

DEVELOPMENT APPLICATION ASSESSMENT

Application No: D/2008/1590

Application Site: 31-33 Oxford Street , SURRY HILLS NSW 2010

Proposal Internal building works to reduce noise impacts from the nightclub (formerly known as UN/DCM) and increased hours of operation to between 6:00pm and 3:00am Sunday to Thursday and between 6:00pm to 6:00am Friday, Saturday and any night preceding a public holiday.

Background: *Development Applications*

D/1975/147

On 29 May 1975 Council approved use of the first floor as a licensed restaurant and cabaret operating between 6pm and 3am daily. The premises operated as a restaurant/cabaret until approximately 1993, after which it appears that DCM Nightclub occupied the first floor as a nightclub and the second floor as ancillary offices and has been trading without authorisation ever since. Conditions of the 1975 approval were:

- (a) *Hours of operation 6pm to 3am.*
- (b) *No amusement or poker machines.*
- (c) *The premises must be soundproofed.*
- (d) *The hours of operation and any aspects of the use to be reviewed if injury is being caused to the amenity of the neighbourhood.*

Background (cont):

D/2003/251

On 14 October 2003 Council refused a development application for a change of use and fitout of the ground floor of the premises from retail shop to hotel with entertainment, trading 24 hours, 7 days. This was an extension to the first floor nightclub use. Reasons for refusal included:

The proposal constituted an intensification of an existing unapproved use. (The operation of a nightclub is a different use to a restaurant/cabaret.)

- (a) The management of the nightclub had not demonstrated that the premises could be operated in compliance with Council requirements and State legislation. (Unauthorised refurbishment works were undertaken, fire safety standards were not acceptable, noise complaints had been received and serious incidents relating to the premises and Licensee were recorded by the Police.)**
- (b) Intensification of use would impact on nearby residential development in terms of noise and public safety.**
- (c) The proposed 24 hour trading did not comply with Council's Policy on Trading Hours.**

The applicant appealed against Council's refusal of the development application for the ground floor hotel extension to the nightclub (D/2003/251). The DA appeal was subsequently withdrawn by the applicant. As part of the appeal proceedings the Court directed the applicant to lodge a Development Application for use of the first floor of the premises which had never been approved as a nightclub (refer D/2004/675).

The applicant concurrently appealed against Council's 2003 refusal of the PoPE application for the first floor and a deemed refusal of the PoPE application which had been lodged for the ground floor.

On 7 July 2004, the Court subsequently dismissed all proceedings and awarded costs to Council.

Background (cont):

D/2004/675

Deferred Commencement Consent granted by Council on 30 August 2004 to change of use of first floor of premises from approved licensed restaurant/cabaret venue to pub/nightclub with entertainment, with the ability to trade 24 hours 7 days a week, and use of second floor for ancillary nightclub office use.

The deferred commencement consent was subject to the completion of acoustic works within 28 days of the date of the determination.

The applicant appealed to the Land and Environment Court against conditions attached to Council's consent. On 24 July 2006 the conditions were upheld in part whilst also allowing the consent to become 'operable'.

D/2004/675/A

S82A application was granted consent by Council on 8 June 2005 to modify Conditions 33 and 38 relating to 'Provision of public telephone services' and 'Access for people with disabilities' respectively. Condition 3 relating to 'Hours of operation' was also modified stating that *"If it is proven that the terms of the consent have been breached, the trial period is to end upon being served with a written notice from the City of Sydney"*

Liquor Licence

The premises has been operating under an Hotelier's Licence since January 1992 with approval to trade 24 hours 7 days a week and to accommodate gaming machines. The Liquor Administration Board (LAB) notified Council of Liquor Licence approvals with extended trading hours in 1992 and 1994.

Place of Public Entertainment (PoPE) Applications issued by Council

In January 1988 a deferred commencement PoPE approval (S68, LGA 1993) was issued by Council. In January 2000 a PoPE licence was issued by Council with a reference to trading hours from 9pm to 6am, 7 days a week. Council renewed the PoPE in December 2001, expiring in April 2003. The renewal included approval for a DJ, music and dancing.

Background (cont):

Normally consent for a PoPE licence is predicated upon prior approval of a development application for a Place of Entertainment. In this case, the applicant was not requested to lodge a DA. In October 2003, Council refused to renew the PoPE as it was not considered that there was good cause for renewal. Concerns included no approval for a change in use from restaurant/cabaret to nightclub, that the approved trading hours were not being complied with, that building works had been undertaken without approval and the nightclub use was impacting on the amenity of the surroundings in terms of excessive noise and security issues.

In 2003 the applicant also applied for a PoPE for the ground floor, in association with the DA for the ground floor. The PoPE remained undetermined by Council.

An order was issued on 15 December 2006 to cease use as a POPE venue citing failure to comply with conditions of the Land and Environment Court approved Development Consent D/2004/675 dated 24 June 2006. A Fire Safety Order was also issued on 18 October 2006 (and modified on 4 May 2007) with a compliance period to November 2007. Formal letter advising of PoPE refusal issued 2 August 2007.

The matter was upheld in the Land and Environment Court in Class 4 proceedings.

General

Liquor Licences are granted by the Licensing Court of NSW under the Liquor Act 1982. A licensed restaurant operates under an On-Licence (Restaurant). A hotel operates under an Hotelier's Licence. A nightclub can operate under an Hotelier's Licence with a PoPE licence which is issued by Council under Sect 68 of the Local Government Act. Hotelier's Licences include permitted hours for the sale of alcohol, and include an 'entitlement' to poker machines.

Background (cont):

It appeared that a change in use of the site from licensed restaurant/cabaret to pub/nightclub occurred around 1993 and that DCM/UN nightclub has been operating since then, trading during the evenings and early mornings in accordance with its Liquor Licence hours.

The applicant was not requested to submit a development application for a formal change of use from the original restaurant/cabaret use to pub/nightclub operating 24 hours until the matter came to light when the application for an extension of the pub/nightclub into the ground floor was submitted and subsequently refused.

At the time of assessment of the ground floor application the applicant was requested to submit a DA for the first floor change of use, but did not respond to the request. As previously outlined the Court directed that an application be lodged (refer D/2004/675).

SITE AND SURROUNDING DEVELOPMENT

The site contains a three storey building with retail tenancies at the ground floor and a blank brick facade on the upper floors. The upper floors contain a nightclub previously known as DCM and UN.

Surrounding land uses include residential apartment buildings and commercial premises.

A site visit was carried out on 03 October 2008. Photos of the site are below:



Figure 1: Entry to premises. Nightclub with residential apartment blocks behind.



Figure 2: Nightclub with residential apartment blocks behind.



Figure 3: Nightclub and surrounding residential apartment blocks.



Figure 3: Nightclub opposite residential apartment blocks on Oxford Street.

PROPOSED WORKS

- Internal alterations and additions to acoustically retrofit the roof, ceiling and north, west and south walls of the first floor
- New fire escape stairs and goods lift to the laneway
- Installation of heavy duty acoustic alarmed doors to the proposed fire escape

ECONOMIC/SOCIAL/ENVIRONMENTAL IMPACTS

The application has been assessed under Section 79C of the Environmental Planning and Assessment Act 1979, including consideration of the following matters:

(a) Environmental Planning Instruments and DCPs.

Sydney LEP 2005

The site is zoned City Edge. The use is permissible with consent. The proposal does not comply with the controls in the LEP as the proposed hours of operation, between 6pm and 3am Sunday to Thursday and 6pm to 6am Friday and Saturday, are not considered to provide a suitable transition between the City Centre zone and nearby lower density residential areas. Specifically, the late trading hours are not considered to comply with Clause 11 (a) (b) (c) and (d) of the LEP. As the proposal seeks to bypass the late night trading trial periods as set out in the City of Sydney Late Night Trading Premises DCP 2007 the proposal is not considered to protect and enhance the diversity and special qualities of the City of Sydney and its surrounding areas, to establish the City of Sydney as the best place to live in, work in and visit, to foster environmental, social and physical well being so the city can continue to develop as an integrated and balanced city or to encourage orderly, sustainable and high quality development of land and other resources within the City of Sydney. The proposal is also inconsistent with Part 2 clause 12 of the LEP in that the proposal is not considered to protect and enhance the amenity of residents, works and visitors (SLEP 12(f))

The site is not listed as a Heritage Item under LEP Schedule 8. The proposal will have no adverse impact of the heritage significance of the item. The proposal is not in the vicinity of a heritage item.

Heritage Act 1977

The building is not listed in the State Heritage Register under the Heritage Act 1977.

Central Sydney DCP 1996

The proposal is not considered to satisfy the relevant strategy objectives and provisions of the DCP in that the proposal is considered to have a significant impact on the amenity of the surrounding area and as such is inconsistent with Part 9 of the DCP which governs that the design, operation and location of uses on the surrounding areas is considered. Also, the application proposes to bypass the trial periods associated with late night trading premises under the City of Sydney Late Night Trading Premises DCP 2007 and as such prevents the impact of the late night trading hours on the amenity and desired future character of the street (CSDCP 9.1.2(iv)) from being monitored and addressed.

City of Sydney Late Night Trading Premises DCP 2007

The proposal seeks a patron capacity of 400 with trading between 6pm to 3am Sunday to Thursday and 6pm to 6am Friday and Saturday. As such, the nightclub is identified as a category 'A' premises within a Late Night Management Area as defined by the DCP. The maximum trading hours permissible would be base hours between 6am to 2am the following day, with extended trading to 4am on a one year trial. The proposed hours are not considered acceptable as they do not comply with the hours specified in the DCP.

Given the nightclub nature of the premises, and its close proximity to residential dwellings, the proposal cannot grantee that the amenity of residential properties will be protected and as such the proposal does not satisfy the relevant aims, objectives and controls of the DCP.

(b) Other Impacts of the Development

The proposed development is capable of complying with the BCA.

It is considered that the proposal will have no significant detrimental effect relating to environmental, social or economic impacts on the locality, subject to appropriate conditions being imposed.

(c) Suitability of the site for the Development

The proposal is of a nature in keeping with the overall function of the site. The premises are in a commercial/retail/residential surrounding and amongst similar uses to that proposed.

It is recommended that disabled access be provided in accordance with the provisions of the City of Sydney Access DCP 2004, an appropriate condition is recommended.

(d) Public Interest

It is considered that the proposal is not in the public interest.

FINANCIAL IMPLICATIONS/S61 CONTRIBUTION

Section 61 Contribution

The cost of the development is \$200 000. A Section 61 Contribution does not apply. The provisions of Section 61 of the City of Sydney Act 1988 do not apply to the development.

CONSULTATION

Internal Referrals

The conditions of other sections of Council have been included in the proposed conditions.

Notification, Advertising and Delegation (Submission(s) received)

In accordance with Council policy, the application was notified and advertised for a period of **21** days. As a result of this notification there were **22** individual submission(s) received and one pro-forma letter with a set of individual responses from 8 respondents.

- (a) *The trading hours were previously refused in the Land and Environment Court and so an application for extended trading hours should not have been accepted by Council for the site***

Response – Council cannot prevent an application being lodged even if an outcome was determined in the Land and Environment Court.

- (a) *The applicant is the same operator that previously presented poor management practice which resulted in the hours for the nightclub being reduced in a Land and Environment Court ruling. Council should not approve the application on this fact alone.***

Response – Council planners examine each application on its individual merits. Planning controls apply to the specific building, not to the operator. As such, the application was assessed on its planning merit.

- (b) *The approval of the application would result in reduced amenity for surrounding residential dwellings, including noise, anti-social behaviour and safety impacts.***

Response – The applicant provided a suitable Plan of Management, in accordance with Council's Late Night Trading Premises Development Control Plan 2007. Also, the sound attenuation measures would be required to be implemented to the satisfaction of Council prior to the issue of a Construction Certificate and the nightclub opening.

- (c) *The applicant supplied an inaccurate acoustic report.***

Response – The acoustic report was referred to Council's health department for assessment and was found to be acceptable.

(d) *The approval of the nightclub would result in an unacceptable cumulative impact.*

Response – The issue of cumulative impacts or saturation of licensed premises has been previously raised in relation to the establishment of new nightclubs and hotels with large patron capacities within the area. While the overall impact of having a nightclub within the premises is acceptable, low quality of management results in the biggest impacts. The applicant has provided an acceptable Plan of Management.

(e) *Inappropriately located venue.*

Response – The site is within a ‘late night management’ area as identified in the City of Sydney Late Night Trading Premises Development Control Plan 2007. The site is considered appropriate for the use.

(f) *Approval of the nightclub would result in parking impacts.*

Response – The premises is applying for 400 patrons, as per the previous approval for the site. Given that there is no net increase in patron numbers, there is unlikely to be any additional parking impacts.

(g) *The club upgrade does not provide facilities for persons with a disability and so should not be approved.*

Response – The upgrade of buildings to provided access and facilities for persons with a disability can be quite difficult and costly. Given the age of the building, and the scope of works that would be required, it is not considered a feasible option in this circumstance.

(h) *How will security manage smokers and queues on the footpath?*

Response – The application includes a Plan of Management which would form part of the consent. Including the Plan of Management as a part of the consent requires the nightclub to operate in accordance with the approved Plan of Management. The Plan of Management outlines that no more than 20 patrons will queue out the front of the premises and will be managed by security guards. Any smokers, including staff and patrons, entering or exiting the premises will be monitored and/or controlled to prevent disturbances to the surrounding neighbourhood. These measures are considered acceptable.

(i) *The proposed trading hours do not comply with the City of Sydney Late Night Trading Premises Development Control Plan 2007.*

Response – The hours applied for do not comply with the hours outlined in the City of Sydney Late Night Trading Premises Development Control Plan 2007 and as such, the proposal is recommended for refusal.

In accordance with the register of delegations, the Area Planning Manager can determine applications. The matters raised in the submissions were taken into consideration in accordance with Section 79C of the Environmental Planning and Assessment Act 1979.

CONCLUSION AND RECOMMENDATION

Having regard to all of the above matters, it is considered that the proposal is not acceptable and it is recommended for refusal.

**Refused under delegated
authority of Council**

MEAGAN KANALEY
Planner

ANDREW REES
Area Planning Manager