



Land and Environment Court New South Wales

Case Name: Auchenflower Investments Pty Ltd v Campbelltown City Council

Medium Neutral Citation: **[2019] NSWLEC 1652**

Hearing Date(s): 28 - 31 October 2019

Date of Orders: 29 January 2019

Date of Decision: 29 January 2019

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The Applicant is granted leave to amend the application and to rely upon the amended plans at Exhibit F, subject to paying the Respondent's costs as assessed or agreed pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.
(2) The appeal is dismissed.
(3) Development consent for Development Application DA 493/2016-DA-RA for the restoration of the existing heritage-listed former CBC Bank building, demolition of the existing commercial building at the rear of the site, construction of a 12-storey building at the rear of the site incorporating two levels of commercial tenancies and 65 residential apartments over 12 levels, and two levels of basement car parking at 263 Queen Street, Campbelltown is refused.
(4) All Exhibits are returned, except for Exhibits A, F, G, 11, 12, 13, 14 and 17.

Catchwords: DEVELOPMENT APPEAL – development adjoining a heritage item – heritage conservation area – exceedance of building height – character – compatibility – Campbelltown City centre

Legislation Cited: Architects Act 2003
Campbelltown Local Environmental Plan 2015
Campbelltown (Urban Areas) Local Environmental Plan 2002

Environmental Planning and Assessment Act 1979
Environmental Planning and Assessment Regulations
2000
Heritage Act 1977
Land and Environment Court Act 1979
State Environmental Planning Policy No 65 – Design
Quality in Residential Apartment Development

Cases Cited: Architects Marshall v Lake Macquarie City Council
(2005) 141 LGERA 1.
Grigorakis v Bayside Council (2016) NSWLEC 1573
Maygood Australia Pty Ltd v Willoughby City Council
[2013] NSWLEC 142
Project Venture Developments v Pittwater Council
(2005) 141 LGERA 80
Rebel MH Neutral Bay Pty Ltd v North Sydney Council
[2018] NSWLEC 191
Valen Properties Pty Ltd ATF Valen Properties Trust v
Hurstville City Council [2015] NSWLEC 1045
Veloshin v Randwick Council [2007] NSWLEC 428

Texts Cited: Apartment Design Guide
Campbelltown (Sustainable City) Development
Control Plan 2014
Campbelltown (Sustainable City) Development
Control Plan 2014
NSW Heritage Office, Design in Context: Guidelines
for Infill Development in the Historic Environment
(2005)
Greater Sydney Region Plan 2018

Category: Principal judgment

Parties: Auchenflower Investments Pty Ltd (Applicant)
Campbelltown City Council (Respondent)

Representation: Counsel:
N Eastman (Applicant)
A Hemmings (Respondent)

Solicitors:
Mills Oakley (Applicant)
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File Number(s): 2018/182961

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by the Sydney Western City Planning Panel of the Development Application DA 493/2016-DA-RA (the DA) for the restoration of the existing heritage-listed former CBC Bank building, demolition of the existing commercial building at the rear of the site, construction of a 21-storey building at the rear of the site incorporating two levels of commercial tenancies and 101 residential apartments over 19 levels, and four levels of basement car parking at 263 Queen Street, Campbelltown.

Evolution of the proposal

- 2 At the commencement of the hearing, Mr Eastman, counsel for the Applicant advised the Court that leave would be sought for the application to be further amended from that for which leave was granted on 28 June 2019 (Exhibit B), responsive to joint expert reports that were filed close to the eve of the hearing, and that amended plans would be completed and issued to the Respondent overnight.
- 3 I allowed Mr Eastman to provide the Court and the Respondent with a copy of the proposed amendments and schedule of changes, marked MFI-1, in order to identify the changes, completed or intended, on a page-turn basis. Once completed, I adjourned the first day of the hearing 30 minutes prior to the scheduled rise and directed that experts should confer in the hour prior to the second day of the hearing.
- 4 The Respondent sought a further adjournment, which I granted, at the commencement of the hearing the following day on the basis that amended plans were received from the Applicant at 11.05pm and further time was required by experts to understand if contentions were, or could be, resolved.
- 5 A further adjournment was granted at the commencement of the final day of the hearing to allow the Respondent to confer with experts on amendments

set out in the further amended plans marked MFI-2 that were said by the Respondent to vary from those issued to experts on the day prior.

- 6 Leave was then granted by the Court on the final day of the hearing for the Applicant to amend the application for development consent subject to the Applicant paying those costs of the Respondent thrown away as a result of the amendment of the leave granted for Exhibit F when compared to the application in Exhibit B, as agreed or assessed.

The onsite view

- 7 In accordance with the Court's usual practice, the proceedings commenced onsite where four public submissions were received from objectors, including a submission from Ms Kay Hayes on behalf of the Campbelltown and Airds Historical Society. While notes of the submissions were taken, agreed and marked Exhibit 17, the concerns may be summarised in general terms as follows:
- The potential for the development to adversely impact on the heritage item and on the local historic value of the area which has character and charm;
 - The development does not provide sufficient space for communal activities, including support for health and mental health of the occupants;
 - The development will create noise, dust and disruption during construction and in ongoing operation of the development, and its basement which is located close to neighbouring property at 461 Queen Street.
- 8 The Court, in the presence of the parties and the experts, visited the rear courtyard and side setback to 261 Queen Street, and attended the location of Ms Thorn's premises, located on the ground floor.

- 9 I was then taken to a number of viewpoints marked by the Respondent in Queen Street, Dumaresq Street and Allman Street from which photomontage images had been prepared by the Applicant, and which are contained in the Planning and Urban Design joint expert report (Exhibit 8).

The site and its context

- 10 The site is legally described as Lots 1 and 2 in SP 41598 with a frontage to Queen Street of 32.055m and having a total area of 2,216m² as shown in Exhibit 1.
- 11 The site contains a two-storey building on Lot 1 fronting Queen Street, known as the former CBC Bank Building and which is a state heritage listed item.
- 12 Behind the heritage item is a single storey commercial building located on Lot 2, with basement car parking. The external open space between the two buildings is common property.
- 13 The site is currently served by a one-way 'circular' driveway around the heritage item, with entry gained from the southwest cross over, and exit via the north east cross over.



Expert evidence

14 The Court was assisted by a number of experts as follows

Expertise	Applicant	Respondent
<i>Heritage</i>	Mr Brad Vale	Mr Paul Davies
<i>Town planning</i>	Mr Benjamin Craig	Mr Luke Joseph
<i>Urban Design</i>	Mr Rohan Dickson	Mr Peter Smith
<i>Traffic engineering</i>	Mr Ken Hollyoak	Mr Adam Urzulak
<i>Geotechnical engineering</i>	Mr Paul Stubbs	Mr Adam Urzulak
<i>Stormwater Engineering</i>	Mr Louis Panagopoulos	Mr Adam Urzulak
<i>Arboriculture</i>	Mr Peter Castor	Mr Hugh Taylor
<i>Waste</i>	Mr Michael Brown	Mr Peter Rimmer

15 As a result of the experts conferring prior to, and throughout the proceedings, a number of supplementary joint expert reports were tendered which confirmed that contentions were resolved, or could be resolved by condition of consent.

16 Experts in traffic engineering, heritage, urban design and town planning were required to give oral evidence.

The issues

17 The remaining issues at the centre of the dispute may be summarised as being whether:

- (1) The proposed development will adversely impact the heritage significance and value of the heritage item, and the Queen Street Heritage Conservation Area located close by.

- (2) The height of the proposal exceeds the maximum permissible height and so fails to achieve a transition in built form, is incompatible with the hierarchy and role of the centre, and does not minimise undesirable impacts arising from height.
- (3) The proposal is of high quality urban design and architectural merit, is consistent with the desired future character of the zone and with the requirement of the SEPP 65, the Apartment Design Guide (ADG).
- (4) Vehicular access to and from the proposed development is a risk to vehicular and pedestrian safety.

Statutory framework

- 18 As the proceedings relate to items listed on the State Heritage Register, the provisions of s 57 of the *Heritage Act 1977* (Heritage Act) apply:

57 Effect of interim heritage orders and listing on State Heritage Register

(1) When an interim heritage order or listing on the State Heritage Register applies to a place, building, work, relic, moveable object, precinct, or land, a person must not do any of the following things except in pursuance of an approval granted by the approval body under Subdivision 1 of Division 3:

- (a) demolish the building or work,
- (b) damage or despoil the place, precinct or land, or any part of the place, precinct or land,
- (c) move, damage or destroy the relic or moveable object,
- (d) excavate any land for the purpose of exposing or moving the relic,
- (e) carry out any development in relation to the land on which the building, work or relic is situated, the land that comprises the place, or land within the precinct,
- (f) alter the building, work, relic or moveable object,
- (g) display any notice or advertisement on the place, building, work, relic, moveable object or land, or in the precinct,
- (h) damage or destroy any tree or other vegetation on or remove any tree or other vegetation from the place, precinct or land.

- 19 The Heritage Act sets out the matters to be considered by the consent authority, or the court on appeal, at s 62 in the following terms:

62 Matters for consideration

In determining an application for approval in respect of an item or land, the approval body shall take into consideration:

- (a) the extent to which that application, if approved, would affect the significance of any item as an item of the environmental heritage,
- (b) the representations, if any, made with respect to that application under section 61 (3),
- (c) such matters relating to the conservation of that item or land as to it seem relevant, and
- (c1) any applicable conservation management plan (within the meaning of section 38A) endorsed by the Heritage Council, and
- (d) such other matters as to it seem relevant.

- 20 As the proposal includes residential apartment development, the State Environmental Planning Policy No 65 (SEPP 65) applies. Clause 28 of the SEPP 65 requires that:

...

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

- (a) the advice (if any) obtained from the design review panel, and
 - (b) the design quality of the development when evaluated in accordance with the design quality principles, and
 - (c) the Apartment Design Guide.
- ...

- 21 Clause 30 of the SEPP 65 includes provisions that, if evident in the development the subject of the development application, cannot be the basis of a refusal:

30 Standards that cannot be used as grounds to refuse development consent or modification of development consent

(1) If an application for the modification of a development consent or a development application for the carrying out of development to which this Policy applies satisfies the following design criteria, the consent authority must not refuse the application because of those matters:

- (a) if the car parking for the building will be equal to, or greater than, the recommended minimum amount of car parking specified in Part 3J of the Apartment Design Guide,
 - (b) if the internal area for each apartment will be equal to, or greater than, the recommended minimum internal area for the relevant apartment type specified in Part 4D of the Apartment Design Guide,
 - (c) if the ceiling heights for the building will be equal to, or greater than, the recommended minimum ceiling heights specified in Part 4C of the Apartment Design Guide.
- ...

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

- (a) the design quality principles, and
- (b) the objectives specified in the Apartment Design Guide for the relevant design criteria.

22 A provision relevant to the operation of SEPP 65 is found in s 50 (1A) and (1AB) of the Environmental Planning and Assessment Regulations (EPA Regulations) which requires that a qualified designer, being defined at s 3 of the EPA Regulations as a person registered under the *Architects Act 2003*, must provide the consent authority, or the Court on appeal, with a statement that they designed, or directed the design of the development and address the design quality principles in Schedule 1 of SEPP 65, and demonstrates, in terms of the Apartment Design Guide, how the objectives in Parts 3 and 4 of that guide have been achieved.

23 During the course of the hearing, and following the tender of exhibits by the parties, I noted to the Applicant that a statement consistent with s 50 (1AB) of the EPA Regulations did not accompany the Notice of Motion before the Court referred to at [2] and had not been filed subsequently. A statement was subsequently tendered in a complying form and marked Exhibit G.

Application of the Campbelltown Local Environmental Plan (2002)

24 It is commonly held by the parties that the original development application was lodged, but not finally determined, prior to the commencement of the Campbelltown Local Environmental Plan 2015 (CLEP 2015). While the savings provisions at cl 1.8A requires that I determine the application as if the CLEP 2015 had not commenced, the Respondent relies on *Maygood Australia Pty Ltd v Willoughby City Council [2013] NSWLEC 142* to the effect that while the CLEP 2015 had not commenced, it did exist and was imminent and certain and so regard should be had to the provisions that follow, under s 4.15(a)(ii) of the EPA Act, or s 79C as it was formerly known.

25 In force at the time of lodgement was the Campbelltown (Urban area) Local Environmental Plan 2002 (CLEP 2002). Its aims, at subcl 2(1) (b) include:

To establish a broad framework of controls and allow the opportunity for more detailed provisions relating to specific types of development or specific areas to be provided by development control plans

26 The objectives at subcl 2 (2) of the CLEP 2002 include, relevantly:

- ...
- (j) to conserve the environmental heritage of the urban area of the City of Campbelltown, and..
 - (l) to conserve existing significant fabric, settings, relics and views associated with the heritage significance of heritage items and heritage conservation areas and their settings
 - (m) to ensure that any development does not adversely affect the heritage significance of heritage items and heritage conservation areas and their settings, and
 - (p) to ensure that the heritage conservation areas throughout the urban area of the City of Campbelltown retain their heritage significance...

27 The CLEP 2002 locates the site within the 10a – Regional Comprehensive Centre Zone in which commercial premises and residential flat buildings are permitted with consent.

28 The objectives of the zone, at cl 28, are as follows:

- (a) to provide land for the City of Campbelltown and the Macarthur region's largest centre of commerce, and
- (b) to encourage employment and economic growth, and
- (c) to accommodate tertiary education and hospital facilities for the City of Campbelltown and the Macarthur region, and
- (d) to accommodate a wide range of cultural, entertainment and like facilities, and
- (e) to permit limited industrial uses that are compatible with the proper operation of a major regional centre, and
- (f) to encourage a variety of forms of higher density housing, including accommodation for older people and people with disabilities in locations which are accessible to public transport, employment, retail, commercial and service facilities.

Except as otherwise provided by this plan, consent must not be granted for development on land within this zone unless the consent authority is of the opinion that carrying out the proposed development would be consistent with one or more of the objectives of this zone.

A further objective of this zone is to encourage a high quality standard of development which is aesthetically pleasing, functional and relates sympathetically to nearby and adjoining development.

- 29 The site is listed in Schedule 1 of the CLEP 2002, and Schedule 5 of the CLEP 2015 as a heritage item of state significance, Item No. 499 (I00499).
- 30 Provisions relating to the conservation of heritage items are found in Division 2 of the CLEP 2002. The objectives, at cl 43 are, relevantly:
- (a) to conserve the environmental heritage of the City of Campbelltown, and
 - (b) to conserve the heritage significance of existing significant fabric, relics, settings and views associated with the heritage significance of heritage items and heritage conservation areas, and
 - ...
 - (e) to ensure that the heritage conservation areas throughout the City of Campbelltown retain their heritage significance.
- 31 Clause 44(1) of the CLEP 2002 sets out the relevant terms when development relating to heritage items and heritage conservation areas may be carried out, and only with development consent:
- (a) demolishing or moving a heritage item or a building, work, relic, tree or place within a heritage conservation area,
 - (b) altering a heritage item or a building, work, relic, tree or place within a heritage conservation area by making structural or non-structural changes to its exterior, such as to its detail, fabric, finish or appearance,
 - ...
 - (f) erecting a building on, or subdividing, land on which a heritage item is located or which is within a heritage conservation area.
- 32 Subclause 44(4) of the CLEP 2002 requires a consent authority to assess the extent to which the carrying out of the proposed development would affect the heritage significance of a heritage item or heritage conservation area, and subclause 44(6) sets out issues to be addressed by a heritage impact statement.
- 33 As the site is occupied by, and is also in the vicinity of, a heritage item, being the adjoining property at 261 Queen Street, cl 49 of the CLEP 2002 applies to the proposed development:
- (1) Before granting consent to development in the vicinity of a heritage item, the consent authority must assess the impact of the proposed development on the heritage significance of the heritage item and of any heritage conservation area within which it is situated.

(2) This clause extends to development:

- (a) that may have an impact on the setting of a heritage item, for example, by affecting a significant view to or from the item or by overshadowing, or
- (b) that may undermine or otherwise cause physical damage to a heritage item, or
- (c) that will otherwise have any adverse impact on the heritage significance of a heritage item or of any heritage conservation area within which it is situated.

34 Subclause 49(3) provides:

The consent authority may refuse to grant any such consent unless it has considered a heritage impact statement that will help it assess the impact of the proposed development on the heritage significance, visual curtilage and setting of the heritage item.

35 Clause 50 of the CLEP 2002 is in similar terms to the provisions at cl 5.10(10) of the CLEP 2015 and provides for heritage incentives in the following terms:

The consent authority may grant consent to the use for any purpose of a building that is a heritage item, or of the land on which such a building is erected, even though the use would otherwise not be allowed by this plan, if:

- (a) it is satisfied that the retention of the heritage item depends on the granting of consent, and
- (b) the proposed use is in accordance with a conservation management plan which has been endorsed by the consent authority, and
- (c) the granting of consent to the proposed use would ensure that all necessary conservation work identified in the conservation management plan is carried out, and
- (d) the proposed use would not adversely affect the heritage significance of the heritage item or its setting, and
- (e) the proposed use would not adversely affect the amenity of the surrounding area otherwise than to an insignificant extent.

Application of the Campbelltown Local Environmental Plan (2015)

36 The aims of the CLEP 2015 are contained at cl 1.2 and provide, relevantly:

...
(g) to encourage high-quality, well-designed development, that is of an appropriate design and scale to complement its setting and that enhances and encourages a safe and healthy environment,

...
(j) to identify, conserve and protect the Aboriginal, cultural and natural heritage of Campbelltown and to minimise any adverse impacts of development on heritage items and conservation areas,

- 37 The CLEP 2015 locates the site within the B3 Commercial Core and there is no dispute that the proposal is consistent with the zone objectives. The proposed development is identified as shop top housing which is permitted in the B3 zone with consent.
- 38 Clause 4.3 of the CLEP 2015 sets a maximum permissible height of 32m for the site, by reference to the height of buildings map, and sets out the following objectives:
- (1) The objectives of this clause are as follows—
 - (a) to nominate a range of building heights that will provide a transition in built form and land use intensity across all zones,
 - (b) to ensure that the heights of buildings reflect the intended scale of development appropriate to the locality and the proximity to business centres and transport facilities,
 - (c) to provide for built form that is compatible with the hierarchy and role of centres,
 - (d) to assist in the minimisation of opportunities for undesirable visual impact, disruption to views, loss of privacy and loss of solar access to existing and future development and to the public domain.
- 39 While the Applicant has prepared a written request pursuant to cl 4.6 of the CLEP 2015, the parties are agreed that, as the CLEP 2002 applied at the time of the lodgement of the DA, and regard may be had to the provisions of the CLEP 2015, consideration of the written request should not be determinative in this matter.
- 40 Provisions relating to heritage conservation are similar, but not identical, to provisions in the CLEP 2002 as they appear, relevantly, in cl 5.10 of the CLEP 2015:

5.10 Heritage conservation

...

(1) Objectives

The objectives of this clause are as follows:

- (a) to conserve the environmental heritage of Campbelltown,
- (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.

(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,

...

(b) altering a heritage item that is a building by making structural changes to its interior or by making changes to anything inside the item that is specified in Schedule 5 in relation to the item,

...

(e) erecting a building on land:

(i) on which a heritage item is located or that is within a heritage conservation area, or

...

(f) subdividing land:

(i) on which a heritage item is located or that is within a heritage conservation area, or

...

(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).

(5) Heritage assessment

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.

...

(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

- 41 Consent must not be granted for mixed use development in the B3 zone containing a residential component unless certain provisions contained in subcl 7.9 (3) of the CLEP 2015 are satisfied.
- 42 Clause 7.13 applies to the site and requires that proposed development achieve design excellence, defined in the following terms:

7.13 Design excellence

(1) The objective of this clause is to ensure that development exhibits the highest standard of architectural and urban design as part of the built environment.

(2) This clause applies to development involving the construction of a new building or external alterations to an existing building on land in the following zones:

- (a) Zone R3 Medium Density Residential,
- (b) Zone R4 High Density Residential,
- (c) Zone B2 Local Centre,
- (d) Zone B3 Commercial Core,
- (e) Zone B4 Mixed Use.

(3) Development consent must not be granted to development to which this clause applies unless the consent authority considers that the development exhibits design excellence.

(4) In considering whether development to which this clause applies exhibits design excellence, the consent authority must have regard to the following matters:

- (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
- (b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,
- (c) whether the development detrimentally impacts on view corridors,
- (d) how the development addresses the following matters:
 - (i) the suitability of the land for development,
 - (ii) existing and proposed uses,
 - (iii) heritage issues and streetscape constraints,
 - (iv) bulk, massing and modulation of buildings,
 - (v) street frontage heights,
 - (vi) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,
 - (vii) the achievement of the principles of ecologically sustainable development,
 - (viii) pedestrian, cycle, vehicular and service access, circulation and requirements,
 - (ix) the impact on, and any proposed improvements to, the public domain,

- (x) the interface with the public domain,
- (xi) the quality and integration of landscape design.

The Campbelltown (Sustainable City) Development Control Plan 2014

43 The Respondent submits that the CLEP 2002 is in a former style which is broadly framed, and relies on controls contained in the Campbelltown (Sustainable City) Development Control Plan 2014 (CDCP 2014), being operational at the time of lodgement. Part 5 of the CDCP 2014 is applicable to Residential Apartment Buildings and Mixed-use development.

44 Part 5.2 of the CDCP 2014 contains background in the following relevant terms:

“The form and character of residential apartment and mixed use developments are required to be carefully managed to ensure the creation of attractive business centre environments, that in themselves, will be a mainstay in attracting investment in housing, retail, commercial and other forms of development. Importantly though, significant heritage and other ‘community places’ need to be respected.”

45 Part 5.3.1 of the CDCP 2014 requires all residential apartment buildings and mixed use development having 3 storeys or more and 4 or more self-contained dwellings to satisfy the standards within the SEPP 65.

46 Part 5.3.2 contains design requirements relating to Building Form and Character in the following terms:

“(a) The maximum height of a residential apartment building and a mixed-use development shall be a maximum of two (2) storeys above ground level (existing), except as specified within Schedule 1 of the Plan

(b) Building design shall consider foremost the qualities (both natural and built) and character of the surrounding area including the significance of any heritage item on the land.

(c) Building design shall incorporate the following features to assist in the achievement of high quality architectural outcomes:

(i) incorporation of appropriate façade treatments that helps the development to properly address the relevant street frontages, key vistas and to add visual interest to the skyline;

(ii) incorporation of articulation in walls, variety of roof pitch, architectural features (balconies, columns, porches, colours, materials etc) into the façade of the building;

(iii) variation in the planes of exterior walls in depth and/or direction;

- (iv) variation in height of the building so that it appears to be divided into distinct base, middle and top massing elements;
 - (v) articulation of all building's façade (including rear and side elevations visible from a public place) by appropriate use of colour, arrangement of façade elements, and variation in the types of materials used;
 - (vi) utilisation of landscaping and architectural detailing at the ground level; and
 - (vii) avoidance of blank walls at the ground and lower levels.
- (d) Building design shall demonstrate to Council's satisfaction that the development will:
- (i) facilitate casual surveillance of and active interaction with the street
 - (ii) be compatible with a higher density character where schedule 1 applies;
 - (iii) be sufficiently setback from the property boundary to enable the planting of vegetation to soften the visual impact of the building; and
 - (iv) maximise cross flow ventilation, therefore minimising the need for air conditioning.
- (e) Building colours, materials and finishes shall generally achieve subtle contrast. The use of highly reflective or gloss materials or colours shall be minimised.
- (f) Building materials shall be high quality, durable and low maintenance.
- ...
- (h) within the Campbelltown Business Centre, the location of a residential apartment building and a mixed use development shall be in accordance with Figure 5.3.4."

- 47 Part 5.3.2(a) provides that a residential apartment building shall be a maximum of two (2) storeys above ground level (existing), except as specified within Schedule 1 of the Plan. Schedule 1 of the Plan, being the CDCP 2014, at Map 2 illustrates the site shaded in a colour that indicates, in the legend, a 10 storey maximum building height.

Expert evidence - Heritage

- 48 While the heritage experts support the proposed works to the heritage item, they are at odds as to whether the proposed development will have an adverse impact upon the heritage values of the heritage items in question, and the Queen Street Heritage Conservation area more broadly.
- 49 As the heritage significance of the site is agreed between the experts, their evidence was given in relation to three broad themes, being:

- Setting and views

- Curtilage and setback
- Heritage values and the desired future character

Setting and views

- 50 The experts agree that the heritage item is visible from locations on Queen Street and Allman Street, and that its setting includes its neighbour, the former Post Office at 261 Queen Street and the Queen Street Heritage Conservation Area (HCA) where a view of the heritage item is acknowledged by Mr Davies to be oblique and largely limited to its frontage, although progressively becomes more frontal as a viewer moves down Queen Street in a north easterly direction.
- 51 The experts also agree that the heritage item is viewed in the round on the site itself, and not beyond the site boundaries and that the rear of the site has limited heritage significance given the past removal of former stables buildings and the construction of a single storey commercial building.
- 52 However it is also agreed by the parties that the proposed development would be visible from the locations described at [50] given the proposed height, and locations on Dumaresq Street, and in what is currently a car park adjacent to the Telstra site. Mr Davies is of the view that a building at the maximum permissible height of 32m would dominate the setting, let alone one that is taller.
- 53 In the Statement of Heritage Impact prepared by Mr Vale (Exhibit B, Tab 14), he considers “the former bank and adjacent post office contribute to the setting of the Georgian commercial buildings to the south-west along Queen Street” (Exhibit B Folio 271), and is of the opinion that the setting will be unaffected by the proposed development.
- 54 I am told the setting of the heritage item also extends to landscape. According to Mr Davies, the setting of the heritage building requires a landscape form that is consistent with its heritage values, and in his view, the proposed raised

planter bed over the basement is not consistent with a landscape form that should use deep soil, screening trees and gardens in the Victorian manner. To facilitate this proposal, Mr Davies provides a sketch showing the extent of the basement car parking setback further from the heritage item. These matters are agreed in the supplementary report and sketch prepared by the heritage experts, marked Exhibit 12.

- 55 Amendment to the landscape design is also supported by Mr Dickson's oral evidence that the current landscape design is not of sufficient size to mitigate the scale of the new building, and that redesign should be a condition of consent to be addressed prior to the Construction Certificate once the rear setback from the heritage item and other relevant matters are settled.

Curtilage and setback

- 56 In their joint report, the experts are essentially agreed that an appropriate rear setback is interdependent with the height of the proposed development. According to Mr Vale, there is a proportional relationship between acceptable development height and setback from a heritage item. To Mr Davies, there is no 'magic dimension' that resolves heritage issues, but as a principle, the greater the height and scale of new development, the greater the setback required to prevent new development overwhelming the heritage building.
- 57 Mr Vale considers the setback to be informed by the curtilage relating to the heritage item, which he says is reduced due to the more recent commercial building located at the rear of the site. Instead, Mr Vale believes the effective curtilage extends forward of the site "into the public domain, across Queen Street and for some distance up Allman Street because these areas are necessary for views of the building" (Exhibit B, Tab 14, Folio 281).
- 58 For this reason, Mr Vale considers the setback of 18m to the new development, measured from the rear of the primary form of the heritage item, to be appropriate. This varies from advice issued by the Heritage Council in letters dated 9 September 2018, 12 February 2019 and 13 August 2019 (Exhibit 2, Tabs 11-13), which encourages a setback of at least 6m to

basements from all significant heritage fabric and a setback of 18m to above-ground structures from the rear most portion of the heritage item. Put another way, while a rear setback dimension of 18m is agreed, the experts are at odds as to the location from which the dimension should be taken.

- 59 To Mr Vale, the proposed tree, or trees as indicated in the setback between the heritage item and the proposed tower, shown in sketch at Exhibit 12 will serve to provide a form of transition between the heritage item and the proposed tower, while acknowledging the height of the tree or trees is unlikely to be any taller than the heritage building itself.

Heritage values and desired future character

- 60 To Mr Eastman, unlike other council areas which consider the height of buildings in what I will refer to as a 'place-based' approach, and which he describes as a 'colour salad', the height of buildings map in the CLEP 2015 applies a consistent maximum height of 32m across the precinct.
- 61 Mr Davies accepts that the height of buildings map is more general than in some other Council areas containing a number of heritage items, however given that other controls operate to constrain development, height should be regarded as a maximum and not of right.
- 62 Mr Davies also accepts that any new development in excess of a two-storey form would be visible, and would act as a background to the heritage item. The form he depicts in Figure 3 of the joint report (Exhibit 5) is a representation of the maximum envelope he considers appropriate when factoring in the suite of controls that apply to the site and as a means of transitioning in scale from the existing heritage item on the site, to the desired future character of development that may be anticipated on adjacent sites.
- 63 In the alternative, Mr Vale's view is that while the sketch at Figure 3 appears to work well as a 2-dimensional drawing, in reality sightlines from the street frontage extend past the heritage item. This means any form of any scale would be visible regardless of its height.

- 64 What is important, according to Mr Davies, is whatever the final bulk and scale of development to the rear of the site, the heritage item should be dominant in the view.
- 65 Mr Vale considers that as any development to the rear of the site must address the desired future character it cannot, then, be in character with the heritage buildings on the site (Exhibit 5, para [3.8(i)]), however is acceptable due to the muted manner of the proposed façade (Exhibit 5, p6). In the Statement of Heritage Impact, and in his oral evidence, Mr Vale accepts that “the proposed tower will have a dramatic contrast in scale”, which the Respondent says can be mitigated by lowering the tower for a less dramatic contrast in scale.
- 66 To Mr Davies, his sight line analysis would suggest a building form that is 5-6 storeys in height is appropriate, so as to allow the transition to taller buildings of around 10 storeys where they are unconstrained by heritage and other considerations.
- 67 In their oral evidence, the experts agreed that controls relating to heritage can also be expected to have an effect on adjacent sites such that the height and setback of future development would need to respect the proximity of the heritage item on the site and so assist to transition in height and scale by lowering height, setting back and the like.

Expert evidence - Planning and Urban Design

Application of the controls to the site

- 68 The Applicant’s town planning expert, Mr Ben Craig, is of the view that the appropriate starting point when considering development potential on a site is to refer first to the zoning and its objectives, and then to the desired future character of the locality. From this perspective, the proposal is consistent with the following zone objectives in the CLEP 2002:

(a) to provide land for the City of Campbelltown and the Macarthur region’s largest centre of commerce, and

(b) to encourage employment and economic growth, and

..
(f) to encourage a variety of forms of higher density housing, including accommodation for older people and people with disabilities in locations which are accessible to public transport, employment, retail, commercial and service facilities.

- 69 As for the desired future character expected by the controls, Mr Craig identifies the 10-storey height limit applicable to the site under the CDCP 2014, the 32m height limit which now applies to the large Campbelltown Mall site directly adjacent to the site, and to the Telstra site immediately to the north of the site under the CLEP 2015, and Mr Craig considers Section 5.3 of the CDCP 2014 to be also relevant.
- 70 According to Mr Craig, is not unreasonable for the Applicant to propose additional height in recognition of the burden, being defined in Exhibit C as a cost of \$715,000, to retain and restore the heritage item.
- 71 Mr Craig considers that an assessment of the appropriateness of the bulk, height and scale of the proposal is best done by reference to the tests set out in *Veloshin v Randwick Council* [2007] NSWLEC 428 (*Veloshin*).
- 72 Applying the *Veloshin* tests, the proposal is said to be consistent with the impacts that may be reasonably expected under the controls, when considering overshadowing, view loss and visual impact from outside the site. Furthermore, while the proposal exceeds the 10 storey limit by 2 storeys, it achieves the taller development expected in the area with a substantial separation distance to the heritage item and incorporates design features consistent with those set out in the CDCP 2014 at Section 5.3.2, and so can be said to be compatible with the higher density character desired in Section 5.3.2(d)(ii).
- 73 Both Mr Smith and Mr Joseph share the view that the starting point set out by Mr Craig is flawed as it fails to adequately consider the heritage values of the site. To explore development options derived from the zone objectives and desired future character alone fails to consider foremost the significance of heritage as required by section 5.3.2(b) of the CDCP 2014, the heritage

controls at cl 44, and cl 49 of the CLEP 2002 which sit alongside and are found in similar terms, at cl 7.13 (4)(d)(iii) of the CLEP 2015 and in Schedule 1 of the SEPP65 (Principle 1, Context and Neighbourhood character).

- 74 Evidence of this failure to appropriately consider the heritage values on the site is found, according to Mr Smith, in the architect's statement prepared by the authoring architect, Steve Zappia of Marchese Partners (Exhibit G) which states, in addressing Principle 1: "...the site is largely free of constraints and gently slopes from west to east."

Visual impact of height

- 75 Mr Joseph considers the height of the proposed development excessive and maintains that the height exceedance of 39% would be discernible from Queen Street, and Allman Street due to the natural topography in the area, and fails to achieve the objectives of cl 4.3 of the CLEP 2015 which seek, relevantly, to nominate a range of building heights that will provide a transition in built form and land use intensity across all zone.
- 76 In Mr Joseph's view, a preferable outcome would be a building of around 20m in height, or six storeys, to achieve a balance between the scale of the heritage item on the site, and development at the rear that is in a manner consistent with Campbelltown's status as a regional centre.
- 77 This is a scale similar to that supported by Mr Davies, and depicted in his sketch at Figure 3, in Exhibit 5. Mr Joseph and Mr Smith also refer to guidance on designing with heritage fabric which is in similar terms and appears in Figure 19, on page 8 (Exhibit 15) NSW Heritage Office, *'Design in Context: Guidelines for Infill Development in the Historic Environment'* (2005) , and which is explained in the following terms:

"The scale of a building is its size in relation to surrounding buildings or landscape. Infill design should recognise the predominant scale (height, bulk, density, grain) of the setting and then respond sympathetically. The impact of an inappropriately scaled building cannot be compensated for by building form, design or detailing."

- 78 According to Mr Craig, this lower scale is inconsistent with the desired future character which clearly seeks a 'transformational change' that will be evident in any future development of the Campbelltown Mall or Telstra sites located immediately adjoining the site, and with which a taller building such as that proposed would be compatible, but not necessarily the same as set out in *Project Venture Developments v Pittwater Council* (2005) 141 LGERA 80; [2005] NSWLEC 191 (*Project Venture*).
- 79 Mr Joseph and Mr Smith are both of the view that the adjoining Campbelltown Mall site is large enough to masterplan so that the heritage impact on the Queen Street HCA and No's 261 and 263 Queen Street could be sensitively managed through setbacks, open space and the like.
- 80 In the joint report, Mr Craig considers it likely that allowable heights will go up given Campbelltown's status as a metropolitan cluster in the Greater Sydney Regional Plan, and a smaller building as preferred by Mr Joseph and Mr Davies would be a significant under-development of the site.
- 81 In drawing DA0.04, the Applicant depicts future development possible on the subject and adjacent sites, which exemplifies the desired future character, and identifies sites on Dumaresq Street and at the 'RSL site' which have been approved at the maximum height, or above.
- 82 In their oral evidence, Mr Joseph and Mr Craig identified the sites at Dumaresq Street, the RSL site and a recently approved development at Cordeaux Street, and agreed that none of those sites were burdened by a heritage item on the site, and where heritage items were located adjacent, those items were listed for their local, and not state, heritage significance.
- 83 The proposed development at 6-12 Dumaresq was, according to Mr Joseph, approved due to the exceedance being visually imperceptible from beyond the site, unlike the subject site, and the development at Cordeaux Street was granted consent by the Court following agreement between the parties under s34 of the Land and Environment Court Act for reasons which included its

height being well below the development standard in recognition of proximity to heritage and to provide a transition to a taller building of 10 storeys.

84 The Respondent also considers it relevant that advice from the Heritage Council was consistently to the effect that any height above 32m was excessive and would adversely impact on the heritage item, and that even a 10 storey building would have adverse visual impact on the heritage item.

85 In the Applicant's written submissions, Mr Eastman further considers the planning principles in *Veloshin* and *Project Venture* which he regards as most relevantly distilled in the four tests outlined by, Mr Eastman, in *Valen Properties Pty Ltd ATF Valen Properties Trust v Hurstville City Council* [2015] NSWLEC 1045 (*Valen*) at [64] as follows:

- What is/are the existing and desired future characters?
- Are there any physical impacts?
- Are there any visual impacts?
- Is the proposal therefore capable of existing in harmony (although not the same)?

86 In summary, Mr Eastman's submissions are that:

- the existing and future character are defined by firstly what is there currently (being the heritage items and the heritage conservation area), and secondly, what the controls expressly permit.
- In terms of physical and visual impacts, there is no material difference between a 10-storey and 12-storey building where the desired future character is of taller buildings, and as relates to the additional height, overshadowing is minor.

- The proposed development will be compatible for the reasons that precede and when the separation and height of the proposed tower form are considered from the heritage item.

Design excellence

- 87 It is Mr Smith's view that the proposal does not relate well to its context as it lacks appropriate consideration of the heritage significance on the subject site, and the adjoining item at No 261 Queen Street. Furthermore it does not satisfy the design excellence provisions at cl 7.13 of the CLEP 2015, as the proposed new tower form is, in summary, "too big, too wide, too high".
- 88 Mr Dickson characterises the proposal as being the result of a design process of constant improvement as it has sought to respond to both the heritage constraints on the site, and the desired future character evident in the development standards. Together, these competing priorities represent a context that is in transition.
- 89 In seeking to address the tests contained in *Valen*, the Applicant submits that there is no difference in the view loss or visual impact whether the proposal is 10-storeys or 12-storeys in height as both would be compatible with the higher density character desired by Part 5.3.2(d)(ii) of the CDCP.

Expert evidence - Traffic

- 90 The traffic engineering joint expert reports, marked Exhibit 9, and Exhibit 14, confirm that the only remaining contention that is not otherwise able to be resolved by way of a condition of consent relates to the safety of vehicular access to and from the basement car parking.
- 91 Mr Urzulak contends that the turning circle and clearance allowed on the Exhibit F plans do not permit 2 vehicles to enter or exit the basement car park ramps without coming in to conflict, and relies on Section 2.5.2(c) of the Australian Standard AS2890.1 which states:

“Intersections between circulation roadways and ramps, and with parking aisles shall be designed so that both the approach roadways and the intersection area are wide enough to accommodate turning vehicles and there is adequate intersection sight distance.”

- 92 Mr Hollyoak accepts that the swept paths in Annexure D of Exhibit 9 show the potential conflict, but maintains that nothing in AS2890.1 requires two vehicles to make the turn simultaneously, and in his experience, it is common for vehicles to approach with caution and to execute the manoeuvre one-at-a-time. Furthermore, AS2890.1 sets out the widths required for ramps, and for aisles with which the proposed development complies.
- 93 In my view, it is only necessary to consider the evidence of the traffic experts in the event that I am minded to grant consent, which is contingent upon consideration first of matters relating to heritage and building height.

Consideration

The proposed tower form is visible above and between heritage items

- 94 In essence, the Applicant seeks consent for development on a site burdened by a state heritage item, which it intends to retain and restore, and in recognition of which the Applicant relies on ‘heritage incentives’ to exceed the maximum permissible height on the site of 10 storeys, under the CLEP 2002, and exceed 32m as set out in the CLEP 2015.
- 95 Section 62(a) of the Heritage Act requires that, in determining this application, I take into consideration the extent to which the application, if approved, would affect the significance of any item as an item of the environmental heritage.
- 96 When read together, sub cl 44(4) and subcl 49(1) of the CLEP 2002 require that I consider the impact of the proposed development on the heritage significance of the item, the heritage item at No 261 Queen Street, and the Queen Street HCA and its setting. Clause 5.10(4) of the CLEP 2015 is in virtually identical terms.

- 97 The heritage items at No 261 and No 263 Queen Street are similar in period, form and style. There is a generous distance between the two heritage items, which is the proposed location of the pedestrian approach to the tower form at the rear, which is shown as an open, paved promenade or forecourt from Queen Street, close to the intersection with Allman Street.
- 98 The parties are agreed that the view of the heritage items from Allman Street is an important one. Relevantly, the site effectively terminates Allman Street, and the arrangement of the site in its context results in a 'gun barrel' view from Allman Street which, as Mr Davies observes, rises to the south east with the effect of elevating a viewer's sightline such that the proposed tower form to the rear is made prominent.
- 99 If I accept Mr Vale's view that the curtilage of the heritage item projects forward of the building, it is from a vantage point within this curtilage that the proposed tower would be prominent over the heritage item on the site. The proposal is not concealed behind, or viewed only as one passes by the site. Instead it will be highly visible above and between the heritage items from Queen Street, and Allman Street.
- 100 The combination of a higher topography and the direct sightline caused by the gun barrel view from Allman Street between the heritage items at No 261 and No 263 Queen Street make it unlikely, in my view, that the proposed tower will be visually associated with taller buildings that may be constructed to the rear of the site sometime in the future, as suggested by Mr Craig.
- 101 Instead, I accept that the heritage item on the site, and its neighbour at No 261 Queen Street, will be visually associated with the new tower form when viewed from Queen Street and Allman Street, aided by the sightlines created by the open and paved promenade connecting to Queen Street. The proposed tower form, and the heritage item will be seen occupying the same site, and it is for this reason that the height, bulk and scale of the proposed tower form is a significant consideration in respect of the provisions at [96].

102 For the reasons stated at [50], I do not consider the Queen Street HCA to have the same immediate or direct visual association with the proposed development and so regard any impact upon it to be remote and likely be acceptable.

103 However, given the prominence of the visual association between the proposed tower form and the heritage item on the site, it is the nature of the setback between the two, and the height of the proposed tower that must be considered.

The proposed setback does not ameliorate the impact on the heritage item

104 As the rear of the heritage item is not visible from Queen Street or Allman Street, I am sympathetic to the manner in which the Applicant proposes to apply the 18m setback advised to it by the Heritage Council, subject to an assessment of the merits of the proposed treatment between the two buildings.

105 In applying the setback from a set out position that is more forward on the site when compared with the Heritage Council's set out, it is reasonable to consider what steps, if any, have been taken to ameliorate any adverse impact that may arise as a result of the reduced setback.

106 Arising from the amended plans at Exhibit F, the experts agree that amendments made to the building side setbacks, building articulation, window placement and materials provide an improved relationship to the heritage context. However, for the reasons set out at [54]-[55], the experts also agree that the landscape design between the existing heritage item and the new tower form requires amendment to ensure a useable and functional landscape setting that respects and responds to the heritage context (Exhibit 13, item 4).

107 The evidence of Mr Dickson is that the landscape design, which he initially describes in the joint report as being "generous" (Exhibit 8, [19.2], p 48), ensures that the height and separation of the proposed tower form is appropriate in relation to the heritage item. However, this written opinion was

later countered in his oral evidence to the effect that the landscape design was insufficient to perform that function.

108 Ultimately Mr Dickson's oral evidence is that the landscape design does not mitigate the scale of the new building, and he believes that a redesign is needed. As it is agreed by the heritage experts and the Applicant's urban design expert to require redesign, it cannot be said that the landscape design, which forms a part of the setting of the heritage item, ameliorates the impact of the reduced setback, nor considers foremost the qualities and character of the surrounding area including the significance of any heritage item on the land, as required by Part 5.3.2(b) of the CDGP 2014. Furthermore as Mr Dickson considers the final design to be contingent upon the rear setback from the heritage item being settled, I do not consider it a matter that can be resolved by a condition of consent.

109 For the same reasons, it is also open to the Court to find that the proposal fails to achieve design excellence by reference to subclls 7.13 (4)(b),(c)(iii),(x) and (xi).

The impact of height, bulk and scale on the site

110 Mr Davies' sketch at Figure 3 of the joint report illustrates his logic in deriving a preferred height to the rear of the site. He also acknowledges in oral evidence that the form could be higher still towards the rear most portion of the site.

111 Likewise, Mr Smith suggests a similar scale may be appropriate at the rear of the site, and relies on "Design in Context: Guidelines for Infill Development in the Historic Environment" published by the NSW Heritage Office" (Design in Context). Mr Joseph concurs.

112 In his written submissions, Mr Eastman cautions that, as 'Design in Context' is not an environmental planning instrument, or a document that carries any statutory weight, it would be improper for the Court to give it any weight. However it is my understanding of Mr Smith's evidence that his reliance

placed on 'Design in Context' is in the manner set out in the planning principle in *Architects Marshall v Lake Macquarie City Council* (2005) 141 LGERA 1; [2005] NSWLEC 78. To summarise the principle at [38]-[39], when considering expert evidence on architectural style, form or character, it is appropriate for the Court to consider whether an expert's opinion is their own individual view, or is reflected in a design code or industry publication indicative of a more widely accepted professional view.

113 'Design in Context' is identified as a joint publication of the NSW Heritage Office and the Royal Australian Institute of Architects, and so answers the description of such a design code, being indicative of a more widely accepted professional view.

114 In the alternative, it is Mr Craig's strong view that the first priority for the Applicant in arriving at an appropriate bulk, scale and height on the site is to consider the zone objectives, and the desired future character set out in the development standards. With this as his starting point, Mr Craig considers it to be most important that the proposed development achieves a height that is compatible with taller buildings envisaged by the development standards in the CLEP 2015.

115 While not determinative in the appeal, Mr Craig's position is further explained in the cl 4.6 request contained in Exhibit B, Tab 10. Reasons advanced by the Applicant for the exceedance in height may be summarised as follows:

- The site is located 110m, which is considered a short walk, from the CBD precinct to which a height of 45m applies, and so is proximate to a future character of even greater height
- The site is surrounded by sites that would achieve the transition in built form desired by the zone objectives in the CLEP 2015
- The proposed development does not exceed the maximum height allowable for the Campbelltown CBD, being 45m, and is below the

height of other developments for which Gateway determination has been granted by the state government.

- The Campbelltown-Macarthur area is identified in the Greater Sydney Region Plan 2018 as a Metropolitan Cluster, and in the Campbelltown Precinct Plan 2017 as being within the Glenfield to Macarthur Urban Renewal Corridor, and tall buildings are consistent with the aims of both plans.

116 In my view, where a state heritage listed item is known to occupy a site, it is inconceivable that an applicant, its agents and advisers would not identify the heritage item as a principal consideration when assessing an appropriate form of development for the site. Furthermore, section 5.3.2(b) of the CDCP 2014 expressly advises applicants to consider foremost the character of the surrounding area including the significance of any heritage item on land.

117 In relation to the height exceedance, the fact that the proposed development does not exceed a height applicable to an area some distance from the site, not relevant to the subject site itself, and generally applicable to a lower topography in the Campbelltown CBD, is not a reason to support height exceedance on this site, with its own unique characteristics – not least of which is a heritage item of state significance.

118 Furthermore while I accept and agree that the area is in an early state of transition, the desired future character of that transition is largely defined by the development standards, which includes the provisions related to height and heritage conservation.

119 I accept Mr Vale's view that an assessment of an appropriate height for new development on the site must 'hold in tension' the existing character formed by the heritage items and their setting, with the desired future character reflected in the controls that set a maximum height of 32m, or 10 storeys. However, on the evidence of Mr Craig the Applicant has not set out to hold these things in tension, but to explicitly favour the controls shaping the desired

future character. Furthermore, the proposal is not for a building of 32m or 10-storeys, but of a maximum height of 41.5m, or 12-storeys.

120 When considering the tension between heritage conservation and other development standards, the Court has regularly held that the proper application of development standards on a site containing, or in the vicinity of, a heritage item(s), may be to constrain the maximal effect of the numerical controls.

121 The Respondent, in written submissions, relies on Brown C in *Grigorakis v Bayside Council* (2016) NSWLEC 1573 who held, at [35] that:

“...the heritage provisions in cl 5.10 have the effect of limiting development on the site such that the full potential, as set out by Control C7 in pt 5.2.2.6 may not be able to be achieved. It is not unusual for local environmental plans to have no specific controls for heritage items in areas where more general controls apply. This however does not diminish or dilute the importance of cl 5.10.”

122 More recently, Moore J described the inter-dependence of heritage and other development standards in *Rebel MH Neutral Bay Pty Ltd v North Sydney Council* [2018] NSWLEC 191, at [24]:

“The building envelope is merely a target, a target which is subject to other planning constraints needing to be assessed in the particular circumstances of this site and matters arising from, and with respect to, the interaction between the site and neighbouring development (particularly the heritage item to the north); relevant applicable provisions of the LEP; and relevant applicable provisions of the DCP”

123 The Applicant argues that the proposed height is achieved by exercising the benefit of heritage incentives which are available to it, according to the Applicant's written submissions in reply. In consideration of such a benefit, or 'bonus', the Applicant submits that the preservation of the heritage item provides the grounds for "bonus aspects of development, such as height, FSR and even overcoming any prohibition in a land use table" (written submissions at 33(b)).

124 However, the Respondent submits that there is no provision expressed in cl 50 of the CLEP 2002 that would permit 'bonus' height or FSR to be granted by

the Court. Furthermore, it is the submission of the Respondent that the Applicant fails to satisfy all of the elements required by subcl 50 (a)-(e) and so fails the test required by the provision in any event

- 125 I accept there is no express provision for the grant of a 'height bonus' under cl 50 of the CLEP 2002, or cl 5.10(1) of the CLEP 2015. Furthermore, I do not understand the heritage conservation incentives to encompass provisions that set aside numerical controls that prescribe a maximum height of buildings. The focus of the provision is on the permissibility of "*use* for any purpose of a building that is a heritage item, or land of which such a building is erected, even though the *use* would otherwise not be allowed by this plan..." (my emphasis).
- 126 In my view, such a provision may provide a basis to consider a tower form that is higher than the 6-storeys preferred by the Respondent, but remain within the height controls.
- 127 As stated at [39], I am not asked to grant an exception to the height standard under cl 4.6 of the CLEP 2015.
- 128 Instead, the Court is required to assess the merits of the proposal against the potential for adverse impact on the heritage significance of the heritage items and the Queen Street HCA. In simple terms, the parties suggest a range of between 6-storeys, in the view of the Respondent, to 12-storeys which is the application before the Court.
- 129 The Applicant's position is, in essence, that the height exceedance of the 12-storey building is not materially different to that of a 10 storey building. However I consider the building envelope, expressed as a maximum permissible height of 10-storeys, to be "a target which is subject to other planning constraints", as held by Moore J in [119].
- 130 The Applicant proposes that I apply the tests in *Valen* to assess the questions of character, visual and physical impact and compatibility. While I agree that

Valen is helpful in synthesizing the methods of assessment used in those matters, the circumstances in that case are different. There, the Court was asked to consider an application for a residential flat building set in the context of residential flat buildings surrounding the site, and where heritage significance was not a relevant consideration.

- 131 The particular relevance of this distinction is that while the CDCP 2014 and the height controls of CLEP 2015 anticipates a future character of taller buildings, consideration of the existing character must, in this matter, be foremost as it is represented by two items that are recognised as being of state heritage significance.
- 132 Instead, the Applicant's position, advanced by Mr Craig, is predicated upon a context that is anticipated, not actual. Tower forms are yet to be in evidence on adjoining sites. A height has been established in the CLEP 2015, with which development can be expected to comply. It is this prospective future with which the proposal is said to be compatible, and it is for this reason that the parties agree that the proposed tower form on the subject site is likely to set a precedent for development that follows.
- 133 The height exceedance in the form proposed would impose a greater visual mass over and between the heritage items at No 261 and No 263 Queen Street, than a proposal that complies with the height control, which would impose a lesser visible mass.
- 134 The additional height and mass has consequential impacts on the transition between the heritage items and the development that can be expected in the future. It would be abrupt. In arriving at this conclusion, I accept Mr Vale's view at [63] that a 3-dimensional appreciation of the sightline from Queen Street directs a viewers gaze beyond the heritage item and so makes the visual association with the tower form.
- 135 However I do not accept Mr Vale's view at [65] that new development must, in effect, make a binary choice between consistency with a desired future

character or respect for heritage significance as it is widely held, and reasonably expected in my view, that skilful design and planning can successfully respond to both the past and the future in the work it does in the present.

- 136 In considering all of the evidence before me, it is my view that the impacts that would flow from this proposal are not consistent with the impacts expected of the controls. The reduced setback from that advised by the Heritage Council is not supported by the landscape design, and the height of the proposed tower form exceeds the limit applicable to the site without sufficient regard for the heritage item on the site, or that adjacent at No 261 Queen Street.
- 137 Given the prominence of the site and of the proposed tower form as stated at [98], the result would be a dramatic contrast in scale that would fail to provide an appropriate transition in scale from the heritage item on the site to taller buildings on adjoining sites, or minimise the opportunities for undesirable visual impact as anticipated by the objectives at cl 4.3 of the CLEP 2015.
- 138 The combined effect of the prominence of the development, the dramatic contrast in scale when viewed in the context of the heritage items at No 261 and No 263 Queen St, the visual impact above that expected by the controls, and a landscape design that is generally accepted to be deficient, would result in development that adversely affects the heritage significance of the item on subject site, and at No 261 Queen Street which are matters required of the Court to take into consideration by s 62 of the Heritage Act, and which relate directly in respect of cl 44(4) and subcl 49(1) of the CLEP 2002, and cl 5.10(4) of the CLEP 2015.
- 139 While not itself fatal to the application, I also consider the statement by the architect in Exhibit G that the site "...currently consists of the heritage item which is to be retained...The site is largely free of constraints..." to support the Respondent's view that insufficient regard has been afforded to the heritage significance of the site or area. Furthermore, I note that there is no reference in the architects' statement to the heritage item at No 261 Queen

Street which may be regarded as a relevant consideration in Principle 1, being its context and neighbourhood character.

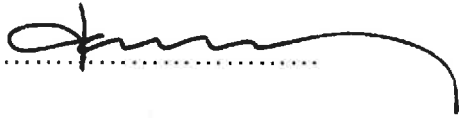
- 140 As the requirements of an architect's statement for development applications referable to SEPP 65 are detailed in the EPA Regulations, I consider it reasonable to give significant weight to the content of such a statement which takes the form of a written verification attesting to how the principles of SEPP 65 and the objectives of the ADG have been realised in the application.
- 141 For the reasons set out above, I do not consider the application has adequately considered the impacts or effect of the proposed development on the heritage item on the site, or of that on the adjacent site, which I regard as likely to be adverse, and for this reason I conclude the application warrants refusal.

Orders

142 The Court orders that:

- (1) The Applicant is granted leave to amend the application and to rely upon the amended plans at Exhibit F, subject to paying the Respondent's costs as assessed or agreed pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.
- (2) The appeal is dismissed.
- (3) Development consent for Development Application DA 493/2016-DA-RA for the restoration of the existing heritage-listed former CBC Bank building, demolition of the existing commercial building at the rear of the site, construction of a 12-storey building at the rear of the site incorporating two levels of commercial tenancies and 65 residential apartments over 12 levels, and two levels of basement car parking at 263 Queen Street, Campbelltown is refused.

- (4) All Exhibits are returned, except for Exhibits A, F, G, 11, 12, 13, 14 and 17.

A handwritten signature in black ink, appearing to read 'T Horton', written over a horizontal dotted line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

T Horton

Commissioner of the Court
