



Land and Environment Court
New South Wales

Case Name:	Hillcrest Rose Bay Pty Ltd v Woollahra Municipal Council
Medium Neutral Citation:	[2021] NSWLEC 1662
Hearing Date(s):	14-15, 18 October 2021
Date of Orders:	28 October 2021
Decision Date:	28 October 2021
Jurisdiction:	Class 1
Before:	Gray C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development consent is granted for alterations and additions to the existing residential flat building at 780-786 New South Head Road, Rose Bay, subject to the conditions in Annexure A.</p> <p>(3) The exhibits are returned, except for Exhibits A-F and 3.</p>
Catchwords:	APPEAL – development application – draft heritage item – alterations and additions for residential flat building – construction of additions within side setbacks – impact on heritage significance – adequacy of side setbacks
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979 ss 8.7, 4.15(3A)</p> <p>Environmental Planning and Assessment Regulation 2000 cll 50, 55, Sch 1</p> <p>State Environmental Planning Policy No 55—Remediation of Land, cl 7</p> <p>State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, cll 6A, 28, 30</p>

Woollahra Local Environmental Plan 2014 cll 4.3, 4.4, 5.10, 6.2

Cases Cited: Bunnings Properties Pty Ltd v Ku-ring-gai Council (No 4) [2017] NSWLEC 1238
Ku-ring-gai Council v Bunnings Properties Pty Ltd (No 2) [2018] NSWLEC 19
Malass v Blacktown City Council [2017] NSWLEC 1043

Texts Cited: Apartment Design Guide
Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Hillcrest Rose Bay Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Pickles SC (Applicant)
C Rose (Solicitor) (Respondent)

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JUDGMENT

1 **COMMISSIONER:** A residential flat building known as Hillcrest is located at 780-786 New South Head Road, Rose Bay. It was originally constructed in around 1890 as a pair of semi-detached dwellings, but it now contains six self-contained dwellings. Hillcrest Rose Bay Pty Ltd (the applicant) seeks development consent to carry out alterations and additions to the building, including internal alterations and the construction of new additions that extend into each of the side setbacks of the existing building. A development application for this work to be carried out was lodged with Woollahra Municipal Council (the Council) on 29 January 2021. Following the expiry of the period after which the development application is deemed to be refused, the applicant lodged this appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

- 2 Prior to the lodgement of the development application, the Council prepared a planning proposal to list Hillcrest, and its interiors and gardens, as a heritage item in Schedule 5 of the Woollahra Local Environmental Plan 2014 (WLEP). The planning proposal was the subject of a Gateway Determination on 9 June 2021. The Gateway Determination authorises the local plan-making authority to be the planning proposal authority, which allows the Council to make the proposed instrument. The planning proposal has been publicly exhibited, subsequent to which it was endorsed by the Council at its meeting on 27 September 2021, and has since been provided to the Parliamentary Counsel for preparation of an instrument for gazettal.
- 3 In the course of the hearing, the applicant amended the development application, and the amendments to the development application were lodged on the NSW Planning Portal with the agreement of the Council, as required by cl 55(1) of the Environmental Planning and Assessment Regulation 2000.
- 4 The Council remains opposed to the grant of development consent. The Council contends that the proposed development will have an unacceptable impact on the heritage significance of the existing building, its external fabric, setting and internal fabric. It also contends that the side and rear setbacks are inadequate, and that the inadequacy of the rear setbacks will create an unacceptable acoustic impact.
- 5 For the reasons set out below, I have determined that the proposed listing of Hillcrest as a heritage item is certain and imminent, but that the proposed development has an acceptable impact on the heritage significance of the building. Further, I consider that the setbacks are acceptable in the context.

The site and locality

- 6 A site inspection was carried out by the Court on the second day of the hearing, with the legal representatives, town planners, and heritage experts. This included viewing the site from both New South Head Road and Dumaresq Road, as well as inspecting the surrounds of the building, its siting and its interiors within three of the dwellings.
- 7 The site has a total site area of 1216.6m². It is located on the western side of New South Head Road, Rose Bay. The site has a steep fall away from New

South Head Road, and is regularly shaped with a frontage of 40.5m. The side boundaries are 32.3m and 31m long, and the rear boundary is 40m wide.

- 8 The building that occupies the site, Hillcrest, is 3 storeys in height and contains 6 residential dwellings. The upper floor (third storey) is linked to North South Head Road by a pedestrian access bridge, and external stairs provide access to the two storeys below. The topography of the site is such that the building presents as single storey with double gable ended roof to the road. On the southern portion of the site's frontage is a large hardstand car parking slab which is level with the street, with storage below. A photograph of the building as viewed from New South Head Road is at Figure 1.



Figure 1: The building as viewed from New South Head Road (Source: Ex 2)

- 9 The site benefits from expansive views over the development to the rear to the waters of Rose Bay to the west, toward the city.
- 10 Adjoining the site to the south is a pedestrian path that connects New South Head Road with Dumaresq Road. Historically, the two sites to the rear of Hillcrest, which front Dumaresq Road, formed part of the site on which Hillcrest is located, such that the subject site had frontage to both Dumaresq Road and New South Head Road.
- 11 The locality is characterised by a mix of residential flat buildings and dwelling houses. Residential flat buildings are located adjacent to the site on each side, other than the residential dwelling located on one of the properties to the rear. A 3-5 storey residential flat building is on the adjoining site to the north, and a 3-5 storey residential flat building is located on the other side of the pedestrian

path to the south. On the two sites to the rear, which front Dumaresq Road, there is a residential flat building of 3-5 storeys, and a two-storey dwelling house.

The planning context

- 12 The site is one of only four sites in the immediate vicinity that are zoned R3 Medium Density Residential, pursuant to the WLEP. The objectives of the zone, which are required to be considered in determining a development application, are as follows:

- 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.

- 13 Clause 4.3 of the WLEP establishes a building height development standard of 16.5m, and cl 4.4 establishes a floor space ratio development standard of 1.3:1. The proposed development complies with these development standards.

- 14 Clause 5.10 of the WLEP concerns heritage conservation, and provides, at sub cl (4):

(4) **Effect of proposed development on heritage significance** 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. This subclause applies regardless of whether a heritage management document is prepared under subclause (5) or a heritage conservation management plan is submitted under subclause (6).

- 15 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) also applies to the proposed development. Clause 28(2) provides that:

(2) In determining a development application for consent to carry out development to which this Policy applies, a consent authority is to take into consideration (in addition to any other matters that are required to be, or may be, taken into consideration):

- (a) the advice (if any) obtained from the design review panel, and

(b) the design quality of the development when evaluated in accordance with the design quality principles, and

(c) the Apartment Design Guide.

16 Clause 30(2) of SEPP 65 provides:

(2) Development consent must not be granted if, in the opinion of the consent authority, the development or modification does not demonstrate that adequate regard has been given to:

(a) the design quality principles, and

(b) the objectives specified in the Apartment Design Guide for the relevant design criteria.

17 In addition to cll 28 and 30, cl 6A provides:

6A Development control plans cannot be inconsistent with Apartment Design Guide

(1) This clause applies in respect of the objectives, design criteria and design guidance set out in Parts 3 and 4 of the Apartment Design Guide for the following—

(a) visual privacy,

(b) solar and daylight access,

(c) common circulation and spaces,

(d) apartment size and layout,

(e) ceiling heights,

(f) private open space and balconies,

(g) natural ventilation,

(h) storage.

(2) If a development control plan contains provisions that specify requirements, standards or controls in relation to a matter to which this clause applies, those provisions are of no effect.

18 The Apartment Design Guide (ADG) is therefore relevant in the context of these clauses.

19 Part 2F 'Building Separation' of the ADG sets out considerations in setting building separation controls, including the following:

"Minimum separation distances for buildings are:

Up to four storeys (approximately 12m):

- 12m between habitable rooms/balconies
- 9m between habitable and non-habitable rooms
- 6m between non-habitable rooms

...

At the boundary between a change in zone from apartment buildings to a lower density area, increase the building setback from the boundary by 3m”

- 20 Objective 3F-1 in Part 3F 'Visual Privacy' of the ADG provides the following design criteria:

"1. Separation between windows and balconies is provided to ensure visual privacy is achieved. Minimum required separation distances from buildings to the side and rear boundaries are as follows:

Building Height	Habitable rooms and balconies	Non-habitable rooms
Up to 12m (4 storeys)	6m	3m
Up to 25m (5-8 storeys)	9m	4.5m
Over 25m (9+ storeys)	12m	6m

...

Apartment buildings should have an increased separation distance of 3m (in addition to the requirements set out in design criteria 1) when adjacent to a different zone that permits lower density residential development to provide for a transition in scale and increased landscaping (figure 3F.5)”

- 21 Further, with respect to acoustic privacy, Part 4H provides the following objective and design guidance:

“Objective 4H-1

Noise transfer is minimised through the siting of buildings and building layout

Design guidance

Adequate building separation is provided within the development and from neighbouring buildings/adjacent uses (see also section 2F Building separation and section 3F Visual privacy)

...”

- 22 The Woollahra Development Control Plan 2015 (WDCP) applies to the site, and there are a number of controls in Chapter B3.2 concerning the building envelope, including setbacks. Clause B3.2.3 concerns side setbacks, and

requires a side setback of 3.5m for development on the site. The relevant objectives of this requirement are as follows:

“O1 To avoid an unreasonable sense of enclosure and to facilitate an appropriate separation between buildings.

O2 To ensure the side elevation of buildings are well articulated.

O3 To protect the acoustic and visual privacy of residents on adjoining properties.

O4 To facilitate solar access to habitable windows of adjoining properties.

O5 To facilitate views between buildings.

O6 To provide opportunities for screen planting.

O7 To allow external access between the front and rear of the site.”

- 23 Clause B3.2.4 concerns rear setbacks. The rear setback control is calculated based on the site dimensions, and, for this site, is 3m. The proposed additions to the existing building comply with this rear setback control. The objectives of this clause include the following:

“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.

O5 To protect vegetation of landscape value and provide for landscaped area and deep soil planting.”

The proposed heritage listing

- 24 At the time that the development application was lodged, an Interim Heritage Order was in place concerning Hillcrest. The Interim Heritage Order was published in the NSW Government Gazette on 10 July 2020. It was in place for an initial period of 6 months, but was extended for an additional period of 6 months following a resolution of the Council on 23 November 2020 to prepare a planning proposal to list Hillcrest, including interiors and gardens, as a heritage item in Sch 5 of the WLEP.
- 25 Following advice from the Woollahra Local Planning Panel, on 22 February 2021 the Council resolved to refer the planning proposal to the Department of Planning, Industry and Environment. On 9 June 2021, the delegate for the Minister for Planning and Public Spaces issued a Gateway Determination,

subject to a number of conditions. Those conditions included the requirement for exhibition, and authorised the Council as the plan-making authority.

- 26 The exhibition period has now passed, and, on 27 September 2021, the Council resolved to proceed to finalise the planning proposal to list Hillcrest, including the interiors and gardens, as a heritage item. The planning proposal has now been sent to Parliamentary Counsel for the preparation and gazettal of an instrument to amend the WLEP.
- 27 The parties agree that an amending instrument that amends the WLEP to list Hillcrest, and its interiors and gardens, as a heritage item in Sch 5 of the WLEP, is certain and imminent. I am also satisfied that the making of the amendment is certain and imminent, in circumstances where the Council has been authorised as the local plan-making authority, the planning proposal has been publicly exhibited, was endorsed by the Council at its meeting on 27 September 2021, and has been forwarded to Parliamentary Counsel.
- 28 In light of the future listing of Hillcrest as a heritage item, including its interiors and gardens, I consider that substantial weight should be given to cl 5.10 of the WLEP and that I ought to assess the impact of the proposed development on the heritage significance of the building, its interiors and the gardens.
- 29 The statement of significance in the heritage data form is as follows:

“Hillcrest”, No.780-786 New South Head Road, Rose Bay, is the residential flat building built c.1890 as a pair of semi-detached dwellings originally known as ‘Dalkey’ and ‘Bionopa’, and converted to six flats in the early 1900s. It is of Local heritage significance within the Municipality of Woollahra for its historic, aesthetic, and associative values, particularly within the Rose Bay locality. Within its locality and LGA context it also demonstrates a rarity of its type, design, and developmental history and context, supported by its relative integrity.

Built by the prominent businessman and local alderman Morrice Alexander Black, the building was the first to be built in the lands subdivided in 1889 from Black's ‘Tivoli’ Estate. Adopting an urban form of semi-detached dwellings, usually seen in more closely developed city and urban streets, the building took advantage of its harbourside site to present as a prestigious ‘marine villa’ set in complementary gardens like its earlier grand but distant neighbours. However, in the context of increasingly closer subdivision and greater densities, with purpose-designed flat buildings becoming the first-builds on surrounding lots, the two aesthetically designed, Victorian Italianate semi-detached houses became four and later, six flats - sold and successively owned by investors.

Renamed '*Hillcrest*', the building remains significantly intact despite its adaptive re-use, and retains key dimensions and qualities of its original spacious garden setting, to maintain its historic and aesthetic contextual significance. '*Hillcrest*' contributes distinctively to the locality in which it is a landmark and an interpretable milestone of evolving development."

The current condition of the building, garden and interiors

- 30 The siting of the original building on a large lot that extended to Dumaresq Road enabled the building to be seen "in the round" within a garden setting, but this has been compromised by the subdivision of the land and the later residential flat building constructed immediately to the west on Dumaresq Road. The original side and front boundary setbacks remain, but none of the current plantings have been dated back to the period of the original building. The side gardens have been internally divided with timber fences, to establish private courtyards for the residents, which alters the original configuration of the setting.
- 31 In the front setback the original iron palisade fence with masonry base, and the stone entry gates and stone steps, which would have led to the front entry to the north, remain. However, the stone steps are not currently in use due to safety concerns.
- 32 The original gardens have also been compromised by the enclosed storage area, the hardstand car parking area, and the hard landscape elements of the grounds and gardens.
- 33 The building is of rendered brick and masonry construction, originally with a slate roof, but now replaced with concrete tiles. It has light timber fretwork to the gables, in the manner of nearby Tivoli estate. The eastern façade fronting New South Head Road is typically Victorian with half hexagonal bay windows. A chimney is located on the party wall, and remains. The new pedestrian bridge and the car stand obscures the view of the eastern façade. Arcaded verandahs are located on the north western and south western corners on the ground level and first floor of the building, but the arches on the northern and southern facades have been infilled to create kitchens in the dwellings. The external fabric of the building is otherwise in a sound, well managed and maintained condition, with some intrusive additions including service conduits,

plant items, the pedestrian bridge, the verandah infills and the hardstand parking area.

- 34 The building originally comprised a pair of substantial dwellings, each with ground floor with reception rooms, first floor bedrooms, and a basement level for kitchens and service areas. The central stair of each house was within the entrance, accessed from the side portico. The central stairs of each house have been removed and the internal layout highly modified for adaptive re-use as 6 residential dwellings. On the upper and mid floors, some original detail survives, including the outline of the stair location in the plaster work, some arches, ceilings, cornices and mouldings.

The proposed development

- 35 The proposed alterations and additions include the addition of the two new additions earlier described, which form an additional wing on each side of the building, as well as an additional floor level within a roof addition, and two new basement levels providing car parking for residents and visitors, accessed by a car-lift. On each floor of the new wings, a glass bridge provides the connection between the existing building and the new wing, and there is a separation between the existing building and the new wing, of 1.1m at the rear and 2.9m at the front.
- 36 The existing building will comprise mainly bedrooms, with the living areas contained in the new additions.
- 37 The works include the removal of a number of unsympathetic additions to the building. This includes the removal of the hardstand car space area within the front setback, and the removal of the pedestrian bridge. Instead, a car lift is proposed within a pergola type structure, which will provide access to the two basement levels below. Excavation of the south eastern portion of the site, and below the existing building, is required for the basement levels.
- 38 The façade of the building is to be restored, the rear balcony columns are to be restored, and the original door and window openings to the front and rear will be retained. The arcaded verandahs on the north western and south western corners will be restored such that they continue part way round the building, but will not be restored to the full extent of their original design.

- 39 The front entrance in the interior of the building, which is already highly modified with the original staircase removed, is proposed to contain a new stairwell and lift.
- 40 There are number of palm trees located on the site, which will be transplanted and replanted back on the site following the completion of the building works. A large fig, which is located on the north-eastern corner of the site, will be retained. The proposal will also reinstate gardens within the front setback, including dense plantings and the re-use of the original elements of the stone stairway.
- 41 A street level perspective, and a photomontage, is shown at Figure 2.



Figure 2: Street level perspective and photomontage (Source: Ex D Tab 3)

- 42 The rear perspective is shown at Figure 3.



Figure 3: Rear perspective (Source: Ex A)

Resident objections

- 43 A number of local residents made written submissions in response to the notification of the development application that was lodged with the Council. In addition, at the commencement of the hearing, a number of representatives spoke on behalf of the local residents. The issues raised in the written submissions and in the evidence given orally can be summarised as follows:
- Overshadowing and visual impact arising from the bulk and scale of the proposed additions.
 - Loss of visual and acoustic privacy.
 - Heritage related impacts.
 - Inadequate side and rear boundary setbacks.
 - Traffic safety impacts.
 - Excessive removal of trees.
 - Impacts caused by excavation.
- 44 Mr Warwick Davies, a geotechnical engineer, has been retained by the residents of 788 New South Head Road, and gave evidence that there is currently insufficient information to inform the engineering design for the proposed excavation, and that the excavation poses a risk to the stability of the building at 788 New South Head Road. His evidence is that this should be dealt with by way of a deferred commencement condition, so that the geotechnical investigation can be undertaken to inform the engineering design, before the commencement of the consent. Ms Vatala, the solicitor engaged by

the same residents, submits that on the basis of Mr Davies' position, the impacts of the development are not known and therefore cannot be adequately considered, and the development application should be refused on that basis. This issue is dealt with further below.

- 45 The heritage impacts and the adequacy of the setbacks are also considered below. The remainder of the concerns raised by the residents are not supported by the evidence that is before the Court. Instead, the traffic impacts will be acceptable, the trees are largely being retained either in situ or by transplant, and there is no unacceptable overshadowing caused by the proposed additions.

Expert evidence

Landscape and arboricultural evidence

- 46 Expert evidence on the landscape plan, arboricultural issues, and the palm tree transplantation, was given by Mr D Matthew Taylor, a landscape architect engaged by the applicant, Mr Mark Kokot, an arborist engaged by the applicant, Mr Lance Carr, a palm tree transplant expert engaged by the applicant, and Ms Simone Woodman, an arborist employed by the Council.
- 47 In their joint report, Mr Taylor, Mr Kokot, Mr Carr and Ms Woodman agree that the submitted arboricultural documentation has satisfactorily demonstrated how the proposed works can be achieved with the successful retention of nominated trees and palms to be retained. As such, contention 12, raised by the Council in its Amended Statement of Facts and Contentions, is resolved.

Evidence on the acoustic impact of rear balcony setbacks

- 48 Expert evidence on the acoustic issues arising from the setbacks of the rear balconies was given by Mr Ben White, an acoustical engineer engaged by the applicant, and Mr Stephen Gauld, an acoustical engineer engaged by the Council. They agree that building siting and layout is an effective measure to provide for acoustic separation between residents. However, they also agree that where a setback is less than the recommended minimum setback, the "setbacks are best determined by the planners as there is no assessment criteria for noise emissions resulting from the use of residential properties for domestic and neighbourhood use" (Ex 5 p 5).

- 49 In their joint report and oral evidence, they disagree as to the acceptability of the acoustic impact of the reduced rear setback. Their evidence is considered below in the context of my determination of the adequacy of the setbacks.

Evidence on impact on heritage significance

- 50 Expert evidence on the impact of the proposed development on the heritage significance of Hillcrest was given by Ms Jennifer Hill, a heritage expert and registered architect engaged by the applicant, and Mr Robert Moore, the heritage expert and registered architect who had previously prepared the Heritage Significance Assessment for the site for the Council for the purpose of the planning proposal.
- 51 Ms Hill and Mr Moore agree that the intactness of the exterior of the building means that much of its exteriors can be reconstructed, and missing elements reinstated. They both agree that the removal of the external additions and alterations would be a positive outcome, as well as the retention of the fig tree and the retention and repair of the front palisade fence, which both date back to the period of construction of Hillcrest.
- 52 They also agree that a major adaption of the building's interiors has taken place, in which the original stairs and layout have been lost. They agree that the level of intactness of the interiors of the building means that they are not likely nor capable of being reconstructed to their original presentation, and that an upgrade to the building may require a lift and stair access.
- 53 Ms Hill and Mr Moore both acknowledge that the site has been reduced by the substantial subdivision to its north, which means that only the original side setback spaces and foreground space of the building remain.
- 54 However, they disagree on the significance of the side setback spaces, and on the importance of retaining the interiors. Their evidence concerning the impact of the proposed development on the heritage significance of the building and the site is considered below.

Evidence on the planning issues

- 55 Expert evidence on the planning issues was given by Mr George Karavanas, a town planner engaged by the applicant, and Mr David Booth, a town planner employed by the Council.
- 56 In their joint report, Mr Karavanas and Mr Booth agree that there is no requirement for the media rooms to be ventilated, and that the extent of excavation is acceptable in the circumstances of the proposal. As a result of their agreement, contentions 3 and 4 are now resolved.
- 57 However, Mr Karavanas and Mr Booth disagree on the external amenity impacts caused by the reduced side and rear setbacks. Their evidence on this point is considered below.

Impact on the heritage significance

- 58 The Council contends that the proposed development will have an unacceptable impact on the heritage significance of Hillcrest, including its exterior fabric, its interior fabric, and its setting (contention 1). Its position is that the new wings are incompatible with the heritage significance of the building and its setting, by virtue of their impact on the external fabric, as well as by virtue of their scale and location in the side setbacks, which will obstruct views to the side elevations of the building and will prevent the building from being seen “in the round”. It also submits that the internal demolition works will have an adverse impact on the internal fabric of the building, which will also cause a loss of the ability to interpret the location of the original rooms. Further, the Council submits that the new wings will diminish the heritage significance of the building because they will dominate the existing building when viewed from the harbour and from New South Head Road.
- 59 In support of its position, the Council relies on the evidence of Mr Moore, who opines that the building’s form and expression is as a “marine villa” that was designed to be seen “in the round”. His evidence is that the side garden setback spaces allow the essential design character and the significance of the building to be appreciated. He says that the sense of these spaces cannot be retained if they are built out with the proposed new wings. Mr Moore therefore opines that the addition of the wings will cause the loss of both the important

garden spaces that enable the building to be seen “in the round”, as well as the value of the building’s side elevation details. That is, it is both the occupation of the side gardens by built form, and the obscuration of the side elevation that causes the impact. He considers that the result will be that “there will be little benefit of effective purpose in retention of the building as changed by these works” (Ex 4, p 8).

- 60 In relation to the internal works, Mr Moore’s evidence is that the heritage significance of the building will also be compromised by the proposed alteration of its interiors, which removes surviving original fabric and frustrates the “ready appreciation and understanding as the ‘special building’ it was designed to be”. When asked what original fabric he considered was being lost and causing the unacceptable impact, Mr Moore identified the loss of the entrance area where an outline of part of the stairs can still be seen in the plasterwork, the loss of the party wall that divided the two original dwellings, and the removal of original walls that defined main bedroom, hallway and living area. Mr Moore opines that the design of the new entrance area will make it hard to understand the original entry area.
- 61 The applicant’s position is instead that the proposed development will enable the heritage significance of Hillcrest to be better appreciated and will result in an improved contribution of the building to its locality. The applicant says that the restoration of the exterior fabric, the removal of the pedestrian bridge and hardstand parking area, and the restoration of the garden within the front setback will enable the building to be better appreciated when viewed from New South Head Road. Further, the applicant says that the design of the new wing additions will retain the symmetry of the existing building and is sympathetic to the original features of Hillcrest but contemporary in form, so as to not compete with the heritage significance of the original building. Further, the applicant points out that the light weight glazed link and the separation between the original building and the new additions allows filtered views to the side elevations of the original building. The applicant also disputes that the building was designed to be seen “in the round” as either a marine villa or a double villa, which is readily appreciated when having regard to the less adorned nature of the side elevations. Further, the applicant points out that the

interior of Hillcrest is highly modified and that the proposed development has very little impact on significant fabric.

- 62 The applicant's position is supported by the evidence of Ms Hill, who opines that the reconstruction of the front garden and the building will enhance the significance of the site as a double villa, and that it is not a marine villa. She considers that there is no need to retain the openness of the sides in circumstances where it was not a marine villa, and where the space of the sides have a low contribution "due to the extent of their division into private open space and additions and pool". Further, Ms Hill opines that the reduction of the space at the sides does not negate the ability to read the scale of the site or the garden setting, and that the restoration of the communal garden will assist in conveying the sense of grandeur and luxury. Ms Hill opines that the wing extensions change its presentation but "does not prevent the appreciation and understanding of the building, the site and its heritage significance". She considers that the glass bridge allows interpretation of the reconstructed building in its setting.
- 63 In relation to the internal works, Ms Hill opines that there is no requirement to retain the interior spaces in circumstances where their integrity has been lost over time.

The impact on the heritage significance is acceptable

- 64 Clause 5.10 of the WLEP requires that the Court, in exercising the function of the consent authority, "consider the effect of the proposed development on the heritage significance" of a heritage item before granting development consent. Although the objectives of cl 5.10 include the conservation of "the heritage significance of heritage items ... including associated fabric, settings and views", there is nothing operative in cl 5.10 that requires a consent authority to be satisfied that those objectives are achieved. Commissioner Brown made the same comments in *Bunnings Properties Pty Ltd v Ku-ring-gai Council* (No 4) [2017] NSWLEC 1238 at [71], which were not disturbed on appeal (see *Ku-ring-gai Council v Bunnings Properties Pty Ltd* (No 2) [2018] NSWLEC 19). There is, plainly, no requirement or presumption that every aspect of a heritage item be retained, but there is a mandate for consideration of the impacts on its

heritage significance. In doing so, there is no requirement to consider whether an alternate form of development could be carried out, notwithstanding Mr Moore's focus on what "more meaningful" development could be undertaken.

- 65 In considering the impacts of the proposed development on the heritage significance of Hillcrest, its external and internal fabric and its setting, I am satisfied that the impacts are acceptable. I reach this conclusion for the following reasons.
- 66 Firstly, whilst the setting of the building will be changed by the proposed development, I do not accept that the loss of the side garden setbacks by the construction of the wings will have an unacceptable impact on the heritage significance of the setting or the side setbacks. There is no dispute that the gardens within the side setbacks are highly modified and the plantings do not date back to the key period of Hillcrest. They have also been divided into private open spaces with large fences. Therefore, any significance of the original gardens has been lost. Further, whilst it is acknowledged that the extent of the grounds on which Hillcrest was originally constructed enabled it to be seen "in the round", I do not accept that it is integral to its original design for it to be seen "in the round" such that the building's significance would be lost if the extent of the side setbacks is lost. The adornment that features on the front and rear elevations is continued along only a portion of the side elevations, as seen in the side entry portico at the front and the arches to the rear, and there is no evidence that either a marine villa or a double villa was designed to be seen "in the round".
- 67 Instead, I accept the evidence of Ms Hill that the reduction of the space in the side setbacks does not negate the ability to read the scale of the site or the garden setting. The glass connection at the lower ground, ground and first floor levels and the separation of the new additions from the original building allows interpretation of the restored building in its setting. That separation enables the side elevations of the original building and its restored adornments to be appreciated by residents from the glass corridor and window openings, and also, in a more limited extent, from those viewing the building from New South Head Road. Further, I accept the evidence of Ms Hill that the restoration

of the garden to a communal area, the removal of the intrusive elements in the front setback, and the proposed plantings in the front and side setbacks, will enable the garden setting of Hillcrest to be readily appreciated.

68 Secondly, I accept the evidence of Ms Hill that the significance of the remnant interior features is not sufficient to justify their retention. Whilst the party wall, the living room arch, and the outline of the original stairs in plaster, are of interest, they are not, of themselves, sufficiently significant or rare to warrant their retention. The interiors of the building have been extensively altered as the building has been adapted for use as 6 dwellings, and, as such, much of the internal fabric that is to be demolished by the proposed development are later additions, including the fireplaces. The proposed new entrance and lift lobby are acceptable in that context, and retain a portion of the party wall to allow an understanding of the original layout. The party wall and a number of the other original walls are also being retained. I accept the evidence of Ms Hill that there will remain an understanding of the interior finishes and the interior layout following the carrying out of the proposed development.

69 Thirdly, I do not accept the Council's position that the wings will dominate the building when viewed from New South Head Road and from the water. Instead, the visual impact assessment shows that the two wings draw on the same proportions of the original building with a consistent colour palette, but with a contemporary design so as to distinguish themselves from the original building. It states that (Ex D Tab 3 p 7):

"The proposed alterations and additions will provide two wings that are the same height at the existing building and enhance the existing architectural design of the building. The two new wings have been designed to match the proportions, modulation and fenestration of the existing building.

...

The new roof forms will be recessive elements and be setback from the front façade, similar to the style of the existing roofing. The proposed design makes the existing windows and new wings features of the building. The roof form will sit between the existing ridgelines and maintain the existing building height."

70 I accept this description of the new wings. The separation between the new wings and the original building allows sight lines to be maintained to the original building, and the proportions of the wing additions enable them to be both recessive and sympathetic to the original building. For these reasons, I

do not accept that the new wings are “competitive” with the building, as opined by Mr Moore. Further, there is no evidence to support the Council’s position that the new wings will dominate the building when viewed from the water.

- 71 Fourthly, I accept the evidence of Ms Hill that the significance of the building primarily relates to its exteriors, which will be retained and restored by the proposed development. The remnant exterior building fabric is retained, the existing portico with glazing will be retained and restored, original features will be restored, and intrusive elements will be removed. The garden setting will be reinstated by the removal of the car stand and pedestrian bridge, and by the restoration of the garden and path area. The glass bridge between the existing building and the new additions will enable residents to appreciate the restored building, but the absence of a connection at the roof level means that the roof remains intact and visually separated from the new additions.
- 72 For those reasons, the proposed development will have an acceptable impact on the heritage significance of the building, its interiors and its setting. Although the side wing additions will result in a changed presentation, there will be a better appreciation of the original building from New South Head Road and from within the site, as a result of the removal of intrusive elements in the front setback, the restoration of original elements in the external fabric of the building, the restoration of the gardens in the front setback, and the separation of the side wing additions from the original building.

Setbacks and acoustic issues

- 73 The Council contends that the proposed development should be refused as the proposed development does not comply with the separation requirements of the ADG and the minimum side setback requirements of the WDCP. The Council says that the reduced rear setback of the balconies of the proposed new wing additions create an unacceptable acoustic impact on the properties to the rear of the site.

The rear setback and the acoustic impact

- 74 As set out above, Part 3F of the ADG, which concerns visual privacy, stipulates a minimum required separation distance from buildings to the side and rear boundaries of 6m in relation to windows to habitable rooms and balconies for

buildings up to 12m in height (4 storeys). Section 3F of the ADG also requires an additional 3m at the boundary between a change in zone from apartment buildings to a lower density area. Accordingly, the ADG requires a separation distance of 9m between the balconies and habitable rooms of the new additions on the site and the rear boundaries, where the adjacent land is zoned R2 Low Density Residential. However, the WDCP requires rear setbacks of 3m. The proposed rear boundary setbacks for the new additions are 4.5m at Lower Ground Floor level, 4.9m at Ground Floor level and Level 1, and 4.5m at Level 2.

- 75 Clause 6A of SEPP 65 operates such that, the extent to which the WDCP sets out requirements, standards or controls in relation to visual privacy, those provisions are of no effect. That is, insofar as the rear setback controls in the WDCP relate to visual privacy, they have no effect. However, no issue is raised by the Council with respect to visual privacy. Mr Booth agrees that there is no visual privacy issue, and the evidence of Mr Karavanas is that there is sufficient screening and design controls to prevent any overlooking or visual privacy impacts.
- 76 The Council submits that the rear setback of the balconies of the wing additions is insufficient because it does not comply with the 9m setback requirement of the ADG, which results in an acoustic impact for the residents at the rear, 7, 9 and 11 Dumaresq Road. The Council says that, in circumstances where both the ADG and the WDCP are mandatory considerations in the assessment of a development application, s 4.15(3A)(a) does not operate to preclude a design criteria of the ADG being applied where it is more onerous than the provisions in the WDCP. The Council relies on the decision of the Court in *Malass v Blacktown City Council* [2017] NSWLEC 1043, in which Commissioner Brown stated (at [39]):

“The AGD provides for the numerical separation of buildings over different sites whereas the DCP provides a numerical requirement for a setback from the boundary of the site in question. While both have a broad role in determining the relationship of a development with another development, they do it in different ways. Consequently both requirements need to be considered even though there is some tension between the two requirements.”

- 77 The Council relies on the evidence of Mr Booth, who considered that the calculation of the rear setback control in the WDCP resulted in an anomaly for the site, where the resulting requirement was less than that required by the ADG. It relies on the acoustic evidence of Mr Gauld, who calculates that there will be a 3 dB difference between the noise impact of a balcony compliant with the ADG and that which is proposed in the wing additions. Consistent with the Noise Policy for Industry, Mr Gauld's evidence is that an increase in noise of 3-4 dB is clearly audible and noticeable. Mr Booth's evidence is that this could be dealt with by some acoustic attenuation measures, but Mr White's evidence is that this will make little difference to the acoustic impacts of the proposed additions.
- 78 The Council also relies on the evidence of the residents of 7 and 9 Dumaresq Road, on whose behalf Mr Moody, town planner, expressed concerns that the proposed western elevation (at the rear of the site), with its new northern and southern additions adjoining the existing building with limited setbacks, will be visually imposing.

The rear setbacks are acceptable

- 79 I consider that the rear setbacks of the new additions, which range from 4.5m to 4.9m, are acceptable, for the following reasons.
- 80 Firstly, the rear setbacks meet the numerical rear setback requirements of B3.2.4 of the WDCP, which have objectives concerning both visual and acoustic privacy. Clause 6A of SEPP 65 does not affect the provisions of the WDCP as they relate to acoustic privacy. There is a general presumption that, where a development control plan stipulates numeric controls that have specific objectives, the objectives are met if the proposed development meets those numeric controls. Accordingly, the fact that the proposed development meets the rear setback controls in the WDCP means that the objectives of those numeric standards are met, including the objective "to provide acoustic ... privacy to adjoining and adjacent buildings" and "to avoid an unreasonable sense of enclosure". Further, s 4.15(3A)(a) of the EPA Act makes it clear that where a development control plan contains relevant provisions, and those provisions set standards with respect to an aspect of the development, the

Court, exercising the functions of the consent authority “is not to require more onerous standards with respect to that aspect of the development”. With respect to acoustic privacy, cl 6A of SEPP 65 does not apply and the WDCP setback controls continue to operate, and s 4.15(3A)(a) of the EPA Act prevents more onerous standards being imposed. I do not accept the submission of the Council that this section does not apply where the “more onerous standards” are set by the ADG, and *Malass v Blacktown City Council* is not authority for such a proposition.

- 81 Secondly, I accept the evidence of Mr Karavanas and Mr White that the acoustic impact of the balconies is acceptable, notwithstanding the calculation by Mr Gauld of the difference in acoustic impact. I accept Mr Karavanas’ opinion that the potential acoustic impacts are not likely to be significant, based on the size of the balconies not being excessive (being 17m² in area), the separation distance being in excess of 10m (see Ex A, DA 413), and the location of the site in an established urban built form with similar separation distances between the residential flat buildings in the immediate vicinity. Similarly, I accept Mr White’s evidence that the use of the proposed balconies will result in noise levels which are less than or similar to that of the “normal residential use of external areas within a residential property which are not required to include setbacks”. His evidence is that (Ex 5 p 8):

“34. Use of the proposed balconies would result in noise levels which are less than or similar to that of the normal residential use of external areas within a residential property which are not required to include setbacks. That is the use of the proposed balconies will be used for residential uses/purposes and will be acoustically similar to (or less than) that the use of an external garden, terraces, pools, tennis courts or the like. The use of external areas of residential properties are not governed by the acoustic criteria of Woollahra Municipal Council or the EPA and are not required to include setbacks based on the recommendations of the ADG.

35. The proposed balconies would be required to be used by residential occupants conducting normal behaviour in line with those expected of being in a residential neighbourhood, as applies within all residential areas.”

- 82 I accept this evidence. The use of the balconies will result in magnitudes and types of noise that are typical of residential uses, consistent with normal residential use and consistent with the noise generated within the existing residential area in which the site is located.

- 83 Thirdly, it is agreed that the screening provided by landscaping and design elements prevents any issues concerning visual privacy. As such, there is no unacceptable overlooking of the properties to the rear occasioned by the 4.5-4.7m rear setback of the balconies.
- 84 Finally, there is no expert opinion evidence or visual impact assessment that supports the position of the residents, expressed through Mr Moody, that the reduced setbacks will cause the building to be visually imposing. Instead, the setbacks of the wing additions, which have balconies for their full length, are acceptable in their context. They are setback further than the existing building, and the closer balconies located in the existing building will become balconies to bedrooms. The balconies within the wing additions have a separation distance in excess of 10m from the properties at 7 and 9 Dumaresq Road. The setbacks are guided by the setbacks of the original building, and the setbacks at the rear of the new additions is greater than that of the original building, in order to remain recessive.

Side setbacks

- 85 The Council also contends that the proposed side setbacks are inadequate, as they fall short of the requirements of Clause B3.2.3 of the WDCP for 3.5m side setbacks. The proposed wing additions have side setbacks of 3m at the lower ground, the ground and the first floor levels. The upper level has side setbacks of 3.6m to the south, and 3.8m to the south, which complies with Clause B3.2.3 of the WDCP. The reduced setbacks at the lower levels is a product of the design of the development, with a separation between the original building and the new wing additions.
- 86 The Council relies on the evidence of Mr Booth, who opines that the proposed setback will give rise to an unreasonable sense of enclosure, contrary to Objective O1 in Clause B3.2.3. He considers that the landscaping on the northern side setback will not compensate for the non-compliance.

The side setbacks are acceptable

- 87 I consider that the side setbacks are acceptable, notwithstanding that they do not comply with the requirement for 3.5m at the lower ground, the ground and the first floor levels.

- 88 Firstly, I accept the evidence of Mr Karavanas that the proposed development will not result in a sense of enclosure due to the characteristics of the urban setting on the northern and southern boundaries. The site is separated from the site to the south by a 1.5m wide public pedestrian pathway, which provides a greater degree of separation than that anticipated by the WDCP. The residential flat building to the north is skewed away from the side boundary at increasing distances deeper into its site, and the proposed development has a generous front setback, such that the proposed additions are located at a point where the adjacent residential flat building is furthest from the boundary and the 500mm non-compliance would not be perceptible in that context.
- 89 Secondly, I accept the evidence of Mr Karavanas that the proposed landscaping will soften the appearance of the built form from the adjoining development to the north and south. Whilst I appreciate the concerns of Mr Booth regarding the success of the landscaping and the characteristics of the palm trees, the landscaping need not obscure the development in its entirety but need only to soften its appearance.
- 90 For these two reasons, taken together, I am satisfied that the proposed side setbacks meet the objectives of Clause B3.2.3, including the objective to avoid an unreasonable sense of enclosure and to facilitate appropriate separation between buildings. Further, there is no issue raised by the Council concerning the visual and acoustic privacy of residents on adjoining properties. Accordingly, the side setbacks of the proposed development are acceptable.

The geotechnical issue raised by the adjacent neighbour

- 91 As set out above, Mr Warwick Davies, a geotechnical engineer, gave evidence that there is currently insufficient information to inform the engineering design for the proposed excavation, and that the excavation poses a risk to the stability of the building at 788 New South Head Road. His evidence is that this should be dealt with by way of a deferred commencement condition.
- 92 Clause 6.2 of the WLEP requires that the Court, in exercising the functions of the consent authority, consider a number of matters relating to earthworks, as follows:

(3) In deciding whether to grant development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters—

- (a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,
- (b) the effect of the development on the likely future use or redevelopment of the land,
- (c) the quality of the fill or the soil to be excavated, or both,
- (d) the effect of the development on the existing and likely amenity of adjoining properties,
- (e) the source of any fill material and the destination of any excavated material,
- (f) the likelihood of disturbing relics,
- (g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,
- (h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

- 93 The development application is supported by a geotechnical report dated 16 December 2020 by JK Geotechnics, which reports on the results of geotechnical investigations and makes recommendations for additional investigation either before or during construction. Part 4 of the report sets out the key geotechnical considerations, and the requirements for stabilising the site, including retention and underpinning. Further, the Structural Engineering Report, dated 21 December 2020, forms the conclusion that, with respect to the north boundary (where 788 New South Head Road is located):

“There is sufficient offset from the new construction envelope of the building to the North Boundary to accommodate any necessary level changes in landscaping and not impact on adjacent property.

...

At the east end of the North Boundary, towards New South Head Road, minimal level changes from the status quo are envisaged and so existing retaining structures should not be impacted.”

- 94 In addition, the Council has proposed the following condition of consent, which require a range of material to be submitted with the construction certificate plans:

“Geotechnical and Hydrogeological Design, Certification and Monitoring

The Construction Certificate plans and specification required to be submitted to the Certifying Authority pursuant to clause 139 of the *Regulation* must be accompanied by a Geotechnical / Hydrogeological Monitoring Program

together with civil and structural engineering details for foundation retaining walls, footings, basement tanking, and subsoil drainage systems, as applicable, prepared by a professional engineer, who is suitably qualified and experienced in geotechnical and hydrogeological engineering.

These details must be certified by the professional engineer to:

a) Provide appropriate support and retention to ensure there will be no ground settlement or movement, during excavation or after construction, sufficient to cause an adverse impact on adjoining property or public infrastructure.

b) Provide appropriate support and retention to ensure there will be no adverse impact on surrounding property or infrastructure as a result of changes in local hydrogeology (behaviour of groundwater).

c) Provide a Geotechnical and Hydrogeological Monitoring Program that:

- will detect any settlement associated with temporary and permanent works and structures,
- will detect deflection or movement of temporary and permanent retaining structures (foundation walls, shoring bracing or the like),
- will detect vibration in accordance with AS 2187.2-1993 Appendix J including acceptable velocity of vibration (peak particle velocity),
- details the location and type of monitoring systems to be utilised,
- details the pre-set acceptable limits for peak particle velocity and ground water fluctuations,
- details recommended hold points to allow for the inspection and certification of geotechnical and hydrogeological measures by the professional engineer, and
- details a contingency plan.”

- 95 Proposed Condition E4 requires compliance with the geotechnical and hydrological monitoring program, and proposed Condition E6 requires vibration monitoring with an audible alarm.
- 96 Contrary to the submissions made by Ms Vatala on behalf of the occupants at 788 New South Head Road, I accept that there is sufficient information, based on the geotechnical report and the engineering report, to consider the impact of the proposed development on the stability of their building. It is clear that structural stability will be maintained, subject to the final design details being responsive to further investigation of the site conditions as the work commences. The conditions of consent are adequate to ensure that the final engineering design will be adequately informed by the site conditions and that

adequate monitoring will be in place to ensure structural stability will be maintained.

- 97 I am satisfied that these conditions are adequate and that there need not be deferred commencement conditions requiring further geotechnical investigation.

Development consent should be granted

- 98 For the reasons that are set out above, the contentions raised by the Council do not warrant refusal of the development application. I am satisfied that the proposed development has an acceptable impact on the heritage significance of Hillcrest, and that the rear and side setbacks are appropriate in the context of the proposal. Additionally, I am satisfied that the following preconditions to the exercise of the Court's jurisdiction have been satisfied:

- The proposed development complies with the applicable development standards in the WLEP.
- The development application in the Class 1 Application was accompanied by a BASIX Certificate in accordance with the requirements of Schedule 1 of the Environmental Planning and Assessment Regulation 2000.
- The development application in the Class 1 Application was accompanied by a statement of a qualified designer that verifies the design of the development, as required by cl 50(1A) and (1AB) of the Environmental Planning and Assessment Regulation 2000.
- As required by cl 30(2) of SEPP 65, I am satisfied that adequate regard has been given to the design quality principles and to the objectives specified in the ADG for the relevant design criteria.
- Consideration has been given as to whether the subject site is contaminated as required by cl 7(1) of State Environmental Planning Policy No 55—Remediation of Land. The preliminary site investigation by JK Environments dated 23 December 2020 recommends that a detailed site investigation be undertaken, and the subsequent Stage 2 detailed site investigation by JK Environments dated 19 April 2021 concludes that the site can be made suitable for the proposed use subject to the preparation of a Remedial Action Plan and a Hazardous Materials Assessment. The Remedial Action Plan is dated 16 June 2021 and is before the Court, and is required to be carried out by the proposed conditions of consent. The conditions of consent also require the hazard materials assessment to be carried out prior to any demolition.

- 99 Accordingly, I am satisfied that development consent ought to be granted, subject to conditions.

Conditions of consent

100 A number of the conditions of consent, as proposed by the Council, were disputed by the applicant. In relation to each dispute between the parties with respect a condition, I make the following findings:

- Condition A.4(10) should be amended as sought by the applicant, in order to make it clear that, although the consent does not authorise a construction zone on New South Head Road, the applicant can seek to obtain a construction works zone permit from Transport for NSW.
- Condition C.3(b) should be imposed as sought by the Council, which requires the side paling fence along the Council's public footpath adjacent to the site's southern boundary to be replaced with masonry boundary wall. To remove any ambiguity about which the applicant is concerned, the words "for the length" have also been removed from this condition. I accept the Council's position that the development of the site is an appropriate time to upgrade the fencing in this location, and it need only be replaced for the length of the site's southern boundary.
- In Condition C.4, the name of the electricity distributor should be amended to read "Ausgrid" as Energy Australia is a retailer and I accept the applicant's position that a retailer does not issue letters with respect to the distribution network.
- In Condition C.13, the changes sought by the applicant are appropriate in circumstances where the wording proposed by the applicant is consistent with the application and the drawings.
- In Condition C.22, I accept the applicant's position that the additional part of the note is superfluous as the condition allows BCA compliance to be achieved by either the compliance with the prescriptive (deemed-to-satisfy) provisions or the performance requirements.
- In Condition D.2, I accept the applicant's position that no provision has been made for when access to a neighbouring property is declined. Accordingly, the additional words proposed by the applicant ought to be added.
- I accept that Condition K.9, which appears to be a standard condition, ought not to be imposed in circumstances where the conditions otherwise impose a strict regime for tree management and conservation. I accept the applicant's position that retaining Condition K9 could create ambiguity.

Outcome of the appeal

101 For the above reasons, I am satisfied that development consent should be granted subject to conditions. The proposed development is an appropriate design for the subject site, which restores the external fabric of Hillcrest and proposes two new side wing additions that are distinct in design but sympathetic to the proportions and colours of the original building. The design

of the proposed development retains the symmetry of the original building, and the separation between the new additions and the original building enable there to be a visual separation between the old and the new. That separation allows the side elevations of the original building and its restored adornments to be appreciated by residents and by those viewing the building from New South Head Road. The restoration of the garden to a communal area, the removal of the intrusive elements in the front setback, and the proposed plantings in the front and side setbacks, will enable the garden setting of Hillcrest to be readily appreciated. The side and rear setbacks are appropriate in their context, and do not create an unacceptable visual or acoustic privacy impact.

102 The Court orders that:

- (1) The appeal is upheld.
- (2) Development consent is granted for alterations and additions to the existing residential flat building at 780-786 New South Head Road, Rose Bay, subject to the conditions in Annexure A.
- (3) The exhibits are returned, except for Exhibits A-F and 3.

.....

J Gray

Commissioner of the Court

[Annexure A \(836454, pdf\)](#)

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