



## New South Wales

<b>Medium Neutral Citation:</b>	<b>Triple Blue Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1065</b>
<b>Hearing dates:</b>	8 December 2020
<b>Date of orders:</b>	12 February 2021
<b>Decision date:</b>	12 February 2021
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	O'Neill C
<b>Decision:</b>	The Orders of the Court are: (1) The appeal is upheld. (2) Development Application No. 190/2017 for alterations and additions to an existing residential flat building at 593 New South Head Road, Rose Bay, is approved, subject to the conditions of consent at Annexure A. (3) The exhibits, other than 2, 30, 31, 32, A, B and C, are returned.
<b>Catchwords:</b>	DEVELOPMENT APPLICATION – alterations and additions to an existing residential flat building – impact on the heritage significance of the adjoining heritage item
<b>Legislation Cited:</b>	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 Woollahra Local Environmental Plan 2015
<b>Cases Cited:</b>	Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 Tenacity Consulting v Warringah (2004) 134 LGERA 23; [2004] NSWLEC 140 Triple Blue Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 27 Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115
<b>Texts Cited:</b>	The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013 Woollahra Development Control Plan 2015

<b>Category:</b>	Principal judgment
<b>Parties:</b>	Triple Blue Pty Ltd (Applicant) Woollahra Municipal Council (First Respondent) Andrew Gray (Second Respondent) Emma Gray (Third Respondent)
<b>Representation:</b>	Counsel: C McEwan SC (Applicant) J Ede (Solicitor) (First Respondent) A Pickles SC (Second and Third Respondents)  Solicitors: Pikes & Verekers Lawyers (Applicant) Wilshire Webb Staunton Beattie Lawyers (First Respondent) Mills Oakley (Second and Third Respondents)
<b>File Number(s):</b>	2019/287018
<b>Publication restriction:</b>	Nil

---

## JUDGMENT

- COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. 190/2017 for alterations and additions to an existing residential flat building (the proposal) at 593 New South Head Road, Woollahra (the site) by Woollahra Municipal Council (the Council).
- The appeal was subject to conciliation on 14 February 2020, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). The conciliation was terminated on 6 April 2020.
- The owners and occupiers of the premises known as Rothesay, at 3 Cranbrook Road, Bellevue Hill, were joined to the proceedings on 1 April 2020: *Triple Blue Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 27. The rear of the site is immediately adjacent to the Intervenor's land.
- Leave was granted by the Court on 16 April 2020 for the Applicant to amend the application by relying on an amended proposal, including amended architectural drawings, amended landscape plans, a conservation schedule of works, an amended written request to contravene the height of buildings development standard and

amended BASIX and NATHERS certificates, subject to an order that the applicant pay the Council's costs thrown away as a result of the amendment, pursuant to s 8.15(3) of the EPA Act.

- 5 Following the amendment of the application, the Council filed an amended Statement of Facts and Contentions (Ex 2), which states that the amendments made to the proposal successfully addressed the contentions set out in the Council's Statement of Facts and Contentions filed on 20 December 2019, and the Council does not oppose the granting of consent to the application subject to conditions (Ex 3).

### Issues

- 6 In joining the Intervenor to the proceedings, Duggan J limited the issues to be raised by the Intervenor to "the Heritage Issue", as follows (*Triple Blue Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 27 at [17], [24]-[27]):

"17 The Intervenor contend that they are a necessary party to be joined pursuant to s 8.15(2) as, in effect, they were able to raise an issue that will not be sufficiently addressed absent their joinder, which in substance are:

(1) The heritage impacts of the development on their heritage listed building known as Rothesay (the Heritage Issue); and

(2) The failure of the development to comply with cl 26 of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP), in that it does not maintain, enhance and protect views from their building to Sydney Harbour (the View Issue).

...

24 I propose to direct the Intervenor to file a Statement of Facts and Contentions. The leave I give in connection with that direction is limited only to the Heritage Issue raised by them. As was observed by Preston CJ in *Avalon Beach Property Proprietary Limited as Trustee for the Avalon Beach Property Trust v Northern Beaches Council* (2017) 227 LGERA 393 at [24]:

Once a person is joined as a party they have all of the rights of a party. In one sense this could include raising other issues than the five issues that I have articulated. However, the neighbour would require leave to advance any further issues. As happened in *Manderrah Pty Ltd v Woollahra Municipal Council (No 2)* (2013) NSWLEC 115, the Court may decline to allow any issues to be raised other than the five issues which were the basis for the joinder. I am not precluding any application being made in the future, but merely indicate that the basis for the joinder is the five issues that have been raised

25 On the same basis and for the same reasons I limit the issues to be raised at this juncture to the Heritage Issue as identified.

26 I do not consider that the View Issue cannot be sufficiently addressed absent the joinder of the Intervenor. The issue of the impact on the views to the harbour from their premises has been the subject of consideration by both the Council and Triple Blue and with the benefit of the Intervenor's submissions. The View Issue can be sufficiently addressed in the context of the SREP requirements by the Court in its assessment of that material and the identified provisions of the SREP without a further contradictor.

27 I note that by declining to order the joinder of the Intervenor on the basis of the View Issue I do not intend in any way to indicate that any or further evidence of the impacts on views to and from the Intervenor's building is not to be considered. I accept that on the basis of the manner in which the Heritage Issue is formulated that issues, for example, relating to the bulk and scale of the proposed building, the impact on screening trees and the impacts on the views, may have some connection with the impact on the heritage significance of their item. It is in that context that the evidence

should be addressed and it will be a matter for the Commissioner who considers this matter (either in the context of a s 34 conciliation conference or a hearing on the merits) to determine what evidence is relevant and/or persuasive.”

- 7 The Intervenors’ contention can be summarised as the proposal will have an adverse and unacceptable impact on the heritage significance of Rothesay, including on the heritage values, setting, and interpretation of the house, interiors and front garden.

**The site and its context**

- 8 The site is located on the south-western side of New South Head Road, Rose Bay, to the west of the corner of New South Head Road and Cranbrook Road, and opposite Sydney Harbour and the Rose Bay Marina.
- 9 The site is rectangular and has an area of 603.9sqm, with a frontage of 15.24m to New South Head Road and a depth of 39.625m.
- 10 The site has been excavated at the rear and falls gradually by approximately 1.1m from the rear to the front of the site. The ground level at the front boundary is RL 3.12 and at the rear corners of the existing building is RL 3.23 and RL 3.3. The rear of the site includes a raised area accessed by external stairs and covered by a concrete slab. The ground level at the rear of the site is approximately RL 4.0 (Ex E).
- 11 The existing building on the site, known as The Chilterns, is a three storey residential flat building, raised above ground level on pilotis, with parking beneath the building at ground level. The Chilterns was designed by the architect Douglas Forsyth Evans and was constructed in 1951-2 as six residential units. The existing building includes a structure over the flat roof at a maximum height of RL 18.11 and a rooftop terrace (Ex E). The entry to the existing building is a raised ramp to the foyer on the eastern side of the building. There is a large street tree directly in front of The Chilterns, with a canopy to a height of RL 23.0 (Ex E).
- 12 Rothesay at 3 Cranbrook Road, Bellevue Hill, adjoins the rear of the site and adjoins the rear of 595 and 597 New South Head Road, Rose Bay. The swimming pool area of Rothesay adjoins the shared boundary with the site. The swimming pool is raised above the natural ground level on a platform that forms the pool surround and is bounded by a retaining wall located on the Rothesay property, adjacent to the shared boundary with the site. The swimming pool surround is at RL 8.6 (Intervenors’ submission). The top of the retaining wall is at RL 11.75 (Ex E).
- 13 There is an existing tree, a Camphor Laurel, located on the Rothesay property, close to the southern corner of the site, with a canopy to a height of RL 24.0 (Ex E).
- 14 The residential area surrounding the site is characterised by a mixture of residential flat buildings fronting New South Head Road and large dwellings addressed to Cranbrook Road. The adjoining residential flat buildings to the east of the site, which also share a

rear boundary with Rothesay, are three storey Inter-War residential flat buildings over basement parking at ground level, with hipped roofs and ridges at RL 16.53 (595 New South Head Road) and RL 16.18 (597 New South Head Road) (Ex E).

- 15 The contemporary residential flat building to the west of the site, at 589 New South Head Road, has a maximum height of RL 15.83. The residential flat building further to the west, at 585 New South Head Road, is a four storey building over basement parking and has a maximum height of RL 25.4 (Ex E).

### **The proposal**

- 16 The proposal includes the following (Ex B, tab 1):
- Extension of the building envelope of the existing building to the rear by 2.603m, so that the rear setback is 4.674m (DA 003 Rev 2);
  - New lift located in the centre of the existing building;
  - Ground Level: minor alterations and additions including addition of storage area and garbage room, new enclosed lobby to access new lift; and landscaping within the rear setback (Landscaping Planting Plan Dwg 001 Rev 1, Ex B, tab 2);
  - Level 1: internal alterations and rear addition to reconfigure into three units, Units 1, 2, and 3;
  - Level 2: internal alterations and rear addition to reconfigure into two units, Units 4 and 5;
  - Level 3: internal alterations and rear addition to reconfigure into two units, Units 6 and 7;
  - Level 4: replacement of the existing roof element with a new higher and larger curved roof structure over part of the existing flat roof, located towards the rear of the existing footprint of the building, to create a new unit, Unit 8. The southern elevation of Level 4 is inset 2.241m from the southern façade of the lower levels. The existing roof terrace on the northern side of the unit retained with the dividing wall removed and a new balustrade. The roof over the roof area to the south and east of Unit 8 is non-trafficable;
  - DA 006 Rev 4 (Ex D) amended DA 006 Rev 3 to add notes clarifying the external finishes to the southern elevation of the proposal. Exhibit D replaced DA 006 Rev 3. There are no windows in the southern elevation, facing Rothesay, on levels 2, 3 and 4, other than windows in the centre of the elevation containing translucent glass (condition F.6 of Annexure A);
  - Conservation works to be carried out to the original fabric of The Chilterns as detailed in the Conservation Schedule of Works dated 11 March 2020 (Ex B, tab 3).

## Planning framework

- 17 The Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP (Sydney Harbour Catchment)) applies to the site at cl 3(2)(a). The relevant planning principles for land with the Sydney Harbour Catchment and foreshores and waterways, at cll 13(f) and 14(d) are as follows:

13(f) development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour

...

14(d) development along the foreshore and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores,

- 18 The site is zoned R3 Medium Density Residential pursuant to cl 2.2 and the Land Zoning Map Sheet LZN\_002 of Woollahra Local Environmental Plan 2014 (LEP 2014). The objectives of the R3 zone, to which regard must be had, are:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

- 19 Rothesay is zoned R2 Low Density Residential.

- 20 The height of buildings development standard for the site is 10.5m (cl 4.3 and Height of Buildings Map HOB\_002 of LEP 2014). The objectives of the height of buildings development standard are:

- (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.

- 21 The floor space ratio (FSR) development standard for the site is 1:1 (cl 4.4 and Floor Space Ratio Map FSR\_002 of LEP 2014). The objectives of the FSR development standard for development in the R3 zone are:

- (i) to ensure the bulk and scale of new development is compatible with the desired future character of the area, and
- (ii) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain, and
- (iii) to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space,

The site is listed as a local heritage item (item 320, “The Chilterns— residential flat building, interiors and grounds”, Sch 5 to LEP 2014). Clause 5.10(4) of LEP 2014 requires the consent authority, or the Court exercising the functions of the consent authority, to consider the effect of the proposal on the heritage significance of the item, before granting consent under cl 5.10 in respect of a heritage item. The relevant objectives of cl 5.10, at sub-cl (1), are:

- (a) to conserve the environmental heritage of Woollahra,
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,

- 23 Rothesay is listed as a local heritage item (item 19, “Rothesay”—house and interiors, front garden”, Sch 5 to LEP 2014). The State Heritage Inventory Listing Sheet for Rothesay (SHI 2710038) includes the following statement of significance (Ex 32, p 4):

“The residence Rothesay, which is constructed in the Victorian Free Classical style. Situated on land originally fronting New South Head Road at Rose Bay the house now has its frontage to Cranbrook Road. This building, although having undergone extensive modification both inside and out, holds social significance as one of the large mansions built in the district in the late nineteenth and early twentieth century. The building holds some aesthetic significance for the quality of the original classical detailing which is still largely intact, and for the contribution it makes to the streetscape of the immediate area.”

- 24 Woollahra Development Control Plan 2015 (DCP 2015) applies to the site at section A1.1.3. The desired future character for the Bellevue Hill North precinct, which includes the site, at Part B, section B1.8.2, is as follows:

“The Bellevue Hill North precinct is an established residential area with a rich mixture of architectural styles and forms. Development is to be compatible with the existing built fabric, subdivision pattern and other prevailing characteristics in the street, such as setbacks and roof forms.

On sloping sites, development should step down the site to maintain views, protect the privacy and solar access of adjoining and adjacent properties, and minimise cut and fill. The design of roofs and fences should also facilitate view sharing opportunities, and carports and other parking structures must not to dominate the streetscape.

There are pockets of Inter-War flat buildings along Drumalbyn Road that contribute to the precinct character, and the retention of these buildings is encouraged. Alterations and additions to the Inter-War flat buildings are to retain the character of the original building through appropriate use of materials, and should not significantly alter significant and traditional building elements visible from the street.

Development is to retain views of the harbour from public spaces and provide for view sharing from private properties. Development adjacent to the heritage conservation areas must also suitably respond to the significance of the HCA.

#### **Streetscape character and key elements of the precinct**

Development respects and enhances the existing elements of the neighbourhood character that contribute to the precinct including:

- a) the rich mixture of residential architectural styles and forms, including dwelling houses and residential flat buildings;
- b) the relationship of development along New South Head Road to the promenade and the harbour;
- c) buildings set within highly visible gardens;
- d) the tree canopy formed by both street and private yard plantings;



- e) mature street trees, grassed verges and sandstone walls;
- f) harbour views available from the streets within the precinct; and
- g) the heritage significance of the adjoining Aston Gardens, Beresford Estate and Balfour Road Heritage Conservation Areas.

#### **Desired future character objectives**

O1 To respect and enhance the streetscape character and key elements of the precinct.

O2 To maintain the evolution of residential building styles through the introduction of well designed contemporary buildings incorporating modulation and a varied palette of materials.

O3 To maintain a transition of development scale from the residential flat buildings that address New South Head Road, to the dwelling houses that dominate the majority of the precinct.

O4 To reinforce a consistent building scale with streets.

O5 To ensure that development responds in form and siting to the street and subdivision pattern.

O6 To design and site buildings to respond to the topography and minimise cut and fill.

O7 To reinforce the landscape setting and maintain the existing tree canopy which forms a green backdrop when viewed from the harbour and the surrounding districts.

O8 To retain and reinforce the green setting of mature street trees, private trees and garden plantings and minimise hard stand areas.

O9 To protect important views from the public spaces of the precinct to the harbour and city skyline, including view corridors between buildings.

O10 To ensure that development facilitates view sharing to adjoining and adjacent private properties.

O11 To ensure on-site parking does not dominate the streetscape.”

25 The relevant rear setback objectives and controls, at section B3.2.4 of DCP 2015, are:

“O1 To provide private open space and landscaped areas at the rear of buildings.

O2 To provide acoustic and visual privacy to adjoining and adjacent buildings.

O3 To avoid an unreasonable sense of enclosure.

O4 To provide separation between buildings to facilitate solar access to private open space.

...

C3 For development in the R3 Medium Density Residential Zone where an FSR applies, the building depth is 60% of the site depth.”

26 The planning experts agreed that C3 of section B3.2.4 requires a rear setback of 10.85m.

27 The relevant objectives and controls for overshadowing, at section B3.5.2 of DCP 2015, require sunlight to be provided to at least 50% (or 35sqm with a minimum dimension of 2.5m, whichever is the lesser) of the main ground level private open space of adjacent properties for a minimum of 2 hours between 9am and 3pm on 21 June. The planning experts agreed that the proposal satisfies this control in relation to Rothesay.

28

The relevant objective for public and private views, at section B3.5.3 of DCP 2015, objective 3, is to encourage view sharing as a means of ensuring equitable access to views from private property.

### **Expert evidence**

- 29 The Applicant relied on the expert evidence of Rosalind Read (planning), John Oultram (heritage) and Guy Paroissien (arboriculture).
- 30 The Intervenors relied on the expert evidence of Brett Brown (planning), Sean Johnson (heritage) and George Palmer (arboriculture).
- 31 The experts were not required to give oral evidence. The experts' joint reports were admitted into evidence as Ex 31 (planning), Ex 32 (heritage) and Ex 33 (arboriculture).

### **Contravention of the height of buildings development standard**

- 32 The proposal has a maximum height of 16.27m above existing ground level (RL 19.607). The height of buildings development standard for the site is 10.5m. The existing maximum height of the building is 14.97m (RL 18.307). The proposal raises the maximum height of the existing building by 1.3m and extends the proposed height further towards the rear of the site.
- 33 The proposed rear extension of the existing building on Levels 1, 2 and 3 by 2.603m also breaches the height of buildings development standard according to the agreement of the planning experts. Most of the rear extension is over the raised platform at the rear of the site at RL 4.0 and the existing roof at the rear of the building, which has no parapet, is at RL 15.37 (Ex E). The proposal includes extending the parapet to the rear of the building and around the rear extension (although the extension of the parapet above the existing building is not shown coloured on the elevations, see DA005 Rev 3). The proposed parapet around the rear extension is shown at approximately RL 15.7 (the RL of the top of the parapet of the rear extension is not indicated). The height above ground level of the proposed parapet of the southern elevation is therefore approximately 11.7m above existing ground level. The balustrade, at RL 16.39, around the non-trafficable roof is deleted by condition (condition C.1(b) of Annexure A) and replaced with a single black rail. A small portion of the rear extension is over the existing ground level at the southern elevation of the existing building, RL 3.23 and 3.3 and is therefore greater than 11.7m above existing ground level.
- 34 The Applicant provided a written request seeking to justify the contravention of the height of buildings development standard (Attachment B to Ex 31).
- 35 Clause 4.6(4) of LEP 2014 establishes preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra*

*Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13] “*Initial Action*” in The consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a). As these preconditions are expressed in terms of the opinion or satisfaction of a decision-maker, they are a “jurisdictional fact of a special kind”, because the formation of the opinion of satisfaction enlivens the power of the consent authority to grant development consent (*Initial Action* [14]). The consent authority, or the Court on appeal, must be satisfied that the applicant’s written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposal development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

36 On appeal, the Court has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(6) LEC Act, but should still consider the matters in cl 4.6(5) of LEP 2014 (*Initial Action* at [29]).

*The applicant’s written request to contravene the height of buildings development standard*

37 The first opinion of satisfaction required by cl 4.6(4)(a)(i) is that the applicant’s written request seeking to justify the contravention of a development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3) (see *Initial Action* at [15]), as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed by the written request in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion of satisfaction (*Initial Action* at [25]). The consent authority has to be satisfied that the applicant's written request has in fact demonstrated those matters required to be demonstrated by cl 4.6 (3) and not simply that the applicant has addressed those matters (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [4]).

39 The applicant's written request justifies the contravention of the height of building development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the height of buildings development standard are achieved, notwithstanding the numerical non-compliance with the development standard, summarised as follows:

- The proposal has a building height that is consistent with the desired future character of the neighbourhood because the essential shape of the building as perceived from the street will generally remain the same and the additional height is located towards the rear of the existing building;
- The proposal achieves a transition in scale between zones to protect local amenity because the site is excavated at the rear and does not reflect the natural lie of the land in the context of the neighbourhood and the amenity of the neighbouring R2 zone is protected because any amenity impacts are non-existent or small;
- The proposal minimises the loss of solar access to existing buildings and open space because the additional overshadowing of the pool terrace, the family room and a small corner of the garden of Rothesay is minor during the morning of the winter solstice;
- The proposal minimises the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion because the impact of the proposal on views from Rothesay are negligible, there is no opportunity to overlook of Rothesay, the increase in overshadowing of Rothesay is minor and the substantial landscaping along the northern boundary of Rothesay provides some screening of The Chilterns;
- The proposal protects the amenity of the public domain by providing public views of the harbour and surrounding areas because the proposal does not affect views of the foreshore from the harbour and does not affect any views of the harbour from the public domain.

The grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature. The applicant’s written request defends the exceedance of the height of building development standard as a justified response to the excavation of the natural topography at the rear of the site and because the proposal includes conservation works to the existing building.

41 According to Mr Brown, the applicant’s written request to contravene the height of buildings development standard does not demonstrate that the proposal achieves the objectives of the development standard and fails to justify that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, for the following reasons:

- The proposal is not consistent with the desired future character of the area because the existing building is four storeys with a further rooftop structure, which is in excess of the height control that seeks to achieve a 3 storey building.
- The proposal is contrary to the character sought by the height development standard. All the existing development in the vicinity of the site is 4 storeys, except for 585 New South Head Road, which is 5 storeys. The 5<sup>th</sup> storey of the proposal is out of keeping with desired future character created by the 4 storey development.
- The DCP 2015 provisions do not envisage any built form in the rear 10.85m of the site, let alone a building that breaches the controls. The reduced rear setback will reduce the ability for the building to be set within a visible garden when viewed from Rothesay.
- The already non-compliant building will move closer to Rothesay, resulting in a lack of separation, an increased sense of enclosure, loss of solar access and less scope for substantial planting, all of which will impact on the heritage setting of Rothesay. Although the proposal meets the DCP 2015 requirements relating to solar access on adjoining properties, there is a considerable degree of impact on Rothesay caused by the elements of the proposal that breach the controls. The proposal therefore does not minimise impacts on adjoining properties.
- The proposal results in minor impacts on the views of the harbour from Rothesay.
- The proposal results in overshadowing of the pool terrace of Rothesay from around 9am until 11.30am at midwinter.
- The proposal does not represent an adequate transition in scale to the R2 zone, which diminishes the setting of Rothesay, as demonstrated by the amenity impacts on Rothesay by the proposal.

- The conservation of the heritage item is not an adequate planning ground as maintenance of the building should not be reliant on increasing floor space, particularly when the increased floor space breaches planning controls.

42 It is sufficient to justify the contravention of the height of building development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the height of buildings development standard are achieved, notwithstanding the numerical non-compliance with the development standard (*Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]-[51] and *Initial Action* [22]). I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's written request to contravene the height of buildings development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). I accept the reasons advanced by the applicant that the objectives of the height of buildings development standard are met by the proposal.

43 I am satisfied that justifying the aspect of the development that contravenes the development standard as a response to the excavation of the rear of the site and that the proposal will facilitate the conservation of the heritage item can both be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* at [23]. Environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]). The environmental planning grounds relied upon in the written request must be sufficient to justify contravening the development standard and the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole (*Initial Action* at [24]).

44 I am satisfied that the historic excavation of the site is a sufficient environmental planning ground to justify the exceedance of the height of buildings development standard. The natural topography of the hill rises steeply behind the site to the top of Bellevue Hill. The change in level between the rear of the existing building and the swimming pool terrace of Rothesay is 5.37m across a distance of approximately 5m. The historic excavation at the rear of the site means that the height of the proposal is measured from the existing ground level, whereas the natural topography in this location would have been at a higher level before the excavation, which is likely to have been undertaken for the construction of The Chilterns.

45 The original ground floor level of Rothesay is a full level above the swimming pool terrace. The family room area that opens onto the swimming pool terrace is a basement level and part of the contemporary addition to Rothesay. Because the original built form

of Rothesay is raised above the natural topography of the hill, the height of the proposal has less impact on the amenity of Rothesay than it would have if the properties were on flat ground.

46 The definition of building height and ground level in the dictionary of LEP 2014 are:

building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

...

ground level (existing) means the existing level of a site at any point.

47 As the height of the proposal is measured from the existing ground level as per the definition, an historic excavation in the location of the vertical measurement results in a building that has a greater numerical value for height than it would otherwise have had if measured from the ground level prior to the excavation. This definition means that the height of a proposed new building is measured from the natural ground level of an undeveloped site, and a future addition to the same building is measured from the lower excavated ground level after the building has been constructed; which potentially results in an increase in the numerical value for the height of the building with the addition being much greater than the increase in height of the addition alone, when compared to the numerical value of the height of the original building under the definition. The terms of cl 4.6 of LEP 2014 provide an appropriate degree of flexibility in applying the height of buildings development standard where there are sufficient environmental planning grounds to justify the contravention of the numerical value. The historic excavation of a site is an example of an environmental planning ground that warrants, in certain circumstances, the variation of the height of buildings development standard, so that the height of the development is appropriate in the context of the site. The context of the site may include the natural topography beyond the site and the height of existing development in the vicinity of the site.

48 As an objective of the height of buildings development standard in LEP 2014 is to establish building heights that are consistent with the desired future character of the neighbourhood, and an objective for the desired future character of the neighbourhood is to reinforce a consistent building scale, the desired future character objective of the development standard looks beyond individual site conditions to the interrelationships of built form and scale and this necessarily includes topography. It is reasonable therefore to consider the height of development in relation to the natural topography of the hill and to be flexible in applying the numerical height of buildings development

standard where the natural fall of the hill has been excavated at the rear of the site. The proposal must meet the objectives of the height of buildings development standard in order to achieve an exception to the numerical standard.

49 The southern elevation of the proposal, setback 4.674m from the shared boundary, is 7.1m above the level of the swimming pool surround and the fourth level addition, setback 7.277m from the shared boundary, is 11.07m above the swimming pool terrace. The dramatic change in levels across the rear of the site and the boundary, as a result of the excavation and natural fall of the hill, significantly reduces the height of the southern elevation and the fourth level when viewed from Rothesay. The bulk and scale of the proposal is consistent with the medium density residential zoning of the site and development within the vicinity of the site.

50 A proposal that facilitates the conservation of a heritage item is an environmental planning ground because it fulfils to the object of the EPA Act to promote the sustainable management of built and cultural heritage. I accept that the conservation of a heritage item does not, in of itself, justify additions to the building envelope of the existing building, however, I am satisfied that the proposed modest additions to the building envelope have been located so as to retain the unique architectural qualities of The Chilterns and that these additions will facilitate the conservation works required for the conservation of the heritage item. I accept the uncontested conclusion of the Statement of Heritage Impact that the proposed works do not adversely affect the identified heritage significance of The Chilterns. The conservation works identified in the Conservation Schedule of Works dated 11 March 2020 are required to be undertaken as part of the consent (condition F.5 of the conditions of consent at Annexure A).

51 I am satisfied that the environmental planning grounds advanced by the applicant are sufficient to justify contravening the height of buildings development standard.

*Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone*

52 The second opinion of satisfaction in cl 4.6(4)(a)(ii) of LEP 2014 is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest (*Initial Action* at [27]). The consent authority must be directly satisfied about the matters in cl 4.6(4)(a)(ii) (*Initial Action* at [26]).

53 I am satisfied that the proposal is in the public interest because it is consistent with the objectives of the height of buildings development standard and the zone objectives, for the reasons set out below.



**The proposed building heights are consistent with the desired future character of the neighbourhood**

- 54 In considering whether the proposed building heights are consistent with the desired future character of the neighbourhood, it is permissible to have regard to the desired future character provisions in DCP 2015, however, I am not bound to do so (*Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 at [50]). I am satisfied that the proposed building heights are consistent with the desired future character objectives for the Bellevue Hill North precinct, because the change in height from the existing building envelope to the proposed building height is modest, it is compatible with the existing range of building envelopes in the vicinity of the site and other prevailing characteristics in the street such as setbacks and roof forms. The proposal maintains views and protects the privacy and solar access of adjoining and adjacent properties.
- 55 The Chilterns is a distinctive and unique building and forms part of the rich mixture of architectural styles and forms in the Bellevue Hill North precinct. The distinctive character of this building makes it unique and identifiable within the row of residential flat buildings on the western side of New South Head Road. The fourth level addition does not disrupt a cohesive four storey street wall, as suggested by Mr Brown (Ex 31, p 7). I do not accept that there is a dominant character or scale to the residential flat buildings along the western side of New South Head Road at Rose Bay. The existing buildings vary in architectural style and period; in form; in height and the variation in the existing buildings is also a result of the irregular subdivision pattern. The proposal is of a modest scale and located so as not to fundamentally change the existing relationship between The Chilterns and the adjoining and nearby residential flat buildings. The proposal maintains the distinctive and unique building that is The Chilterns and its unique contribution to the character of the development on the western side of New South Head Road, Rose Bay.
- 56 The landscape setting of The Chilterns is maintained and enhanced with additional deep soil areas at the rear and eastern side of the site. The landscaped character of the precinct is established by the street trees and landscaping and mature trees on adjoining, larger properties.
- 57 The proposal maintains the transition of development scale from the residential flat buildings that address New South Head Road to the dwelling houses that dominate the majority of the precinct. Although a traditional transition from R3 to R2 would be to reduce the overall scale of development; in this locality, the transition is one of density, but not of scale. Rothesay is significantly higher upon the hill as it rises from Rose Bay when compared to The Chilterns, and this relationship is further exaggerated by the excavation at the rear of the site compared to the raised platform of the swimming pool

surround of Rothesay. The significant bulk and scale of Rothesay and its generous landscaped setting is not in any way diminished by the modest increase in bulk and scale of the fourth level of the proposal.

- 58 The proposal facilitates view sharing by maintaining view corridors between the residential flat buildings. The proposal does not impact on any important views from the public spaces of the precinct to the harbour and city skyline.
- 59 The on-site parking is maintained under the building and it does not dominate the streetscape of New South Head Road.

**The proposal establishes a transition in scale between zones to protect local amenity**

- 60 The proposal maintains the transition in scale between zones to protect local amenity because the additional height proposed is modest and the change in levels across the boundary and at the rear of the site reduces the impact of the height of the southern elevation and the fourth level.

**The proposal minimises the loss of solar access to existing buildings and open space**

- 61 I accept the agreement of the planning experts that the control for overshadowing, at section B3.5.2 of DCP 2015, requiring sunlight to be provided to at least 50% (or 35sqm with a minimum dimension of 2.5m, whichever is the lesser) of the main ground level private open space of adjacent properties for a minimum of 2 hours between 9am and 3pm on 21 June, is satisfied in relation to the swimming pool and surround of Rothesay (Ex 31, par 3.1.4). I am satisfied that the proposal minimises the loss of solar access to the existing open space of Rothesay.

**The proposal minimises the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion**

- 62 I accept Mr Brown's expert planning evidence, addressing the Court's planning principle in *Tenacity Consulting v Waringah* (2004) 134 LGERA 23; [2004] NSWLEC 140 at [26]-[29], that the impact of the proposal on views from the tower and the first floor verandah are cumulatively minor (Ex 31, pp 8-9). The filtered views of the harbour from the upper levels of Rothesay are generally between buildings and through tree canopies.

**The proposal protects the amenity of the public domain by providing public views of the harbour and surrounding areas**

- 63 The proposal has no impact on the public domain, because the additions are located at the rear of the existing building.

**R3 Medium density residential zone objectives**

- 64 I am satisfied that the proposal is consistent with the medium density residential zone objectives, because The Chilterns will continue to provide for the housing needs of the community within a medium density residential environment; the proposal will contribute to the variety of housing in the municipality; and the proposal is of a height and scale that is consistent with the existing and desired future character of the neighbourhood.

### **Contravention of the FSR development standard**

- 65 The proposal has a FSR of 1.25:1. The FSR development standard for the site is 1:1. The existing FSR of the building is 1.03:1. The proposal increases the gross floor area (GFA) of the existing building from 621m<sup>2</sup> to 758m<sup>2</sup>. The building envelope is increased on the fourth level and extended further towards the rear of the site, private open spaces have been included and a lift lobby is added beneath the existing building.
- 66 The Applicant provided a written request seeking to justify the contravention of the FSR development standard (Attachment C to Ex 31).

### *The applicant's written request to contravene the height of buildings development standard*

- 67 The applicant's written request justifies the contravention of the FSR building development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the FSR development standard are achieved, notwithstanding the numerical non-compliance with the development standard, broadly for the same reasons justifying the contravention of the height of building development standard, set out above at [39].
- 68 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's written request to contravene the FSR development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). I accept the reasons advanced by the applicant that the objectives of the FSR development standard are met by the proposal.
- 69 I am satisfied that justifying the aspect of the development that contravenes the development standard as a response to the excavation of the rear of the site and that the proposal will facilitate the conservation of the heritage item can both be properly described as an environmental planning ground. I am satisfied that the environmental planning grounds advanced by the applicant are sufficient to justify contravening the FSR development standard.

### *Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone*

- 70 I am satisfied that the proposal is in the public interest because it is consistent with the objectives of the FSR development standard and the zone objectives, for the reasons set out below and at [63].

**The proposal ensures the bulk and scale of new development is compatible with the desired future character of the area**

- 71 I am satisfied that the proposed building heights are consistent with the desired future character objectives for the Bellevue Hill North precinct, because the change in bulk and scale from the existing building envelope to the proposed building envelope is modest; it is compatible with the existing range of building envelopes in the vicinity of the site and other prevailing characteristics in the street such as setbacks and roof forms. The proposal maintains views and protects the privacy and solar access of adjoining and adjacent properties. The proposal is compatible with the desired future character of the area because it maintains the contribution of the distinctive architecture of this heritage item to the streetscape and harbour foreshore.

**The proposal minimises adverse environmental effects on the use or enjoyment of adjoining properties and the public domain**

- 72 The proposal has no impact on the public domain, because the additions are located at the rear of the existing building. The impact of the proposal on the views from Rothesay to Sydney Harbour are minor and acceptable.
- 73 I accept the agreement of the planning experts that the proposal satisfies the control at section B3.5.2 of DCP 2015. I am satisfied that the proposal minimises the loss of solar access to the private open space of Rothesay.
- 74 I am satisfied that the proposal has minimised its impact on adjoining properties and that the proposal will not interfere with the use or enjoyment of the private open space of Rothesay.

**The proposal ensures that development allows adequate provision on the land for deep soil planting and areas of private open space**

- 75 The existing rear setback of the site is a concrete slab. The proposal reduces the rear setback and introduces soft landscaping to the rear and eastern side of the site (Ex B, tab 2). The proposal introduces enclosed loggias to each of the units on Levels 1, 2 and 3.
- 76 I am satisfied that the proposal meets this objective by removing hard surfaces and increasing the deep soil planting on the site and by providing an area of private open space in the form of a wintergarden or terrace to each unit.

**Impact of the proposal on the heritage significance of Rothesay**

*Evidence*

- 77 The heritage experts agreed that Rothesay is a fine example of a late Victorian Italianate villa built in 1890 and was designed to see and be seen from the water and that it is not highly visible from Cranbrook Road. They agreed that Rothesay is a more

important heritage item than The Chilterns, due to its historical and aesthetic significance. They agreed that the northern garden of Rothesay is important to its setting and that the plantings along the northern boundary provide screening and privacy to the northern garden.

- 78 The heritage experts agreed that the Heritage Impact Statement prepared by Robert Staas of NBRS + Partners and dated March 2017 (the Heritage Impact Statement) (Ex A, tab 8) does not adequately address the impact of the proposal on the heritage significance of Rothesay. They agreed that the impact of the proposal on Rothesay arises from the proposed roof addition and rear addition and that The Chilterns will be more visible, when compared to the existing building, when viewed from Rothesay's western garden, front verandah and north facing windows. The heritage experts agreed that that the proposal will have some impact on the setting of Rothesay and that the proposal will have some impact on views from the upper levels of Rothesay.
- 79 The arboricultural experts agreed that the Camphor Laurel tree, on the Rothesay property close to the southern corner of the site and identified as Tree 3, is in decline with only a short life expectancy and that some pruning of the lower canopy will be required to accommodate the rear extension of the proposal (Ex 33).
- 80 In Mr Oultram's opinion, the relationship of Rothesay to the harbour was partly extinguished in 1937 with the subdivision and sale of two of the three lots fronting New South Head Road that contain the Inter-War residential flat buildings and the later construction of The Chilterns. The construction of these three residential flat buildings completely separated Rothesay from the harbour and Rothesay is not prominent to the water and can barely be seen from any viewpoints. In Mr Oultram's opinion, the physical and visual relationship of Rothesay to the harbour has been lost.
- 81 According to Mr Johnson, Rothesay was designed as a grand marine villa, being sited close to the waterfront of Rose Bay with uninterrupted views to the harbour. The design of Rothesay expresses the relationship to the water as it was set up high with an unusual colonnaded verandah and open first floor terrace over it, plus a prominent belvedere tower and open balcony above the bay window. Rothesay was a popular Victorian seaside town overlooking a bay on the Isle of Bute, so even the name, Rothesay, refers to its waterfront location. Although the association between Rothesay and the harbour has been diminished by development, it still has some views of the water and the association remains. In Mr Johnson's view, any further erosion of Rothesay's views of the harbour would diminish its historical association and therefore its cultural significance.
- 82 According to Mr Johnson, the proposal will be highly visible from Rothesay and would impact detrimentally on the heritage significance of Rothesay because of the visual impact on Rothesay's remaining setting. Setting is defined by the Burra Charter (The

Australia ICOMOS Charter for Places of Cultural Significance 2013) as ‘the area around a place, which may include its visual catchment’. The residential flat buildings in front of Rothesay are effectively screened from Rothesay by mature trees planted along the northern boundary, which have given the grounds of Rothesay a secluded character. In Mr Johnson’s opinion, enough remains of the garden in front of the house and of views to the water to warrant careful consideration of any development in Rothesay’s setting or visual catchment. The proposal adds bulk to the existing building and intrudes visually upon the setting of Rothesay.

- 83 Mr Oultram noted that the proposal does not make any changes to the property of the Rothesay. In his view, the proposal is not at a scale that would impact detrimentally on the setting or significance of Rothesay. In his opinion, Rothesay is a large and elevated mansion, with a larger footprint and a much larger site area than The Chilterns and the proposal will maintain the current transition to Rothesay in terms of scale.
- 84 According to Mr Oultram, the impact of the proposal on views of the harbour from Rothesay is more of an amenity issue rather than a heritage issue and Rothesay will continue to have a visual relationship to the water from its upper levels.
- 85 Mr Johnson noted that the additions to The Chilterns have been located at the rear of the site which is to the detriment of Rothesay. In his opinion, the partial obscuring of precious remaining water views and visual intrusion on the setting of Rothesay appear to have been overlooked in designing the proposal. The proposal would be imposing and unsympathetic to the heritage values and setting of Rothesay, interiors and front gardens, resulting in an adverse and unacceptable heritage impact on Rothesay.
- 86 In Mr Oultram’s opinion, Rothesay has a large garden to the north that provides its primary, internal setting. The north-western section of the garden has been modernised and has a pool and deck and the experts agreed that this area is of less significance in terms of its role in the setting of Rothesay. The portion of the house closest the swimming pool and the site of the Chilterns is a contemporary two storey addition to Rothesay. The Chilterns is largely hidden from the eastern section of the lower garden of Rothesay due to the density of plantings along the northern boundary. The Chilterns is more visible from the upper levels and tower of Rothesay. He noted that there is a large separation between The Chilterns and the contemporary addition to Rothesay, which is the portion of the house closest to the site.
- 87 According to Mr Johnson, although the swimming pool and contemporary addition to Rothesay are modern elements of less significance, the proposal will be highly visible from elsewhere in the garden and from the verandahs and northern rooms of Rothesay. In his opinion, the existing landscaped screen along the northern boundary of Rothesay

would be compromised by the visibility and imposing bulk of the proposed brick and concrete additions and this effect would be aggravated by the loss of the Camphor Laurel tree.

- 88 According to Mr Oultram, the rear addition of the proposal is set on the alignment of the swimming pool and contemporary addition to Rothesay and it will not become more apparent when viewed from the main section of the northern garden of Rothesay.
- 89 Mr Oultram noted that the proposal will fund the conservation works required for The Chilterns and documented in the Conservation Schedule of Works prepared by NBRIS & Partners and dated 11 March 2020 (Ex B, tab 3). In Mr Johnson's view, the funding of conservation works should not be reliant upon increasing floor space, when it has a negative impact on another more important heritage item, Rothesay. The proposal should be limited to repair and refurbishment works and retain The Chilterns in its original form.

### *Findings*

- 90 I accept Mr Johnson's evidence that the association between Rothesay and the harbour has been diminished, but not extinguished, by the subdivision in the 1930s and the development of the three residential flat buildings in front of Rothesay. There are still some filtered views of the harbour from the upper levels of Rothesay and an understanding of Rothesay as a marine villa is evident in the design of the northern façade, the tower and particularly the orientation of the villa towards Rose Bay. I accept Mr Oultram's evidence that the large garden in the northern setback of Rothesay provides a generous landscaped setting to the villa and that the setting and curtilage of Rothesay no longer extends beyond Rothesay's northern boundary. The dense landscaping along the northern boundary creates an edge to the private domain of the villa.
- 91 I am satisfied that the proposal will not detrimentally impact on the heritage values of Rothesay or its remaining relationship to the harbour. The relationship between The Chilterns and Rothesay is very much maintained by the proposal. The rear addition of 2.603m and the rooftop addition, which is inset from the southern façade by 2.241m, are modest and do not significantly add to the bulk and scale of The Chilterns. The Chilterns proximity to Rothesay is primarily in the location of the swimming pool and where there is a large, contemporary addition to Rothesay.
- 92 I am satisfied that there is no diminution of the curtilage or the setting of Rothesay as a result of the proposal. Rothesay is significantly higher upon the hill as it rises from Rose Bay when compared to The Chilterns, and this relationship is further exaggerated by the excavation at the rear of the site compared to the raised platform of the swimming pool surround of Rothesay. The maximum height of the proposal is RL 19.607 and the

ridge of Rothesay's roof directly behind the site is RL19.87 and the apex of the roof of Rothesay's tower is RL 23.9 (Ex E). This change in level between the ground level of the two heritage items, and the significant scale of Rothesay within a very generous landscaped setting, diminishes any effect of the small increase in the overall height and bulk of the proposal on the setting of Rothesay. I accept and prefer Mr Oultram's evidence that the rear addition of the proposal is set on the alignment of the swimming pool and contemporary addition to Rothesay and the proposed additions to The Chilterns will not become more apparent when compared to the existing view of The Chilterns when viewed from the main section of the northern garden of Rothesay.

93 I accept the agreement of the planning experts that the proposed rear setback of the rear addition to The Chilterns is consistent with the rear setbacks of the adjoining residential flat buildings at 595 and 597 New South Head Road. I am satisfied that the reduced rear setback of the proposal, when compared to the existing rear setback, is acceptable because it maintains sufficient separation between the proposed rear façade of The Chilterns and Rothesay of 19.87m and increases the landscaping at the rear of the site. I am satisfied that the proposal achieves the relevant rear setback objectives at section B3.2 of DCP 2015, because the proposal introduces a landscaped area at the rear of the site; the Intervenor conceded that the proposal does not result in the loss of privacy for the residents of Rothesay; and there is sufficient separation between the proposed rear façade of The Chilterns and the northern, contemporary façade of Rothesay's addition.

94 The existing views of the harbour and environs are primarily obtained from Rothesay's first floor verandah and tower and those views are significantly limited by the existing residential flat buildings fronting New South Head Road, the landscaping on Rothesay's northern boundary and the tree canopies of the substantial trees along New South Head Road, including the tree in front of the site, which has a maximum height of RL 23.0. I accept Mr Brown's evidence that the impact of the proposal on those views is minor. I am satisfied that the minor impact of the increased building envelope of The Chilterns on the remaining filtered harbour views from the upper levels of Rothesay is not determinative of the appeal.

### **Conclusion**

95 I accept the uncontested conclusion of the Statement of Heritage Impact that the proposed works do not adversely affect the identified heritage significance of The Chilterns. I accept the Applicant's submission that The Chilterns is in need of conservation works and that the proposal provides an opportunity to impose this obligation on the consent and to fund the works. The proposal significantly improves the amenity of the units.



The impacts of the proposal on the amenity of Rothesay have been appropriately minimised. The proposal does not impinge on the heritage values, or the setting, of Rothesay. I am satisfied that the Intervenor's contention, that the proposal will have an adverse and unacceptable impact on the heritage significance of Rothesay, including on the heritage values, setting, and interpretation of the house, interiors and front garden, is not made out by the evidence before me.

- 97 Pursuant to the relevant planning principles of SREP (Sydney Harbour Catchment), I am satisfied that the retention of the existing building known as The Chilterns will maintain its current relationship with Sydney Harbour, and that the proposal will not have any effect on the existing unique visual qualities of Sydney Harbour, because the scale of the additions to the roof of the existing building, when viewed from the harbour, is de minimis.
- 98 The Intervenor's filed a version of the conditions (Ex 34) with changes to the Council's conditions (Ex 3), including adding the 'exterior colour schedule' to condition A.3; adding conditions A.6(b), A.6(c), C.1(b), F.6; adding 'The retaining wall structure and pool at No. 3 Cranbrook Rd, Bellevue Hill (Rothesay)' to condition D.2; and amending conditions F.5 and I.5. These changes were agreed to by the Applicant and the Council and Ex 34 is the conditions of consent at Annexure A.

### **Orders**

- 99 The orders of the Court are:
- (1) The appeal is upheld.
  - (2) Development Application No. 190/2017 for alterations and additions to an existing residential flat building at 593 New South Head Road, Rose Bay, is approved, subject to the conditions of consent at Annexure A.
  - (3) The exhibits, other than 2, 30, 31, 32, A, B and C, are returned.

---

**Susan O'Neill**

**Commissioner of the Court**

**Annexure A (612430, pdf)**

\*\*\*\*\*

---

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 12 February 2021