



# DESIGN COLLABORATIVE Pty Limited

ABN 36 002 126 954  
ACN 002 126 954

Planning and Development Consultants

G W Smith  
BSurv(QLD)  
MCP(MIT)  
MIS(Aust)  
FPIA MRTPI  
FAPI CPP

H M Sanders  
MPhil(Lon)  
MSc(Rdg)  
FPIA MRTPI  
MRICS CPP

J Lidis  
BTP (UNSW)  
MPIA CPP

## STATEMENT OF ENVIRONMENTAL EFFECTS

To accompany an application  
made under Section 96(1A)

for the further modification of conditions of consent of  
DA174-07-05, as modified by  
174-07-05 MOD (6),

for premises at  
12-20 Argyle Street  
The Rocks

Prepared for Bavarian Hospitality Group Pty Ltd  
As lessee from the Sydney Harbour Foreshore Authority

February 2011  
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1. Floor plans showing premises to which DA 174-07-05 applies
2. Copy of DA 174-07-05 MOD 6
3. Stephen Grubits & Associates' report
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## 1. INTRODUCTION

- 1.1 The Bavarian Hospitality Group Pty Ltd (*BHG*) is a long-established operator of licensed premises in The Rocks. It has occupied space in the heritage-listed building, known as The Argyle Stores, situated at the corner of Argyle and Playfair Streets, since the mid-1970s, initially, for the restaurant known as the Lowenbrau Keller and The Argyle Function Centre. Until 2006 it used – with consent – what is known as the Argyle Courtyard for amplified live entertainment.
- 1.2 In 2004/05, BHG approached the Sydney Harbour Foreshore Authority (*SHFA*), its landlord, about leasing some additional space in The Argyle Stores. In response, SHFA – which was having difficulties letting space in that building – suggested that BHG apply to occupy all of the building not then leased to others as well as the Courtyard. BHG agreed to do so.
- 1.3 As a result, SHFA made an offer to lease some 4,955 square metres in the Argyle Stores and to licence the Courtyard in May 2005. The use was to be for “*hotel, function centre, restaurant and entertainment*”. The offer covered BHG’s existing tenancies as well as new space, with the latter to be licensed as a hotel. BHG accepted that offer. The 25 year lease, which commenced on 5 April 2007, incorporated the Courtyard in to the area leased.
- 1.4 In May 2005, Dreamtime Australia Design lodged – on behalf of BHG – a development application with SHFA, registered as DA 174-07-05, for “*alterations to existing premises to use the two (2) lower floors plus the external courtyard as a hotel/function centre and construction of several free-standing bars, toilets and ancillary works*” at 12-20 Argyle Street, The Rocks.
- 1.5 DA174-07-05 covered the new space which BHG was to lease in the building and the Courtyard, ie, an area less than that set out in the lease.
- 1.6 On 28 June 2006, Mr S Watson, an officer of SHFA acting on delegated authority from the Minister, granted consent to DA174-07-05 for what is now known as the “*Argyle*”. **Annexure 1** contains copies of the floor plans illustrating the extent of the premises to which that consent applied. About June 2005, the Lowenbrau Keller, Argyle Function Rooms and the Argyle were licensed as a hotel.
- 1.7 Due to delays in construction work, the Argyle did not open until April 2007. It has traded very successfully since then.
- 1.8 DA174-07-05 has been modified five times since it was originally issued. Those modifications were:-
- i) MOD 174-07-05 (2), dated 28/6/07 which modified the plenum design;
  - ii) MOD 174-07-05 (3), dated 22/7/08, which confirmed the permanent trading hours of the interior and permitted trading in the Courtyard until midnight as a beergarden for an 18 month trial period;
  - iii) MOD 174-07-05 (4), dated 27/2/09, permitted a change in the furnishings of the Courtyard;

- iv) MOD 174-07-05 (5), dated 26/2/09, extended the hours of service of the mobile bar in the Courtyard until 11:30pm; and
- v) DA 174-07-05 MOD 6 (*MOD 6*) provided a further 12-month trial period for the use of the Courtyard as a beergarden between 10pm and midnight and introduced a trial period for its use as a smoker's area between midnight and 3am.

**Annexure 2** contains a copy of MOD 6.

1.9 During that period, there have been changes in the authority responsible for determining applications in The Rocks. Whereas a SHFA officer – as the Minister's delegate – determined the first three modification applications, an officer of the Department of Planning (*the Department*) – as the Minister's delegate – has determined the third, fourth and fifth modifications and will be the Minister's delegate for the application which this statement of Environmental Effects (*SEE*) accompanies. However, in the interim, the City of Sydney – in its role as the consent authority for “new” applications in The Rocks – has determined three development applications affecting parts of the hotel:

- D/2009/919 (approved 27/7/09) for the establishment of “*Sake*” – now one of Sydney's best fine dining restaurants – in part of the Argyle Function Centre;
- D/2009/1621 (approved 21/10/09) for the “PoPE renewal for the Argyle Stores” and
- D/2010/1066 (approved 16/8/10) for the establishment of “*Cut*” – a fine dining steak restaurant – in another part of the Argyle Function Centre.

The two restaurants operate under the same hotel licence as the Argyle and Lowenbrau Keller. PoPEs (places of public entertainment) disappeared from the legislative lexicon in October 2009 but D/2009/1621 remains operative. BHG is seeking to surrender D/2009/1621 because it conditions which conflict with those in DA 174-07-05 MOD 6.

1.10 The application which this SEE accompanies seeks to modify the fifth modification determination (*MOD6*). It seeks to have the two trial periods instigated by that modification incorporated into the hotel's permanent trading hours. In addition, it seeks to incorporate conditions of D/2009/1621 that relates to safety in the event of a fire into the main consent.

1.11 The conditions which are the primary focus of this application are Conditions F2(a), (b), (c), (d) and (f) in MOD 6 which read: -

“F2 *The use of the Argyle Courtyard shall be regulated as follows:*

- (a) *The use of the Argyle Stores Courtyard as a Beer Garden shall be restricted as follows:*

*Monday to Sunday 8.00am to 10.00pm seven days a week;*

- (b) *Notwithstanding (a) above, the premises may operate between the following hours for a trial period of 12 months from the date of this consent;*

*Monday to Sunday 10.00pm to 12.00m midnight seven days a week.*

- (c) *The use of the Argyle Courtyard as a “smoker’s area” shall be restricted as follows:*

*Monday to Sunday 8.00am to 12.00 midnight seven days a week;*

- (d) *Notwithstanding (c) above, the “smoker’s area” may operate between the following hours for a trial period of 12 months from the date of this consent.*

*Monday to Sunday 12.00 midnight to 3.00am seven days a week.*

- (e) *A further application may be lodged to continue the trial periods specified in (b) above and (d) above, before the end of the trial period. The Department of Planning’s consideration of any proposed continuation and or extension of the hours permitted by the trial will be based on, among other things, the performance of the operator in relation to the compliance with development consent conditions, the results of noise monitoring required under condition F2 (f), any substantiated complaints received, and any views expressed by the NSW Police or the local council.*

- (f) *During the trial periods outlined in (b) and (d) above, the applicant must engage a suitably qualified acoustic engineer approved by the Department of Planning to measure noise emanating from the courtyard, and noise received at the nearest residence boundary at 88 Cumberland Street, The Rocks. The acoustic engineer is required to conduct noise monitoring on no less than 4 separate occasions over 12 months from the date of this consent. On each occasion monitoring must be undertaken between the hours of 6.00pm and 3.00am, Thursday to Sunday inclusive. The results of the noise measurements are to be submitted to the Department of Planning prior to the lodgement of any application to continue the trial periods of the “beer garden” and “smokers area” referred to in conditions F2(b) and (d) respectively.*

- (g) *The operator shall ensure that all activities on the Argyle Courtyard are monitored by management and staff at all times to protect the amenity of the surrounding residents and tenants.*

1.12 The application, which the Statement accompanies, is being lodged in accordance with Condition F2(e) and seeks:-

- i) in relation to Condition F2(a), the substitution of “12.00 midnight” in place of “10.00pm”;
- ii) in relation to Conditions F2(b), (d), (e) and (f), their deletion; and
- iii) in relation to Condition F2(c), the substitution of “3am the following day” in place of “12 midnight”.

- 1.13 The changes in conditions seek to make permanent the times during which the Courtyard has been used as a “*beergarden*” and “*smokers’ area*” after a trial period of over 3½ years.
- 1.14 BHG is seeking to surrender D/2009/1621 (see 1.9 above). In order to satisfy SHFA’s concerns about safety in the event of fire if D/2009/1621 is surrendered, BHG offers the following additional modifications to DA/174-07-05 MOD 6:-
- a. Condition A1: Add: “*Alternative Solution Report*” prepared by Stephen Grubits and Associates dated 19 April 2006.”
  - b. Condition F41: Add: “*The maximum numbers of persons permitted in the internal areas of Argyle Stores – North Wing shall be:*
- Ground floor 589 persons*
- First floor 500 persons.*”
- A copy of the Grubits & Associates’ report forms **Annexure 3**.
- 1.15 In view of the legislative changes that have deleted the term “*Place of Public Entertainment*” from the lexicon of planning terminology and as approvals for such plans can no longer be obtained, BHG also requests that Conditions E12 and E13 be deleted from DA 174-07-05 as modified. They are *otiose*.
- 1.16 The proposed modification is being sought under Sec 96 (1A) since the modified development is identical with the previous development and would have no different environmental impact, being the same development.
- 1.17 The current trial period terminated on 18 January 2011. On that day BHG ceased using the Courtyard as a beergarden after 10pm and ceased using the Courtyard as an area where its patrons can smoke after midnight. The latter will mean anyone who wishes to smoke after midnight is required to go out onto Argyle Street to do so. However, patrons coming to and going from the Argyle will – of necessity – continue to traverse the Courtyard up until 3:15am or thereabouts.

## **2 THE CONTEXT**

- 2.1 Before examining the modifications sought, it is worthwhile setting out the broad context in which they are made.
- 2.2 The Courtyard – the part of the Argyle with which the application, principally, deals - is now part of a hotel, licensed under the Liquor Act 2007, and authorized – under that Act - to trade between 10am and 3am the following day, seven days a week. The licensee is authorised to sell liquor by retail on the licensed premises for consumption on, or away, from the licensed premises. As such, it must be open to the general public and food - of a nature and quantity consistent with the responsible sale, supply and service of alcohol – is to be available whenever liquor is sold or supplied.

- 2.3 The Argyle does not sell packaged liquor for consumption off the premises and does not have gaming machines. [A small amount of packaged liquor for consumption away from the premises is sold over the bar of the Lowenbrau but it is not within the ambit of DA 174-07-05 as modified.] Meals are a major feature of the Argyle's operations. BHG reports that the Argyle supplies on average of about 11,000 meals each week. It has recently opened an up-market tapas bar, the "Argyle Bazar", on the ground floor of the Argyle to add to the range of food previously available in the hotel which also encompasses Sake and Cut restaurants although those two premises are not covered by DA 174-07-05 as modified.
- 2.4 Until the concept was abandoned, the internal spaces of the Argyle constituted a place of public entertainment with a maximum capacity of 1,089 including staff and entertainers. As noted in 1.14 above, BHG offers to accept that the limits on numbers in D/2009/1621 be incorporated into DA 174-07-05 as modified. Entertainment in those spaces is limited by DA174-07-05 to "*background and ancillary entertainment including music, live DJs, comedy acts and music performances*". The Courtyard was not a place of public entertainment (not being a space in a building). The only limit on its capacity is that, advanced by BHG's fire engineers of 300 persons. Condition F14 of DA174-07-05 prohibited the provision of all but a very limited form of entertainment in the Courtyard.
- 2.5 The licensee, who is an employee of BHG, is responsible for the conduct of the hotel and its patrons including those in the Courtyard.
- 2.6 Under DA174-07-005 MOD6, any patron of the Argyle could use the Courtyard as a "*beer garden*" until midnight on any night (other than a restricted trading night). Up until 11.30pm, those patrons could be served beverages from the mobile bar in the Courtyard. Between 11.30pm and midnight, they could be served beverages at the bar inside the ground floor of the Argyle and take those beverages to consume in the Courtyard. After midnight, the use of the Courtyard was restricted with only patrons who were smokers permitted to be there. Smokers could (and did) bring their drinks into the Courtyard when they resorted to it to smoke.
- 2.7 What the conditions of consent did not recognise is that the Courtyard forms part of the only ingress to, and egress from, the internal spaces of the Argyle. Thus there are always non-smokers passing through it up until the last patron leaves the hotel at about 3.15am.
- 2.8 At present, and if this application were to be refused or unless further trial periods are allowed, the situation in the Courtyard would be that only smokers would be permitted to remain in it between 10pm and midnight but they could be served drinks from the mobile bar until 11:30pm. The status of those going to, or coming from, the interior of the Argyle is unclear. If their presence were to be prohibited, the hotel would be forced to close at 10pm.

### **3 EVENTS ARISING DURING THE TRIAL PERIOD**

- 3.1 The Argyle took advantage of the additional hours permitted by MOD 6 from 18 January 2010 to 18 January 2011.

- 3.2 The usual means of assessing whether or not a trial period at a hotel has revealed that the activities permitted had adversely affected the amenity of the neighbourhood (or had adverse impacts) is to rely on complaints received by the licensee/owner, the Police, the licensing authorities [in this case the Casino, Liquor and Gaming Control Authority (*the Authority*)] and the relevant consent authority which, in effect, is the Department. In addition, in The Rocks, complaints can be, and are, also made to SHFA as the landowner.
- 3.3 In this instance, the modifications sought do not constitute “*additional activities*” as they are activities which have been conducted – with consent – since the Argyle opened in 2007 until 18 January 2011.
- 3.4 The licensee and BHG (as the owner of the business) did not receive any complaint and were not notified of any complaint except as set out in 3.8ff below, during the last 12-month trial period.
- 3.5 The Rocks Local Area Command (*LAC*) of the NSW Police Force has not reported any complaint to BHG about the conduct of the Argyle during the present trial period.
- 3.6 The Authority (or its administrative arm, the NSW Office of Liquor, Gaming and Racing) has declined to reveal whether or not it has received any complaints on privacy grounds.
- 3.7 SHFA has not reported any complaint to BHG arising from the use of the Courtyard during the trial period and no record of any complaint in the entire trial period as the owner of the property.
- 3.8 The Department became the consent authority in November 2008. It received complaints alleging excessive noise being generated from the Argyle at night with, apparently, the first being made late in January or early February 2009, ie, well before the last trial period. On 12 June 2009, the Department wrote to BHG notifying it that the Department had received complaints from a resident (or residents) of 88 Cumberland Street about the operation of the Argyle Hotel. An owner of one of the four apartments on the top floor of that office building provided the Department with a report prepared by Heggies Pty Ltd, dated 8 March 2009, on noise monitoring which it had carried out at one of the apartments at that address. The Department forwarded a copy of that report to BHG with its letter of 12 June 2009. That monitoring had been undertaken on a Thursday, 26 February 2009, over three months before BHG was notified of the complaint.
- 3.9 Design Collaborative Pty Ltd (*DC*) - as BHG’s planning consultant – responded to the Department’s letter on 25 June 2009. It sought full details of the alleged complaints. On 14 July, the Department responded but did not provide the requested details. It did, however, state that – following discussions with the complainant – access would be arranged so that BHG’s acoustical consultant could undertake noise monitoring at the allegedly-affected properties. No adequate access resulted.
- 3.10 On 15 September 2009, Ms J Pope, the Department’s Senior Compliance Officer, in company with Messrs Flanagan and Evans, Compliance Officers from the Strategic Enforcement Branch of the NSW Office of Liquor, Gaming and Racing,

visited the Argyle to confer with BHG. Ms Pope reported that the Department had received another complaint from the same source about noise from the Hotel and was visiting it to check compliance with the conditions of consent and of its licence. (BHG has never been given a copy of that complaint.) Ms Pope found no evidence of non-compliance with the conditions of consent. The OLGR Compliance Officers noted that the Hotel had been inspected on a number of occasions just prior to the meeting as part of a wider investigation of compliance with licence conditions at hotels in the City generally. Those inspections did not reveal any non-compliance. It appeared that – once more – the complainant offered to permit monitoring subject to some pre-conditions. Ms Pope undertook to continue to try to find a reasonable basis whereby BHG’s acoustic consultant could monitor noise at the complainant’s apartment. Nothing came of that undertaking.

- 3.11 In October 2009, BHG submitted an application under Section 96 to modify DA 174-07-05 MOD5 which was granted consent on 18 January 2010 as MOD 6.
- 3.12 In the interim, in December 2009, BHG managed to arrange a meeting with three of the four owners of the apartments at 88 Cumberland Street. They complained about noise prior to midnight and at 3am as patrons left. It was agreed that one of their number and DC would liaise in order to arrange access for noise monitoring. Nothing came of those endeavours which were intensified following the determination of MOD 6 in order that BHG could ensure compliance with Condition F2(f) of that consent.
- 3.13 On 21 April 2010, officers of the Department met with BHG’s representatives and Mr N Koikas of Koikas Acoustics Pty Ltd whom BHG had nominated as an “*independent consultant*” as required by Condition F2(f) of MOD6. It was agreed that Mr Koikas should submit a measurement methodology and that DC should continue its attempts to arrange access. The Department accepted Mr Koikas’ methodology in May. The pursuit of the residents for access resulted in a request from the residents for Mr Koikas’ methodology. That was supplied.
- 3.14 On 19 July, Heggies, as the residents’ acoustic consultant, advised the Department that it did not agree with Mr Koikas’ methodology and invited the Department’s officers to visit an apartment after midnight when it would be evident that the applicant was breaching Condition F38(d) of MOD6. That visit was arranged – by the Department – to occur from midnight on 16 October 2010. [One immediate consequence of that was that BHG could not comply with Condition F2(f) of MOD6.]
- 3.15 On the visit on 17 October 2010, it was apparent that there was noise from patrons in, or crossing, the Courtyard which was audible with the sliding doors of the nearest apartment open (but there were also other sources of human noise). Whether or not the noise was audible with the doors closed depended on how close to the glazing a person stood and its audibility, apparently, varied from person to person. The dominant noise was from mechanical plant. [In the darkness, it was not possible to identify which unit of plant (there being a number on the roofs of the Argyle Bond Stores, the Cleland Building and other buildings nearby) was the principal source, eg, the acoustic consultants were not aware of the existence of

one unit which appears – on subsequent daylight inspection – to be the most likely source. It is understood the SHFA is the entity responsible for that unit.]

- 3.16 **Annexure 4** contains noise levels recorded by Mr Koikas during the event on 17 October 2010.
- 3.17 While that visit indicates that there may be an issue with noise, a single visit for a short period is not an adequate basis on which to make a proper assessment of noise conditions. For example, the apartment visited is air-conditioned but that system was not operating at the time of the visit. There is no provision for insect screening of the floor to ceiling doors which – in the living room – can be opened to a width of about 8 metres. This suggests that, in summer time at least, the sliding doors may be kept closed. Before any firm conclusions can be drawn about noise, the independent consultant should be permitted to conduct monitoring of the kind specified in Condition F2(f).
- 3.18 As far as BHG is aware, no-one made any complaint about noise from the Courtyard during the most-recent trial period. If anyone has, BHG has not been informed of its receipt.
- 3.19 During the current trial period, BHG’s usual acoustical consultant – Renzo Tonin and Associates (RTA) – monitored noise from the Argyle as best it could in the absence of being able to gain access to the apartments. During the recent trial period, measurements were undertaken on March 12 and on 6 and 7 August. In its last report, RTA stated:

*“Renzo Tonin & Associates has undertaken reference noise level measurements for the Argyle Hotel licensed premise at The Rocks. Comparison to the previous measurements undertaken at the same locations revealed lower overall noise levels, although patron noise was more readily detected in the noise level recordings (in particular at the elevated location) and at standing height. However, noise from mechanical plant was lower. This has been attributed to the recent works undertaken on the Kitchen Exhaust Fan for Lowenbrau Keller and also the observed intermittent operation of chillers serving both The Argyle and Bel Mondo restaurant.”*

Copies of those RTA reports have been filed with the Department as required by Condition F40 of MOD6.

- 3.20 The kitchen exhaust fan referred to by RTA was re-fitted early in the recent trial period when the relevant parts became available from overseas.
- 3.21 During the recent trial period, SHFA – as the owner of the Argyle Stores Building – moved various items of mechanical plant associated with the Argyle and the other tenant of the Building – the Bell Shakespeare Theatre Company – from above the east wing of the building to above its south wing. That may have altered the aural environment.

#### 4 COMPLIANCE WITH CONDITIONS OF CONSENT

4.1 Steven Watson of Steve Watson and Partners, the principal certifying authority (PCA), appointed by BHG to supervise the work undertaken under DA 174-07-05, issued an interim occupation certificate for that works approved under that consent on 5 April 2007. Consequently, it is assumed that all conditions pertaining to building work in DA 174-07-05 have been satisfactorily completed. On that basis, the following conditions of consent are deemed to have been satisfied:-

A1, A2, A3, B1, B2, B3, B4, C1, C2, D1, D2, D3, D4, D5, D6, D7, D8, D9, D10, D11, D12, E1, E2, E3, E6, E7, E9, E10, E12, F26, F27, F28, G1 – G13, P1 and P2.

4.2 On 21 May 2001, Mr Watson (of SHFA) wrote to BHG, on behalf of the Minister, setting out how various conditions of consent had been satisfied. It concludes:

*“On the basis of the above details, I advise that the premises complies with the relevant conditions of consent listed in Section E of DA 174-07-05, and subsequently the final Occupation Certificate for DA 174-07-05 can be issued”.*

4.3 The remaining conditions in MOD 6, including some in Section E, can be described as “operational” or relating to management and are on-going. They cover all of the matters which need to be assessed in the assessment of the Section 96 application which this Statement accompanies. They are addressed below:

A4: MOD174-07-05(4) amended this condition.

A5: The entertainment provided in the hotel (ie, in the North Wing of Argyle Stores) is “background”, being either recorded music or music supplied by a disc jockey which is played over the in-house sound system. The primary purpose of the building is a “hotel and function centre”.

E4: Public access is permitted to The Argyle Courtyard in accord with para 5 of “Argyle Courtyard Tours” in “Managing Patrons and Anti-Social Behaviour” in the Plan of Management submitted with DA 174-07-05 which, it is understood, constitutes the “Courtyard Access Plan” required by this condition. It was approved by the PCA.

E5: The licence of The Courtyard forms part of the lease entered into between BHG and SHFA on 5 April 2007 (Clause 29).

E8: A Plan of Management was approved and the premises are operated in accord with it.

E11: CCTV cameras have been installed and are monitored. The tapes are kept. To date, no authority has sought to view any of the tapes.

E13: See 1.9, 1.10 and 1.14 and 1.15 above.

F1: The hotel trades in accordance with this condition.

F2: The Courtyard’s use accorded with the provisions of this condition but it has not been possible for BHG to comply with (f) of that Condition. (This modification application seeks to vary those provisions.)

- F3: Public access to the Courtyard is maintained. (Presumably, the *Public Access Plan* referred to in this Condition is intended to be the *Argyle Courtyard Access Plan* referred to in E4).
- F4: This condition has been observed.
- F5: This condition has been observed.
- F6: As far as is known this condition has been observed. SHFA has not informed BHG of any dissatisfaction with the condition or storage of any furniture.
- F7: Disposable tableware is not used. The Argyle now uses polycarbonate containers for drink service at ground level after 9pm. They do not constitute “*disposable tableware*”.
- F8: This condition has been observed.
- F9: No speakers were placed in the Courtyard during the trial period.
- F10: No awnings or the like has been installed. However, MOD174-07-05(4) gave consent for an awning above the mobile bar. That awning has been installed.
- F10.1: BHG has received approval for the details of the mobile bar.
- F11: MOD174-07-05(4) gave consent to different furnishings in the Courtyard. They have been installed.
- F12: The licensee is a member of the City North Local Liquor Accord.
- F13: Copies of those documents are kept at the premises and are available to the nominated authorities.
- F14: This condition was observed during the trial period.
- F15: This condition has been observed.
- F16: This condition has not been observed in full. All windows are permanently closed. Doors to the Courtyard are left open during the daytime and, at times, until midnight. The eastern door is the first closed and a security person is stationed at it to ensure it remains closed. The western door remains in use by patrons entering or leaving the ground floor or moving between the interior and the Courtyard after midnight. A security person is stationed at that door to ensure it is closed whenever possible but it is frequently open to allow patrons to move in and out. The Argyle has operated on that basis since it opened and it cannot operate otherwise.
- F17: The licensee observes the conditions on the hotel’s licence.
- F18: This condition has been observed.

- F19: Signs are displayed, affixed in a manner that does not damage the heritage building physically.
- F20: BHG believes this condition has been observed as there has been no complaint of which it is aware about the behaviour of patrons entering or leaving the premises during the current trial period. It has not been directed by SHFA to employ more security staff. It notes that the licensee is responsible for the behaviour of patrons since it is a provision of the Liquor Act 2007 that the licensee, not the proprietor, must *be responsible, at all times, for the personal supervision and management of the conduct of the business of the licensed premises.*
- F21: This condition has been observed. (A late-night rank operates in Argyle Street directly in front of the Argyle.)
- F22: This condition is not observed because there is no entry and no consent for an entry from Playfair Street to the Argyle or the Courtyard.
- F23: No authority has set any maximum for the number of patrons in The Courtyard. However, fire safety engineers have recommended that no more than 300 patrons be allowed in it at any one time. That limit is observed.
- F24: This condition has been observed with the most recent report being filed on 9 November 2011.
- F25: The Courtyard Bar ceases service at 11:30pm each night.
- F29: This condition has been observed.
- F30: This condition has been observed.
- F31: This condition has been observed.
- F32: This condition has been observed.
- F33: This condition has been observed.
- F34: This condition has been observed.
- F35: This condition has been observed.
- F36: BHG has not received any notice that the Argyle has breached this condition.
- F37: As discussed above, BHG is aware of complaints by residents made prior to the recent trial period but not during that period. It has been attempting to assess those issues in order to establish what it might reasonably do to resolve them.
- F38: As a result of the visit to an apartment at 88 Cumberland Street, it appears that the Argyle may breach (d) of this condition.

F39: It appears that some plant at the Argyle Stores Building may breach this condition.

F40: This condition has been observed.

F41: The requisite signage is displayed above the entrance doorway.

F42: This condition has, and will be, observed.

4.4 The above listing of operational conditions indicates that – as far as BHG is aware – the only conditions which have not, or may not have, been observed during the current trial period of the hotel’s operation and which are not dealt with above are:-

F2, F36, F38, F39 and F40.

## **5 CONDITION F2**

5.1 The Argyle was conducted in accordance with conditions F2(a), (b), (c) and (d) insofar as the use and hours of use are concerned during the trial period. Since 18 January 2011, (b) and (d) are no longer available and the Argyle’s hours of trade have been adjusted accordingly.

5.2 The application which this Statement accompanies satisfies Condition F2(e).

5.3 Condition F2(f) has not been complied with because – despite the best efforts of BHG and the Department of Planning – the only access granted to the most affected residence was for less than one hour between midnight and 1am on 17 October 2010.

5.4 BHG has staff and security personnel in the Courtyard at all times after 9pm each night to do all that is reasonably possible to ensure compliance with Condition F2(g).

## **6 CONDITION F36**

6.1 It is understood that this Condition is intended to deal with noise from plant and equipment. As far as BHG is aware, no one has questioned whether or not there has been (or is) non-compliance with this condition in the trial period. It assumes that there is compliance.

## **7 CONDITION F38**

7.1 There have been numerous tests undertaken to establish whether or not the operation of the Argyle complies with Condition F38. Due to the inability of acoustical consultants to gain access to the apartments at 88 Cumberland Street in order to undertake proper testing, that monitoring has utilized surrogate locations. None of the reports prepared for SHFA or BHG of monitorings undertaken since the Argyle opened has suggested any breaching of Condition F38. However, the

visit to Apartment 4, 88 Cumberland Street, on 17 October 2010 suggests that there may be breaching of Condition F38(d).

7.2 In terms of the four parts of Condition F38, it appears –

- a) There is no evidence of any breach of this part;
- b) and c): The acoustical reports submitted in accord with Condition F40 indicate that there has been compliance with those parts assuming that “*the nearest affected property*” is at 88 Cumberland Street. However, BHG accepts that its consultant has not been able to measure noise levels at the apartments on that property. Moreover, no one has established what the background noise level in the absence of noise emitted from the Argyle may be. That level is likely to vary seasonally as well as diurnally. Consequently, no one can say whether or not there is compliance with these parts of the condition; and
- d) As discussed above, one brief visit to the affected property is not sufficient to verify whether or not there is compliance with this requirement but it would appear that there may not be compliance.

7.3 BHG is prepared to cooperate with the responsible authorities to do what can reasonably be done to rectify the situation.

## 8 **CONDITION F39**

8.1 Condition F39 deals with noise from mechanical plant. There are a number of units of plant on the roof of the Argyle Stores Building and the adjoining Cleland Building. They service, at least, three tenancies - BHG, Bell Shakespeare and the Bel Mondo restaurant. Some of those units are owned by BHG and others are owned by SHFA. There were complaints about noise from the source shortly after the Argyle opened. SHFA accepted responsibility for rectifying that problem. As a result of RTA’s monitoring in July 2009 and the complaints lodged with the Department, BHG had RTA investigated the noise generated by the mechanical plant associated with the Argyle. It identified the kitchen exhaust of the Lowenbrau Keller as a source of plant noise late in 2009. As a result, the fan in that exhaust was re-fitted by BHG early in 2010. However, the Lowenbrau and its exhaust are not covered by MOD6. That work appears to have made some difference. In the last year, SHFA has progressively moved plant from above the east wing of the Argyle Stores Building to above its south wing. BHG’s plant for Sake and Cut is located on the same platform above the south wing as the relocated SHFA plant. As a result of the recent consent for Cut, BHG’s plant on that platform has been acoustically shielded. [On the visit to the apartment at 88 Cumberland Street, that plant did not appear to be audible.]

8.2 There remain, at least, three major units of plant above the east wing and on the Cleland Building. One belongs to BHG. From the visit to Apartment 4 at 88

Cumberland Street on 17 October, it appears that one or more of those units may be operating in breach of Condition F36. Further investigation is required to establish whether or not that is the situation, to identify which unit(s) is involved and which entity is responsible for any rectifications required to cure any breach.

- 8.3 Unless BHG's independent consultant is permitted to monitor noise from the apartments at 88 Cumberland Street, undertaking the necessary investigations to establish whether or not there is a breach and to identify which plant may be in breach, may not be possible.

## **9 CONDITION F40**

- 9.1 At the outset, there is a conflict between the criteria set out in Conditions F38 and F40 relating to maximum noise levels. Condition F38 sets out what are commonly referred to as the "*LAB noise conditions*", ie, those adopted and imposed by the former Liquor Administration Board over a considerable period of time on licensed premises across NSW and which have been adopted by the Office of Liquor Racing and Gaming, by many local governments and the Land and Environment Court. Condition F40 sets out far tighter criteria, viz –

*“noise emanating from the premises during the hours of operation, [ie, from 11am to 3am each day] at the nearest residential boundary, is not above the ambient background noise level (with such measurement being made between 8pm and midnight) and ... to ensure that the use of the property (internal and external courtyard) is inaudible at the nearest residential property.”*

- 9.2 An immediate problem with implementing this condition is that BHG's acoustical engineers have never been able to gain access to the nearest residential property to assess what the background noise level is or whether or not the activities at the hotel comply with those criteria at that residential property.
- 9.3 Be that as it may, strict compliance with the criterion in Condition F40 would probably mean that the Argyle could not operate at any time - day or night. Indeed, very few businesses of any kind could operate in accordance with it. Because of its unreasonableness, it has been ignored and the Argyle has operated in accord with the LAB noise conditions set out in Condition F38 which constitute the most stringent noise controls adopted or imposed by relevant authorities in NSW.
- 9.4 Condition F40 was also not observed for a period in that reports were not submitted as required. However, the acoustical reports referred to above evidence regular noise monitoring of the Argyle. They show – as best can be achieved in the absence of access to the nearest residential property - that the Argyle has been operating within the criteria specified in Condition F38. As discussed above, strict compliance with Condition F40 could result in the Argyle having to cease operation altogether.

## **10 CONCLUSION**

- 10.1 From the above, it is evident that – in terms of the criteria set out in Section 96(1A), -
- i) the principal proposed modifications set out in 1.12 above would have minimal environmental impact since they simply seek to make permanent the conditions under which the hotel has operated from its opening in 2007 until 18 January 2011 during three trial periods; and
  - ii) the proposed modified development would be identical with that recently approved and operated.
- 10.2 The minor modifications set out in 1.14 and 1.15 above would not affect the environmental impact of the Argyle since they would maintain the *status quo* which has existed since it commenced to trade or would remove *otiose* conditions from the consent.
- 10.3 BHG is aware of the existence of the four dwellings nearby and has taken reasonable measures to moderate any adverse aural impact the operation of the hotel may have on their occupants. As far as it is aware, no resident of those dwellings complained to any relevant authority during the recent trial period. BHG will continue to do whatever it reasonably can to ameliorate any adverse effects. However, the close proximity of dwellings to what is one of Sydney's premier tourist attractions and major late trading hotels (which is a substantial contributor to the life and economy of the The Rocks and the City) is anomalous. In terms of the public interest, the hotel is a much more valuable asset to the City (and even the State) than the four dwellings despite their being prestige apartments. In these circumstances, strict compliance with constraints, such as imposed by Condition F38(d), seems unreasonable. Nevertheless, BHG accepts that any reasonable measures that can be taken to ameliorate any adverse impact should be pursued. The difficulty is to identify such measures.