



# The Pub With No Beer Garden

Simon Fraser  
COLIN BIGGERS & PAISLEY

The North Annandale Hotel in Sydney is located on the corner of Johnston and Booth Streets, Annandale.



It has been there for many years. An issue arose as to whether the Hotel was lawfully able to continue using an area at the rear of the Hotel building as a beer garden.

The Hotel submitted that approval was given by Leichhardt Council in 1953 which permitted the use of the property as a hotel “without any limitation as to the nature or location of any part of that use”. The 1953 consent was given by Council under clause 34(1) of the County of Cumberland Planning Scheme Ordinance. The Ordinance provided that where there was an existing use as at 27 June 1951, an owner could make application to Council for confirmation of the continuation of the existing use.

The Hotel asserted that, in light of the approval granted under the Ordinance in 1953, the Hotel enjoyed existing use rights under section 109B of the Environmental Planning and Assessment Act 1979. Those existing use rights, said the Club, extended to the use of the rear of the Hotel premises for the purpose of a beer garden.

The issue before the Land and Environment Court was whether, as at 27 June 1951, the yard behind the Hotel was used as a beer garden. In considering the issue the Court reviewed several previous cases, particularly the decision of the New South Wales Court of Appeal in *House of Peace v Bankstown City Council* decided in 2000. That case considered whether a development consent

given by the Council in 1954 “for the erection of a brick church and office” for the Presbyterian Church was sufficient to allow an Islamic group, which purchased the property in 1995, to continue to use it as a mosque without requiring a development consent. At first instance in the Land and Environment Court it was held that a mosque was not a church and that a separate development consent should be sought by the new owners. In the Court of Appeal the Court upheld the appeal by House of Peace, essentially holding that the concept of “a place of public worship” was not limited to Christian worship.

As to the argument that the new Islamic owners might use the building in a different way than its previous owner, the Court observed that, over time, there could be changes in Christian usage such as through increasing membership and changes in worship patterns which could result in changed usage. The fact that the group undertaking that usage was now an Islamic group was not legally critical. In making this finding the Court held that a development consent, once given, was an important right attaching to the property impersonal to the applicant. It should be given a fair, liberal and broad interpretation.

The Land and Environment Court in considering the status of the beer garden had to make some deductions from the

limited information available before it regarding the then use of the hotel. The Court found that prior to 27 June 1951, the then existing use of the rear area was as a yard only in connection with the use of part of the hotel where alcohol was not sold to customers. Accordingly, the Court found that the yard area was not used as a beer garden in 1951. The Court also held that the consent given in 1953 was for the use of the building and land for its then purposes. The intention was not to create a new consent applying to the whole of the premises such that alcohol could be sold and consumed on every part of the premises. The Court concluded:

“The Council intended by its 1953 consent to permit continuance of the use of the hotel as it was actually used immediately before the appointed day in 1951. In fact at that time, the rear yard, the bedrooms and bathrooms were not used for or in connection with the sale of alcohol. The Council did not intend to grant consent for those areas to be used for the sale of alcohol. Consequentially, the consent should not be construed as permitting the rear yard to be used as a beer garden.”

The case is a useful reminder both of the benefits of existing use rights and the evidentiary problem faced by land owners wishing to establish - many years later - the existence, nature and extent of an existing use entitlement. (*Kayora Pty Limited v Leichhardt Council* [2009] NSWLEC 126). ▀