



Land and Environment Court New South Wales

Medium Neutral Citation:	Fullerton House Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1653
Hearing dates:	25 September 2020, final date of submissions 8 December 2020
Date of orders:	17 December 2020
Decision date:	17 December 2020
Jurisdiction:	Class 1
Before:	Walsh C
Decision:	<p>The orders of the Court are:</p> <p>(1) The applicant's request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 (in relation to the height of buildings development standard at clause 4.3 of the Woollahra Local Environmental Plan 2014), prepared by GSA Planning dated April 2020, and forming Exhibit D in the proceedings, is upheld.</p> <p>(2) The appeal is upheld.</p> <p>(3) Development Application No. DA2018/305/1 for the demolition of existing structures and the construction a new three storey residential flat building ('RFB') and associated development, at 30 Kent Road Rose Bay is approved subject to the conditions included at Annexure "A".</p> <p>(4) The exhibits are returned except Exhibits A, B, G.</p>
Catchwords:	DEVELOPMENT APPLICATION – residential flat building – demolition – heritage conservation
Legislation Cited:	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development Woollahra Local Environmental Plan 2014
Cases Cited:	Emmott v Ku-ring-gai Municipal Council (1954) 3 LGRA 177 Goldin v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995 (2002) 121 LGERA 101; [2002] NSWLEC 75

Helou v Strathfield Municipal Council (2006) 144 LGERA 322; [2006] NSWLEC 66
Initial Action Pty Ltd v Woollahra Municipal Council 236 LGERA 256; [2018] NSWLEC 118
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827
Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115

Texts Cited:

Apartment Design Guide
Woollahra Development Control Plan 2014

Category:

Principal judgment

Parties:

Fullerton House Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation:

Counsel:
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Solicitors:
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File Number(s):

2019/216942

Publication restriction:

No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings are an appeal by the Applicant under s 8.7 of the *Environmental Planning and Assessment Act 1979* ('EPA Act') against the refusal of Development Application DA2018/305/1 ('DA') by Woollahra Municipal Council ('Council'). The DA seeks consent for the demolition of existing structures and the construction a new three storey residential flat building ('RFB') and associated development, at 30 Kent Road Rose Bay ('site').

Site and surrounds

- 2 I rely on Council's Amended Statement of Facts and Contentions (Ex 2) for much of the material in this and the following two descriptive sections.
- 3 The site is rectangular in shape with an eastern frontage to Kent Road and western (rear) boundary of 21.335m in length and northern and southern (side) boundaries of 45.72m. The site area is 973.8m². The site falls some 5.74m from east to west along the northern boundary. The cross fall along the rear boundary is about 1m. The site area is some 973.8 m².

The site is occupied by an existing single storey dwelling with a terra cotta tile hipped roof. The adjoining property to the south (32 Kent Road) is occupied by a 2 storey dwelling house with a tiled hipped roof, which is a locally listed heritage item. The adjoining property to the north (28 Kent Road) is occupied by a 2-3 storey residential flat building with a part gabled and part hipped tiled roof. Council advises this site is the subject of development application DA140/2018 (currently under assessment) for demolition of existing structures and construction of a 3 storey residential flat building.

5 Development in the wider vicinity consists of a mixture of 1-2 storey dwelling-houses, 2-3 storey Inter-War residential flat buildings with pitched roof forms, 2-3 storey Federation era “Arts and Crafts” dwelling-houses and a number of 2-3 storey more contemporary residential flat buildings. The Woollahra Playing Fields adjoin the site to the west (rear). Cranebrook School playing fields are also nearby to the west. Royal Sydney Golf Club is to the east of the properties which front the other side of Kent Road. Thus, Kent Road provides for something of an island of residential development between substantial areas of greenspace.

Statutory and policy setting

6 Important to this matter, the site is located within the Kent Road Heritage Conservation Area under Woollahra Local Environmental Plan 2014 (‘WLEP’). Clause 5.10 of KLEP is triggered and is considered in evidence.

7 It is otherwise relevant to note the site is located in the R3 – Medium Density Residential zone under WLEP 2014. Residential flat buildings are a permitted use in the R3 zone. The R3 zone objectives 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.

8 Ex 2 included compiled maps relating to zoning and heritage which I reproduce below.

9 The fact that the proposal constitutes a three storey RFB and four residential units means State Environmental Planning Policy 65—Design Quality of Residential Apartment Development (‘SEPP 65’) and the Apartment Design Guide (‘ADG’) apply.

10 Woollahra Development Control Plan 2014 (‘WDCP’) applies and is considered relevantly in evidence.

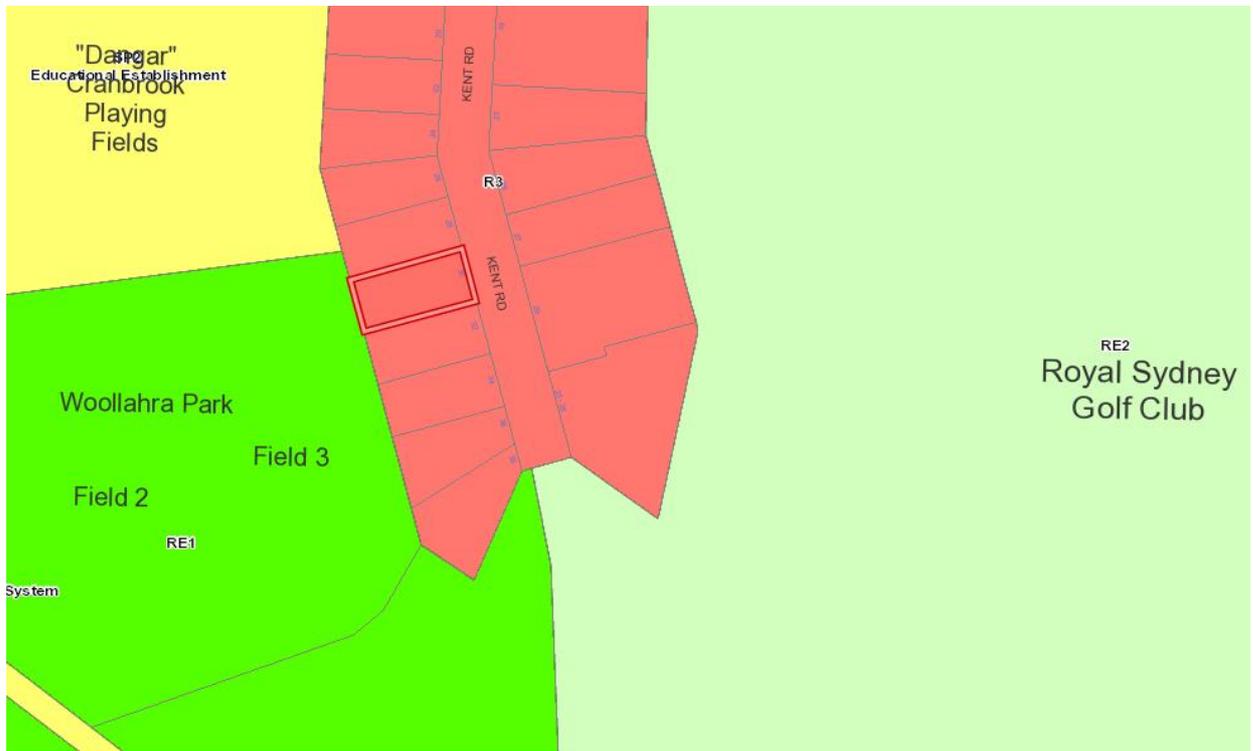


Figure 1 - Zoning map extract compiled by Council (Source Ex 2, p6)



Figure 2 - Heritage map extract compiled by Council (Source Ex 2, p6)

Proposal

11 Consent is sought for demolition of the existing dwelling, garage and shed on the site and the construction a new three storey RFB with parking at the lower ground floor level. Architectural and landscape plans (Ex A and B, respectively) detail the proposed development which steps down the site from the street to the rear boundary.

A single residential unit would be located at the lower ground floor level which orients to the rear or west, overlooking the adjoining open space. Two residential units would be located on the ground with a single unit on the first floor. Each of the units include three bedrooms and accommodate relatively generous private outdoor areas.

- 13 The front building setback is some 9.25m and slightly greater than the setback of the existing dwelling. The main building is setback some 9.04m from the rear boundary with a pool located quite close to the boundary. Vehicle access to the basement is via a sloped driveway along the southern boundary. There is terraced paving along the northern boundary providing for pedestrian accessibility. Landscaping is indicated in the front and rear setback areas and along the side boundaries (Ex B).
- 14 I will reference the form and material of the proposed building in the examination of the issues. However here I note that there is a contravention of the building height control under WLEP. The proposed gross floor area (GFA) is 632.97 m² with the floor space ratio (FSR) calculated at 0.65:1 in Ex A (Drawing DA 00 Issue 1). The FSR control under WLEP is 0.65:1.

Issues

- 15 After leave was granted to amend the application before the Court, the remaining issues contended by Council at the hearing came down to two: heritage conservation impacts (including public interest-related concerns) and inconsistency with desired future character. As it is more straightforward, I will deal with the latter first. Objecting submissions from lay participants are also considered below.

Inconsistency with desired future character

- 16 Council contends that the proposal should be refused as it is inconsistent with the desired future character of the Kent Road Conservation Area and Rose Bay Precinct.

Particulars

- 17 There were two particulars raised in Council's contentions:

"a) The proposed development is inconsistent with Part 1.2(2)(l) of the Woollahra LEP 2014 in that the proposed development does not achieve the desired future character of the Rose Bay (B1.9.2) or Kent Road Heritage Conservation Areas (B2.11).

b) The proposal is inconsistent with O1, O2, O3, C1 and C5 of Part B3.5.1 of Woollahra DCP 2015 as the proposed development is not of a scale that is compatible with the streetscape and the desired future character of the Kent Road Heritage Conservation Area."

(Ex 2, p 27)

Evidence

- 18 Expert evidence was given by town planning experts: G Karavanas (for the Applicant) and D Waghorn (for the Council). Their expert report was tendered into evidence as Ex 5.

The experts analysed the proposal against planning controls, other than those related to heritage conservation (concerns considered by heritage experts and addressed below). The position of the planning experts can be understood from the three paragraphs below (Ex 5, par 1.3-1.4, 1.6):

1.3. The proposal complies with the floor space ratio (FSR) (as per Council's expert's interpretation) and for most part complies with the height standard (with the exception of a small portion of the roof that at its highest point is 371mm above the height standard). The proposal also complies with the front, side and rear setbacks. Further, the proposal complies with the landscaped area controls of Council, including total deep soil landscaped area as well as deep soil landscaped area in the front and rear yards.

1.4. Given the proposal's compliance with the FSR, height (for most part), setbacks and landscaped area, it comprises an envelope that is anticipated by the Council's controls for the site. The compliant landscaped areas provide the opportunity for well landscaped areas that soften and complement the development consistent with Council's controls and the surrounding area.

...

1.6. Therefore, it is our opinion that the external envelope and contribution to the landscaped character are consistent with the desired future character of the area. That is, if the site is not within the Kent Road Heritage Conservation Area, the form and scale of the building and its surrounds are anticipated by the controls. The contribution of the existing building to the Kent Road Heritage Conservation Area will be considered by the Heritage Experts.

- 20 The planning experts together concluded that, other than in regard to heritage conservation concerns, "the proposal is consistent with the desired future character of the Kent Road Conservation Area and Rose Bay Precinct" Ex 5, par 1.7).

Finding

- 21 There is no sworn evidence to support the contention that the proposal is inconsistent with the desired future character from the planning experts on the basis of their analysis, limited as it was to other than heritage-related concerns. Heritage-related concerns in regard to desired character are considered below.
- 22 I do note reports and legal submissions prepared on behalf of the owners of the adjoining heritage listed property at 32 Kent Road. Among this material were specialist reports objecting to the proposal on planning grounds. I queried the experts jointly on the points raised in these submissions, including in regard to loss of amenity with overshadowing a particular point of attention. I am satisfied that the planning concerns raised in objections are relevantly addressed.
- 23 I mention as well that the contravention of WLEP's building height control requires its own attention which is also considered later.

Heritage conservation

- 24 Heritage experts providing sworn evidence in this matter were: S Davies (for the Applicant) and F Scardamaglia (for the Council).

Particulars

There were three expert reports tendered into evidence. Mr Davies provided an individual report (Ex J). Ms Scardamaglia provided an individual report (Ex 3). In addition, a joint report was prepared by these two experts (Ex 4). Ex 4 firstly outlined certain points of agreement:

- The “statement of significance” in regard to the Kent Road HCA (Part B2.11 of WDCP) identifies the area as comprising Inter-War flats and houses built between 1920 and the late 1930s, as a direct result of rapid residential expansion of Rose Bay following the First World War.
- 30 Kent Road does not meet the threshold for individual heritage listing.
- 30 Kent is a substantially intact building.

26 Ex 4 also established the points of disagreement between the experts, which were framed into the following three topics:

- Whether “(the) subject building is a contributory item in the heritage conservation area and a contributory building, having a high degree of integrity and dating from a key development period of significance”.
- Whether “(the) demolition of an intact contributory item will have an unacceptable impact on the significance of the heritage conservation area”.
- Whether “(the) replacement building will adversely impact the character of the HCA”.

27 After outlining relevant further policy provisions, I deal with the first two of these topics initially, leading to a positive finding in regard to the demolition of the existing residence. I then turn to the acceptability of the replacement dwelling.

Policy

28 Clause 5.10 of the LEP is concerned with heritage conservation. Subclause (1) outlines the clause objectives, which are (relevantly) as follows:

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

...

29 Subclause 5.10(4) is concerned with the effects of a proposed development on heritage significance, and provides (relevantly) as follows:

The consent authority must, before granting consent under this clause in respect of a heritage item or heritage conservation area, consider the effect of the proposed development on the heritage significance of the item or area concerned...

30 I reproduce the Kent Road HCA “statement of significance” and “desired future character” description as per WDCP (B2.11, p23-24) below:

“Statement of significance

Kent Road is a long cul-de-sac located off the southern side of New South Head Road opposite the reclaimed land, which forms Lyne Park. It is an important part of the extended setting of the Royal Sydney Golf Club, with the road and its related

subdivision creating the western edge of the golf links. The golf clubhouse is located at the lower northern end where it is the dominant element.

The Kent Road HCA represents a distinct, isolated pocket of residential development in the Rose Bay area, arising directly from the historical development and financial activities of the Royal Sydney Golf Club.

The road is dominated at its lower end by the impressive mass and detail of the historically, aesthetically and socially significant 1920s Clubhouse building and its immediate setting. The other buildings in the street fall into three broad categories:

substantial late Federation era Arts & Crafts style houses on the eastern side of the road overlooking the golf links which were well established before the 1919 "Knoll" subdivision sale and are now largely modified;

Inter-War flats and houses built between 1920 and the late 1930s which were a direct result of rapid residential expansion of Rose Bay following the First World War; and

infill developments which have replaced earlier buildings or vacant sites in the late 20th century.

Amongst these buildings are a number of excellent representative and rare examples of Inter-War residential development by prominent architects which are of local significance within the Woollahra Municipality.

Kent Road itself is wide with street trees of varying species and maturity, along with wide verges and footpaths. It rises steeply to the 'knoll' and contains a double bend following the contours, which adds to the character of the streetscape, creating a series of enclosed vistas. The road terminates in the cul-de-sac with views over the Golf links and beyond up to Dover Heights.

The area also has significant aesthetic qualities arising from the overall form and layout of the subdivision, the presence of prominent mature gardens and the character created by a variety of substantial street tree plantations.

Desired future character

To conserve the streetscape characteristics that gives the Kent Road HCA its special sense of identity.

To ensure that individual heritage items are retained and conserved, as well as their streetscape context and curtilage."

- 31 The background expert study informing the content of Kent Road HCA statement of significance and related WDCP comes under the following name: "Woollahra Council Potential Heritage Conservation Area Study - Kent Road Area Rose Bay prepared by NBR&P Heritage September, 2002" (Ex 1, behind Tab 12, referred to forthwith as the 'NBR&P Study')

Evidence on contributory item considerations

- 32 Ms Scardamaglia believes the existing dwelling fits the definition of contributory building under WDCP due to:

"...its materials, detailing, finishes and form, its being from a significant historical period (Inter-War) and being highly intact. Even if the front verandah has been infilled, this change does not affect the Inter-War character of the dwelling and its identification as such. There have been no changes to the dwelling's building envelope and form and minimum internal changes".

- 33 Ms Scardamaglia notes the specific reference to "Inter-War" houses in the Kent Road HCA statement of significance. This would be in regard to the third paragraph (see [30]). Reference is also made to chapter B2 .1 of WDCP which Ms Scardamaglia indicates provides that: "all other buildings, except the heritage items and intrusive buildings are considered contributory items".

Ms Scardamaglia also believes the NBR&P Study “reinforces” the position that the existing dwelling is contributory to the streetscape by way of the textual reference in the individual survey sheet applying to 30 Kent Road, which formed part of the study (Chapter 15).

- 35 Mr Davies says the existing dwelling is of low contributory significance. In referencing the NBR&P Study, and individual surveys of properties, Mr Davies notes that there is no explanation of the existing dwelling’s ranking as a contributory item in the survey material (ibid, p37). He compares the descriptive content for the existing dwelling to other contributory items which generally included descriptive text in support (eg a small residential flat building at 24 Kent Road (ibid, p34) is noted as “contributory to the dominant streetscape character”).
- 36 Mr Davies believes the existing dwelling is of low individual significance because it brings low representative comparative value aesthetically and has low visibility in the street (being set relatively low) except for the terra cotta roof. He says “there is very little to nothing in the DCP which recognises the objectives or controls for these buildings” (Ex 4, p6).

Evidence on impact of demolition

- 37 Evidence on the impact of demolition generally followed the individual expert opinions in regard to the contributory credentials of the existing dwelling.
- 38 Ms Scardamaglia believed that demolition of the existing dwelling would impact adversely on the collective historical and representatives significance of the Kent Road HCA. The Burra Charter was quoted as follows (Ex 4, p7):
- ‘Conservation is based on a respect for the existing fabric, use, associations and meanings. It requires a cautious approach of changing as much as necessary but as little as possible’.
- 39 Ms Scardamaglia indicated that demolition of an intact contributory item (comprising “significant fabric”) does not embody the cautious approach provided for in the Burra Charter.
- 40 Mr Davies opinion that demolition would have an acceptability impact in the streetscape is based on his finding on the low contribution made by the existing dwelling.
- 41 Both experts were familiar with and made reference to the findings of then Moore C in *Helou v Strathfield Municipal Council* (2006) 144 LGERA 322; [2006] NSWLEC 66 (*‘Helou’*). Paragraphs from *Helou* ([43]-[43]) were subsequently adopted by the Court as a planning principle in regard “demolition of contributory item in conservation area”.

Consideration

- 42 Having regard to WDCP’s statement of significance for the Kent Road HCA, I generally agree with Mr Davies that heritage conservation emphasis goes to: (1) conserving the Kent Road streetscape character (which gives it “its special sense of identity”), (2)

individually valued buildings (as listed), (3) the Federation Arts and Crafts buildings (as a clustering) and then (4) maintaining the sense of the overall identified precinct.

43 While the Inter-War dwellings are referenced, the major emphasis in WDCP in regard to an identifiable building grouping, including how that emphasis is drawn out through “controls”, is clearly towards the Federation Arts and Crafts buildings. I see the “three broad categories” referenced in the statement of significance as not a justification for heritage significance of Inter-War buildings of themselves (see [33]). The three broad categories are simply a grouping of the building types within the street. There is no suggestion to me in that particular part of the statement of significance that, for example, the first two building categories have heritage significance and the third category does not.

44 I see that it is important that the Kent Road HCA WDCP controls have little to say in regard to Inter-War buildings. The most relevant objectives are O1 and O2 which are reproduced below (see [Figure 3](#)). I don’t believe the proposed development would be at odds with the corresponding “controls” (C1 and C2). That is to say, the control in regard to the conservation of buildings and their settings, makes direct reference to retention of Federation Arts and Crafts buildings, only.

B2.11 Kent Road, Rose Bay

Objectives	Controls
O1 To conserve the buildings and their settings.	C1 The original fabric of Federation Arts and Crafts buildings is retained.
O2 To maintain the streetscape character and scale of buildings.	C2 New buildings, while also encouraging architectural diversity, are of a scale and form compatible with existing buildings and do not dominate the streetscape.

Figure 3 - Excerpt from Woollahra DCP Chapter B2

45 As noted above, the Kent Road HCA statement of significance, having particular regard to the desired future character points, is concerned with conserving streetscape characteristics that give Kent Road its “special sense of identity”. On this point, I agree with Mr Davies that the existing dwelling is making little contribution to Kent Street streetscape identity at present. The reasons for this include its physically low setting, and the front verandah infills, which are reasonably evident in the street. I note that these infills are capable of being returned to original form. However, the general form of the building and terra cotta roof is insufficient for me to consider that the existing dwelling makes a positive impact and contribution to Kent Road’s streetscape character.

Finding - contribution of existing dwelling and the acceptability of demolition

I turn to the Court's Planning Principle in *Helou*, referenced above, and selectively quoted below:

“44 A contributory item in a conservation area is a building that is not individually listed as a heritage item, but by virtue of age, scale, materials, details, design style or intactness is consistent with the conservation area, and therefore reinforces its heritage significance.

45 The demolition of a building which contributes to a conservation area will impact on the area's heritage significance even if its replacement building "fits" into the conservation area. Although the replacement building may be a satisfactory streetscape or urban design outcome, this does not address heritage impacts as the original heritage element has been removed. Despite this, it is open to the consent authority still to permit the demolition of a contributory element, for example, if the replacement has other planning benefits that the original does not.

46 The following questions should be addressed in assessing whether the demolition should be permitted:

1. What is the heritage significance of the conservation area?
2. What contribution does the individual building make to the significance of the conservation area? ...
3. Is the building structurally unsafe? ...
4. If the building is or can be rendered structurally safe, is there any scope for extending or altering it to achieve the development aspirations of the applicant in a way that would have a lesser effect on the integrity of the conservation area than demolition? ...
5. Are these costs so high that they impose an unacceptable burden on the owner of the building? ...
6. Is the replacement of such quality that it will fit into the conservation area?

If the replacement does not fit, the building should be retained until a proposal of suitable quality is approved.”

47 Paragraphs 44 and 45 in *Helou* are instructive of themselves. Par 44 synthesises the test at cl 5.10(4) of WLEP that is, whether a building, in this case one that might be removed, might at present “reinforce” the heritage significance of the HCA.

48 Par 45, among other things, in my interpretation draws attention to the fact that while heritage conservation is a most important component part of the NSW planning system, it does sometimes compete with other environmental planning objectives. In this instance, the other environmental planning objective which could be thought of as competing with heritage conservation objectives would be primarily that of “(providing) for the housing needs of the community within a medium density residential environment”, as per the first objective of the R3 Medium Density zone.

49 In regard to Question 1 in *Helou*, the heritage significance of the Kent Road HCA is not in dispute.

50 In regard to *Helou's* Question 2, and the first of the “topics” considered by the heritage experts in this matter [26], it is my conclusion that the existing residence makes a quite limited contribution to the HCA mindful of heritage conservation objectives. The policy aspirations in terms of desired future character would generally not be prejudiced by demolition. Here, I agree with Mr Davies that (Ex 4, p7):

“...if the building were not retained then the acknowledged character of Kent Road would be retained through the subdivision, street planting and significant Arts and Crafts houses and the (Sydney) Golf Club.”

In turn I do not believe there is anything but a passive “reinforcement” of the heritage significance of the HCA contributed by the existing dwelling. Here that would be in regard to either: (a) conserving the Kent Road streetscape character (which gives it “its special sense of identity”), or (b) maintaining the sense of the overall identified precinct (see [42]).

52 I also believe there is some other planning benefit associated with the replacement of the existing residence with the proposed four units, which I have indicated aligns with the first R3 zone objective. All other things being equal, this objective in regard to housing provision can have particular resonance in settings such as this, where there is good accessibility to services and infrastructure.

53 Provided I find positively in regard to Question 6 in Helou, which it will be seen below that I do, there is no need for me to consider the other Helou questions in this matter before me.

Evidence on whether replacement building will adversely impact HCA

54 The parties agree that both west and east elevations of the proposed building would be visible from the public domain (east elevation from Kent Road and west elevation from Woollahra Park).

55 Council is concerned that “the replacement building (would) adversely impact the character of the HCA”. The proposed building is seen to be particularly contrary to Objectives O1 of chapter B1.9.2 and O2, O6 and O7 and C11 of chapter B2.11 of WDCP. The central concern after plan amendments (which seem to address certain earlier contentions and I consider below) is what Council sees as excessive use of glazing, visible in the public domain (from Woollahra Park and Kent Road). Ms Scardamaglia’s evidence is that (Ex 4, p7):

“Both east and west elevations employ excessive glazed areas with horizontal proportions that appear as an anomaly in the HCA context. Dominancy should be given to solid elements rather than glazed areas through vertically proportioned openings. The excessive use of glazed areas adversely affects the streetscape character.

I believe that the replacement building, while having some DCP non-compliances, has capability to improve its design and enhance its suitability to the conservation area, but the real issue of this proposal is the loss of a contributory item providing evidence of the Inter-War development of Kent Road that has been recognised by heritage listing this heritage conservation area.”

56 In his individual expert report at Ex J, Mr Davies referenced the findings of the proposal Heritage Impact Statement (prepared by his firm):

“The Heritage Impact Statement for No. 30 Kent Road prepared by Urbis, July 2018, concludes that: “The proposed works are supported from a heritage perspective as:

- The proposed scale of the development is compatible with the surrounding buildings. The new development would be three storeys in height. However, the sloping topography of the site conceals the lower ground floor from public view. The proposed development would present as a two-storey building when viewed from Kent Road.
- The form of the proposed building presents a solid to void ratio consistent with the existing built form of the locality. Furthermore, the building would feature architectural elements compatible character of Kent Road.
- Brick and render have been identified as the dominant finishes in the vicinity of the site. As the proposed development would have a painted render, and brick finish, it would therefore be compatible with the established character.

- The proposed setback of the new development is in line with that of the adjacent heritage listed building at 32 Kent Road and that of the submitted DA at 28 Kent Road.
- The proposed landscaping works would have a positive impact on the site and the character of the HCA.
- High-quality finishes are proposed, that would ensure the building would make a positive contribution to the character of the Kent Road HCA.””

57 In the joint report (Ex 4, p7) and oral evidence, Mr Davies pointed to the further design revision undertaken to the proposed building, including changes to roof material (terracotta tiles) and provision at the first floor of sliding screens (“in a patinated brass finish”), addressing “solid to void” concerns.

Policy

58 Beyond the policy provisions already raised, relevant WDCP provisions at Part B2.11 (in direct regard to Kent Road HCA) include:

- Objective O2 - in regard to maintaining the streetscape character and scale of buildings, which includes a control encouraging scale and built form compatibility rather than domination of the streetscape (C2).
- Objective O6 - in regard to maintaining the variety of exterior building materials and ensuring conservation of streetscape character, which includes a control seeking replacement building fabric of a similar material and type to existing (C8).
- Objective O7 - in regard to ensuring that external facades are sympathetic to the original building and the predominant streetscape character, which includes a control seeking replacement roofing of a similar pitch, style and material to existing (C12).

59 Objective O1 in regard to desired future character at Part B1.9.2 of WDCP (on the wider Rose Bay precinct) is concerned with respecting and enhancing “streetscape character and key elements of the precinct”, which Council relates to identified streetscape character “key element”: “dwelling houses set within highly visible gardens”.

60 Part B2.1.3 of WDCP introduces a broader perspective on WDCP’s heritage conservation provisions in general alignment with the above.

Finding

61 Having considered the expert evidence and reviewed the plans (encompassing amendments in response to prior Council concerns), I am satisfied that the proposed development provides a scale and form which is compatible with the Kent Road streetscape. The proposal complies with relevant controls with the exception of a relatively minor height contravention which requires further consideration below.

62 I agree with Mr Davies that the massing, in company with architectural form and materials (including roofing, screening to glazing elements, reused material, as well as landscaping would mean the proposal can sit as a positive feature in the streetscape

without visually dominating, an important test in terms of streetscape heritage conservation. This also applies to the west, with the view from the parklands. I note that the applicant has removed intended spas in the front setbacks to Units 2 and 3 (now embodied in proposed conditions) which would have brought potential concerns in regard to ambitions for dwellings to be seen as set within “highly visible gardens”.

63 While the exchange between the experts relates principally to the potential impact of the proposal on the HCA, as required under cl 5.10(4) of WLEP, I need to give attention to the potential effect of the proposed development on the heritage significance of the adjacent heritage item. To expand, 32 Kent Road is listed as of local significance in WLEP in regard to the existing “house, interiors and grounds”. My conclusions in regard to this potential effect are that they are not unreasonable. Mindful of the setting of 32 Kent Road (in particular the house and grounds, including existing landscaping) and the siting, architectural and landscape treatment proposed with the subject application (including building positioning, height, roof form and materials), it is my view that no unreasonable adverse impact on the heritage significance of 32 Kent Road would result.

64 The proposed building seems to exhibit higher architectural design qualities and has a capacity to contribute positively to the streetscape setting in some alignment with other, more historical, architect-designed buildings in the street.

65 I note that in coming to my position in regard to the effect of the proposed development on the heritage significance of both the Kent Road HCA and the heritage item at 32 Kent Road, I have read and given consideration to specialist submissions objecting to the proposal on heritage impact grounds on behalf of the owners of 32 Kent Road. I am of the view that the submissions do not raise significant further issues. That is to say that the analysis above adequately covers relevant heritage issues raised in objector submissions.

Precedent

66 I note Council also contends that (Ex 2, p24):

“The removal of an intact contributory item will set an adverse precedent for other contributory items in the heritage conservation area.”

67 In *Goldin v Minister for Transport Administering the Ports Corporatisation and Waterways Management Act 1995* (2002) 121 LGERA 101; [2002] NSWLEC 75 (*‘Goldin’*), Lloyd J gave guidance in relation to the question of precedent, and where it may properly be taken into consideration. Justice Lloyd found, inter alia, as follows [28]:

“As I understand the decision, if the Court is entertained with an application for a proposed development which is both objectionable in itself and where there is a sufficient probability that there will be further applications of a like kind, then the fact that a consent would operate as a precedent may be taken into consideration.”

68 The initial test under *Goldin* goes to whether the proposal is objectionable of itself (or as put by Sugerman J in *Emmott v Ku-ring-gai Municipal Council* (1954) 3 LGRA 177 “not unobjectionable”). In the case before me, and mindful of the findings in *Helou*, I have not found anything substantively objectionable about the proposal in regard to

heritage conservation, and in regard to planning merits generally. My evaluation is that the proposal is satisfactory, rather than objectionable. Future applications will need to demonstrate their own satisfaction to the consent authority.

Height of building development standard contravention

69 The proposal involves a contravention of the building height development standard at cl 4.3 of WLEP. A maximum height of 10.5m applies which the proposal contravenes by some 371mm. There are permissive powers available to a consent authority to grant development consent despite such a contravention within cl 4.6 of WLEP, subject to certain conditions.

70 To open the gate to these permissive powers a written request pursuant to cl 4.6(3) of WLEP has been prepared by GSA Planning (April 2020), on behalf of the applicant, seeking to justify the contravention (Ex D).

71 The next step, under cl 4.6(2) of WLEP, would require the Court to form two positive opinions of satisfaction under cl 4.6(4)(a). The first opinion is in regard to the applicant's written request and, specifically, whether it has adequately addressed the two matters required to be demonstrated at cl 4.6(3): (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 second opinion requires me to make my own finding of satisfaction that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objective of the zone in which the development is proposed to be carried out.

Compliance unreasonable or unnecessary in the circumstances of the case

72 The written request demonstrates that compliance with the height development standard is unreasonable and unnecessary as the objectives of the height development standard are met notwithstanding the noncompliance (cl 4.6(3)(a) of WLEP 2012). The objectives of WLEP's height of buildings clause 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.

73 The written request describes how the proposed development's building height is compliant other than for an area above the existing basement excavation. The written request goes on to describe how the height of the building is generally consistent with nearby buildings through showing comparisons of nearby buildings in the streetscape.

Mindful of the findings of Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 [57], I accept the written request's position that the development is consistent with Objective (a).

- 74 The first part of Objective (b) is, as described by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 [64] (*Wehbe*), "descriptive of the result achieved by the clause itself". In this case it might extend to relate to WLEP's development standards relating to FSR also. That is to say, the "transition in scale" sought by Objective (b) is in part founded on the spatially varying development standards as prescribed in WLEP's building height and FSR maps. The written request has established that the proposed building height is consistent with the desired future character of the neighbourhood (see above). The written request also describes how the proposal complies with the FSR development standard. The written request has demonstrated that the clause objective in relation to scale transition is achieved notwithstanding the contravention.
- 75 The second part of objective (b), as well as objectives (c) to (e), are concerned with minimising amenity impacts. I am satisfied with the written request's advice that the proposed development would minimise loss of solar access to existing buildings and open space because of the written request's reference to shadow diagrams accompanying the application which demonstrate this. More broadly I accept the written request's advice that the development minimises impacts on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion. This is because of the written request's demonstration that the proposal satisfies the built form controls relating to setbacks, FSR and building height with the exception of the contravening height area (above an area of excavation for basement) of 371mm. It follows for me that such controls are themselves concerned with minimising amenity impacts. Here I also accept the written request's advice that the proposed development would protect the amenity of the public domain by not impacting on public views, confirming my own observations from the site inspection.
- 76 The written request adequately demonstrates that the objectives of the development standard have been achieved notwithstanding the contravention. In turn the written request has demonstrated that strict compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Sufficient environmental planning grounds

- 77 The written request also adequately establishes sufficient environmental planning grounds that justify the breach of the height standard (cl 4.6(3)(b) of WLEP). This is by demonstrating that the contravention is of a minor scale and comes about as a consequence of the existing basement excavation and what it describes as a "technical interpretation of the existing ground line" (Ex D, p10).
- 78 On the preceding basis, I am satisfied that the first opinion of satisfaction under cl 4.6(4)(a)(i) is met.

Development in the public interest because of consistency with objectives of the standard and objectives of the zone

- 79 The second opinion requires me to make my own direct finding of satisfaction. For the same reasons outlined in the written request I am directly satisfied that the development is consistent with the objectives of the height of buildings standard. I am also satisfied that the development is consistent with the R3 Medium Density Residential zone objectives. The zone objectives 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.
- 80 Consistent with the first two zone objectives, the proposal would result in four residential apartments, of some individual variety (given the response to the topography setting), in a medium density setting where, presently, a single dwelling exists. In regard to the fourth zone objective, for the reasons indicated in the written request I believe the development is a of height that achieves the desired future character. The FSR control is met, which I see as a reasonable indicator of achievement of desired future character with respect to scale. The third objective is not relevant here.
- 81 On the preceding basis, I am satisfied that the second opinion of satisfaction under cl 4.6(4)(a)(ii) of WLEP is met.

Concurrence function under cl 4.6(4)(b) of WLEP

- 82 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) of the Land and Environment Court Act 1979 (LEC Act)), but should still consider the matters in cl 4.6(5) (*Initial Action Pty Ltd v Woollahra Municipal Council* 236 LGERA 256; [2018] NSWLEC 118 at [29]). Pursuant to cl 4.6(5) I am satisfied the proposal does not raise any matter of significance for State or regional development and that there is no particular public benefit in maintaining the development standard in this instance.
- 83 The states of satisfaction required by cl 4.6 of the WLEP have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the height control.

State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development

- 84 As indicated previously SEPP 65 applies. In accordance with cl 28(2) I have considered the design quality of the proposed development (as amended), when evaluated in accordance with the design quality principles, and the ADG. Of assistance here was the

Design Verification Statement prepared by architects Luigi Rosselli Pty Ltd and dated September 2020 (Ex L). Ex L provides particulars on the architect's view on how the SEPP 65 design quality principles and objectives of the Apartment Design Guide have been achieved.

85 I am satisfied that the proposed development demonstrates that adequate regard has been given to the design quality principles and the objectives specified in the Apartment Design Guide for the relevant design criteria (as required by cl 30(2)).

Objector submissions

86 In coming to my decision in this matter I have read and given consideration to submissions from objectors, some of which have been referenced in dealing with the planning and heritage-related contentions, above. Concerns from objectors were also raised in regard to geotechnical considerations. In response to my questioning, Council confirmed that further expert advice provided by the applicant (Letters from EI Australia dated 23 April 2020 and 31 March 2020, Ex O) satisfied the contention with respect to this issue as raised by Council. On this basis, I am also satisfied that the objector concerns on this issue are adequately addressed.

Conclusion and orders

87 The proposed demolition of the existing residence and replacement proposal on the site is acceptable with conditions as nominated.

88 The orders of the Court are:

- (1) The applicant's request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 (in relation to the height of buildings development standard at clause 4.3 of the Woollahra Local Environmental Plan 2014), prepared by GSA Planning dated April 2020, and forming Exhibit D in the proceedings, is upheld.
- (2) The appeal is upheld.
- (3) Development Application No. DA2018/305/1 for the demolition of existing structures and the construction a new three storey residential flat building ('RFB') and associated development, at 30 Kent Road Rose Bay is approved subject to the conditions included at Annexure "A".
- (4) The exhibits are returned except Exhibits A, B, G.

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P Walsh

Commissioner of the Court

[Annexure A \(816878,.pdf\)](#)

[Architectural Plans \(11004947,.pdf\)](#)

[Landscape Plans \(1542014,.pdf\)](#)

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Decision last updated: 17 December 2020