

## Kim Holt

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**From:** Pleming, Rebecca <Rebecca.Pleming@allens.com.au>  
**Sent:** Tuesday, 16 October 2018 12:50 PM  
**To:** Kim Holt  
**Cc:** Rourke, Felicity; Philip Drew  
**Subject:** FW: heritage evidence for Pymble Bunnings  
**Attachments:** Decision of Sheahan J.pdf; Decision of Brown C (No 2).pdf; Decision of Commissioner Brown (No. 1).pdf  
  
**Importance:** High

### Email 1 of 4

Dear Kim

Further to your email below to Phil Drew of Bunnings, please see **attached** the following documents:

1. Decision of Commissioner Brown dated 20 July 2016;
2. Decision of Commissioner Brown dated 16 May 2017;
3. Decision of Justice Sheahan dated 28 February 2018;
4. Individual Expert Report of Brian McDonald dated 2 March 2016;
5. Joint Report of Heritage Experts dated 10 March 2016; and
6. Joint Report of Heritage Experts dated 22 March 2017.

Given the size of the documents, we will send these to you under cover of 4 separate emails.

The Applicant will also shortly provide to the Panel Secretariat a response to Council's Assessment Report.

Please let me know if the Panel would be assisted by any further documents.

Regards

Rebecca Pleming  
Senior Associate, **Allens**  
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**From:** Philip Drew [mailto:PDrew@bunnings.com.au]  
**Sent:** Tuesday, 16 October 2018 12:08 PM  
**To:** Pleming, Rebecca; Rourke, Felicity  
**Subject:** FW: heritage evidence for Pymble Bunnings  
**Importance:** High

Hi Rebecca

Can you note and action the below with urgency please.

Thanks

Phil

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**From:** Kim Holt <kim.holt@planning.nsw.gov.au>  
**Sent:** Tuesday, 16 October 2018 12:04 PM  
**To:** Philip Drew <PDrew@bunnings.com.au>  
**Subject:** FW: heritage evidence for Pymble Bunnings  
**Importance:** High

Hi Phil,

I've received a request from the Panel in regards to Bunnings Pymble.

*"note that the council's heritage evidence for the appeal on the previous application by Graham Brooks (which I understand was rejected by the Court) is enclosed to the report. The Panel should also have the applicant's heritage evidence (which I understand was accepted). The Panel should also have Graham Brown's judgment and possibly Justice Sheahan's judgment on the section 56 appeal. Can you please ask the applicant to supply these. I note that there is no submission from the applicant, although we have one for the Tempe Bunnings. "*

Are you able to respond to the above.

Regards

Kim

**From:** John Roseth <[johnroseth@gmail.com](mailto:johnroseth@gmail.com)>  
**Sent:** Friday, 12 October 2018 5:10 PM  
**To:** Peter Debnam <[peterdebnam@gmail.com](mailto:peterdebnam@gmail.com)>; Francis Sue <[suef@cityplan.com.au](mailto:suef@cityplan.com.au)>; Kim Holt <[kim.holt@planning.nsw.gov.au](mailto:kim.holt@planning.nsw.gov.au)>  
**Subject:** heritage evidence for Pymble Bunnings

Hi Kim, I note that the council's heritage evidence for the appeal on the previous application by Graham Brooks (which I understand was rejected by the Court) is enclosed to the report. The Panel should also have the applicant's heritage evidence (which I understand was accepted). The Panel should also have Graham Brown's judgment and possibly Justice Sheahan's judgment on the section 56 appeal. Can you please ask the applicant to supply these. I note that there is no submission from the applicant, although we have one for the Tempe Bunnings.  
Regards John

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Land and Environment Court  
New South Wales

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Case Name: Bunnings Properties Pty Ltd v Ku-ring-gai Council

Medium Neutral Citation: [2016] NSWLEC 1658

Hearing Date(s): 26,27,28 April 2016

Date of Orders: 20 July 2016

Decision Date: 20 July 2016

Jurisdiction: Class 1

Before: Brown C

Decision: Directions for amended plans

Catchwords: DEVELOPMENT APPLICATION: demolition of existing structures, tree removal, earthworks and retaining walls, construction of a four storey building and use for hardware and building supplies - demolition of a heritage item - unsuitable design for location on a prominent corner - inadequate setbacks - inadequate communal open space - absence of deep soil landscaping

Legislation Cited: Environmental Planning and Assessment Act 1979  
Ku-ring-gai Local Environmental Plan 2015

Cases Cited: BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399  
Blackmore Design Group Pty Ltd v North Sydney Council [2001] NSWLEC 279  
Maygood Australia Pty Ltd v Willoughby City Council [2013] NSWLEC 142  
Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) NSWCA 289

Texts Cited: Assessing Heritage Significance (2001) NSW Heritage Office

Category:	Principal judgment
Parties:	Bunnings Properties Pty Ltd (Applicant) Ku-ring-gai Council (Respondent)
Representation:	Counsel: Mr A Galasso SC (Applicant) Mr J Robson SC and Ms V McWilliams, barrister (Respondent)  Solicitors: Norton Rose Fulbright (Applicant) Sparke Helmore (Respondent)
File Number(s):	2016/152878
Publication Restriction:	No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the deemed refusal of Development Application DA0115/15 that seeks the demolition of all existing structures, tree removal, earthworks and retaining walls and construction of a four storey building and its use for the sale of hardware and building supplies. The proposal also includes road widening and driveway access from Ryde Road, signage, landscaping and the consolidation of titles at 950-950A Pacific Highway and 2 Bridge Street, Pymble (the site). The development is to be operated by Bunnings.
- 2 The council maintains that the application should be refused because it includes:
  - (1) the demolition of a heritage item,
  - (2) an unsuitable design, including inadequate setbacks, the location on a prominent corner, inadequate communal open space and the absence of deep soil landscaping, and
  - (3) the loss of significant vegetation.

### The site

- 3 The site comprises two allotments, being 950-950A Pacific Highway, Pymble (Lot 1 in DP 718718) and 2 Bridge Street, Pymble (Lot B in DP 371406)(the site). The site has an area of 1.825 ha made up of 1.737 ha (Lot 1) and 0.088

ha (Lot B). It is an irregularly shaped allotment on the corner of the Pacific Highway and Ryde Road and also has frontages to Bridge Street.

- 4 A five storey commercial building (the former 3M building) is located on Lot 1 with concrete and bitumen driveways accessing Bridge Street, along with an open carpark area (on the southwest boundary) and a two storey carpark (on the southern boundary). Lot B is a regular shaped allotment in close proximity to the intersection of the Pacific Highway and Bridge Street. A two storey commercial building and carpark are located on this lot with an access driveway from Bridge Street.
- 5 The site has two frontages to Bridge Street, each of which provides vehicular access to the site. It is also burdened by an easement that benefits the adjoining commercial development on the east boundary of the site and the Roads and Maritime Services for batter protection.
- 6 Development in the immediate vicinity of the site is primarily for the purpose of commercial uses, which are accommodated in buildings of varying size. Commercial development exists along both sides of Bridge Street in buildings of between 2 and 4 storeys in height.

### **Relevant planning controls**

- 7 The site is within Zone B7 Business Park under *Ku-ring-gai Local Environmental Plan 2015* (LEP 2015). The proposed development is a permissible use, with consent in this zone as “Hardware and building supplies”. The Dictionary to LEP 2015 provides the following definition:

**hardware and building supplies** means a building or place the principal purpose of which is the sale or hire of goods or materials, such as household fixtures, timber, tools, paint, wallpaper, plumbing supplies and the like, that are used in the construction and maintenance of buildings and adjacent outdoor areas.
- 8 Clause 2.3(2) states:

(2) The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.
- 9 The zone objectives are:
  - To provide a range of office and light industrial uses.

- To encourage employment opportunities.
- To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.

- 10 Clause 4.3(2) provides that the “height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map”. The site has a maximum height of 32.5 m on the Height of Buildings Map”. The proposed development satisfies this development standard with a height of around 23 m.
- 11 Clause 4.4(2) provides that the maximum FSR for a building on any land is not to exceed the FSR shown for the land on the Floor Space Ratio Map. The site has a maximum FSR of 3.5:1 on the Floor Space Ratio Map. The proposed development satisfies this development standard with an FSR of 0.81:1.
- 12 Clause 5.9 provides requirements for Preservation of trees or vegetation.
- 13 Clause 5.10 Heritage conservation is relevant as part of the site is currently identified as Item 1593 in Sch 5, Pt 1 Heritage items of LEP 2015. The site identified in Sch 5 is Lot 1 in DP 718718 and not Lot B in DP 371406. The site is also in the vicinity of a heritage item (Item 1598 Substation at 982-984 Pacific Highway Pymble) although the council took no issue with the proximity to this item.
- 14 Clause 5.10(2)(a)(i) provides that:

**(2) Requirement for consent**

Development consent is required for any of the following:

(a) demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance):

- (i) a heritage item,
- (ii.

- 15 Clause 5.10(4) provides that:

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).

- 16 Clause 5.10(5) provides that:

The consent authority may, before granting consent to any development:

- (a) on land on which a heritage item is located, or
- (b) on land that is within a heritage conservation area, or
- (c) on land that is within the vicinity of land referred to in paragraph (a) or (b),

require a heritage management document to be prepared that assesses the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item or heritage conservation area concerned.

- 17 *Ku-ring-gai Development Control Plan* (the DCP) applies. Part 1 provides an Introduction and states that the DCP came into effect on 2 April 2015. Part 14A identifies the site as part of the Pymble Business Park. Relevantly pt 14A.3 identifies building setbacks, pt 14A.4 identifies built form with the site being identified as a “Landmark site” and pt 14A.6 identifies heritage matters.

### **Can the item be demolished?**

#### *The weight to a draft planning instrument*

- 18 The former 3M building was not listed as a heritage item at the time of the lodgement of the development application on 8 April 2015. While LEP 2015 came into effect on 5 March 2015, the amendment to LEP 2015 that inserted the former 3M building into Sch 5 of LEP 2015 occurred on 1 May 2015. There was no dispute that the effect of this timing is that the applications falls within the savings provisions in cl 1.8A of LEP 2015. Clause 1.8A states:

#### **1.8A Savings provision relating to development applications**

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

- 19 The decision of Pepper J in *Maygood Australia Pty Ltd v Willoughby City Council* [2013] NSWLEC 142 at [29] means that the amendment to Sch 5 is not irrelevant to the determination of the development application.
- 20 The weight to be attributed to a draft environmental planning instrument (or the amendment to Sch 5, in this case) will be greater if there is a greater certainty that it will be adopted (*Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) NSWCA 289 at par 5). Relevantly, in *Terrace Tower*, Spigelman CJ states at pars 6 and 7 that:



6. Notwithstanding 'certainty and imminence', a consent authority may of course grant consent to a development application which does not comply with the draft instrument. The different kinds of planning controls would be entitled to different levels of consideration and of weight in this respect.

7. Where a draft instrument seeks to preserve the character of a particular neighbourhood that purpose will be entitled to considerable weight in deciding whether or not to reject a development under the pre-existing instrument, which would in a substantial way undermine that objective.

21 If the draft LEP is imminent and certain, *Terrace Tower* (par 7) raises the question of whether the proposed development will preserve the character anticipated by zone and whether the proposed development will undermine the objectives of the zone.

22 In *Blackmore Design Group Pty Ltd v North Sydney Council* [2001] NSWLEC 279, Lloyd J relevantly states:

30. Whether one applies the test of "significant weight", or "some weight", or "considerable weight" or "due force" or "determining weight" to the later instrument is not, however, the end of the matter. The savings clause still has some work to do. The proposed development is a permissible development by dint of the savings clause. In giving the 2001 LEP the weight of being imminent and certain, that does not mean that there is no further inquiry. It is necessary to look at the aims and objectives of the later instrument and then see whether the proposed development is consistent therewith. Various expressions have been used to define this concept, but the approach which has been favoured in the Court of Appeal is to ask whether the proposal is "antipathetic" thereto (*Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185 at 193).

31. This approach was adopted in the cases to which I have referred. In *Mathers v North Sydney Council* Talbot J (as noted in par [22] above) attributed significant weight to the then draft LEP to the extent the Court ought to be satisfied that approving the development would not detract from its objectives as expressly stated or reflected in the proposed controls.

32. In that case Talbot J refused the appeal on the ground that the proposed development was inconsistent with the proposed planning controls in the draft local environmental plan.

33. Similarly, in *Architects Haywood & Bakker v North Sydney Council* after stating that significant weight should be placed upon the provisions of the draft plan, Pearlman J considered whether the proposed development accorded with the planning approach and objectives of the proposed controls in the draft local environmental plan. It was the fact that the proposed development ignored the planning approach adopted by the draft LEP that led Her Honour to refuse the application in that case.

34. In *Edward Listin Properties v North Sydney Council* Talbot J said (at par [15]):

Although it may not be appropriate to dwell too heavily upon the detailed controls implemented by the draft LEP, it is certainly important to have regard to the broad objectives which the draft planning instrument seeks to achieve.

35. His Honour further stated (at par [35]):

...If what is proposed is unsatisfactory in general terms and inconsistent, in particular, with the expressed future planning objectives for the area, then it should be rejected.

36. In *Walker v North Sydney Council* Cowdroy J found that the evidence established that the development application was contrary to the planning objectives of the locality, for which reason His Honour rejected the development application.

- 23 The questions to be answered are firstly, whether the amendment to Sch 5 is imminent and certain and if so, what weight should the amendment to Sch 5 be given in the consideration of the application. Secondly, whether the proposal undermines the expressed future planning objectives for the area impacted by the amendment to Sch 5.
- 24 On the question of whether the amendment to Sch 5 is imminent and certain; it must be accepted that the amendment is imminent and certain given that the amendment has come into effect. Consequently, the amendment to Sch 5 should be given considerable weight. Whether the proposal undermines the expressed future planning objectives for the site in the amendment to Sch 5 must, in my view, be answered in the positive. Without the amendment to Sch 5, the site would not have the protection afforded by the Heritage conservation provisions in cl 5.10. Even though nothing in cl 5.10 prohibits the demolition of a heritage, the provisions seek to conserve heritage items. The objectives in cl 5.10(1) are:
- (a) to conserve the environmental heritage of Ku-ring-gai,
  - (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,
  - (c) to conserve archaeological sites,
  - (d) to conserve Aboriginal objects and Aboriginal places of heritage significance.
- 25 Notwithstanding the savings provisions, I accept that that development would be contrary to the planning objectives in cl 5.10(1). The effect is that the application should be considered under the requirements in cl 5.10 of LEP 2015.

### *The heritage assessment criteria*

- 26 Clause 5.10(2)(a)(i) provides the opportunity to demolish a heritage item subject to cl 5.10(4) that requires, before granting consent, the Court must consider the effect of the proposed development on the heritage significance of the heritage item. Despite having different opinions on the heritage significance of the former 3M Building, the council and the applicant's experts both rely on the assessment of the heritage significance of the building using the criteria in *Assessing Heritage Significance* (2001) from the NSW Heritage Office. The same criteria are to be used when "making decisions about whether to retain an item" (p 4). The criteria (with reference to local significance underlined) are:

**Criterion (a)** - An item is important in the course, or pattern, of NSW's cultural or natural history (State significance); OR An item is important in the course, or pattern, of the local area's cultural or natural history (local significance) (Historical significance)

**Criterion (b)** - An item has strong or special association with the life or works of a person, or group of persons, of importance in NSW's cultural or natural history (State significance); OR An item has strong or special association with the life or works of a person, or group of persons, of importance in the cultural or natural history of the local area (local significance). (Historical association significance)

**Criterion (c)** - An item is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in NSW (State significance); OR An item is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in the local area (local significance) (Aesthetic significance).

**Criterion (d)** - An item has strong or special association with a particular community or cultural group in NSW for social, cultural or spiritual reasons (State significance); OR An item has strong or special association with a particular community or cultural group in the area for social, cultural or spiritual reasons (local significance) (Social significance).

**Criterion (e)** - An item has potential to yield information that will contribute to an understanding of NSW's cultural or natural history (State significance); OR An item has potential to yield information that will contribute to an understanding of the area's cultural or natural history (local significance) (Technical/research significance)

**Criterion (f)** - An item possesses uncommon, rare or endangered aspects of NSW's cultural or natural history (State significance); OR An item possesses uncommon, rare or endangered aspects of the area's cultural or natural history (local significance). (Rarity)

**Criterion (g)** - An item is important in demonstrating the principal characteristics of a class of NSW's – cultural or natural places; or – cultural or natural environments (State significance); OR An item is important in demonstrating the principal characteristics of a class of the area's – cultural or

natural places; or – cultural or natural environments (local significance).  
(Historical significance)

*The significance of the item*

- 27 The site is identified as Item 1593 in Sch 5 Heritage items of LEP 2015 as “3M Building (former)” having Local Significance. The property is described as Lot 1 in DP 718718. The Statement of Significance (Exhibit 9) prepared by John Oultram (2013) states:

The 3M Building is an interesting and locally rare example of a late Twentieth Century office building in the International style that was constructed c.1967 for the 3M (Minnesota Mining and Manufacturing) Company as their Sydney headquarters. The building is an early example of a high rise company headquarters in Ku-ring-gai in an area that was zoned for residential development. The building was designed by architects Hanson Todd and Partners on the 'site of the former Pymble Gas works that was established by the Australian Gas Light Company in 1888. The building is intact externally but has been altered internally and is set in a well-landscaped site that retains much of the original setting of the building. The building represents the establishment of the 3M Company in Australia was a landmark development for the company reflecting their corporate strength and remained as their headquarters for over forty years. It is likely to have special associations for former employees and is a local landmark.

- 28 The heritage significance of the item is set out in the report to the council on 10 December 2013 and followed the criteria in *Assessing Heritage Significance*. The assessment stated:

**Criterion (a) Historical significance**

The 3M Building is an example of a late Twentieth Century office building that was constructed c.1967 for the 3M (Minnesota Mining and Manufacturing) Company as their Sydney headquarters.

The building was constructed on the site of the former Pymble Gas works that was established by the Australian Gas Light Company in 1888.

The building is an early example of a high-rise company headquarters in Ku-ring-gai in an area that was zoned for residential development.

**Criterion (b) Historical association significance**

The building is strongly associated with the 3M (Minnesota Mining and Manufacturing) Company that was established in Two Harbors Minnesota in 1902 and that has grown into an influential and innovative company with offices and plants worldwide. The building was a landmark development for the company reflecting their corporate strength and remained as their headquarters for over forty years.

The building is associated with the architects Hanson Todd and Partners

**Criterion (c) Aesthetic significance**

The 3M Building is an example of a late Twentieth Century office building in the International style that forms the focus for the expansive landscaped grounds that were designed to complement the building. The building is a well-known local landmark set on a prominent site at the junction of two main roads through the suburb. The building was designed by architects Hanson Todd and Partners.

**Criterion (d) Social significance**

The place may have special associations for former employees and those associated with 3M and is a well-known landmark in the local area.

**Criterion (e) Technical/Research significance**

The site has some archaeological potential as the site of the Pymble gas works.

**Criterion (f) Rarity**

The building is rare locally as being an early example of a high rise office building in the International style with an unusual curved design.

**Criteria (g) Representativeness**

Representative significance is a good, and relatively intact, example of a five storey, late Twentieth Century, International style office building with associated landscaping.

- 29 This Statement of Significance and the assessment against the heritage assessment criteria was relied upon by the council in their resolution of 10 December 2013 to have the site listed as a heritage item in Sch 5 of LEP 2015.

*McDonald Evidence*

- 30 Mr McDonald states that there are four individual experts' opinions on whether the former 3M building and site warrant listing as a heritage item in Sch 5 of LEP 2015. Two assessments support heritage listing and two do not support heritage listing.
- 31 Mr McDonald notes that the heritage significance of the former 3M building and site had not been recognised by any heritage studies up to recent times. In recent times, heritage studies commissioned by the council to consider individual buildings, for which the former 3M building could have been nominated for assessment or that might have identified the former 3M building, did not include it in any nominations for heritage listing. These studies were: *Perumal Murphy Alessi Study (2006) - Review of potential heritage items in the Ku-ring-gai area* (restricted to review of 154 potential heritage items, which appear to be confined to residential examples), *Ku-ring-gai Town Centres*

*Heritage Review* by CityPlan Heritage (May 2006) for which the study area stopped at the north side of Bridge Street specifically excluding Pymble Business Park and the then occupied 3M building and; *Perumal Murphy Alessi Study (2011) - Review of Ku-ring-gai potential heritage items from the Post - War period* (restricted to a review of 23 potential heritage items).

- 32 Mr McDonald states that the inclusion of the former 3M building and site may also have been considered in the various studies that were associated with the last three planning instruments that applied to Pymble, Business Park: *Town Centres LEP 2010*; *Pymble Business Park LEP* January 2013 and the current comprehensive LEP 2015. If it had been considered, it was not identified as a potential heritage item. The first time any action was taken to list the property was when the council resolved to seek inclusion the former 3M building and site as a heritage was following lodgment of a planning proposal with the Council by Bunnings on 15 May 2013.
- 33 Mr McDonald states that the main question that needs to be addressed is whether the former 3M building and site are important enough to demonstrate historic or aesthetic values, or have strong or special associations with persons or groups of persons of importance, or demonstrate a high degree of creative or technical achievement to meet the thresholds for listing in the significance assessment criteria (a) to (e) established by the NSW Heritage Council. These matters must be considered before assessing whether the potential item is rare as something can be considered to be rare but, if it does not meet any of the first five criteria, it is not significant. Mr McDonald states that he does not find the former 3M building and site to rise to the thresholds for listing in the significance assessment criteria a) to e) established by the NSW Heritage Council.
- 34 Mr McDonald suggests that when a potential item is singled out for heritage significance assessment, that there is a tendency to focus too much on that item to the exclusion of a meaningful comparative analysis. In this instance, much has been made of the building being curved. The former 3M building is a poor example when compared with the items selected by John Oultram in the report for the council and Mr Brooks. These are 17 Wylde Street, Potts Point

(1951), the AMP Building, 33 Alfred Street, Circular Quay (1962), the Australia Square Building, Sydney (1966), the Sofitel Wentworth Hotel, Phillip Street Sydney (1966) and the former Qantas House, Hunter Street Sydney (1957). Mr McDonald states that overseas examples listed by Mr Brooks do not assist in making a comparative analysis in the Australian, NSW, metropolitan or local contexts.

35 The assessment by Mr McDonald using the Heritage Office criteria comes to the following conclusions:

36 **Criterion (a) Historical significance:** Mr McDonald states that he sees no persuasive case for the property to have significance for historical reasons. The building itself is an unremarkable five storey office building at the time of construction in 1967. It is not the first high rise commercial building in Ku-ring-gai because it is not high rise and therefore not distinctive due to its height. Nor does its curved form make it particularly distinctive. Other more impressive and larger examples of this form predate the former 3M building and include Qantas House (1957) (State Heritage Item), the AMP Building (1962), which is important because it was the first building in Sydney to break the 150 ft height limit and the Ryde Council office building, Devlin Street, North Ryde (1964). The fact that the site was previously occupied by a gas works is not physically reflected today. This is not a matter that would warrant retention of a building erected after the gas works activity ceased.

37 **Criterion (b) - Historical association significance:** Mr McDonald states that there is no strong evidence that the 3M Company had a "*strong or special*" association with the Ku-ring-gai local government area and played an important role in the cultural or natural history of the area. If this association was used to justify listing of the 3M building, it would equally apply to many other businesses throughout the local government area, who have since departed. Similarly, the association with the architectural firm Hansen Todd does not elevate it to warrant inclusion under this criterion. It was not recognised at the time it was built, or after, as an important building whereas others designed by the firm have been seen as significant.

- 38 **Criterion (c) - Aesthetic significance:** according to Mr McDonald, the council's report on heritage significance appears to confuse the fact that it is possibly the first or one of the first of its type with its actual aesthetic and technical characteristics. He does not agree that heritage status is achieved by a statement that "The 3M building • is an example of a late Twentieth Century International style building set in park like grounds" or that "it was purpose designed headquarters for company". These reasons would apply to many other office developments. Nothing about the architecture or the setting makes the building important. The setting does not demonstrate an intentional landscape design. It represents part retained forest and part cleared and grassed area, which was left relatively unchanged to allow for future additional buildings. The intention to expand the activities of the 3M Company is indicated by a preliminary sketch showing three rectangular buildings arranged along the Pacific Highway frontage, which is reproduced from "Building, Lighting, Engineering", (June 1966 at p 8) of the heritage impact statement by Paul Davies. A Landscape Concept Plan by Landscan dated May 1985 shows the existing 3M building with a building identified as 3M1 to the north where T135 is located. A building is also identified as 3M2 to the south west together with a formal landscape layout.
- 39 The curved form of the final design of the building is a logical reflection of the shape of the site boundary resulting from roadworks at the intersection. While the former 3M building was entered on the Australian Institute of Architects Register of Significant Architecture No 4703567, Mr McDonald notes that according to information in the register entry, the original concept by Hansen Todd, the architects, was for a number of rectangular buildings. The 3M Company referred the design to its American advisers, who suggested the curved form of what appears to have been intended as the first of a group of buildings at the curved corner of the site. This design was then developed by Hansen Todd. Mr McDonald notes that the Australian Institute of Architects Register of Significant Architecture has no statutory status and the evaluation criteria do not correspond to the State Heritage assessment criteria.
- 40 The building is not considered to be exceptional in any way. The former 3M building is not an exemplar of the International style. The strong emphasis of



the expressed concrete columns on the facade is contrary to the more distinguishing horizontality and sheer wall character of the earlier examples recognised by heritage listing such as the Qantas building at Chifley Square, Sydney (1957) and 17 Wylde Street Potts Point (1961).

- 41 The council's heritage assessment states that "the building is a well-known Ideal landmark set on a prominent site at the junction". Mr McDonald considers that the site cannot be considered a landmark simply because it stands at the busy intersection of Pacific Highway and Ryde Road. Its five storey height and curved form are not attributes of a landmark. Because the building is set down into the site relative to the street boundaries, where it can be glimpsed between the trees around the perimeter, only the top two storeys are evident and three storeys through the trees from further north along the Pacific Highway. Mr McDonald accepts that this was not always the case. In his opinion, the 3M building is not a landmark, and even if it was, this would not be a reason for heritage listing given it does not qualify as a heritage item against all other heritage assessment criteria.
- 42 **Criterion (d) Social significance:** Mr McDonald notes that the Council's heritage assessment responds to criterion d) with an observation that "the place would have special association for former employees of the company and particularly those employed at the site". Mr McDonald states that this suggestion does not establish "strong or special association with a particular community or cultural group .. for social, cultural or spiritual reasons".
- 43 **Criterion (e) Technical/Research significance:** Mr McDonald notes that the council's heritage assessment raises the possibility of underground remains relating to the former gasworks activity on the site. This "possibility" is not reason to elevate the building or the site to the threshold for criterion (e) The gasworks structures were at the south-western extremity of the site. The existing carpark structure was designed to sit over the ground level following removal of the gasworks structures. The development proposal does not disturb the ground below the existing carpark floor slab, making it highly unlikely that any archaeological resources (if remaining) will be encountered. Should it be found that archaeological investigations are warranted, the

archaeological provisions of the *Heritage Act* 1977 are available to manage the process prior to commencement of construction.

- 44 **Criterion (f) – Rarity** : The council's report bases qualification of the item under criterion f) Rarity on the contention that "further research is required to confirm this, the building is likely the first international styled, high rise building in Ku-ring-gai. This statement certainly does not qualify the building as "uncommon, rare or endangered". Firstly, the building is not high rise and secondly, the fact that it has some historic value as an early modern commercial development within the area, does not mean that it meets the thresholds for criteria a) to e).
- 45 The council's heritage assessment includes a comparative analysis. The curved plan form examples chosen for comparison are much larger, mostly earlier and arguably of more architectural merit. 17 Wylde Street (1951) is a heritage item, Qantas House (1957) is a State Heritage Item, the AMP building, Circular Quay (1962) is a heritage item.
- 46 **Criteria (g) – Representativeness** : Without qualifications to meet criteria a) to e), the former 3M building does not rise to a level of importance in demonstrating the principal characteristics, being a poor representative of a 1960s international style commercial buildings. The site would not warrant heritage listing status under criterion (g) alone.
- 47 Based on his assessment under the Heritage Office heritage significance criteria, Mr McDonald concludes that the listing of the former 3M building cannot be justified.

#### *Brooks evidence*

- 48 Expert heritage evidence was provided by Mr Graham Brooks for the council. Mr Brooks states that there are other aspects of the history of the site, such as its initial re-zoning and design that had not been revealed or thoroughly assessed by other heritage experts in previous reports. His assessment of this additional research information expanded, in his opinion, the significance of the building and setting beyond that of a standalone building into land development initiatives on this site. This had a crucial effect on the formation of an important business park in Ku-ring-gai local government area.

- 49 Mr Brooks states that the former 3M Building and its site meet a sufficient number of the standard assessment criteria thresholds to justify entry on Sch of the LEP 2015.
- 50 Mr Brooks rejects the reference to previous studies between 2006 and 2013 not identifying the site to have heritage significance by Mr McDonald as irrelevant to the circumstances. He also does not accept Mr McDonald's recognition of the involvement of the architectural firm of Rudder Littlemore and Rudder in the Qantas Building and at the same time dismissing the association of Hanson Todd with the former 3M building. He notes that Mr McDonald also quotes the involvement of the American firm of Skidmore Owings and Merrill in the Sofitel Wentworth Hotel project, but does not give any credence to the role of the US architects in the design of the former 3M Building. The fact that Mr McDonald does not ascribe any value to the international examples referred to by Mr Brooks suggests that Mr McDonald does not recognise that many, if not most architects are continuously taking note of international trends and design directions in architecture. Mr McDonald's comments also do not recognise the listing of the site in LEP 2015
- 51 Mr Brookes agrees with the assessment adopted by the council and, as part of his evidence produces a more expansive Statement of Significance that adds the role of the site as a precedent for the subsequent development of office parks projects in regional locations across metropolitan Sydney as adding to its significance.

*Brookes Heritage assessment*

- 52 The assessment by Mr Brookes using the Heritage Office criteria is:
- 53 **Criterion (a) Historical significance:** Mr Brookes states that the mid 1960s change of land use of the site from Services Infrastructure and Residential to Commercial was an early and important strategic example in Ku-ring-gai of the rezoning of largely residential land for such purposes. The extent of commercial uses in the locality was subsequently expanded to create the current Pymble Business Park on the corner of the Pacific Highway and Ryde Road.

- 54 The rezoning of the site from largely residential to commercial, as requested by the 3M Company, was originally resisted by the State Planning Authority (SPA) as it was not located in any of the District Centres identified in the Sydney Regional Outline Plan. The SPA's eventual support appears to have been encouraged by the capacity of the proposed project to minimise traffic concerns and respond to the proposed major upgrade of the adjacent intersection. The rezoning and subsequent commercial development of the site provided Ku-ring-gai Council with a highly desirable opportunity to rejuvenate a redundant but prominently located industrial site (former gas distribution facility) in what had essentially been a residential area. It also provided an opportunity to consolidate and comprehensively redevelop a group of otherwise small individual properties with outdated residential building stock, whose future development was otherwise likely to be severely disadvantaged by the impending road works.
- 55 The original 1965 rezoning proposal for the building included a comprehensive, staged development of a large scale office park, enhanced by a fine landscaped setting with ample on-site staff parking. It set an early precedent for the subsequent development of office park projects in regional locations across metropolitan Sydney.
- 56 When subsequently submitted as a development application, the building was conceived and built as the first and possibly only example in Ku-ring-gai of an Australian headquarters for a significant and high profile international manufacturer of a wide range of industrial and consumer products. Australia was the sixth largest international market for the Minnesota Mining & Manufacturing Company, after France, Great Britain, Germany and Canada. By the mid-1960s, 3M had some 900 employees in Australia. The local manufacturing operations distributed products to export markets throughout the Pacific and to the company's subsidiaries in Singapore and the Philippines. The new national headquarters administration building at Pymble reflected the company's growth since entering the Australian market in 1952.
- 57 **Criterion (b) - Historical association significance;** Although no longer present on site, a portion of the land purchased by Minnesota Mining &

Manufacturing (Australia) Pty Ltd in 1965, had contained a strategic gas distribution plant for AGL from the mid-1920s. The facility serviced and facilitated the growth in the residential areas of Ku-ring-gai in the first half of the 20th century that had been generated by the opening of the North Shore Railway at the end of the 19th century. It is highly likely that the steeply sloping ridge-top topography of the site was cut away to create a level platform for the industrial facility, a topography that facilitated and was exploited by 3M when developing their new Australian headquarters.

- 58 The mid 1960s development of the site as the first stage of a commercial office park was associated with the 3M Company who selected the site and developed the project as their Australian headquarters. 3M was a major producer of industrial and consumer products, including products marketed under the generic name "Scotch" and remains a well-known brand in Australia and internationally. A number of the company's products were reportedly used during the construction of the building. The company continued its presence on the Pymble site until 2011, when it relocated to a new national headquarters in Ryde.
- 59 There is some documentary evidence confirming that the final design of the 1967 building and its landscaped setting was directly influenced by US architects associated with, or commissioned by, the 3M Head Office in Minnesota.
- 60 The completed building is associated with the well-established Sydney architectural firm of Hanson Todd and Partners, who were commissioned by 3M to manage the change of zoning and development application submissions, and subsequent design development, tendering and delivery of the project. Albert Hanson had won a Sulman Award for his own house in 1945 and Lionel Todd went on to become one of the partners of Hall Todd and Littlemore, charged by the NSW Government with the completion of the Sydney Opera House after the departure of Joern Utzon.
- 61 The distinctive pre-cast concrete facade panels were fabricated by Melocco Bros, the largest precast concrete manufacturer in Sydney at the time.

- 62 **Criterion (c) - Aesthetic significance:** It is an imaginatively conceived and well executed example of post-war international modernism architectural style applied to a commercial building. It differed from many of its contemporary buildings of this style in Sydney through the use of a self-cleaning pre-cast concrete facade instead of the more commonly used curtain wall.
- 63 The unusual and distinctive curvilinear plan form of the 3M building in Pymble was widely recognised as being a direct response to the curved corner of the site created by the upgraded intersection. By comparison, the majority of commercial buildings of this genre were designed as relatively simple cubic forms deliberately devoid of their local context, and intended to project a straightforward architectural massing. While five storeys in overall height, the building took advantage of the reduced topography from the former gas works to project only two storeys above the Pacific Highway frontage, where it achieved landmark status due to its association with 3M. The restriction on its projection above the highway frontage was possibly agreed with Ku-ring-gai Council to retain the overall allowable scale of the previously zoned residential site when viewed from the highway.
- 64 The architectural presentation of the building was enhanced by a "Japanese" style landscaped setting, and a curved entry driveway, providing enhanced amenities for staff and visitors.
- 65 The building retains its external architectural integrity and much of the early character of its landscaped setting. As would be anticipated with a building that was used for over 40 years, its interior office spaces have been altered and upgraded.
- 66 **Criterion (d) Social significance:** although a well recognised local landmark at the intersection of the Pacific Highway and Ryde Road, the level of awareness and association with the local community or distinct community group is not sufficiently strong to meet the Inclusion Threshold for LEP heritage listing under this criterion.
- 67 **Criterion (e) Technical/Research significance:** While there may be some information regarding the former gas works contained in the archaeological

record, it is unlikely that this would meet the Inclusion for heritage listing under this criterion

68 **Criterion (f) – Rarity:** While there may be some information regarding the former gas works contained in the archaeological record, it is unlikely that this would meet the Inclusion Threshold for LEP heritage listing under this criterion

69 **Criteria (g) – Representativeness:** Mr Brooks does not address this criterion in his evidence.

70 Based on his assessment under the Heritage Office heritage significance criteria, Mr Brooks concludes that the listing of the former 3M building is warranted.

### *Findings*

71 Mr Brookes and Mr McDonald disagree significantly on the heritage significance of the site despite using the same assessment criteria. They however agree that Criterion (d) Social significance, Criterion (e) Technical/Research significance and Criterion (f) Rarity are not met.

72 The evidence of Mr Brookes and Mr McDonald highlight specific areas of disagreement that led to their different views. These can be summarised as:

#### **Criterion (a) Historical significance**

73 To have Historical significance, the item must be “important in the course, or pattern of the local area’s cultural or natural history”. Depending on the association, the link must be “strong”, be associated with “significant” historical events or relate to “significant cultural landscapes”.

74 I find Mr Brooks’ more recent observations that the initial re-zoning expands the significance of the building and setting beyond that of a standalone building into land development initiatives on this site as overstating the process in heritage terms. Mr Brooks provided no evidence to support the proposition that this process “had a crucial effect on the formation of an important business park in Ku-ring-gai local government area” or that the 3M development was an important strategic example in Ku-ring-gai of the rezoning of largely residential land for commercial purposes or that the rezoning provided a “precedent for the subsequent development of office park projects in regional locations across

metropolitan Sydney” I do not accept that the rezoning process demonstrates a strong association with land development in Ku-ring-gai local government area or regionally.

- 75 On the historical significance of the 3M operation at the site, I prefer the conclusions of Mr McDonald. The evidence of Mr Brooks describes the development of the site by the 3M company in considerable detail although I do not accept that this could be regarded as being a “significant historical event”. In my view, the word “significant” places a considerably higher burden on establishing any link to the historical significance assessment criterion. While accepting that 3M established its Australian headquarters on the site; the association is not that significant to warrant inclusion under this criterion. I agree with Mr McDonald that the approach adopted by Mr Brooks on the association with 3M could equally apply to other businesses throughout the local government area, who have also left the area.

**Criterion (b) Historical association significance**

- 76 There is no dispute that 3M is a well known brand however this in itself does not necessarily warrant inclusion under this criterion. I agree with Mr McDonald that the limited association with the architectural firm Hansen Todd also does not elevate it to warrant inclusion under this criterion. Similarly, the use of pre-cast concrete facade panels by Melocco Bros, the largest precast concrete manufacturer in Sydney at the time does not elevate it to warrant inclusion under this criterion.
- 77 The previous use of the site as a gas works is not evident on the site and would not warrant the retention of a building erected after the gas works activity ceased.

**Criterion (c) - Aesthetic significance**

- 78 If the building is to have Aesthetic significance the building would need to demonstrate that it “is important in demonstrating aesthetic characteristics and/or a high degree of creative or technical achievement in the local area”. According to the experts the building is either an “an unremarkable five storey office building” or an “imaginatively conceived and well executed example of post-war international modernism architectural style”.



- 79 In considering the different evidence, I am not satisfied that the building displays “a high degree of creative or technical achievement in the local area” suggested by Mr Brooks. I prefer the evidence of Mr McDonald that the curved form of the final design of the building is a logical reflection of the shape of the site boundary resulting from roadworks at the intersection rather than an imaginatively conceived and well executed example of post-war international modernism architectural style. As I understand, the international modernism architectural style reflected the increasing number of buildings constructed over the world after World War II in the modernist fashion. The buildings constructed at this time had varied forms however a curved form was not necessarily a regular feature of this architectural style. In any event, a comparison with more well-credentialed examples of buildings where a curved form is provided, such as the former Qantas Building and AMP Building in Sydney support such a conclusion that the former 3M building does not have “a high degree of creative or technical achievement in the local area”. The Landscape Concept Plan for the future 3M development of the site (Exhibit D, Appendix B) add further support through the use of more conventional buildings forms over the site in all places except at the curved street frontage at the corner of the Pacific Highway and Ryde Road.
- 80 The landmark status is also overstated, in my opinion. As I understand, the building, when operational, had a large “3M” sign on the roof of the building. The sign was observed still located on the roof on the site inspection but was not operational and was removed from its previous location. There is some merit in the evidence of Mr McDonald where he states that the use of the words “land mark” in relation to the building could be misleading given that the site is at the intersection of two major roads and the building is largely screened but not hidden by vegetation from the adjoining roads. I am more inclined to accept that the signage and its location gave the site prominence rather than the building having landmark status.
- 81 Pursuant to cl 5.10, I find that the proposed development has little if any, heritage significance and as such the demolition on the former 3M building can be supported.

## **Tree 135**

### *The evidence*

- 82 Expert evidence was provided by Dr David Robertson, an ecologist, Mr Mark Kokot, an arborist and Mr John Lock, a landscape architect for the applicant and Ms Robyn Askew, a landscape architect for the council.
- 83 The council maintains that the proposed development will result in the removal of a *Eucalyptus saligna* (Sydney Blue Gum) (Tree T135) which forms part of the Blue Gum High Forest Critically Endangered Ecological Community, has been identified as having high significance, good overall health and condition and has visual amenity and significance to the site and in particular the heritage item. The removal of Tree T135 is inconsistent with the objective which seeks "to preserve the amenity of the area, including biodiversity values, through the preservation of trees and other vegetation" (cl 5.9 of LEP 2015) and that it does not "recognise, protect and enhance and aesthetic and heritage values of trees" or "Secure and maintain local character and amenity" (pt 13.1 of DCP 2015)
- 84 Mr Kokot and Ms Askew agree that the landscape significance of Tree T135 is rated as "Very High" based on its amenity, environmental and heritage values, the Visual Tree Assessment (VTA) has the highest rating of 5 reflecting its good form and structure and Tree T135 is very good example of its species. They further agree that based on the high VTA and landscape significance, T135 has a height of greater than 30 m and canopy spread of 24 m makes T135 at least 30% larger than any of the trees assessed on the site. It is considered viable for retention having no structural faults however the current design necessitates the removal to accommodate the proposal.
- 85 Ms Askew states that the design of the development has not taken into consideration the relevant controls and objectives under LEP 2015 and DCP 2015 in that T135 is the most significant tree of the 231 trees assessed by the arborist as part of the application. Unlike the other existing vegetation on the site, T135 is growing in isolation with high visibility particularly within the site.
- 86 The applicant has relied on the built form controls to justify removal of the tree however the planning controls are only one consideration in the overall

analysis of the attributes and constraints of the site. Vegetation and trees are of equal importance in achieving a sensitive outcome for the site. The retention of most of the existing vegetation along the Pacific Highway and Ryde Road which would have been retained in conjunction with any redevelopment of the site does not provide justification for the removal of Tree T135.

87 Further, Ms Askew states that the planting of replacement trees cannot offset the loss of, or compensate for, the maturity, visual and landscape significance of Tree T135. An attempt at replacing Tree T135 as an isolated specimen is also unlikely due to lack of space within the setbacks which are constrained by either existing vegetation or the need to provide adequate screening for the development. The proposed removal of Tree T135 is a failure to recognise its landscape significance which is in conflict with the aims and objectives of the relevant controls.

88 Mr Lock accepts that the description of Tree T135 by Mr Kokot and Ms Askew The tree would appear to predate the 3M building and has been left isolated on a mown grass bank. The predominant view of the tree is from within the site only as viewed from the south. It is agreed that part of the tree canopy can be seen from distant views on the Pacific Highway but it is only possible though to see the top of the canopy. In his opinion, Tree 135 does not present with visual significance as single specimen when viewed from outside the site.

89 In response to Ms Askew's evidence, Mr Lock notes that a large landscape area is to be provided in the northern corner of the site which is to be re vegetated with Blue Gum High Forest species. Planting densities that are outlined in the Vegetation Management Plan will provide compensation planting including several Sydney Blue Gums. The future landscape character will be improved by the replanting of groves of new trees that will mature in time and compensate for the immediate loss of Tree T135.

90 Dr Robertson states that while Tree T135 is a large specimen of a Blue Gum, and is regarded as part of Blue Gum High Forest under the State *Threatened Species Conservation Act 1995*, it is not highly significant in ecological terms. This is because Tree T135 is an isolated specimen, set within an artificial landscape. It does not provide "special" ecological values such as floral

resources for feeding, that are not also provided by adjacent plantings of native vegetation. The Blue Gum High Forest on the subject site is fragmented and extremely altered from its original form. As such it is not eligible for consideration under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*. It also only technically qualifies as part of Blue Gum High Forest under the *Threatened Species Conservation Act 1995* because the Final Determination for that Act mentions that the community definition includes scattered trees.

### *Findings*

- 91 The undisputed evidence was that Tree T135 has high significance, good overall health and condition and has visual amenity. The site inspection confirmed the state of Tree T135. I accept the evidence of the applicants experts that, given the findings on the heritage significance issue that the retention of the Tree T135 should not be raised to the level of importance suggested by Ms Askew. In accepting that the removal of the tree is part of the balancing that is required in the development of land, the location of Tree T135 however has a considerable impact on any redevelopment of the site, particularly given the findings in preceding paragraphs on the significance of the former 3M building. While I accept that every endeavor should be made to retain Tree T135 in any redevelopment of the site, it is not a matter that would warrant the refusal of an application if the tree needed to be removed.

### **Urban design/planning**

#### *The evidence*

- 92 Expert evidence was provided by Mr Peter Smith, an architect and Mr Kendal McKay, a town planner for the applicant and Ms Kerry Gordon, a town planner and Ms Gabrielle Morrish, an architect and urban designer for the council.
- 93 The council, through the evidence of Ms Gordon and Ms Morrish, maintain that inadequate setbacks are provided to the Pacific Highway and Ryde Road. The proposed building encroaches within the setback control for the site contained at Part 14A.3 - Building Setbacks of DCP 2015 which requires a 20m landscaped street setback to both the Pacific Highway and Ryde Road. The encroachments comprise the following elements:

- the four level high lift, entry, travelator structure, which has a setback from Ryde Road of approximately 12m - 17m, a height of up to 14.1m and a length of approximately 62m
- the southern corner of the proposed 4 level warehouse building above parking which has a setback from Ryde Road of approximately 11.7m, a height of up to 19.8m and the breaching element has a length of approximately 35m.
- the 2 or 4 level carpark, trade, bagged goods and nursery component of the warehouse building, which has a setback from Pacific Highway approximately 9.5m, an unknown height and the breaching element has a length of approximately 55m.
- the colonnade structure at the corner of Pacific Highway and Ryde Road which has variable height of up to approximately 9m and wholly breaches the setback requirement.

94 The projection of the encroaching elements results in a dramatic reduction in the area available to create a landscape setting for the development on a landmark site. The lack of landscaped setting is in contravention of the planned future character of the locality.

95 From an urban design perspective, the scale, massing, siting and design of the proposed building is inappropriate to the landmark corner location of the site and inconsistent with the planned future character of the locality. The design has the following negative aspects:

- the location of the building within the Ryde Road and Pacific Highway setback is a poor response to the site and does not have regard for the unique attributes of the site, particularly the curvilinear Ryde Road and Pacific Highway corner.
- the proposal seeks to establish the prominence of the building through proximity to the street frontage, rather than through a building of architectural quality located within a generous landscaped public domain interface as required by DCP 2015.
- the proposed building is basically a large "shed" that is partially wrapped in a curved colonnade screen and does not achieve the status of a landmark building. In its majority, the building provides little visual interest, does not achieve architectural excellence and does not address the landmark site "to have a building design that is visually prominent and distinctive in form so as to identify the location of Pymble Business Park within the Region".
- the proposal's large building footprint does not enhance the site character and the design inappropriately attempts to create a visual prominence for the building by providing reduced setbacks and a large, low scale entrance structure.

- 96 In response, Mr McKay states that the proposal provides for a cohesive streetscape presentation to Ryde Road and the Pacific Highway with a building alignment ranging from 10 m to the colonnade structure near the corner of Ryde Road/Pacific Highway to 20 m in the north-eastern corner. Of the main building, only one small area of the main building structure encroaches within the 20 m setback, this being a length of approximately 36 m in the southern corner of the building which is setback between 12.46 m to 20 m from the Ryde Road boundary. The other building works which encroach within the 20 m setback include the colonnade, part of the travelator structure and part of the shade sail structure over the nursery/bagged goods area. These are considerably lesser built elements in the context of the overall design and have an openness and transparency rather than being enclosed structures.
- 97 Due to the nature of materials and products stocked in a 'hardware and building supplies' development and due to manual-handling operating efficiencies, there is a necessity for large sites with large level floor plates and uniform internal racking systems. Accordingly, the proposed main building is unavoidably cubical, this is not dissimilar to the majority of warehouse-style or factory-style buildings. In this regard, it is noted that the B7 Zone also permits 'General industries', light industries', and 'Warehouse or distribution centres', all of which might be expected to have essentially large cubical building structures. Accordingly, the proposed varying setback and use of the colonnade and travelator structures in conjunction with the proposed materials and finishes, facilitate building modulation and articulation of the building facades - consistent with the objective of the control. Furthermore, notwithstanding the non-compliance with the 20 m building setback control under the DCP, the proposal provides significant opportunities for front setback planting to supplement the retention of most of the existing landscaping along the Ryde Road and the Pacific Highway frontages with 70% of the Pacific Highway setback and 60% of the Ryde Road setback available for deep soil landscaping
- 98 Mr McKay maintains that the proposed development satisfies the DCP definition of a landmark building as it will be easily seen from a distance along the Pacific Highway looking north and from Ryde Road looking east and will

supplement the intersection of two major arterial roads as a marker for people to establish their location.

- 99 Mr Smith states that the setback to the Pacific Highway and Ryde Road frontages are acceptable and are consistent with the intent of the relevant sections of the DCP. The introductory section of Part 14 - Urban Precincts and Sites provides the reasons for the variations to the setbacks nominated in this part as:

To provide opportunities for street tree plantings or footpath widening in appropriate locations

To allow widening of lanes and streets in identified locations

To provide for an increase in the area of the public domain

To enable a consistency of built character

- 100 On this basis, the setbacks proposed are entirely consistent with these reasons but also with the specific objectives for the site.

- 101 The Planned Future Character in 14A.1 describes the character of the street frontages as follows:

Ryde Road is to have a landscaped character with large street setbacks allowing quality planting, and a landmark building at the corner of Ryde Road and Pacific Highway.

- 102 Mr Smith acknowledges that the 20m setback would set the building within a landscaped setting, however it is difficult to reconcile this with the desire to create a landmark. Mr Smith agrees with the conclusions of Mr McKay that the majority of the built form and in particular the main bulk of the building being the warehouse is contained within the 20m setback. The colonnade which is transparent and semi-transparent adds further articulation to the built form and is located within the 20m setback but not forward of the 10m setback required for adjoining sites. This combination allows for the built form to manage the competing priorities of the landmark nature of the site and the landscape setting.

- 103 As demonstrated by other development along the highway, the extent of vegetation retained along the boundaries of the 10m setback is sufficient in providing a landscape setting for the building so that the built form becomes a backdrop.

## Findings

104 In considering the different evidence from the experts and with the benefit of a site inspection, I am not satisfied that the proposed development is acceptable in the form presented to the Court. That is not to say that a “Hardware and building supplies”, in some form, is not capable of being constructed on the site. In *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399, McClelland CJ relevantly states (at par 117):

117 In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site. Although the fact that a particular use may be permissible is a neutral factor (see *Mobil Oil Australia Ltd v Baulkham Hills Shire Council (No 2)* 1971 28 LGR 374 at 379), **planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted** (my emphasis). The more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects (*Nanhouse Properties Pty Ltd v Sydney City Council* (1953) 9 LGR(NSW) 163; *Jansen v Cumberland County Council* (1952) 18 LGR(NSW) 167). Part 3 of the EP&A Act provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. If the zoning is not given weight, the integrity of the planning process provided by the legislation would be seriously threatened.

105 During closing submissions, Mr Galasso sought, in the event that the Court did not find the proposed plans acceptable, to be given the opportunity to address the concerns raised by the council, including the breach of the 20 m setback to the Pacific Highway and Ryde Road and the design quality of the building, with further plans. I propose to take up this offer principally because the matter of the demolition of the former 3M building has been found in the applicants favour and Mr Smith, the applicant’s architect submitted additional plans that sought to address the concerns of the council over the appearance of the building’s functional form (Exhibit J). While Ms Morrish, the council’s architect and urban designer made a genuine attempt to address the amended designs (and also provided her own response with photos of “big box” developments that provided added architectural treatment), I accept that it was unreasonable to expect any valuable response particularly when other important matters, such as the breach of the 20 m setback were still contemplated by the applicant.



106 In coming to this conclusion, it does not follow that approval will be granted if amended plans are provided. DCP 2015 correctly highlights the importance of the Pymble Business Park through its controls in cl 14A.1 where the clause describes the planned future character for the Pymble Business Park as:

The planned future character for Pymble Business Park is one of commercial buildings that have good integration with the street character. Due to its topography and location the precinct has several pockets of

differing character:

i) Bridge Street is to have buildings with entries and frontages that contribute to the street activity through direct physical access and visual surveillance from ground floors of the buildings. It is to have a landscape character with well considered and planted front setbacks.

ii) Development along the north of the Pacific Highway is to create a continuous urban character with buildings to the street boundary having a high ground floor visibility from adjacent roadways.

iii) Development along the south of the Pacific Highway and to the north of Bridge Street is to respect the Heritage Item and ensure its continued prominence in that streetscape.

iv) West and Suakin Streets are to have buildings built to the boundary with awnings and active frontages creating a neighbourhood character with shops and services at street level.

v) Ryde Road is to have a landscaped character with large street setbacks allowing quality planting, and a landmark building at the corner of Ryde Road and Pacific Highway.

107 The site is specifically addressed in cl 14A.5 as a “landmark site at the corner of Ryde Road and Pacific Highway. This is a visually prominent site with the potential to serve as a memorable marker in this locality”. Control 6 states:

6 The site is to have a landmark building that is unique and site responsive. The building design is to be visually prominent and distinctive in architectural form and identify the location of Pymble Business Park within the region.

108 In considering the controls in cl 14A, it must be understood that the architectural form will normally reflect its use. In this case, a development application is for a “hardware and building supplies” establishment and will have a different form to say “Office premises” but that does not mean that a “hardware and building supplies” establishment cannot be designed to address the requirements in cl 14A.

109 Based on the evidence, any new design should include:

- compliance with the 20 m setback.

- comprehensive landscaping of the 20 m setback,
- details of signage that are relatively discrete,
- the absence of outside storage areas that can be viewed from the public domain, and
- an architectural design that provides interest and an attractive appearance from the public domain.

110 If the applicant is prepared to provide additional drawings, the future progress of the matter will be discussed when these findings are handed down.

Alternatively, if the applicant does not wish to provide additional drawings; the appeal will be dismissed.

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G T Brown

Commissioner of the Court

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Land and Environment Court  
New South Wales

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Case Name: Bunnings Properties Pty Ltd v Ku-ring-gai Council (No.4)

Medium Neutral Citation: [2017] NSWLEC 1238

Hearing Date(s): 26,27,28 April 2016, 6 December 2016, 23 March 2017, conditions 31 March 2017

Date of Orders: 16 May 2017

Decision Date: 16 May 2017

Jurisdiction: Class 1

Before: Brown C

Decision:

1. The appeal is upheld.
2. Development Application DA0115/15 for the demolition of all existing structures, tree removal, earthworks, road widening, driveway access from Ryde Road, signage, landscaping, the consolidation of titles, retaining walls and construction of a building and its use for the sale of hardware and building supplies at 950-950A Pacific Highway and 2 Bridge Street, Pymble is approved subject the conditions in Annexure A.
3. The exhibits are returned with the exception of exhibits N, O and P.

Catchwords: DEVELOPMENT APPLICATION: demolition of existing structures, tree removal, earthworks and retaining walls, construction of a four storey building and use for hardware and building supplies – whether amended plans represent a new application - consideration of amended plans - demolition of a heritage item – loss of vegetation

Legislation Cited: Environmental Planning and Assessment Act 1979  
Environmental Planning and Assessment Regulation 2000

Ku-ring-gai Local Environmental Plan 2015  
Land and Environment Court Act 1979

Cases Cited:

Addenbrooke Pty Ltd v Woollahra Municipal Council  
(No 2) [2009] NSWLEC 134  
Australian Enterprise Holdings v Camden Council  
(2010) 173 LGERA 226  
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De Angelis v Wingecarribee Shire Council (2016) 214  
LGERA 96  
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[2013] NSWLEC 142  
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734  
Radray Constructions Pty Limited v Hornsby Shire  
Council (2006) 145 LGERA 292

Texts Cited:

Assessing Heritage Significance (2001) NSW Heritage  
Council

Category:

Principal judgment

Parties:

Bunnings Properties Pty Ltd (Applicant)  
Ku-ring-gai Council (Respondent)

Representation:

Counsel:  
Mr A Galasso SC (Applicant)  
Mr I Hemmings SC (Respondent)  
  
Solicitors:  
Norton Rose Fulbright (Applicant)  
Sparke Helmore (Respondent)

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No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the refusal of Development Application DA0115/15 that seeks the demolition of all existing structures, tree removal, earthworks and retaining walls and construction of a four storey

building and its use for the sale of hardware and building supplies. The proposal also includes road widening and driveway access from Ryde Road, signage, landscaping and the consolidation of titles at 950-950A Pacific Highway and 2 Bridge Street, Pymble (the site). The development is to be operated by Bunnings.

- 2 The hearing was conducted on 26,27,28 April 2016 and interim findings were handed down on 20 July 2016 that gave directions for amended plans and stated:

Based on the evidence, any new design should include:

- compliance with the 20 m setback.
- comprehensive landscaping of the 20 m setback,
- details of signage that are relatively discrete,
- the absence of outside storage areas that can be viewed from the public domain, and
- an architectural design that provides interest and an attractive appearance from the public domain.

### **Power to accept amended plans**

- 3 On 6 December 2016, I heard a Notice of Motion filed by the applicant on 28 November 2016 that the Court has no power to consider the amended plans directed by the interim findings handed down on 20 July 2016. At the conclusion of the submissions on the Notice of Motion, I indicated that for the “quick, just and cheap” disposal of the proceedings that would allow a future hearing date to be made, the Notice of Motion should be dismissed and that the reasons for this decision would be published at a later date. The reasons are as follows:
- 4 Mr Galasso SC, for the applicant, submits that one of the objects of the *Environmental Planning and Assessment Act 1979* (EP&A Act), which governs development applications, is to encourage proper development for the “purpose of promoting the social and economic welfare of the community and a better environment” (EP&A Act, s5). Also, a merits review of a development application “shall be conducted with as little formality and technicality” as possible, and in the course of such proceedings the Court “may inform itself on any matter in such manner as it thinks appropriate and as the proper

consideration of the matters before the Court permits": (*Land and Environment Court Act 1979*, ss38(1) and (2)).

- 5 Further, Mr Galasso SC submits that there is no doubt that the Court has power to deliver an interim judgment with directions whereby amendments could be effected, and consequently, the appeal upheld. In *Maxnox Pty Ltd v Hurstville City Council* (2006) 145 LGERA 373 at [56], Biscoe J held that the Court has power to deliver an interim judgment in Class 1 of the Court's jurisdiction. In *Maxnox*, Biscoe J referred to the *Mison* principle (*Mison v Randwick Municipal Council* (1991) 23 NSWLR 734) in terms of "significantly altering" the development for which consent is sought, as guidance to the limit of the power . However, subsequently, in *Addenbrooke Pty Ltd v Woollahra Municipal Council (No 2)* [2009] NSWLEC 134, Biscoe J granted conditional consent for the Rose Bay Marina proposal except for the eastern arm and certain berths. Biscoe J concluded that by reason of ss 80(4), the development approved may be substantially different from that applied for (*Addenbrooke* at [101]). In reaching this conclusion, Biscoe J considered the principle established in *Mison* and the qualification of that principle which results from later statutory provisions in ss80(4), 80(1 )(a) and (g) (*Addenbrooke* at [97] - [101]).
- 6 Mr Galasso submits that on one view power is derived from this Court's inherent jurisdiction as consequential upon the ability to conduct its business in such a way as to deliver an interim judgment. To this extent it is to be noted that no reference was made to any specific statutory power for that purpose in *Maxnox*. That notwithstanding, it is nonetheless clear that the power to amend can be properly enlivened by reference to cl 55 of the *Environmental Planning and Assessment Regulation 2000* (Regulation).
- 7 Clause 55 of the Regulations provides that:

**55 What is the procedure for amending a development application?**

1. A development application may be amended or varied by the applicant (but only with the agreement of the consent authority) at any time before the application is determined.
2. If an amendment or variation results in a change to the proposed development, the application to amend or vary the development application

must have annexed to it -written particulars sufficient to indicate the nature of the changed development.

3. If the development application is for:

(a) development for which concurrence is required, as referred to in section 79B of the Act, or

(b) integrated development, the consent authority must immediately forward a copy of the amended or varied application to the concurrence authority or approval body.

8 Relevantly, s 39(2) of the *Land and Environment Court Act 1979* provides:

(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

9 The power to amend conferred by cl 55 is significantly broad, and would easily accommodate the changes now proposed (*Radray Constructions Pty Limited v Hornsby Shire Council* (2006) 145 LGERA 292). The availability of the power is to be determined having regard to the beneficial and facultative nature of the provision. That is, cl 55 ought to be constructed so as to give "the widest interpretation which its language will permit" (*Radray* at [9]).

10 At [16] in *Radray*, Jagot J stated:

I do not consider that the "substantially the same" formula (apparently derived from the modification power in s96) reflects the full extent of the power available under cl 55. I prefer to ask whether the development now proposed is an amendment or variation of the application, recognising that an amendment or variation may result in change to the proposed development, but that the Court has no jurisdiction to entertain an original application.

11 The Court has consistently adopted a broad approach to the scope and application of the power to allow an amendment pursuant to cl 55. (*Australian Enterprise Holdings v Camden Council* (2010) 173 LGERA 226 per Pepper J, and *Campton v Parramatta City Council* [2011] NSWLEC 12 per Pain J).

12 Mr Galasso submits that in the present case, the amendments proposed by the applicant in response to the Court's interim findings will, self-evidently in any case of an amendment, lead to a "changed development", but that is not determinative of the application for leave to amend. The amended plans reflect changes to the built form as identified in the judgment. The essence of the development however remains the same. (*Radray* at [17]). The amendments,

although creating a changed development, have not converted the application into a new application. The changed development depicted in the amended plans, having regard to the particular circumstances of this case and, do not, in the Mr Galasso's submission, fall outside the scope of cl 55, even if that it is the basis for the amendments (which is not accepted). The amendments are clearly within the breadth of the Court's power discussed in *Maxnox* and leave should be granted to rely upon the amended plans.

- 13 Mr Hemmings SC, for the council, submits that there is no power to grant that leave. The changes cannot be described as an amendment or variation to the proposed development. Rather, the changes are so significant that properly considered it amounts to a new development application. The Court has no jurisdiction to entertain an original application. Further, even if there was power, in the exercise of discretion, the Court would not grant leave.
- 14 Mr Hemmings submits that cl 55(2) requires that the application to amend or vary the development application "must have annexed to it written particulars sufficient to indicate the nature of the changed development." The particulars are not sufficient according to Mr Hemmings. They do not put the Court in a position so that it can properly understand the nature of the changed development. For that reason alone, leave should be refused.
- 15 The power in cl 55(1) is limited to the "amendment" or "variation" of a development application. Clause 55(2) then provides a process to facilitate the Court's consideration of any amendment or variation. Clause 55(2) accepts that some, though not all, amendments or variations may result in a change to the development. It is necessary therefore to identify the amendments and/or variations with some precision. The applicant has not done that. It is common for amendments or variations to plans to be "clouded" so that any change can easily be understood. No clouding is provided. Mr Hemmings maintains that is because there is an amendment to almost every component part of the development.
- 16 Further, the changes are accepted to be only "generally described". That is both unsatisfactory - for the purposes of cl 55(2) - and also the inevitable consequence of the fact that the materials and plans the subject of the



application amount to a new development application and are not identifiable amendments or variations to the existing plans.

- 17 Even accepting that there is power for the Court to give an "amber light" judgment, the Court's judgment does not meet the requirements for an amber light judgment. If the Court is going to give the potential for amendments to be made, they must be defined with the sufficient precision. Regrettably, the applicant's request was not one which permitted the Court to identify with any precision the possible amendments. Fundamentally, that is because the Court was dissatisfied with the siting, architectural presentation, visual appearance and setting. The consequence of that submission is that the fact that the current plans may be responsive to the Court's acceptance of the applicant's request is irrelevant to the determination of whether or not the amendments and variations are within power.
- 18 To the extent there is any conflict in the authorities in describing the test that the Court applies to determine whether the proposal is for amendments or variations to the development application or properly considered amounts to a new development application. In Mr Hemming's submission, the plans, and supporting material, the subject of the Motion are, properly considered, a new application.
- 19 In considering the opposing submissions, I prefer the conclusions of Mr Galasso for a number of reasons. First, I am satisfied that the amendments do not result in change to the proposed development to the point where it could be regarded as a new application. In my view, the amended plans are clearly an "amendment" or "variation" of a development application. The amendments squarely address those matters set out in the interim findings. Second, the amendments, unsurprisingly, require consequential changes to other parts of the proposed development – none of which are significant in effect or suggest that it could be regarded as a new application. The amendments could not be regarded as "significantly altering" the development for which consent is sought. Third, "clouding" of amendments on plans is one method of identifying any amendments however the extent of the amendments are set out in Exhibit

N in some detail in the Supplementary Statement of Environmental Effects, including a comparison with the original application in certain areas.

- 20 I am satisfied that the amendments are within the power available under cl 55 of the Regulations and the power discussed in *Maxnox* and leave should be granted to rely upon the amended plans.

### **The amended application**

- 21 The council filed a Further Amended Statement of Facts and Contentions on 7 February 2017. The council maintained that the amended application should be refused for the following reasons:

1. the demolition of a heritage item,
2. an unsuitable design, including, the location on a prominent corner, insufficient detail of design elements and materials, and inconsistent with future character, and
3. the loss of significant vegetation, particularly Tree T135.

- 22 The contention relating to the design was not pressed by the council following the agreement by the experts in their joint report that the design was acceptable. I note the design was the sole reason for the interim findings and the amended plans.

### **The site**

- 23 The site comprises two allotments, being 950-950A Pacific Highway, Pymble (Lot 1 in DP 718718) and 2 Bridge Street, Pymble (Lot B in DP 371406)(the site). The site has an area of 1.825 ha made up of 1.737 ha (Lot 1) and 0.088 ha (Lot B). It is an irregularly shaped allotment on the corner of the Pacific Highway and Ryde Road and also has frontages to Bridge Street.
- 24 A disused five storey commercial building (the former 3M building) is located on Lot 1 with concrete and bitumen driveways accessing Bridge Street, along with an open carpark area (on the southwest boundary) and a two storey carpark (on the southern boundary). Lot B is a regular shaped allotment in close proximity to the intersection of the Pacific Highway and Bridge Street. A two storey commercial building and carpark are located on this lot with an access driveway from Bridge Street.

- 25 The site has two frontages to Bridge Street, each of which provides vehicular access to the site. It is also burdened by an easement that benefits the adjoining commercial development on the east boundary of the site and the Roads and Maritime Services for batter protection.
- 26 Development in the immediate vicinity of the site is primarily for the purpose of commercial uses, which are accommodated in buildings of varying size. Commercial development exists along both sides of Bridge Street in buildings of between 2 and 4 storeys in height.

### **Relevant planning controls**

- 27 The site is within Zone B7 Business Park under *Ku-ring-gai Local Environmental Plan 2015* (LEP 2015). The proposed development is a permissible use, with consent in this zone as “Hardware and building supplies”.
- 28 Clause 2.3(2) states:
- (2) The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.
- 29 The zone objectives are:
- To provide a range of office and light industrial uses.
  - To encourage employment opportunities.
  - To enable other land uses that provide facilities or services to meet the day to day needs of workers in the area.
- 30 The council raised no contentions in relation to cl 2.3(2).
- 31 Clause 4.3(2) provides that the “height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map”. The site has a maximum height of 32.5 m on the Height of Buildings Map” and the proposed development satisfies this development standard.
- 32 Clause 4.4(2) provides that the maximum FSR for a building on any land is not to exceed the FSR shown for the land on the Floor Space Ratio Map. The site has a maximum FSR of 3.5:1 on the Floor Space Ratio Map. The proposed development satisfies this development standard.
- 33 Clause 5.9 provides requirements for Preservation of trees or vegetation.

34 Clause 5.10 Heritage conservation is relevant as part of the site is currently identified as Item 1593 in Sch 5, Pt 1 Heritage items of LEP 2015. The site identified in Sch 5 is Lot 1 in DP 718718 and not Lot B in DP 371406. The site is also in the vicinity of a heritage item (Item 1598 Substation at 982-984 Pacific Highway Pymble) although the council took no issue with the proximity to this item.

35 Clause 5.10(2)(a)(i) provides that:

**(2) Requirement for consent**

Development consent is required for any of the following:

(a) demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance):

(i) a heritage item,

(ii).

36 Clause 5.10(4) provides that:

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).

37 *Ku-ring-gai Development Control Plan* (the DCP) applies. Part 1 provides an Introduction and states that the DCP came into effect on 2 April 2015. Part 14A identifies the site as part of the Pymble Business Park. Relevantly, pt 14A.3 identifies building setbacks, pt 14A.4 identifies built form with the site being identified as a “Landmark site” and pt 14A.6 identifies heritage matters.

**Can the item be demolished?**

*The weight to a draft planning instrument*

38 The former 3M building was not listed as a heritage item at the time of the lodgement of the development application on 8 April 2015. While LEP 2015 came into effect on 5 March 2015, the amendment to LEP 2015 that inserted the former 3M building into Sch 5 of LEP 2015 occurred on 1 May 2015. There was no dispute that the effect of this timing is that the applications falls within the savings provisions in cl 1.8A of LEP 2015. Clause 1.8A states:

### **1.8A Savings provision relating to development applications**

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

- 39 It was agreed at the time of the interim findings, that the decision of Pepper J in *Maygood Australia Pty Ltd v Willoughby City Council* [2013] NSWLEC 142 at [29] was appropriate for the interpretation of cl 1.8. This decision meant that the amendment to Sch 5 is not irrelevant to the determination of the development application. The consideration of cl 1.8A in the interim findings adopted the agreed approach as required by *Maygood*.
- 40 A similar approach was adopted by Craig J in *De Angelis v Wingecarribee Shire Council* (2016) 214 LGERA 96 however this decision was overturned by the Court of Appeal (*De Angelis v Wingecarribee Shire Council* (2016) NSACA 189). The effect is that from 1 May 2015 the site was listed as a heritage item pursuant to Sch 5 of LEP 2015.

#### *The evidence*

- 41 Mr Graham Brooks provided evidence for the council and Mr Brian McDonald provided evidence for the applicant. Mr Brooks and Mr McDonald provided evidence previously in the appeal. Their current evidence in the proceedings is based on the different interpretation required under the *De Angelis* decision of the Court of Appeal.
- 42 Mr Brooks and Mr McDonald provided a further joint report (Exhibit 14) although their evidence did not specifically address the criteria in the NSW Heritage Office *Assessing Heritage Significance* but instead addressed the following areas, as set out in the councils contentions:
- the significance of the heritage item,
  - the redevelopment is contrary to the aims in cl 2 of LEP 2015,
  - the redevelopment is contrary to cl 5.10(1) of LEP 2015,
  - the redevelopment is contrary to cl 5.10(4) of LEP 2015, and
  - the redevelopment does not consider cl 5.10(10) of LEP 2015.

#### *The significance of the heritage item*

- 43 The Statement of Significance for the former 3M building (Exhibit 9) states:

The 3M Building is an interesting and locally rare example of a late Twentieth Century office building in the International style that was constructed c.1967 for the 3M (Minnesota Mining and Manufacturing) Company as their Sydney headquarters. The building is an early example of a high rise company headquarters in Ku-ring-gai in an area that was zoned for residential development. The building was designed by architects Hanson Todd and Partners on the 'site of the former Pymble Gas works that was established by the Australian Gas Light Company in 1888. The building is intact externally but has been altered internally and is set in a well-landscaped site that retains much of the original setting of the building. The building represents the establishment of the 3M Company in Australia was a landmark development for the company reflecting their corporate strength and remained as their headquarters for over forty years. It is likely to have special associations for former employees and is a local landmark.

- 44 Mr Brooks agrees that the statutory heritage listing is most clearly expressed in the Statement of Significance as set out in the Heritage Inventory Sheet however for an enhanced understanding of the heritage significance; Mr Brooks refers to the publication *A Pictorial Guide to Identifying Australian Architecture, Styles and Terms from 1788 to the Present* (Apperley, Irving and Reynolds, 1989). Mr Brooks states that the transition from Post War to Late 20th Century Internationalism in major projects around Sydney is exemplified by the move beyond the curved curtain-wall facades of Qantas House in Chifley Square (1957) and the AMP Building at Circular Quay (1959) to the external precast concrete structural framing of the facade of Australia Square (1966). It is possible to appreciate the difference between the initial, simple rectilinear site planning model for the 3M Building (1964), and the curvilinear form of the final architectural outcome. In his opinion, this further supports his previous position on the heritage significance of the former 3M building.
- 45 Mr McDonald states that at least four assessments have been made as to the level of heritage significance of the former 3M building and whether it meets the thresholds of the assessment criteria that are commonly used for evaluation of significance. This is a relevant consideration because the extent to which the former 3M building contributes to the environmental heritage of Ku ring gai and its value as a heritage item must be addressed. Its listing in Schedule 5 is not a qualitative measure of its significance. The statement of heritage significance supporting its listing does provide qualitative measures.
- 46 Using the terminology of the criteria for assessing significance in his original statement, Mr McDonald examined whether the former 3M building qualifies as

“important” in demonstrating the qualities set down by criteria (a), (b), (c) and (g) or has “strong or special” associations (criteria (b) and (d)) or achieves a “high degree” of creative or technical achievement (criterion (c)) or possesses “uncommon, rare or endangered” aspects of NSW's cultural or natural history (or cultural or natural history of the local area) (criterion (f)). The assessment sets out the reasons why the former 3M building fails to rise to the levels that the accepted definitions of the above words highlighted in bold would imply.

- 47 It follows that, having made his own assessment of significance that Mr McDonald does not agree with the Statement of Significance that supported listing of the former 3M building in Sch 5 of LEP 2015 or the expanded understanding of the significance of the former 3M building provided by Mr Brooks. In his previous statement Mr McDonald states why the former 3M building is a poor example of the Post War International style when compared with the other examples cited by Mr Brooks.

*Redevelopment is contrary to the aims in cl 2 of LEP 2015*

- 48 The relevant aims in cl 2(2) of LEP 2015 are:

(2) The particular aims of this Plan are as follows:

(a) to guide the future development of land and the management of environmental, social, economic, heritage and cultural resources within Ku-ring-gai,

.

(f) to recognize, protect and conserve Ku-ring-gai's indigenous and non-indigenous cultural heritage,

- 49 Mr Brooks states that the first aim of LEP 2015 is to guide the future development of land and management of the heritage and cultural resources within Ku-ring-gai. The provisions of cl 5.10(10) and DCP 2015 Part 19 support this aim. They enable consent to be granted for the re-use of heritage items and the development of heritage sites for uses that may otherwise not be permitted. Mr Brooks does not accept that the applicant has made a compelling case that the demolition of the former 3M building is warranted.

- 50 Mr McDonald restates that with regard to the relevant objectives, at least four assessments have been made as to the level of heritage significance of the former 3M building and whether it meets the thresholds of the assessment

criteria that are commonly used for evaluation of significance. This is a relevant consideration because the extent to which the former 3M building contributes to the environmental heritage of Ku ring gai and its value as a heritage item must be addressed. The listing in Sch 5 is not a qualitative measure of its significance. The statement of heritage significance prepared by Mr McDonald, in his previous evidence, sets out the reasons why the former 3M building fails to rise to the levels under the appropriate significance criteria

*Redevelopment is contrary to cl 5.10(1) of LEP 2015*

51 Clause 5.10(1) states:

**5.10 Heritage conservation**

**Note.**

Heritage items (if any) are listed and described in Schedule 5. Heritage conservation areas (if any) are shown on the Heritage Map as well as being described in Schedule 5.

**(1) Objectives** The objectives of this clause are as follows:

- (a) to conserve the environmental heritage of Ku-ring-gai,
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,
- (c) to conserve archaeological sites,
- (d) to conserve Aboriginal objects and Aboriginal places of heritage significance.

52 Mr Brooks states that he does not accept that a compelling case has been made out for the demolition of the former 3M building. Mr McDonald claims that the significance of its relationship with the 3M Company was irretrievably broken when the 3M Headquarters moved to another site. He came to no such conclusion when he referred to the former Qantas Building in Chifley Square, despite the fact that Qantas has long abandoned that building. In these circumstances, Mr Brooks does not accept that a photographic or other archival recording, or an Interpretation program, can be regarded as an appropriate attempt to conserve the environmental heritage of Ku-ring-gai, or to conserve the heritage significance of heritage items, including associated fabric, settings and views.

53 Mr McDonald states that his response in his earlier evidence addresses the same issues in terms of the weight to be given to the level of significance of the



former 3M building and the degree of loss of heritage that its demolition would incur. In relation to the setting of the former 3M building, the previous comments still apply (par 2.4.3). These comments state:

It follows that the setting, which is lacking in any evidence of intentional landscape design, does not demonstrate any of the activities of 3M on the site and therefore has no associated heritage significance. The question of tree retention, discussed later is more related to scenic and ecological values than heritage values.

- 54 Mr McDonald states that there is a compelling case that, putting aside the level of heritage significance the former 3M Building possesses, its retention cannot be sustained. It is important to note that the 3M Company abandoned the building despite the fact that the company had explored the potential for further expansion of its activities on the site in May 1985.

*Redevelopment is contrary to cl 5.10(4) of LEP 2015*

- 55 Clause 5.10(4) states:

#### **5.10 Heritage conservation**

##### **Note.**

Heritage items (if any) are listed and described in Schedule 5. Heritage conservation areas (if any) are shown on the Heritage Map as well as being described in Schedule 5.

**(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).

- 56 Mr Brooks states, in a similar way to his previous comments, that there can be no dispute that the proposed demolition of the former 3M building and the redevelopment of the overall site must, by definition, effectively destroy the heritage significance of the building. In his opinion, no evidence has been provided to suggest that the building is in such poor structural condition or in such a poor state of dilapidation overall that necessary remedial works would compromise its heritage significance.
- 57 As previously stated, a photographic or other archival recording, or an Interpretation program, cannot be regarded as an appropriate response to the demolition of the building.

- 58 Mr McDonald notes that cl 5.10(4) sets out the matters that the consent authority must consider - specifically "the effect of the proposed development on the heritage significance of the item or area concerned". He acknowledges that demolition of any item that has heritage significance would clearly destroy that heritage significance. The question in this case is how significant is the item? In Mr McDonald's opinion, the weight to be given to the loss of significance must be in proportion to the level of heritage significance.
- 59 Mr McDonald also states that the extent of the burden on an owner must also be weighed in proportion to the level of significance of the item. The costs associated with repair and reconstruction of an item of exceptional or high significance would be more justifiable. A high cost of repairing and reconstructing an item that is of limited significance may not be justifiable if it is a heavy burden on the owner. Even accepting that the item is listed in Sch 5 of LEP 2015, Mr McDonald finds the significance of the 3M Building to fall below the accepted acceptance criteria.
- 60 In this case, it is not a matter of whether the applicant has presented evidence to suggest that the building is in such poor structural condition or in such a poor state of dilapidation overall that necessary remedial works would compromise its heritage significance. This is not the only test. The ability of a building of limited significance to be used for a compatible use at a reasonable cost is also an important consideration.

*Redevelopment does not consider cl 5.10(10) of LEP 2015*

*Clause 5.10(10) states:*

**5.10 Heritage conservation**

**Note.**

Heritage items (if any) are listed and described in Schedule 5. Heritage conservation areas (if any) are shown on the Heritage Map as well as being described in Schedule 5.

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**(10) Conservation incentives** The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place

of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that:

- (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and
- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and
- (d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and
- (e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area.

- 61 Mr Brooks states that no new evidence has been provided to suggest that the opportunities now presented by cl 5.10(10) have been taken up by the applicant. In light of the decision in *De Angelis* alternatives to the proposed development should have been considered as part of the preparation of amended plans. The alternative use provisions would enable the remainder of the site to be developed for high density residential with the former 3M building upgraded as a centre for small business or other compatible purposes.
- 62 Mr Brooks, again, does not believe that the applicant has made a compelling case for demolition of the former 3M building
- 63 Mr McDonald responds by stating that when the heritage issue was raised by the council, the applicant commissioned an experienced and respected heritage architect to undertake an independent assessment of the heritage significance of the 3M Building, which found that it did not qualify as a heritage item. Also, an overview of the work necessary to bring the building up to current Building Code and Fire Safety standards was commissioned. In these circumstances, it is unrealistic and unreasonable to demand that the applicant should undertake a study of alternative forms of development retaining the former 3M building. Mr McDonald states that it would have been obvious that the site cannot accommodate a Bunnings store and an operational 3M Building. Furthermore, the multi-level nature and the size of the floor plates of the 3M Building mean it could not be adapted as part of a Bunnings store.

- 64 At this point, the heritage incentives cl 5.10(10) was not applicable and would not need to be considered. Clause 5.10(10) could not have been applied until after 1 May 2015 when the item was listed. When it became apparent that the former 3M building's heritage listing would in fact proceed, the project had reached the point where the applicant was committed to development of a Bunnings store. Any alternative development option that would retain the 3M Building would render the Bunnings project unviable. Nothing could be achieved by invoking the provisions of cl 5.10(10). In these circumstances, it is unreasonable to expect that the applicant should go through an exercise of exploring other adaptable uses for the former 3M building that do not serve the applicant's core business needs.
- 65 Putting aside the development of a Bunnings Store, evidence has been provided to show that upgrading or adaptation for office or similar uses, (a) would significantly change the building, (b) that commercial office use in the precinct is failing because businesses are vacating and going elsewhere, just as the 3M company did, and (c) the building had been vacant for several years due to lack of interest in purchasing it. The evidence provided by other experts indicates that there is not a market that would sustain this level of expenditure. The break with continuous use by the 3M company several years ago, further weakens any connections under assessment criteria (a), (b) and (d).
- 66 Mr McDonald states that even though a hotel or motel is permissible in the zone, the extent of alteration to serve this use would seriously diminish the little heritage significance it possesses. Alternatively, non-complying uses that might be considered by someone else under cl 5.10(10) are types of residential adaptation, which would likely have unacceptable impacts due to the substantial transformation of the nature of the building through degree of compartmentation and provision of balconies as required for residential accommodation. The building lacks flexibility in its ability to meet the requirements of SEPP 65 and the Apartment Design Guide.
- 67 In the opinion of Mr McDonald, all of the alternative uses fail the test of "the use should fit the building, not "the building be made to fit the use." In the light of the above discussion, Mr McDonald fails to see how the listing the 3M Building

on 1 May 2015 and therefore bringing the introduction of cl 5.10(10) into play, would make any significant difference to the matters dealt with by the applicants economic and market evidence from Mr David Leyshon, Mr Martin Hilland and Mr Simon Hensley. Mr McDonald refers to his previous evidence where he states "Any estimation of the costs of additional hypothetical adaptive re-use works and/or other development options on the rest of the site with the building retained could only be highly conjectural at this stage."

- 68 Mr McDonald concludes by stating the evidence before the Court from the original proceedings shows that there is a compelling case that the former 3M building may be demolished on the grounds of its limited heritage significance and the lack of viability in upgrading the building for commercial office use or adapting the building to some other use

#### *Findings*

- 69 The fundamental difference between the expert evidence is the very different levels of significance attributed to the former 3M building. This difference is central to the evidence on each of the specific areas addressed by Mr Brooks and Mr McDonald in their further evidence. In considering their further evidence I make the following comments. First, I did not understand there to be any dispute over the significance of the former 3M building. The site is identified as Item 1593 in Sch 5 Heritage items of LEP 2015 as "3M Building (former)" having Local Significance. The Statement of Significance is set out in the Inventory Sheet was accepted by both experts although Mr Brooks sought to add to the description of the significance of the heritage item with reference to the publication *A Pictorial Guide to Identifying Australian Architecture, Styles and Terms from 1788 to the Present*. While this reference supports the position of Mr Brooks, I am not satisfied that it adds, in any meaningful way, to the debate between the experts. At best, it provides additional support for Mr Brooks position but does not provide any new evidence on the significance of the former 3M building.
- 70 The second matter relates to the concern that the redevelopment is contrary to some aims in cl 2 of LEP 2015. While a reference to the aims of LEP 2015 is not an irrelevant consideration, there is no operative clause that requires that

the aims must be taken into consideration of a development application. I do not see this as a means of diminishing the importance of those matters addressed in the aims but more specific and probably more effective requirements are available in cl 5.10(4).

- 71 Third, and in relation to the concern that the redevelopment is contrary to cl 5.10(1) of LEP 2015, I adopt similar comments I made in the previous paragraph in that there is no operative clause that requires that the objectives must be taken into consideration of a development application. Again, more specific and probably more effective requirements are available in cl 5.10(4).
- 72 Fourth, and in relation to the incentive provisions in cl 5.10(10), I note the provisions are not mandatory. They simply provide the opportunity to use “a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance” for a “purpose (that) would otherwise not be allowed by this Plan” subject to the matters in ss (a) to (e). There can be no obligation for a person that seeks the demolition of a heritage item to address the requirements of this sub clause. As Mr McDonald stated, “it is unreasonable to expect that the applicant should go through an exercise of exploring other adaptable uses for the former 3M building that do not serve the applicant's core business needs”.
- 73 In response to the assertion of Mr Brooks that another use could be found for the building, the evidence of Mr Peter Leyshon is uncontested. He states that:
- the Pymble/Gordon area; as an office location has at best, has been static since the early 1990s, in that there has been no new development of offices,
  - the results of a survey of the Pymble Business Park undertaken in January 2016 identified a vacancy rate of 23.6%, and
  - the current vacancy rate in the Pymble/Gordon area can reasonably be described as being "off the chart" as far as Sydney's major office markets currently are concerned.
- 74 Mr Leyshon states that the major problem confronting the Pymble Business Park is the substantial increase in competition that the area faces from both a change in the way businesses use office space and, more relevantly, from a substantial increase in competition from other suburban office centres/locations. In his view, the preconditions which gave rise to the demand

for, and feasibility of, office development in Pymble have irrevocably changed. Consequently, the retention of the former 3M building for a commercial use runs the very real risk that it will continue to remain vacant, compounding the existing deterioration of the Pymble Business Park as a whole.

75 Also, the uncontested evidence of Mr Martin Hill and Mr Simon Hensley identifies that the former 3M building would require substantial refurbishment and upgrade in order to meet current day BCA standards, with the cost of the rectification works being in the order of \$10.660 million excluding GST.

76 Fifth, and there can be no doubt that the assessment required by cl 5.10(4) is at the centre of the dispute. Mr Brooks and Mr McDonald hold totally different views on the heritage significance in their earlier evidence and their more recent evidence. Consistent with assessing heritage significance, Mr Brooks and Mr McDonald appropriately used the criteria in *Assessing Heritage Significance* (2001) from the NSW Heritage Office in their previous evidence; the conclusions were repeated in their most recent evidence. This assessment was undertaken in the interim findings (pars 26 to 81) after considering the evidence of Mr Brooks and Mr McDonald. The conclusion (at par 81) stated:

81. Pursuant to cl 5.10, I find that the proposed development has little if any, heritage significance and as such the demolition on the former 3M building can be supported.

77 I am not satisfied that Mr Brooks provided any new evidence in the recent joint report with Mr McDonald that would suggest that the findings in the interim judgment should be changed. In my view, the assessment undertaken in the interim findings at pars 26 to 81 remains valid.

78 Mr Hemmings also raises other matters in his submissions that require a response. He submits that weight should be given to the existence of the listing of the former 3M building in Sch 5 of LEP 2015 by the council. This submission must be rejected. Clause 5.10 (or any part of LEP 2015) contains no such consideration or requirement. Clause 5.10(2)(a)(i) provides the opportunity to demolish a heritage item subject to cl 5.10(4) that requires, before granting consent, the Court must consider the effect of the proposed development on the heritage significance of the heritage item. This assessment has been

undertaken and found that the former 3M building has little if any, heritage significance.

- 79 Mr Hemmings also submits that it is not the role of Mr McDonald to “go behind” the listing of the former 3M building in Sch 5. This also must be rejected as Mr McDonald simply carried out the task required by cl 5.10(4) in assessing the heritage significance of the heritage item using the accepted criterion in *Assessing Heritage Significance*.
- 80 Mr Hemmings also submitted that, contrary to the interim judgment (at par 69) that Mr Brooks did address Criteria (g) – Representativeness in *Assessing Heritage Significance*. It is not clear to me where Mr Brooks addressed Criteria (g). He provided two sets of evidence in the original hearing; an individual expert report (Exhibit 5), and a joint expert report with Mr McDonald (Exhibit 6): The analysis of the criteria in *Assessing Heritage Significance* was undertaken in Exhibit 5 at Part 3.1 - Assessment of Heritage Significance (p21). Part 3.1 addresses Criterion (a), (b), (c), (d), (e) and finishes with Criterion (f) on p25. If Mr Brooks addressed Criterion (g), I would have expected to find any evidence in Exhibit 5 and following his commentary on the other criteria. I also cannot find any reference to Criterion (g) in Exhibit 6 although I accept that it may have been referred to in the oral evidence of Mr Brooks.

## **Loss of significant vegetation**

### *The evidence*

- 81 The loss of significant vegetation was identified as the removal of Tree T135. Evidence was provided by Mr John Lock, a landscape architect and Mr Mark Kokot, an arborist for the applicant and Ms Robyn Askew, a landscape architect for the council. The experts were not required for cross examination.
- 82 Mr Lock states that Tree T135 is large healthy Sydney Blue Gum with good form and structure and has visual significance within the site. The tree would appear to predate the 3M building and has been left isolated on a mown grass bank. The predominant view of the tree is from within the site only, as viewed from the south. It is agreed that with a canopy of over 30m, the top part of the tree canopy can be seen from distant views on the Pacific Highway. It is only possible though to see the top of the canopy, which is layered in with other



surrounding trees. Due to the site topography and with the trunk of tree screened by the existing building and surrounding trees, Tree T135 does not present with visual significance as single specimen when viewed from outside the site.

- 83 Mr Lock further states that a large landscape area is to be provided in the northern corner of the site which is to be re vegetated with Blue Gum High Forest species. Planting densities that are outlined in the Vegetation Management Plan will provide compensation planting including several Sydney Blue Gums. The future landscape character will be improved by the replanting of groves of new trees that will mature in time and compensate for the immediate loss of Tree T135.
- 84 Ms Askew states that the design of the development has not taken into consideration the relevant controls and objectives under LEP 2015 and the DCP. In her opinion, Tree 135 is the most significant tree of the 231 trees assessed by Mr Kokot as the combined height of greater than 30 m and canopy spread of 24 m makes Tree T135 at least 30% larger than any of the trees assessed by the arborist. The landscape significance of Tree T135 is rated as "Very High" based on its amenity, environmental and heritage values, the Visual Tree Assessment (VTA) has the highest rating of 5. Unlike the other existing vegetation on the site, Tree T135 is growing in isolation with high visibility particularly within the site.
- 85 Ms Askew describes Tree T135 as the best example of a Sydney Blue Gum that she has viewed over the last 28 years of working in the council. In her opinion, the applicant has relied upon the built form controls to justify removal of the tree. The planning controls, specifically setbacks, are only one consideration in the overall analysis of the attributes and constraints of the site. Vegetation and trees are of equal importance in achieving a sensitive outcome for the site. The broad application of the setback controls does not outweigh the significance and contribution to the site that this tree makes.
- 86 The retention of most of the existing vegetation along the Pacific Highway and Ryde Road which would have been retained in conjunction with any redevelopment of the site does not provide justification for the removal of Tree

T135. Further, the planting of replacement trees cannot offset the loss of, or compensate for, the maturity, visual and landscape significance of Tree T135. An attempt at replacing Tree T135 as an isolated specimen is also unlikely due to lack of space within the setbacks which are constrained by either existing vegetation or the need to provide adequate screening for the development. The proposed removal of Tree T135 is a failure to recognise its landscape significance which is in conflict with the aims and objectives of the relevant controls.

### *Findings*

- 87 Similar, if not identical issues were raised in the earlier hearing on Tree T135 and I propose to adopt my previous findings, which state (at par 91):

The undisputed evidence was that Tree T135 has high significance, good overall health and condition and has visual amenity. The site inspection confirmed the state of Tree T135. The location of Tree T135 however has a considerable impact on any redevelopment of the site, particularly given the findings in preceding paragraphs on the significance of the former 3M building.

While I accept that every endeavor should be made to retain Tree T135 in any redevelopment of the site, it is not a matter that would warrant the refusal of an application if the tree needed to be removed.

### **Orders**

- 88 There being no reason why development consent should not be granted, the orders of the Court are:

- (1) The appeal is upheld.
- (2) Development Application DA0115/15 for the demolition of all existing structures, tree removal, earthworks, road widening, driveway access from Ryde Road, signage, landscaping, the consolidation of titles, retaining walls and construction of a building and its use for the sale of hardware and building supplies at 950-950A Pacific Highway and 2 Bridge Street, Pymble is approved subject the conditions in Annexure A.
- (3) The exhibits are returned with the exception of exhibits N, O and P.

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**G Brown**

**Commissioner of the Court**

**152878.16 (C) gtb (263 KB, pdf)**

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Land and Environment Court  
New South Wales

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Case Name: Ku-ring-gai Council v Bunnings Properties Pty Ltd (No 2)

Medium Neutral Citation: [2018] NSWLEC 19

Hearing Date(s): 13 October 2017

Date of Orders: 28 February 2018

Decision Date: 28 February 2018

Jurisdiction: Class 1

Before: Sheahan J

Decision: Appeal dismissed with costs. See paragraph [106]

Catchwords: APPEAL – s 56A appeal from the decision of a Commissioner to grant conditional consent to a development application – whether Commissioner correctly applied the “amber light” approach – whether amber light approach resulted in a significantly different development – amber light approach correctly applied – heritage significance of a listed heritage item on the site – no error of law in the Commissioner’s decision to allow for the demolition of a locally listed heritage item – decision to remove tree not found to be made unreasonably – issue in cross-appeal did not arise for decision – costs

Legislation Cited: Civil Procedure Act 2005  
Criminal Appeal Act 1912  
Environmental Planning and Assessment Act 1979  
Ku-ring-gai Local Environmental Plan 2015  
Land and Environment Court Act 1979

Cases Cited: ABAX Contracting Pty Limited v The Hills Shire Council [2016] NSWLEC 105  
Ali v Liverpool City Council [2009] NSWLEC 1327

Botany Bay City Council v Botany Development Pty Ltd  
 (No 2) [2015] NSWLEC 55  
 Bunnings Properties Pty Ltd v Ku-ring-gai Council (No  
 2) [2016] NSWLEC 1659  
 Bunnings Properties Pty Ltd v Ku-ring-gai Council (No  
 4) [2017] NSWLEC 1238  
 Bunnings Properties Pty Ltd v Ku-ring-gai Council  
 [2016] NSWLEC 1658  
 Champions Quarry Pty Limited v Lismore City Council  
 [2011] NSWLEC 1124  
 Helou v Strathfield Municipal Council (2006) 144  
 LGERA 322; [2006] NSWLEC 66  
 Ku-ring-gai Council v Bunnings Properties Pty Ltd  
 [2017] NSWLEC 16  
 Luxe Manly Pty Limited v Northern Beaches Council  
 [2016] NSWLEC 156  
 Marinkovic v Rockdale City Council (2007) 151 LGERA  
 385; [2007] NSWLEC 71  
 Maxnox Pty Limited v Hurstville City Council (2006) 145  
 LGERA 373; [2006] NSWLEC 146  
 Port Stephens Council v Jeffrey Sansom (2007) 156  
 LGERA 125; [2007] NSWCA 299  
 Randwick Municipal Council v Manousaki (1988) 66  
 LGRA 330  
 Riordans Consulting Surveyors Pty Limited v Lismore  
 City Council [2010] NSWLEC 1333  
 Riverstone Parade Pty Limited v Blacktown City Council  
 [2015] NSWLEC 137  
 Southon & Ors v Gordon Plath on behalf of the  
 Department of Environment and Climate Change  
 (2010) 181 LGERA 352; [2010] NSWCCA 292  
 Stanton Dahl Architects v Penrith City Council [2010]  
 NSWLEC 156  
 Tanious v Georges River Council [2016] NSWLEC 142  
 The Benevolent Society v Waverley Council [2010]  
 NSWLEC 1082  
 Wingecarribee Shire Council v De Angelis [2016]  
 NSWCA 189

Category:

Principal judgment

Parties:

Ku-ring-gai Council (Appellant)

Bunnings Properties Pty Ltd (Respondent)

Representation:	Counsel: Mr I Hemmings, SC with Mr C Lenehan, barrister (Appellant) Mr A Galasso, SC (Respondent) Solicitors: Sparke Helmore Lawyers (Appellant) Norton Rose Fulbright Australia (Respondent)
File Number(s):	2017/206960
Decision under appeal:	
Court or Tribunal:	Land and Environment Court of New South Wales
Jurisdiction:	Class 1
Citation:	Bunnings Properties Pty Ltd v Ku-ring-gai Council (No 4) [2017] NSWLEC 1238
Date of Decision:	16 May 2017
Before:	Brown C
File Number(s):	2016/152878

## JUDGMENT

### Introduction

- 1 In the Class 1 development appeal now the subject of this present appeal under s 56A of the *Land and Environment Court Act 1979* (“the Court Act”), a commissioner of the Court relevantly made **four** substantive decisions.
- 2 In brief summary, those decisions were, in chronological order:
  - (1) to make what he has called “interim findings” in respect of issues in the appeal ([2016] NSWLEC 1658, on 20 July 2016 – “**the first decision**”);
  - (2) to grant leave to reopen ([2016] NSWLEC 1659, on 28 October 2016 – “**the reopening decision**”);
  - (3) to grant leave to rely on amended plans (“**the amended plans decision**” on 5 December 2016 – the Commissioner published no specific judgment, but his reasons were included early in judgment (4) in May 2017); and
  - (4) to uphold the Class 1 appeal and grant consent, on conditions ([2017] NSWLEC 1238, on 16 May 2017 – “**the final decision**”).

3 The appellant, Ku-ring-gai Council (“**Council**”), says that the Commissioner’s first decision really amounted to a **refusal** of the development application (“**DA**”), without an order to that effect. Council notes, in its submissions in chief (21 September 2017, pars 2-3):

2. The decisions are inextricably linked. The primary grounds of appeal are derived from the reasons in the Decision on 20 July 2016, with the three later decisions being infected by the initial error.

3. At the heart of the appeal is whether the Commissioner had power to refuse an application for development approval and then in the same proceedings, to allow the respondent, ... to present a further proposed development for approval by the Court, giving an indication of what such a hypothetical development application ought contain.

4 On the other hand, the respondent, Bunnings Properties Pty Ltd (“**Bunnings**”) says (subs pars 2-5):

2 ...

(4) the Interim Findings were not a final and operative decision, and their proper characterisation is as interim findings or, as styled by Commissioner Brown, as “Directions for Amended Plans”;

...

3 Section 56A(1) of the [Court Act] provides that a party may appeal to the Court against an order or a decision of the Court on a question of law, being an order or a decision made by a Commissioner or Commissioners.

4 None of the Interim Findings, the Re-Opening Decision or the Amended Plans Decision, was a final, operative or determinative decision. The decision of Pain J in *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2017] NSWLEC 2017 (sic – 16) so held at [19] and [21].

5 It follows from this that:

(1) In this Appeal, the only decision which this Court has jurisdiction to consider in a s56A Appeal is the Final Decision, as only that decision constituted a final, operative and determinative decision.

(2) Therefore, the primary issue for this Court to consider is whether the Final Decision is infected by an error of law.

(3) The only relevance of the Interim Findings, Reopening Decision and Amended Plans Decision is the extent (if any) to which they may give rise to any jurisdictional error in the Final Decision.

5 The present s 56A appeal was lodged on **7 July 2017**, and came on for hearing before me on **13 October 2017**.

6 Also before me on 13 October 2017 was a **cross-appeal** filed by Bunnings on **1 August 2017**.

- 7 The appellant Council is represented by Mr Ian Hemmings SC and Mr C Lenehan of counsel, and the respondent Bunnings by Mr Adrian Galasso SC.
- 8 It is appropriate to now summarize the grounds stated, and the relief sought, in both the appeal and the cross-appeal, omitting the particulars provided.
- 9 In the Council's appeal, the stated grounds can be summarized as follows:
- 1 & 3 In respect of his decisions of 20 July 2016 and 5 December 2016, the Commissioner erred at law in allowing revised plans, at least partly by following what has been called the “**amber light**” approach (Ground 1(d)).
- 2 In respect of his decision on 28 October 2016, the Commissioner erred at law by making, without power, the reopening decision.
- 4 In respect of the final decision on 16 May 2017, the Commissioner erred at law by granting, without power, the Court's approval to the DA. His decision is also said to include several other errors of law.
- 10 Council seeks the following orders in its appeal:
- 1 To the extent necessary, leave be granted to extend the time within which to file an application for leave to appeal to the date of the filing of this summons.
  - 2 Appeal allowed.
  - 3 The Decision insofar as it concerns the findings the subject of appeal be set aside and in lieu thereof, the application ... be dismissed.
  - 4 The decisions of 28 October 2016, 5 December 2016 and 16 May 2017 be set aside and in lieu thereof, the applications be dismissed.
  - 5 The respondent pay the costs of the appeal.
- 11 In its Cross-Appeal, Bunnings pleads:
- If the Court makes the order sought by the Applicant at paragraph 4 of the Summons filed on 7 July 2017, or otherwise finds that the Commissioner erred at law in granting leave to rely upon amended plans, the Cross-Claimant cross-appeals from that part of the order ... made on 5 December 2016 (**Amended Plans Decision**) which requires the Cross-Claimant to pay costs pursuant to s97B of the *Environmental Planning and Assessment Act 1979* (NSW) ([“**EPA Act**”]) ...
- 12 Bunnings seeks, on stated grounds, the following orders in its cross-appeal:
- 1 The Cross-Appeal be allowed.
  - 2 [Council] be ordered to repay to [Bunnings] the amount of s97B costs paid by Bunnings to Council pursuant to the Amended Plans Decision.



3 The Cross-Respondent [Council] pay the costs of the Cross-Appeal.

- 13 Before I set out relevant statutory provisions, I will now endeavour to summarize some relevant facts and events (informed by the chronology at tab 21).

### **Background and Chronology**

- 14 The subject site is located at 950-950A Pacific Highway and 2 Bridge Street, Pymble, and is zoned “B7 Business Park” under the Ku-ring-gai Local Environmental Plan 2015 (“LEP”), which commenced on **2 April 2015**.
- 15 As noted in Council’s submissions in chief (par 7), existing on the Site is a 5-storey commercial building (known as the former 3M Building), set in an established landscape setting, with driveways accessing Bridge Street, a 2-storey carpark, and, on the second allotment, a separate 2 storey building with another carpark and driveway accessing Bridge Street.
- 16 The relevant DA was lodged with Council on **8 April 2015**.
- 17 As also noted in Council’s submissions (par 5) the applicant for consent, Bunnings, sought approval for the demolition of existing structures, tree removal, earthworks and retaining walls, construction of a four-storey building and its use for hardware and building supplies, road widening and driveway access from Ryde Road, signage, landscaping, consolidation of titles and Stage 1 approval for a community garden.
- 18 On **1 May 2015**, the “3M” building became a listed heritage item under an amendment to the LEP.
- 19 On **26 June 2015**, Bunnings lodged its Class 1 appeal against Council’s deemed refusal of its DA.
- 20 On **6 November 2015**, the Court granted leave for Bunnings to rely on amended plans, and the amended application (subs par 10) sought consent for “demolition of the existing 5-storey [3M] office building ... at 950 Pacific Highway and ancillary structures, the 2-storey concrete car park at 950-950A Pacific Highway, the hardstand car parking area on No. 950-950A Pacific Highway, and the part 2 and part 3 storey office building, garage and metal shed at 2 Bridge Street”.

21 On **26 to 28 April 2016**, the Commissioner heard the merits appeal. He handed down his “first decision” on **20 July 2016** ([2016] NSWLEC 1658). He made a series of findings, in a lengthy judgment, much of it concerned with competing evidence on heritage issues. He also addressed design and vegetation issues. He relevantly found “little if any” heritage significance in the 3M building, and he also found that the asserted threat to a particular tree (numbered “135” in the material) would not warrant refusal of consent.

22 The learned Commissioner concluded (at [104]-[110] – emphasis mine):

104 In considering the different evidence from the experts and with the benefit of a site inspection, **I am not satisfied that the proposed development is acceptable in the form presented to the Court. That is not to say that a “Hardware and building supplies”, in some form, is not capable of being constructed on the site. ...**

105 During closing submissions, **Mr Galasso sought**, in the event that the Court did not find the proposed plans acceptable, to be given **the opportunity to address the concerns raised by the council**, including the breach of the 20 m setback to the Pacific Highway and Ryde Road and the design quality of the building, with further plans. **I propose to take up this offer** principally because the matter of the demolition of the former 3M building has been found in the applicants favour ...

106 In coming to this conclusion, **it does not follow that approval will be granted if amended plans are provided**. DCP 2015 correctly highlights the importance of the Pymble Business Park through its controls in cl 14A.1 where the clause describes the planned future character for the Pymble Business Park ...

107 The site is specifically addressed in cl 14A.5 as a “landmark site at the corner of Ryde Road and Pacific Highway. This is a visually prominent site with the potential to serve as a memorable marker in this locality”. Control 6 states:

6 The site is to have a landmark building that is unique and site responsive. The building design is to be visually prominent and distinctive in architectural form and identify the location of Pymble Business Park within the region.

108 In considering the controls in cl 14A, it must be understood that the architectural form will normally reflect its use. In this case, a development application is for a “hardware and building supplies” establishment and will have a different form to say “Office premises” but that **does not mean that a “hardware and building supplies” establishment cannot be designed to address the requirements in cl 14A.**

109 Based on the evidence, **any new design should include:**

- compliance with the 20 m setback.
- comprehensive landscaping of the 20 m setback,
- details of signage that are relatively discrete,

- the absence of outside storage areas that can be viewed from the public domain, and
- an architectural design that provides interest and an attractive appearance from the public domain.

110 **If the applicant is prepared to provide additional drawings, the future progress of the matter will be discussed when these findings are handed down. Alternatively, if the applicant does not wish to provide additional drawings; the appeal will be dismissed.**

- 23 On **1 August 2016**, the Court of Appeal handed down a decision which overturned a construction point upon which the Commissioner had relied in his July 2016 decision, in respect of the heritage issue: see *Wingecarribee Shire Council v De Angelis* (“*De Angelis*”) [2016] NSWCA 189.
- 24 Bunnings then sought leave to reopen its Class 1 appeal, and leave was granted, in the Commissioner’s “reopening decision”, on **28 October 2016** ([2016] NSWLEC 1659).
- 25 In that judgment, the learned Commissioner described (at [19]) his earlier/first judgment as an “‘Interim Judgment’, ... in essence only interim findings on the application before the Court”. He noted (again at [19]) that the cover sheet of that judgment described the July “decision” as “Directions for amended plans”.
- 26 He also said (at [20] – emphasis mine): “... **the interests of justice are best served** by hearing from the parties on the Court of Appeal decision in *De Angelis*”, and then made the following order (at [21]):
- (1) Leave to reopen the proceedings is granted, with respect to the application of clause 1.8A of the ... LEP ... following the Court of Appeal decision in ... *De Angelis* ...
- 27 During a hearing on **5 December 2016**, the Commissioner granted Bunnings leave to rely on further amended plans, and indicated he would later provide reasons (T05.12.16, p26, LL18-20).
- 28 On **3 March 2017** (in [2017] NSWLEC 16), Pain J dismissed a Notice of Motion, filed by Bunnings on 20 February 2017, and heard on 24 February 2017, for the summary dismissal of a s 56A appeal Council had lodged on 10 February 2017, against the Commissioner’s “amended plans” decision.

- 29 Pain J noted (at [3]) that the Commissioner had delivered an “interim findings judgment”, had “resolved not to approve the DA and gave Bunnings the option of filing amended plans”. Her Honour then said (at [19] – emphasis mine):

The material finding of the Commissioner in the interim findings judgment was in [104] to the effect that he was not satisfied that the proposed development was acceptable in the form before the Court. That finding is not the subject of the s 56A appeal. I agree with Bunnings’ submissions that **the statements in par [110] of the interim findings judgment providing an option to Bunnings to file additional plans do not constitute a decision within the meaning of s 56A** because the statements are not a finding which is final, operative or determinative in a practical sense of an issue falling for consideration. To the extent final might be understood to exclude interlocutory I do not intend that the word have that meaning.

- 30 Her Honour also noted (at [21]), as the Commissioner had (first decision at [106] – quoted in [22] above), that “the lodging of amended plans does not give rise to any particular outcome in the appeal”.
- 31 On the basis of those “further amended plans”, the Commissioner conducted a further merits hearing on **24-28 March 2017**.
- 32 On **16 May 2017**, the Commissioner published his “final decision”, upholding Bunnings’ appeal.
- 33 The learned Commissioner gave (at [3]-[20]) his reasons for having allowed amended plans – he was satisfied that the amendments would not render the proposal a “new” application. He then noted (at [22]):

The contention relating to the design was not pressed by the council following the agreement by the experts in their joint report that the design was acceptable. I note the design was the sole reason for the interim findings and the amended plans.

- 34 He went on to deal with *De Angelis*, and to consider all the expert heritage evidence then before him. He said (at [69]-[79], under the heading “Findings” – emphasis mine):

69 The fundamental difference between the expert evidence is **the very different levels of significance attributed to the former 3M building**. This difference is central to the evidence on each of the specific areas addressed by Mr Brooks and Mr McDonald in their further evidence. In considering their further evidence I make the following comments. First, I did not understand there to be any dispute over the significance of the former 3M building. The site is identified as Item 1593 in Sch 5 Heritage items of LEP 2015 as “3M Building (former)” having Local Significance. The Statement of Significance is set out in the Inventory Sheet was accepted by both experts although Mr Brooks sought to add to the description of the significance of the heritage item

with reference to the publication *A Pictorial Guide to Identifying Australian Architecture, Styles and Terms from 1788 to the Present*. While this reference supports the position of Mr Brooks, I am not satisfied that it adds, in any meaningful way, to the debate between the experts. At best, it provides additional support for Mr Brooks position but does not provide any new evidence on the significance of the former 3M building.

70 The second matter relates to the concern that the redevelopment is contrary to some aims in cl 2 of LEP 2015. While a reference to the aims of LEP 2015 is not an irrelevant consideration, there is no operative clause that requires that the aims must be taken into consideration of a development application. I do not see this as a means of diminishing the importance of those matters addressed in the aims but more specific and probably more effective requirements are available in cl 5.10(4).

71 Third, and in relation to the concern that the redevelopment is contrary to cl 5.10(1) of LEP 2015, I adopt similar comments I made in the previous paragraph in that there is no operative clause that requires that the objectives must be taken into consideration of a development application. Again, more specific and probably more effective requirements are available in cl 5.10(4).

72 Fourth, and **in relation to the incentive provisions in cl 5.10(10), I note the provisions are not mandatory**. They simply provide the opportunity to use “a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance” for a “purpose (that) would otherwise not be allowed by this Plan” subject to the matters in ss (a) to (e). There can be no obligation for a person that seeks the demolition of a heritage item to address the requirements of this sub clause. As Mr McDonald stated, “**it is unreasonable to expect that the applicant should go through an exercise of exploring other adaptable uses for the former 3M building that do not serve the applicant's core business needs**”.

73 In response to the assertion of Mr Brooks that another use could be found for the building, the evidence of Mr Peter Leyshon is uncontested. He states that:

- the Pymble/Gordon area; as an office location has at best, has been static since the early 1990s, in that there has been no new development of offices,
- the results of a survey of the Pymble Business Park undertaken in January 2016 identified a vacancy rate of 23.6%, and
- the current vacancy rate in the Pymble/Gordon area can reasonably be described as being "off the chart" as far as Sydney's major office markets currently are concerned.

74 Mr Leyshon states that the major problem confronting the Pymble Business Park is the substantial increase in competition that the area faces from both a change in the way businesses use office space and, more relevantly, from a substantial increase in competition from other suburban office centres/locations. In his view, the preconditions which gave rise to the demand for, and feasibility of, office development in Pymble have irrevocably changed. Consequently, **the retention of the former 3M building for a commercial use runs the very real risk that it will continue to remain vacant**, compounding the existing deterioration of the Pymble Business Park as a whole.

75 Also, the **uncontested evidence** of Mr Martin Hill and Mr Simon Hensley identifies that the former 3M building would require substantial refurbishment and upgrade in order to meet current day BCA standards, with **the cost of the rectification works being in the order of \$10.660 million excluding GST.**

76 Fifth, and there can be no doubt that the assessment required by cl 5.10(4) is at the centre of the dispute. **Mr Brooks and Mr McDonald hold totally different views on the heritage significance in their earlier evidence and their more recent evidence.** Consistent with assessing heritage significance, Mr Brooks and Mr McDonald appropriately used the criteria in *Assessing Heritage Significance* (2001) from the NSW Heritage Office in their previous evidence; the conclusions were repeated in their most recent evidence. This assessment was undertaken in the interim findings (pars 26 to 81) after considering the evidence of Mr Brooks and Mr McDonald. The conclusion (at par 81) stated:

81. Pursuant to cl 5.10, I find that the proposed development has little if any, heritage significance and as such the demolition on the former 3M building can be supported.

77 **I am not satisfied that** Mr Brooks provided any new evidence in the recent joint report with Mr McDonald that would suggest that **the findings in the interim judgment should be changed.** In my view, the assessment undertaken in the interim findings at pars 26 to 81 remains valid.

78 Mr Hemmings also raises other matters in his submissions that require a response. He submits that weight should be given to the existence of the listing of the former 3M building in Sch 5 of LEP 2015 by the council. This submission must be rejected. Clause 5.10 (or any part of LEP 2015) contains no such consideration or requirement. Clause 5.10(2)(a)(i) provides the opportunity to demolish a heritage item subject to cl 5.10(4) that requires, **before granting consent, the Court must consider the effect of the proposed development on the heritage significance of the heritage item. This assessment has been undertaken and found that the former 3M building has little if any, heritage significance.**

79 Mr Hemmings also submits that it is not the role of Mr McDonald to “go behind” the listing of the former 3M building in Sch 5. This also must be rejected as Mr McDonald simply carried out the task required by cl 5.10(4) in assessing the heritage significance of the heritage item using the accepted criterion in *Assessing Heritage Significance*.

- 35 The learned Commissioner then dealt again with Tree 135, confirming (at [87]) his interim finding (at [91] of the first decision).
- 36 He concluded (at [88]) that there was “no reason why (sic) development consent should not be granted”, and proceeded to make orders accordingly.
- 37 I turn now to set out the various legislative and other provisions relevant to this appeal, some of which have already been mentioned.

## Legislative Scheme

### *The Court Act*

38 Section 17 of the Court Act relevantly provides:

#### **17 Class 1—environmental planning and protection appeals**

The Court has jurisdiction (referred to in this Act as “Class 1” of its jurisdiction) to hear and dispose of the following:

...

(d) appeals, objections and applications under sections 75K, 75L, 75Q, 75W (5), 95A, 96, 96A, 97, 97AA, 98, 98A, 109K, 121ZK, 121ZM, 121ZS and 149F of the [EPA Act].

39 Section 38 provides:

#### **38 Procedure**

(1) Proceedings in Class 1, 2 or 3 of the Court’s jurisdiction shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and as the proper consideration of the matters before the Court permit.

(2) In proceedings in Class 1, 2 or 3 of the Court’s jurisdiction, the Court is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate and as the proper consideration of the matters before the Court permits.

(3) Subject to the rules, and without limiting the generality of subsection (2), the Court may, in relation to proceedings in Class 1, 2 or 3 of the Court’s jurisdiction, obtain the assistance of any person having professional or other qualifications relevant to any issue arising for determination in the proceedings and may receive in evidence the certificate of any such person.

(4) In proceedings in Class 1, 2 or 3 of the Court’s jurisdiction, the Court may, in respect of a matter not dealt with by this Act or the rules, give directions as to the procedure to be followed at or in connection with the hearing.

(5) In this section, a reference to the Court includes a reference to the Commissioner or Commissioners directed under section 36 to hear and dispose of proceedings.

40 Section 39 provides the Court with the power to hear appeals within Class 1 of its jurisdiction:

#### **39 Powers of Court on appeals**

(1) In this section, ***appeal*** means an appeal, objection, reference or other matter which may be disposed of by the Court in proceedings in Class 1, 2 or 3 of its jurisdiction.

(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

(3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal.

(4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.

(5) The decision of the Court upon an appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect to accordingly.

...

(7) The functions of the Court under this section are in addition to and not in derogation from any other functions of the Court.

...

41 Section 56 provides:

**56 Nature of decision of the Court**

Except as provided:

(a) by Division 2, in relation to proceedings in Class 1, 2, 3, 4 or 8 of the Court's jurisdiction, or

(b) by the *Criminal Appeal Act 1912*, in relation to proceedings in Class 5, 6 or 7 of the Court's jurisdiction,

a decision of the Court shall be final and conclusive.

42 Section 56A relevantly provides:

**56A Class 1, 2, 3 and 8 proceedings—appeals to the Court against decisions of Commissioners**

(1) A party to proceedings in Class 1, 2, 3 or 8 of the Court's jurisdiction may appeal to the Court against an order or a decision of the Court on a question of law, being an order or a decision made by a Commissioner or Commissioners.

(2) On the hearing of an appeal under subsection (1), the Court shall:

(a) remit the matter to the Commissioner or Commissioners for determination by the Commissioner or Commissioners in accordance with the decision of the Court, or

(b) make such other order in relation to the appeal as seems fit.

(3) Notwithstanding subsection (1), an appeal shall not lie to the Court under that subsection in respect of a question of law that has been referred to, and determined by, a Judge pursuant to section 36.

43 Section 97B of the Court Act is relevant to the respondent's Cross-Appeal:

**97B Costs payable if amended development application filed**



- (1) This section applies to proceedings if the Court, on an appeal by an applicant under section 97 allows the applicant to file an amended development application (other than to make a minor amendment).
- (2) In any proceedings to which this section applies, the Court must make an order for the payment by the applicant of those costs of the consent authority that are thrown away as a result of amending the development application.
- (3) The regulations may provide for circumstances in which subsection (2) does not apply.
- (4) This section has effect despite the provisions of any other Act or law.

*The EPA Act*

44 Section 83(4) of the EPA Act should be noted:

**83 Date from which consent operates**

...

- (4) If a determination is made by refusing consent or if an application is taken by section 82 to have been so determined, and the decision on the appeal made pursuant to section 97 in respect of that determination has the effect of granting consent, the decision is taken to be a consent granted under this Division and that consent is effective and operates from the date of that decision.

*The LEP*

45 The savings provision in the LEP states:

**1.8A Savings provision relating to development applications**

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

...

46 The objectives in cl 5.10(1) of the LEP include “to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views”.

47 Clause 5.10(2)(a)(i) provides that:

**(2) Requirement for consent**

Development consent is required for any of the following:

- (a) demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance):

- (i) a heritage item,

...

48 Clause 5.10(4) provides that:

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).

49 The term “**heritage significance**” is defined to mean “historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value”.

50 Clause 5.10(10) contains incentive provisions:

**(10) Conservation incentives**

The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that:

- (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and
- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and
- (d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and
- (e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area.

**Section 56A Principles**

51 I summarized the well settled principles for the determination of s 56A appeals, in my judgment in *Botany Bay City Council v Botany Development Pty Ltd (No 2)* [2015] NSWLEC 55, in these terms (at [5]):

- (a) the appeal is limited to a question of law, and not concerned with errors of fact;
- (b) the error of law must be identified by the Appellant, and shown to be of a sufficiently material character as to vitiate the entirety of the Commissioner’s decision;
- (c) the Commissioner’s reasons must be adequate, but should not be examined with a “fine tooth comb” in an endeavour to discover error; and

(d) the Court is not to take an overly critical or “pernickety”, legalistic approach in examining the Commissioner’s decision, as if it were written by a lawyer.

52 Those principles were re-stated more fully by Pepper J, in *Tanious v Georges River Council* (“*Tanious*”) [2016] NSWLEC 142, in these terms (at [10], citations omitted):

(a) first, the appeal is only concerned with errors or questions of law and not questions of fact ...;

(b) second, an overly critical examination of the Commissioner’s decision for relevant error should not be employed ... The Commissioner’s reasons for the decision must therefore be read as a whole and considered reasonably. A “verbal slip or infelicity of expression does not necessarily warrant drawing and (sic) inference of an error of law” ...;

(c) third, the Commissioner must give adequate reasons for her decision. This means that she must refer to evidence that is important or critical to the determination of the principal or central issues in the case ... This does not mean, however, that every argument advanced by a party in support of these issues must be considered by the Commissioner or reasons given for accepting or rejecting it ...;

(d) fourth, and as corollary to the principle above, if the decision of the Commissioner reveals an error on a question of law, the decision is only vitiated if the error is material to the decision made ...; and

(e) fifth, an error will not be material to the decision if the matter complained of on appeal was a matter that was not the subject of submissions made to the Commissioner below in a way that called for a reasoned consideration of that matter ... A party is bound by the way it conducted its case at the hearing ...

### **Consideration**

53 In the competing submissions there was much discussion about the fairly unique nature of this Court.

54 As Spigelman CJ said, in *Port Stephens Council v Jeffrey Sansom* (2007) 156 LGERA 125; [2007] NSWCA 299, this Court has imposed upon it by statute a particular “combination of functions ... It is, simultaneously, both a court of law and an administrative tribunal. The determination of whether or not a particular development is prohibited, particularly when decided as a preliminary question, bears the character of ordinary litigation in a court. The determination of a development application by way of a process of merits review is an administrative tribunal function ...”.

55 His Honour continued (at [52]):

... Although a judicial officer exercising a merits review jurisdiction stands in the shoes of the primary decision-maker, s/he cannot behave in the same ways as an administrator. A court is required to manifest a high level of impartiality, independence and consistency in its decision-making.

56 He noted (in [66]) that the Court Act provides, inter alia:

That, in appeals to the Court in Class 1, 2 or 3, that the Court has all of the functions and discretions of the person from whose decision the appeal is brought and that such an appeal is by way of rehearing on fresh evidence, if permitted, and any decision is deemed to be the final decision of the person from whose decision the appeal has been brought (s39).

57 The Chief Justice added (at [73]):

One of the critical differences between ordinary civil litigation and planning appeals is the absence of a reciprocal relationship between the interests of the parties. They are not, or should not be, adversaries in the sense that can be said of the usual kind of civil litigation in courts.

58 I gladly adopt the Chief Justice's remarks, and, against that background, there are four questions to be resolved in deciding the present appeal:

- (1) Was the Commissioner's approach to dealing with this case based on an erroneous understanding or application of what he had the power to do in taking what is known as an "amber light" approach to this Class 1 appeal?
- (2) Did the Commissioner deal appropriately with heritage questions, in terms of cl 5.10 of the LEP?
- (3) Was the Commissioner's approach to the issue of Tree 135 legally "reasonable"?
- (4) The cross-appeal?

59 I shall now turn to consider those four questions, in that order.

#### *The "Amber Light" approach*

60 I do not accept that the Commissioner's first decision was effectively to refuse the DA. It is very clear from his judgments that, having some residual concerns about the appeal, he intended and/or purported to adopt the so-called "amber light" approach.

61 That approach has no statutory basis, but it is a "practice", if not a "policy" established and circumscribed by a series of decisions of the Court. Applied appropriately it does not offend the principle of finality, nor any principles underlying the *Civil Procedure Act 2005* regarding the "just quick and cheap" disposition of proceedings.

- 62 It was pioneered by Moore J when His Honour was a commissioner (and later Senior Commissioner) of the Court, but it has been considered and endorsed by several judges of the Court, as well as Moore J, including but not only the Chief Judge and myself.
- 63 I surveyed in detail the relevant authorities in *Luxe Manly Pty Limited v Northern Beaches Council* (“*Luxe*”) [2016] NSWLEC 156.
- 64 The question in the s 56A appeal in *Luxe* was the correctness of a commissioner’s exercise of her discretion to **not** adopt such an approach. The respondent Council in that case rejected the description of the approach as a “policy”. I think it is, indeed, a court “policy”, but I am content to use the word “approach”.
- 65 The approach involves (*Luxe* at [16]) delivery of an interim judgment, which falls short of outright refusal of the appeal, but indicates elements of concern in the application which could be amended, such that the appeal could be upheld and an approval granted.
- 66 As the Chief Judge said in *Marinkovic v Rockdale City Council* (“*Marinkovic*”) (2007) 151 LGERA 385; [2007] NSWLEC 71 (at [22]-[26] – emphasis mine):
- 22 There should be a capacity for an applicant in class 1 proceedings before the Court to amend its application to respond to evidence, including evidence of a court appointed expert, and to address concerns of the court that is hearing the appeal. A respondent council should expect that an applicant might need to respond in this way. That is to say, **such amendments should be seen to be part of the usual process of conducting a class 1 appeal in this Court**. The mere making of an amendment is not by itself a circumstance that always makes it fair and reasonable to make an order for costs.
- 23 Of course, **there must be some limit placed** upon this capacity to respond to evidence and to the Court’s concerns by means of an amendment.
- ...
- ...
- 26 ... there must be some capacity for an applicant to respond to the evidence and the concerns of the Court. **This should be seen as part of the usual conduct of proceedings**. Where making that amendment does lead to costs thrown away, then there may be some justification for making an order ...
- 67 In adopting the amber light approach, the Court “must have regard to, among other things, the public interest”: per Biscoe J in *Maxnox Pty Limited v Hurstville City Council* (“*Maxnox*”) (2006) 145 LGERA 373; [2006] NSWLEC 146, at [57].

68 In several cases since *Marinkovic*, Moore J (as Senior Commissioner) “developed” the approach, and provided guidance to his colleagues as to its use, in an effort to achieve “the best community outcome” (*Maxnox* at [57]). His Honour made the following comments (in those of his cases cited by me in *Luxe*):

(i) In *Ali v Liverpool City Council* (“*Ali*”) [2009] NSWLEC 1327, at [120]-[121]:

120 ... This [“amber light”] approach says that, if a proposal is not appropriate to be given approval in the form being considered but, with minor and identifiable amendments consistent with the application before the Court, it would be capable of approval, the Court should make a determination:

- setting out the changes that are required to render the proposal acceptable;
- requiring the applicant to make those changes, whether by preparation of amended plans or by Court imposed conditions settled between the parties; and
- when such modifications are incorporated (thus rendering the proposal acceptable), approval should be given to the amended proposal.

121 In this case, a number of modifications emerging from the objectors’ evidence and the concurrent evidence given by the town planners led to a number of propositions being put to Mr Ayling for the applicant to consider. These propositions were not put on any basis to indicate that I had already formed any conclusion concerning the overall merits of the proposal but were merely put in response to comparatively minor matters raised where these matters appeared, to me, both to have merit warranting consideration and being of comparatively easy scope to address.

(ii) In *The Benevolent Society v Waverley Council* (“*Benevolent*”) [2010] NSWLEC 1082, at [66]-[67]:

66 It has been the consistent approach of the Court, over recent years in development appeal proceedings, to assess proposals on what has been described as an “amber light” basis. This approach means that the Court not only considers the question of whether the proposal should be approved in the form that is before the Court but also asking whether the proposal is capable of approval, with specified modifications imposed by the Court, within the scope of the present proceedings. It is in that fashion that I approach the present appeal.

67 Indeed, consistent with this approach, during the course of the expert evidence in all three disciplines – planning, heritage and arboriculture – that I tested a number of “what if?” propositions on those experts. Such propositions were put not on the basis that I had reached even any tentative conclusions concerning any aspect of the proposal but in order to explore whether there were any modifications to the proposal that would cause the council to indicate that an acceptable design had been achieved if such modifications were to be adopted by the Society.

(iii) In *Riordans Consulting Surveyors Pty Limited v Lismore City Council* [2010] NSWLEC 1333, at [27]-[31]:

27 I have approached my consideration of the issues in these proceedings by adopting the “amber light approach” now taken in merit proceedings in the Court.

28 This approach has me first ask myself this initial question – “On the merits, is the application capable of being approved as applied for?” If this question is answered in the affirmative, I must then proceed to approve the proposal.

29 If I were to conclude that it is not capable of being approved as applied for, I do not automatically refuse the proposal. In the alternative to refusal, I then proceed to address a second question – “Is the proposal capable of being given development consent within the scope of the present application but with amendments or changes that are defined by me with sufficient precision as to be incorporated in either plans or in conditions of consent?”

30 If this second question is answered in the affirmative, I should then proceed to specify the amendments or changes; require their incorporation in the proposal; and approve the proposal as so modified.

31 However, if this second question is answered in the negative, I am obliged to proceed to reject the proposal and dismiss the appeal.

(See also *Champions Quarry Pty Limited v Lismore City Council* [2011] NSWLEC 1124, at [148]-[151])

69 Biscoe J noted, in 2010 in *Stanton Dahl Architects v Penrith City Council* [2010] NSWLEC 156, that the approach was by then being “consistently adopted”, and that it was “facilitative”, providing guidance to the parties on a way forward.

70 Pain J said in *Riverstone Parade Pty Limited v Blacktown City Council* (“*Riverstone*”) [2015] NSWLEC 137, at [38]:

... A commissioner not giving an “amber light” to a development application before him or her does not give rise to a question of law. Whether such an approach is adopted is a matter of merit which must be weighed up by a commissioner in the exercise of his or her function as a consent authority under the Court Act.

71 In 2016, in *Luxe*, I summarised the then situation with the approach in these terms (at [33]-[38], and [71]):

33 Sometimes the bench takes the initiative, and sometimes a party requests the opportunity, usually as a backup position, secondary to its primary claim that its proposal should be accepted.

34 ... the question of its appropriateness is a “discretionary exercise”, for which there is “absolutely no mandate, nor any statutory basis”.

35 The bench must be not persuaded to approve the application in its current form, but the suggested amendments must not significantly alter that proposal – they must be “minor and identifiable amendments, consistent with the

application before the court; ... they must have merit warranting consideration and being of comparatively easy scope to address” (*Ali*, at [120]).

36 They may, but not necessarily should, render the proposal before the Court acceptable to the respondent consent authority (*Benevolent*, at [67], *Ali*, at [286]).

37 The present applicant claims that the Court has established the approach as its “clear policy”, but the respondent does not concede it that status. It was, however, an approach taken with some consistency in the 2000s, and the Chief Judge was happy to say nine years ago that its consideration had evolved in the Court’s management of Class 1, and may, in appropriate cases, be seen as “part of the usual conduct of those proceedings” (*Marinkovic*, at [26]).

38 As Pain J says, it is a merit matter (*Riverstone*, at [38]). Of itself, declining to do it is, therefore, not an error of law, but doing it on the Court’s own motion could involve a denial of procedural fairness and constitute an error of law.

...

71 In applying the “amber light”, the Court is exercising a discretion to grant implicit applications for adjournment and amendment. The potential amendments must be defined with “sufficient precision”.

- 72 At around the same time as I decided *Luxe*, Moore J, in *ABAX Contracting Pty Limited v The Hills Shire Council* [2016] NSWLEC 105, expressed (at [73]-[74]), in the context of the case then before him, his concern “that exploration of such an approach might not be appropriate as such a change could not be accommodated as an amber light outcome from the present proceedings”, and determined that the changes there proposed as “necessary for such a development approach to the site were so substantial that a fresh development application would be required”.
- 73 Clearly the approach is not universally appropriate, and each case must be considered on its own facts and merits.
- 74 In the present matter I can find no error of law in the learned Commissioner’s approach to the disposition of the Class 1 appeal by way of an “amber light” approach.
- 75 In the first decision, he gave detailed explanations of his concerns with the DA before him, and provided the applicant with the opportunity to amend, in order to address those concerns.
- 76 That first decision was clearly “interim findings”, but the appellant has taken, erroneously, a “fine tooth comb” approach to it (see [51](c) above).



- 77 The Commissioner clearly indicated what was required so as not to infringe the requirement that the Court not then be asked to approve a significantly different development (see *Maxnox*, at [58]-[59]).
- 78 The amendments made in response to the adoption of the “amber light” approach were (as submitted by Bunnings, at par 40, and consistent with par [109] of the first decision – see [22] above) “constrained to the following discrete alterations:
- (1) compliance with the 20m setback,
  - (2) comprehensive landscaping of the 20m setback.
  - (3) details of signage that are relatively discrete,
  - (4) the absence of outside storage areas that can be viewed from the public domain, and
  - (5) an architectural design that provides interest and an attractive appearance from the public domain.”
- 79 The first decision, said by the Council to infect all later judgments, cannot fairly be described as either a (constructive) “refusal” or as “advice”. Nor can it be said that the later decisions suffer from any such “infection”. I also find unhelpful the Council’s attempt to compare the “amber light” approach with cases on “liberty to apply”.
- 80 I, therefore, reject the appeal brought on the “amber light” ground, and turn now to the appeal arguments concerning heritage.

### **The heritage issue**

- 81 Clause 5.10(4) of the LEP ([48] above) required the Commissioner, in terms, to consider the effect of the proposal by Bunnings on the “heritage significance” (defined in [49] above) of the former 3M Building, which had been listed as a heritage item in Sch 5 in the LEP.
- 82 Bunnings’ proposal involved complete demolition of that building, and action which would remove all heritage significance from that heritage item. However, cl 5.10(4) required a consideration by the Commissioner of what the heritage significance of the item actually was, a matter, as the respondent correctly submits (par 53), not determined, necessarily or conclusively, merely by its listing as a heritage item, albeit following a “justification” process (Council subs par 82).

- 83 Both parties appear to accept that, in carrying out the requirement of cl 5.10(4), a consideration of the objectives listed in cl 5.10(1) is required – the Council says (subs par 77) that that is the starting point, but Bunnings say (subs par 52) that it is not necessarily the starting point, but an important consideration.
- 84 In his final decision (at [71]), the learned Commissioner noted that:
- ... there is no operative clause that requires that the objectives must be taken into consideration of a development application. Again, more specific and probably more effective requirements are available in cl 5.10(4).
- 85 The Commissioner set out in his first decision the competing assessments provided by the parties' respective heritage experts, and, based on his consideration of that evidence, arrived at his own assessment of "heritage significance", using the same criteria as employed by the experts. He concluded (at [81]) that the Bunnings proposal had "little if any, heritage significance, and as such the demolition of the former 3M building can be supported".
- 86 Having conducted his "final" hearing, he found (at [77]) no new evidence which would cause him to change his "interim" view of its heritage significance.
- 87 In terms of cl 5.10(4), it is clear that the Commissioner fully understood the issues and his function. (See *Southon & Ors v Gordon Plath on behalf of the Department of Environment and Climate Change* (2010) 181 LGERA 352; [2010] NSWCCA 292, at [79].) He considered the effect of the proposal on the heritage item, and, in doing so, accorded a measure of heritage significance to that item, albeit at the lowest end of the "significance" spectrum, a question and finding of fact. He then weighed that finding against other merits of the proposal in coming to his conclusion to allow the appeal with conditions.
- 88 On the issue of the weight that, the appellant submits, should be given to the former 3M building, due to its listing in Sch 5 of the LEP, I agree with the Commissioner's final decision (at [78]):

Mr Hemmings ... submits that weight should be given to the existence of the listing of the former 3M building in Sch 5 of LEP 2015 by the council. This submission must be rejected. Clause 5.10 (or any part of LEP 2015) contains no such consideration or requirement. Clause 5.10(2)(a)(i) provides the opportunity to demolish a heritage item subject to cl 5.10(4) that requires,

before granting consent, the Court must consider the effect of the proposed development on the heritage significance of the heritage item. This assessment has been undertaken and found that the former 3M building has little if any, heritage significance.

- 89 That factual finding is not amenable to s 56A.
- 90 The appellant Council also submits that, due to the existence of cl 5.10(10) ([50] above), permitting a wider range of uses to be explored where a heritage item is conserved, the Commissioner should have considered whether any alternatives to the commercial development proposed by Bunnings, involving maintaining the former 3M building, were possible.
- 91 Since cl 5.10(10) allows for a variety of wider uses, Council submits that the Commissioner erred in taking into consideration the financial burden on the owner associated with repair or reconstruction of a heritage item as opposed to demolition. Council, however, accepts that any financial burden on an owner is at least a “permissive consideration”.
- 92 Clause 5.10(10) provides for “Conservation incentives”. It does not widen the range of mandatory considerations, as the appellant suggests.
- 93 I agree with the respondent that the feasibility of upgrading the building and finding an office tenant is a relevant financial burden on the land owner. Evidence of those expenses was actually before the Commissioner (Appeal Book, tab 15, pp502-504, and tab 16, p650).
- 94 The Commissioner weighed that evidence – again a matter of fact, not amenable to s 56A – and it was relevant to his decision. (See *Helou v Strathfield Municipal Council* (2006) 144 LGERA 322; [2006] NSWLEC 66, at [46].)
- 95 I find no error of law in the Commissioner’s consideration of the heritage issues.
- 96 I turn, therefore, to the major landscape issue, the threat to Tree 135.

### **Tree 135**

- 97 The appellant claims that the Commissioner failed to meet the requirement of legal reasonableness in the decision he made, on the basis of expert evidence,

to allow the removal of Tree 135 in the implementing of his consent to Bunnings' proposal.

98 These, again, were factual or merit considerations (see AB tab 37), and the appellant has not demonstrated any error or law on the Commissioner's part. These are questions of balancing the various relevant considerations.

99 The respondent relevantly quoted (par 68) a little of what Clarke JA said in *Randwick Municipal Council v Manousaki* (1988) 66 LGRA 330, as part of His Honour's excellent analysis at 333-334:

... On the other hand perverse or unreasonable findings of fact do not constitute errors of law ... even if the reasoning whereby a court or tribunal reached its conclusion of fact were demonstrably unsound this would not amount to an error of law.

100 The challenge on this ground also fails.

101 I turn then, lastly, to the fourth issue, the cross-appeal.

### **The Cross-Appeal**

102 I again note that, on 1st August 2017, Bunnings filed with the Court a Cross-Appeal essentially in these terms (see [11]-[12] above):

If the Court ... finds that the Commissioner erred at law in granting leave to rely upon amended plans, the Cross-Claimant cross-appeals from that part of the order ... made on 5 December 2016 (**Amended Plans Decision**) which requires the Cross-Claimant to pay costs pursuant to s97B of the [EPA Act] ...

103 I have not so found, so the issue raised in the cross-appeal requires no action.

104 The cross-appeal may and will be dismissed, with no order as to costs.

### **Costs**

105 In s 56A appeals costs follow the event (*Tanious*). The appellant will, therefore, be ordered to pay the respondent's costs of the appeal.

### **Orders**

106 The Court orders that:

- (1) The Council's appeal under s 56A is dismissed.
- (2) The Appellant is to pay the Respondent's costs of the appeal, on a party-party basis, as agreed or assessed.
- (3) The Respondent's cross-appeal is dismissed, with no order as to costs.

- (4) Exhibit R1, the Appeal Books, and the bundles of authorities may be returned.

\*\*\*\*\*

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**INDIVIDUAL EXPERT REPORT OF BRIAN McDONALD**  
**HERITAGE**  
**2 MARCH 2016**

**COURT DETAILS**

Court	Land and Environment Court of New South Wales
Class	1
Case number	10560 of 2015

**TITLE OF PROCEEDINGS**

Applicant	<b>Bunnings Properties Pty Ltd</b>
Respondent	<b>Ku-ring-gai Council</b>

**FILING DETAILS**

Filed for	<b>Bunnings Properties Pty Ltd, Applicant</b>
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**DOCUMENT**

1. Individual Expert Report of Brian McDonald, dated 2 March 2016.



planning consultants

## Statement of Heritage Evidence

Land & Environment Court of NSW Proceedings No. 10560 of 2015

Bunnings Properties Pty Ltd v Ku-ring-gai Council

Prepared on Instructions from: Norton Rose Fulbright

Prepared by: Brian McDonald

March 2016

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# 1 Introduction

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## 1.1 Commission

This statement of evidence has been prepared by Brian McDonald of DFP on instructions from Norton Rose Fulbright Solicitors acting on behalf of Bunnings Properties Pty Ltd.

## 1.2 Qualifications

I am a Heritage Architect, Urban Designer and Town Planner of DFP with the qualifications and experience as set out in **Appendix A**.

In summary, I have 49 years of experience in architecture, heritage, town planning and urban design in the public sector and private sector.

## 1.3 Uniform Civil Procedure Rules 2005

I have read Part 31 of Division 2 of the *Uniform Civil Procedure Rules 2005* and Schedule 7 of the *Uniform Civil Procedure Rules 2005*. I understand my obligations to the Court and agree to abide by the rules in Part 31 and Schedule 7.

## 1.4 Purpose of Statement

The appeal is against a deemed refusal for a development proposal comprising:

- Demolition of all existing structures;
- Tree removal/pruning;
- Bulk earthworks;
- Construction of a hardware and building supplies development;
- Ancillary outdoor shaded plant nursery, offices and café;
- Vehicular access and minor road widening;
- Car parking for 351 vehicles;
- Landscaping;
- Associated signage.

Accordingly, the purpose of this statement of evidence is to provide a heritage opinion as to: the significance of the former 3M building and its site and; whether the proposed demolition of the building and redevelopment of the site to accommodate a Bunnings Hardware and Building Supplies development will cause adverse heritage impacts.

## 1.5 Scope of Statement

This statement addresses heritage issues arising from the Amended Statement of Facts and Contentions filed with the Court on 4 December 2015;

- (1) Contention 1 (particulars a – e) Heritage Significance; and
- (2) Contention 5 (particulars a-d) Loss of Significant Vegetation.

## 1.6 Material Relied Upon

For the purposes of preparing this statement of evidence, I have reviewed documents and undertaken investigations as follows:

1. Ku-ring-gai Local Environmental Plan 2015 (LEP);
2. Planning Proposal to heritage list the site (the Heritage Planning proposal);
3. Applicable State Environmental Planning policies (SEPPs) and Regional Environmental Plans (REPs), Section 117 Directions and background planning documents;
4. Site inspections undertaken in July 2015 and February 2016;

5. Site Survey prepared by Craig and Rhodes dated 5 June 2014;
6. Architectural Plans prepared by Smith and Tzannes dated 29 and 30 October 2015;
7. Statement of Environmental Effects prepared by DFP Planning dated April 2015;
8. Heritage Impact Assessment prepared by Paul Davies dated February 2015;
9. DA Design Report by Smith and Tzannes dated February 2015;
10. Supplementary Statement of Environmental Effects by DFP Planning dated November 2015;
11. Supplementary DA Design Report by Smith and Tzannes dated November 2015;
12. Arborist Reports – rain Tree Consulting, 10 February 2015 and 2 November 2015.

### 1.7 Approach to the Heritage Issues

I understand by reference to the recent decision of Justice Craig of the Land and Environment Court (*De Angelis v Wingecarribee Shire Council* [2016] NSW LEC 1), there is a construction that the amendment to the LEP 2015 to list the site as a heritage item in Schedule 5 of the LEP, and which commenced on 1 May 2015, does not apply to the assessment of DA 0115/15.

Therefore I deal with the heritage issues in these proceedings in two ways:

1. That the site was not listed as a heritage item at the time of lodgement of DA0115/15 (8 April 2015) and the heritage listing does not apply to assessment of the DA as a result of the savings provision in Clause 1.8A of LEP 2015.
2. That the site is presently listed as a heritage item under LEP 2015.

## 2 Contention 1 – Heritage Significance

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### 2.1 The Issue

Council contends that: *The proposed demolition of the former 3M building and removal of its landscaped setting will adversely impact on the heritage significance of the building and site, which is individually listed as a heritage item in Schedule 5 of Ku-ring-gai LEP 2015.*

The following opinions are set out against the Particulars a – e.

### 2.2 Particular (a)

- 2.2.1 The former 3M building at 950 Pacific Highway, Pymble (Lot 1, DP 718718) is individually heritage listed as Heritage Item 593 in Schedule 5 of the LEP. The heritage listing extends across the entirety of the site.

#### Opinion

#### 2.2.2 Approach 1

On the interpretation that the savings provision in Clause 1.8(A) of LEP 2015 applies, the heritage status of the former 3M building and its site is a matter for consideration given weight only insofar as Section 79C(1)(a)(ii) of the Environmental Planning and Assessment Act, 1979 applies because the draft environmental planning instrument, being the heritage planning proposal, had been exhibited prior to lodgement of the DA. In these circumstances Clause 5.10 of LEP 2015 does not have statutory force but may be taken into account to provide a frame of reference only. Based on my assessment of the significance of the former 3M building and site, it should not have been the subject of a proposed amendment to LEP 2015 to include it in Schedule 5. On this construction of the heritage evidence, demolition of the building would have no adverse heritage effects on the building, the site or the area.

- 2.2.3 In considering the issues I believe it is relevant to, not only make an independent assessment of the heritage significance of the former 3M building and its site, but to also be aware of the timing of the steps the Council took to undertake a heritage assessment and to subsequently list the building and its site in Schedule 5 of Ku-ring-gai LEP 2015 on 1 May 2015.

- 2.2.4 Bunnings met with the Council's planning officers on 8 January 2013 to discuss a planning proposal to amend the Ku-ring-gai Planning Scheme Ordinance (KPSO - the operative planning instrument at that time) to permit "hardware and building supplies" on the site due to the uncertainty about the timing of gazettal of the new primary LEP. After the planning proposal was lodged by Bunnings with the Council on 15 May 2013 and recommended by planning officers to proceed to DoPE for Gate Way determination, the Council, on 27 August 2013, resolved to commission an independent assessment of the heritage significance of the 3M building and site. The Council deferred the Bunnings planning proposal pending the heritage assessment.

- 2.2.5 A heritage assessment report by Paul Davies, a recognised heritage consultant, dated 30 October 2013 was submitted to the Council (see Appendix C of this statement). It is understood that the Council did not accept the report's conclusion, quoted below:

*"In summary I can find no reasons to suggest that the building should be a heritage item or that it has any heritage value.*

*I would suggest that this building should not be heritage listed and that it does not have significance".*

This report appears as Appendix 3 in the Council business paper for 10 December 2013.



- 2.2.6 The Council commissioned a heritage assessment by John Oultram Heritage and Design in October 2013, which recommended listing of the former 3M building in the draft LEP that existed at that time. This report appears as Appendix 1 in the Council business paper for 10 December 2013.
- 2.2.7 On 20 February 2014 the Council resolved to forward Bunnings' amended planning proposal to the DoPE for a Gateway Determination. The amendments were in response to Council's resolution on 10 December 2013 to support the Bunnings planning proposal with minor amendments, none of which involved any heritage issue. Gateway approval was granted by the DoPE on 3 April 2014.
- 2.2.8 On 21 May 2014 the Heritage Division of the Office of Environment and Heritage wrote to the Council stating that there was no objection to the Bunnings planning proposal to allow for hardware and building supplies.
- 2.2.9 Concurrently, the Council proceeded to prepare its own heritage planning proposal to include the former 3M building and site as a heritage item by amendment of the KPSO (or the new primary LEP if in force). In due course the Gateway determination was obtained for the Council's heritage planning proposal on 21 July 2014 and the proposal was exhibited between 15 August and 12 September 2014. In the meantime, LEP 2015 had come into force on 2 April 2015 without the site being included in Schedule 5 as a heritage item.
- 2.2.10 Paul Davies' assessment dated 8 September 2014 found that the 3M building does not reach the thresholds of the State Heritage Inventory Criteria for listing as a heritage item. See Appendix C. I have been informed by Paul Davies that his assessment was rejected by the Council.
- 2.2.11 The 3M site has been subject to three successive LEPs in recent times: Town Centres LEP 2010; Pymble Business Park LEP January 2013 and; the current comprehensive LEP 2015. It is understood that in the studies and considerations leading to all three LEPs the heritage significance of the former 3M building, if considered at all, was not recognised in the draft and gazetted instruments. In a Council officers' report to Council dated 22 May 2012, the Council was advised that *"Recent heritage reviews of the Kuring-gai Town Centres and the northern heritage conservation area review did not identify"* the 3M site as a potential heritage item. The 3M site was not included in Schedule 5 of the Principal LEP Planning Proposal exhibited between 25 March and 6 May 2013.
- 2.2.12 LEP 2015 was amended on 1 May 2015 to include 950 Pacific Highway, Pymble (the former 3M building) as a heritage item in Schedule 5.
- 2.2.13 The development application DA0115/15 was accompanied by a heritage impact assessment by Paul Davies dated February 2015.
- 2.2.14 **Approach 2**
- If it is determined by the court that the decision of Justice Craig is not relevant in these proceedings and the present heritage listing does apply, because my assessment of the heritage values of the former 3M building and site is that it does not reach the assessment thresholds to qualify as a heritage item I believe heritage listing should not have been made. In any event, taking into consideration the provisions of Clause 5.10 of LEP 2015, demolition of the building and removal of tree T135 would, in my opinion, have no adverse heritage effects on the building, the site or the area.
- 2.2.15 I have reviewed the heritage assessment by John Oultram Heritage and Design, October 2013 and the heritage impact assessment by Paul Davies, February 2015, which was issued on 24 July 2015.

- 2.2.16 The question I address is: does the 3M building meet the assessment criteria to be listed as a heritage item? After considering the physical evidence and reviewing the documentary evidence contained in both reports I concluded that the assessment by John Oultram Heritage and Design inflates the values of the 3M building against the assessment criteria and that the significance assessment by Paul Davies is a more balanced evaluation leading me to concur with his conclusion in Section 4 of his report that.

*"I conclude that neither the building nor the site have specific or important heritage value that would justify protection by heritage listing. Consequently, I can see no heritage reason to oppose future demolition of the 3M building or redevelopment of the site."*

- 2.2.17 It is essential to have clear distinctions in judging the relativity of levels of significance. There is a tendency to focus too much on the subject in hand with insufficient regard for its value and meaning in a wider heritage context. This can lead to overstatement of the value of the item under consideration when compared with other examples of the particularly type and time.

A critical consideration in determining the significance of the former 3M building and site is raised at page 16, Section 3.1 of the Detailed Assessment of Heritage Significance by Paul Davies, which accompanied the development application, discussing the meaning of the word "important" in criterion a) which is quoted below:

*To understand this and many of the following criteria the concept of 'important' as used in the criteria needs to be considered. 'Important' is defined in the OED as 'having great significance carrying with it great or serious consequences, weighty, momentous.'*

He goes on to say that:

*a place must demonstrate values that are well above the average or typical and that in terms of assessing value it has to be "great value" or "momentous value".*

To be sure that local usage also applies, I refer to the Macquarie Dictionary, which defines "important" in similar terms:

*"of much significance or consequence.... Prominent....of considerable influence or authority, as a person, position, etc."*

- 2.2.18 It is also important to note that, being a representative (criterion f) or a rare (criterion g) example are not in themselves heritage values unless there is already a satisfaction of one of the other five criteria.

This approach aligns with the approach taken by other heritage practitioners, myself included, whereby criterion f) (rarity) and criterion g) (representativeness) are qualifiers of values identified under the substantive criteria a) to e).

- 2.2.19 My assessment against the significance criteria is set out below.

- 2.2.20 **Criterion a):** *An item is **important** in the course, or pattern, of NSW's cultural or natural history (or the cultural history of the local area).*

I see no persuasive case for the property to have significance for historical reasons. The building itself is an unremarkable five storey office building at the time of construction in 1967. It is not the first high rise commercial building in Ku-ring-gai because it is not high rise and therefore not distinctive due to its height. Nor does its curved form make it particularly distinctive. Other more impressive and larger examples of this form predate the former 3M building such as Qantas House (1957) (State Heritage Item), the AMP Building (1962), which is important because it was the first building in Sydney to break the 150 ft height limit, which had stood from about 1912, and the Ryde Council office building, Devlin Street, North Ryde (completed in 1964).

The fact that the site was previously occupied by a gas works is not physically reflected today. This is not a matter that would warrant retention of a building erected after the gas works activity ceased.

- 2.2.21 **Criterion b):** *An item has **strong** or **special** associations with the life or works of a person, or group of persons, of **importance** in NSW's cultural or natural history (or the cultural history of the local area).*

There is no strong evidence that the 3M Company had a "strong or special" association with the Ku-ring-gai local government area and played an important role in the cultural or natural history of the area. If this association was to justify listing of the 3M building, it would equally apply to many other businesses throughout the local government area, who have since departed.

Similarly, the association with the architectural firm Hansen Todd does not elevate it to warrant inclusion under this criterion. It was not recognised at the time it was built, or after, as an important building whereas others designed by the firm have been seen as significant.

- 2.2.22 **Criterion c):** *An item is **important** in demonstrating aesthetic characteristics and/or a **high degree** of creative or technical achievement in NSW (or the local area).*

The Council's report appears to confuse the fact that it is possibly the first or one of the first of its type with its actual aesthetic and technical characteristics. I do not agree that heritage status is achieved by the Council's heritage assessment that: "The 3M building is an example of a late Twentieth Century International style building set in park like grounds" or that "it was purpose designed headquarters for company".

These reasons would apply to many other office developments. Nothing about the architecture or the setting makes the building important. The setting does not demonstrate an intentional landscape design. It represents part retained forest and part cleared and grassed area, which it is understood was left relatively unchanged to allow for a future additional building. The intention to expand the activities of the 3M Company is indicated by a preliminary sketch showing three rectangular buildings arranged along the Pacific Highway frontage, which is reproduced from "Building, Lighting, Engineering", June 1966 at page 8 of the heritage impact statement by Paul Davies. A Landscape Concept Plan by Landscan dated May 1985 shows the existing 3M building with a building identified as 3M1 to the north where

T135 is located. A building is also identified as 3M2 to the south west and a formal landscape layout. A copy of this drawing is attached at Appendix B.

- 2.2.23 The curved form of the final design of the building is a logical reflection of the shape of the site boundary resulting from roadworks at the intersection. The 3M building was entered on the Australian Institute of Architects Register of Significant Architecture No 4703567. According to information in register entry, the original concept by Hansen Todd, the architects, was for a number of rectangular buildings. The 3M Company referred the design to its American advisers, who suggested the curved form of what appears to have been intended as the first of a group of buildings at the curved corner of the site. This design was then developed by Hansen Todd. Note: The AIA Register has no statutory status and the evaluation criteria do not correspond to the State Heritage assessment criteria. This is not considered to be exceptional in any way. The former 3M building is not an exemplar of the International style. The strong emphasis of the expressed concrete columns on the façade is contrary to the more distinguishing horizontality and sheer wall character of the earlier examples recognised by heritage listing such as the Qantas building at Chifley Square, Sydney (1957) and 17 Wylde Street Potts Point (1961).



Figure 1: View of the former 3M building from the south- west showing the strongly expressed verticality of the external columns. This aspect of the building is similar to much larger and more prominent Civic Centre building at Devlin Street Ryde, which is not a heritage item. Source: Brian McDonald February 2016

- 2.2.24 **Criterion d):** An item has **strong** or **special** association with a particular community or cultural group in NSW (or the local area).

The Council's heritage assessment responds to criterion d) with an observation that *"the place would have special association for former employees of the company and particularly those employed at the site"*.

This suggestion does not establish *"strong or special association with a particular community or cultural group ...for social, cultural or spiritual reasons"*.

- 2.2.25 **Criterion e):** An item has the potential to yield information that will contribute to an understanding of NSW's cultural or natural history (or cultural or natural history of the local area).

The Council's heritage assessment raises the possibility of underground remains relating to the former gasworks activity on the site.



This "possibility" is not reason to elevate the building or the site to the threshold for criterion e) Research Potential. The gasworks structures were at the south-western extremity of the subject site. The existing carpark structure was designed to sit over the ground level following removal of the gasworks structures. The subject development proposal does not disturb the ground below the existing carpark floor slab, making it highly unlikely that any archaeological resources (if remaining) will be encountered. Should it be found that archaeological investigations are warranted, the archaeological provisions of the NSW Heritage Act, 1977 are available to manage the process prior to commencement of construction.

**2.2.26 Criterion f):** *An item possesses uncommon, rare or endangered aspects of NSW's cultural or natural history (or cultural or natural history of the local area).*

The Council's report bases qualification of the item under criterion f) Rarity on the contention that *"further research is required to confirm this, the building is likely the first international styled, high rise building in Ku-ring-gai"*. This statement certainly does not qualify the building as *"uncommon, rare or endangered"*.

Firstly, the building is not high rise and secondly, the fact that it has some historic value as an early modern commercial development within the area, does not mean that it meets the thresholds for criteria a) to e).

The Council's heritage assessment includes a comparative analysis. The curved plan form examples chosen for comparison are much larger, mostly earlier and arguably of more architectural merit 17 Wylde Street (1951) is a heritage item, Qantas House (1957) is a State Heritage Item, the AMP building, Circular Quay (1962) is a heritage item. It is difficult to understand why Australia Square building is included for comparison, except that it is round and of the same period. It is arguably of heritage value because it won the Sulman Award and was a ground breaking development in the CBD.

**2.2.27 Criterion g):** *An item is important in demonstrating the principal characteristics of a class of NSW's cultural or natural history (or cultural or natural history of the local area).*

Again, without qualifications to meet criteria a) to e), the former 3M building does not rise to a level of importance in demonstrating the principal characteristics, being, in my opinion, a poor representative of 1960s international style commercial buildings. It cannot warrant heritage listing status under criterion g) alone.

**2.2.28** The Council's heritage assessment, under criterion c) states that *"The building is a well-known local landmark set on a prominent site at the junction"*.



*Figure 2: View towards former 3M building from Pacific Highway looking north from south east corner of the intersection. Note: the building does not present as 5 storeys or as a prominent landmark. The screening trees will substantially remain and be enhanced in the proposed development. Source: Brian McDonald February 2016*



*Figure 3 View towards former 3M building from Pacific Highway looking west from north east corner of the intersection. Note: the building does not present as 5 storeys or as a prominent landmark. The screening trees will substantially remain and be enhanced in the proposed development. Source: Brian McDonald February 2016*



*Figure 4: View towards former 3M building from Pacific Highway from the opposite side of Pacific highway. Note: the building does not present as 5 storeys or as a prominent landmark. The screening trees will substantially remain and be enhanced in the proposed development. Source: Brian McDonald February 2016*



*Figure 5: View towards former 3M building to the south from the opposite side of Pacific Highway. Note: the building presents as 3 storeys from this viewpoint but not as a prominent landmark. The screening trees will substantially remain and be enhanced in the proposed development. Source: Brian McDonald February 2016*





Figure 6: View towards former 3M building from opposite side Pacific Highway from a point further north. Note: the building does not present as 3 storeys from this point but not as a prominent landmark. The screening trees will substantially remain and be enhanced in the proposed development. Source: Brian McDonald February 2016

2.2.29 It cannot be considered a landmark simply because it stands at the busy intersection of Pacific Highway and Ryde Road. Its five storey height and curved form are not attributes of a landmark. Because the building is set down into the site relative to the street boundaries, where it can be glimpsed between the trees around the perimeter, only the top two storeys are evident as demonstrated at the major road intersection by Figures 2 – 4 and three storeys through the trees from further north along the highway in Figures 5 and 6. I acknowledge that this was not always the case because I remember the building from an earlier time when the vegetation was not as dense as it is now. Even so, as Paul Davies notes in the heritage impact statement, *"not all landmarks are of heritage significance"*. Despite the fact that I don't consider the former 3M building to be a landmark, landmark status would not be a reason for heritage listing given that I do not believe it qualifies as a heritage item against all other criteria.

## 2.3 Particular (b)

2.3.1 The proposed demolition of the former 3M building and general redevelopment of the overall site, including early landscaped setting of the 3M building is contrary to two of the particular aims of the LEP, as set out in sections 2(a) and 2(f) of Clause 1.2 of the LEP, which are as follows:

- (a) *to guide the future development of land and the management of environmental, social, economic, heritage and cultural resources within Ku-ring-gai.*
- (f) *to recognise, protect and conserve Ku-ring-gai's indigenous and non-indigenous cultural heritage.*

### Opinion

2.3.2 The foregoing background to the Bunnings development proposal, discussion of the Council's consultants heritage assessment and my own heritage significance assessment leads me to the conclusion that the former 3M building and its site does not meet the criteria for listing as a heritage item. It follows from this conclusion that, to the extent that the building is of any heritage interest, its loss would not be in conflict with the quoted aims of LEP 2015. The low level of heritage interest can be appropriately managed by archival recording and interpretation on the site.

## 2.4 Particular (c)

- 2.4.1 The proposed demolition of the former 3M building and general redevelopment of the overall site, including early landscaped setting of the 3M building is contrary to two of the particular objectives of Clause 5.10 (10) of the LEP, as set out in sections 1(a) and 1(b) of the LEP, which are as follows:

- (a) *to conserve the environmental heritage of Ku-ring-gai.*
- (b) *to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views.*

### Opinion

- 2.4.2 The Council's desire to use heritage listing of the former 3M building as a means to frustrate a permissible development on the subject site debases the cause of true heritage conservation. Retention of the building will not contribute in any significant manner to *"conserve the environmental heritage of Ku-ring-gai."*
- 2.4.3 It follows that the setting, which is lacking in any evidence of intentional landscape design, does not demonstrate any of the activities of 3M on the site and therefore has no associated heritage significance. The question of tree retention, discussed later is more related to scenic and ecological values than heritage values.
- 2.4.4 The former 3M building and site are not located in a heritage conservation area or in the vicinity of any heritage items.

## 2.5 Particular (d)

- 2.5.1 The proposed demolition of the former 3M building and general redevelopment of the overall site, including early landscaped setting is contrary to the particular requirement of Clause 5.10(4) of the LEP, which is as follows:

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

### Opinion

- 2.5.2 Sub clause 5.10(4) sets out the consideration that the consent authority must take. To the extent that it has any bearing on the process a consent authority might follow in meeting its obligations under the sub-clause, it is appropriate that a heritage assessment and/or a heritage impact statement would assist. The applicant provided an opinion on the heritage significance of the 3M building and site by Paul Davies dated 30 October 2013 as requested and an additional submission by Paul Davies dated 8 September 2014. (See Appendix C of this statement). The Council did not accept the conclusions of these assessments, which were that the former 3M building is not worthy of heritage listing and whatever heritage values it might possess would be greatly diminished by works required to bring the building up to present day building code and fire safety compliance and adaptation to use other than commercial offices.
- 2.5.3 Clause 5.10(4) does not oblige the consent authority to rule out demolition as an option when weighing a range of factors, including the level of heritage significance of the item in question. Nor does any other provision in LEP 2015. Clause 5.10(2)(a) of LEP 2015 lists demolition of a heritage item as an activity that requires development consent.
- 2.5.4 My assessment leads me to conclude that demolition of the former 3M building would have no adverse effect on the heritage significance of the item or the area (which is not in a conservation area and is not in the vicinity of heritage items). For the reasons given elsewhere in this statement I consider the former 3M building fails to meet the established assessment criteria for heritage listing.

- 2.5.5 As discussed earlier, my independent assessment of the physical and documentary evidence lead me to the conclusion that the former 3M building does not possess significance to warrant heritage listing, contrary to the findings of the report commissioned directly by the Council.

## 2.6 Particular (e)

- 2.6.1 The proposed demolition of the former 3M building and general redevelopment of the overall site, including early landscaped setting failed to take into account the imminent heritage listing of the Site in the LEP. Accordingly, there is no evidence of any analysis of the potential to take advantage of the conservation incentives in Clause 5.10(10) of the LEP when the development was being formulated, as follows:

*The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that:*

- (a) The conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent; and*
- (b) The proposed development is in accordance with a heritage management document that has been approved by the consent authority; and*
- (c) The consent to the proposed development would require that all necessary conservation work identified in the heritage conservation management document is carried out; and*
- (d) The proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance; and*
- (e) The proposed development would not have any significant adverse effect on the amenity of the surrounding area.*

## Opinion

- 2.6.2 The first point to be made is that the applicant's planner made the necessary due diligence inquiries about any heritage issues relating to the site. These inquiries found that, while the 3M building may have been looked at in the many heritage studies, including studies and considerations for the three most recent LEPs affecting the site, at no stage did the Council show any interest in heritage listing the 3M building or its site until August 2013. In these circumstances the earlier stages of the project understandably did not analyse heritage values and did not need to consider Clause 5.10(10) when the project was being formulated with no knowledge that it would be a heritage item and therefore no sense in looking at Cl 5.10(10).
- 2.6.3 When the heritage issue was raised by the Council a heritage report by Paul Davies assessed the heritage significance of the former 3M building finding that it did not qualify as a heritage item. On 8 September 2014 Paul Davies wrote to the Council providing an opinion on the level of significance of the former 3M building and an overview of the work necessary to bring the building up to current Building Code and Fire Safety standards and a discussion on adaptability options. A copy is attached at Appendix C.
- 2.6.4 The list of works that would be necessary is not exhaustive – a thorough assessment would be a large task. However, the extent of the work items covered in the review is considerable and would result in almost all internal finishes, building services and fire stairs and lifts being replaced as well as external changes to the building to achieve sustainability requirements such as reglazing and sun protection.

- 2.6.5 As an experienced architect, I can see that the changes to the building would be so great that it would present in an entirely different manner, losing any architectural integrity it currently possesses.
- 2.6.6 The building is certainly not adaptable for Bunnings' purposes for use as a hardware and building materials centre. Satisfaction of this requirement of the Council would have the effect of forcing abandonment of the Bunnings project. Uses that might be considered, such as business premises and office premises, are permissible in the zone anyway, and would not trigger the need to use Clause 5.10(10). The building form and configuration is not suitable for any of the other uses permissible. Evidence by others will show that office and commercial uses have moved from the precinct to more attractive locations resulting in a high local floor space vacancy rate.
- 2.6.7 A hotel or motel accommodation is a permissible use. Residential accommodation is not a permissible use and would invoke the application of Clause 5.10(10). Even more physical change than for an office upgrade would be necessary for a hotel, motel or residential use.

In addition to the works required to upgrade the building to meet compliance requirements, residential conversion would involve:

- a high degree of compartmentation of the floor plates;
- corridors and most likely at least one additional fire stair;
- external balconies, which would not fit with the existing closely spaced vertical columns;
- residential accommodation that would be compromised by the constraints of the existing building configuration, structure and fabric.

The extent of physical change would be so great that the building could no longer be interpreted as a former office building and the integrity of the original design would be lost.



### 3 Contention 5 – Loss of Significant Vegetation

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#### 3.1 The Issue

Council contends that: *the development will result in the loss of significant vegetation on the site.*

The following opinions are set out against the Particulars a – d.

#### 3.2 Particular (a)

- 3.2.1 Council contends that: *The proposed development will result in the removal of a Eucalyptus saligna (Sydney Blue Gum) known as T135, which forms part of the Blue Gum High Forest Critically Endangered Ecological Community, has been identified as having high significance, good overall health and condition and has visual amenity and significance to the Site and in particular the heritage item.*

##### Opinion

- 3.2.2 My evidence is confined to the landscape and visual value of T 135 and its relationship to the building. Arboricultural evidence about its condition, relationship to the Blue Gum High Forest Critically Endangered Ecological Community, biodiversity values is provided by other experts.
- 3.2.3 I have viewed tree T135 on a recent site inspection. It is evident from the undeveloped nature of the cleared grass slope and absence of any intentional landscape design that the 3M Company chose to retain it on a part of the site that could have accommodated additional buildings. Refer to paragraph 2.2.20 of this statement and Appendix B. This part of the site is an attractive informal landscape of no particular distinction. Significantly, T135 pre-dates the 3M development and has no direct association with the 3M Company and relationship to the architecture of the building.
- 3.2.4 The arborist's report by rain Tree consulting rates T135 as having good health and vigour, a landscape significance rating of 2 (very high) and a medium Useful Life Expectancy (15 – 40 years).
- 3.2.5 Trees T91, T120, T150, and T191 are identified as Eucalyptus saligna (Sydney Blue Gum) generally in good condition. T120 and T150 will be retained in the development. They are both located amongst other trees contributing to the density of the landscaping around the proposed building. T91 is to be removed. The Council has not raised an issue about its removal.
- 3.2.6 T135 is an isolated specimen which can be seen from within the site but does not make any notable contribution to the tree canopy continuity viewed from outside the site. I do not see this tree as having heritage significance, certainly not derived from its proximity to the former 3M building. Therefore the relevant considerations are in regard to ecology and landscape values.
- 3.2.7 With regard to ecological considerations about remnant Blue Gum Forest, T135 is an isolated specimen – it is not part of a forest. With regard to landscape values, if T135 were to be removed its absence would not be discernible from the public domain.





Figure 7: View of T135 from the south. Source: Brian McDonald, February 2016

### 3.3 Particular (b)

- 3.3.1 The removal of Tree T135 is inconsistent with the objective of Clause 5.9 of LEP 2015, which seeks *"to preserve the amenity of the area, including biodiversity values, through the preservation of trees and other vegetation."*

#### Opinion

- 3.3.2 The contribution of a single tree, T135, to biodiversity values when isolated from the remnant forest areas of the site is not likely to be critical. Although it is an attractive tree to look at, it is at present of limited amenity value on a piece of land that has not been maintained and does not serve any current occupancy of the site.

### 3.4 Particular (c)

- 3.4.1 The removal of Tree T135 is inconsistent with the objectives of Part 13.1 of DCP 2015 in that it does not *"Recognise, protect and enhance the aesthetic and heritage values of trees"* or *"Secure and maintain local character and amenity."*

#### Opinion

- 3.4.2 As noted above, T135 does not visually contribute to the local character outside the site. It does have aesthetic value as an isolated specimen within the site but it does not have heritage value derived from its proximity to the former 3M building, which in my opinion does not qualify as a heritage item, in any event. Given the current zoning of the site it is not realistic to have an expectation that a relatively isolated tree in the centre of site could be retained.

### 3.5 Particular (d)

- 3.5.1 The removal of Tree T135 is inconsistent with the objectives of Part 20E.3 of DCP 2015 in that it does not "*Retain and conserve the significance of a Heritage Item in its setting*" or "*Retain and conserve the significant garden elements and structures of Heritage Items and to retain an appropriate garden setting.*"

#### Opinion

- 3.5.2 As previously stated, I do not consider the former 3M building to have heritage value, notwithstanding its present heritage listing. The building does not have an intentionally designed garden setting. It is situated in a setting of remnant forest, partly cleared land with lawn and isolated trees and paved car park. These components have no heritage values.

## 4 Conclusion

- 4.1 This statement of evidence has taken into account two scenarios with regard to whether the former 3M building and site had statutory heritage listing at the time of lodgement of the application for the Bunnings development.
- 4.2 Approach 1 is based on the determination by Justice Craig in *De Angelis v Wingecarribee*, meaning that the savings provision of Clause 1.8A of LEP 2015 applies such that the development application is to be assessed on the basis that the site is not a heritage item, but only the subject of a draft heritage planning proposal. In this circumstance, the heritage provisions of the LEP have the weight of matters for consideration only. My conclusion that the former 3M building and site do not reach any of the thresholds of the heritage assessment criteria means that there should be no impediment to demolition of the building or removal of tree T135 on heritage grounds.
- 4.3 Approach 2 is based on the assumption that, if it is determined that the savings provisions of Clause 1.8A of LEP 2015 do not apply, would demolition of the former 3M building and tree T135 result in any adverse effects on the heritage significance of the heritage item or the area? It is noted that the site is not in a conservation area or in the vicinity of other heritage items.
- 4.4 Demolition is not prohibited by LEP 2015. Indeed the possibility of demolition is anticipated by 5.10(2)(a) by requiring development consent for:
- (a) **demolishing** or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance):
    - (i) **a heritage item,**
    - (ii) **an Aboriginal object,**
    - (iii) **a building, work, relic or tree within a heritage conservation area,**
- 4.5 In my opinion, the former 3M building and site do not warrant listing as a heritage item in Schedule 5 of LEP 2015. In this statement of evidence I have set out my reasons for concluding that the former 3M building and site do not meet the assessment thresholds and that therefore the listing of the item is based on a flawed heritage assessment. Much rests on the interpretation of the words "important", "strong", "special" and "high degree" used in the significance assessment criteria. In my opinion, neither the characteristics of the building or its historic associations fall within these descriptions.
- 4.6 Although the *Eucalyptus saligna* (Sydney Blue Gum) is an attractive and healthy tree T135, it does not warrant retention on heritage grounds. It pre-dates the existing development of the site and there is no connection with the building or the site planning in the way an intentional and integrated landscape design would have a connection.
- 4.7 To conclude, having assessed the building and site as well as the surrounding urban context, I do not believe that the proposed development for Bunnings should be prevented by retention of the former 3M building and the *Eucalyptus saligna* on heritage grounds, whichever interpretation of the applicability of the savings provisions in LEP 2015 Clause 1.8A is taken.
- 4.8 In arriving at this view, I have not turned my mind to the merits of the proposed development because, if it is agreed that the former 3M building and site are not worthy of retention, no heritage issues need to be considered in assessing the proposal.

## Appendix A: CV

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planning consultants

## BRIAN McDONALD

### Professional Experience

#### Education & Professional Status

Registered Architect in NSW 1966 (No. 2545)

B. Arch. (Hons), University of NSW

NSW Board of Architects Medallion

M. Sc. (Hons), Urban Planning, Edinburgh University

OHS General Induction for Construction Work in NSW (No. 29698)

Examiner, NSW Board of Architects

Fellow of the Australian Institute of Architects

Member Planning Institute of Australia

Member Hunters Hill Council Conservation Advisory Panel

Member Independent Assessment Panel, Manly Municipal Council

Member Development Approvals Panel, Mosman Municipal Council

Member Joint Regional Planning Panel – Sydney East representing Hunter's Hill, Leichhardt and Auburn Councils

Member St George Design Review Panel

#### Professional History

Principal Urban Designer, DFP Planning from February 2016

Director, CCG Architects Pty Ltd / CCG Architects Pty Ltd 2010-2015

Director, HBO+EMTB Heritage Pty Ltd 2003-2010

Managing Director, Brian McDonald + Associates Pty Ltd 1984-2003

Associate Director and Director, Gazzard and Partners Pty Ltd 1982-1984

Government Architects Representative, NSW Heritage Council 1978-1981

Deputy Member, Historic Houses Trust of NSW

Senior Architect, Government Architects Branch, NSW Department of Public Works 1969-1977

Architect, Government Architects Branch, NSW Department of Public Works 1966-1969

Trainee architect, Government Architects Branch, NSW Department of Public Works 1961-1965

Founding Chairman, National Trust (NSW) Urban Conservation Committee

Member National Trust (NSW) Historic Buildings Committee (former)

Member Australian Planning Institute, NSW Division Committee (former)



## Profile

Brian has 30 years of experience in private practice working at director level and 20 years public sector experience at high levels of responsibility and leadership. His qualifications and experience cover architectural practice, urban planning and design and heritage conservation. He has a long standing interest in study of places for human habitation, how they work and how they can work better. His multi-disciplinary background is applied to a thorough appreciation of context as the foundation for creative place making.

Brian has worked on project establishment and urban planning feasibility analyses to establish the opportunities and constraints based on context, played a key role in negotiation of feasible outcomes for major city developments and green field education campus sites. He also has a strong interest in the challenge of adapting older buildings to new compatible uses and to counterpoint fine historic architecture with quality contemporary design. He believes the adaptation of older buildings can make a significant contribution to securing a sustainable future. His commitment to heritage conservation and urban design is balanced by a keen appreciation of contemporary architectural practice, building technology and engineering services are reinforced by appreciation of the broader issues of place making and land use.

Brian has extensive experience as a consultant to federal, state and local government with an understanding of the regulatory framework of local government planning and environment approval processes. The width and depth of his experience over three disciplines is recognised by his appointment to Manly Council's and Mosman Council's Independent Hearing and Assessment Panel, St George Design Review Panel and also by appointment to represent Hunters Hill and Leichhardt Councils on the Joint Regional Planning Panel, Sydney East.

## Key Experience

### Planning and Heritage Studies

- Lord Howe Island: Planning and Building Code Review
- Martin Place Civic Design Study
- Mosman Urban Design Study and draft DCP for Residential Zones
- Armidale Civic Centre Precinct Planning Study
- Hyde Park Plan of Management - Heritage Report 2006
- Pittwater and Barrenjoey Peninsula Heritage Study
- Singleton and Jerry's Plain Conservation Areas Study and Draft Development Control Plan
- Fenwick's Tug Boat Site, Balmain Development Control Plan for Leichhardt Council
- Leichhardt Heritage Study
- Maitland Conservation Area Study and Outline for DCP
- Parramatta Park Historic Landscape Study
- Parramatta Park Historic Buildings and Monuments Study
- Marrickville Historic Retail Centres Study and Draft Development Control Plan
- Brigidine Site Randwick Medium Density Master Plan for NSW Dept of Housing
- Old Government Farm Site, Castle Hill Heritage Study & Master Plan
- Central Sydney Heritage Inventory Review: Pilot Study of 40 Interwar Period buildings and 40 early Twentieth Century buildings
- Harris Park: Review of planning controls and heritage constraints for Elizabeth Farm visual curtilage for Parramatta Council
- Conservation Areas Study for Leichhardt Council
- Building Typologies Study and design guidelines for alterations and additions for Leichhardt Council
- Building Typologies Study, design guidelines for alterations and additions and draft DCP sections for Marrickville Council

- Northern Sydney Rail Link – Concept Plan – Urban Design component
- 363 George Street Redevelopment, Sydney – heritage architect – negotiating heritage outcomes and conservation of former warehouses 22 – 26 York Street
- Scots Church and Assembly Hall, York Street Sydney – established heritage and urban design parameters, negotiating with consent authorities, jury member for design excellence competition, heritage architect for duration of project.

#### **Advisory and Expert Witness Services**

Town planning, architectural, heritage conservation services to local government include:

- Development application assessments,
- Strategic advice
- Urban design studies
- Design based development controls
- Expert witness in the Land and Environment Court
- Membership of advisory and approvals panels

Councils for which these services have been provided, include:

- |                 |                  |                |
|-----------------|------------------|----------------|
| • Hunter's Hill | • Leichhardt     | • Mosman       |
| • Manly         | • City of Sydney | • Lane Cove    |
| • Pittwater     | • Warringah      | • North Sydney |
| • Woollahra     | • Waverly        | • Burwood      |
| • Ku-ring-gai   | • Wollongong     | • Sutherland   |
| • Botany        | • Parramatta     | • Marrickville |

#### **Major architectural and master planning projects – selected examples**

- Nepean College of Advanced Education master plan and stage 1 for 600 students (now part of UWS)
- Milperra College of Advanced Education master plan and stage 1 for 600 students (now part of UWS)
- Sydney Water Board Illawarra Headquarters Building Coniston Wollongong
- Drummond College Stage 3 residential, Dining Hall and Principal's Residence, University of New England
- Gosford Court House
- Broken Hill Magistrate's Court
- Retreat and Spirituality Centre for the Sisters of St Joseph, South Kincumber
- Conversion of Naremburn Convent to apartments for the Sisters of St Joseph
- Adaptive re-use of St Leonards Park Grandstand to Planet X Youth Centre for North Sydney Council (National Trust/Energy Australia award for adaptive re-use)
- Australian Catholic University new chapel, North Sydney Campus.
- Liverpool Court House upgrade and additions.

## **Appendix B: Landscape Concept Plan, May 1985**





CRI  
CUSTOM RESOURCES  
INTERNATIONAL

· LANDSCAPE CONCEPT PLAN ·  
· CRI - 3M PROJECT PYMBLE ·

LANDSCAN



may 1985

## **Appendix C: Letters to Council from Paul Davies dated 30 October 2013 and 8 September 2014**

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PTY LTD  
ARCHITECTS  
HERITAGE CONSULTANTS

30<sup>th</sup> October 2013

Mr P Drew  
Development Approvals Manager  
Bunnings Group Limited  
11 Shirley Street, Rosehill NSW 2142

Dear Phil

Re 3M Building

I write to set out my opinion on the potential heritage values of the 3M Building at Pymble. As you are aware we commissioned a site history (prepared by Nicholas Jackson, historian, at our request) in order to establish if there are any aspects of the building, the site or the history of the site development that would justify heritage values being established for the site and if those values were sufficient for the building or site to be considered for protection by heritage listing.

I conclude that neither the building nor site have specific heritage value that would justify protection by heritage listing. Consequently I can see no reason to oppose future demolition of the 3M building or redevelopment of the site for heritage grounds.

In considering the potential heritage values of a place there are guidelines established by the NSW Heritage Council on how to determine whether a particular place meets the thresholds of heritage value that would result in a heritage listing. These apply to individual heritage items and to places within conservation areas. The site is not within or near a conservation area so it is the considerations under heritage items that needs to be considered.

The intent of the guidelines is to establish a level of consistency in approach to heritage listing.

More modern buildings can be quite hard to assess as often they are not within an understanding of heritage value that can be achieved with a greater historical perspective, however, buildings from the mid to late twentieth century are being placed on heritage registers and there is a reasonable understanding of the values that can be understood to achieve this.

For a building to be a heritage item it needs to demonstrate values that are beyond the normal, that is it is not sufficient for a place to be say a good example of a style, but rather it has to demonstrate excellence, innovation, a significant departure from the norm, an association with someone or a group that is important, perhaps the work of a significant architect that demonstrates important aspects of their work, etc.

Firstly there needs to be a consideration of what was previously on the site and if there are remnants or elements remaining that are significant in relation to past uses.



The site was in part a gasholder that was significant, but this was completely removed for the construction of the current building. While this is historically of interest the site no longer demonstrates any aspect of its use or development prior to the 3M building construction. There are no grounds to heritage list the building from earlier development or use.

The history of the 3M building is of some interest as the company planned for expansion, however the proposals for site development is not outstanding or distinctive.

The architects were Hanson Todd who was a well-known architectural firm in Sydney. Hanson won a Sulman award for his housing and Todd became associated with the completion of the Opera House around the time of the 3M building construction.

There is no suggestion that the 3M building is an important part of the work of that firm or that the building was particularly innovative. Its curve form is interesting but its use of materials and its construction technique were reasonably standard for the time.

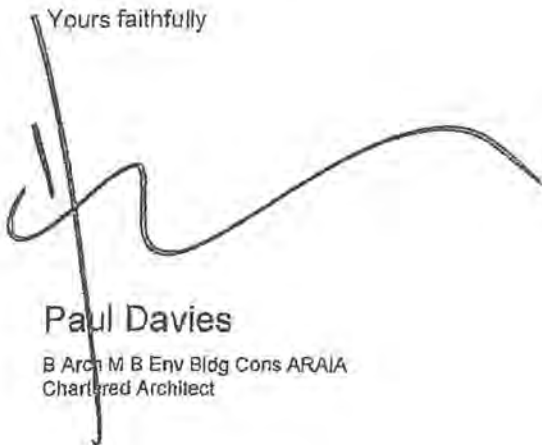
It is also important to consider if the building has been recognised by other bodies such as the Institute of Architects in their register of significant twentieth century buildings and it is not. This would not be because it has not been a building that would be considered as the work of Hanson and Todd would have been examined in that process but rather that the building, which is also visually prominent, is not an important twentieth century building.

It is also noted in the history that the interior of the building has been refitted, as would be expected so that there is little of the early fitout that remains.

In summary I can find no reasons to suggest that the building should be a heritage item or that it has any heritage value.

I would suggest that this building should not be heritage listed and that it does not have significance.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Paul Davies', written over a vertical line that extends from the signature down to the printed name.

**Paul Davies**

B Arch M B Env Bldg Cons ARAIA  
Chartered Architect



PTY LTD  
ARCHITECTS  
HERITAGE CONSULTANTS

8<sup>th</sup> September 2014

The General Manager  
Kuring-gai Council  
Council Offices  
Gordon NSW

Dear Sir,

Re    **Former 3M Building Pymble – Proposed Heritage Listing**

We write on behalf of Bunnings, the owner of the site, to object to the proposed listing of the former 3M building at Pymble. We have previously made a submission to council related to this building setting out a heritage assessment that concluded heritage listing. It is attached by way of reference and for completeness.

We do not intend to reiterate the contents of the report at this point but remain of the conclusion that the building and site should not be heritage listed.

We also note that our assessment varies from the one council commissioned and having had the opportunity to read and consider that report we are of the view that its conclusions are not well founded and that the assessments contained within that report are not correct or valid, even though they may be the personal opinion of the author.

We wish to make some other observations about the building and site that have not been previously made and which look to the outcome of a potential heritage listing for the place and how heritage values will be impacted as the building would (in that scenario) move forward. These comments are based on the assumption that council proceeds with the listing process and the building and site become listed, even though that is not our view on what should occur.

#### OUTCOMES OF POTENTIAL HERITAGE LISTING

If the building and site are listed, presumably the listing will affect the whole of the site and the building fabric.

#### THE BUILDING

We know that parts of the building have been refitted over time and those changes we would assume would be generally agreed as not being significant.

If the building is listed we also assume council would intend that it be retained and has some ongoing use. For this to happen the building will require significant upgrade as the structure and fitout and façade elements are now some 60 years old. This would need to be explored in detail, but this overview provides the most likely scenario regarding the building.

There will be statutory requirements for the building to comply with the BCA and in particular DDA requirements. This will inevitably involve the refitting of all bathrooms, adding equitable access facilities throughout the building, enlarging door openings, providing graded access, etc., to achieve compliance. This will be required as the extent of refit of the building would need to be viable to compete in the commercial market place (that is as there is significant competition and around 12,000m<sup>2</sup> of currently vacant office space in the vicinity). This is in addition to having to satisfy environmental and other compliance requirements that will be extensive.

The building will require new complying lifts and lift cars, they will need to be enlarged to accommodate DDA requirements and will require faster modern controls and operation. It is most likely that the lift shafts will be demolished and new lifts and infrastructure installed.

The building will require complying finishes throughout that will involve the removal of many of the existing finishes in public areas as they are not fire rated, slip resistant or generally complying to code requirements.

The building will require façade rejuvenation. The extent of this work is not known, however the pre-cast panels have aged and it appears will require upgrade, recoating or similar.

Glazing will not comply with current codes and will have to be replaced with new complying window units that achieve thermal performance requirements.

It is probably (but not tested) that windows will require sun shading to the west to achieve environmental objectives. This will significantly change the façade appearance.

All services are out of date and will require replacement.

Air conditioning will require replacement with new plant.

All ceilings will need to be replaced, lighting will be replaced, etc.

Fire stairs will need to be replaced as the stair codes have been changed and no stairs in the building now comply with the BCA. This will also involve removing the stair shafts to enlarge them.

In summary, internally the building will retain almost no elements of its 1960s design and form.

Externally the building shape would remain but with new glazing, sunshading and new façade treatments the building will present very differently.

Most of these items are not matters of choice but are required under council and government codes and are mandatory.

#### THE SITE

In addition Council have zoned the site for a much higher density including floor space (3.5:1) and height (32.5 metres). This compares to the quite small present floor space and height.

The current building occupies a small part of the site and relatively little floor space. It has to be presumed that Council anticipates new development on the site of some form given the up scaling of development potential. This would either be an extension to the existing building or separate development on the site. Given the location of trees site development locations are limited but are likely to have an impact on the setting of the existing building. Parking is also inadequate and will require major upgrades.

#### USE

A further problem is the use of the building. While one of the arguments for its heritage value is that it was one of the early commercial buildings of any scale in Kuring-gai, it is now a building that is struggling to find a commercial use. That is reflected in the abandonment of the building by the 3M Company. It could reasonably be assumed that if the building had a viable economic life or was in a suitable location for the future that 3M would have retained the building, but they did not.

The zoning allows the following limited range of uses, for clarity the current building could reasonably accommodate the uses in bold type:

*Permitted with consent*

**Business premises;**

*Child care centres;*

*Food and drink premises;*

*Light industries;*

*General industries;*

*Hotel or motel accommodation;*

*Neighbourhood shops;*

**Office premises;**

*Passenger transport facilities;*

*Respite day care centres;*

*Warehouse or distribution centres;*

*Water reticulation systems;*

*Any other development not specified in item 2 or 4*

The building as it is now situated is only suitable for office or business type use of the uses that are permitted in the zone. If the building cannot be used for this purpose it is redundant and there would appear to be a good argument that it has reached the end of its usable life.

Without extensive research, one has only to look at the level of vacancy in commercial space in the locality (that was once full and growing and as noted above has a local floor space vacancy of over 12,000 meters squared) to understand that sites such as this and the office area behind to the west are in decline and that areas such as Macquarie Park and Norwest have taken over the market for commercial space. A number of adjacent buildings have been vacant for long periods of time and offer significantly more attractive accommodation than the former 3M building.

There would appear to be no demand for further commercial office space in the locality and the following schedule of buildings or large areas of buildings for lease at the beginning of September 2014 gives an indication of the falling market and inability to lease older buildings in the area even if refurbished.

*Summary of Google search using 1 website only of current larger scale commercial rental property in the area.*

Address where provided	Description	Areas where noted
15 Bridge St	1 floor of 2 story building	400m2
19 Ryde Road	Whole building	1,000m2
1/19 Ryde Road	Tenancy	250m2
4/19 Ryde Road	Tenancy	150m2
Bridge ST (no number but near highway)	Whole building	1,327m2
20 Bridge St	Various tenancies throughout Corporate Centre	No areas available Estimate 1,000 m2
1 Merriwa St	Whole building	2,678m2
7-9 Merriwa St	Large tenancies throughout the building	No areas given Estimate 500m2
Gordon	Whole building	400m2
816 Pacific Highway Gordon	Part of building	810m2
828 Pacific Highway Gordon	Whole building	6,000m2
Indicative total		Approx. 11,500m2 of presently unoccupied office space in tenancies from 150m2 – 6,000m2  Note this does not include a large range of smaller tenancies.

Consequently as there appears to be little demand for ageing refurbished and now, in reality, second level commercial buildings, retention of the former 3M building will inevitably involve a major change of use, possibly an application for residential use, as there are no uses that would appear viable for an outdated 1960s inflexible office building that has no further use for commercial occupation.



Any application for change of use will involve major external changes to the building to make it viable and comply with council policies, alternatively, the building will remain unoccupied and will eventually be abandoned or demolished.

#### CONCLUSION

We are making this submission to Council in support of NOT proceeding to heritage list this building.

We believe, even apart from any historic heritage value that Council may consider the building to have that the building has no viable commercial use ahead. It also has no use within the zoning that could be reasonably accommodated within the building fabric.

Looking even further ahead and potentially to rezoning the site, it is hard to see how the building could be adapted for other than commercial use as it is a fundamentally inflexible and awkward built form that will be difficult to upgrade, difficult to adapt and as a result the cost of such action will not be viable to achieve an ongoing use.

While cost is not usually a consideration in heritage matters, if there is no realistic viable use or upgrade option for the building, it has not future whether it is heritage listed or not.

When we consider these matters in addition the marginal heritage value that we have assessed the building as having we conclude that listing the building is not a supportable action.



**Paul Davies**

B Arch M B Env Bldg Cons ARAIA  
Chartered Architect



## JOINT EXPERTS' HERITAGE REPORT

### COURT DETAILS

Court	Land and Environment Court of New South Wales
Class	1
Case number	10560 of 2015

### TITLE OF PROCEEDINGS

Applicant	<b>Bunnings Properties Pty Ltd</b>
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Respondent	<b>Ku-ring-gai Council</b>
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### PREPARATION DETAILS

Prepared for	<b>Ku-ring-gai Council, Respondent</b>
Legal representative	Christopher Drury, Spark Helmore
Legal representative reference	KUR955/64
Contact name and telephone	Catherine Morton; (02) 9373 1447

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES  
PROCEEDINGS NO 10560 OF 2015

**JOINT EXPERTS' REPORT –HERITAGE**

**APPLICANT**

**Bunnings Properties Pty Ltd**

**RESPONDENT**

**Ku-ring-gai Council**

**PROPERTY**

**950-950A Pacific Highway and 2 Bridge Street, Pymble NSW**

## 1. INTRODUCTION

The subject appeal before the Land and Environment Court relates to the deemed refusal by Ku-ring-gai Council of Development Application (No. DA-0115/15) for a hardware and building supplies development at 950-950A Pacific Highway and 2 Bridge Street, Pymble NSW

- 1.1. The site is currently occupied by an office building of the former 3M Company, car parking and road works.
- 1.2. This document is a Joint Experts' Report covering heritage considerations prepared by the following Experts:-
  - Graham Brooks (GB) heritage expert for the Respondent
  - Brian McDonald (BMCD) Heritage expert for the ApplicantA Curriculum Vitae for each of the experts are attached to this joint report.
- 1.3. The contentions addressed by the experts are:  
Contention 1 - Heritage Significance: particulars (a) to (e);  
Contention 5 - Loss of Significant Vegetation: particulars (a) to (d).
- 1.4. The report was prepared following a joint conference held on 4 March 2016. An objective of the joint conference was to narrow the contentions to the key heritage issues, identifying where the experts agree and where the experts do not agree.
- 1.5. The experts have read Part 31 of Division 2 of the Uniform Civil Procedure Rules 2005 and Schedule 7 of the Uniform Civil Procedure Rules 2005. The experts understand their obligations to the Court and agree to abide by the rules in Part 31 and Schedule 7: Expert witness code of conduct.

### Annexures

#### Appendix A - CVs

## CONTENTIONS

The experts agree that the issues in this case contained within the contentions can be grouped and summarised as follows:

1. Whether the former 3M building and site meet the accepted assessment criteria for listing as a heritage item in Schedule 5 of Ku-ring-gai LEP 2015, notwithstanding that the building and site are now included in Schedule 5 of Ku-ring-gai LEP 2015.
2. Whether the proposed demolition of the former 3M building is contrary to Clause 1.2 (2)(a) and (f) and Clause 5.10(1) of Ku-ring-gai LEP 2015.
3. Whether the applicant undertook any analysis of the options available in the conservation incentives of Clause 5.10(10) of Ku-ring-gai LEP 2015 and whether adaptation of the building to other uses would be feasible.
4. Whether the existing tree T135 derives any significance from its relationship to the former 3M building and whether the proposed removal of tree T135 would adversely affect the heritage values of the site.

## DISCUSSION OF ISSUES -

- 2.1 Whether the former 3M building and site meet the accepted assessment criteria for listing as a heritage item in Schedule 5 of Ku-ring-gai LEP 2015, notwithstanding that the building and site are now included in Schedule 5 of Ku-ring-gai LEP 2015.

### Agreement

- 2.1.1 The experts did not agree on this issue on the basis information and conclusions contained in their individual statements of evidence.

### Disagreement

#### GB

- 2.1.2 On the basis of the additional research undertaken by me and my office, I concluded that there were other aspects of the history of the site, its initial rezoning and design that had not been revealed or thoroughly assessed by other heritage commentators. This applied to Council and Applicant appointed heritage consultants. My assessment of this overall research information expanded the significance of the place beyond that of a stand-alone building into land development initiatives on this site that had a crucial effect on the formation of an important business park in Ku-ring-gai.
- 2.1.3 I am firmly of the opinion that the former 3M Building and its site do meet a sufficient number of the standard assessment criteria thresholds to justify entry on Schedule 5 of the Ku-ring-gai LEP. My assessment and the consequent expanded Statement of Significance are contained in Section 3 of my Statement of Evidence. For brevity, I have included the expanded Statement of Significance below:
- 2.1.4 I totally reject Mr McDonald's reading of my research conclusions. Among other things his inclusion of Council studies between 2006 and 2013 is irrelevant to the circumstances. He rejects the association of the 3M Building with the 3M Company but identifies the association with Qantas as important for the state heritage listing of 1 Chifley Square. Equally he recognizes the involvement of the architectural firm of Rudder Littlemore and Rudder in the Qantas Building, while dismissing Hanson Todd for 3M. These architects came together with Peter Hall to complete the Sydney Opera House.
- 2.1.5 Mr McDonald also quotes the involvement of the American firm of Skidmore Owings and Merrill in the Sofitel Wentworth Hotel project, but does not give any credence to the role of US architects in the design of the 3M Building. The fact that he ascribes no value to the International examples quoted in my assessment suggests that he does not recognize that many, if not most architects are continuously taking note of international trends and design directions in architecture.
- 2.1.6 Mr McDonald's comments in this section do not recognize that the issue at hand in the listing of the subject site is the Local Environmental Plan for Ku-ring-gai.

#### 2.1.7 Statement of Significance prepared by Mr Brooks

The former 3M Building and property at 950 Pacific Highway Pymble is of heritage significance in Ku-ring-gal as an imaginatively conceived and well executed example of the post-war international modernism architectural style applied to a commercial building. It differed from many of its contemporary buildings of this style in Sydney through the use of a self-cleaning pre-cast concrete façade instead of the more commonly used curtain wall. The building was conceived and built as the first and possibly only example in Ku-ring-gal, of an Australian headquarters for a significant and high profile international manufacturer of a wide range of industrial and consumer products. 3M was a major producer of industrial and consumer products, including products marketed under the generic name "Scotch" and remains a well known brand in Australia and internationally.

The mid 1960s change of land use of the subject site from "Services Infrastructure" and "Residential" to "Commercial", was an early and important strategic example in the Municipality of the rezoning of largely residential land for such purposes. The extent of commercial uses in the locality was subsequently expanded to create the current Pymble Business Park on the north western corner of the major intersection of the Pacific Highway and Ryde Road, in Pymble. The rezoning and subsequent commercial development of the site provided Ku-ring-gal Council with a highly desirable opportunity to rejuvenate a redundant but prominently located industrial site (former gas distribution facility) in what had essentially been a residential area. It also provided an opportunity to consolidate and comprehensively redevelop a group of otherwise small individual properties with outdated residential building stock, whose future development was otherwise likely to be severely disadvantaged by the impending road works.

The original (1965) rezoning proposal for the building included a comprehensive, staged development of a large scale office park, enhanced by a fine landscaped setting with ample on-site staff parking. It set an early precedent for the subsequent development of office park projects in regional locations across metropolitan Sydney.

There is some documentary evidence confirming that the final design of the 1967 building and its landscaped setting was directly influenced by US architects associated with, or commissioned by, the 3M Head Office in Minnesota. The completed building is associated with the well established Sydney architectural firm of Hanson Todd and Partners, who were commissioned by 3M to manage the change of zoning and development application submissions, and subsequent design development, tendering and delivery of the project.

It is one of a relatively few examples of post-war international modernism in the Sydney Metropolitan Area to demonstrate a detailed response to the nature of its site. The unusual and distinctive curvilinear plan form of the 3M building in Pymble was widely recognised as being a direct response to the curved corner of the site created by the upgraded highway intersection. By comparison, the majority of commercial buildings of this genre were designed as relatively simple cubic or sculptural forms deliberately devoid of their local context.

While only five storeys in overall height, the building took advantage of the reduced topography from the former gas works site to project two storeys above the Pacific Highway frontage, as constrained by permissible height restrictions. Nevertheless, it achieved landmark status due to the prominent roof level 3M signage at this major, regional traffic intersection. The building retains its external architectural integrity, the presentation of which is enhanced by its landscaped setting and backdrop, combining natural and cultural planting, and curved entry forecourt driveway.

The former 3M building and property has rarity significance in Ku-ring-gai as the Municipality's only commercial building of this quality in the Post War International Modernism architectural style. The contextual approach adopted by the 3M building was unusual in post war modernism, especially in Sydney, where the only other major example was Qantas House in Chifley Square (1955). Buildings with curved facades such as the AMP Building in Sydney (1962), Ryde Council Chambers (1964) and the UNESCO Headquarters in Paris (1958) or designed as cylindrical or curved masses, such as Australia Square (1967), 17 Wylde Street Potts Point (1951) and the Sofitel Wentworth Hotel in Sydney (1966) tended to create simple, straightforward architectural statements.

As would be anticipated with a building that was used for over 40 years, its interior office spaces have been altered and upgraded.

#### BMcD

- 2.1.2 Four experts' opinions on whether the former 3M building and site warrant listing as a heritage item in Schedule 5 of Ku-ring-gai LEP 2015 are now available to the Court. Two assessments support heritage listing and two do not support heritage listing.
- 2.1.2 The heritage significance of the former 3M building and site had not been recognised by any heritage studies up to recent times. In recent times, heritage studies commissioned by the Council to consider individual buildings, for which the former 3M building could have been nominated for assessment or that might have identified the former 3M building, did not include it in nominations for heritage listing. These studies were: Perumal Murphy Alessi Study (2006) – Review of potential heritage items in the Ku-ring-gai area (restricted to review of 154 potential heritage items, which appear to be confined to residential examples), Ku-ring-gai Town Centres Heritage Review by CityPlan Heritage (May 2006) for which the study area stopped at the north side of Bridge Street specifically excluding Pymble Business Park and the then occupied 3M building and; Perumal Murphy Alessi Study (2011) - Review of Ku-ring-gai potential heritage items from the Post - War period (restricted to a review of 23 potential heritage items).
- 2.1.3 Inclusion of the former 3M building and site may have been considered in the various studies that were associated with the last three planning instruments that applied to Pymble Business Park: Town Centres LEP 2010; Pymble Business Park LEP January 2013 and; the current comprehensive LEP 2015. If it had been considered, it was not identified as a potential heritage item. The first time any action was taken to list the property was when the Council resolved to re, following lodgement of a planning proposal with the Council by Bunnings on 15 May 2013.
- 2.1.4 The main question that needs to be addressed is whether the former 3M building and site are **important** enough to demonstrate historic or aesthetic values, or have **strong** or **special** associations with persons or groups of



persons of **importance**, or demonstrate a **high degree** of creative or technical achievement to meet the thresholds for listing in the significance assessment criteria a) to e) established by the NSW Heritage Council. These matters must be considered before assessing whether the potential item is rare because, in my opinion, something can be considered to be rare but, if it does not meet any of the first five criteria, it is not significant. I do not intend to repeat the significance assessment contained in my statement of evidence here. However, the conclusions can be summarised by stating that under all the criteria I do not find the potential item to rise to the descriptions highlighted in bold above.

2.1.4 It concerns me that when a potential item is singled out for heritage significance assessment, that there is a tendency to focus too much on that item to the exclusion of a meaningful comparative analysis. In this instance, much has been made of the building being curved. The former 3M Building is a poor example when compared with the items selected by John Oultram in the report for the Council and Graham Brooks in his statement of evidence:

- 17 Wylde Street, Potts Point (1951) is arguably a more refined work of Post - War International style architecture and is justifiably recognised as an **"outstanding example of post war international style architecture"** and **"as a forerunner of modern apartment design"** and warrants listing as a heritage item by Sydney City Council;
- The AMP Building, 33 Alfred Street, Circular Quay (1962) qualifies as **important** as the first building to break the Sydney height limit of 150 ft which had stood since 1912. It was also the tallest building in Australia at the time. It can truly be considered a landmark. Its associations with the AMP Society and the long established architectural firm, Peddle Thorp and Walker are more enduring than the connections of the former 3M building with the 3M Company and the architects, Hansen Todd.
- A comparison with the Australia Square building, Sydney (1966) is hardly relevant. It has a circular floor plan. It is convex – not concave. It is a commercial office tower. In any event it can rightly claim to have heritage significance on several grounds: structural engineering innovation; landmark status (particularly because when it was completed Sydney was a much lower city); associations with Harry Seidler, the architect, and the world renowned Luigi Nervi, the structural engineer; recognition of architectural excellence by the Sulman Award and tallest building utilising lightweight concrete construction in the world at the time. Australia Square is a heritage item in Sydney LEP 2012.
- The Sofitel Wentworth Hotel, Phillip Street Sydney (1966) is classified as Post-War Minimalist style in the State Heritage Inventory database. It is assessed as **important** for being the only work of the prominent American architectural firm, Skidmore Owings and Merrill, in Australia and being Australia's biggest international hotel at the time of its construction. The Sofitel Wentworth Hotel is a heritage item in Sydney LEP 2012.
- The former Qantas House (1957), Hunter Street Sydney, is a State Heritage item. It derives its high significance from a number of factors, including: one of the first curtain wall buildings in Australia; an excellent example of response to the city context through its curved form realising the semi-circular form proposed in 1908 for the northern side of the present Chifley Square ; recognition for architectural excellence through the award of the Royal Institute of British Architects Bronze Medal in 1959; an exemplar of the Post-War International style; a landmark closing the vista along Elizabeth Street and forming the space of Chifley Square; and **strong** association with Qantas Airways as its first purpose designed headquarters for twenty five years and the noted architectural firm of Rudder, Littlemore and Rudder. The former Qantas House can rightly be

considered as *"a rare and outstanding example of architectural design of the highest quality in the Australian context from the first phase of post-War, multi-storey commercial building construction in Australia in the period up to 1960". (SHR Listing database).*

- 2.1.5 The other examples cited in Sydney for comparison are not recognised for any heritage values (Ryde Council Chambers (1964) and 815 Pacific Highway, Chatswood (c1970s – c1980s). They do demonstrate that concave building forms are not rare in the metropolitan context.
- 2.1.6 Overseas examples listed by Graham Brooks do not assist in making a comparative analysis in the Australian, NSW, metropolitan or local contexts.
- 2.1.7 In my opinion it is misleading to confine the assessment of the significance to the local government area context to establish rarity or important associations, when the comparative analysis provided serves to show that the former 3M Building is in fact a quite undistinguished example of its type and period.
- 2.1.8 I also believe that the association with Hanson Todd, architects, inflates the associational significance of the former 3M building, particularly because this firm was not the initiator of the curved building form.
- 2.1.9 The connection with the 3M Company from 1967 to 2011 is of some historical interest. However, other notable and large companies were located in the Pymble Business Park and have moved elsewhere. The statement of evidence by Peter David Leyshon lists Harper Collins, PepsiCo and Fuji Xerox in this category. These companies are also international and have similar, if not greater, corporate profiles to that of 3M.
- 2.1.10 The heritage assessments by John Oultram and Graham Brooks contain extensive research into the history of the involvement of the 3M Company with the site as well as the use of the site previously by the Australian Gaslight Company. The research makes interesting reading, but it must reveal information that translates to levels of significance that meet the thresholds for the significance assessment criteria. The weight of research alone does not establish significance.
- 2.1.11 John Oultram's assessment of historic significance (criteria a) and b)) for the Council contains a lot of historic background but no substantial statement of why the building and site are significant, other than that the building would have been rare in Pymble as a *"high rise"* building when it was built. 5 storeys was not considered a high rise building at the time, particularly in this instance, when the height above the street level was limited to two and a half storeys. The AMP building was considered to be a *"high rise"* building.
- 2.1.12 John Oultram's assessment of aesthetic significance (criterion c)) also contains a lot of interesting background information but nothing that establishes the former 3M building as **exceptional** or **important** or exhibiting any quality to a **high degree**. The assessment against criterion d) Social and criterion e) Technical/Scientific is inconclusive and not sufficient to underpin heritage listing.
- 2.1.13 John Oultram's discussion under Intactness and Rarity (criterion f)) provides no clear evidence that the building is rare other than: *"Though further research is required to confirm this, the building is likely to be the first International style, high rise building in Ku-ring-gai."* I have noted above that five storeys would not have been considered high rise even at the time. The building would need to be an exemplar of the Post-War International style to qualify as rare, and not restricted to the local context. It compares unfavourably with a building that is truly an exemplar - the former Qantas House.
- 2.1.14 In my opinion, the assessment which the Council relied upon to resolve to list the former 3M Building and site as a heritage item is based on a significant

amount of background information that does not state reasons for inclusion and insufficient evidence of inflated weight with too much reliance on a very narrow localised context.

- 2.1.15 Graham Brooks' assessment against the significance assessment criteria in his statement of evidence also provides a lot of background information from which it is necessary to extract reasons why the potential item would reach the thresholds. Under criterion a) it appears that rezoning of the former industrial site is a relevant factor. However zoning changes have occurred, and still do occur, all over Sydney without being a heritage consideration. This leaves two reasons: *"the first and possibly only example in Ku-ring-gai of an Australian headquarters for a significant and high profile international manufacturer of a wide range of industrial and consumer products"* and *"when constructed in 1967, the five storey building, containing some 50,000 sq.m. of office space, was one of, if not the largest commercial building in Ku-ring-gai."* I do not consider the amount of office space a qualification for heritage listing and, if being the first (but not the only example) example of a headquarters for an international manufacturer in Ku-ring-gai is a qualification, this could apply to the first office building of this kind anywhere.
- 2.1.16 The assessment under criterion c) provides some technical detail about the style of the building and its external construction materials that, in my opinion, do not elevate it above most buildings of the same type and period. The assessment focuses on the curved building form as the main distinguishing characteristic. A sensitive architect would logically respond to the curved site boundary. I do not consider this to be sufficient to qualify the buildings as *"important in demonstrating aesthetic characteristics and/or high degree of creative or technical achievement in the local area."*
- 2.1.17 Although I do not agree that the building is a good example of a landmark, I do agree with Graham Brooks that it does not meet criterion d).
- 2.1.18 I also agree with Graham Brooks' conclusion that the neither the building nor the site meet criterion e).
- 2.1.19 Even though the listing of the former 3M building has been made in the local Ku-ring-gai context, it is still important to understand its qualities relative to the significance of the other examples identified for comparative analysis. There is such a large divergence between the characteristics of the former 3M building and the other comparable examples that have been recognised as heritage items that, in my view, the listing of the 3M Building degrades the meaning of the heritage listings of Qantas House, the AMP Building, 17 Wyde Street, Potts Point and the Sofitel/Wentworth Hotel.

2.2 Whether the proposed demolition of the former 3M building is contrary to Clause 1.2 (2) (a) and (f) and Clause 5.10(1) of Ku-ring-gai LEP 2015.

**Agreement**

- 2.2.1 The experts did not agree on this issue on the basis information and conclusions contained in their individual statements of evidence.

## Disagreement

### GB

- 2.2.2 Based on my firm opinion that the heritage listing of the former 3M building and site are justified and that the site is currently LEP listed, I maintain the views and the analysis contained in Sections 4.1.2 and 4.1.3 of my Statement of Evidence. The heritage resources of Ku-ring-gai can, in my opinion, be taken to include far more than just those which have received formal statutory protection.
- 2.2.3 The proposed demolition of the building and comprehensive redevelopment of the site is contrary to the particular overall aims of the LEP and to the particular objectives of 5.10(1) of the LEP.
- 2.2.4 Moreover, I am of the opinion that the proposed project does not make any attempt to respond to the potential for a larger development project that might support a re-use of the existing 3M Building. The Applicant is relying on evidence that the stand-alone building cannot economically justify upgrading to full contemporary commercial standards. The Applicant simply claims the 3M Building must be self sustaining in its own right, without providing any evidence of alternative scenarios.

### BMcD

- 2.2.2 Because I do not consider that the former 3M building and site meet the significance assessment criteria and should not have been included in Schedule 5 of Ku-ring-gai LEP 2015, I therefore do not consider that demolition of the building and redevelopment of the site will be contrary to *'the future development of land and management of ....heritage and cultural resources in Ku-ring-gai'* (a) or be prejudicial to recognition and protection of Ku-ring-gai's non indigenous cultural heritage (f). My assessment of the significance of the former 3M building and site also means that I do not believe it is **important** enough that demolition and redevelopment would be contrary to the objectives in Clause 5.10(1).
- 2.2.3 As discussed in my statement of evidence, inclusion of the former 3M building and site in Schedule 5 of Ku-ring-gai LEP 2015 does not prohibit demolition of the item. Clause 5.10(2) (a) lists demolition of a heritage item as an activity requiring development consent.
- 2.2.4 With regard to the other provisions of Clause 5.10 my opinions are set out in my statement of evidence.
- 2.3 Whether the applicant undertook any analysis of the options available in the conservation incentives of Clause 5.10(10) of Ku-ring-gai LEP 2015 and whether adaptation of the building to other uses would be feasible.

## Agreement

- 2.3.1 The experts did not agree on this issue on the basis information and conclusions contained in their individual statements of evidence.

## Disagreement

### GB

- 2.3.2 The potential LEP heritage listing of the former 3M building had been public knowledge for some considerable time before the subject development application was lodged. In fact it was an issue for the then joint heritage

experts, of whom I was one, when they prepared their joint report for the Appeal 10631 of 2014. The relevant SOFC Contention discussed at the time was:

*The proposed development will adversely impact on the identified heritage significance of the former 3M Building existing on the allotment at 950 Pacific Highway, Pymble, which has been identified as having heritage value.*

2.3.3 The Heritage Experts in that Appeal re-configured this contention to read:

*Whether the former 3M Building and its immediate landscaped curtilage has sufficient heritage significance to pass the Inclusion Threshold for listing in the Heritage Schedule of the Draft Local Environmental Plan.*

2.3.5 Appeal 10631 of 2014 was discontinued by the Applicant, who nevertheless could be assumed to have knowledge of the completed Joint Heritage Expert report.

Given that public knowledge, I am of the opinion that a responsible project team charged with preparing a new development Application should have examined the implications and opportunities that would emerge once the site was heritage listed on the LEP. Such an assessment of the alternatives available to the applicant under Clause 5.10(10) of the standard LEP format could have been included in the Statement of Heritage Impact prepared for the current Development Application. I would regard this as a necessary component of a comprehensive heritage impact assessment process.

2.3.6 I note the expert report by Peter Leyshon, dated January 2016 where he states at clause 4.5, *In summary, it is my considered opinion that the most appropriate strategy for Council to adopt is one of encouraging sympathetic land-use change within the Pymble Business Park...* I maintain that the process of heritage listing the 3M site has in fact created that opportunity

#### BMcD

2.3.2 Graham Brooks' statement of evidence states that *"the Applicant has not demonstrated that the heritage listing of the site has been taken into account during the formulation of the proposed development."* In the first instance, the applicant had no reason to expect that the site had any heritage values until well after the application for Gateway determination was submitted on 15 May 2013, which was supported by Council's planners.

2.3.3 Very soon after the Council resolved to commission an independent heritage assessment on 27 August 2013, the applicant commissioned Paul Davies, a recognised heritage architect, to undertake an initial assessment of the former 3M building, which was issued to the applicant on 30 October 2013 and subsequently sent to the Council. This assessment concluded with the statements that:

*"In summary I can find no reasons to suggest that the building should be a heritage item or that it has any heritage value.*

*I would suggest that this building should not be heritage listed and that it does not have significance."*

2.3.4 It is understandable that the applicant would not have assumed that heritage listing of the property was a foregone conclusion when the Council resolved to support the Bunnings planning proposal proceeding to a Gateway determination on 10 December 2013 and when the Heritage Division of the Office of Environment and Planning wrote to the Council on 21 May 2014 stating that it had no objection to the Bunnings planning proposal.

2.3.5 When the Council did take action to list the former 3M Building and site by preparing a planning proposal for Gateway determination, which was granted



on 21 July 2014, the applicant took steps to understand the implications, should the site become a heritage item. Paul Davies had already prepared a heritage impact statement in January 2014 and then undertook an examination of the works that would be required to bring the building up to present day building code and fire safety compliance, as well as market expectations of accommodation standards. He also briefly commented on the implications of a change of use to a use not currently permissible in the zone – residential adaptation – concluding that the external changes to make a residential adaptation would be major. This information was contained in a letter to the Council dated 8 September 2014.

- 2.3.6 Graham Brooks states that *"The applicant has prepared a Statement of Heritage Impact (SHI) but has not prepared a Conservation Management Plan. (CMP) for the site."* Pursuant to Clause 5.10(6) of Ku-ring-gai LEP 2015, *"The consent authority may require, after considering the heritage significance of a heritage item and the extent of change proposed to it, the submission of a conservation management before granting consent under this clause."* As far as I am aware the Council did not make a request for a conservation management plan.
- 2.3.7 Taking into consideration the decision of Justice Craig in *De Angelis v Wingecarribee Shire Council*, the savings Clause 1.8A of Ku-ring-gai LEP 2015 applies and it is arguable that the Council would not have the power to demand a conservation management plan until the former 3M Building and site became a heritage item, which did not occur until 1 May 2015. Development application No DA0115/15 was lodged on 8 April 2015.
- 2.3.8 Nevertheless, the application was accompanied by a *"heritage management document"* in the form of the heritage impact statement by Paul Davies dated February 2015 which satisfies Clause 5.10(5) of Ku-ring-gai LEP 2015. This document updated a previous heritage impact statement by Paul Davies dated January 2014 with a discussion on adaptive re-use in Section 5 and a discussion on interpretation in Section 6. An observation was also added at the end of Section 2.6 that the 3M Company abandoned the Pymble site despite it being large enough to allow for the type of expansion achieved at the new North Ryde site.
- 2.3.9 In my opinion, the applicant did give sufficient consideration to the potential for application of Clause 5.10(10) up the point of lodging DA0115/15. The information provided to the Council has now been augmented by the expert Feasibility Reports of Martin Hill and the expert Economic Impact Report of Peter Leyshon now before the Court.
- 2.3.10 It should be noted that the estimate by WT Partnership appended to Martin Hill's statement was updated from May 2015 to January 2016. It is correct, as Graham Brooks states, that the costing is confined to the building because the purpose was to determine what it would cost to bring it up to a code compliant base building upgrade. Any estimation of the costs of additional hypothetical adaptive re-use works and/or other development options on the rest of the site with the building retained could only be highly conjectural at this stage.
- 2.3.11 There is enough information in these statements and the discussion of other uses by Paul Davies to establish that:
- a) upgrading and adaptation of the building itself is not commercially viable by a significant margin of cost over potential returns;
  - b) the cost burden of retaining the building as office space or some other use would be a significant disincentive to other development on the site with the building retained; and

- c) works to adapt the building to a use other than commercial offices would diminish whatever architectural integrity it now has.

**2.4 Whether the existing tree T135 derives any significance from its relationship to the former 3M building and whether the proposed removal of tree T135 would adversely affect the heritage values of the site.**

**Agreement**

- 2.4.1 The experts agree that T135 does not have a visual presence when viewed from outside the site. Otherwise the experts did not agree on this issue on the basis information and conclusions contained in their individual statements of evidence.

**GB**

- 2.4.2 While recognizing that the subject tree is now much taller than it might have been when the building was first erected, Mr Brooks maintains that the tree now contributes to the landscaped setting that is recognized as being an integral part of the original identity of the place and the "internal" site amenity provided for the staff, in the then emerging concept of an office park.

The relevant extract of the upgraded Statement of Significance for the property reads:

*The original (1965) rezoning proposal for the building included a comprehensive, staged development of a large scale office park, enhanced by a fine landscaped setting with ample on-site staff parking. It set an early precedent for the subsequent development of office park projects in regional locations across metropolitan Sydney.*

**BMcD**

- 2.4.2 There is no reference to T135 in the heritage assessment report to Council by John Oultram dated October 2013 or the report to Council for the 10 December 2013 meeting. There is only a description of a *'well landscaped site'*. The State Heritage Inventory Listing Sheet prepared by John Oultram appended to the report for the 10 December 2013 meeting describes the site:

*"The site is relatively level but slopes from the north west where there is a large area of lawn. To the front of the building is a circular entrance drive with central lawn and feature tree".*

- 2.4.3 Tree T135 is situated at the large area of lawn so it would not be the feature tree associated with the circular drive.
- 2.4.4 Tree T135 is obviously an element within the setting of the building. It was not considered to be a critical element in the early planning for the site as shown in a 1966 drawing or in the scheme prepared by DEM in 1985, although it would have been smaller at those times.
- 2.4.5 In my opinion, tree T135 is an attractive but isolated Sydney Blue Gum specimen that, even if the former 3M Building is considered to be of heritage value, only has landscape value as a part of a now neglected setting but not as an essential element in a heritage curtilage.

Signed by



.....  
**Brian McDonald**, for Applicant



.....  
**Graham Brooks** for Respondent

10 March 2016



## Appendix A - CVs

### GRAHAM BROOKS CV

#### Positions Held

Managing Director, GBA Heritage Pty Ltd, 2015 -  
Managing Director, Graham Brooks and Associates Pty Ltd, 1996 – 2015  
Director, Schwager Brooks and Associates Pty Ltd, 1984 – 1996  
Associate Director, Travis Partners, 1977 – 1984  
Architect, Pollard Thomas & Edwards, London, 1975 – 1977  
Architect, Commonwealth Department of Works, 1972 - 1975

#### Professional Qualifications

Bachelor of Architecture (Hons), Sydney University, 1972  
Master of the Built Environment (B Cons) UNSW 1984  
Associate Australian Institute of Architects, 1974  
Associate Royal Institute of British Architects, 1975  
Registered Architect, New South Wales  
Member, Australia ICOMOS

#### Professional Associations

President ICOMOS International Committee on Cultural Tourism, 2001 – 2011  
Chairman, AusHeritage Ltd, 1999-2001  
Chairman, National Trust (NSW) Historic Buildings Committee, 1996-1999  
Former Heritage Adviser, Liverpool City Council c1995-2005  
Member, Senior Advisory Panel, Global Heritage Fund 2010-  
Member, National Trust of Australia (NSW) 1973-  
Member Australia ICOMOS, 1980-  
UNESCO Monitoring Mission to World Heritage Site of Borobudur, 2003, 2006, 2007  
World Heritage Centre Monitoring Mission to Ajanta & Ellora Caves, India, 2004-2010  
Visiting Professor, Institute of Tourism Studies, Macao, 2006  
Former Executive Committee Member, Australia ICOMOS, 1990-1992  
Member Asia and West Pacific Network for Urban Conservation  
Honorary Member, Philippines Heritage Society  
Former Member Heritage Council Technical Advisory Committee on Materials Conservation, RAIH Heritage Committee & RAHS Historic Buildings Committee

#### CAREER SUMMARY

I have worked in the fields of Architectural design, Heritage Conservation and Cultural Tourism Management for some 40 years, in Australia, the United Kingdom and more recently for UNESCO in Asia. During that period I have conducted heritage assessments and developed heritage management protocols for hundreds of historic buildings and places. My office has conducted hundreds more under my supervision.

I have lectured widely to business, heritage, professional and student groups on heritage assessments, heritage management, conservation practice, preparing heritage sites for cultural tourism and the methodologies of heritage asset management.

I have participated in many appeals before the Land & Environment Court, acting on behalf of both Respondents and Applicants, and have also acted as a Court Appointed Heritage Expert.



## Brian McDonald

PRINCIPAL URBAN DESIGNER



planning consultants

### Experience and qualifications

Brian has over 30 years of experience in private practice working at director level and 20 years of public sector experience at high levels of responsibility and leadership.

His qualifications and experience cover architectural practice, urban planning and design and heritage conservation.

His commitment to heritage conservation and urban design is balanced by a keen appreciation of contemporary architectural practice, building technology and engineering services are reinforced by appreciation of the broader issues of place making and land use.

Brian has extensive experience as a consultant to federal, state and local government with an understanding of the regulatory framework of local government planning and environment approval processes. The width and depth of his experience over three disciplines is recognised by his appointment to Manly Council's and Mosman Council's Independent Hearing and Assessment Panel, St George Design Review Panel and also by appointment to represent Hunters Hill and Leichhardt Councils on the Joint Regional Planning Panel, Sydney East.

- Registered Architect in NSW 1966 (No. 2545)
- B. Arch. (Hons), University of NSW
- NSW Board of Architects Medallion
- M. Sc. (Hons), Urban Planning, Edinburgh University
- OHS General Induction for Construction Work in NSW (No. 29698)
- Examiner, NSW Board of Architects
- Fellow of the Australian Institute of Architects
- Member Planning Institute of Australia
- Member Hunters Hill Council Conservation Advisory Panel
- Member Independent Assessment Panel, Manly Municipal Council
- Member Development Approvals Panel, Mosman Municipal Council
- Member Joint Regional Planning Panel – Sydney East representing Hunter's Hill, Leichhardt and Auburn Councils
- Member St George Design Review Panel

### Positions held

2016 to Present | DFP Planning Pty Ltd, NSW, Australia, Principal Urban Designer

2010-2015 | CCG Architects Pty Ltd, NSW, Australia, Director

2003-2010 | HBO+EMTB Heritage Pty Ltd, NSW, Australia, Director

1984-2003 | Brian McDonald + Associates Pty Ltd, NSW, Australia, Managing Director

1982-1984 | Gazzard and Partners Pty Ltd, NSW, Australia, Associate Director and Director

1978-1981 | NSW Heritage Council, NSW, Australia, Government Architects Representative

Deputy Member, Historic Houses Trust of NSW

1969-1977 | Senior Architect, Government Architects Branch, NSW Department of Public Works

1966-1969 | Architect, Government Architects Branch, NSW Department of Public Works

1961-1965 Trainee architect, Government Architects Branch, NSW Department of Public Works

Founding Chairman, National Trust (NSW) Urban Conservation Committee

Member National Trust (NSW) Historic Buildings Committee (former)

**Key Experience includes:**

**Planning and Heritage Studies**

**Major architectural and master planning projects**

**Advisory and Expert Witness Services**

Town planning, architectural, heritage conservation services to local government and the private sector include:

Strategic advice

Urban design studies

Heritage feasibility studies

Urban design studies

Design based development controls

Expert witness in the Land and Environment Court

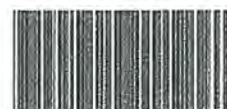
Membership of advisory and approvals panels

Councils for which these services have been provided, include:

- |                 |                  |                |
|-----------------|------------------|----------------|
| • Hunter's Hill | • Leichhardt     | • Mosman       |
| • Manly         | • City of Sydney | • Lane Cove    |
| • Pittwater     | • Warringah      | • North Sydney |
| • Woollahra     | • Waverly        | • Burwood      |
| • Ku-ring-gai   | • Wollongong     | • Sutherland   |
| • Botany        | • Parramatta     | • Marrickville |



Filed: 22 March 2017 12:52 PM



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### Joint Expert Report

#### COURT DETAILS

Court	Land and Environment Court of NSW
Division	Class 1
Registry	Land and Environment Court Sydney
Case number	2016/00152878

#### TITLE OF PROCEEDINGS

First Applicant	Bunnings Properties Pty Ltd
First Respondent	Ku-ring-gai Council ABN 86408856411

#### FILING DETAILS

Filed for	Bunnings Properties Pty Ltd, Applicant 1
-----------	--

Legal representative	FELICITY JANE ROURKE
Legal representative reference	
Telephone	02 9330 8000
Your reference	2822296

#### ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Joint Expert Report (170322 950 Pacific Highway Pymble LEC 10560 Of 2015 Joint Heritage Supplementary Report.pdf)

[attach.]

LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES  
PROCEEDINGS No. 10560 of 2015

**JOINT HERITAGE EXPERTS'  
SUPPLEMENTARY REPORT 2017**

APPLICANT  
Bunnings Properties Pty Ltd

RESPONDENT  
Ku-ring-gai Council

PROPERTY  
950-950A Pacific Highway and 2 Bridge Street, Pymble NSW

17 MARCH 2017

## 1.0 INTRODUCTION

1.1 This Joint Heritage Experts' Supplementary Report has been prepared in the context of the continuation of the original Appeal (10560 Of 2015), following the Court's Direction for the submission of amended plans.

1.2 The Report has been prepared by the following Experts, subsequent to their joint conference on 14 March 2017. An objective of the conference was to identify where the Experts agree and where they do not agree.

- Graham Brooks (GB) Heritage Expert for the Respondent
- Brian Mc Donald (BMcD) Heritage Expert for the Applicant

1.3 The subject appeal before the Land and Environment Court relates to the deemed refusal by Ku-ring-gai Council of Development Application (DA-0115/15) for the demolition of the 1960s era former 3M office building and the development of a hardware and building supplies complex at 950-950A Pacific Highway and 2 Bridge Street, Pymble NSW.

1.4 At the time of the initial hearing, in July 2016, there was considerable doubt as to the heritage listing status of the 3M building and the bulk of the subject site, in Schedule 5 of Ku-ring-gai Local Environmental Plan 2015. That status has since been resolved by the Judgement in the Court of Appeal in *Wingecarribee Council v De Angelis (2016) NSWCA 189*.

1.5 The Heritage Experts have now been advised that the effect of the August 2016 Judgement by the Court of Appeal is that the 3M Building and the majority of the subject site is confirmed as a Heritage Item on Schedule 5 of Ku-ring-gai LEP 2015. (KLEP 2015)

1.6 Accordingly, the amended plans must now be assessed under Clause 5.10 of KLEP 2015 and the associated provisions of Ku-ring-gai Development Control Plan 2015 (KDCP 2015), in particular Section 19 Heritage Items and Heritage Conservation Areas.

1.7 The subject site is now occupied by an office building of the former 3M Company, car parking and road works.

1.8 Given the Judgement in *Wingecarribee Council v De Angelis (2016) NSWCA 189*, this Supplementary Report revisits and considers each of the Particulars in Contention 1, Heritage Significance, in the Amended Statement of Facts and Contentions, filed on 7 February 2017.

1.9 This Supplementary Report primarily addresses Contention 1, Heritage Significance, Particulars (a) to (e).

1.10 The Experts agreed that their response to Contention 5 (now Contention 3), particularly in reference to the loss of tree T135, had generally not changed from their original Joint Experts' Report, dated 10 March 2016. However, Contention 3 amends the former Contention 5 by deletion of some particulars. The experts briefly address the effect of the amended Contention relating to T135.

1.11 The Heritage Experts have read Part 31 of Division 2 of the Uniform Civil Procedure Rules 2005 and Schedule 7 of the Uniform Civil Procedure Rules 2005. The Experts understand their obligations to the Court and agree to abide by the rules in Part 31 and Schedule 7, Expert Witness Code of Conduct.

## ANNEXURES

Appendix A – Heritage Experts' Curricula Vitae



## 2.0 CONTENTION 1 - Heritage Significance

*The proposed demolition of the former 3M Building and removal of its landscaped setting will adversely impact on the heritage significance of the building and site, which is individually listed as a heritage item in Schedule 5 of Ku-ring-gai LEP 2015.*

### 2.1 Particulars:

*a) The former 3M Building at 950 Pacific Highway, Pymble (Lot 1, DP 718718) is individually heritage listed as Heritage Item 593 in Schedule 5 of the LEP. The heritage listing extends across the entirety of the Site.*

*b) The proposed demolition of the former 3M Building and general redevelopment of the overall site, including the early landscaped setting of the 3M Building, is contrary to two of the particular aims of the LEP, as set out in sections 2(a) and 2(f) of Clause 1.2 of the LEP, which are as follows:*

- (a) to guide the future development of land and the management of environmental, social, economic, heritage and cultural resources within Ku-ring-gai,*
- (f) to recognize, protect and conserve Ku-ring-gai's indigenous and non-indigenous cultural heritage.*

*c) The proposed demolition of the former 3M Building and general redevelopment of the overall site, including the early landscaped setting of the 3M Building, is contrary to two of the particular objectives of Clause 5.10(1) of the LEP, as set out in sections 1(a) and 1(b) of the LEP, which are as follows:*

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

*d) The proposed demolition of the former 3M Building and general redevelopment of the overall Site, including the early landscaped setting is contrary to the particular requirement of Clause 5.10(4) of the LEP, as set out in the LEP, which is as follows:*

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

*e) The proposed demolition of the former 3M Building and general redevelopment of the overall site, including the early landscaped setting failed to take into account the heritage listing of the Site in the LEP. Accordingly, there is no evidence of any analysis of the potential to take advantage of the conservation incentives in Clause 5.10(10) of the LEP when the redevelopment was being formulated, as follows:*

*"The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that:*

- (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and*
- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and*
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and*
- (d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and*
- (e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area."*

### 3.0 AGREEMENT BETWEEN THE EXPERTS

3.1 The following matters have been agreed between the Heritage Experts:

3.2 The 3M Building and the majority of the subject site is confirmed as a Heritage Item on Schedule 5 of Ku-ring-gai LEP 2015 (KLEP 2015). The area covered by the Heritage Listing is as shown on the Heritage Map of KLEP 2015.

3.3 The amended plans, including the proposed demolition of the former 3M Building, must now be assessed under Clause 5.10 of KLEP 2015 and the associated provisions of Ku-ring-gai Development Control Plan 2015 (KDCP 2015), in particular Section 19 Heritage Items and Heritage Conservation Areas.

3.4 The *Statement of Significance* contained in the Ku-ring-gai Heritage Inventory Sheet for the Former 3M Building shall be referred to as expressing the Heritage Significance of the place, although Mr McDonald prefers that is referral is only for the purposes of inclusion in Schedule 5 of Ku-ring-gai LEP 2015. In so agreeing Mr McDonald reserves the right to maintain his opinion, as set out in the original Heritage Experts Joint Report, that the property does not pass the threshold tests for LEP Listing as set out in the Heritage Council Publication *Assessing Heritage Significance*.

3.5 The *Statement of Significance* is as follows:

The 3M Building is an interesting and locally rare example of a late Twentieth Century office building in the International style that was constructed c.1967 for the 3M (Minnesota Mining and Manufacturing) Company as their Sydney headquarters. The building is an early example of a high-rise company headquarters in Ku-ring-gai in an area that was zoned for residential development. The building was designed by architects Hanson Todd and Partners on the site of the former Pymble Gas works that was established by the Australian Gas Light Company in 1888. The building is intact externally but has been altered internally and is set in a well-landscaped site that retains much of the original setting of the building. The building represents the establishment of the 3M Company in Australia was a landmark development for the company reflecting their corporate strength and remained as their headquarters for over forty years. It is likely to have special associations for former employees and is a local landmark.

3.6 In addition to the Heritage Provisions of KLEP 2015, the Objectives and Controls of Ku-ring-gai DCP 2015 (KDCP 2015), in particular Part 19, also apply.

3.7 The Introduction section of KDCP 2015, when referring to Part 19 states:

This Part includes objectives and design controls to ensure that any development involving a Heritage Item conserves and enhances the Item. It also seeks to mitigate any potential adverse impacts of new development on the setting of Heritage Items and the Heritage Conservation Area.

#### **Part 1A.5 General Aims of the DCP**

ix) Ensure the heritage significance of the Heritage items and Heritage Conservation Areas, and encourage development which respects that significance.

3.8 Section 19 of Ku-ring-gai DCP states that this Part applies to any development that is a Heritage Item listed under Schedule 5 Environmental heritage within KLEP 2105. For any works within the above categories, a Heritage Impact Statement (HIS) is required. Applicants are advised to refer to Council's Heritage Inventory Sheets for Heritage items and HCAs.

3.9 Part 19B.2 Demolition Related to a Heritage Item sets out the primary Objectives and Controls for demolition:

#### **Objective 1**

To ensure that Heritage Items and all significant elements of Heritage Items are retained and conserved.



### Controls

1. The demolition of a Heritage item, including buildings, other structures, trees and landscape features, is not supported.
2. Council will only consider the demolition of a Heritage item where an applicant can satisfactorily demonstrate:
  - (i) Retention and stabilisation of the building or structure is unreasonable, taking into consideration the following:
    - The Heritage significance of the property
    - Whether the building constitutes a danger to the public.
  - (ii) All alternatives to demolition have been considered with reasons provided as to why the alternatives are not acceptable.

## 4.0 DISCUSSION OF CONTENTION 1

### HERITAGE SIGNIFICANCE

#### 4.1 PARTICULAR A

*a) The former 3M Building at 950 Pacific Highway, Pymble (Lot 1, DP 718718) is individually heritage listed as Heritage Item 593 in Schedule 5 of the LEP. The heritage listing extends across the entirety of the Site.*

#### AGREEMENT

4.1.1 The Heritage Experts agree that the subject site (Lot 1 DP 718719) is heritage listed, as Item 593, in Schedule 5 of KLEP 2015.

4.1.2 The heritage listing does not apply to that portion of the overall site, generally known as 2 Bridge Street.



Figure 1

Extract from Ku-ring-gai LEP 2015 Heritage Map, showing the full extent of the heritage listing.



Figure 2

Contemporary aerial photo with the subject site marked in yellow (six maps)

## DISAGREEMENT

### Graham Brooks

4.1.3 An important component of the discipline of reviewing the management of an LEP listed Heritage Item is to seek a comprehensive understanding of its heritage significance.

4.1.4 Having reviewed the findings of the Court in its Interim Judgement, I recognise that the decision of Ku-ring-gai Council, in determining that the site was worthy of statutory heritage listing on KLEP 2015, is now most clearly expressed in the Statement of Significance set out in the Heritage Inventory, as quoted above.

4.1.4 However, in order to assist the Court in reaching an enhanced understanding of the heritage significance I have also sought to build an expanded understanding of the place occupied by the former 3M Building in the history of the Late 20<sup>th</sup> Century International style of architecture in the Sydney region. The categorisation of "Late 20<sup>th</sup> Century" was developed by Apperley, Irving and Reynolds in their seminal work *A Pictorial Guide to Identifying Australian Architecture, Styles and Terms from 1788 to the Present*, Angus and Robertson, 1989.

4.1.5 They relevantly captured the spirit of the post 1960 period (pp227) thus:

The first two decades of the late 20<sup>th</sup> century period saw Australian architecture generally conform to the world-wide trends by breaking away from the rigorous simplicity demanded by the functionalists and moving towards more sculptural and extroverted forms of expression. The preference for lightness and minimalism, which had long characterised modern architecture was rejected in favour of weight, toughness and elaborate articulation.

4.1.6 Their discussion of the Late 20<sup>th</sup> Century International architectural style, as set out at pages 232 – 235, includes the following:

As the 20<sup>th</sup> century draws to a close, there seems to be little doubt that historians of the future will acknowledge that the century's most significant brand of architecture has been that which, from the 1920s onwards, grew from the twin seeds of functionalism and abstract painting – the International style...

The Post War International style came into common parlance in many parts of the world during the 1950s. Two decades later, and in spite of the sophisticated alternatives late modernism and post modernism were offering, the International style had become so entrenched that it remained in general use, even though it featured less prominently in the glossy architectural magazines.

The style's insistence on rationality, comprehensibility and simplicity made it attractive to business enterprises which sought unpretentious efficiency and economy in their buildings...

In Australia, as in most part of the world, the Late 20<sup>th</sup> Century International style was used mainly for commercial and institutional buildings. Compared with examples of the International style from the post war period, the exteriors of many buildings in the 1960s and 1970s had a greater three-dimensional quality and displayed more assertive textures through the use of sculpturally modelled precast concrete cladding panels instead of flat, metal curtain-wall treatment.

The Broad Characteristics of the Late 20<sup>th</sup> Century International style included:

- Greater sculptural quality than buildings from the Post War International style
- Increasing use of curvilinear forms
- Reinforced concrete members used expressively in response to structural forces
- Cubiform overall shapes often complemented by contrasting non-rectilinear shapes and plain smooth wall surfaces.





Figure 3  
 Extracted from 1988 intersection construction aerial photo in Joint Ecologists' Expert Report  
 Note the high degree of visual exposure of the 3M Building to this major cross roads  
 20 years after its construction  
 By this time the additional buildings had been built



Figure 4  
 Contemporary aerial of the 3M building at 950 Pacific Highway, Pymble (Nearmap)  
 The tree cover at the intersection is a relatively recent visual screen



4.1.7 The transition from Post War to Late 20<sup>th</sup> Century Internationalism in major projects around Sydney is exemplified by the move beyond the curved curtain-wall facades of Qantas House in Chifley Square (1957) and the AMP Building at Circular Quay (1959) to the external precast concrete structural framing of the façade of Australia Square (1966). One can therefore appreciate the difference between the initial, simple rectilinear site planning model for the 3M Building (1964), as illustrated in Figures 7 and 9 of my original Statement of Evidence, and the curvilinear form of the final architectural outcome (1968).



Figure 5  
Qantas House, Chifley Square, with curtain wall (1957) (Google Street View)



Figure 6  
AMP Building Circular Quay, with curtain wall 1959 (Google Street View)





Figure 6  
Australia Square, George Street, with its load bearing facade (1966) (Google Street View)



Figure 7  
The curvilinear form and load bearing precast façade of the 3M Building (1968)

4.1.8 One can also view the completed 3M Building as drawing together the strong local influence of Harry Seidler and the shadow of Walter Gropius' Harvard Graduate School of Architecture, that exerted such a strong influence on Post War and Late 20<sup>th</sup> Century International style buildings, in the US and across the world. Hanson Todd Architects and their US architectural colleagues, appointed by the 3M Headquarters in Minnesota, moved away from the rectilinear composition of buildings shown in the 1964 rezoning submission to the final curvilinear architectural form in the final 1968 project.

4.1.9 It is reasonable to conclude, therefore, that the 3M Building in Pymble, with its sculptured curvilinear form, relatively unadorned profile and the architectural expression of its load bearing precast façade framing, was an important early example of the Late 20<sup>th</sup> Century International style in Sydney and, in particular, in Ku-ring-gai. More importantly, however, is that the decision by Ku-ring-gai Council to list the former 3M Building in Schedule 5 of KLEP 2015, is sufficient confirmation that in Council's judgement, the 3M Building does have sufficient significance to exceed at least one of the threshold criteria for listing. The fact that Mr McDonald might disagree with that decision is, in my understanding, of little import to the confirmed LEP heritage listed status of the property.

4.1.10 During the preparation of this Supplementary Report, I researched a number of published LEC Judgements that had involved the demolition of heritage items. Many of these were for buildings or building complexes that had been damaged by fire or partial demolition. Nevertheless the discussions in those Judgements have been informative.

4.1.11 In *Williams v Ku-ring-gai Council (2008) NSWLEC 1354*, Hussey C (at 19) referred to remarks by the then Senior Commissioner in *Sandig v Ku-ring-gai Municipal Council (2000) NSWLEC (Appeals 10924 and 10925 of 2000)*.

9 During the hearing there was a great deal of discussion whether the existing house is appropriately listed as a heritage item. The applicant submitted that there was not adequate assessment of the house to justify its heritage status. This is not a matter for the Court to determine. The fact is that the house is a heritage item.

4.1.12 The Commissioner continued

20 As the circumstances are similar in the current matter, I accept the dwelling is a listed heritage item and consider the applicant therefore must demonstrate demolition is warranted. I do not consider the applicant's evidence on this criterion demonstrates demolition is warranted.

32 It seems to me that accepting the listing on the basis as previously stated, that the dwelling does make a heritage contribution, then reasonable consideration should be given to the dwelling's retention.

4.1.13 At 37 Hussey C referred to *Tova Pty Ltd v Parramatta City Council (2004) NSWLEC 282*, where Bly C said:

14. an application for the demolition of a heritage item that has been listed under a local environmental plan needs to be dealt with somewhat differently. It must be assumed that any listed heritage item has been correctly and justifiably listed, and that the primary purpose of such listing is for the conservation of the item. In these circumstances weight must be given to the listing of the item and it is for the applicant to overcome this by persuading the consent authority that, notwithstanding the listing, demolition is warranted.

**Brian McDonald**

4.1.14 Particular (a) of Contention 1 is a statement of fact.

4.1.15 Section 1.7 – Approach to the Heritage Issues – in my statement of evidence in the original proceedings, discussed the two ways that the status of the heritage significance of the 3M Building and its site were addressed:

*I understand by reference to the recent decision of Justice Craig of the Land and Environment Court (De Angelis v Wingecarribee Shire Council [2016] NSW LEC 1),*



*there is a construction that the amendment to the LEP 2015 to list the site as a heritage item in Schedule 5 of the LEP, and which commenced on 1 May 2015, does not apply to the assessment of DA 0115/15.*

*Therefore, I deal with the heritage issues in these proceedings in two ways:*

- 1. That the site was not listed as a heritage item at the time of lodgement of DA0115/15 (8 April 2015) and the heritage listing does not apply to assessment of the DA as a result of the savings provision in Clause 1.8A of LEP 2015.*
- 2. That the site is presently listed as a heritage item under LEP 2015.*

- 4.1.16 In his preliminary judgement, Commissioner Brown considered the weight to be given to a draft planning instrument at some length. After reviewing several case law reports, at paragraph 23, the commissioner concluded that:

*The questions to be answered are firstly, whether the amendment to Sch 5 is imminent and certain and if so, what weight should the amendment to Sch 5 be given in the consideration of the application. Secondly, whether the proposal undermines the expressed future planning objectives for the area impacted by the amendment to Sch 5.*

- 4.1.17 The commissioner decided that because, at the time of the hearing, the 3M Building had been included in Schedule 5 of Ku-ring-gai LEP 2015 by an amendment coming into effect, consideration of the imminence and certainty of it being a heritage item had been resolved and that:

*Consequently, the amendment to Sch 5 should be given considerable weight. Whether the proposal undermines the expressed future planning objectives for the site in the amendment to Sch 5 must, in my view, be answered in the positive. Without the amendment to Sch 5, the site would not have the protection afforded by the Heritage conservation provisions in c1 5.10. Even though nothing in c1 5.10 prohibits the demolition of a heritage, the provisions seek to conserve heritage items. The objectives in c1 5.10(1) are:*

- (a) to conserve the environmental heritage of Ku-ring-gai,*
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,*
- (c) to conserve archaeological sites,*
- (d) to conserve Aboriginal objects and Aboriginal places of heritage significance.*

- 25 *Notwithstanding the savings provisions, I accept that that development would be contrary to the planning objectives in c1 5.10(1). The effect is that the application should be considered under the requirements in c1 5.10 of LEP 2015.*

- 4.1.18 The objectives for Clause 5.10 are set out in Clause 5.10(1) as follows:

- (a) to conserve the environmental heritage of Ku-ring-gai,*
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,*
- (c) to conserve archaeological sites,*
- (d) to conserve Aboriginal objects and Aboriginal places of heritage significance.*



- 4.1.19 With regard to objectives a) and b) at least four assessments have been made as to the level of heritage significance of the 3M building and whether it meets the thresholds of the assessment criteria that are commonly used for evaluation of significance. This is a relevant consideration because the extent to which the 3M Building contributes to the environmental heritage of Ku ring gai and its value as a heritage item must be addressed. Its listing in Schedule 5 is not a qualitative measure of its significance. The statement of heritage significance supporting its listing does provide qualitative measures. My views on the level of significance of the 3M building are set out by an assessment under the significance criteria at paragraphs 2.2.20 to 2.2.29 of my Statement of Evidence dated 2 March 2016.
- 4.1.20 Using the terminology of the criteria in my assessment, I have examined whether the 3M Building qualifies as **important** in demonstrating the qualities set down by criteria (a), (b), (c) and (g) or has **strong or special** associations (criteria (b) and (d)) or achieves a **high degree** of creative or technical achievement (criterion (c)) or possesses **uncommon, rare or endangered** aspects of NSW's cultural or natural history (or cultural or natural history of the local area) (criterion (f)).
- 4.1.21 My assessment sets out the reasons why, in my opinion, the 3M Building fails to rise to the levels that the accepted definitions of the above words highlighted in bold would imply.
- 4.1.22 It follows that, having made my own assessment of significance, I do not agree with the Statement of significance that supported listing of the 3M Building in Schedule 5 of Ku ring gai LEP 2015 or the expanded understanding of the significance of the 3M Building provided by Mr Brooks set out above. I have set down in my statement of evidence at paragraph 2.2.26 and paragraphs 2.1.4 and 2.1.5 of the previous Joint Heritage Statement why I believe the 3M Building is a poor example of the Post War International style when compared with the other examples cited by Mr Brooks.

## 4.2 PARTICULAR B

*b) The proposed demolition of the former 3M Building and general redevelopment of the overall site, including the early landscaped setting of the 3M Building, is contrary to two of the particular aims of the LEP, as set out in sections 2(a) and 2(f) of Clause 1.2 of the LEP, which are as follows:*

- (a) to guide the future development of land and the management of environmental, social, economic, heritage and cultural resources within Ku-ring-gai,
- (f) to recognize, protect and conserve Ku-ring-gai's indigenous and non-indigenous cultural heritage,

### AGREEMENT

4.2.1 The Heritage Experts did not agree on this issue on the basis of information and conclusions contained in their original individual statements of evidence and during further consideration during the preparation of this Supplementary Report.

### DISAGREEMENT

#### Graham Brooks

4.2.2 The proposed demolition of the 3M Building and the redevelopment of the overall site must, by definition, effectively destroy the Heritage Significance of the Heritage Item. Accordingly, the proposed demolition and the related redevelopment of the property is contrary to the particular aims of the LEP as set out in this Contention.

4.2.3 The former 3M Building is in reasonable condition and can readily be updated internally to suit a range of compatible uses, including a continuation of its commercial use. The Applicant has presented no evidence that the structural condition of the building, nor its general external fabric, is in such poor condition that it cannot be upgraded as part of a comprehensive site development project. Conservation of the heritage significance of the Building can be achieved through adaptive reuse or a continuation of commercial use.

4.2.4 The first aim of Ku-ring-gai LEP 2015, is to guide the future development of land and management of the heritage and cultural resources within Ku-ring-gai. The provisions of Clause 5.10(10) and KDCP 2015 Part 19 support this aim. They enable consent to be granted for the re-use of Heritage Items and the development of heritage sites for uses that may otherwise not be permitted.

4.2.5 I do not believe that the Applicant has made a compelling case that the demolition of the 3M Building, which is a Heritage Item in KLEP 2105, is warranted.

4.2.6 In the circumstances of the current project, I do not believe that a photographic or other archival recording, or an Interpretation programme, can be regarded as an appropriate attempt to protect and conserve the environmental heritage of Ku-ring-gai, or to guide the future development of land and the management of the heritage and cultural resources of Ku-ring-gai.

#### Brian McDonald

4.2.7 Clause 5.10(2)(a) **Requirement for consent** in Ku ring gai LEP 2015 also applies in this instance:

*Development consent is required for any of the following:*

- (a) *demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance):*
  - (i) *a heritage item,*

- (ii) an Aboriginal object,
- (iii) a building, work, relic or tree within a heritage conservation area,

- 4.2.8 Clause 5.10(4) - **Effect of proposed development on heritage significance** - must be taken into account by the consent authority in determining an application to demolish a heritage item:

*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).*

- 4.2.9 It is my contention that the effect of the proposed demolition "on the significance of the item or area concerned" is very slight because the significance of the item does not meet the thresholds of the criteria for assessing heritage significance. To put it at the highest possible level, its significance is marginal, notwithstanding that it is included in Schedule 5 of Ku ring LEP 2015
- 4.2.10 A heritage management document was prepared and formed part of the application documents. While the Statement of Heritage Impact by Paul Davies, February 2015, included a case for not listing the 3M building and was written prior to inclusion in Schedule 5 of Ku ring gai LEP 2105 on 1 May 2015, the fact of listing would not have made any difference to the conclusions reached in this heritage management document.
- 4.2.11 Mr Brooks cites several cases involving applications to demolish a heritage item, where there is a general consensus along the lines of the conclusion by Bly C in *Tova v Parramatta* (2004) NSWLEC 282, that

*"However, an application for the demolition of a heritage item that has been listed under a local environmental plan needs to be dealt with somewhat differently. It must be assumed that any listed heritage item has been correctly and justifiably listed, and that the primary purpose of such listing is for the conservation of the item. In these circumstances weight must be given to the listing of the item and it is for the applicant to overcome this by persuading the consent authority that, notwithstanding the listing, demolition is warranted."*

While this is a relevant matter, each case should be considered on its merits. A common feature of some of the cases cited is that persuasive reasons must be given to address why a heritage item should be demolished and these reasons must address the statement of significance. In my opinion, both of these tests have been met in my original Statement of Evidence, 2 March 2016, and in the previous Joint Heritage Statement. This matter is also addressed under Particular (e).

- 4.2.12 In *Regent Constructions v Ku ring gai Council* (2006) NSWLEC 743, Watts C considered an application for demolition and redevelopment of two properties containing heritage listed two cottages at Nos 3 and 5 Margaret Street Roseville. In his judgement, he stated:

65 *I accept the evidence of Mr Staas and prefer that to the evidence of Mr Dignam, and I am convinced that both Nos 3 and 5 Margaret Street, as examples of lower cost housing in Ku ring gai, do not have sufficient aesthetic, technical or historic significance or value to warrant their retention. I do not go so far as to say that they should not have been listed in the first place. I accept the status accorded to them in Schedule 7 of the KPSO.*

66 *However, the potential for their practical and economic continued use as residences considering the extent of repair, the need to replace hazardous*

*materials and the difficulty of adaptation required to make them suitable for contemporary living standards, is slight.*

- 4.2.13 The fact that, while there is a common approach in the Court to acceptance of heritage listing in a LEP as a serious matter for consideration, different decisions have been made concerning whether it is acceptable to demolish a listed heritage item based on the merits of different cases.
- 4.2.14 Mr Brooks states that *"The former 3M Building is in reasonable condition and can readily be updated internally to suit a range of compatible uses, including a continuation of its commercial use."* I discuss the state of the building in response to Particular (e).

### 4.3 PARTICULAR C

*c) The proposed demolition of the former 3M Building and general redevelopment of the overall site, including the early landscaped setting of the 3M Building, is contrary to two of the particular objectives of Clause 5.10(1) of the LEP, which are as follows:*

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

#### AGREEMENT

4.3.1 The Heritage Experts did not agree on this issue on the basis of information and conclusions contained in their original individual statements of evidence and during further consideration during the preparation of this Supplementary Report.

#### DISAGREEMENT

##### Graham Brooks

4.3.2 In a similar with my discussion of Particular b) above, there can be no dispute that the proposed demolition of the 3M Building and the redevelopment of the overall site must, by definition, effectively destroy the Heritage Significance of the Heritage Item.

4.3.3 The Applicant has not made a compelling case for the demolition of the 3M Building.

4.3.4 In *Tova Pty Ltd v Parramatta City Council (2004) NSWLEC 282*, Bly C made the following determination:

28. In all of the circumstances I am satisfied that notwithstanding the fire and the vandalism that the cottage is capable of being conserved and utilised in a manner that would not be inconsistent with conservation.

29 Taking this into account together with the fact that the site is capable of reasonable redevelopment where such redevelopment incorporates the heritage item I have decided that the application for demolition of the cottage should be refused. The case for the demolition of the cottage has not been made out and the appeal should therefore be dismissed.

4.3.5 The Applicant has presented no evidence that the former 3M Building, being an item of the environmental heritage of Ku-ring-gai, is incapable of conservation in a manner that protects and respects its heritage significance.

4.3.6 I do not believe that the Applicant has made a compelling case for the demolition of the 3M Building, which is a Heritage Item in KLEP 2105. Mr McDonald claims that the significance of its relationship with the 3M Company was irretrievably broken when the 3M Headquarters moved to another site. He came to no such conclusion when he referred to the former Qantas Building in Chifley Square, despite the fact that Qantas has long abandoned that building.

4.3.7 In the circumstances of the current project, I do not believe that a photographic or other archival recording, or an Interpretation programme, can be regarded as an appropriate attempt to conserve the environmental heritage of Ku-ring-gai, or to conserve the heritage significance of heritage items, including associated fabric, settings and views.



**Brian McDonald**

- 4.3.8 Particular (c) refers to objectives (a) and (b) of Clause 5.10(1) of Ku ring gai LEP 2015, which have a similar meaning to the heritage related objectives (a) and (b) of Clause 1.2 of Ku ring gai LEP 2015,
- 4.3.9 My responses in my Statement of Evidence in the earlier proceedings, the previous Joint Heritage Statement and comments on particular (b) address the same issues in terms of the weight to be given to the level of significance of the 3M Building and hence the degree of loss of heritage that its demolition would incur.
- 4.3.10 In relation to the setting of the 3M Building I repeat paragraph 2.4.3 of my Statement of Evidence:  
*It follows that the setting, which is lacking in any evidence of intentional landscape design, does not demonstrate any of the activities of 3M on the site and therefore has no associated heritage significance. The question of tree retention, discussed later is more related to scenic and ecological values than heritage values.*
- 4.3.11 I believe there is a compelling case that, putting aside the level of heritage significance the 3M Building possesses, its retention cannot be sustained. It is important to note that the 3M Company abandoned the building despite the fact that the company had explored the potential for further expansion of its activities on the site in May 1985.
- 4.3.12 This matter is dealt with further in my response to particular (e).

## 4.4 PARTICULAR D

***d) The proposed demolition of the former 3M Building and general redevelopment of the overall Site, including the early landscaped setting is contrary to the particular requirement of Clause 5.10(4) of the LEP, as set out in the LEP, which is as follows:***

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

### AGREEMENT

4.4.1 The Heritage Experts did not agree on this issue on the basis of information and conclusions contained in their original individual statements of evidence and during further consideration during the preparation of this Supplementary Report.

### DISAGREEMENT

#### Graham Brooks

4.4.2 In a similar with my discussion of Particular b) and c) above, there can be no dispute that the proposed demolition of the 3M Building and the redevelopment of the overall site must, by definition, effectively destroy the Heritage Significance of the Heritage Item.

4.4.3 In *Norm Fletcher & Associates Pty Ltd v Strathfield Municipal Council (2013) NSW LEC 1118*, Pearson C made the following determination, in an appeal regarding the demolition of a fire damaged house that was a listed heritage item under Strathfield PSO.

71. Demolition would destroy its heritage significance. In circumstances where the building can be repaired and reconstructed so as to retain its heritage significance, and the costs of doing that work do not impose an unacceptable burden on the owner, demolition should not be permitted.

4.4.4 In *Grigorakis v Bayside Council (2016) NSWLEC 1573*, Brown C made the following determination.

28. Clause 5.10(4) requires the Court to "consider the effect of the proposed development on the heritage significance of the item". If there is a finding that there is an effect; it is necessary to determine whether the effect is of such significance that it unacceptably affects the significance of the heritage item and warrants the refusal of the application.

4.4.5 The Applicant has presented no evidence to suggest that the building is in such poor structural condition or in such a poor state of dilapidation overall that necessary remedial works would compromise its heritage significance.

4.4.6 I do not believe that the Applicant has made a compelling case that the demolition of the 3M Building, which is a Heritage Item in KLEP 2015 is warranted.

4.4.7 In the circumstances of the current project, I do not believe that a photographic or other archival recording, or an Interpretation programme, can be regarded as an appropriate response to the devastating effect on the Heritage Significance of the Heritage Item that would result from its total demolition.

**Brian McDonald**

- 4.4.8 Clause 5.10(4) of Ku ring gai LEP 2015 sets out the matters that the consent authority must consider – specifically “the effect of the proposed development on the heritage significance of the item or area concerned”.
- 4.4.9 Mr Brooks cites Paragraph 71 of *Norm Fletcher & Associates Pty Ltd v Strathfield Municipal Council (2013) NSW LEC 1118*, I concur with the statement in this judgement that demolition of any item that has heritage significance would clearly destroy that heritage significance. The question in this case is how significant is the item? In my opinion the weight to be given to the loss of significance must be in proportion to the level of heritage significance. Mr Brooks and I differ is on this point, attributing very different levels of significance to the 3M Building.
- 4.4.10 Pearson C went on to write: “In circumstances where the building can be repaired and reconstructed so as to retain its heritage significance, and the costs of doing that work do not impose an unacceptable burden on the owner, demolition should not be permitted.” In my opinion, the extent of the burden on an owner must also be weighed in proportion to the level of significance of the item. The costs associated with repair and reconstruction of an item of exceptional or high significance would be more justifiable. A high cost of repairing and reconstructing an item that is of limited significance may not be justifiable if it is a heavy burden on the owner. I must accept that the item is statutorily recognised by its inclusion in Schedule 5 of Ku ring gai LEP 2015. However, for the reasons I have given in my Statement of Evidence, the previous Joint Experts Statement and this statement, I consider the significance of the 3M Building to fall below the accepted acceptance criteria.
- 4.4.11 In this case, it is not a matter of whether the applicant has presented evidence to suggest that the building is in such poor structural condition or in such a poor state of dilapidation overall that necessary remedial works would compromise its heritage significance. This is not the only test. The ability of a building of limited significance to be used for a compatible use at a reasonable cost is also an important consideration.
- 4.4.12 I have also considered this matter in the light of Part 19B.2 of Ku ring gai DCP 2105:

**Objective 1**

*To ensure that Heritage Items and all significant elements of Heritage items are retained and conserved.*

**Controls**

1. *The demolition of a Heritage item, including buildings, other structures, trees and landscape features, is not supported.*
  2. *Council will only consider the demolition of a Heritage item where an applicant can satisfactorily demonstrate:*
    - (iii) *Retention and stabilisation of the building or structure is unreasonable, taking into consideration the following:*
      - *The Heritage significance of the property*
      - *Whether the building constitutes a danger to the public.*
    - (iv) *All alternatives to demolition have been considered with reasons provided as to why the alternatives are not acceptable.*
- 4.4.13 I have considered the level of heritage significance of the property as limited. It does not, while secured from entry, constitute a danger to the public. In my opinion, the alternatives to demolition that have been considered are not viable and associated costs are not commensurate with the limited significance of the item.



## 4.5 PARTICULAR E

*e) The proposed demolition of the former 3M Building and general redevelopment of the overall site, including the early landscaped setting failed to take into account the heritage listing of the Site in the LEP. Accordingly, there is no evidence of any analysis of the potential to take advantage of the conservation incentives in Clause 5.10(10) of the LEP when the redevelopment was being formulated, as follows:*

"The consent authority may grant consent to development for any purpose of a building that is a heritage item or of the land on which such a building is erected, or for any purpose on an Aboriginal place of heritage significance, even though development for that purpose would otherwise not be allowed by this Plan, if the consent authority is satisfied that:

- (a) the conservation of the heritage item or Aboriginal place of heritage significance is facilitated by the granting of consent, and
- (b) the proposed development is in accordance with a heritage management document that has been approved by the consent authority, and
- (c) the consent to the proposed development would require that all necessary conservation work identified in the heritage management document is carried out, and
- (d) the proposed development would not adversely affect the heritage significance of the heritage item, including its setting, or the heritage significance of the Aboriginal place of heritage significance, and
- (e) the proposed development would not have any significant adverse effect on the amenity of the surrounding area."

## AGREEMENT

4.6.1 The Heritage Experts did not agree on this issue on the basis of information and conclusions contained in their original individual statements of evidence and during further consideration during the preparation of this Supplementary Report.

## DISAGREEMENT

### Graham Brooks

4.6.2 Given that the Decision in Judgement in *Wingecarribee Council v De Angelis (2016) NSWCA 189* was given in August 2016, one would have expected that the Applicant would give serious consideration to the opportunities for a development project that retained the 3M Building and utilised the Heritage Incentive Provisions of Clause 5.10(10) of KLEP 2015. Such consideration could also have taken note of the existing permissibility of the site for a Hardware and Building Supplies use. There is no evidence that such a consideration was undertaken.

4.6.3 Clause 5.10(10)(b) requires that any submission for alternative uses be accompanied by a heritage management document. KLEP 2015 defines such a document as follows:

**heritage management document** means:

- (a) a heritage conservation management plan, or
- (b) a heritage impact statement, or
- (c) any other document that provides guidelines for the ongoing management and conservation of a heritage item, Aboriginal object, Aboriginal place of heritage significance or heritage conservation area.

4.6.4 The relevant Definition contained in the KLEP 2015 with regard to the preparation of Heritage Impact Statements is as follows:

**heritage impact statement** means a document consisting of:

- (a) a statement demonstrating the heritage significance of a heritage item or heritage conservation area, and
- (b) an assessment of the impact that proposed development will have on that significance, and
- (c) proposals for measures to minimise that impact.

4.6.5 In this regard the Applicant is essentially relying on the January 2014 *Heritage Impact Assessment, Former 3M Building, 950 Pacific Highway, Pymble*, prepared by Paul Davies. (2014 HIA). There is no evidence of an attempt by the Applicant to commission an updated Statement of Heritage Impact to take account of the De Angelis Judgement in the Court of Appeal.

4.6.6 In Section 4.0 of the 2014 HIA, (pp20), Mr Davies states:

I conclude that neither the building nor the site have specific or important heritage value that would justify protection by potential heritage listing. Consequently, I can see no heritage reason to oppose future demolition of the 3M building or redevelopment of the site.

4.6.7 This lack of any updated consideration of the impact on the formally Heritage listed 3M Building, in Schedule 5 of KLEP 2015, clearly demonstrates that there has been no attempt on the part of the Applicant to explore or embrace the opportunities available under Clause 5.10(10) of the LEP.

4.6.8 An equivalent omission can be ascertained by an examination of the *Supplementary Statement of Environmental Effects*, prepared by DFP Planning Consultants. This Supplementary report is dated September 2015 after the August 2016 De Angelis Judgement in the Court of Appeal. There is no evidence in the Supplementary SEE that this Judgement was taken into account during the preparation of the amended documentation now before the Court.

4.6.9 The Introduction to the SEE (pp 1) includes the following statement:

The plans have been prepared in response to the findings of Commissioner Brown of the NSW Land and Environment court (LEC or 'the Court') in his 'amber light' judgement delivered on 20 July 2016 in Proceedings No 2016/00152878 ('these Proceedings') and pursuant to the Commissioner's directions. The amendments reflect the designs provided in material in evidence at the hearing before Commissioner Brown.

4.6.10 The SEE includes no reference to a Statement of Heritage Impact or any other heritage management document being part of the amended submission. Instead it relies on the following entries in *Table 3 Assessment against Relevant Provisions of the LEP*:

4.6.11 Provision

Clause 5.10 relates to Heritage Conservation and provides that development consent is required for the demolition, moving or alteration to a heritage item, heritage conservation area, relic, building, work, tree or place or disturbing an archaeological site or place of Aboriginal significance.

4.6.12 Assessment

The interim judgement of the court in these proceedings is that demolition of the existing building can be supported. Accordingly, no further assessment in regard to heritage is considered necessary as part of this amended proposal.

4.6.13 Consistent

Yes

4.6.14 There is no indication within the submitted amended architectural drawings of any consideration given by the Applicant to the opportunities available under Clause 5.10(10) of KLEP 2015.

4.6.15 I also note in the Supplementary SEE quotation above, the comment that the Interim Judgement simply concluded that "demolition of the existing building can be supported".

4.6.16 My reading of that interim decision is that it does not constitute an approval to demolish, particularly as the 3M Building is now a Heritage Item in KLEP 2015.

4.6.17 Elsewhere in the original Appeal documentation, the Applicant submitted expert reports by Peter David Leyshon, Martin Hill and Simon Hensley, discussing the economic, market and cost issues related to the possible retention of the 3M Building.

4.6.18 In my February 2016 Statement of Evidence, and again in the original Joint Heritage Experts report, I commented in detail about the relevance of those reports in the context of the discipline required to make a comprehensive or compelling case against the use of Clause 5.10(10) for an alternative, whole of site conservation and development proposal.

4.6.19 In the current circumstances of the LEP heritage listed status of the 3M Building, I maintain and confirm my earlier conclusions in this regard.

4.6.20 In *Velore Cellars v Fairfield Coty Council BC2007 03236* Brown C made the following determination, in an appeal regarding the demolition of a fire damaged Listed Heritage Item in Fairfield LEP 1994. In that case there was no disagreement between the experts that the property had been appropriately heritage listed.

33. The question is whether the costs of adaptive re-use are so high or there are no suitable uses that an unacceptable burden is placed on the owner of the building so that demolition should be permitted? If not, what is the most appropriate use? This question can only be properly answered through the submission (and approval) of a development application.

34. I am also mindful of the development incentives relating to heritage items in CI 32. ...Clearly these provisions provide a significant opportunity for the adaptive reuse of the site when combined with the structural soundness of the remaining fabric...the application is clearly inadequate in this regard and development consent must be refused.

35. Overall, the onus placed on the applicant to show why the building should be demolished has not been adequately discharged because the significance of part of the building and the potential adaptive re-use of the building...has not been adequately addressed.

4.6.21 The Applicant has not presented any new evidence to suggest that the opportunities now presented by Clause 5.10(10) of KLEP 2015, in the light of the recent De Angelis Judgement in the Court of Appeal, have been considered as part of the preparation of amended plans. The alternative use provisions would enable the remainder of the site to be developed for high density residential with the 3M Building upgraded as a centre for small business or other compatible purposes.

4.6.22 I do not believe that the Applicant has made a compelling case demolition of the 3M Building, which is a Heritage Item in KLEP 2015 is warranted.

**Brian McDonald**

4.6.23 I refer to paragraph 2.6.2 of my Statement of Heritage Evidence. Prior to the project proceeding

*"the applicant's planner made the necessary due diligence inquiries about any heritage issues relating to the site. These inquiries found that, while the 3M building may have been looked at in the many heritage studies, including studies and considerations for the three most recent LEPs affecting the site, at no stage did the Council show any interest in heritage listing the 3M building or its site. In these circumstances the earlier stages of the project understandably did not analyse heritage values and did not need to consider Clause 5.10(10) when the project was being formulated with no knowledge that it would be a heritage item and therefore no sense in looking at CI 5.10(10)."*

4.6.24 When the heritage issue was raised by the Council, the applicant commissioned an experienced and respected heritage architect to undertake an independent assessment of the heritage significance of the 3M Building, which found that it did not qualify as a heritage item. These findings, together with an overview of the work necessary to bring the building up to current Building Code and Fire Safety standards and a discussion on

adaptability options, were provided to the Council by the consultant. Paul Davies, by letter on 8 September 2014. A copy of that letter is attached at Appendix C of my original Statement of Evidence.

- 4.6.25 In these circumstances, it is unrealistic and unreasonable to demand that the applicant should undertake a study of alternative forms of development retaining the 3M building. In fact, it would have been obvious that the site cannot accommodate a Bunnings store and an operational 3M Building. Furthermore, the multi-level nature and the size of the floor plates of the 3M Building mean it could not be adapted as part of a Bunnings store.
- 4.6.26 At this point the heritage incentives Clause 5.10(10) of the Ku ring gai LEP 2015 was not applicable and could not be considered. Clause 5.10(10) could not have been applied until after 1 May 2015 when the item was listed.
- 4.6.27 When it became apparent that the 3M Building's heritage listing would in fact proceed, the project had reached the point where the applicant was committed to development of a Bunnings store. Any alternative development option that would retain the 3M Building would render the Bunnings project unviable. Nothing could be achieved by invoking the provisions of Clause 5.10(10). In these circumstances, it is unreasonable to expect that the applicant, Bunnings, should go through an exercise of exploring other adaptable uses for the 3m Building that do not serve the applicant's core business needs.
- 4.6.28 Putting aside the development of a Bunnings Store, evidence has been provided to show that upgrading or adaptation for office or similar uses (a) would significantly change the building, (b) that commercial office use in the precinct is failing because businesses are vacating and going elsewhere, just as the 3M company did, and (c) the building had been vacant for several years due to lack of interest in purchasing it. The evidence provided by other experts indicates that there is not a market that would sustain this level of expenditure. The break with continuous use by the 3M company several years ago, further weakens any connections under assessment criteria (a), (b) and (d).
- 4.6.29 A hotel or motel is permissible. However, the extent of alteration to serve this use would seriously diminish the little heritage significance it possesses.
- 4.6.30 Alternative but non-complying uses that might be considered by someone else under Clause 5.10(10) are types of residential adaptation, which would have unacceptable impacts due to the substantial transformation of the nature of the building through degree of compartmentation and provision of balconies as required for residential accommodation. The building lacks flexibility in its ability to meet the requirements of SEPP 65 and the Apartment Design Guide.
- 4.6.31 All of the alternative uses fail the test of: *"the use should fit the building, not the building be made to fit the use."*
- 4.6.32 In the light of the above discussion, I fail to see how the listing the 3M Building on 1 May 2015 and therefore the introduction of Clause 5.10(10) into play, would make any significant difference to the matters dealt with by David Leyshon, Martin Hill, Simon Hensley. As I noted in paragraph 2.3.10 of the previous Joint Heritage statement *"Any estimation of the costs of additional hypothetical adaptive re-use works and/or other*



*development options on the rest of the site with the building retained could only be highly conjectural at this stage."*

- 4.6.32 The above discussion and the evidence before the court from the original proceedings shows that there is a compelling case that the 3M Building may be demolished on the grounds of its limited heritage significance and the lack of viability in upgrading the building for commercial office use or adapting the building to some other use.

## 5.0 DISCUSSION OF CONTENTION 3

### LOSS OF SIGNIFICANT VEGETATION

The development will result in loss of significant vegetation on the Site.

#### Particulars:

- a) The proposed development will result in the removal of a *Eucalyptus saligna* (Sydney Blue Gum) known as T135, which has been identified as having high significance, good overall health and condition with visual amenity and significance to the Site. T135 is also a characteristic species of the Blue Gum High Forest Critically Endangered Ecological Community.
- b) The removal of Tree T135 is inconsistent with the objective of Clause 5.9 of LEP 2015, which seeks "to preserve the amenity of the area, including biodiversity values, through the preservation of trees and other vegetation."
- c) The removal of Tree T135 is inconsistent with the objectives of Part 13.1 of DCP 2015 in that it does not "Recognise, protect and enhance and aesthetic and heritage values of trees" or "Secure and maintain local character and amenity."

#### AGREEMENT

- 5.1 The experts agree that the previous Contention 5 has been amended by removal of references to the relationship of T135 to the heritage significance of the 3M Building.
- 5.2 The remaining reference in particular (c) contains a reference to the heritage values of trees in general which the experts do not dispute.

#### DISAGREEMENT

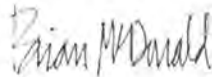
##### Graham Brooks

5.3 I have no reason to amend my previous opinion that T135 does not contribute to the heritage significance of the 3M Building. However, I make no comment on the aborological or visual values of the tree.

##### Brian McDonald

- 5.4 I reiterate my previous evidence that T135 does not contribute to the significance of the 3M Building and that Tree 135 derives no heritage significance from its proximity to the 3M Building. I do not claim to have the expertise to address the heritage significance of T135 as an isolated specimen of Blue Gum High Forest Critically Endangered Ecological Community.

#### Signed by



**Brian McDonald**, for Applicant



**Graham Brooks** for Respondent

21 March 2017

## Appendix A - CVs



### **GRAHAM BROOKS CV**

**Managing Director, GBA Heritage Pty Ltd**

#### **Positions Held**

Managing Director, Graham Brooks and Associates Pty Ltd, 1996 – 2015 and GBA Heritage Pty Ltd 2016 –  
Director, Schwager Brooks and Associates Pty Ltd, 1984 – 1996  
Associate Director, Travis Partners, 1977 – 1984  
Architect, Pollard Thomas & Edwards, London, 1975 – 1977  
Architect, Commonwealth Department of Works, 1972 – 1975

#### **Professional Qualifications**

Bachelor of Architecture (Hons), Sydney University, 1972  
Master of the Built Environment (B Cons) UNSW 1984  
Australian Institute of Architects, 1974  
Associate Royal Institute of British Architects, 1975  
Registered Architect, New South Wales  
Member, Australia ICOMOS

#### **Professional Associations**

President ICOMOS International Committee on Cultural Tourism, 2001 – 2011  
Chairman, AusHeritage Ltd, 1999-2001  
Chairman, National Trust (NSW) Historic Buildings Committee, 1996-1999  
Former Heritage Adviser, Liverpool City Council c1995-2005  
Member, Senior Advisory Panel, Global Heritage Fund 2010-  
Member, National Trust of Australia (NSW) 1973-  
Member Australia ICOMOS, 1980-  
UNESCO Monitoring Mission to World Heritage Site of Borobudur, 2003, 2006, 2007  
World Heritage Centre Monitoring Mission to Ajanta & Ellora Caves, India, 2004-2010  
Visiting Professor, Institute of Tourism Studies, Macao, 2006  
Former Executive Committee Member, Australia ICOMOS, 1990-1992  
Former Member Heritage Council Technical Advisory Committee on Materials Conservation, RAA Heritage Committee & RAHS Historic Buildings Committee

#### **CAREER SUMMARY**

I have worked in the fields of Architectural design, Heritage Conservation and Cultural Tourism Management for some 40 years, in Australia, the United Kingdom and more recently for UNESCO in Asia. During that period I have conducted heritage assessments and developed heritage management protocols for hundreds of historic buildings and places. My office has conducted hundreds more under my supervision.

I have lectured widely to business, heritage, professional and student groups on heritage assessments, heritage management, conservation practice, preparing heritage sites for cultural tourism and the methodologies of heritage asset management. I have participated in many appeals before the Land & Environment Court, acting on behalf of both Respondents and Applicants, and have also acted as a Court Appointed Heritage Expert.



## Brian McDonald

### PRINCIPAL URBAN DESIGNER, DON FOX PLANNING

Brian has over 30 years of experience in private practice working at director level and 20 years of public sector experience at high levels of responsibility and leadership.

His qualifications and experience cover architectural practice, urban planning and design and heritage conservation. He has a long-standing interest in study of places for human habitation, how they work and how they can work better. His multi-disciplinary background is applied to a thorough appreciation of context as the foundation for creative place making.

Brian has worked on project establishment and urban planning feasibility analyses to establish the opportunities and constraints based on context, played a key role in negotiation of feasible outcomes for major city developments and green field education campus sites. He also has a strong interest in the challenge of adapting older buildings to new compatible uses and to counterpoint fine historic architecture with quality contemporary design. He believes the adaptation of older buildings can make a significant contribution to securing a sustainable future. His commitment to heritage conservation and urban design is balanced by a keen appreciation of contemporary architectural practice, building technology and engineering services are reinforced by appreciation of the broader issues of place making and land use.

Brian has extensive experience as a consultant to federal, state and local government with an understanding of the regulatory framework of local government planning and environment assessment and approval processes. The width and depth of his experience over three disciplines is recognised by his appointment to Manly Council's Independent Assessment Panel, Mosman Council's Development Approvals Panel, Cumberland Council Independent Approvals Panel, St George Design Review Panel, also by appointment to represent Hunters Hill, Inner West and Cumberland Councils on District Planning Panels of the Greater Sydney Commission.

- Registered Architect in NSW 1966 (No. 2545)
- B. Arch. (Hons), University of NSW
- NSW Board of Architects Medallion
- M. Sc. (Hons), Urban Planning, Edinburgh University
- OHS General Induction for Construction Work in NSW (No. 29698)
- Examiner, NSW Board of Architects
- Fellow of the Australian Institute of Architects
- Member Planning Institute of Australia
- Member NSW Division Committee, Planning Institute of Australia
- Member Hunters Hill Council Conservation Advisory Panel
- Member Independent Assessment Panel, Manly Municipal Council (now Northern Beaches Council)
- Member Development Approvals Panel, Mosman Municipal Council
- Member Cumberland Independent Approvals Panel



- Member District Planning Panels representing—representing Hunter's Hill, Inner West and Cumberland Councils
- Member St George Design Review Panel

2016 to Present | DFP Planning Pty Ltd, NSW, Australia, Principal Urban Designer

2010-2015 | CCG Architects Pty Ltd, NSW, Australia, Director

2003-2010 | HBO+EMTB Heritage Pty Ltd, NSW, Australia, Director

1984-2003 | Brian McDonald + Associates Pty Ltd, NSW, Australia, Managing Director

1982-1984 | Gazzard and Partners Pty Ltd, NSW, Australia, Associate Director and Director

1978-1981 | NSW Heritage Council, NSW, Australia, Government Architects Representative,

Deputy Member, Historic Houses Trust of NSW

1969-1977 | Senior Architect, Government Architects Branch, NSW Department of Public Works

1966-1969 | Architect, Government Architects Branch, NSW Department of Public Works

1961-1965 | Trainee architect, Government Architects Branch, NSW Department of Public Works

Founding Chairman, National Trust (NSW) Urban Conservation Committee

Member National Trust (NSW) Historic Buildings Committee (former)

## Key Experience

### Planning and Heritage Studies

- University of New England Economics Faculty Master Plan
- University of New England – Traffic and Parking Study
- NSWIT Ultimo Master Plan
- Asia Australia Institute and ATO Training Facility for UNSW
- Lord Howe Island: Planning and Building Code Review
- Martin Place Civic Design Study
- Mosman Urban Design Study and draft DCP for Residential Zones
- Armidale Civic Centre Precinct Planning Study
- Hyde Park Plan of Management - Heritage Report 2006
- Pittwater and Barrenjoey Peninsula Heritage Study
- Singleton and Jeny's Plain Conservation Areas Study and Draft Development Control Plan
- Fenwick's Tug Boat Site, Balmain Development Control Plan for Leichhardt Council
- Leichhardt Heritage Study
- Maitland Conservation Area Study and Outline for DCP
- Parramatta Park Historic Landscape Study
- Parramatta Park Historic Buildings and Monuments Study
- Manickville Historic Retail Centres Study and Draft Development Control Plan
- Brigidine Site Randwick Medium Density Master Plan for NSW Dept. of Housing
- Old Government Farm Site, Castle Hill Heritage Study & Master Plan

- Central Sydney Heritage Inventory Review; Pilot Study of 40 Interwar Period buildings and 40 early Twentieth Century buildings
- Harris Park: Review of planning controls and heritage constraints for Elizabeth Farm visual curtilage for Parramatta Council
- Conservation Areas Study for Leichhardt Council
- Building Typologies Study and design guidelines for alterations and additions for Leichhardt Council
- Building Typologies Study, design guidelines for alterations and additions and draft DCP sections for Marrickville Council
- Northern Sydney Rail Link – Concept Plan – Urban Design component
- Hyde Park North Master Plan
- 363 George Street Redevelopment, Sydney – heritage architect – negotiating heritage outcomes and conservation of former warehouses 22 – 26 York Street
- Scots Church and Assembly Hall, York Street Sydney – established heritage and urban design parameters, negotiating with consent authorities, jury member for design excellence competition, heritage architect for duration of project.

### **Advisory and Expert Witness Services**

Town planning, architectural, heritage conservation services to local government and the private sector include:

- Development application assessments
- Strategic advice
- Heritage feasibility studies
- Urban design studies
- Design based development controls
- Expert witness in the Land and Environment Court
- Membership of advisory and approvals panels

Councils for which these services have been provided, include:

- |                 |                  |                |
|-----------------|------------------|----------------|
| • Hunter's Hill | • Leichhardt     | • Mosman       |
| • Manly         | • City of Sydney | • Lane Cove    |
| • Pittwater     | • Warringah      | • North Sydney |
| • Woollahra     | • Waverly        | • Burwood      |
| • Ku-ring-gai   | • Wollongong     | • Sutherland   |
| • Botany        | • Parramatta     | • Marrickville |
| • Georges River | • Rockdale       | • Cumberland   |

### **Major architectural and master planning projects – selected examples**

- Nepean College of Advanced Education master plan and stage 1 for 600 students (now part of UWS)
- UNSW Oatley Campus Planning Feasibility Study for Judd's Brick Pit site
- Milperra College of Advanced Education master plan and stage 1 for 600 students (now part of UWS)
- Sydney Water Board Illawarra Headquarters Building Coniston Wollongong

- Drummond College Stage 3 residential, Dining Hall and Principal's Residence, University of New England
- Gosford Court House
- Broken Hill Magistrate's Court
- Retreat and Spirituality Centre for the Sisters of St Joseph, South Kincumber
- Conversion of Naremburn Convent to apartments for the Sisters of St Joseph
- Adaptive re-use of St Leonards Park Grandstand to Planet X Youth Centre for North Sydney Council (National Trust/Energy Australia award for adaptive re-use)
- Australian Catholic University New Chapel and Campus Urban Design Improvements, North Sydney Campus.
- Liverpool Court House upgrade and additions,
- Liverpool Police Station - architectural and planning
- Deniliquin Police Station - architectural and planning