



Land and Environment Court of New South Wales

CITATION :	187 Kent Pty Limited v Council of the City of Sydney [2007] NSWLEC 88 <small>Text</small>
PARTIES :	APPLICANT 187 Kent Pty Limited RESPONDENT Council of the City of Sydney
FILE NUMBER(S) :	10576 of 2006
CORAM:	Brown C
KEY ISSUES:	Development Application :- conversion of 128 residential units into dual use residential/serviced apartments in part of an existing building - compatibility of uses - amenity impacts
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979 Sydney Local Environmental Plan 2005
CASES CITED:	Renaldo Plus 3 Pty Limited v Hurstville City Council [2005] NSWLEC 315

DATES OF HEARING:	01/02/07
DATE OF JUDGMENT:	2 March 2007
LEGAL REPRESENTATIVES:	APPLICANT Mr P Rigg, solicitor SOLICITORS Deacons RESPONDENT Mr S Kondilios, solicitor SOLICITORS Maddocks

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Brown C

2 March 2007

**10576 of 2006 187 Kent Pty Limited v Council of the
City of Sydney**

JUDGMENT

1 **COMMISSIONER:** This an appeal against the refusal by the Council of the City of Sydney (the council) of Development Application D2004/1402 to convert 128 residential units into dual use residential/serviced apartments in part of an existing building at 187 Kent Street, Sydney (the site).

Background

2 The building was originally constructed in 1958 and was known as 'Caltex House'. Approval was granted by the council on 13 June 1997 to convert the building into 143 serviced apartments (levels 1 to 8 and known as the 'Stamford Plaza Hotel') and 158 residential units (levels 9 - 27).

3 Development Application D2001/00301 sought to convert the serviced apartments on levels 1 to 8 into 128 residential units. The council refused the application on 13 December 2001. This decision was appealed to the Land and Environment Court and the appeal was upheld on 1 February 2002. Condition 6 of the consent stated that the accommodation within the building on levels 1 to 8 must not be used for the purpose of a *"hotel, motel, serviced apartments, private hotel, boarding house, tourist accommodation or the like... "*

4 On 31 August 2004, Council issued a Notice of Intention to Serve an Order. The reasons listed in the Notice included non-compliance with condition 6 of the Court granted consent.

5 The applicant lodged Development Application D2004/1402 on 12 November 2004 for the dual use of all apartments on levels 1 to 8 for residential and serviced apartments. The council refused the application on 18 July 2005.

6 A Section 82A review of the Determination of Development Application D2004/1402 was lodged 17 July 2006. The council refused the review on 29 September 2006.

The site and locality

7 The site is occupied by a 27-storey building that is subdivided into two strata plans, being Strata Plan 61897 and Strata Plan 88180. The strata plans represent the two separate uses approved by the council on 13 June 1997. The subject application relates only to Strata Plan 61897.

8 A mix of residential and commercial uses surrounds the site. The area to the north is characterised by multi-storey residential buildings, such as the "The Georgia" and "Highgate". The area to the south and west is characterised by commercial development such as the Maritime Trade Towers and Grafton Bond Store. The site has a frontage to Kent Street and the Western Distributor to the east.

The proposal

9 Development Application D2004/1402 (and subsequent s 82A review) proposes dual use of all apartments on levels 1 to 8 for residential and serviced apartments.

Relevant planning controls

10 The site is zoned City Centre under *Sydney Local Environmental Plan 2005* (LEP 2005). Mixed-use development, residential accommodation and

serviced apartment are permissible uses, with consent in this zone. The Dictionary to LEP 2005 provides the following definitions:

mixed-use development means a building or buildings in which two or more uses are carried out.

residential accommodation in Central Sydney means a building or part of a building that provides permanent or long-term accommodation, and includes residential flat buildings, dwellings, boarding houses, hostels, student accommodation and the like.

serviced apartment in Central Sydney is a form of tourist and visitor accommodation and means a building or part of a building that provides self-contained accommodation which is serviced or cleaned by the owner or manager of the apartments or the owners or managers agents.

11 Chapter 2 of LEP 2005 provides requirements for Central Sydney. Clause 33 states that before consenting to development, a consent authority must have regard to the objectives of the zone. Clause 36 provides objectives for the City Centre zone. The relevant objectives are:

- (a) to encourage Central Sydney's role and growth as one of the Asia-Pacific regions principal centres for finance, commerce, retailing, tourism, cultural activities, entertainment and government, and*
- (b) to permit a diversity of uses which reinforce the multi-use character of Central Sydney, and*
- (c) to facilitate the development of buildings and works that are scale and character consistent with achieving the other objectives of this zone, and*
- (d) to provide for increased residential development with appropriate amenity and to ensure the maintenance of a range of housing choices, and*

12 *Central Sydney Development Control Plan 1996* (DCP 1996) also applies. Clause 2.13.1 states:

The consent authority should not consent to a mixed-use development which includes two or more dwellings unless it is satisfied that separate lift access and a separate entrance will be provided for use exclusively for the dwellings.

13 Clause 6.1 provides amenity requirements for residential buildings and serviced apartments. The objective is:

To enhance the amenity of residential buildings and serviced apartments in terms of daylight, solar access, ventilation, privacy, outlook, noise, safety, recreation facilities and storage.

The issues

14 The council filed a Statement of Issues containing 3 issues. The issues relate to:

- 1) the impact on the amenity of future residents, including shared lift access (Issues 1 and 2),
- 2) the precedent for similar applications (Issue 3).

15 Mr Kondilios, for the council, raised a further issue during the hearing. He submitted under the terms of an existing s 88E Instrument, the site is cannot be used *"for any purpose other than as a "residential building" as that term is defined in the Central Sydney Local Environmental Plan 1996"*. As the proposed development is inconsistent with this requirement and as LEP 2005 does not contain any overriding provisions, the proposed development is prohibited.

16 Mr Rigg, for the applicant, objected to this issue being raised late in proceedings and submitted that he was not in a position to properly deal with this issue. He also submitted that the documentation provided by the council was not complete and that the council had already breached the terms of the s 88E Instrument with a previous approval.

17 It was agreed that the issue could not be properly considered at the hearing and in the event that the merits of the proposed development warranted an approval, the parties would be provided with a further opportunity to address this issue prior to final orders being made.

The evidence

18 The parties agreed to the appointment of Mr David Crane as the Court

appointed town planning expert.

19 Additional evidence was provided by:

- Ms Daxa Chauhan, owner/operator of café – lot 3,
- Mr Alex Fok, unit 913,
- Mr Tony Orr, unit 205,
- Mr Brian Wood, unit 806, Observatory Tower,
- Mr Chris Williams, unit 1101,
- Mr Peter Stavely, National Manager, Tourism and Transport Forum,
- Ms Hilda Byrne, unit 210,
- Mr John Murphy, unit 2307,
- Mr Jean-Luc Clavelle, unit 1709,
- Mr Ray Siddiqui, units 530 and 802,
- Mr James Wu, unit 801,
- Mr Michael Bell, unit 718,
- Mr John Lim, unit 2309.

Impact on the amenity of future residents ***Crane evidence***

20 Mr Crane states that cl 2.13 of the DCP 1996 is not applicable as the proposal does not involve a mixed-use development nor are there any provisions in DCP 1996 which would imply or suggest that the proposal would constitute a mixed-use development. Clause 6 of DCP 1996 relates to both residential buildings and serviced apartments and does not imply or suggest that the two uses cannot co-exist or that they should be considered as two distinctive mixed uses.

21 In his opinion, the design of the apartments on levels 1 to 8 are more suited to serviced apartments than for permanent residency. He sees no issue with security because of the full time receptionist/concierge service, security surveillance and card access system. He notes a lack of evidence to support the proposition that short-term occupants of serviced apartments are any noisier than long-term occupants of residential units and concludes that occupancy turnover is not a determinant of residential amenity.

22 Mr Crane also relies on the applicant's Plan of Management that details a number of administrative, security, noise and behavioural control measures to ensure compatibility between the two uses and consequently finds that the proposal is consistent with objective (d) and also advances objectives (a), (b) and (c) in cl 36.

Resident evidence

23 The owners of units within Strata Plan 61897 largely supported the proposal with 97% of individual lot owners consenting to the development application.

24 The owners of units within Strata Plan 88180 provided mixed responses although the majority of owners who provided evidence on site opposed the application. The main grounds of objection related to:

- increased noise and damage,
- reduced security,
- disproportionate costs associated with health club because of increased patronage from short term tenants,
- lift access available through basement between the different strata plans.

25 The main grounds of support related to:

- the dual use provides flexibility for potential tenants,
- security and noise can be controlled through staff on site,
- the design of the units is more appropriate for short term tenants.

Findings

Does cl 2.13.1 of DCP 1993 apply?

26 If the proposal is not defined as a mixed-use development, as suggested by Mr Crane, cl 2.13.1 of DCP 1993 would not apply and separate lift access and a separate entrance need not be provided.

27 The question whether the proposed use is defined as a mixed-use development was not an issue in the proceedings. It is not determinative as both residential accommodation and serviced apartment are permissible uses. Even if cl 2.13.1 does not apply, the question of shared access would be a valid consideration in the wider issue of compatibility between the residential and serviced apartment uses.

Are the uses compatible?

28 Mr Crane finds the uses are compatible whereas the council comes to the opposite conclusion. The council officers report (Tab 9, Exhibit 1) makes the following comments:

There is a difference in the living and activity patterns and the behaviour of short and long-term residents, and the responsibility to resolve and control any conflict between the uses and occupants falls entirely upon the serviced apartment managing agency. Short term residents have no long-term interest in the maintenance of the amenity within the building or the surrounding area. While it appears that the dual use has been

occurring on the site for a number of years, the reliance on the managing agency to maintain acceptable levels of residential amenity leaves open the potential for considerable adverse impact should changes to management occur in the future.

29 I accept the council's position on compatibility between residential accommodation and serviced apartments. While both are residential in nature, the fact that they are separately defined in LEP 2005 would suggest that they have different characteristics. I agree that there is likely to be a difference in behaviour, living and activity patterns between short-term and long-term occupants. A conclusion that short-term occupants are likely to have less concern about maintaining of the amenity of the building than long-term occupants is a finding that can be reasonably made, in my opinion. That is not to say that all short-term occupants are likely to have less concern about maintaining the amenity of the building than long-term occupants but only that there is likely to be a greater proportion who use the building differently through their behaviour and activities in and around the building.

30 The greater frequency of short-term occupants in and out of the building is potentially disruptive for long-term occupants, particularly at times such as early in the morning or late at night. These movements may not always create excessive noise but may occur at a time when long-term occupants reasonably expect not to be disturbed. These disturbances could relate to matters such as doors closing, noise from adjoining apartments and general conversation in common areas. While there may be measures, such as door closers to minimise potential noise impact, it would be unlikely that all sources of noise could be removed.

31 In general terms, long-term occupants would generally have a greater expectation and promote a more quiet and peaceful amenity than short-term occupants, as they would regard their apartment as a home compared to a temporary place to reside for short-term occupants. Long-term occupants are also likely to be less tolerant of disturbances and likely to be more concerned with activities that may potentially cause damage to the building, as they would have a greater feeling of ownership and ultimately be responsible through the Owners Corporation for repairs. While Mr Crane states that there is no evidence to support such a finding, I am satisfied that by simply adopting a common sense approach, the council's conclusion of incompatibility between the two uses can be supported.

32 For these reasons I find that there is an fundamental incompatibility between a mix of residential and serviced apartments that share the same floor and access points.

Can any measures be taken to address amenity impacts?

33 *Renaldo Plus 3 Pty Limited v Hurstville City Council* [2005] NSWLEC 315 identified a number of questions relevant to the appropriateness of use of a management plan as part of the measures to mitigate the impacts of a development. Those questions involved considering the consistency of the management plan with consent conditions, whether the management plan required people to act in an unlikely or unreasonable manner, the clarity of the requirements of the management plan to enable ready enforcement in the event of breach, whether the management plan was sufficiently effective to enable adequate operation even absent absolute compliance, effective communication of the management plan to employees and others engaged on site, effective complaint management procedures and procedures for the management plan to be updated and amended as required (including making those changes public).

34 The questions of whether the management plan was sufficiently effective to enable adequate operation even absent absolute compliance and whether communication of the management plan to employees and others engaged on the site are particularly relevant in this case. On the first question, I am not satisfied that a management plan can deal with spontaneous events of noise that may disturb the existing residents. Again, the noise events may not necessarily relate to unacceptable behaviour but to the normal comings and goings of short-term tenants. The existence of full-time staff is a positive aspect of the proposed development and would be effective in managing most situations around the foyer area however it could not be reasonably expected that staff would be in a position to address spontaneous events of noise elsewhere in the building.

35 On the second question, I am unsure how short-term occupants can be bound by the contents of the management plan. Even if the contents of the management plan are explained to each short-term occupant (and this has problems in itself) there is no obligation to comply with the requirements in the same way as if the management plan applied to employees or other persons associated with the holder of the consent. Enforcement of the contents of the management plan would be virtually impossible for short-term occupants and as such it has minimal effectiveness to address any amenity impacts.

36 For the reasons in the preceding paragraphs I do not accept that a management plan will provide an effective means of addressing potential amenity impacts that may occur on the site.

The zone objectives

37 Clause 33 states that before consenting to development, a consent authority must have regard to the objectives of the zone. In accepting that the proposed development is consistent with objectives (a), (b), (c) and part (d), I am not satisfied that the proposed development adequately addresses

part objective (d) in that *appropriate amenity* cannot be provided with a mix of residential and serviced apartments that share the same floor and access points. Consequently, I find the proposed development is unacceptable and the appeal should be dismissed.

Precedent

38 Precedent is a valid planning consideration (*Goldin & Anor v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995* [2002] NSWLEC 75) although I am not satisfied that the particular characteristics of this proposal, including the layout of the apartments and the separate strata plans, would likely be that similar to other applications that any reasonable comparisons could be drawn. The issue is essentially redundant following the findings in the preceding paragraphs however taken in isolation; precedent is not an issue that would support the refusal of the application.

Orders

39 The orders of the Court are:

- 1) The appeal is dismissed.
- 2) Development Application D2004/1402 to convert 128 residential units into dual use residential/serviced apartments in part of an existing building at 187 Kent Street, Sydney is refused.
- 3) The exhibits are returned.

G T Brown
Commissioner of the Court

that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.