

# Land and Environment Court

## New South Wales

**Medium Neutral  
Citation:**

**Oaks Hotels and Resorts (NSW) No 2 Pty Ltd v  
The Council of the City of Sydney [2011]  
NSWLEC 1054**

**Hearing dates:**

7 & 8 June, 15 July & 14 August 2010, plans  
submitted 23 August 2010

**Decision date:**

01 March 2011

**Before:**

Murrell C

**Decision:**

1. The appeal in respect of the property known as 'Maestri Towers' at 298 to 340 Sussex Street and 515 to 519 Kent Street is dismissed.
2. The development application number D/2009/2057 submitted to the City of Sydney Council and as amended for the conversion of 143 apartments, from residential to serviced apartments is refused consent.
3. The exhibits are returned to the parties except Exhibit 1.

**Catchwords:**

DEVELOPMENT APPLICATION:

Change of use from residential apartments to serviced apartments for 143 of the 334 residential apartments within an existing building known as 'Maestri Towers'.

Conflict with, and impact on amenity of residential apartments in the same building and on the same floors without separate access and facilities; inconsistencies with LEP and DCP and SEPP 65; and precedential effect

**Legislation Cited:**

Environmental Planning and Assessment Act 1979  
State Environmental Planning Policy No. 65  
Sydney Local Environmental Plan 2005  
Central Sydney Development Control Plan 1996

**Cases Cited:**

Botany Bay City Council v Premier Customs  
Services Pty Ltd [2009] NSWCA 226  
Goldin & Anor v Minister for Transport  
Administering the Ports Corporation and Waterways  
Management Act 1995 [2002] NSWLEC 75

Jarasius v Forestry Commission of New South Wales (1989) 17 LGRA  
Jonah Pty Ltd v Pittwater Council [2006] NSWLEC 99 144 LGERA 408  
Stockland Development Pty Ltd v Manly Council [2004] NSWLEC 472 revised - 01/10/2004  
The Oaks Hotels & Resorts Pty Ltd v City of Holdfast Bay and Another [2010] SAERDC 16  
Zhang v Canterbury City Council [2001] NSWCA 167  
Principal judgment

**Category:**

**Parties:**

Oaks Hotels and Resorts (NSW) No 2 Pty Ltd (Applicant)  
The Council of the City of Sydney (Respondent)

**Representation:**

Counsel:  
Mr T Hale SC (Applicant)  
Mr J Maston (Barrister) (Applicant)  
Mr M Baird (Barrister) (Respondent)  
Solicitors:  
Minter Ellison (Applicant)  
The Council of the City of Sydney (Respondent)

**File Number(s):**

10056 of 2010

---

## JUDGMENT

- 1 COMMISSIONER : The applicant in these proceedings is seeking development consent for the change of use from residential to serviced apartments for 143 apartments in the buildings known as 'Maestri Towers' at 298-304 Sussex Street and 515-519 Kent Street, Sydney. The appeal is for the refusal by the City of Sydney Council of development application (D1200912057) .

### The Site and Locality

- 2 The site is L-shaped with a 41m frontage to Bathurst Street and a similar frontage to Sussex Street that provides both the main pedestrian and vehicle access to the complex. The complex also has a 16 m frontage to Kent Street and this serves as a secondary pedestrian access. The total site area is 2,165 sq m .
- 3 The site is occupied by basement parking and podium levels with two towers and is comprised of:
  - a. a 27-storey building on Sussex and Bathurst Streets containing 250 residential apartments, 24 serviced apartments in the podium Levels 1 to 7 , and 5 retail tenancies;
  - b. a 27-storey building on Kent Street containing 84 residential apartments; and

c. 7 levels of basement car parking.

- 4 There are a total of 358 apartments, comprising 334 residential apartments and 24 serviced apartments.
- 5 The existing 24 serviced apartments are located on podium Levels 1 to 7 in the southeast corner of the Sussex Street building and are serviced by separate lift and lobby area that is accessed via the main entry from Sussex Street. In February 2010 the Council granted approval for a change of use of these 24 units to residential apartments.
- 6 Surrounding land uses are a mix of commercial, retail and residential. The site is in close proximity to Darling Harbour, Chinatown and the entertainment precinct of George Street between Bathurst and Liverpool Streets.

## **Background**

- 7 For the subject buildings on this large amalgamated site there is a history of numerous approvals and modifications from 1997. The following is a description of the Sussex Street building as amended and constructed.
- 8 The Sussex Street building was originally approved in 1997 and contains 274 units in total, ground level retail and basement parking with 121 residential apartment spaces and 39 spaces for serviced apartments. There is one entrance lobby and 4 lifts servicing the Sussex Street building.
- 9 For the Kent Street building a approval was first granted in 1998 to erect a 27-storey building. This consent was amended and the constructed building contains 4 floors of commercial offices, 84 residential apartments, and 89 residential car spaces. Condition 10 of the development consent provides for a permanent residential restriction for residential apartments on Levels 5 to 26. No serviced apartments are approved for the Kent Street building. The building is accessed by an entrance lobby at Kent Street and two lifts.
- 10 On 17 June 1999 approval was granted for consolidation of the land to construct 7 common levels of basement parking and carry out alterations to the ground, first and second levels of the above multi-storey approved developments.
- 11 Condition 5(a) of the consent (as amended under D99-00255/G) provides for a maximum 263 car spaces within the amalgamated site, comprised of 259 residential spaces, (nil serviced apartment spaces), and 4 commercial/retail spaces. The development (as amended) makes no provision for car parking for any serviced apartments within the site. It is understood that an existing driveway at Bathurst Street is currently disabled in accordance with a direction by the Roads and Traffic Authority, thereby leaving one single driveway access point at Sussex Street for the entire development.

- 12 Strata subdivision was granted and a s 88B Instrument provides for restrictions on use of land, being serviced apartments for 24 lots only, with the balance of the apartment units restricted to residential use only. This restriction on the use is also consistent with the conditions on the original consents.
- 13 In summary, the development (as amended) contains 2 multi-storey buildings containing a total of 358 units comprising 334 residential units (250 units in the Sussex Street building and 84 units in the Kent Street building) and 24 serviced apartments at podium Levels 1 to 7, ground level retail space within the Sussex Street building, commercial offices on Levels 1 to 4 of the Kent Street building, and basement parking with 263 spaces comprising 259 residential car spaces, no car spaces for serviced apartments, and 4 commercial/retail car spaces.
- 14 By way of background, his Honour Sheahan J heard Class 4 proceedings in this Court (*City of Sydney v Oaks Hotels No.2 Pty Ltd* 40515 & 40516 of 2009) and on 30 September 2010 he found that: "The way it (Oaks 2) deals with the units in its care...is clearly to "use" them as serviced apartments, in many cases beyond the conditions of consent.

## **The Proposal**

- 15 The application now before the Court seeks consent to change the use 143 of the 334 residential units within the complex to serviced apartments (42.5%). If the consent to change the 24 serviced apartments to residential is taken up this becomes around 40% of all apartments would be serviced (143 out of 358), and if not taken up the percentage of serviced apartments in the complex would be 46% (166 serviced out of 358 total number of apartments).
- 16 The proposal requires the use of lobby and lifts to access the apartments and provides for the use of common property facilities within the building for guests, including the pool and spa.
- 17 The units are distributed over the levels of both the towers. The number of units in the Kent Street tower proposed to be converted from residential to serviced apartments is 25 on levels 3 to 26 with 1, 2 or 3 on each level. The Sussex Street building has 117 residential units proposed as serviced apartments on levels 1 to 26 ranging from 1 unit up to 8 per floor. The proposed serviced apartment mix is 105 x 1-bedroom apartments (73%) and 38 x 2-bedroom apartments (27%).
- 18 There are 114 car parking spaces associated with the use of the proposed serviced apartments.

## **Contentions**

- 19 The Respondent's Statement of Facts and Contentions states the contentions as follows:

### **1. Residential amenity Contention**

The inherent conflicts associated with the proposed scale and mix of residential and serviced apartments, in particular, the co-location of apartments on the same building levels and using the same points of access, would result in unacceptable disturbances to longer term residents and diminution of the experience of serviced apartment guests, contrary to the City's goal of maintaining a high standard of amenity for residential apartments.

#### **Particulars**

Aims and objectives of the Sydney LEP

(i) One of the objectives of the City Centre zone under **Clause 36(d)** of the *Sydney LEP* is to provide for increased residential development with appropriate amenity and to ensure a range of housing choices.

Objectives of the Sydney DCP

(ii) **Clause 6** of the *Central Sydney DCP* seeks to ensure that reasonable levels of amenity, consistent with a Central Sydney location, are achieved in residential buildings including serviced apartments. The Strategy in Clause 6.1 is to ensure that residential buildings will be of high amenity. Further, serviced apartments should have a comparable level of amenity to residential buildings so that any subsequent conversion of serviced apartments to permanent residential stock is not constrained by poor amenity.

Physical / operational constraints

(iii) The proposal involves an intensification of use of common property on a daily basis by guests, and hospitality and maintenance staff. The building's design and its facilities do not lend themselves to an efficient or effective functioning of the property for the proposed number and distribution of serviced apartments.

(iv) The intermingling of residential and serviced apartments throughout the development, particularly on the same floor levels, is considered incompatible and leads to detrimental amenity impacts, or decreased amenity, to the long-term residents of the building.

User conflicts and expectations

(v) The proposal cannot be considered a suitable mix of long-term and short-term residential accommodation uses. There is a fundamental incompatibility between the proposed mix of residential and serviced apartments that share the same floor levels and access points, in consideration of the difference in behaviour, living and activity patterns of long-term residents compared to short-term occupants, and the greater expectations of long-term residents for quiet amenity and care for the building through a greater sense of ownership, accountability and permanence compared to temporary residents.

Car park conflicts and operation

(vi) User conflicts and security issues are likely to arise due to the intermingling of residential and serviced apartment car spaces over the multiple basement levels beneath both buildings.

(vii) The lack of any check-in system for serviced apartment guests arriving at the site by car for the first time, or any lay-by car space to facilitate the check-in process for newly arrived drivers, will likely give rise to user conflicts through illegal parking, driveway and footway obstructions, and potential safety hazards .

## Management limitations

(viii) The responsibility to resolve and control conflicts between long-term residents and short-stay users falls entirely on the serviced apartment managing agent.

(ix) A Plan of Management, covering such things as the use of the main lobby, baggage storage, location and use of trolley and cleaners' stores, user protocols for lift and car park access, has not been submitted with the application.

## **2. SEPP 65**

As the application involves the substantial redevelopment of an existing residential flat building, the provisions of SEPP 65 apply. The lack of separation of facilities for serviced apartment users and long-term residents and commercial tenants results in an unacceptable level of user conflicts and diminished safety and amenity within the building, contrary to SEPP 65.

### **Particulars**

(i) The SEPP seeks to improve the design quality of residential flat developments. In particular, *Clause 2(3)(d)* of the SEPP seeks to maximise the amenity, safety and security of residential flat development for the benefit of its occupants. *Part 2, Clause 16 - Principle 8* states that "good design optimises safety and security, both internal to the development and for the public domain" and this is achieved by "providing clear, safe access points, ... and clear definition between public and private spaces."

(ii) The serviced apartments do not have exclusive lift and entry access; rather, users of serviced apartments and associated hospitality and maintenance personnel will share the same lifts, lobby, corridors and other common property with longer term residential and commercial users of the building. Further, there is no separation of car park access between users. The proposal does not provide for suitable levels of territorial reinforcement, in particular, in lifts and corridors, and undermines the safety, security and amenity of residents.

## **3. Access to mixed use developments**

The proposal does not provide separate lift access and separate entrances between serviced apartment users and long-term residents, contrary to the DCP. The consequential impacts on safety and amenity are not acceptable.

### **Particulars**

(i) *Clause 2.13.1* of the *Central Sydney DCP* provides that 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.

### **Unit mix**

The unit mix is contrary to the DCP.

### **Particulars**

(i) *Clause 6.1.30* provides for a maximum of 60% of 1-bedroom apartments within serviced apartment developments. The proposed development, comprising 105 studio/1-bedroom units out of 143 serviced apartments, amounts to 73% studio/1- bedroom units.

## **5. Financial burden - building upgrades, repairs and maintenance**

The proposal will require extensive building upgrades for fire safety and for access for persons with a disability. The proposal will likely lead to a disproportionate financial burden on long-term residents, in terms of retrofitting the building, and as well, for operational repairs and maintenance.

## Particulars

(i) The *Access DCP* requires the provision of continuous travel paths and facilities for persons with disabilities. As the proposal is a substantial redevelopment of the building for serviced apartment use, no concessions or exemptions from the requirements of the DCP are considered to be applicable.

(ii) The proposed change of use entails a change of building class under the Building Code of Australia (BCA) from Class 2 Residential Apartments to Class 3 Serviced Apartments. The submitted BCA Assessment Report prepared by Peter Dix and dated August 2009 indicates a number of items that will be required to be rectified or updated for the proposed building to comply with the BCA, including upgrades of smoke management systems and facilities for persons with disabilities. The required accessibility upgrades outlined in Section 4.1 of the BCA report are extensive and apply throughout the premises, including building entry, lifts, ramps and stairs, car park, swimming pool and sauna, and sanitary facilities. While not all apartment owners have given consent to the development application, all owners will nevertheless be required to bear the burden of retrofitting costs associated with the change of use.

(iii) In addition, due to the difference in behaviour and expectations between short and long-term residents, it is likely that short-term occupants who do not have a financial or stewardship interest in the building are more likely to generate increased general wear and tear to the hallways and other common property. Therefore, there is likely to be a disproportionate financial burden placed upon long-term residents for the repair and maintenance of common property attributable to the wear and tear caused by serviced apartment users.

## Orderly development

The proposal does not constitute orderly and high quality development of land.

## Particulars

(i) **Clause 5(a)(ii)** of the *Environmental Planning and Assessment Act 1979* provides that one of the objects of the Act is to encourage the promotion and co-ordination of the orderly and economic use and development of land.

(ii) The *Sydney LEP* aims to encourage orderly, sustainable and high quality development of land and other resources within the City (**Clause 11(d)**), and one of the strategies for achieving this aim is to protect and enhance the amenity of residents, workers and visitors to the City (**Clause 12(f)**). The aims and strategies of the *Sydney LEP* are to be applied in a consistent manner so as to provide certainty for applicants, investors, residents and the public (**Clause 13 (d) and (e)**).

(iii) The proposal is an ad hoc piecemeal change of use of the site that adversely impacts on existing residential and commercial users. Approval of the development would be a departure from the City's consistent application of policy and provisions relating to residential and serviced apartment buildings. The incremental increase in the serviced apartment component of a predominantly residential flat building such as that proposed undermines certainty, in particular, for investors and residents, and especially in terms of amenity expectations and financial considerations as outlined above.

## 7. Public interest

The proposal is not in the public interest as it is contrary to the provisions of relevant planning instruments, development control plans, and in consideration of public submissions.

## Particulars

(i) The conversion of existing residential units to serviced apartments within this development constitutes an undesirable and inappropriate reduction in the stock of quality permanent long-term residential accommodation within the City, contrary to **Clause 36(d)** of the *Sydney LEP*.

(ii) The proposal is likely to give rise to unreasonable levels of user conflicts which may place an undue burden on public resources in terms of Council compliance actions, and police investigations in terms of breaches of security.

On the balance of the above matters and in consideration of the public submissions received by Council, approval of the development would not be in the public interest.

## Statutory Planning Framework

- 20 The subject site is within the City Centre Zone under the Sydney Local Environmental Plan 2005. Clause 11 of the LEP contains the aims that include:
- to protect and enhance diversity;
  - to foster environmental economic social and physical well-being and;
  - to encourage orderly, sustainable and high quality development.
- 21 The strategies for achieving the aims include:
- development of the city as a vibrant culturally diverse multi-use city centre;
  - continued growth of a permanent residential population in central Sydney;
  - provision of visitor and tourist accommodation;
  - protection and enhancement of the amenity of residents, workers and visitors.
- 22 The Principles to be followed in implementation of the LEP referred to by the council are contained in cl 13 and in particular council identified:
- (d) consistent application of the provisions of this plan so that the aims and strategies can be achieved and implemented and provide certainty for applicants for development consents, investors, residents and the public
- (e) consistent and proper regard for the aims and strategies of the plan in particular when development applications are determined.
- 23 The objectives of the City Centre Zone are contained in cl 36 as follows:
- to encourage Central Sydney's role and growth as one of the Asia-Pacific region's principal centres for finance, commerce, retailing, tourism, cultural activities, entertainment and government, and
  - to permit a diversity of uses which reinforce the multi-use character of Central Sydney, and
  - to facilitate the development of buildings and works that are of a scale and character consistent with achieving the other objectives of this zone, and to provide for increased residential development with appropriate amenity and to ensure the maintenance of a range of housing choices, and
  - to enhance the amenity of parks and community places by protecting sun access, and
  - to ensure wind levels are consistent with pedestrian comfort

- and the amenity of the public domain, and
- to ensure satisfactory sky exposure, levels of daylight and ventilation to the public areas of Sydney, including the parks, places, streets and lanes, and
- to recognise and enhance the character of Special Areas, and
- to facilitate the conservation of items and areas of heritage significance, and
- to protect the fine-grained urban fabric of Central Sydney, especially the existing network of streets and lanes, and to provide for high quality development that contributes to the existing urban form, and
- to extend retail uses on frontages to retail streets, and
- to provide active frontages to streets.

24 Apartments are a permissible use within the City Centre Zone and require development consent.

25 The relevant definitions contained in the LEP include:

- dwelling in Central Sydney is a form of residential accommodation capable of being separately occupied.
- 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.
- tourist and visitor accommodation means a building or part of a building that provides temporary or short-term accommodation for travellers and tourists who generally have their principal place of business elsewhere. Tourist and visitor accommodation includes serviced apartments, backpacker accommodation, hotels, guesthouses, bed-and-breakfast establishments, motels and the like.

26 The *Central Sydney Development Control Plan 1996* is relevant for the assessment of the application. This contains a provision for access to mixed-use developments wherein at 2.13 it states:

The consent authority should not consent to a mixed-use development, which includes 2 or more dwellings unless it is satisfied that separate lift access and a separate entrance will be provided for use exclusively for the dwellings.

27 Section 6 contains provisions for the amenity for residential buildings and serviced apartments:

The consent authority is seeking to ensure that residential buildings within Central Sydney will be of high amenity, encouraging an increase in the residential population of the city (see Figure 6.1). Serviced apartments, which often cater for longer stay visitors, should have a comparable level of amenity to residential buildings so that any subsequent conversion of serviced apartments to permanent residential stock is not constrained by poor amenity.

For the purposes of this section, the term 'dwelling unit' refers to units in both residential buildings and serviced apartments. The amenity of dwelling units is influenced by factors including daylight access to the principal living room, siting, and orientation of the development to provide privacy.

The following provisions are intended to ensure a reasonable level of amenity for dwelling units, recognising that achievable residential amenity in Central Sydney may differ from that achievable in lower density situations. The provisions concentrate on the design of dwelling units, their relationship to their surroundings and key issues of internal amenity. Relevant aspects of AMCORD - A National Resource Document for Residential Development (Department of Housing and Urban Development 1995) should also be considered during the design phase.

28 *State Environmental Planning Policy 65 - Design Quality of Residential Flat Development* applies to:

- (a) the erection of a new residential flat building and
- (b) the substantial redevelopment or the substantial refurbishment of existing residential flat building and
- (c) the conversion of an existing building to residential flat building. In particular, the council referred to the aim contained in clause 2(D) to maximise amenity, safety and security for the benefit of its occupants and the wider community.

29 Clause 16 of the SEPP on safety and security states:

good design optimises safety and security, both internal to the development for the public domain.

30 In the Statement of Facts and Contentions the respondent also identified s 5(a) (ii) of the Environment Planning and Assessment Act that requires that the orderly and economic use of the land and section 79C(1): subcl (b) the likely impacts of the development; (c) the suitability of the site for the development; (d) submissions; and (e) public interest.

## **EVIDENCE**

31 On behalf of the respondent council, evidence was given to the Court by a number of objectors, who either own apartments or are owner occupiers of apartments within the towers. Ms Susanne Cheng, town planner for Council gave expert evidence. For the applicant: Mr Paul Mitchell consultant town planner; Mr Todd Spagnolo and Mr Daniel Sprange both managers with the Oaks Group, gave evidence to the Court.

32 The respondent tendered a volume of resident submissions and the Court also heard from a number of objectors who are either owner occupiers, or owners of commercial or residential units and also those that have been a tenant within the building.

33 The Court heard that many considered they had purchased a unit in a building that contained no serviced apartments. One objector expressed concern that there are currently a number of serviced apartments being operated within the building and the concern that the impacts would increase in the future. These impacts included luggage and lifts, linen in the lifts, waiting times for lifts and security, and two break-ins were also identified where the police had been called on both occasions. Concern was also expressed about the noise from the lobby and holidaymakers. The lobby is a short distance from the mezzanine floor, where professional offices are located and as such, concern was expressed about being able to present a professional business. The example was given:

"It wouldn't look very nice if there are people with bags waiting downstairs in the Court here in the foyer trying to push past them as you come to work. I don't like seeing it. It's even worse when it impacts on when I have guests and visitors... to negotiate business and they have the same experience pushing past guests with noise, with bags and the like."

34 Concern was also expressed that the Statement of Environmental Effects stated that guests are generally long-term guests for 3 weeks. However, the witness indicated that it is a lot less than 3 weeks.

"The normal stay is very short. Where I park my car, the space next to me is a serviced apartment space. There is a different car in there every day, every second day. There's been some damage to my car because people don't park carefully, obviously if you're a guest and not used to parking in tight spaces. My car's been dinged on two occasions. Also the website advertised one night accommodation. It's very easy to go to Google and try to book a room ... if you rang Oaks now by phone you'd get one night accommodation quite easily."

35 Concern was also expressed about the fact that there are only two lifts that service 27 floors and rooms are serviced through the same lifts. Photographs in the bundle of linen in the lifts and in common areas were referred to. The Court was told that a large metal linen trolley, is observed in the lifts very often, "You'll notice it's also metal, so they're scraping on the edges of the lifts and on the walls as they go through, scratching lifts, causing damage wear and tear etc." The witness also confirmed that plastic coloured trolleys are also used, but this is for bulk towels that have arrived. Another photo showed a metal trolley in the mailroom, and the objector expressed concerns that one has to push past trolleys to check ones mail. By way of example, it was mentioned that:

"There are only two lifts servicing the offices, commercial offices and also the residential area. It's often slow, waiting at the bottom for a lift to arrive, because it's being used by so many people and then when it does arrive, I mean obviously there's trolleys, there's people with luggage so you can't get in, you have to wait for the next lift two only lifts, are bad enough. Just this morning I found a notice from Oaks basically saying the lifts will be out of work for 7 days due to maintenance. So we're now down to one lift for 30 floors for 7 days."

36 Another owner of a unit, with a tenant, said that the costs of the levies have gone up dramatically in the last three or so years by over 50%. Another objector advised the Court that the impact of the short term residents will have through the large flow of people and the damage that will occur to all common areas, the gym area, the pool area and the like.

"The environment itself I don't believe will be the same as an environment with to longer term tenants, so with respect to that I believe it will be detrimental to my investment value, also my ability to be able to tenant it with tenants over a period of time due to the long-term damage, the way the building is perceived".

37 A resident owner expressed concern to the Court about the difficulty accessing the car parking and said he had been blocked from the car park entry because people have nowhere to park to book into the hotel and the Sussex Street entrance is the only entrance to the serviced apartments and the car park of the building and there is no facility for dropping off and picking up hotel guests. He also expressed concern about being caught in the lift and the weight of the trolleys full of towels overloading the lift, photographs were tendered in the lift with the large trolleys. He said there were probably four different types of trolleys, depending upon if they are service trolleys or transporting the linen.

38 Concern was also expressed about blocking access to the mailroom and the fact that the mailroom has been converted to a storage room and the conversion of the games area that is no longer in existence because of serviced apartments requirements. Concern was also expressed about deliveries associated with the serviced apartments to the Kent Street side, that one would then you need to go down in the lifts from the parking area and then up serviced elevators to the Sussex Street side, so that they can be transported further in the lifts for apartments in that tower. A resident owner expressed great concern about the safety of his son being put at risk by the activities associated with the serviced apartment.

39 Another objector stated that the current levy has gone up 57% from November 2006 to June 2010. Concern was also expressed as a resident owner paying disproportionately higher cost in relationship to the serviced apartments, and an attachment was referred to in the bundle about air-conditioning, where 60% of the air-conditioning repaired in 2008 was for those that belonged to serviced apartments. The objector calculated this by looking at the mailboxes

that were identified as, please forward to reception, as those that are used as serviced apartments. The lift maintenance reports were also referred to, that were contained in the bundle that showed the log sheet of incidents of lift maintenance reported. For example: "Passengers trapped, seven adults and two kids, many suitcases, tripped switch." The residents also reported incidents of where other cars had been parked in their car parking spaces.

- 40 The Court met onsite the first morning of the hearing with the parties and inspected the subject building. The Court also had the benefit of statements of evidence from the planners and also a joint report and concurrent evidence.
- 41 In their joint report, the planners agreed that the minimum stay of 7 nights would alleviate some potential impacts from short term users of the building. The experts also agreed that the behaviours of residential apartment owners, tenants and serviced apartment occupants are difficult to predict or determine with certainty and that there will be a proportion of anti social occupants within all three types of users.
- 42 For contention 1 "inherent conflicts associated with the proposed scale and mix of residential and serviced apartments, in particular the co-location of apartments on the same building levels and using the same points of access..." Mr Mitchell anticipates that the serviced apartment occupants would typically reside in the building for about three weeks, whereas Ms Cheng from her research of the marketing, "it appears the stay is oriented towards shorter periods."
- 43 Mr Mitchell considers that "the distinction in use between residential and serviced apartments is minor, to the extent of being immaterial", whereas Ms Cheng maintains there is a distinction between the expectations and behaviours of residents and serviced apartment users, because the latter group are impermanent tourists and visitors, compared to owners/residents. Ms Cheng also notes that the definition of tourist and visitor accommodation in the draft standard instrument is, "accommodation not being a dwelling house." Mr Mitchell points to the definition of tourist and visitor accommodation and residential accommodation, both including hostels and backpacker accommodation.
- 44 Mr Mitchell considers that typically users are workers and longer term guests with accommodation costs met by employers and in such circumstances, guests would be working long hours and not inclined to noisy late-night activities. Ms Cheng disagrees that this description is typical. Ms Cheng is of the opinion that "whether they are owner occupied or long-term tenants, that renters have a greater interest in caring for the building, in order to have their rental bond returned and they have a greater sense of ownership, accountability and permanence, compared to visitors and guests." Mr Mitchell

considers that serviced apartment guests would also have an interest in caring for the building, as credit card information is taken and that a proportion of renters and similarly serviced apartment guests, would have less interest in the care of the building.

- 45 In terms of user conflicts and expectations, Mr Mitchell considers that "the behaviours, which underlie the impacts are dependent on the standard of accommodation, as opposed to the length and type of tenure." Ms Cheng on the other hand, considers "the permanence of residents and the impermanence of serviced apartment users is a critical difference that gives rise to different behavioural norms, while other factors such as the standard of accommodation and supervision are secondary." The planners agreed however, that potentially a higher proportion of short term occupants would be disrespectful of neighbours.
- 46 Mr Mitchell, states that most visitors travel to and from interstate by air, resulting in the underutilisation of car parks. Ms Cheng is unable to confirm that a majority of the guests do not bring a vehicle with them, or hire a vehicle, for all or part of the stays, however, photos taken by residents clearly show windscreen notices with names of guests and durations of stays, indicating there is a demand for car spaces by serviced apartment guests.
- 47 On the question of movement patterns in lifts and corridors and common areas of serviced apartment occupants and permanent residents, Mr Mitchell is of the opinion that they would be similar, whereas Ms Cheng considers serviced apartment use will give rise to more peak movement times during check-in/out periods, with surges when groups arrive. For example sports teams or tour groups arriving and generate a greater turnover of occupants per unit. She also considers there are additional movements of baggage, service and maintenance trolleys required for serviced apartment use in the building. Mr Mitchell considers that sports teams would be unlikely to stay in serviced apartments due to their price and a high proportion of one bedroom apartments.
- 48 In summary, the planners agreed that there are inherent differences in behaviour, living and activity patterns, however they disagree over the extent of these differences and their impacts.
- 49 During Ms Cheng's site inspection, she witnessed a congested reception desk in the lobby and wear and tear in hallways likely to be attributable to cleaning carts, and cars parked in incorrect spaces. Mr Mitchell disagrees that the wear and tear is likely to be attributable to cleaning carts, as these are plastic and less than a metre in width and he said that the wear and tear that was seen in the building could potentially be attributed to residential tenants moving furniture in and out. Ms Cheng considers that the daily trolley traffic is more

likely to cause greater cumulative wear and tear to the building than removalists. Mr Mitchell considers that the additional cleaning services for serviced apartments would only provide a marginal increment of additional potential wear and tear, whereas Ms Cheng considers that the number and distribution of serviced apartments and the required daily travel paths for utilities and carts would be significant, over and above any such requirements associated with residential apartments.

- 50 Ms Cheng considers the manner of distribution of serviced apartment car spaces, intermingled with residential car spaces throughout seven basement levels, is difficult to supervise and not appropriate, especially for serviced apartment guests who are not familiar with the car park layout.
- 51 On the issue of the community games room, the planners agree that the condition of consent is not being complied with as it is currently being used as a mailroom and cleaners' store. Although it was noted that this was approved by the executive committee. Ms Cheng notes that the mailroom is also used for storing service trolleys for serviced apartments, which disrupts the ordinary use of this common property. She notes also the luggage store occupies an area of the main entry foyer that is not in accordance with the approved plans. In her opinion this is an example of conflicts in the use of space in the building arising from serviced apartment use.
- 52 Incremental changes, Ms Cheng said have seen the mail room relocated from the ground floor at Sussex Street, to the current location and a luggage store located in open foyer space to the benefit of the serviced apartment use. Mr Mitchell understands the mailroom is not used for the storing of trolleys, and are stored in the cleaners' store.
- 53 On the conflicts and impacts on long-term residents as detailed in their submissions, Mr Mitchell disagrees that the issues raised are directly attributable to serviced apartments and argues that these are common issues seen in residential buildings.
- 54 Ms Cheng raises the issue of a lack of any check-in system to serviced apartment guests arriving at the site by car, or any formal parking lay by to facilitate the check-in process. Mr Mitchell states that there is legal parking outside the building at certain times and guests can only bring cars on site on a prearranged basis.
- 55 On the issue of obstruction, inconvenience and delays from congestion of the lobby for permanent residents, Mr Mitchell is of the opinion that these would be for occasional short periods, whereas Ms Cheng does not agree this would be occasional. She notes that:

"The physical pinch point will persist, even if some furniture is removed, that is the couches, and that 40% of the units in the building are proposed to be serviced apartments. The operation of the business means that lift and lobby traffic will be a persistent and daily occurrence more acute during summer period, nevertheless an ongoing state of operation."

- 56 Ms Cheng considers the main physical constraint is the lift service, and that the serviced apartment use will strain finite lift capacity, because there are peak check-in/out times and the number of passengers per trip would be reduced by serviced apartment users, who typically have baggage. The fact that there is no dedicated lift for serviced apartment users, means residents lift users would be adversely affected on a routine daily basis. Mr Mitchell does not agree that the movements of serviced apartment guests will constrain lift services.
- 57 The council contends there is inadequate storage facilities for luggage, linen trolleys and maintenance carts and the common property has been assigned in part, for the baggage room. Mr Mitchell disagrees that the storage facilities are inadequate, and that the store room was approved by the executive committee for which The Oaks pay a fee. Ms Cheng is of the opinion that this takes away circulation space in the lobby and the DA documentation does not provide details for these facilities.
- 58 Mr Mitchell considers that any incompatibility can be managed effectively. Ms Cheng is of the opinion that the proposal gives rise to an over reliance on management, which is subject to change and the critical planning issue of ensuring the mix of uses is physically compatible it is not addressed by the application. She further considers that given the proposed number and manner of distribution of serviced apartments throughout the buildings, the proposal would not provide reasonable levels of amenity for residential apartment residents.
- 59 The planners agree that a plan of management would be beneficial however Mr Mitchell considers that this would be effective if it was largely self enforcing. Ms Cheng considers that the quality of implementation of a plan of management, including the effective resolution of any incidences, would vary depending on the managing agent, the quality of which cannot be assured.
- 60 On the issue of reasonable levels of amenity, Mr Mitchell argues that as the DCP seeks to have similar levels of amenity for serviced and residential apartments, this should allow for a change to and from serviced apartments. Ms Cheng disagrees, as a strategy contained in the DCP states that serviced apartments should have a comparable level of amenity to residential buildings so that any subsequent conversion of serviced apartments to permanent residential stock is not constrained by poor amenity.

- 61 The planners also disagree about the change of use and the amenity impacts. Mr Mitchell considers that the building was designed and approved to enable a change of use, without any diminution of overall amenity. Ms Cheng notes that the proposal leads to over 40% of total units being serviced apartments, which is a significant number and the manner of distribution on different levels is inappropriate, while 24 serviced apartments have previously been approved at the site, they were located in a discrete part of the Sussex Street building with their own lift.
- 62 The experts do not agree as to the extent the proposal constitutes substantial redevelopment, and whether the provisions of SEPP 65 apply, or whether it is a change of use of the existing building. Mr Mitchell considers the proposal is not a substantial redevelopment, as few works are necessary for the conversion of the apartments to serviced apartments. Ms Cheng considers that the proposed change of use of 40% of the units within the complex is a substantial redevelopment, in terms of use, character and impacts.
- 63 On the question of whether the residential apartments and serviced apartments represent a mixed use, Mr Mitchell is of the opinion that it is exclusively residential and not a mixed use, whereas Ms Cheng is of the view that both buildings are mixed use, by virtue of the difference between residential accommodation and serviced apartments and the different BCA requirements. Mr Mitchell accepts that the Kent Street building is already a mixed use building, in that it also has a commercial component. Mr Mitchell considers that as a solely residential development, separate access for different types of short and long term residents is not necessary. He notes that the commercial uses at levels 2 to 6 of the Kent Street building, are serviced by the same access and that there is only a separate entrance for the ground floor retail.
- 64 On the contention that the proposal will result in an unacceptable level of user conflicts and diminished safety and amenity, Mr Mitchell disagrees that the proposal will unacceptably diminish amenity and does not believe evidence has been produced to support the reduced safety contention. Ms Cheng considers that the proposed change of use should be in accordance with the principles under SEPP 65, which is to plan by better design against security and safety risks posed by different user groups.
- 65 Mr Mitchell argues that access to the car park is controlled, as the entrance is gated and lifts to the car parks are accessed only by key card. Ms Cheng considers that access to all seven basement levels is not able to be controlled, due to the intermingling of residential and serviced apartments car spaces and this co-location is inconsistent with accepted design principles and that for a relatively large development the lack of separation diminishes actual and perceived safety and security.

- 66 The planners agreed that the coming and going of strangers can lead to security issues and that this is the case for all residential buildings.
- 67 While it is agreed between the planners that cleaning and maintenance is required for the common areas irrespective of the presence of serviced apartments, Mr Mitchell considers that the additional requirements for cleaning of serviced apartments would not have unacceptable impacts, whereas Ms Cheng disagrees and states that they will require room maintenance and cleaning to a greater extent than residential apartments, in terms of frequency.
- 68 On the length of stay of guests for serviced apartments, Mr Mitchell states that this is a market response and Ms Cheng considers that the satisfying of market demand, driven by tourists and visitors, is not a sound reason for the inappropriate provision of serviced apartments in the subject residential buildings, and this would have a detrimental impact on residential amenity. In her opinion, it is the manner of satisfying the demand that it is an important planning consideration.
- 69 On the issue raised by the council that short term occupants who do not have a financial or stewardship interest in the building are more likely to generate increased wear and tear to the common property, Mr Mitchell argues that tenants of residential apartments would also contribute to wear and tear in common property areas. Ms Cheng considers that tenants would have more of a financial and stewardship interest than visitors as they would regard their unit as home, rather than a place to stay only and more is at stake in terms of rental bond and rental history, compared to serviced apartment guests.
- 70 The issue of whether the proposal undermines certainty for owners and residents, Mr Mitchell does not consider this to be the case whereas Ms Cheng states that uncertainty is created for owners and investors of residential apartments, who have an expectation of the residential character and amenity of the site, and the intermingling of serviced apartments catering for visitors and tourists, would not be in line with such expectation.
- 71 Ms Cheng considers that the proposal is contrary to cl 36(d) of the Sydney LEP, as serviced apartments are tourist and visitor accommodation, as distinct from residential accommodation or housing stock, and the proposal does not increase the size or diversity of housing stock. Mr Mitchell disagrees and believes the objective used is not the correct one, it should be to increase the size and diversity of housing stock. He does not accept that the proposal has residential amenity and compatibility issues and in his opinion it is not a mixed use development, and that residential safety and security is also not an issue.

- 72 The planners agreed that assuming the works are identified for accessibility and building compliance, these matters can be addressed.
- 73 Mr Mitchell told the Court that he thought "the definitions in the LEP are so fine as to be effectively meaningless". Ms Cheng said that she would look to the planning instruments at first instance to characterise exactly what kind of use and clearly the definition is that serviced apartments is a form of 'tourist and visitor accommodation' and if you look at this definition it states, "to provide temporary or short term accommodation for travellers and tourists who have their principal place of residence elsewhere". She also referred to the LEP where dwelling is defined as 'residential accommodation' and this is defined as "permanent or long-term accommodation." Mr Mitchell further commented that:
- "The reasons the definitions in the LEP are unhelpful, is because they're clearly types of accommodation needs that are defined as residential accommodation that fall within the same functional category as serviced apartments, so residential accommodation includes residential flat buildings, dwellings, boarding houses, hostels and student accommodation...there is no doubt that students use serviced apartments and short-term occupancy that would otherwise occupy hostels or boarding houses...so I just find the distinction between the various categories in the LEP so fine as to be artificial. There is not a distinct type of residential accommodation that is so narrow as to fit the definition of serviced apartments in my opinion".
- 74 Mr Mitchell stated that a typical user would stay for 3 weeks on a work assignment. On cross-examination, he was asked if he had referred to the booking sheets or booking records of the Oaks, and he had not. Mr Mitchell was cross-examined and asked, whether in terms of the statements about length of stay whether he thought it would have been beneficial to undertake an assessment of the historical records of the number of people who stay for 1 night, 2 nights, 7 nights, 3 weeks as a proportion of the use.
- 75 Mr Mitchell responded, "It could have helped yes, provided it was representative of what would happen in the future in terms of the consent." Mr Mitchell said he had discussed the nature of the complaints generally with the building managers and ascertained that there was a complaints register, but had not looked at same. Before preparing his original report, he had not looked at the submissions received from objectors although he subsequently did.
- 76 The question was put to Mr Mitchell that the 24 serviced apartments originally approved were serviced by the one lift, whereas the 143 serviced apartments proposed in this application, are throughout the two buildings. Mr Mitchell says that there would be a need for the provision of trolleys that provide towels and sheets to access all the serviced apartments and that would be the only difference in the movement of trolleys and that all common areas, irrespective of the existence of serviced apartments, require trolleys to visit them on a daily basis for cleaning and maintenance.

77 On the question of a Plan of Management to assist in the day to day management of the serviced apartment use, Mr Mitchell said:

"There are aspects of management that need to be improved, but whether or not a Plan of Management is the most appropriate vehicle... because most of the concerns seem to be about the common property, not the interiors of the serviced apartments the subject of the DA, and the body that is responsible for management of the common property is the owners corporation".

78 He considers therefore that it would be more appropriate to deal with it by way of an amendment to the by-laws and the contract held with Oaks, in terms of caretaking. Mr Mitchell said that:

"The appropriate entity is not the contractor, the contractor is accountable to the body that is legally responsible, that is the owners corporation, and it is more effective to give that group the full powers it needs, including better control over the contractor if that is necessary. Perhaps even including replacing the contractor, if that is necessary. There are a number of contracts with the Oaks who have a caretaker agreement with the owners corporation that deals, as it were, with the management of the building and common property, and then there is the contract of each individual unit owner, and it is in that capacity that Oaks has lodged this development application as agents, not in its capacity as caretaker".

79 On the current management and the perceptions of residents Mr Mitchell commented that "better communication about the issues and who is responsible would be a starting point, and the procedures for management... but management so far, as a certain proportion of the residents are concerned, is clearly ineffective and so that needs to be improved".

## Findings

80 I have assessed the development application with the benefit of all the evidence to the Court including that of the experts and the site visit and in the context of the statutory planning framework and for the reasons below I am not persuaded the application is worthy of approval.

81 While the proposal may be a form of residential use nonetheless serviced apartments are separately and clearly defined in the LEP. I note that the owner of the common property has given consent to the making of the application. An assessment of the proposal to change the use from residential apartments to serviced apartments is required under the planning regime and the application is subject to a merits assessment under s79C of the Act.

82 I also note in exhibit H, a special bylaw, that the owners corporation have additional functions and the power of authority to permit Oaks management trading as Oaks, to use the common property of the purpose of storage of linen and luggage and other supplies.

83 The parties referred me to a number of judgments that I have had regard to. Of particular relevance and authority is the judgment of *Zhang v Canterbury City Council* [2001] NSWCA 167 , the Chief Justice held that:

The statutory power to determine a development application under s 80 of the *Environmental Planning and Assessment Act 1979* is not unfettered and is not at large. It is subject to the obligation to take into consideration matters required by section 79C(1). Relevantly the DCP had to be treated as a fundamental element in, or a focal point of, the decision making process ...

A Development Control plan is not an environmental planning instrument. Accordingly, the requirement in s 80(2) that a consent authority must refuse an application that would result in contravention of such an instrument does not apply to a development control plan. ... Nor can such a plan contain a non-discretionary development standard which if complied with would take away a consent authority's discretion under s 79C(2).

The consent authority has a wide ranging discretion, one of the matters required to be taken into account is the public interest, but the discretion is not at large and is not unfettered. .. the DCP was entitled to significant weight in the decision-making process but was not, of course, determinative. ...

There was a relevant and applicable standard ... It ought to have served as a focal point for or constituted a fundamental element in his deliberations. .

84 The respondent raises the issue of inherent conflicts with the proposed scale and mix of residential and serviced apartments. In this issue, Council raises the intermingling of residential and serviced apartments throughout the development, particularly on the same floor levels, is considered incompatible and leads to detrimental amenity impacts on the long term residents of the building .

85 Council contends that the proposal is not consistent with provision 2.1.3 that requires 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. It is curious that this provision is under s 2 of the DCP under *building form and character* and the development provisions in this section are intended 'to encourage high-quality design and the resulting built form and character of new development should contribute to an attractive public domain in central Sydney and produce a desirable setting for its intended uses'.

86 I also refer to the authority of *Jonah Pty Ltd v Pittwater Council* [2006] NSWLEC 99, wherein the Chief Judge of this Court noted that 'the Courts have consistently held that past unlawful use is not a relevant factor in the assessment of a development application'. In this judgment, his Honour provides a convenient summary of case law and an extract is quoted below:

The issue of the relevance of past unlawful use to determining whether a consent should be granted or modified has been considered by courts in the past. The courts have consistently held that past unlawful use is not a relevant factor.

In *Kouflidis and Jenquin Pty Ltd v Corporation of the City of Salisbury* (1982) 29 SASR 321 at 323-324; 49 LGERA 17 at 19-20, King CJ with whom Mohr J agreed, sitting as a Full Court of the South Australian Supreme Court, stated:

"In my opinion, moreover, the past unlawful use is not a relevant factor in determining whether consent should be granted. That decision should be made upon the planning considerations envisaged by the Act and Regulations irrespective of the past or continuing conduct of the applicant. I do not think there is any warrant in the Act or Regulations for refusing or deferring an application or appeal by reason of the unlawful conduct of the applicant.

The learned judge in the Land and Valuation Court was rightly concerned with the activities of a person 'who, cynically and fraudulently, changes the use of his or her land, and who hopes, by doing so, to present planning authorities with a *fait accompli*, and thus to extract a planning consent to the changed use'. His Honour posed the question: 'How should such a person fare when his or her application comes to be considered at the administrative and judicial level?' The answer, it seems to me, is that the unlawful use should be ignored. It does not enter into the planning considerations upon which the planning decision must be made. The punishment of the unlawful conduct should be left to criminal proceedings. The supposed *fait accompli* should not be recognized as such. The unlawful user of the land should gain no advantage from having established an unlawful use. Any argument based either directly or indirectly upon the unlawful use should be firmly rejected. ... Although an applicant for consent should derive no advantage, direct or indirect, from the unlawful use, I do not think that it should be an impediment to the consideration of his application on its planning merits."

In *Ireland v Cessnock City Council* (1999) 103 LGERA 285, Bignold J held that s 79C(1)(e) ("the public interest") does not preclude the grant of development consent to allow the prospective use of an illegally erected building. The grant of consent does not sanction an illegality and accordingly the consideration of "the obligation not to sanction the illegality" was not relevant... In a subsequent judgment in *Ireland v Cessnock City Council* (1999) 110 LGERA 311 dealing with the issue of whether a building certificate should be issued, Bignold J stated at 316:

"The proper approach to be taken ...namely to leave to the criminal law, the punishment of the unlawful conduct involved in the erection of the building and to determine the present application on the merits, but taking care not to allow the wrongdoer to benefit from his wrongdoing".

The above conclusion that mere unlawfulness of past use is not a relevant factor does not mean, however, that past use - without any consideration of its unlawfulness - cannot ever be relevant.

For instance, past conduct (regardless of whether it is unlawful) may have given rise to unacceptable impacts, such as unacceptable acoustic impacts on adjoining properties. The experience of impacts of the past use could be relevant in evaluating, first, the likely impacts of a prospective use for which consent is sought of the same or similar character, extent, intensity and other features as the past use, secondly, the acceptability of the likely impacts and thirdly, if likely impacts are considered to be unacceptable, the appropriate measures that ought to be adopted to mitigate the likely impacts to an acceptable level. Past use would, therefore, be of relevance but it is for proper planning reasons, not because the past use happened to be unlawful. The unlawfulness of the past use is not relevant.

- 87 However, in my assessment of the application under s 79C(1)(c), I have determined the site is not suitable for the change of use to serviced apartments. The applicant has not persuaded me that the site with the configuration of the built form is suitable for the proposed use of 143 units as serviced apartments.
- 88 While I accept the conversion of this large number of residential apartments to serviced apartments may not constitute redevelopment the configuration of the existing built form on the subject site is not suitable for the proposed use. I do not accept the building was designed and construed to facilitate a change of use from residential to serviced apartments. The building as constructed accommodated 24 serviced apartments in a layout and configuration that minimized conflicts between permanent residents and serviced apartment users in a well defined part of the building with its own lift and while access was via the Sussex Street entrance, the relatively small number of 24 serviced apartments was readily accommodated.
- 89 The configuration of the building as constructed with the need to change levels to access different lifts together with the limited number of lifts, in particular on the Sussex Street side of the complex together with the design of the narrow corridors with corners on the apartment levels makes the design incompatible for the co-location of the different uses of residential and serviced apartments.
- 90 The design lacks legibility for serviced apartment users to readily "read" the layout of the building and there is a lack of direct access to different parts of the building by the one lift. For example, for a serviced apartment on the Kent Street side. a guest would need to firstly access the building at the reception desk in the Sussex Street lobby.
- 91 From the plans the corridors serving the units are less than the requirement in the DCP of 2 metres . From the plans they would appear to be between 1.2-1.4 metres . This narrowness would lead to congestion and conflicts when service trolleys are in the corridors. The applicant has also not demonstrated on any plans how and where the associated storage facilities and activities can be satisfactorily accommodated within the building and the large number and proportion of serviced apartments would necessitate the provision of service

and storage facilities in the building.

- 92 In my merits assessment of the subject premises I am not satisfied that the site with the buildings as configured are suitable for the change of use of 143 residential units to serviced apartments. The design of the buildings is fundamentally unsatisfactory for the co-location of residential and serviced apartments on the site.
- 93 Furthermore, the Sussex Street lobby is relatively narrow and from the plans tendered and filed would appear to be only about 5 m at the pinch point of the reception desk and excluding the reception desk about 7m. I agree with the council's expert this is inadequate to function as the reception for 143 serviced apartments as well as being the main and only direct entry for the residential units on the Sussex Street side. I agree with Ms Cheng, the physical design would lead to congestion at various times with the check in and check out of large numbers of short term stayers and their luggage.
- 94 For the large number of 143 serviced apartments in the complex, the design of the building complex is not conducive to the convenient pick up and set down of passengers with luggage for the serviced apartments. With this scale of development for short term visitors and tourists to the city, this would be another example of the potential conflicts of the proposed use and the constraints of the building as constructed on the site.
- 95 I am also not persuaded that a trial period is appropriate in the circumstances of this case with the fundamental design and configuration of the buildings on the subject site that would not facilitate the co-location of serviced apartments with the residential use.
- 96 I agree with council's planner that there is a fundamental incompatibility of the uses in the complex. In the development of this scale with the restricted common access and lift use in a design that is complex the proposed change of use could not be accommodated in a satisfactory way that provides appropriate amenity and surveillance for all residents both long and short term.
- 97 The Council officer in the assessment report of the application stated:
- The building's design and its facilities do not lend themselves to an efficient or effective property for serviced apartments. The building's lobbies and elevator services are designed for predominantly residential use and relatively minor traffic from 24 serviced apartments. The proposal involves an intensification of use of common property on a daily basis by guests with luggage, hotel staff with baggage trolleys, cleaners using hallways and lifts with cleaning and linen trolleys, and other repairs and maintenance staff.
- 98 In terms of the aims of the LEP in clause 12(f) the proposed use is inconsistent with the aim to protect and enhance the amenity of residents, workers and visitors to the city .

99 In the circumstances of this case I am not persuaded that the provisions of the Development Control Plan should be varied for the proposed change of use because of the restricted size of common areas, lack of direct access together with narrow corridors on the unit floors. In my merits assessment these basic design features of the built form make the site unsuitable for the proposed use.

## **ORDERS**

Accordingly based on my assessment above, the formal orders of the Court are:

- (1) The appeal in respect of the property known as 'Maestri Towers' at 298 to 340 Sussex Street and 515 to 519 Kent Street is dismissed.
- (2) The development application number D/2009/2057 submitted to the City of Sydney Council and as amended for the conversion of 143 apartments, from residential to serviced apartments is refused consent.
- (3) The exhibits are returned to the parties except Exhibit 1.

**J S Murrell**

**Commissioner of the Court**

\*\*\*\*\*

---

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure 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.

Decision last updated: 17 March 2011