

Appeal

Building Act 1993

VICTORIA

DETERMINATION OF THE BUILDING APPEALS BOARD

Municipality	City of Melbourne
Subject Address	Units S909, S802 and N1502 at 8-18 Waterview Walk Docklands 3008
First Appellant	Paul Salter
Second Appellant	Belinda Balcombe
Third Appellant	David Platt
Fourth Appellant	Elizabeth Platt
Fifth Appellant	Andrew Smith
First Respondent	Giuseppe Genco
Second Respondent	City of Melbourne
Joined Party	Owners Corporation 1 & 2 PS501391P

Nature of Appeal

Appeal pursuant to s142(2)(a) of the Building Act 1993 [the Act] between the owner of the building or land and the municipal building surveyor against the making of a building order under s111 of the Act.

A. Determination/s of the Board

Having considered all the submissions and information placed before it and following a site inspection on 7 November 2012, the Board determines, pursuant to s149(1)(a) of the Building Act, to affirm the decision of the Municipal Building Surveyor in the making of a Building Order.

Accordingly, the Appeal is dismissed.

The costs of the proceeding are reserved, with liberty to apply for costs within 14 days of the date of this determination by written submissions being filed and served by each party if all parties agree or by way of a further hearing at a convenient date (allow one-half day). Otherwise, each party will bear their own costs of the proceeding.

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B. Reasons

1. Background

This Appeal concerns 3 building orders made in respect of 3 apartments, namely S909, S802 and N1502 at 8 -18 Waterview Walk, Docklands ("the apartments") as a result of what the respondents say is a change in the use of the apartments, that is using those apartments for short term accommodation.

In late 2004 various occupancy permits were issued, which were staged over a period of time and which provided for a residential Class 2 and which also provided Essential Services Safety Determination based on that class.

The history of this matter is contained in the agreed statement of facts filed by the parties dated 31 August 2012.

The appellants have appealed the issuing of the 3 building orders. Paul Salter and Belinda Balcombe are the owners of Unit S909, Andrew Smith is the owner of Unit N1502 and David and Elizabeth Platt are the owners of Unit S802. In summary, they submit that the building orders have been erroneously issued in that short term accommodation is permitted under a Class 2 building, which is the applicable class for this apartment building. The Panel notes Occupancy Permits which have been issued refer to the subject apartments as being residential Class 2.

By way of an appeal dated 18 November 2011, Paul Salter also sought to appeal the issuing of 3 building notices (Unit 909, Notice No: BUI-2011-183 dated 14 April 2011, Unit 1502, Notice No: BUI-2011-178 dated 14 April 2011 and Unit 802, Notice No: BUI-2011-184 dated 15 April 2011) ("the building notices"). However as the appellants were not within time to do so, the real concern was the 3 building orders (Unit 909, Order No: BUI-2011-183 dated 19 October 2011, Unit 1502, Order No: BUI-2011-178 dated 19 October 2011 and Unit 802, Order No: BUI-2011-184 dated 19 October 2011) ("the building orders"). An amended Notice of a Appeal was filed dated 11 May 2012

There was also a related proceeding (known as the Pakington Properties proceeding) which involved similar issues to the current appeal. However the appellants in that proceeding did not proceed with the appeal and the proceeding was dismissed as a result of non-compliance with the Panel's directions dated 11 October 2012.

2. The Building Appeals Board Hearing

There were five appellants, who were represented at the hearing by Mr Niall S.C. with Ms Brezzi of Counsel. The respondents were represented at the hearing by Mr Margetts S.C. with Mr Wallwork of Counsel and the Owners Corporation was represented at the hearing by Mr Bacon. After a number of direction hearings, the hearing proceeded over 6-half-days, namely on 5, 7, 8, 9, 12 and 14 November 2012. Counsel helpfully filed and served outlines of submissions as well as closing submissions. The Panel reserved its decision at the end of the hearing to consider those submissions and the evidence presented.

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3. The Legislative Provisions

The following legislative provisions have been referred to:-

"s40. Occupation must be in accordance with permit

- (1) A person must not occupy a building in contravention of the current occupancy permit or permits issued under this Division for the building."

"s106. Building notices

Subject to section 107, a municipal building surveyor or a private building surveyor may cause a building notice to be served on an owner of a building, land on which building work is being or is proposed to be carried out or a place of public entertainment if the building surveyor is of the opinion that any one of the following circumstances exists-

- (a) building work has been carried out on the building, land or place without a building permit required by this Act, or in contravention of a building permit or this Act or the building regulations;
- (b) the use of the building or place contravenes this Act or the building regulations;
- (c) the building or place is unfit for occupation or for use as a place of public entertainment;
- (d) the building, land or place or building work on the building, land or place is a danger to the life, safety or health of any member of the public or of any person using the building, land or place or to any property."

The building orders were predicated on the building notices.

s111. Building orders-general

- (1) Subject to section 107, a municipal building surveyor or a private building surveyor may make a building order under this section after the end of the time allowed by the building notice for making representations."

Section 107 is not relevant for present purposes.

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"s142. Building notices and orders

142(2) The owner of a building or land may appeal to the Building Appeals Board against-

- (a) the making of a building order under Division 2 of Part 8 applying to that building or land."

Under the Building Act 1993 ("the Act"), the Board has the following powers in respect of the Appeal:-

"s149. What action can be taken on appeal?

- (1) The Building Appeals Board must consider and determine an appeal and by its determination may-
 - (a) affirm the decision under appeal; or
 - (b) quash the decision under appeal; or
 - (c) vary the decision under appeal; or
 - (d) set the decision under appeal aside and-
 - (i) substitute its own decision; or
 - (ii) remit the decision to the decision-maker for reconsideration in accordance with any directions or recommendations that it considers appropriate.
- (2) In considering and determining an appeal, the Building Appeals Board has in addition to its other powers all the powers of the decision-maker in relation to the decision under appeal.
- (3) Without limiting subsection (2), on an appeal under section 140 the Building Appeals Board has the same powers as the Commission has under Part 6 to give directions concerning transitional and other arrangements following a consent given by the Commission.
- (3A) For the purposes of this Part, if an appeal is made to the Building Appeals Board against the refusal of a building permit or the imposition of a condition on a building permit, the decision under appeal is to be taken to include the decision or report of the relevant reporting authority if-
 - (a) the building permit was refused because the reporting authority refused consent or the condition was imposed as a result of a recommendation in a report of the reporting authority; and

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- (b) the refusal of consent, or the making of the recommendation, was based on a decision made by the reporting authority in relation to the guidelines made under section 188A.
- (4) The Building Appeals Board may make any ancillary or incidental orders that it considers necessary to give effect to its determination on an appeal.”

“Schedule 3 Part 3 – Proceedings before the Building Appeals Board

15. Conducting a proceeding

- (1) The Building Appeals Board must give the parties to the proceeding reasonable opportunity to make—
 - (a) oral submissions at a hearing; or
 - (b) written submissions in the case of a proceeding that is not a hearing.
- (2) Sections 14, 15, 16 and 21A of the **Evidence Act 1958** apply to the Building Appeals Board in relation to a proceeding as if the Board were a Board appointed by the Governor in Council.
- (3) The Building Appeals Board—
 - (a) may proceed by accepting written submissions or by conducting a hearing; and
 - (b) may inform itself in any manner it thinks fits; and
 - (c) is bound by the rules of natural justice; and
 - (d) is not bound by any rule or practice as to evidence; and
 - (e) may conduct a proceeding in private if it considers it in the public interest or the interest of justice to do so, but must otherwise hold its hearing in public; and
 - (f) must proceed with as little formality and technicality and with as much expedition as the requirements of this Act and the regulations and the proper consideration of the matter before it permit; and
 - (g) may proceed with the hearing in the absence of a party to the proceeding if it is satisfied that the party has been given reasonable notice of the date, time and place of the hearing; and

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- (h) may at any time adjourn the proceeding; and
 - (i) may deal with proceedings or classes of proceedings together if it is satisfied that they relate to the same parties, the same building, land or building work or the same or related subject-matter; and
 - (j) may seek the independent advice of a person to assist it in dealing with the proceeding.
- (4) A party to a proceeding may appear at a hearing before the Building Appeals Board or do anything else in relation to a proceeding before that Board either personally or through an agent.
- (5) The Board must disclose to each party to a proceeding any advice it receives under sub-clause (3)(j) and give each party a reasonable opportunity to make submissions about that advice before determining the proceeding.”

“16. Determinations and reasons

- (1) A determination of the Building Appeals Board must be in writing.
- (2) The determination may include any order as to costs that the Building Appeals Board, on the application of a party to the proceeding, considers is just.
- (3) The determination may include any other incidental order or direction that the Building Appeals Board considers is necessary.
- (4) The Building Appeals Board must without delay cause a copy of its determination in any proceeding to be served on each party to the proceeding.
- (5) Within one month after being served with a copy of the Building Appeals Board's determination, or within any further time allowed by the Board, a party to a proceeding may request the Board to give to the party written reasons for its determination.
- (6) The Building Appeals Board must comply with a request received under subclause (5) without delay after receiving it.
- (7) The Building Appeals Board may make public any of its determinations in any manner it thinks fit.
- (8) The Building Appeals Board is not bound by its earlier determinations.”

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Building Regulations 2006

"108. Use of buildings

In these Regulations any reference to the purpose for which a building is used includes the purpose for which it is intended to be used"

"112. Classification of buildings

- (1) For the purposes of these Regulations, buildings must be classified as set out in the BCA.
- (2) If there is any doubt as to the classification of a building under the BCA, the relevant building surveyor must classify the building as belonging to the class it most closely resembles".

"1011. Change of use

- (1) A person not must change the use of a building or place of public entertainment unless the building or place of public entertainment complies with the requirements of these Regulations applicable to the new use.
- (2) Despite subregulation (1), the municipal building surveyor may exempt a building or place of public entertainment from compliance with any of these Regulations applicable to the new use.
- (3) In deciding whether to grant an exemption under subregulation (2) the municipal building surveyor must take into account-
 - (a) the structural adequacy of the building or place; and
 - (b) the requirements necessary to make reasonable provision for-
 - (i) the amenity of the building or place and the safety and health of people using the building or place; and
 - (ii) avoiding the spread of fire to or from any adjoining building.
- (4) A private building surveyor may exercise the powers of the municipal building surveyor under this regulation in the case of a building or place of public entertainment for which the private surveyor has been appointed to issue an occupancy permit.
- (5) This regulation applies in addition to any requirements under the Act to obtain an occupancy permit in respect of change of use or any requirements under regulation 608 in respect of alterations."

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Building Code of Australia Definition of Sole – Occupancy unit

“Sole Occupancy unit means a room or other part of a building for occupation by one or joint owner, lessee, tenant, or other occupier to the exclusion of any other owner, lessee, tenant, or other occupier and includes-

- a) a dwelling; or
- b) a room or suite of rooms in a Class 3 building which includes sleeping facilities; or
- c) a room or suite of associated rooms in a Class 5, 6, 7, 8 or 9 building; or
- d) a room or suite of associated rooms in a Class 9c *aged care building*, which includes sleeping facilities and any area for the exclusive use of a resident.”

The Relevant Provisions of Volume 1 of the BCA – 2011 (“the BCA”)

“A3.2

Classifications

b) **Class 1b**

- (i) a boarding house, guest house, hostel or the like-
 - (A) with a total area of all floors not exceeding 300 m² measured over the enclosing walls of the Class 1b; and
 - (B) in which not more than 12 persons would ordinarily be resident; or
- (ii) 4 or more single dwellings located on one allotment and used for short term accommodation,

which are not located above or below another dwelling or another Class of building other than a *private garage*.

Class 2: a building containing 2 or more *sole-occupancy units* each being a separate dwelling.

Class 3: a residential building, other than a building of Class 1 or 2, which is a common place of long term or transient living for a number of unrelated persons, including –

- a) a boarding house, guest house, hostel, lodging house or backpackers accommodation; or
- b) a residential part of a hotel or motel; or
- c) a residential part of a *school*; or
- d) accommodation for the aged, children or people with disabilities
- e) a residential part of a *health-care building* which accommodates members of staff; or
- f) a residential part of a *detention centre*.”

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Dictionary Definitions

The Chambers Dictionary (1995 edition) defines "Dwell" as:-

"to abide or reside; to remain; to rest attention (on); to continue long (in), to inhabit."

"Dwelling" is defined as:-

"The place where one dwells; a house; habitation; continuance."

"Dwelling house" is defined as:-

"a house used as a Dwelling in distinction from a place of business or other building."

"Dwelling place" is defined as:-

"a place of residence."

These dictionary definitions suggest that a dwelling is more than merely a lodging, or temporary accommodation, but its occupation is of a more permanent nature. Other dictionaries have similar definitions (e.g. Oxford).

"Home" is defined as:-

"a habitual dwelling place, as the place felt to be such; the residence of one's family; the scene of domestic life, with its emotional associations; a separate building occupied by a family; a house."

"Residence" is defined as:-

"the act or duration of dwelling in a place; the act of living in a place required by regulations or performance of functions; a stay in a place; a dwelling place; a dwelling house, esp one of some pretensions that in which anything permanently inheres or has its seat."

The building permit for this development was issued in approximately 2002. The various editions of the BCA ranging from BCA 1996 to BCA 2011 all define Class 2 and 3 occupancies consistently through the different updated editions, with only minor amendments.

One of the distinctions between the definitions of Class 2 and Class 3 is the use of the word "dwelling" for Class 2. Neither the Building Act, the Building Regulations 2006 or the Building Code of Australia contain a definition of "dwelling". However some guidance as to the definition of dwelling can be gained from not only the dictionary definitions but also the cases which were referred to in the closing submissions on behalf of the Owners Corporation and in particular the case of ***Derring Lane P/L v Port Phillip City Council (No. 2) (1998) 108 LGERA 129*** (page 1201 of the Court Book) which refers to the definition of residential building which was defined as "a building constructed for the

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purposes of people dwelling there permanently or for a considerable period of time, or having in that building their settled or usual abode." The Domestic Building Contracts Act 1995 does not define dwelling. It does however define "home".

"home means any residential premises and includes any part of a commercial or industrial premises that is used as a residential premises but does not include-

- a) *a caravan within the meaning of the Residential Tenancies Act 1997 or any vehicle used as a residence; or*
- b) *any residence that is not intended for permanent habitation; or*
- c) *a rooming house within the meaning of the Residential Tenancies Act 1997; or*
- d) *a motel, residential club, residential hotel or residential part of licensed premises under the Liquor Control Reform Act 1998; or*
- e) *a nursing home, hospital or accommodation associated with a hospital; or*
- f) *any residence that the regulations state is not a home for the purposes of this definition;"*

The definition in (b) above excludes any residence that is not intended for permanent habitation.

There are also some historical references to "dwelling" in the Building Control Act 1981 and the Victorian Building Regulations 1983 ("VBRs").

The VBRs contained the definitions for classifications of buildings.

Regulation 6.1(1) provided:-

- a) Class I being a building that is-
 - i. Class 1a: a detached *dwelling* but excluding a Class 1b; and
 - ii. Class 1b: a detached *dwelling* constructed pursuant to the *Housing Act 1983*.
- b) Class II: a building containing two or more "dwellings"
- c) Class III: a building used for residential purposes and not being a class I or II building including -
 - i. A boarding house, guest house, hostel & lodging house;
 - ii. A special accommodation house, home for the aged, children or the like;
 - iii. The residential part or a hotel, motel or the like;
 - iv. The residential part of a school;
 - v. A dwelling not included in paragraphs (a), (b) or (d)

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A definition of a dwelling was given in the Building Control Act 1981:

“dwelling means a building used or intended to be used for use as a separate residence”

The definitions of Class 3 includes short term accommodation and long term accommodation. The short term accommodation captures typical transient use and hospitality facilities such as hotels, motels and guest houses. The long term accommodation captures facilities which traditionally were institutional facilities.

The common link between the long and short term stay accommodation is that the residents are unrelated.

The common aspect of Class 1 and 2 occupancies is that they are both dwellings. Reference to dictionary definitions indicate that a dwelling is for permanent and long term residence.

Having considered current and past definitions of Class 1, 2 and 3 buildings and the definitions of dwelling provided in past legislation and regulations, as well as dictionary definitions of “dwelling”, the Panel has formed the view that a “dwelling” is not only defined by the physical characteristics required by building codes, but also by a sense of connection by the occupants. The Panel is therefore of the view that the nature of the use is an important factor that a building surveyor considers when classifying a building. The Panel is also of the view that Class 2 apartments cannot be used for short term accommodation, such as the “serviced accommodation” which is offered by Docklands Executive Apartments.

4. The Evidence

The appellants called as witnesses Paul Salter, a joint owner of Unit S909 and the owner of the business “Docklands Executive Apartments.” Shane Leonard, a Registered Building Surveyor, also gave evidence on behalf of the appellants.

Guiseppe Genco, the Municipal Building Surveyor of the City of Melbourne, Anastosios Georgas, Acting Executive Manager of the Melbourne Fire Brigade (“the MFB”) and Andrew Gibson, the Relevant Building Surveyor, gave evidence on behalf of the respondents.

Barbara Francis, Chairperson of the Owners Corporation and the owner of Unit S907 and Marshall Delves, the Building Manager, gave evidence on behalf of the Joined Party.

The substance of the evidence given by Mr Salter was that he conducted a business which provided short term accommodation as a commercial enterprise as a result of internet advertisements. The Panel finds in accordance with his evidence (and which is uncontested) that the use of the apartments is solely for short term stays. Further, the Panel finds that many of the services and facilities provided by Mr Salter are similar to those provided by a hotel, namely: -

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- a) greeting guests on arrival;
- b) showing guests to their rooms;
- c) providing a directory for guests;
- d) arranging various services to be provided by third parties. e.g. babysitting, dry-cleaning, shuttles, etc., for an additional charge, daily linen changes could be arranged;
- e) Wi-Fi could be provided for an extra fee;
- f) luggage storage;
- g) check in and check out times;
- h) car parking.

The Panel was provided with a copy of an agreement entitled "licence to occupy" which is to be completed in part by "guests".

The occupancy data prepared by Mr Salter showed that 65.7% of guests stayed 3 days or less and 82.2% stayed 4 days or less.

Mr Leonard was of the view that the actual use within the apartment had not changed in that the apartment was still being used for residential purposes and fell within Class 2. However his view seemed to rely upon a proposition that one must have a kitchen and laundry facilities so one could "live there forever" and also that disability access would usually be provided for a Class 3 use.

Mr Genco gave evidence that in his view, the use had changed from Class 2 to a use which now resembled a Class 3.

Mr Georgas reported on what officers of the MFB had observed at their recent inspection, however he had not inspected the building himself and had not had any operational fire-fighting experience.

Mr Gibson gave evidence that prior to issuing the building permits for all apartments and the buildings, he considered the intended use of the apartments and buildings and made inquiries from the designer and developer as to the intended use for the apartments and buildings. In his view, using the subject apartments for short term accommodation contravened the occupancy permits and was not permitted in a Class 2 classification. Mr Gibson stated that the use of some of the Watergate apartments for short term accommodation in the manner and style of a hotel is contrary to the building permit and the occupancy permit as it was not the intended use.

Mr Delves gave evidence which was to the effect that the majority of incidents which required his attention related to guests whose stays were arranged through commercial businesses such as Docklands Executive Apartments. He also gave evidence of the increased security issues as a result, which included MFB call-outs, damage to common property, frequent parties involving large groups of young people who were not staying at the apartments in question, the misuse of the stairwell, various breaches of the Owners Corporation Rules, blocking of fire exits in various corridors by cleaners hired by various short-term stay operators and the increased maintenance requirements of the building as a result of the above.

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Ms Francis gave evidence of being regularly disturbed throughout the night by various parties and that she was aware that at least one owner had vacated their apartment due to the use of various apartments by short term guests i.e. parties (she stated that the building was nicknamed "Partygate").

Whilst the majority of the incidents were not attributed to the apartments operated by Mr Salter, the Panel deemed it relevant that the change in occupant characteristics goes to the nature of the use.

5. Views as to the Evidence

The Panel was of the view that Mr Salter was using the apartments in a manner which had most of the hallmarks of a hotel. The Panel finds that the arguments advanced by Mr Leonard as to the classification of a building were unconvincing as they focused on the physical attributes of the apartments in question rather than the nature of the use. The Panel is also of the view that Mr Leonard appeared to be an advocate for the appellants and justified his position by making various unsupported assertions, including that short term tenants were better behaved than long term tenants. His example of the use of a Class 2 building for a Disco, which he conceded would change the use if it was "a commercial arrangement" and then promptly withdrew the word "commercial" when he realised it was contrary to the previous opinion that he was expressing, was one example of his lack of objectivity. His unsupported opinion that people who tenant buildings treat them badly and that a short term occupant is less likely to do damage was contrary to the evidence of all of the other witnesses.

6. Conclusions

The Panel finds that the use of the apartments for commercial short term stays is not a use which is permitted under the existing occupancy permit for Class 2 (which involves the operation of a business).

The operation of such an enterprise within a residential Class 2 building is deemed a change of use according to Regulation 1011 and therefore a new occupancy permit is required. The municipal building surveyor can exercise his discretion under Regulation 112 of the Building Regulations to classify a building to what it most closely resembles (R112(2)). In this case, based on the evidence and information before it and based upon the Panel's view of the statutory scheme, the Panel is not persuaded that the classification of the MBS that the subject apartments had become Class 3 as a result of their use for short term stays is incorrect and therefore the Appeal is dismissed.

The Panel is of the view that the definition of dwelling does not include the use by short term guests resulting from a commercial enterprise which is conducted in a hotel style.

The current use of the subject apartments is very different to what would usually be the case under a tenancy agreement e.g. under a tenancy agreement, there are usually no check in and check out times, no limit on visitors, no daily rates to occupy the apartments, the time for the commencement of the tenancy agreement is usually between business hours, referees are normally requested, the stay is generally longer

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than 30 days, a security deposit is required to be deposited with the Residential Authority and not the landlord etc.

There has always been an inherent difference between a licence to occupy premises and a tenancy agreement. Quite clearly, in this case, the occupants of the subject apartments are treated as guests and have a mere licence to occupy. They are not, unlike tenants of other apartments, entitled to use the pool and gym facilities, i.e. they have restricted access to the common property. Further, the induction process of tenants is more comprehensive than Mr Salter's induction of one of the nominated representatives of the apartment guests.

That is not to say that the use of an apartment for short term accommodation can never be defined as a dwelling. However, based on the facts of this case, the use of the apartments is not permitted under Class 2.

The Panel notes that the original fire engineering report (the Arup report dated 20 June 2002) which the relevant building surveyor relied upon to approve the development contains numerous qualifications (refer sections 5.1 and 5.2) which indicate that any changes, including to building fabric and layout, fire load, occupancy characteristics or building classification may invalidate the findings contained in the report and would require review (by a fire engineer). It is considered that this type of qualification would be necessary when a municipal building surveyor assesses building enforcement action such as in this case.

The Panel is of the view that based on the evidence of Mr Delves and Ms Francis, the occupancy profile has changed due to the use of the subject apartments by Mr Salter. It is clear that this type of commercial arrangement which Mr Salter has with the owners of the other subject apartments can change the use to short term accommodation.

The Panel does consider stays less than 3 days (which comprised 65.7% of guests who occupied the subject apartments) to be short term stays. However it does not deem it necessary to specify a particular duration associated with short term stays. The Panel further relies on the intended use and the nature of the occupant in determining that the subject apartments the subject of this appeal are being used in a short term manner.

The Panel is of the view that the defined time frame of 30 days referred to in the Building Orders does not necessarily impact upon the Municipal Building Surveyors' decision to issue the Building Orders (which is the decision appealed against) or the building classification referred to in the Building Orders with respect to the subject apartments. In any event, the Panel did not understand that the appellants were objecting to this reference being contained in the Building Orders.

Even if the Panel did not uphold the decision of the MBS, the Panel would still be of the view that the Building Notices were validly issued as the changed use results in a danger to the life and safety of any person using the building in that the occupant characteristics, fire safety needs and reaction to fire or other emergencies have varied from that for which the building was originally designed, approved and intended to be used.

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In addition to life and safety issues, the Panel notes that there are specific and distinct amenity characteristics associated with both Class 2 and 3 buildings, which is a key point of distinction in those definitions.

7. Costs

The costs of the proceeding are reserved, with liberty to apply for costs within 14 days of the date of this determination by written submissions being filed and served by each party if all parties agree or by way of a further hearing at a convenient date (allow one-half day). Otherwise, each party will bear their own costs of the proceeding.

Panel Members

Date of Hearing

5, 7, 8, 9, 12 and 14
November 2012

Leslie Schwarz, Joe Zita, Emily Mudge



Chairperson, Building Appeals Panel

Registrar

Date signed: 22/03/13

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