

## DEVELOPMENT APPLICATION ASSESSMENT

<b>Application No:</b>	<b>D/2008/1919</b>
<b>Application Site:</b>	<b>31-33 Oxford Street , SURRY HILLS NSW 2010</b>
<b>Proposal</b>	<b>Change of use from retail to licensed premises for 85 people on the ground floor (in association with the premises formerly known as DCM/UN on the first and second floors) with associated alterations and additions to the internal layout, construction of a smoking area to the ground floor front facade and trading hours between 11.00am to 3.00am the following day Sundays to Thursdays and between 11:00am and 5:00am the following day Fridays and Saturdays and any day proceeding a public holiday.</b>

### BACKGROUND

#### Development Applications:

##### D/1975/147

On 29 May 1975 Council approved use of the first floor of the building 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. 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.

##### D/2003/251

On 14 October 2003 Council refused a development application for a change of use and fit-out 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 has been operating as an unauthorised nightclub (refer D/2004/675).

Concurrently, the applicant appealed a 2003 POPE refusal for the first floor and a deemed POPE refusal relating to the application D/2003/251 for the ground floor, respectively.

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

#### 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, trading 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"

#### D/2008/1590

Application for 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. The application was refused on 05 November 2008.

#### **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.

In general, 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:**

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 is a retail tenancy at the ground floor of a three storey building. The building contains three (3) retail tenancies at the ground floor. The upper floors contain a nightclub previously known as DCM and UN.

Surrounding land uses include retail and commercial tenancies including a supermarket, beauty salon/academy and coffee shop as well as multiple residential apartment buildings.

A site visit was carried out on 18 November 2008. Photos of the site are below:



**Figure 1: Site and surrounding residential apartment buildings.**



**Figure 2: Site at ground floor, operating as a retail tenancy.**

## **PROPOSED WORKS**

### **Ground Floor**

- Facade upgrade including glazed double doors and stainless steel lettering;
- Smokers lounge with glazed bi-fold windows, louvers and planter boxes;
- Upgrade of the existing fire escape doors;
- New bar;
- Fit out for 85 patrons including fixed and moveable seating;
- New male, female and accessible toilets;
- New kitchen;
- New office;
- Stairs to form direct access from the ground floor bar (the subject of this application) to the nightclub premises on the first floor.

## **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 is not considered to comply with the main aims of the LEP. Specifically, the proposal is not considered to protect and enhance the diversity and special qualities of the City of Sydney and its surrounding areas(11(a)), to establish the City of Sydney as the best place to live in, work in and visit (11(b)), to foster environmental, social and physical well being so the city can continue to develop as an integrated and balanced city (11(c)) or to encourage orderly, sustainable and high quality development of land and other resources within the City of Sydney(11(d)).

Additionally, the proposal is not considered to protect and enhance the quality and amenity of the public areas of the City of Sydney, specifically the street (12(g)). The patrons lining up on the footpath waiting for entry to the venue are considered to have amenity impacts through obstruction of the footpath and as such, the proposal does not encourage a high quality pedestrian environment (12 (o)).

The proposal is also inconsistent with Part 2, Clause 12 of the LEP in that the proposed hours, the proposed use and the increase in capacity of the nightclub (formerly known as UN/DCM), from the approved 400 to 485 (the additional 85 within the proposed ground floor bar, the subject of this application) are not considered to protect and enhance the amenity of residents, workers and visitors (12(f)).

The proposal is also inconsistent with the description and objectives of the City Edge Zone (Part 2, Division 3) as the proposed hours, noise from the use and increase in patron capacity are not considered to provide a suitable transition between the City Centre zone and nearby lower density residential areas (38(a)).

The proposal is considered to be inconsistent with Part 6 of the LEP. Specifically, the proposal is not considered to minimise the impact of the use on the amenity of the City of Sydney (28(a) and 29(a)) and the opening of another late night trading premises within the local is considered to result in an inappropriate concentration of such premises (29(b)). Additionally, the proposal is considered to be detrimental to other uses, such as residential, which are considered to be more consistent with the objectives of the zone in which the land is situated (29(c)).

The acoustic information provided with the submission did not take into account the operation of the lounge in conjunction with the nightclub upstairs. Given this, amenity impacts associated with noise generation by the use cannot be reasonably assessed and as such the approval of the proposal is not considered to be in the public interest.

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.

The proposal is inconsistent with the aims and objectives of the DCP in that the proposed hours, noise from the use and increase in patron capacity are considered to have a significant impact on the amenity of the surrounding area and as such is inconsistent with Part 9 of the DCP.

Specifically, the proposal is in a location with several surrounding late night trading premises within close proximity (objectives, 9.1) and the addition of another late night trading premises, with direct access to the night club on the floors above, is considered to result in unacceptable cumulative impacts on the surrounding area (objectives 9.1) (See Figure 3).



**Figure 3 – Distance to Late Night Trading Premises within the vicinity of the site.**

Premises	Type	Trading Hours	Distance from Premises
Slide Bar – 41 Oxford Street	Nightclub, bar, Restaurant	Fri-Sat 7pm to 3am	10m
The Exchange Hotel – 34-36 Oxford Street	Live music venue, Pub with POPE	Fri-Sat 9am to 6am	40m
The Oxford Art Factory – 38-46 Oxford Street	Music Venue, art showcase space	Mon-Sat 8pm to 6am	60m
Brighton Hotel – 77 Oxford Street	Pub	Sun-Thurs 3am Fri-Sat 5am	140m
The Burdekin Hotel – 2-4 Oxford Street	Pub with POPE	Mon-Thurs 11am to 2am Fri 11am continuously to Sun 12am.	70m

As the acoustic report did not take into account the downstairs bar (the subject of this application) being operated in conjunction with the nightclub upstairs, the proposal prevents the impact of the late night trading hours and noise on the amenity and desired future character of the street (9.1.2(iv)) from being assessed. As such, the proposal is not considered to be in the public interest.

### ***City of Sydney Late Night Trading Premises DCP 2007***

The proposal seeks a patron capacity of 85 with trading between 11am and 3am the following day Sunday to Thursday and 11am to 5am the following Friday, Saturday and any night preceding a public holiday. Given that the proposal is directly linked to the nightclub (formally known as DCM/UN) on the upper floors, the premises is identified as a category 'A' premises within a Late Night Management Area as defined by the DCP. The DCP permits maximum base trading hours between 6am to 12midnight, and extended trading to 2am the following day 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 link to the existing nightclub premises the proposal cannot grantee that the amenity of residential properties in the vicinity will be protected and as such the proposal does not satisfy the relevant aims, objectives and controls of the DCP.

### ***City of Sydney Access DCP 2004***

The proposal provides access to the ground floor bar and accessible facilities. As such, the proposal is generally considered to comply with 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 significant detrimental effect relating to environmental, social or economic impacts on the locality.

#### **(c) Suitability of the site for the Development**

The proposal is of a nature in keeping with the overall function of the site. However, it will intensify an existing use without adequately protecting nearby residential amenity.

#### **(d) Public Interest**

It is considered that the proposal will have a detrimental effect on the public interest, and as such, the proposal is not considered to be in the public interest.

### **FINANCIAL IMPLICATIONS/S61 CONTRIBUTION**

#### **Section 61 Contribution**

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

## CONSULTATION

### External Referrals

The proposal was referred to the Police who indicated that they do not support the intensification of use and increased patrons numbers as there is potential for greater problems associated with the licensed premises. The Police also indicated that they have reserves about the premises due to previous non-compliance with development consent for the nightclub premises upstairs.

### Internal Referrals

The proposal was discussed with Council's Place of Public Entertainment Department who advised that the application is not acceptable given that the increase in patron capacity and hours of operation are an intensification of use, not in keeping with the intent of the Court consent in both hours of operation and capacity.

Council's Place of Public Entertainment Department also indicated that, as the ground floor bar is to be operated in conjunction with the nightclub on the upper floors of the building, sufficient acoustic information was not submitted with the application to conduct an accurate assessment.

### 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 26 submission(s) received. The following relevant planning concerns were raised in the submissions:

- (a) ***The proposal will result in accumulated impacts from the addition of another licensed premises on Oxford Street.***

**Response** – The proposal is recommended for refusal given that the proposed hours, noise from the use and increase in patron capacity are not considered to provide a suitable transition between the City Centre Zone and nearby residential areas.

- (b) ***The increase in patron capacity will result in amenity impacts, specifically increase noise, from patrons lining up along the street and the opening of the front of the building as a smoking area.***

**Response** – The nature of the premises, run in conjunction with a nightclub, and its close proximity to residential dwellings means that the proposal cannot guarantee that the amenity of residential properties will be protected. As such, the proposal is recommended for refusal.

- (c) ***The proposal will result in unacceptable increases in anti-social behaviour from the patrons of the premises.***

**Response** – As part of the application a Plan of Management, in accordance with the City of Sydney Late Night Trading Premises Development Control Plan 2007 was submitted, outlining management of patrons.

- (d) ***The trading hours are inconsistent with the City of Sydney Late Night Trading Premises DCP.***

**Response** – The proposed trading hours are considered unacceptable and the application is recommended for refusal.

- (e) ***The Plan of Management is only for the bar and does not take into consideration management of patrons between the bar and the nightclub above.***

**Response** – The Plan of Management is for both the bar and the nightclub above. Management of patrons moving between the two floors was assessed within the plan and was to be controlled by security staff.

- (f) ***The proposal will result in an intensification of the use of the nightclub due to an increase in patron capacity (85 people) to bring the total patron capacity to 485.***

**Response** – The increase in patron capacity is considered unacceptable and the application is recommended for refusal.

- (g) ***The line to enter the premises is located next to a pedestrian crossing. There is not enough room on the footpath to provide both.***

**Response** – While this issue is addressed in the Plan of Management it is considered that patrons lining up on the footpath waiting for entry to the venue are likely to have amenity impacts through obstruction of the footpath. As such, the proposal does not encourage a high quality pedestrian environment.

- (h) ***Soundproofing of the venue has not been adequately addressed.***

**Response** – The ground floor bar is to be operated in conjunction with the nightclub on the upper floors of the building, sufficient acoustic information was not submitted with the application to conduct an accurate assessment

- (i) ***Disabled access has not been provided to the nightclub above from the bar below and is a reason for refusal.***

**Response** – The application is for the use and fit-out of the ground floor bar, adequate access and accessible facilities are considered to be provided.

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 does not meet the aims, objectives and controls of the Sydney Local Environmental Plan 2005, Central Sydney Development Control Plan 1996 or the City of Sydney Late Night Trading Development Control Plan 2007. As such, the proposal is not acceptable and it is recommended for refusal, subject to conditions as shown in the attached decision Notice.

**The undersigned declare they have no conflict of interest in this Development Application.**

**Refused under delegated  
authority of Council**

**MEAGAN KANALEY**  
Planner

**ANDREW REES**  
Area Planning Manager