



Land and Environment Court
New South Wales

Case Name: RNB Property Group Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1012

Hearing Date(s): 15-16 September 2022; 14 October 2022: 21 November 2022; 24 November 2022

Date of Orders: 11 January 2023

Decision Date: 11 January 2023

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the application for development consent, pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, in the sum of \$3000.
(2) The appeal is upheld.
(3) Development application DA-416/2021/1 for seniors housing development comprising the adaptive reuse of the existing dwellings on the site and alterations / additions to the dwellings to accommodate 6 units and multi-level underground parking is determined by the grant of consent, subject to conditions of consent at Annexure A.
(4) All exhibits are returned, except for Exhibits A, B, C, D, E, F, N and 15.

Catchwords: DEVELOPMENT APPLICATION – seniors housing development in R2 Low Density Residential zone – heritage conservation area – heritage significance of local heritage item – earthworks – whether deferral of essential matter

Legislation Cited: Conveyancing Act 1919 s 88
Environmental Planning and Assessment Act 1979, ss 8.7, 8.11, 8.15
Environmental Planning and Assessment Regulation 2000, cll 50, 55
NSW Heritage Act 1977, s 25
State Environmental Planning Policy No 65 – Design quality of residential apartment development, cll 28, 30
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cll 2, 4, 5, 10, 13, 14, 16, 18, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
Woollahra Local Environmental Plan 2014, cll 4.3, 4.6, 5.10, 5.21, 6.1, 6.2, Sch 5

Cases Cited: Bettar v Council of the City of Sydney [2014] NSWLEC 1070
Ku-ring-gai Council v Pathways Property Group Pty Ltd [2018] NSWLEC 73
Manderrah Pty Ltd v Woollahra Municipal Council and Anor [2013] NSWLEC 1196
SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112.
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Texts Cited: Apartment Design Guide
Seniors Living Policy: Urban Design Guideline for Infill Development published by the Department of Infrastructure, Planning and Natural Resources in March 2004
Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: RNB Property Group Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
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File Number(s): 2021/358556

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** Development for the purposes of seniors housing is proposed on a steeply sloping site to the uphill side of Drumalbyn Road, Bellevue Hill, on a site currently occupied by two existing dwelling houses, one positioned behind the other.
- 2 To this end, development application DA-416/2021/1 was lodged by the Applicant in these proceedings on 22 September 2021 (the DA). That DA sought consent to demolish the two dwelling houses on the site at Nos 53 and 55 Drumalbyn Road, Bellevue Hill in order to construct 11 apartments over four storeys, and over a multi-level underground car parking for 16 vehicles.
- 3 Following the elapse of the period prescribed for a determination of the development application pursuant to s 8.11 of the Environmental Planning and Assessment Act 1979 (EPA Act), the Applicant in these proceedings, RNB Property Group Pty Ltd, now brings this Class 1 appeal pursuant to s 8.7 of the EPA Act.
- 4 The DA was amended on two occasions prior to the hearing. The practical effect of these amendments is that the dwellings are no longer to be demolished, but instead are to be adaptively reused to accommodate 6 apartments.
- 5 The amendments to the DA also had the effect of resolving all of the contentions originally pressed by the Respondent, but for the single remaining issue in dispute between the parties which is the impact of the development on built and natural environmental heritage.
- 6 The parties agree the sole matter in contention is in respect of built and natural heritage which is a merit issue of whether, having considered the effect of the

proposed development on a heritage item(s), development consent ought to be granted. The parties also agree that the proposed development breaches development standards in respect of building height, number of storeys adjacent to the boundary, and the number of storeys proposed at the rear of the site.

- 7 As this is a jurisdictional precondition that must be satisfied for the Court to have power to grant consent, I will first consider the written requests the Applicant relies upon before considering the evidence in respect of heritage.
- 8 It is also relevant to record that the Court observed the development application was clearly deficient in certain areas that were not identified by the Respondent, and so beyond the scope of the principally contested issues in dispute.
- 9 Firstly, the Court expressed concern that, on such a steeply sloping site, the stormwater plans (Exhibit F) prepared by its design hydraulic engineers, failed to indicate any stormwater drainage whatsoever to the rear half of the site, being the upper slope from which discharge can be expected from No 55 Drumalbyn, and surface areas surrounding that dwelling.
- 10 Secondly, the Court sought assistance in understanding whether the proposed method of, evidently complex, excavation was achievable, given the level of geotechnical investigation undertaken to date.
- 11 At the completion of the second day of the hearing, the parties jointly sought an adjournment to address the Court's questions and, relatedly, to seek expert review of an amendment to the relevant provision at cl 6.2 of the Woollahra Local Environmental Plan 2014 (WLEP) that, on 9 September 2022, inserted construction dewatering to be a mandatory consideration in deciding whether to grant development consent for earthworks.
- 12 I granted the adjournment, with directions for the Applicant to file and serve additional information no later than 30 September, and for additional joint expert conferencing relevant to that additional information by 14 October.
- 13 The Court facilitated case management on 14 October at which the Respondent was directed to serve particulars of any additional contention(s) to

the Applicant by 19 October, after which time the geotechnical and structural engineering experts were to confer on material prepared by Applicant and provide joint expert report by 25 October 2022.

- 14 The Court's directions were not complied with, and so the Court also facilitated case management on 21 November after which joint expert reports in respect of stormwater, and Geotechnical and structural engineering were filed with the Court on 22 November 2022.
- 15 That said, as the written requests are in respect of standards contained in State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (the Seniors Housing SEPP), it is helpful to first set out the relevant provisions of the Seniors Housing SEPP, after first summarising certain characteristics of the site.

The site and its context

- 16 The site comprises No 53 Drumalbyn Road, otherwise legally described as Lot 3 in DP 316390, and No 55 Drumalbyn Road, otherwise legally described as Lot B in DP 186880 and Lot 1 in DP 135110.
- 17 Together, the allotments have a frontage to Drumalbyn Road of 21.55m in width, and a site area of 1,857m².
- 18 According to the site survey (Exhibit G, Tab 5), the site falls in the order of 30m in elevation from the rear to the frontage to Drumalbyn Road.
- 19 An imposing rock formation occupies the rear of the site, creating a sudden rise in level to properties fronting Victoria Road to the south-west.
- 20 The site is described in the Amended Statement of Facts and Contentions (Exhibit 1) as being located in the middle of the Bellevue Hill North Precinct and near to the high end of the north-eastern facing escarpment from which significant views and vistas are enjoyed from both public and private vantage points.
- 21 Adjoining the site to the north-west is No 51 Drumalbyn Road, a one/two-storey dwelling with garage fronting Drumalbyn Road.

- 22 Further to the north-west is No 47B and 47C Drumalbyn Road, being both two-storey dwelling houses on a battle-axe allotment, essentially behind No 51 when viewed from the street.
- 23 Adjoining the site to the south-east is a four-storey residential flat building at No 59 Drumalbyn Road, with five garages fronting Drumalbyn Road, and a two-storey building comprising 2 units and 2 street-facing garages at No 57 Drumalbyn Road.
- 24 The site is located within the R2 Low Density Residential zone, according to the WLEP, in which the objectives of the zone are:
- To provide for the housing needs of the community within a low density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.
- 25 The proceedings commenced with an onsite view at which the Court heard oral submissions from residents at the following addresses:
- No 107 Victoria Road, Bellevue Hill, that adjoins the subject site to the rear.
 - Unit 1 of No 59 Drumalbyn Road, Bellevue Hill.
- 26 Oral submissions were also made on behalf of residents by the following professionals:
- Mr Scott Barwick, of SJB Town Planning on behalf of the owners of No 47C.
 - Mr Warwick Davies, a geotechnical engineer on behalf of the owners corporation of Nos 57 and 59.
 - Ms Natalie Vatala, solicitor, on behalf of the owners corporation of Nos 57 and 59.
 - Mr Kerry Nash, town planner, on behalf of the owners corporation of Nos 57 and 59.
- 27 In notes agreed between the parties (Exhibit 15), the oral submissions may be summarised under the following broad topics:
- (1) Height
 - (2) Off site impacts resulting from excessive excavation

- (3) Construction related impacts
 - (4) Privacy and overlooking
 - (5) Insufficient onsite parking for vehicles
 - (6) Acoustic and overshadowing impacts
 - (7) Heritage
- 28 Additionally, written submissions prepared in response to the development application are found at Exhibit 3.
- 29 The Court, in the company of the legal representatives and experts, was taken to the properties at No 57 Drumalbyn Road, and to Units 1, 3 and 5 of No 59 Drumalbyn Road from where certain views over side boundaries, and to distant views to Sydney Harbour and the wider district were pointed out, and certain relative levels were also identified from plans.
- 30 The Court was also taken inside Nos 53 and 55 Drumalbyn Road where, with the assistance of the heritage experts, the Court observed historic fabric that was identified, variously, to be retained, adapted, or removed.

The proposed development contravenes certain development standards

- 31 The proposed development seeks development consent for seniors housing development pursuant to the Seniors Housing SEPP.
- 32 The aims of the Seniors Housing SEPP are in the following terms:

2 Aims of Policy

- (1) This Policy aims to encourage the provision of housing (including residential care facilities) that will—
 - (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
 - (b) make efficient use of existing infrastructure and services, and
 - (c) be of good design.
- (2) These aims will be achieved by—
 - (a) setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and
 - (b) setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and

(c) ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.

33 As the site is located in the R2 zone, and dwelling house development is permitted with consent, the land can be said to be zoned primarily for urban purposes, consistent with cl 4 of the Seniors Housing SEPP which relevantly provides:

(1) **General** This Policy applies to land within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if—

(a) development for the purpose of any of the following is permitted on the land—

(i) dwelling-houses,

...

34 The particular type or kind of Seniors housing proposed, is defined by cl 10(c) of the Seniors Housing SEPP as “a group of self-contained dwellings”.

35 A ‘self-contained dwelling’ is defined at cl 13 as:

(1) **General term: “self-contained dwelling”** In this Policy, a **self-contained dwelling** is a dwelling or part of a building (other than a hostel), whether attached to another dwelling or not, housing seniors or people with a disability, where private facilities for significant cooking, sleeping and washing are included in the dwelling or part of the building, but where clothes washing facilities or other facilities for use in connection with the dwelling or part of the building may be provided on a shared basis.

An example of self-contained dwellings is then provided at (2) in the following terms:

“in-fill self-care housing” In this Policy, **in-fill self-care housing** is seniors housing on land zoned primarily for urban purposes that consists of 2 or more self-contained dwellings where none of the following services are provided on site as part of the development: meals, cleaning services, personal care, nursing care.

36 The objective for development of housing for seniors, at cl 14, Chapter 3, is:

The objective of this Chapter is to create opportunities for the development of housing that is located and designed in a manner particularly suited to both those seniors who are independent, mobile and active as well as those who are frail, and other people with a disability regardless of their age.

37 Clause 15, Chapter 3, enables seniors housing development notwithstanding provisions of other environmental planning instruments in the following terms:

This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy—

(a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and

...

38 Clause 16 provides that development for the purposes of seniors housing may be carried out only with the consent of the relevant consent authority unless another environmental planning instrument allows that development without consent.

39 Clause 18 requires seniors development to be for the purposes of accommodating seniors or people who have a disability, people who live within the same household with seniors or people who have a disability, and staff employed to assist in the administration of and provision of services to housing provided under this Policy.

40 To this end, cl 18(2) provides that:

(2) A consent authority must not consent to a development application made pursuant to this Chapter unless—

(a) a condition is imposed by the consent authority to the effect that only the kinds of people referred to in subclause (1) may occupy any accommodation to which the application relates, and

(b) the consent authority is satisfied that a restriction as to user will be registered against the title of the property on which development is to be carried out, in accordance with section 88E of the *Conveyancing Act 1919*, limiting the use of any accommodation to which the application relates to the kinds of people referred to in subclause (1).

41 Without prejudice Conditions of Consent (Exhibit 19) provide accordingly, at Condition I.13.

42 Part 1A of the Seniors Housing SEPP deals with Site Compatibility Certificates, that are agreed to not be relevant to this appeal, but for a requirement contained in cl 29 for a development application made pursuant to this Chapter to which clause 24 does not apply.

43 As cl 24 does not apply, the following provisions at cl 29(2) and (3) do:

(2) A consent authority, in determining a development application to which this clause applies, must take into consideration the criteria referred to in clause 25 (5) (b) (i), (iii) and (v).

(3) Nothing in this clause limits the matters to which a consent authority may or must have regard (or of which a consent authority must be satisfied under another provision of this Policy) in determining a development application to which this clause applies.

44 The provisions referred to at subcl 29(2), being provisions contained in cl 25(5)(b) are, relevantly:

(i) the natural environment (including known significant environmental values, resources or hazards) and the existing uses and approved uses of land in the vicinity of the proposed development,

...

(iii) the services and infrastructure that are or will be available to meet the demands arising from the proposed development (particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26) and any proposed financial arrangements for infrastructure provision,

...

(v) without limiting any other criteria, the impact that the bulk, scale, built form and character of the proposed development is likely to have on the existing uses, approved uses and future uses of land in the vicinity of the development,

45 According to cl 26(1) of the Seniors Housing SEPP, residents of seniors housing development must have access to the following facilities:

...

(a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and

(b) community services and recreation facilities, and

(c) the practice of a general medical practitioner.

46 Those services may be located off-site if access to those off-site services satisfies the requirements of cl 26(2)(b) of the Seniors Housing SEPP that are in the following relevant terms:

...

(2) Access complies with this clause if—

...

(b) in the case of a proposed development on land in a local government area within the Greater Sydney (Greater Capital City Statistical Area)—there is a public transport service available to the residents who will occupy the proposed development—

(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and

(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in subclause (1), and

(iii) that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive),

and the gradient along the pathway from the site to the public transport services (and from the public transport services to the facilities and services referred to in subclause (1)) complies with subclause (3)...

...

- 47 Subclause (3) defines the acceptable gradients applicable, and the 'suitable access pathway' cited in subcl (2)(b)(i) is defined at subcl (4)(a) in the following terms:

a **suitable access pathway** is a path of travel by means of a sealed footpath or other similar and safe means that is suitable for access by means of an electric wheelchair, motorised cart or the like, and

- 48 Clause 28 provides that a consent authority must not grant consent unless satisfied that the development will be connected to water and sewer services.
- 49 Clause 30 provides that a consent authority must not grant consent unless satisfied that the applicant has taken into account a site analysis prepared by the applicant in accordance with subcl (2), including a written statement explaining how the design of the proposed development has regard to the design principles set out in Division 2 of the Seniors Housing SEPP, and the information contained at subcl (3) and (4).
- 50 Clause 31 provides the consent authority, or the Court on appeal, must take into consideration the provisions of the *Seniors Living Policy: Urban Design Guideline for Infill Development* published by the Department of Infrastructure, Planning and Natural Resources in March 2004 (Exhibit 14).
- 51 Clause 32 requires that satisfaction be had as to whether the proposed development demonstrates that adequate regard has been given to the principles set out in Division 2, that are, broadly:
- (1) Neighbourhood amenity and streetscape (cl 33)
 - (2) Visual and acoustic privacy (cl 34)
 - (3) Solar access and design for climate (cl 35)
 - (4) Stormwater (cl 36)

- (5) Crime Prevention (cl 37)
- (6) Accessibility (cl 38)
- (7) Waste management (cl 39)

52 Part 4 of the Seniors Housing SEPP contains the following relevant development standards:

40 Development standards—minimum sizes and building height

(1) **General** A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.

(2) **Site size** The size of the site must be at least 1,000 square metres.

(3) **Site frontage** The site frontage must be at least 20 metres wide measured at the building line.

(4) **Height in zones where residential flat buildings are not permitted** If the development is proposed in a residential zone where residential flat buildings are not permitted—

(a) the height of all buildings in the proposed development must be 8 metres or less, and

Note—

Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).

(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and

Note—

The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.

(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.

...

53 The written requests cited at [15] are responsive to breaches of cl 40(4)(a), (b) and (c) of the Seniors Housing SEPP.

54 Clause 4.6 of the WLEP provides, at subcl (2), that development consent may be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument.

55 The second sentence of subcl (2) also states, relevantly:

However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

56 As shown by Moore J in *Ku-ring-gai Council v Pathways Property Group Pty Ltd* [2018] NSWLEC 73, at [91], where the provision sought by the Applicant to be varied is not expressly excluded from the wording of cl 4.6(8) of the WLEP, it has been consistently held by the Court that a proponent's ability to utilise cl 4.6 to vary a development standard is not ousted so long as the proponent is able to justify the contravention in terms set out in cl 4.6 of the relevant local environmental plan.

57 His Honour's summary then, as now, is helpful in its terms:

Because the development standards in cl 40(4) of the SEPP are not expressly excluded from the operation of cl 4.6 of the LEP, the first sentence of cl 4.6(2) remains operative and thus made available below the opportunity for the Company to seek to have its three objections, pursuant to cl 4.6 of the LEP, assessed for the purpose of granting of dispensation from compliance with the development standards in cl 40(4) of the SEPP.

The proposed development contravenes certain development standards

58 As stated previously, the Applicant acknowledges the development exceeds three development standards, in respect of which the following written requests, prepared by GSA Planning are relied upon:

- (1) Clause 4.6 Exception to Development Standards – Building Height, dated August 2022 (Height request) (Exhibit C, Tab H)
- (2) Clause 4.6 Exceptions to Development Standards – Number of Storeys Adjacent to Boundary, dated August 2022 (Storeys at boundary request) (Exhibit C, Tab J)
- (3) Clause 4.6 Exceptions to Development Standards – Number of Storeys at rear, dated September 2022 (Storeys at rear request) (Exhibit J)

Clause 4.6 Exception to Development Standards – Building Height

59 The proposal exceeds the height standard at cl 40(4)(a) of the Seniors Housing SEPP that serves to limit the height of all buildings in the proposed development to less than 8m.

60 The written request in respect of building height identifies an inconsistency between the height standard in the Seniors Housing SEPP, permitting a height of 8m to the underside of a ceiling, and that contained at cl 4.3 of the WLEP,

permitting an overall height of building to 9.5m. As such, the provision in the Seniors Housing SEPP prevails (cl 5(3), Seniors Housing SEPP).

61 That said, the written request in respect of building height states the maximum height, as defined in the Seniors Housing SEPP, is 9.36m, which is below that permitted by the WLEP.

62 Adopting the approach taken by the Court in *Bettar v Council of the City of Sydney* [2014] NSWLEC 1070 (“Bettar”), the written request asserts the exceedance is limited to the eastern portion of the upper storey of the addition to No 53 and No 55.

63 In *Bettar*, the Court found that height should be determined by reference to topography as one aspect of the proposal’s context. So understood, the proposal in the circumstances of this case is for a two to three-storey built form that will have limited visibility from the street, and so maintain compatibility with neighbouring building heights.

64 The height request relies on the first test as it is expressed in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (“Wehbe”), in asserting compliance with the height standard is unreasonable and unnecessary as the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

65 That said, an objective of the height standard is absent from cl 40 of the Seniors Housing SEPP. For this reason, the height request adopts the objectives of the height standard at cl 4.3 of the WLEP, that are in the following terms:

- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,
- (b) to establish a transition in scale between zones to protect local amenity,
- (c) to minimise the loss of solar access to existing buildings and open space,
- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

66 In respect of objective (a), the height request asserts, in summary:

- (1) Desired future character is not defined in the WLEP, but is properly derived from the text and context of relevant controls including the R2 zone, its objectives and the land use table; development standards including that at cl 4.3; and five-storey residential buildings that are the subject of recent development consent, which is a similar circumstance to that at play in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112.
- (2) The adaptive reuse of the existing dwelling at No 53 results in a two-storey presentation, while the upper storeys that partially exceed the permitted height, substantially comply with the height standard at cl 4.3 of the WLEP, and are recessed so that, in the case of No 53, there is limited visibility. In the case of No 55, there is no visibility of the exceedances from Drumalbyn Road.
- (3) The proposal is consistent with the twelve desired future character objectives of the Bellevue Hill North Precinct in Part B1 of the Woollahra Development Control Plan 2015 (WDCP) because it is:
 - (a) consistent with the streetscape on the high side of Drumalbyn Road, and the arrangement of 'two tiers'; one viewed as separate and behind the other, and
 - (b) is consistent with the prevailing subdivision pattern, and
 - (c) because adaptive reuse of the existing dwellings with contemporary alterations and additions maintain the evolution of residential building styles, and provides a transition in scale that is compatible with the neighbouring dwellings.
 - (d) cut and fill is minimised by the decision to step the development up the topography, and the landscape setting is reinforced by the plantings proposed in the landscape plan.
 - (e) Finally, as two free standing garages fronting the street are proposed to be replaced by a single, recessed entry, the onsite parking will not dominate the streetscape.

67 In respect of objective (b), the height request asserts that:

- (1) The site is within the vicinity of the R3 Medium Density Residential zone, in which building heights of up to 16.5m are permitted, or buildings of up to five storeys in height.
- (2) As the proposal is for two and three-storey development within an R2 zone, the transition in scale between zones is considered appropriate.

68 In respect of objective (c), the height request asserts compliance with the WDCP as follows:

- (1) The shadows diagrams demonstrate the adjoining building at No 59 Drumalbyn Road will maintain its current solar access between 9am and 1pm, and be overshadowed, in part, between 2-3pm.

- (2) Likewise, the shadows diagrams demonstrate the adjoining building at No 57 Drumalbyn Road will maintain its current solar access between 9am and 3pm. However, a portion of its open space will be overshadowed from 12pm onwards.

69 In respect of objective (d), the height request asserts that:

- (1) A combination of compliant front and side setbacks, the stepped form of the development, and the topography itself, ensures that existing view corridors from adjoining properties to the south and west of the site are retained.
- (2) Likewise, the potential for privacy impacts and visual bulk arising from the areas of exceedance are addressed by setbacks of 9m to habitable rooms and private open space on neighbouring properties.

70 In respect of objective (e), the height request asserts that the site is not within an area with identified view corridors, and will not affect public views of Sydney Harbour due to the location of built form below the 'cliff edge' to the rear of the site.

71 Next the height request sets out a number of environmental planning grounds that are said to be sufficient to justify the contravention of the standard. These may be summarised as follows:

- (1) The site's steeply sloping topography is a constraint addressed by stepping the built form down the site, and additional setback at the upper levels, consistent with s 1.3(g) of the EPA Act, to promote good design and amenity of the built environment.
- (2) The proposal is permissible in the R2 zone by virtue of the Seniors Housing SEPP, is within an area in which a height of 9.5m applies and, by retaining and adapting the existing dwelling at No 53 Drumalbyn Road, presents a bulk and scale consistent with the existing and emerging development in the area, and so is compatible with its context. This is distinct from a number of development applications for seniors housing development recently approved that exceed height and the number of storeys.
- (3) Furthermore, the area of exceedance will not result in significant privacy, solar access or view sharing impacts but is instead recessive such that its impact on neighbours, or visibility from Drumalbyn Road is limited.
- (4) As the proposal is for alterations and additions to existing heritage items, compliance is made more difficult given existing floor-to-ceiling heights are retained.

72 Finally, the height request asserts consistency with the objectives of the zone, at [24], because the development provides seniors housing within a low density

residential area, meeting the needs of an ageing community, and, for reasons advanced earlier, is compatible with the low density residential character, and is of a height and scale that achieves the desired future character of the neighbourhood.

- 73 I note here that the Respondent is satisfied that the height request adequately addresses the matters required to be demonstrated by cl 4.6(3) of the WLEP, and that the proposed development, as amended, will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development in the R2 Low Density Residential Zone.
- 74 Furthermore, the Respondent does not contend that the contravention of the development standard raises any matter of significance for State or regional environmental planning, or that there is any public benefit in maintaining the development standard, pursuant to cl 4.6(5) of the WLEP.
- 75 Accordingly, the Respondent raises no issue regarding cl 4.6 and accepts that a variation of the height development standard under cl 4.3 is justified.
- 76 I am satisfied under cl 4.6(4) that the height request has adequately addressed the matters required to be demonstrated by subcl (3) and that the proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development within the R2 Low Density Residential Zone, for the reasons given in the request.
- 77 In forming this opinion of satisfaction, I accept that the proposed development is substantially contained within the height plane at cl 4.3 of the WLEP, that also applies to any form of development permissible in the surrounding neighbourhood within the R2 zone, and that the external form of the development substantially retains the appearance of two separate dwellings on the site, as is common in the surrounding neighbourhood.
- 78 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl

4.6(5) of the WLEP and I find no grounds on which the Court should not uphold the height request.

Clause 4.6 Exception to Development Standards – Number of Storeys Adjacent to Boundary

- 79 The proposal exceeds the development standard at cl 40(4)(b) of the Seniors Housing SEPP that serves to limit the number of storeys of buildings adjacent to a boundary to two storeys in height, where the site is located in a zone in which residential flat building are not permitted, as is the case here.
- 80 The written request in respect of the number of storeys adjacent to the boundary (Storeys at boundary request) states that the built form proposed complies with side setback controls found in the WDCP, above basements, and that the result is a proposal of two and three storeys, where adjacent to boundaries.
- 81 The reason for the variation, according to the Storeys at boundary request, is the steeply sloping topography and recessed upper floors.
- 82 As in the height request, the Storeys at boundary request relies on the first test as it is expressed in *Wehbe*, in asserting compliance with the height standard is unreasonable and unnecessary as the objectives of the standard are achieved notwithstanding the non-compliance with the standard.
- 83 That said, as stated at [65], the standards contained at cl 40 of the Seniors Housing SEPP lack an express objective. In lieu, a note follows the standard at subcl (4)(b), stating:
- The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.
- 84 While the Storeys at boundary request acknowledges that limited weight can be given to the note above, it asserts some guidance may be taken as to the underlying objective of the standard, with which the proposal conforms when the relevant controls applicable to the streetscape are understood.
- 85 The relevant control is the height standard, permitting development up to 9.5m which may be understood to envisage three-storeys in height. However, the proposal is to retain the existing two-storey form of No 53 Drumalbyn Road, behind which an upper level is stepped back, and landscaping serves to soften.

- 86 Similarly, while the height standard permits three-storeys, the effect of the steep topography and narrow site, if strict compliance with the standard at cl 40(4)(b) is required, would be a more continuous two-storey built form stepping down the site. However, this would be inconsistent with the surrounding character, and with recently approved development in the area.
- 87 Next, the Storeys at boundary request sets out a number of environmental planning grounds that are said to be sufficient to justify the contravention of the standard. In many respects, the grounds are similar to those at [72]-[73], and relies upon consistency with the desired future character of the Bellevue Hill North Precinct, for the reasons summarised at [66(3)].
- 88 Additionally, two grounds are unique to the provisions of subcl (4)(b), which I summarise as follows:
- (1) Firstly, despite the non-compliance, the side setbacks proposed by the development are consistent with controls in the WDCP that apply to development on this site and to development in the area. Additional to this conformity, the proposal incorporates further setbacks in the form of deep recesses.
 - (2) Secondly, while the consolidation of built form in to two separated building envelopes results in the exceedance, this is preferable to an envelope that complies with the standard, that would be a more continuous form stepping down the steep slope.
- 89 The position taken by the Respondent in respect of the Storeys at boundary request is identical to that set out [73]-[75], in which it is commonly held that the contravention of the relevant standard is justified, and should be upheld.
- 90 I am satisfied that the Storeys at boundary request adequately addresses the matters required to be demonstrated by cl 4.6(3) of the WLEP, and I am also satisfied that the development will be in the public interest because it is consistent with the underlying objective of the development standard at cl 40(4)(b) of the Seniors Housing SEPP, as expressed at [83].
- 91 In arriving at this opinion of satisfaction, I note my reasons summarised at [72] as to the grounds on which I am also satisfied that the proposal is consistent with the objectives of the R2 zone, and I accept the argument advanced by the Storeys at boundary request that the proposed development is compatible, if

not consistent, with the storey heights evident in neighbouring properties such as No 59 Drumalbyn Road, at the front of the site.

- 92 I am also assisted by Mr Karavanas' oral evidence that when Figure 3 of the Storeys at boundary request is read with the architectural plans, the height of new additions to No 55 is similar in height to the height of the existing pergola structure over the rooftop terrace, at the rear of the site, and so an abrupt change in scale is avoided. Finally, I accept the Applicant's analysis of sightlines between the proposed development in the vicinity of No 53, and the adjacent site at No 59 Drumalbyn Road (Exhibit K) that, in my view, establishes reasonable distances permitting privacy between properties in an urban setting.
- 93 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP and I find no grounds on which the Court should not uphold the height request.

Clause 4.6 Exceptions to Development Standards – Number of Storeys at Rear

- 94 The proposal also exceeds the development standard at cl 40(4)(c) of the Seniors Housing SEPP that serves to limit the number of storeys in the rear 25% area of the site to no more than one storey, where the site is located in a zone in which residential flat building are not permitted, as is the case here.
- 95 The Storeys at rear request states that as the proposal includes an amalgamation of two sites of differing geometry, the area to be defined as the 'rear 25% of the site' is subject to interpretation.
- 96 Three scenarios are proffered, addressing varying interpretations of what may be defined as the rear 25% of the site.
- (1) Scenario 1 identifies the rear 25% of the site occupied by No 53 Drumalbyn Road.
 - (2) Scenario 2 identifies the rear 25% of the site occupied by No 55 Drumalbyn Road.
 - (3) Scenario 3 identifies the rear 25% of the site being the rear of the lots at [16], after consolidation.

- 97 Clearly, Scenario 1 and 2 are concepts capable of co-existing, whereas Scenario 3 is an alternate concept. So, while three scenarios are represented in the Storeys at rear request, there are just two methods of defining the rear 25% of the site, being the rear of the lots as they are legally described today, or as a consolidated site as proposed by the development the subject of the development application.
- 98 Common to all scenarios is that the proposal will result in development that varies from one to three-storeys in the rear 25% of the site, is within the 9.5m height permitted by the height standard, and is also within the height control as defined by cl 40(4)(a) of the Seniors Housing SEPP, at [59].
- 99 I accept that Scenario 3 is the applicable area because the text of the development standard applies to built form in the rear 25% of the site. In the circumstances of this case, because consolidation of the lots is proposed, the rear 25% of the site is that described in Scenario 3.
- 100 As in the height request, the Storeys at rear request relies on the first test as it is expressed in *Wehbe*, and asserts compliance with the standard is unreasonable and unnecessary as the objectives of the standard are achieved notwithstanding the non-compliance with the standard.
- 101 That said, absent an expressed objective, an implicit objective is said to be that derived in *Manderrah Pty Ltd v Woollahra Municipal Council and Anor* [2013] NSWLEC 1196 (“Manderrah”). In that case, the Commissioner found, at [70]:
- The primary objective of cl 40(4)(c) is to limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties.
- 102 The proposal is said to be consistent with the objective of the standard, as found by the Commissioner in *Manderrah*, because:
- (1) The bulk and scale of the proposal is limited by retaining the existing buildings on the site, which are two storeys in height, and by complying with the height permitted by the height standard at cl 4.3 of the WLEP that applies to development in the area.
 - (2) In all scenarios, the exceedance is located on a part of the site that is substantially setback from the street. The exceedance in proximity to the existing building at No 55 Drumalbyn Road, is described as secluded below the dramatic rock outcrop.

- (3) While non-compliant, the exceedance is sympathetic to adjoining development, and is not out of character when viewed in context with existing development, with recently approved development on sites identified at p 9 of the Storeys at rear request, or in the nearby R3 zone where building heights of up to 16.5m are permitted.
- (4) In general terms, the Storeys at rear request states, given the site's topography, neighbourhood's development pattern and relevant controls, any new single dwelling is also likely to exceed one storey at the rear. In more particular terms, the different forms of amenity currently enjoyed by the rear of adjoining properties is protected as follows:

- Privacy is maintained by orienting living areas and balconies to the front of the site.
- The effect of the proposal on the solar access amenity of adjoining properties varies in each of the scenarios. However, common to all is the maintaining of sufficient solar access to both private open space and to north-facing windows to comply with the relevant provisions of the WDCP.
- In each scenario, north-easterly views are protected by locating the area of the exceedance behind the existing built form on the site so that new built form does not constitute a leading edge in the view corridor. This is relevant to Scenario 1, which defines the rear 25% of the site by reference to No 53 Drumalbyn Road, as summarised at [96(1)]. The rear 25% of the site as described in Scenario 2 and 3 is within the vicinity of the rock outcrop where the Storey at rear request asserts no view impact results from the exceedance.

103 Next, the Storeys at rear request sets out a number of environmental planning grounds that are said to be sufficient to justify the contravention of the standard. In many respects, the grounds are similar to those at [72]-[73]. In addition to these grounds, the request cites the rear rock outcrop and much more elevated neighbouring buildings on Victoria Road as context that departs from the usual circumstance in which a single storey scale would be considered appropriate.

104 The position taken by the Respondent in respect of the Storeys at rear request is identical to that set at out [73]-[75], in which it is commonly held that the contravention of the relevant standard is justified, and should be upheld.

105 I am satisfied that the Storeys at rear request adequately addresses the matters required to be demonstrated by cl 4.6(3) of the WLEP, and I am also satisfied that the development will be in the public interest because it is consistent with the underlying objective of the development standard at cl 40(4)(c) of the Seniors Housing SEPP.

- 106 In arriving at this opinion of satisfaction, I note my reasons summarised at [72] as to the grounds on which I am also satisfied that the proposal is consistent with the objectives of the R2 zone, and I accept the argument advanced by the Storeys at rear request that the amenity currently enjoyed by the rear of adjoining properties is protected in the ways summarised at [102(4)].
- 107 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP and I find no grounds on which the Court should not uphold the Storeys at rear request.

Heritage contention

- 108 The two existing dwelling houses on the site are commonly held to have heritage significance. However, the heritage experts differ on the degree to which that significance is conserved by the proposed development.
- 109 On 12 September 2022, being the virtual eve of the hearing, the Respondent determined to include the properties in Schedule 5 of the WLEP for their heritage significance.
- 110 This follows a number of steps undertaken by the Respondent, contained in the Respondent's bundle of documents, marked Exhibit 2, commencing on 17 December 2021, at which time the Respondent made an Interim Heritage Order under s 25 of the NSW Heritage Act 1977 in respect of the properties at Nos 53 (Tab 11) and 55 Drumalbyn Road (Tab 12).
- 111 On 17 March 2022, the Respondent resolved to proceed with a planning proposal to list the two dwellings as items of local heritage significance in Schedule 5 of the WLEP (Tab 13).
- 112 The Planning Proposal was submitted to the Department of Planning and Environment for a Gateway Determination on 26 April 2022. (Tab 16)
- 113 On 16 June 2022 the Department of Planning and Environment issued the Gateway Determination. (Tab 17B)

114 On 12 August 2022, the exhibition period for the Planning Proposal expired after which a report was prepared for, and subsequently endorsed by, the Environmental Planning Committee on 5 September 2022.

115 Ultimately, the Planning Proposal was endorsed by the Council on 12 September 2022 (Exhibit 12, Tab 4).

116 At the resumption of the hearing on 24 November 2022, the Respondent tendered the WLEP as amended 4 November 2022, to include Nos 53 and 55 as items listed in Schedule 5 for their local heritage significance (Exhibit 2, Tab 1).

117 The item at No 53 is listed in Sch 5 as follows:

House including interiors, garage, outbuilding and gardens including retaining walls

118 The statement of significance for No 53 (Exhibit 4, Tab B) is in the following terms:

“53 Drumalbyn Road, Bellevue Hill is of at least Local historical and aesthetic significance as a relatively intact example of interwar Spanish style (inter-war Spanish Mission/Mediterranean) architecture that reflects the characteristic features of this architectural style such as low-pitched tile roof, rendered walls, rendered external architraves and spandrel decoration, arched loggia, and wrought iron balconettes. It is also of at least local historical significance in reflecting the lifestyle of the upper Middle Class in the interwar period with a garage for their car and accommodation for the live-in maid, which was indicative of the wealth of the residents and also is a reflection of a lifestyle (live-in maids) that is defunct except for the rarest instances of the super-wealthy.

53 Drumalbyn Road, Bellevue Hill is of at least local significance for its association with the prolific and well-known interwar architects Bohringer, Taylor & Johnson, and the developer clients, the Wells Family and High Standards Constructions Ltd, and is part of a group of individual buildings and flats in Drumalbyn designed in a similar architectural vocabulary.”

119 The item at No 55 is listed in Sch 5 as follows:

House including interiors, garage, outbuilding and gardens including retaining walls

120 The statement of significance for No 55 (Exhibit 4, Tab D) is in the following terms:

“55 Drumalbyn Road, Bellevue Hill is of at least local historical significance as an early New South Wales example of Modernist residential architecture that demonstrates the distinctive features of the style such as horizontal emphasis, open plan living areas and useable roof terrace, reflecting the first wave of

modernism to be employed in Australia; as such it is a rare remaining example of the style and one of the first examples to be erected in Sydney generally and in the Eastern suburbs. The house takes advantage of its elevated sloping site through terracing of the gardens facing the principal rooms to the view and sun and linking of the roof terrace to the sandstone ledge in the rear garden. It is also of at least local historical significance in reflecting the lifestyle of the upper Middle class in the inter-war period with a garage for their car and accommodation for live-in maids, which was indicative of the wealth of the residents and also is a reflection of a lifestyle (live-in maids) that is, defunct except for the rarest instances of the super-wealthy.

55 Drumalbyn Road, Bellevue Hill is of at least local significance for its association with the long time owners, the world-famous, internationally recognised, Cole family of magician, escapologists and illusionists and for its association with the body of work of the prolific interwar architect, P Gordon Craig and his younger partner who worked on the designed of the house, John M Brindley.

- 121 In understanding the competing positions on heritage significance, and heritage impact, the Court was assisted by Mr Zoltan Kovacs, heritage expert for the Applicant, and Dr Scott Robertson, heritage expert for the Respondent who conferred in the preparation of the joint expert report on heritage (Exhibit 4).
- 122 As stated at [108], the experts differ on the degree to which the heritage significance is conserved by the proposed development.
- 123 In general terms, Dr Robertson believes the removal of original fabric unreasonably impacts on the ability to appreciate the heritage significance for which the properties are listed, and that the extent of excavation proposed in the immediate vicinity of the existing dwellings risks further compromise of the structural integrity of the original built form.
- 124 According to Mr Kovacs, the significant fabric and setting of the two buildings are respected by adaptive reuse. Mr Kovacs has prepared a Retained Significant Items Schedule (Exhibit 4, Tab G), in which a Fabric Integrity Diagram, for No 53 (Integrity Diagram) (p 3) and No 55 (p 13) identifies certain rooms and elements at a level of high, medium or low significance.
- 125 Dr Robertson takes issue with the Integrity Diagrams, and regards it as a blunt instrument, lacking a schedule of particular items or elements.

No 53

- 126 No 53 Drumalbyn Road is agreed by the heritage experts to have been designed in 1929 by architects and engineers Bohringer, Taylor & Johnson in an 'eclectic' variation of a 'Spanish Mission/Inter-war Mediterranean' style for the Wells Family who were among the founding directors of High Standard Constructions Ltd that constructed the house, as well as a number of other properties in the Woollahra LGA.
- 127 Dr Robertson expresses concern at the removal of the garage fronting Drumalbyn Road as it is an important element that represents middle class wealth of its owners, and for which no assessment has been made by Mr Kovacs. Likewise, removal of a bathroom that is substantially original in its layout and finishes is unacceptable.
- 128 Mr Kovacs' oral evidence is that the significance of historic fabric derives from its consistency with the stylistic characteristics of the period, and/or where those elements are 'signature details' of the authoring architect.
- 129 However, where the fabric is at odds with the identified stylistic characteristics of the 'Spanish Mission' style, the significance embodied in those elements is diminished, and its removal more readily justified.
- 130 This is particularly so in the case of the staircase that, while original, exhibits low aesthetic quality more associated with Art Nouveau, which is incongruous with the identified significance of the dwelling.
- 131 However, according to Dr Robertson, the removal of the staircase not only removes original fabric but also deprives an appreciation of the original house as two-storey dwelling, and the addition of a new floor to Unit 3 within the roof space compromises original ceilings at the level below.
- 132 Dr Roberston also explains the departure of the staircase design from the Spanish Mission style of the exterior by advancing the notion, at par 3.1.7 of the joint report, that the interwar period was marked by what he describes as a 'battle of styles' responsible for a 'melange of styles in interior decoration' that should be immune to 'late 20th century notions of "architectural purity"'.

- 133 Reference to this notion, first advanced in a state-wide study commissioned by the National Trust of Australia (National Trust study), is also found on p 54 of the Assessment of Heritage Significance for No 53, prepared by Hindmarsh and Roberston dated 23 June 2022, p 54 (Exhibit 4, Tab B), in the case of No 53, and the Assessment of Heritage Significance, on p53, in the case of No 55 (Exhibit 4, Tab D).
- 134 The National Trust study on which Dr Robertson relies is not in evidence so was not the subject of cross examination, but, in my assessment, appears to broaden the accepted framework of assessing heritage significance for the degree of significance embodied in a work or place by reference to a framework centred on particular characteristics demonstrating or exemplifying key characteristics of a type or class.
- 135 The notion is also unsupported by references in the Assessment of Heritage Significance for No 53 Tabs B, which omits reference to any departure from the identified 'Spanish Mission' style, let alone any reference to the degree of significance to be found in the dwelling as an example of the 'melange of styles in interior decoration'.
- 136 Instead, a close read of references to the National Trust study in the Assessment of Heritage Significance suggests it was the work of the office of Bohringer, Taylor & Johnson that varied in style "depending on the building type, the clients requirements, the budget or the site." (Tab B, p 54). There is no reference to such variations in style being evident within a particular project, as is suggested by Dr Robertson in par 3.1.7.
- 137 This appears to be an extrapolation of the statement originally made in respect of variation in styles between projects, not within projects, undertaken by the office of Bohringer et al.
- 138 Further evidence of the generality of this statement is found in an identical reference at p54 of the Assessment of Heritage Significance for No 55, also prepared by Hindmarsh and Robertson dated November 2022, which is in respect of a work completed by a different office of architects, and about a building for which there is no suggestion that the interior is at odds with the exterior expression.

- 139 The reference appears to support the view that there was a general stylistic agnosticism prevalent in the work undertaken by architects in the interwar period, but not that any distinction should accrue because of the disjunction between interior and exterior treatment in No 53 or No 55.
- 140 Relevantly, there is also no reference in the Assessment of Significance, or in any part of the Statement of Significance, to the interior decoration at No 53 being at odds with the exterior architecture as a key characteristic of the dwelling that contributes to its heritage significance.
- 141 In fact, there is no reference in the Statement of Significance to the interiors, and only cursory reference is made to the interiors in the physical description of the dwelling. That reference is to a general statement of intactness, but for a superlative employed to describe the 'extraordinary spout structure' in the bathroom.
- 142 Accordingly, I do not accept that removal of elements that are agreed by the experts to be at odds with the Spanish Mission style diminishes the significance of the dwelling at No 53 as a fine example of the Spanish Mission style in Australia.
- 143 I also do not accept the staircase would remove an understanding of the original two-storey form of No 53 given the substantial retention of the existing fabric. When viewed externally, the two-storey form is evident in many of those elements identified in the Statement of Significance, such as the low pitched tiled roof, rendered walls and external architraves, spandrel decoration and wrought iron balconettes. When viewed internally, I accept the inventory of images and notations at pp 4-11 of the Retained Significant Items Schedule demonstrates a substantial quantum, if not a majority, of existing rooms and their features, are to be retained, albeit with the loss of the first floor bathroom.
- 144 The proposed additions are well setback from viewpoints in the public domain, resulting in the primary view to the heritage item at No 53 being substantially preserved.
- 145 Internally, the change in hierarchy and use of spaces does not, in my view, fundamentally compromise an understanding of the original hierarchy or use of

those spaces to the trained eye. The greatest degree of change coincides with the location of greatest past alteration, where the former maids room and kitchen have since been combined.

146 I prefer and accept the evidence of Mr Kovacs, supported by the assessment of significance and conservation evident in the Integrity Diagram prepared for No 53, that adequate provision is made to retain the fabric so that the heritage significance of the heritage item at No 53 is not adversely affected by the proposal.

147 I also consider the Structural Construction Methodology prepared by the Applicant's architect, Bureau SRH dated 29 September 2022 (Construction Methodology) (Exhibit N) adequately explains the means by which fire separation and acoustic privacy will be achieved while retaining existing ceiling and floor fabric. In particular, I note Figures 6 and 7 detail the proposed relationship of new and existing fabric at locations marked on Figures 1-3, supported by notations as to the construction methodology in each instance.

148 Finally, while the proposal includes demolition of a garage identified in the Statement of Significance, I note the garage to No 53 sits alongside the garage for No 55, interspersed with gates, stairs and retaining walls that vary in both style and period. The two garages vary in form and style, both from each other, and from what appears to be the predominant approach to garaging of vehicles that on this side of Drumalbyn Road. That predominant approach is for a street wall, in which a garage door or doors presents to the street.

149 I consider the proposed garaging to be consistent with the streetscape in the immediate vicinity of the site, and I accept the Applicant's submission that the heritage significance of the dwelling at No 53 is not diminished by the removal of the garage.

No 55

150 No 55 Drumalbyn Road is agreed to have been designed in 1937 by architects and engineers P. Gordon Craig & John M. Brindley for Alfred Kiel Jones in an 'Inter-war Functionalist' style, with later additions including an on-street garage, summer house and outhouse on the site.

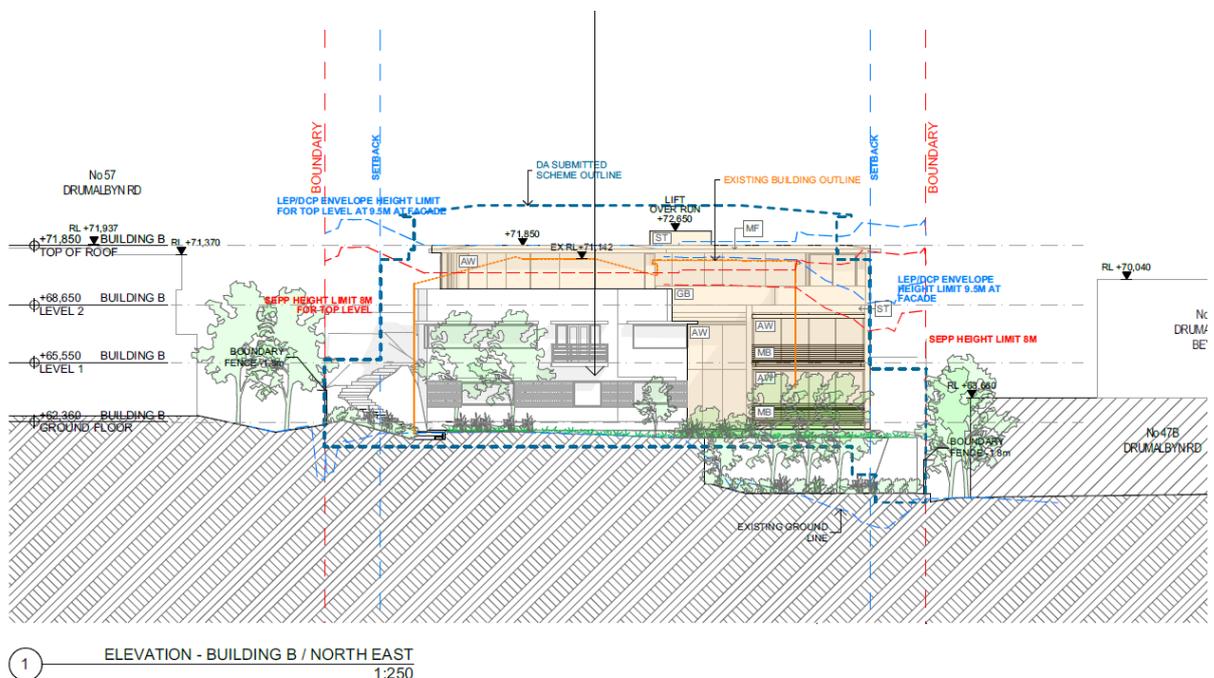
- 151 Dr Robertson identifies the western wing as an important element of the existing dwelling that is proposed to be demolished, and the modification of other existing features such as a balustrade, steel-framed windows and change in the hierarchy and use of rooms such that there will be nothing left but an external shell, adverse to the heritage significance of the item.
- 152 The removal of the western wing of the dwelling at No 55 also results in the removal of the roof terrace over it, a feature described in the statement of significance at [120] as a rare remaining example, and one of the first examples to be erected in Sydney.
- 153 In its place, the Applicant proposes an additional floor that will remove a pitched roof regarded by the experts as somewhat of an oddity in the functionalist oeuvre, but which was included either at the insistence of the Council at the time, or by the original architect as a means of ensuring weather tightness before waterproof membranes made possible the flat roof with which modernism became synonymous.
- 154 Furthermore, new built form to the west of the original dwelling serves to remove important fabric that tells a story of maid service and diminishes the status of the original dwelling from a primary to secondary element in the development, accommodating bedrooms and service areas only, and where the former entry is retained, but relegated to use as a walk-in robe.
- 155 The dwelling also has a level of significance due to its association with the Cole family, who were internationally recognised as magicians, from 1943-1988.
- 156 A comparative analysis of the dwelling with contemporaneous examples designed by other architects suggests the significance of No 55 has laid latent due to its concealed location at the rear of No 53.
- 157 The originally intended use of the western wing to No 55, and the roof terrace over, is also contested. Dr Robertson cites plans contained in the Assessment of Heritage Significance (Exhibit 4, Tab D) sourced from the Respondent's archives, to show accommodation for maids and access to the rooftop terrace.
- 158 The Applicant likewise relies on plans (Exhibit H) also sourced from the Respondent's archives, which it says are the stamped plans, dated 29 October

1937, showing the intended use of the western wing to be for 'Sewing Room' and 'Laundry'.

159 Both heritage experts acknowledge that the archives contain multiple copies of plans that vary from each other, some of which bear a stamp indicating 'cancelled'. Both experts also believe the plans they rely on demonstrate the original intent of the architect and client.

160 Whether or not the original intent was for maid accommodation, and whether or not the rooftop terrace was likewise original, I accept Mr Kovacs' evidence that the primary and original form of the house designed by P. Gordon Craig & John M. Brindley is retained in the proposal. Notwithstanding changes proposed to the interior of the dwelling, which I regard as moderate and reversible, the original features and elements of the functionalist architectural expression will, in my view, retain a high degree of integrity, and will remain legible when viewed from the external stair providing access along the eastern side of the site, and the lawn that is retained in the current location.

161 The extent of original fabric to be retained is evident in the north-east elevation, depicted on drawing DA204 (Exhibit E), re-produced below:



162 Finally, for reasons similar to those set out at [148]-[149], I also accept the removal of the garage to the front of the site does not diminish the heritage

significance of the dwelling, particularly given the lack of visual connection between the garage and the dwelling at No 55. In fact, I note the uncomfortable co-existence of a functionalistic garage seen in the foreground of the Spanish Mission expression of No 53 when viewed from Drumalbyn Road.

The effect of the proposed development on the heritage significance of the site

163 Having considered the heritage significance of the dwellings at No 53 and No 55, the degree of fabric proposed to be retained in the proposed development, and the construction methodology for how this is to be achieved, I find the proposed development is sympathetic to those elements that embody the significance of this place.

164 While certain elements are proposed for removal, I consider the extent of original fabric to be retained, in the manner in which it is proposed to be retained and/or adapted, is a reasonable and considered adaptive reuse of two single, separate dwellings that will continue to be understood for the period and architectural expression of their original authors.

165 I am satisfied that the Integrity Diagrams, the proposed condition of consent for a Schedule of Conservation works to be prepared, and the construction methodology at [147] adequately provides for the conservation and adaptation of the heritage items on the site.

166 However, this is predicated on works proposed to the curtilage of the items, including extensive excavation within close proximity of the heritage fabric. While no contention was initially pressed by the Respondent in this regard, as stated at [10], the Court sought further assistance from the parties for which an adjournment was granted.

Structural and Geotechnical joint conferencing

167 At the outset of the hearing, the Applicant relied upon a Preliminary Geotechnical and Hydrogeological Investigation Report, prepared by Alliance geotechnical and environmental solutions dated 31 August 2021 (Exhibit A, Tab 13) which stated the extent of geotechnical investigation comprised two boreholes of a depth of 2m, and four Perth Sand Penetrometer tests.

- 168 In the joint Structural and Geotechnical engineering report (Exhibit 18), the experts agree that a second geotechnical investigation, undertaken on 27 and 31 October 2022 comprised four boreholes to a maximum depth of 6m. In summary, the results of this investigation are agreed as follows:
- (1) One borehole encountered sandstone bedrock. Three did not encounter bedrock.
 - (2) While the quality of the underlying sandstone bedrock has not been quantified, the nature and quality of the rock in the area is known to be of high and adequate quality.
 - (3) Four Dynamic Cone Penetrometer (DCP) tests, undertaken close to the location of the boreholes, extended to a depth of 10.4m before refusal, agreed by the geotechnical experts to most likely be bedrock.
 - (4) Geotechnical and structural inspections, such as hold points for further assessment, are common and would be provided for in further detailed design stages.
- 169 The experts in geotechnical engineering are Mr Mark Green for the Applicant, and Mr Kim Chan for the Respondent. The experts in structural engineering are Mr Ken Demlakian for the Applicant and Mr David England for the Respondent.
- 170 The Respondent's experts believe the second geotechnical investigation at [167] should have confirmed the actual level and quality of bedrock. Without such confirmation, the design of retaining structures, which I understand to include the method of shoring, and embedment depth of piles, cannot be finalised.
- 171 To this end, Mr England proposes that any development consent, should the Court be so minded, should be deferred until further geotechnical investigation has been completed to determine the depth and strength of the sub-surface ground conditions where contiguous piles are proposed.
- 172 Mr Green and Mr Demlakian consider the results of the second investigation consistent with conditions prevalent in the area, and the refusal depths encountered sufficient to determine where bedrock can be expected.
- 173 While counsel did not identify questions for the experts, the Court sought to better understand the relationship between the geotechnical investigations undertaken, the method of shoring proposed, and the proximity of excavation

and shoring to the heritage item at No 53, in the location of the entry lobby, and the boundary adjacent to No 59 Drumalbyn Road.

- 174 The experts share a common level of comfort as to the subsurface ground conditions in the vicinity of No 55 where rock appears close to the surface. I understand this is the location of the borehole at [168(1)] in which rock was found.
- 175 However, the subsurface conditions in the vicinity of No 53 are less certain. It is in this location that the Court aired its questions to the experts as to whether the final size and location of piling to the perimeter of No 53, the narrow width of land to the east between No 53 and the boundary to No 59, is achievable given the narrow entry lobby depicted on the architectural plans in this location.
- 176 Mr Demlakian's view, supported by Mr Green, is that piles will be drilled, not driven, and that as the subsurface is alluvial sand, that process should be straightforward, and it should be possible to drill piles with precision.
- 177 Whether a pile drilling rig is able to fit within the eastern setback is queried by Mr England and Mr Chan. In his oral evidence, Mr Demlakian advises the drilling rig intended can install piles as close as 35mm from the existing dwelling.
- 178 The Applicant's experts agree that the piles are likely to be between 400-600mm in diameter.
- 179 All experts agree that bracing and propping is required, to be installed progressively as excavation occurs, at no greater than 2.5m in depth at a time.
- 180 The Applicant submits that the Geotechnical and Hydrogeological Investigation Report, prepared by Alliance geotechnical and environmental solutions dated 9 November 2022 (Updated Geotechnical Report) (Exhibit P) has resulted in agreement between the experts that the geotechnical investigations have yielded sufficient data to be certain of the method of excavation, shoring and piling on the site without harm to the items of heritage. Where disagreement remains, it is limited to the matters that are properly the domain of detailed design.

- 181 The architectural drawings in the area of interest to the Court were notably deficient. The cross section produced by the Applicant's architect (Exhibit N, DA301) appears at odds with Section 1, 104 of the Shoring details (Exhibit Q).
- 182 Most notably, the cross section is absent bounding walls or enclosure over the narrow lobby, where allowance for shoring and finishes, and clearance to the heritage item at No 53 would be expected to be shown. Given this was clearly inconsistent with the remainder of the plans and other documents forming the development application, I directed the Applicant to correct the drawing, consistent with the architectural plan at Drawing DA102 within 7 days, and granted the Respondent leave to provide submissions, if deemed necessary.
- 183 I note here that, on 12 December 2022, the Applicant filed the corrected drawing DA301, along with consequential amendments to drawing DA101 and DA102, unopposed by the Respondent, who filed conditions of consent incorporating the amended plans.
- 184 The further amended cross section drawing DA301, and the dimensioned plans at Drawing DA101 and DA102 satisfy the Court that adequate provision is made in the width of land between the heritage item at No 53 and the boundary adjacent to No 59 Drumalbyn Road to give effect to the shoring details.
- 185 I accept the consensus of the geotechnical and structural engineering experts that the excavation can be achieved, without harm to the heritage items on the site, or to adjoining property. I am further assisted by the dimensioned plans at [184] which convince me that the larger pile diameter, should that be necessary, can be accommodated within the width of land between the heritage item at No 53 and the boundary adjacent to No 59 Drumalbyn Road.
- 186 A deferred commencement condition is proposed. The condition requires further geotechnical investigation on the site prior to operation of the consent, so that the shoring design can be finalised, and certain geotechnical/hydrogeological monitoring and civil and structural engineering details be agreed with Council's Development Engineer.
- 187 I accept the Applicant's submission that the proposed conditions do not defer consideration of an essential matter, but rather provide for the detailed design

of certain structural and civil engineering aspects of the design to be brought forward in the program, given the proximity of the works to both items of heritage significance, and neighbouring properties on a steeply sloping site.

188 Accordingly, having considered the effect of the proposed development on the heritage items on the site, I conclude that the proposal will not unreasonably affect the heritage significance of the items, pursuant to cl 5.10 of the WLEP.

189 As I am satisfied that adequate geotechnical investigation, civil and structural design have been undertaken to understand the potential impacts arising from the development the subject of the development application, I am also satisfied in respect of those matters that the Court must take into consideration prior to the grant of consent that flow from the geotechnical, civil and structural documentation:

- (1) Having considered the Updated Geotechnical Report, the amended Stormwater drainage system documentation (Exhibit N, Tab D, and Exhibit O), and the Construction Methodology prepared by Dr Richard Barnes, I conclude that the proposed earthworks will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land, when those matters at cl 6.2(3) of the WLEP are taken into account.
- (2) I also accept the conclusions of the memorandum prepared by Alliance dated 14 September 2022 that the site geomorphology, elevation above sea level and lack of groundwater encountered during geotechnical investigation on the site, the site is unlikely to be affected by acid sulfate soils, pursuant to cl 6.1 of the WLEP.
- (3) Finally, I have considered the documentation at [189] in conjunction with the arboricultural impact assessment prepared by Botanics Tree Wise People Pty Ltd dated September 2022 (Exhibit G, Tab 6), and I find the proposed development compatible with surrounding residential land uses when those matters at cl 25(5)(b)(i), (iii) and (v) of the Seniors Housing SEPP are taken in to account. I also note that bulk, scale and built form that are the particular focus of subcl (b)(v) is a matter about which the Court is satisfied for reasons set out at [59]-[107] of this decision.

Jurisdictional preconditions

190 Prior to now, this decision has considered the principally contested matters as identified by the Respondent, and matters about which the Court also sought to be informed.

191 While the Court's findings in respect of those matters have favoured the Applicant, the Court is unable to determine whether development consent ought to be granted to the proposed development, unless and until other jurisdictional preconditions to the Court having power to grant consent to the proposed development have been met.

Stormwater and flood planning

192 As stated at [9], the Court identified deficiencies in the stormwater plans marked Exhibit F.

193 At the resumption of the hearing on 24 November 2022, the Applicant tendered a bundle of documents marked Exhibit N. The Applicant's hydraulic engineer, itm design, provided a written statement dated 29 September 2022 (Tab D) confirming the extent of drainage had been amended, and further amended stormwater plans marked Exhibit O.

194 A supplementary joint expert report prepared by the stormwater experts, Mr David England for the Respondent, and Mr Markus Lachele for the Applicant was also tendered, marked Exhibit 17.

195 The experts agree the amended stormwater drainage plans are consistent with discussions held during joint conferencing, with no issues taken by the experts as to the stormwater drainage system depicted on the plans.

196 I note that the amended stormwater plans now appear to provide drainage to the entire site, which was not the case with the stormwater plans initially relied upon at Exhibit F.

197 On the basis of the further amended stormwater plans, and certain conditions of consent in respect of flood planning, I am satisfied of those matters at cl 5.21 of the WLEP. In particular, I regard the provision of a flood barrier at the entry to the car park, lift and pedestrian entry, required by Condition C.10 to be an appropriate measure to manage risk to life in the event of a flood, and to bring the proposed development into compatibility with the flood behaviour of the site.

198 In reaching the required state of satisfaction, I have considered the flood risk management report prepared by Torinex dated 2 November 2021 (flood report)

(Exhibit A), and I note the flood report is listed in Condition A.3 of the conditions of consent. While the flood report states that the site is flood free in a 1% AEP event, I consider the proposed conditions of consent appropriately deal with changes in flood behaviour that may result from climate change.

SEPP Seniors

- 199 As stated more fully at [32], the aims of the Seniors Housing SEPP are said to be achieved by the setting aside of local planning controls that would otherwise prevent development of housing for seniors or people with a disability, consistent with certain design principles and where support services can be accessed.
- 200 The subject site is located in close proximity to two public bus stops, identified as the Beresford Road stops, on both sides of Drumalbyn Road that are serviced by the 326 route, connecting residents of the area to services and facilities of a kind referred to in cl 26(1) of the Seniors Housing SEPP.
- 201 The assessment report prepared by the Respondent for the Panel on 17 March 2022 (Exhibit 2, folio 565) states that the gradient to the nearest bus stop complies with the requirements set out at cl 26(3) of the Seniors Housing SEPP, and so I am satisfied that the proposed access complies with subcl (2).
- 202 The site is currently occupied by two dwellings that are connected to water and sewer utilities, and conditions of consent are also proposed to that effect. On the basis of the amended stormwater plans marked Exhibit O, I am satisfied the site will be connected to water and sewer in accordance with cl 28 of the Seniors Housing SEPP.
- 203 I have considered the evaluation of the proposal, completed by the Applicant's architect (Exhibit M) against the provisions of the *Seniors Living Policy: Urban Design Guideline for Infill Development* published by the Department of Infrastructure, Planning and Natural Resources in March 2004, in accordance with cl 31 of the Seniors Housing SEPP. I accept the conclusion that the provisions are met by the proposal.
- 204 There is some overlap in the provisions at [203], and the design principles found in Division 2 of the Seniors Housing SEPP, summarised at [51]. The

assessment of the proposal against the design principles at cl 33-39 of the Seniors Housing SEPP, set out at pp 20-21 of the Statement of Environmental Effects, authored by GSA Planning dated August 2022 (Statement of Environmental Effects) (Exhibit C, Tab G), satisfies me that adequate regard has been given to those design principles.

205 Clause 30 of the Seniors Housing SEPP requires the preparation of a site analysis in a form described at subcl (2)(a) and comprising those elements at subcl (3) and (4). The provision also requires that the Applicant has taken the site analysis into account (subcl (1)). The architectural plans contained in the Applicant's Class 1 Application to the Court (Exhibit A) includes four drawing sheets, identified as DA000, DA010, DA011 and DA012, that depicts the elements required by subcl (3) and (4).

206 On the basis of the Statement of Environmental Effects and a design statement authored by Mr Simon Hanson, architect, on behalf of Bureau SRH dated 9 September 2022 (design statement), and prepared in accordance with cl 50(1A) of the *Environmental Planning and Assessment Regulation 2000* (EPA Regulation), I consider the Applicant to have accompanied the site analysis with written statements consistent with the requirements of cl 30(2)(b) of the Seniors Housing SEPP, and I so am satisfied that the Applicant has taken into the account the site analysis.

207 Finally, I am satisfied that the development standards at cl 40 of the Seniors Housing SEPP are met, but for those at subcl (4) that are the subject of consideration at [58]-[107].

State Environmental Planning Policy No 65 – Design quality of residential apartment development

208 The design statement also assists the Court in considering the design quality of the proposal when evaluated in accordance with the design quality principles contained at Schedule 1 of State Environmental Planning Policy No 65 – Design quality of residential apartment development (SEPP 65), as required by cl 28 of SEPP 65.

209 The design statement is in a form consistent with cl 50(1AB) of the EPA Regulation, and so addresses the design quality principles and relevant parts

of the Apartment Design Guide, which also satisfies me as to those matters about which I must form an opinion at cl 30(2) of SEPP 65.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

210 In respect of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, the application is accompanied by a BASIX certificate (Cert No. 1237642M_02, dated 14 September 2022) prepared by EPA (Exhibit G, Tab 10)) in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Regulation.

State Environmental Planning Policy (Resilience and Hazards) 2021

211 Section 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 requires the consent authority, or the Court on appeal, to consider whether land is contaminated.

212 On the basis of the historical chronology of the site detailed in the Assessment of Heritage Significance at [133], I consider the site to be suitable for the purposes intended by the development, given the long history of residential use, in the form it is today.

Conclusion

Public submissions

213 I have already considered a number of those matters raised in public submissions, such as the sufficiency of geotechnical investigation, breaches of certain development standards and heritage.

214 I have also considered the issue of privacy and overlooking that is said to arise from the external stairs proposed adjacent to the boundary shared with No 59 Drumalbyn Road.

215 It must be said at the outset that the arrangement of built form on such a steeply sloping site preferences access to the apartments via the network of subterranean tunnels, lifts and terraces over a steep and winding climb for all but the residents and visitors to Unit 1 that is accessed off the first landing.

216 However, for anyone inclined to take the external stairs as far as the rear of No 53, where the stair turns 90 degrees, returns on itself, before joining up with the original winding steps leading to No 55, the levels shown on the stair detail

plan marked Exhibit L suggest they would stand at virtually the same level as they do today.

217 Accordingly, I do not regard the proposal to change the opportunity for overlooking from that achieved today, except for perhaps the reduced likelihood of residents or visitors using the stairs for the reasons stated at [215].

Conditions of consent

218 As stated at [183], without prejudice conditions of consent were filed with the Court by the Respondent on 13 December 2022.

219 The parties submit that the conditions of consent are agreed, but for a dispute as to the extent of dilapidation survey and reporting required by Condition D.2.

220 Parties agree that dilapidation surveys and reports are appropriate for properties at Nos 51, 57 and 59 Drumalbyn Road, and No 107 Victoria Road, Bellevue Hill as these properties adjoin the site.

221 However, the Applicant objects to a dilapidation report for a property at No 82 Beresford Road, Bellevue Hill on the grounds the property is too remote from the site to be affected by the construction works.

222 I agree that there is no nexus demonstrated between the property at No 82 Beresford Road, and so find it should be struck from the wording of the condition.

223 The Court notes that:

- (1) The Respondent, as the relevant consent authority, in accordance with cl 55 of the EPA Regulation, agreed to the Applicant amending development application DA-416/2021/1 by the amended application bundle of documents filed with the Court on 12 December 2022.
- (2) The Applicant provided evidence of lodgement of the amended application bundle of documents on the NSW Planning Portal.

Orders

224 The Court orders that:

- (1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the application for development consent, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the sum of \$3000.

- (2) The appeal is upheld.
- (3) Development application DA-416/2021/1 for seniors housing development comprising the adaptive reuse of the existing dwellings on the site and alterations / additions to the dwellings to accommodate 6 units and multi-level underground parking is determined by the grant of consent, subject to conditions of consent at Annexure A.
- (4) All exhibits are returned, except for Exhibits A, B, C, D, E, F, N and 15.

T Horton

Commissioner of the Court

Annexure A

Amendments

19 January 2023 - Pursuant to UCPR r 36.17, the Court's order (3) is amended as follows:

Development application DA-416/2021/1 for seniors housing development comprising the adaptive reuse of the existing dwellings on the site and alterations / additions to the dwellings to accommodate 6 units and multi-level underground parking is determined by the grant of consent, subject to conditions of consent at Annexure A.

Furthermore, par 4 is amended as follows:

The DA was amended on two occasions prior to the hearing. The practical effect of these amendments is that the dwellings are no longer to be demolished, but instead are to be adaptively reused to accommodate 6 apartments.

Typographical errors at conditions A.3 and I.1 of the Annexure A

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.