ZONES
AREA FOR BROTHEL LOCATION

**MOUNT MAUNGANUI BUSINESS AREA
MAP D / 1**



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MOUNT MAUNGANUI BUSINESS AREA MAP D / 2

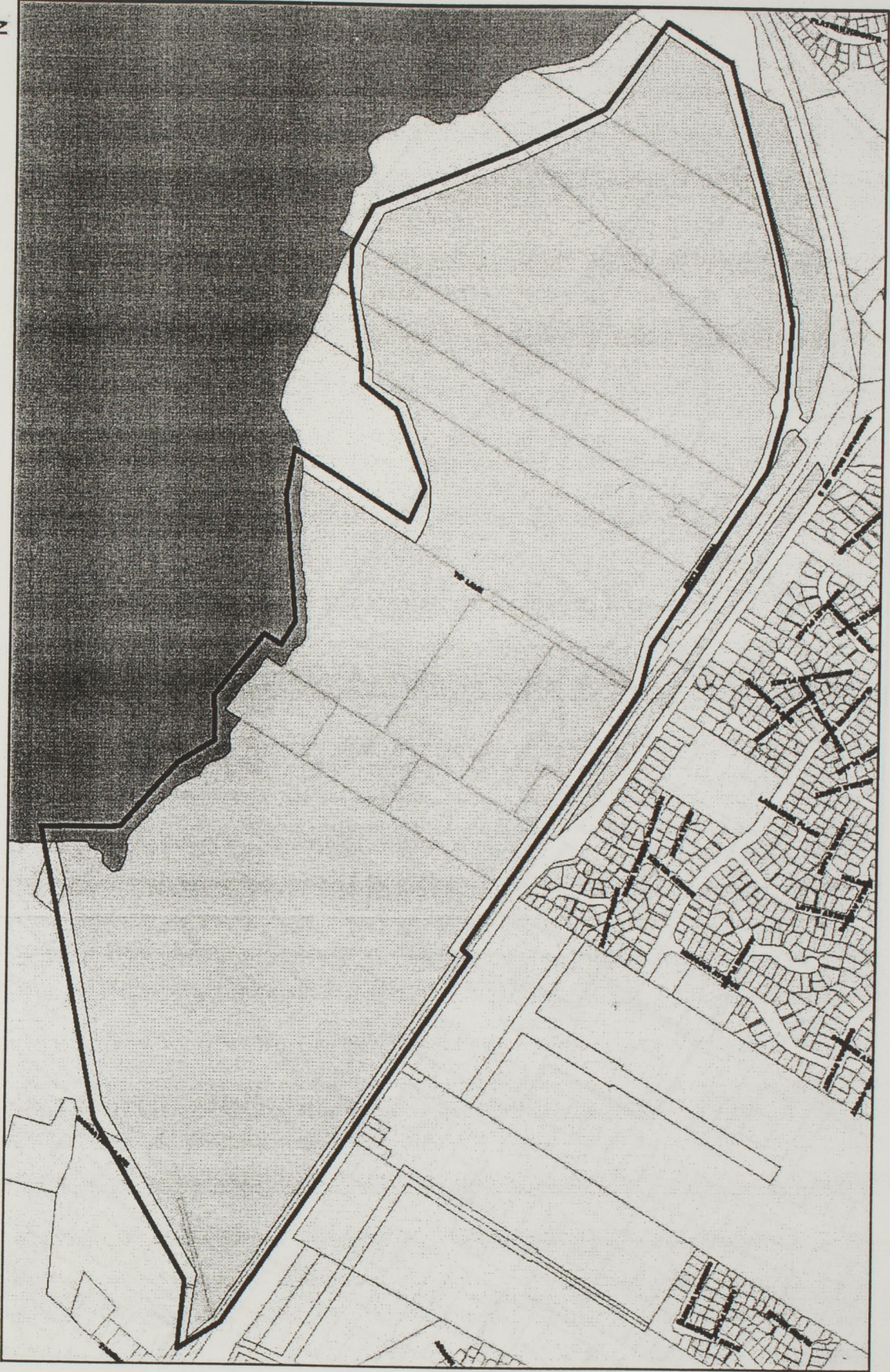
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MOUNT MAUNGANI BUSINESS AREA
MAP D / 3



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■ BUSINESS ZONES
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TE MAUNGA BUSINESS AREA MAP E

-  BUSINESS ZONES
-  AREA FOR BROTHEL LOCATION

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