



Land and Environment Court
New South Wales

Case Name:	Moffat v Woollahra Municipal Council
Medium Neutral Citation:	[2022] NSWLEC 1016
Hearing Date(s):	22 and 25 October 2021
Date of Orders:	14 January 2022
Decision Date:	14 January 2022
Jurisdiction:	Class 1
Before:	Pullinger AC
Decision:	See directions at [117].
Catchwords:	DEVELOPMENT APPLICATION – dwelling house – alterations and additions – accessible roof terrace – heritage conservation area – desired future character – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 8.7 Environmental Planning and Assessment Regulation 2000, cl 55 Land and Environment Court Act 1979, ss 34AA, 39 State Environmental Planning Policy No 55— Remediation of Land Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 Woollahra Local Environmental Plan 2014, cll 1.2, 2.2, 4.3, 4.6, 5.10, Sch 5
Texts Cited:	Land and Environment Court, COVID-19 Pandemic Arrangements Policy, April 2021 The Burra Charter: the Australia ICOMOS Charter for Places of Cultural Significance, 2013 Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Ben Moffat (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
T March (Applicant)
J Ede (Solicitor) (Respondent)

Solicitors:
Rydge Evans Lawyers (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2021/206743

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application DA-419/2020/1 (the DA) by Woollahra Municipal Council (the Respondent). The DA sought consent for alterations and additions to construct a rooftop terrace at the upper-most level of an existing dwelling at 142 Glenmore Road, Paddington (the site).
- 2 The key features of the DA include:
 - (1) The construction of an accessible, tiled roof terrace above the existing upper-most front bedroom, set behind the existing ornamental parapet, and incorporating an existing approved skylight to the bedroom below.
 - (2) Facilitating access to the proposed new roof terrace via a new stair, constructed within an existing stair enclosure, a new ramp connecting the stair enclosure to the terrace, and the construction of new balustrading to enclose the terrace and ramp.
- 3 The Court arranged a conciliation conference and hearing under s 34AA(2) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 22 and 25 October 2021. I presided over the conciliation conference and subsequent hearing.
- 4 Consistent with the Court's COVID-19 Pandemic Arrangements Policy, published on 6 April 2021, the matter commenced with a site view limited in the number of participants, and thereafter was conducted by Microsoft Teams.

- 5 During the conciliation conference, the parties were unable to reach agreement as to the terms of a decision that would be acceptable to the parties. Accordingly, the conference was terminated, and a hearing held forthwith.
- 6 The Applicant's Class 1 application included architectural drawings prepared by Vaughan Architects, dated 27 July 2020. These drawings are generally marked as Issue 1.
- 7 On 25 October 2021, at the commencement of the hearing and with the consent of the Respondent, the Court granted leave to the Applicant to amend the DA and to rely upon amended plans prepared by Vaughan Architects, dated 24 October 2021 (now generally marked as Issue 3). These drawings form Exhibit 8 in these proceedings and are the subject of the appeal.
- 8 The final amended proposal remains substantially the same as the original DA, however reduces the extent of roof terrace area proposed to be tiled and made accessible, and situates this area generally within the centre of the existing roof, intending to limit both cross viewing between neighbouring properties and the area available for congregation on the roof terrace. The detailed configuration of the proposed access ramp and the nature of enclosing balustrade has also been amended, and additionally a series of planter boxes have been introduced.

The site and its context

- 9 The site is located at 142 Glenmore Road, Paddington and is legally described as Lot A in DP 100463.
- 10 The allotment is rectangular in shape with an area of approximately 303.5sqm. The site has a primary frontage of 5.70m to Glenmore Road, and a rear boundary with a secondary frontage to Cooper Lane of 5.67m. The common boundary with 140 Glenmore Road to the west is 53.485m in length. The common boundary with 144 Glenmore road to the east is 53.5m in length.
- 11 The site is characterised by a moderate topography, falling from Glenmore Road at the front of the lot towards the north and rear boundary along Cooper Lane by approximately 5m.

- 12 The site is occupied by a three-storey Victorian terrace house that presents to Glenmore Road as a two-storey dwelling with an ornate parapet and pediment. At the rear of the property - addressing Cooper Lane - the terrace house presents as a three-storey dwelling.
- 13 The subject property forms one of a group of four similar terrace houses at 142 to 148 Glenmore Road, and are adjacent to another similar group of four terrace houses at 134 to 140 Glenmore Road.
- 14 The site is located within the Paddington Heritage Conservation Area (HCA). The terrace dwelling at 142 Glenmore Road is generally representative of more ornate and composed Victorian terrace houses that characterise the Paddington HCA.
- 15 The two terrace groups, comprising dwellings at 134 to 140 and 142 to 148 Glenmore Road, are contributory to the qualities of the streetscape of Glenmore Road and to the character of the Paddington HCA more generally.
- 16 Opposite the site, addressing the southern side of Glenmore Road and occupying elevated topography, is a heritage item identified as "The Royal Hospital for Women Park", which a listed item of local environmental heritage (Item 244) as defined in Sch 5 of the Woollahra Local Environmental Plan 2014 (WLEP).
- 17 Of further relevance to this matter, the park - with its elevated topography and open landscape character - offers a series of public vantage points from which the two groups of terrace houses at 134 to 148 Glenmore Road are visible as a coherent and cohesive streetscape. This streetscape presence is not typical and gives the two groups of terrace houses a particular prominence and visibility not usually afforded from within a defined local street.

The planning controls

- 18 The key relevant statutory controls and development guidance are as follows:
 - (1) EPA Act
 - (2) The Environmental Planning and Assessment Regulation 2000 (EPA Reg)
 - (3) Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

- (4) State Environmental Planning Policy No 55—Remediation of Land (SEPP 55)
 - (5) WLEP
 - (6) Woollahra Development Control Plan 2015 (WDCP)
 - (7) The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013 (Burra Charter)
- 19 The site is zoned R2 Low Density Residential under cl 2.2 of the WLEP.
- 20 Pursuant to cl 5.10 - Heritage conservation - of the WLEP, the site is situated within the Paddington HCA as identified within Sch 5 - Environmental heritage - of the WLEP.
- 21 The subject terrace dwelling at 142 Glenmore Road is identified as a contributory building consistent with the terms of Part C1.1.7 of the WDCP, which deals with the Paddington HCA.

History of the Development Application

- 22 The Respondent's Statement of Facts and Contentions, filed with the Court on 1 September 2021 and forming Exhibit C in these proceedings, sets out the history of the subject DA and, also of relevance, an earlier approved Development Application pre-dating this matter. A concise summary follows.
- 23 A "parent" Development Application DA-264/2018/1 was lodged with the Respondent by the Applicant on 22 June 2018. After a period of correspondence between the parties, including the provision of additional information and amended plans, the Respondent granted development consent, subject to conditions, on 21 March 2019.
- 24 The amended plans included for the removal of a rooftop terrace, which had earlier been proposed towards the rear of the property.
- 25 During the site view at the commencement of the matter, I observed construction activity at the site, which appears to have largely been completed in accordance with this "parent" consent.
- 26 The subject Development Application DA-419/2020/1 - proposing a roof terrace - was lodged with the Respondent on 26 October 2020.

27 The DA was publicly notified from 11 November to 25 November 2020. Three submission were received, which objected to the DA, raising issues associated with:

- (1) Adverse noise, privacy and cross viewing impacts upon adjoining properties.
- (2) Security concerns resulting from potential access from the roof terrace to neighbouring properties.
- (3) Concerns the proposal exceeds the scale of a historic “widow’s walk”.
- (4) Inconsistency with Parts C1.4.1 and C1.4.8 of the WDCP.
- (5) Concerns for the safety of users of the roof terrace, and for passing pedestrians and vehicles.
- (6) Concerns that the earlier “parent” DA had been approved only after the roof terrace was omitted from the proposal, and such a roof terrace should not be reintroduced given concerns for access and location.

28 On 24 February 2021, the Respondent refused the DA for the following reasons:

- (1) The proposal is inconsistent with a number of the aims of the WLEP.
- (2) The proposal is inconsistent with a number of the objectives of the R2 Low Density Residential zone of the WLEP.
- (3) The proposal is inconsistent with a number of the objectives of cl 4.3 - Height of buildings - of the WLEP.
- (4) Pursuant to cl 4.6 - Exceptions to development standards - of the WLEP, the proposal fails to adequately justify the contravention of the height of building development standard.
- (5) The proposal is inconsistent with a number of the objectives and controls set out in the WDCP at Chapter C1 dealing with the Paddington HCA.
- (6) The proposal is contrary to the public interest pursuant to s 4.15(1)(e) of the EPA Act.

The issues

29 The contentions pressed by the Respondent can be found in the Statement of Facts and Contentions forming Exhibit C in these proceedings.

30 These contentions are summarised as follows, and all remain pressed by the Respondent:

- (1) The proposal is inconsistent with the aims of the WLEP as listed at cl 1.2(2)(f), (g), (j) and (l).

- (2) The proposal is inconsistent with the objectives of the R2 Low Density Residential zone as set out in dot points 3 and 4 of the R2 Land Use Table within the WLEP.
 - (3) The proposal is inconsistent with objectives (a) and (d) as set out at cl 4.3 - Height of buildings - of the WLEP, and the Applicant's cl 4.6 written request does not adequately justify the proposed exceedance of the relevant height of building development standard.
 - (4) The proposal is inconsistent with objectives (a) and (b) as set out at cl 5.10 - Heritage conservation - of the WLEP and will have an unacceptable impact upon a contributory terrace dwelling within the Paddington HCA.
 - (5) The proposal is inconsistent with the desired future character of the Paddington HCA as described within the WDCP Chapter 1 at Parts C1.2.4, C1.3.4, C1.4.1 and C1.4.4.
 - (6) The proposal is inconsistent with a number of the objectives and controls set out in Part C1.4.4 of the WDCP dealing with roofs and roof forms.
 - (7) The proposal will result in unacceptable visual and acoustic privacy impacts upon neighbouring terrace dwellings and is inconsistent with objectives and controls set out in Part C1.4.10 of the WDCP dealing with such issues.
 - (8) The proposal was publicly notified and submissions were received in response. To the extent these submissions are consistent with Contentions 1-7 above, the proposal is not in the public interest.
 - (9) Insufficient information to assess heritage impacts.
 - (10) Insufficient information to assess visual impacts.
- 31 It is helpful to distill these various intersecting contentions into two key heritage and planning issues:
- (1) Whether the proposed roof terrace - by reconstructing a significant early feature of the existing terrace house - represents an appropriate heritage conservation response to a contributory building within the Paddington HCA.
 - (2) If so, then whether the use of the roof terrace for recreation and congregation is appropriate given concerns for visual and acoustic privacy.

The evidence

- 32 The Court was assisted by experts in planning and heritage, who conferred to prepare a joint report. The experts are Mr George Lloyd (planner) and Ms Nastaram Forouzesh (heritage specialist) for the Respondent, and Mr Brian

McDonald (planner and heritage specialist) for the Applicant. Their joint expert report forms Exhibit D in these proceedings.

- 33 Throughout the joint report Mr Lloyd, Ms Forouzesh and Mr McDonald set out their disagreement in response to all contentions, and generally limit the extent of their agreement to a series of points (pp 12-18), including that:
- (1) Physical evidence exists to indicate the presence of an earlier roof terrace at the subject dwelling, although the heritage experts disagree as to whether sufficient evidence exists to determine if this roof terrace is “original” or “early”.
 - (2) The existing stair enclosure and rooftop door at the subject dwelling represents further evidence of the presence of a roof terrace at some point in the building’s history.
 - (3) Similar evidence of stair enclosure roof features, common to other terrace dwellings forming the group at 142 to 148 Glenmore Road, further supports the existence of accessible roof terraces at some point in the history of the group.
- 34 In his oral evidence, Mr McDonald introduced the final series of amendments made to the proposal and described in the architectural drawings forming Exhibit 8. These amendments included confirmation that the area of flat roof is intended to be reinstated using zinc sheet and roll roofing material.
- 35 Additionally, the extent of accessible and trafficable roof terrace is to be reduced in area and set back from the parapet and side boundaries to minimise visual impacts upon the streetscape, and to mitigate against potential cross viewing impacts.
- 36 Further, Mr McDonald noted that the trafficable portion of the roof terrace is to be constructed in a manner which is reversible, as a framed and tiled platform which “floats” above the reconstructed zinc sheet and roll roof. The proposed access landing and ramp are to be constructed of a similar “floating” frame system and made accessible with a grated trafficable surface. A series of loose planter boxes are also proposed beyond the new balustrading along the northern edge of the roof terrace.
- 37 In her oral evidence, Ms Forouzesh set out her view that extant physical evidence at the site, including the stair enclosure, roof joists, tongue and groove flooring, and herringbone struts, was sufficient to indicate the “earlier”

presence of a flat roof terrace pre-dating the skillion roof form currently evident at the terrace dwelling.

38 However, in Ms Forouzesh's view, no physical or documentary evidence exists sufficient to convince her that the flat roof terrace was also the "original" roof form.

39 Ms Forouzesh accepted that the presence of similar roof features at 144, 146 and 148 indicated the group of four terrace dwellings each included an accessible roof terrace "early" in the buildings' history.

40 Ms Forouzesh then offered her view that there was insufficient evidence to demonstrate the accessible roof terrace was used for recreation rather than purely utilitarian - maintenance or clothes drying - purposes.

41 Ms Forouzesh did accept the presence of some further physical evidence of landing and balustrade fixing points but held her view that any such landing and balustrade did not imply more than the ability to access the roof terrace for utilitarian and service functions.

42 Ms Forouzesh was taken to the notation included at the end of Part C1.1.1 of the WDCP, which states:

"Note: The term 'original' as used throughout the DCP refers to any significant fabric. This may be from a range of historic periods."

43 Under cross examination, Ms Forouzesh accepted the terms "original" and "early" could be used interchangeably in the context of the WDCP and the subject proposal to restore and reconstruct the roof terrace.

44 Finally, under further cross examination, Ms Forouzesh accepted that the statement of desired future character set out at Part C1.2.4(e) of the WDCP refers to the retention of the Paddington HCA's distinctive features including its "mixture of roofs".

45 In his oral evidence, Mr McDonald stated he was "convinced" the roof terrace was an "original" feature of the subject dwelling and its group of four terraces. This view was based on Mr McDonald's assessment of the physical evidence able to be viewed at the dwelling and supporting documentary evidence

provided within the Applicant's Heritage Impact Statement (forming Exhibit 3 in these proceedings).

- 46 Mr McDonald, referring to the Burra Charter (forming Exhibit 6 in these proceedings), noted that Article 15 of the Burra Charter encourages the conservation (including restoration or reconstruction) of an artefact or building to the period of its greatest cultural significance.
- 47 Mr McDonald set out his view that since physical evidence supports the "original" (or "early") existence of roof terraces across the group of four dwellings, and that such roof terraces are uncommon in the Paddington HCA, it follows in this particular instance that the rarity of the roof terraces is a valuable heritage characteristic of the group of four terraces at 142 to 148 Glenmore Road. Mr McDonald elaborates on this point at par 52 of the joint report.
- 48 Mr McDonald then set out his view that the proposed restoration and reconstruction of the roof terrace would return the dwelling to a more culturally significant state, noting it has been designed to be reversible and is generally not visible from public vantage points, and for these reasons - in Mr McDonald's view - the creation of any inconsistency between the group of four terraces is "irrelevant".
- 49 Mr McDonald noted that a number of original features of the existing terrace house currently exceed the height of building development standard, including chimneys, the front parapet and party walls, and that although the reconstruction of the roof terrace would perpetuate the overall height exceedance, it would generally be lower in height than the existing skillion roof.
- 50 Mr McDonald elaborates on this point in the joint report at pars 63-69, where he sets out his view that the Applicant's cl 4.6 written request is adequate in its justification of the proposed exceedance of the height of building development standard.
- 51 In his oral evidence, Mr Lloyd was taken to par 41 of the joint report, where he described the proposal for an accessible roof terrace, intended for recreational purposes as "entirely inconsistent with (the) desired future character of the surrounding area."

- 52 Elaborating on this point, Mr Lloyd set out his view that it is both the nature of the “floating”, tiled, accessible roof terrace and associated balustrading, and its use for recreation that render it incompatible with the desired future character of the Paddington HCA.
- 53 Mr Lloyd continued, explaining that in his view the final amendments to the proposal - although reducing the extent of the roof terrace configured to be accessible - do not “promote a high standard of design” as required by cl 1.2(j) - Aims of Plan - of the WLEP.
- 54 Further, Mr Lloyd set out his view that the amended proposal fails to meet objectives (a) and (d) as set out in cl 4.3 - Height of buildings - of the WLEP, noting that the majority of the proposed works are situated in a location exceeding the maximum height of building development standard of 9.5m.
- 55 At par 71 of the joint report, Mr Lloyd elaborates on his reasons for not supporting the Applicant’s cl 4.6 written request seeking to justify the proposed exceedance of the height of building development standard. Mr Lloyd’s reasons reiterate the particulars of Contention 3 set out in the Respondent’s Statement of Facts and Contentions (Exhibit C in these proceedings).
- 56 Mr Lloyd gave oral evidence regarding Part C1.4.8 of the WDCP, which deals with the provision and design of private open space. The relevant detailed commentary in this part of the WDCP includes the following text:
- “Roof terraces are not characteristic of Paddington and are not generally acceptable as private or communal open space. Further, because of the dense built character and sloping landform of Paddington, use of roof terraces can produce detrimental impacts on privacy due to overlooking and noise transmission.”
- 57 The relevant associated control (C12) states: “Private and communal space is generally not permitted in the form of a roof terrace.”
- 58 Mr Lloyd stated his view that, although not specifically addressed within the Respondent’s reasons for refusal, the proposed roof terrace was inconsistent with this provision of the WDCP.
- 59 In response, Mr McDonald noted that the WDCP is able to be applied flexibly, and the detailed phrasing of control C12 includes the word “generally”, which

offers the consent authority discretion in assessing the suitability of a specific proposal.

- 60 Mr McDonald also gave his view that the amended proposal - by reducing the extent of area made accessible and setting it back from the party walls and parapet - results in no privacy impacts and no opportunities for cross viewing between neighbouring properties. He added that there was unlikely to be any acoustic privacy issue given the relatively contained nature of the roof terrace and anticipated low levels of usage.
- 61 Finally, Mr Lloyd expressed his concern for the precedent any such accessible roof terrace might create within the Paddington HCA, particularly in a scenario where each of the group of four terrace dwellings sought to reinstate the flat roof terraces and provide similar access for recreation. In such a scenario, Mr Lloyd raised the potential for significant cumulative noise generation in an elevated location, where acoustic impacts are likely to be more widespread.

Findings

- 62 I now propose to uphold the appeal and grant consent to the DA as amended, subject to conditions. In proposing this course, I set out my reasons in the following paragraphs.
- 63 As noted earlier in this judgment, it has been helpful to distill the substance of the dispute into two key heritage and planning issues:
- (1) Whether the proposed roof terrace - by reconstructing a significant early feature of the existing terrace house - represents an appropriate heritage conservation response to a contributory building within the Paddington HCA.
 - (2) If so, then whether the use of the roof terrace for recreation and congregation is appropriate given concerns for visual and acoustic privacy.
- 64 There are also a number of jurisdictional considerations to be addressed prior to the grant of any consent and I return to these later in this judgment.

Heritage conservation and desired future character

- 65 Firstly, I find it is acceptable - in terms of heritage conservation - for the flat roof terrace to be reconstructed. I am satisfied that adequate physical evidence

exists at the terrace house to indicate that a flat, accessible roof terrace existed at some point early in the building's history.

- 66 I am satisfied that an acceptable heritage conservation outcome would be achieved regardless of the roof terrace being “original” or “early”, given that the notation included at the end of Part C1.1.1 of the WDCP, makes clear that culturally significant early phases of a contributory building are to be regarded as equivalent to original fabric. Ms Forouzesh, in her oral evidence, accepted this point.
- 67 In any case, I also accept that the absence of physical evidence of any earlier phase of development pre-dating that of the flat roof is a strong indicator that the flat roof is likely to be original. The evidence of Mr McDonald and the Applicant's Heritage Impact Statement (Exhibit 3) are credible.
- 68 I also note that an acceptable heritage conservation outcome would be achieved if the existing skillion roof were to be left intact. The heritage values of this contributory building are not significantly impaired by its existence and I note that a skillion roof form has been evident for a considerable period, and from as early as 1949. Ms Forouzesh provided oral evidence to this effect.
- 69 I next turn to the application of the WDCP in the particular circumstances of this matter. In closing, both the Applicant and Respondent made submissions regarding the relative acceptability of the proposal when assessed against the guidance provided by the WDCP.
- 70 Of particular relevance to this matter is the concept of desired future character. At Part C1.2.4 of the WDCP, the desired future character of the Paddington HCA is described as a “vision statement about the future image and function of the Paddington HCA”. Following this description are a series of points - (a) to (k) - which further define the parameters by which the desired future character of the Paddington HCA is to be assessed.
- 71 I accept that the proposal, by seeking to restore and reconstruct the “early” or “original” roof terrace, is consistent with the desired future character statement for the Paddington HCA. This is due to the nature of the proposal, which:

- (1) Retains the principal form of the contributory terrace house and its fundamental relationship and presentation to the streetscape setting, and the public domain more generally.
 - (2) Maintains a cohesive relationship between the adjacent terrace houses forming the group of four at 142 to 148 Glenmore Road.
 - (3) Will not be visible from public vantage points.
 - (4) Supports the heritage conservation of the terrace house to a more culturally significant state based on extant physical evidence of the roof terrace.
- 72 Moving through the WDCP, there are three parts of further relevance to the question of desired future character. Part C1.3.4, deals with multi-storey terrace style housing and particularly with pairs and groups of terrace houses, Part C1.4.1 deals with principal building form and the relationship between contributory buildings and the street, and Part C1.4.4 deals with roofs and roof forms.
- 73 In each instance, I have determined that the proposal is consistent with the relevant objectives and controls set out in these parts of the WDCP. In forming this view, I accept the Applicant's premise that by seeking to return an existing contributory terrace house to an earlier, more culturally significant state in its history, it necessarily embodies the desired future character statement for the Paddington HCA.
- 74 Having determined that the proposal represents an appropriate heritage conservation outcome for the existing contributory terrace house, I turn to the second issue - whether the proposed use of the roof terrace for recreation is appropriate given the Respondent's concerns for potential visual and acoustic privacy impacts.

Acoustic and visual privacy

- 75 I note from the outset that there is no doubt that various relevant planning controls make it clear that elevated rooftop terraces are not a common characteristic of the Paddington HCA, and actively discourages them.
- 76 I also accept that the Respondent has consistently made its concerns about acoustic and visual privacy impacts known to the Applicant - both at the time the "parent" DA was amended to omit an earlier version of an elevated roof terrace, and during the assessment of the subject DA.

77 As noted during the experts' oral evidence, the plainest statement of the discouragement of rooftop terraces made within the WDCP exists at Part C1.4.8, which deals with private open space, where the fourth paragraph sets out the following text:

"Roof terraces are not characteristic of Paddington and are not generally acceptable as private or communal open space. Further, because of the dense built character and sloping landform of Paddington, use of roof terraces can produce detrimental impacts on privacy due to overlooking and noise transmission."

78 In this instance, I accept the Applicant's submissions that the WDCP, although a relevant consideration, does not prohibit the grant of consent for a roof terrace.

79 Rather, having formed a view of satisfaction that a restored and reconstructed roof terrace will improve the dwelling's heritage values, then recreational use of the roof terrace may be acceptable if visual and acoustic privacy impacts can be appropriately mitigated.

80 In the particular circumstances of this matter, I am satisfied there are a number of relevant factors evident in the amended proposal that serve to appropriately mitigate against potential visual and acoustic privacy impacts:

- (1) The proposed roof terrace is relatively small in area, at approximately 11.5sqm (having been reduced from approximately 23.1sqm as originally proposed in the DA). This serves to limit the potential for congregation and associated noise generation.
- (2) In reducing the area of the accessible roof terrace, the final amended proposal is set back from the ornamental parapet and from the two party walls to reduce any visibility of the roof terrace from surrounding public vantage points.
- (3) Similarly, the final amended proposal is configured in such a manner that cross viewing between adjacent dwellings will not be possible given the scale of the two existing bounding party walls and the extent of existing roof situated in the foreground immediately north of the roof terrace.
- (4) The proposed roof terrace is accessed from the upper-most level of the terrace house, which is configured as three bedrooms, and does not directly or conveniently serve the principal living spaces of the terrace house.
- (5) The principal private open space provided by the approved terrace house is adequately sized for the dwelling and is situated at ground level to the rear of the property, directly accessed from the principal

living spaces of the terrace house. For these reasons I accept that private and social congregation will typically (and appropriately) occur in this location on a day-to-day basis, rather than on the roof terrace.

- (6) By my assessment, there are 8 flights of stairs (albeit some quite short) and a ramp between the principal living and private open spaces of the house and the proposed roof terrace. I also note that the proposal provides for no weather protection, reducing its utility and amenity during inclement or hot weather.
- (7) I accept the Applicant's submissions that the roof terrace is therefore most likely to accommodate small family groups on an occasional basis in a configuration that supports the maintenance of acoustic and visual privacy between neighbouring properties in the vicinity of the subject site.

Other jurisdictional considerations

- 81 Having formed the view that the proposal represents an acceptable heritage conservation response and that visual and acoustic privacy impacts are appropriately resolved, I turn to the remaining jurisdictional considerations that must be addressed prior to the grant of any consent.
- 82 Firstly, I am satisfied the DA, as amended, is consistent with the relevant aims of the WLEP as set out at cl 1.2(f), (g), (j) and (l).
- 83 Specifically, and pursuant to WLEP cl 1.2(f), I am satisfied the DA, as amended, does conserve the built environmental heritage of the Paddington HCA for the reasons set out earlier in this judgment relating to the restoration and reconstruction of the "original" or "early" roof terrace.
- 84 Pursuant to WLEP cl 1.2(g), I am satisfied the DA, as amended, is configured in a manner that protects the amenity and visual privacy of neighbouring properties.
- 85 Pursuant to WLEP cl 1.2(j), I am satisfied the DA, as amended, is of an acceptable high standard of design, and additionally note the proposal is not visible from public vantage points within the public domain. Conditions of consent are to be imposed to further ensure the high standard of design is maintained and improved.
- 86 Pursuant to WLEP cl 1.2(l), I am satisfied the DA, as amended, represents the heritage conservation of an "original" or "early" roof terrace, and is thereby consistent with the statement of desired future character of the local vicinity as

described within the WDCP. The preceding points resolve Contention 1 as pressed by the Respondent.

- 87 Secondly, I am satisfied the DA, as amended, is consistent with the relevant objectives (as described in dot points three and four) of the R2 Low Density Residential Zone so far as the proposal is compatible with the character and amenity of the surrounding neighbourhood, and is of a general form and scale that is consistent with the desired future character of the neighbourhood. This resolves Contention 2 as pressed by the Respondent.
- 88 Thirdly, pursuant to cl 4.3 - Height of buildings - of the WLEP, I accept the DA, as amended, exceeds the principal development standard for maximum height of building of 9.5m. Of relevance is that a number of features of the existing contributory terrace house (including its existing skillion roof form, party walls, parapet and chimneys) also contribute to this height exceedance.
- 89 In such an instance, cl 4.6(3) of the WLEP requires consideration of a written request from the Applicant demonstrating compliance with the development standard is unreasonable or unnecessary in the circumstances of this case, and that there are sufficient environmental planning grounds to justify contravening the development standard.
- 90 Clause 4.6(4) of the WLEP requires the consent authority to be satisfied the Applicant's written request has adequately addressed the matters required by cl 4.6(3), and the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 91 As required by cl 4.6 of the WLEP, the Applicant has provided a written request (prepared by Vaughan Architects, dated 9 October 2020 and forming Exhibit 2 in these proceedings) seeking to vary the height of building development standard. The written request seeks to demonstrate the objectives of the height of building development standard are achieved notwithstanding the exceedance of the standard. The written request also sets out environmental planning grounds to justify the exceedance of the standard.

- 92 In written submissions, the Respondent highlights that the Applicant's cl 4.6 written request (dated 9 October 2020) does not reflect the final amended proposal (dated 24 October 2021) and is therefore deficient. Further, the Respondent notes the cl 4.6 written request does not quantify the extent of the proposed height exceedance, and also submits that the written request is poorly constructed neglecting to specifically address the objective set out in cl 4.3(1)(d) of the WLEP, which deals with the minimisation of impacts of development including loss of privacy and visual intrusion.
- 93 Accepting there are limitations evident in the Applicant's cl 4.6 written request, I am nonetheless satisfied it does adequately address the exceedance of the height of building development standard as required by cl 4.6(4) of the WLEP, and in particular I am satisfied that par 5.1.3 of the cl 4.6 written request adequately addresses objective 4.3(1)(d) of the WLEP.
- 94 I am therefore satisfied the DA, as amended, meets objectives (a) and (d) as set out in clause 4.3(1) of WLEP despite the exceedance of the height of building development standard.
- 95 I have previously elaborated on my reasons for determining the proposal is consistent with the desired future character statement set out in the WDCP, and why I have determined that visual and acoustic privacy impacts have been adequately addressed in the proposal. This resolves Contention 3 as pressed by the Respondent.
- 96 Fourthly, I am satisfied the DA, as amended, is consistent with the relevant objectives of the WLEP as set out at cl 5.10(1)(a) and (b).
- 97 Specifically, and pursuant to WLEP 5.10(1)(a), I am satisfied the DA, as amended, conserves the environmental heritage of Woollahra (and the Paddington HCA more specifically) for the reasons set out earlier in this judgment relating to the restoration and reconstruction of the "original" or "early" roof terrace.
- 98 Pursuant to WLEP 5.10(1)(b), I am satisfied the DA, as amended, is configured in a manner that conserves the heritage significance of nearby heritage items

and the Paddington HCA, including fabric, settings and views. This resolves Contention 4 as pressed by the Respondent.

99 Contention 5 and 6 as pressed by the Respondent, generally relate to the assessment of the proposal against the desired future character statement set out in the WDCP and has largely been addressed earlier in this judgment.

100 At particular (c) of Contention 5, the Respondent raises the prospect that an accessible roof terrace will establish an undesirable precedent within the group of four terrace houses at 142 to 148 Glenmore Road and elsewhere within the Paddington HCA.

101 In this regard, I find that in the specific circumstances of this matter the restoration and reconstruction of an “earlier” or “original” roof terrace, based on extant physical evidence, and representing an appropriate heritage outcome, is unlikely to establish a straightforward or common precedent.

102 The heritage experts agree the group of four terrace houses likely each had roof terraces at a point early in their history, and that this feature is uncommon - even rare - within the Paddington HCA. For this reason, there is little prospect of widespread replication of roof terraces on contributory terrace houses in the neighbourhood.

103 Additionally, I note that in the context of this matter, had physical evidence of the earlier roof terrace not existed or been inconclusive, I expect the outcome of the appeal would have resulted in dismissal.

104 Consequently, I am satisfied the preceding points resolve the outstanding particulars of Contentions 5 and 6.

105 Contention 7 as pressed by the Respondent, generally relates to the assessment of the proposal against the objectives and controls set out in the WDCP seeking to achieve acceptable visual and acoustic privacy. These points have been addressed earlier in this judgment, and I am satisfied that Contention 7 is resolved.

106 Contention 8 as pressed by the Respondent, relates to the public interest and notes that submissions received in response to the public notification of the DA include issues reinforcing a number of the Respondent's contentions.

107 The substantive issues raised in public submissions include:

- (1) Adverse noise, privacy and cross viewing impacts upon adjoining properties.
- (2) Concerns the proposal exceeds the scale of a historic “widow’s walk”.
- (3) Inconsistency with Parts C1.4.1 and C1.4.8 of the WDCP.

108 On these points, and for reasons set out earlier in this judgment, I am satisfied the DA, as amended, is in the public interest as required by s 4.15(1)(e) of the EPA Act. I am satisfied this resolves Contention 8.

109 Consequently, I am satisfied that the Court has power to grant consent, and there are no remaining jurisdictional obstacles to doing so.

110 At the conclusion of the hearing, the parties were directed by the Court - and to the extent possible - to settle agreed draft conditions of consent. These draft conditions were shared electronically with the Court on 16 December 2021 and are dated 13 December 2021.

111 In proposing to grant consent, I have determined to accept the draft conditions of consent to the extent these are agreed between the parties, and then move to settle those conditions where agreement has not been reached. These particular unresolved conditions are set out in the following paragraphs.

112 Draft condition C.1(a) - shall not be imposed. I accept the Applicant has reduced the extent of the accessible portion of the roof terrace sufficient to mitigate against visual and acoustic privacy impacts.

113 Draft condition C.1(c) - shall not be imposed. In finding that physical evidence exists to justify the restoration and reconstruction of the earlier roof terrace, the most appropriate heritage outcome will be to ensure the detailed design of the landing, balustrade and ramp be guided by the physical evidence of earlier fixing points identified during the hearing.

114 Draft condition C.1(d) - although agreed by the parties, in order to ensure the final amended proposal maintains an acceptable high standard of design, any proposed replacement sheet and roll roofing material is to be zinc as intimated by Mr McDonald in his oral evidence during the hearing. The final wording of this condition shall therefore be:

The existing sheet and roll roofing uncovered underneath the existing skillion roof is to be retained. Where it cannot be retained and is required to be replaced due to its condition, it is to be replaced to match the existing like for like or alternatively with zinc sheet and roll roofing that closely resembles the existing roofing in terms of appearance, size and profile.

- 115 Draft condition C.1(e) - shall be imposed in the form proposed by the Respondent. For similar reasons as given earlier, in finding that the restoration and reconstruction of the access ramp is an appropriate heritage outcome, the detailed design of the ramp should faithfully reflect the physical evidence in existence on the site.
- 116 For the reasons set out above, I propose to uphold the appeal and grant consent to the DA, as amended, subject to conditions. Prior to the Court's final orders in this matter, I direct the parties as follows.

Directions

117 The Court directs that:

- (1) The Court, under s 39(2) of the *Land and Environment Court Act 1979*, and exercising the function of Woollahra Municipal Council as the relevant consent authority pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000, agrees to the Applicant amending Development Application DA-419/2020/1 to reflect the architectural plans which form Exhibit 8 in these proceedings.
- (2) The Applicant is to effect lodgement of the amended Development Application on the NSW Planning Portal within 7 days of the date of these orders and notify the Respondent.
- (3) The Applicant is to file a copy of the amended Development Application (along with evidence of its lodgement having been effected on the NSW Planning Portal) with the Court within 7 days of the date of these orders.
- (4) The Respondent is to file a final set of conditions of consent reflecting the reasons set out in this judgment within 7 days of the date of these orders.
- (5) Upon receipt of the filed amended Development Application and final conditions of consent, the Court will give consideration to the making of appropriate final orders.

.....

M Pullinger

Acting Commissioner of the Court

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