



Land and Environment Court
New South Wales

Case Name:	Feros Hotel Group Pty Limited v Shoalhaven City Council
Medium Neutral Citation:	[2025] NSWLEC 1052
Hearing Date(s):	13, 16 and 24 December 2024 and 29 January 2025
Date of Orders:	30 January 2025
Decision Date:	30 January 2025
Jurisdiction:	Class 1
Before:	O'Neill C
Decision:	<p>The orders of the Court are:</p> <p>(1) The appeal is dismissed.</p> <p>(2) Development Application No. RA/23/1002 for alterations and additions to the Berry Hotel at 120 and 122 Queen Street and 79-83 Princess Street, Berry, including expansion onto 122 Queen Street, Berry, construction of new hotel accommodation, consolidation of 4 lots, associated parking and landscaping, and formalisation of access and parking on 77 Princess Street, Berry, is refused.</p> <p>(3) The exhibits, other than Exhibits 4 and C, are returned.</p>
Catchwords:	DEVELOPMENT APPLICATION – alterations and additions to an existing hotel – adverse impact on the identified heritage significance of the hotel; adverse heritage impact on the character and significance of the heritage conservation area
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 3.43, 8.7, 8.15</p> <p>Land and Environment Court Act 1979, ss 34, 39</p> <p>Civil Procedures Act 2005, s 56</p> <p>Environmental Planning and Assessment Regulation</p>

2021, s 38
Shoalhaven Local Environmental Plan 2014 (LEP
2014), cl 5.10, Sch 5

Texts Cited: Shoalhaven Development Control Plan

Category: Principal judgment

Parties: Feros Hotel Group Pty Limited (Applicant)
Shoalhaven City Council (Respondent)

Representation: Counsel:
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N Hammond (Respondent)

Solicitors:
Mills Oakley (Applicant)
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File Number(s): 2023/465502

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application No. RA/23/1002 for alterations and additions to the Berry Hotel, including expansion onto 122 Queen Street, Berry, construction of new hotel accommodation, consolidation of 4 lots, associated parking and landscaping, and formalisation of access and parking on 77 Princess Street, Berry (the proposal), at 120 Queen Street, 122 Queen Street and 79-83 Princess Street, Berry (the site), by Shoalhaven City Council (the Council).
- 2 The appeal was subject to conciliation on 22 July 2024, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated, pursuant to s 34(4) of the LEC Act.
- 3 The applicant was granted leave to amend the application on the second day of the hearing, pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021 and s 39(2) of the LEC Act. The Council did not

oppose leave being granted for the amendment of the application. The parties agreed that the amendments made to the architectural plans (Exh H) were minor within the meaning of s 8.15(3) of the EPA Act.

- 4 The respondent was granted leave on 24 December 2024 to reopen the case to rely on new evidence concerning the draft Princess Street Heritage Conservation Area. The Heritage NSW Response to the planning proposal to make heritage amendments to the Shoalhaven Local Environmental Plan 2014 (LEP 2014) was admitted into evidence (Exh 10).
- 5 The respondent was granted leave on 29 January 2025 to reopen the case to rely on the further objection evidence of the secretary of the Berry Forum (added to Ex 3), as he registered to make an oral objection at the hearing but was unable to do so due to technical difficulties with the audio-visual link.
- 6 The respondent sought leave to reopen the case to rely on new evidence on 29 January 2025. The motion was dismissed for the reasons submitted by the applicant. The evidence sought to be admitted was an objection from the Berry Forum regarding parking calculations, based on a traffic survey conducted by a member of the Berry Forum. The respondent submitted that the new evidence, although not expert evidence, reflects the community's position regarding the traffic issue raised in the respondent's contentions. The applicant submitted that the respondent's traffic contention was resolved by the traffic experts in the proceedings and based on their agreement, the issue was not pressed by the respondent. The introduction of the objector evidence does not promote the overriding purpose of the of the *Civil Procedures Act 2005*, facilitate the just, quick and cheap resolution of the real issues in the proceedings. The reopening of the case for the purpose of admitting the objector's traffic survey and parking calculations would have been prejudicial to the applicant and not in the interest of the timely disposal of the proceedings.

Issues

- 7 The Council's contentions can be summarised as:
 - The building envelope of the accommodation building fronting Princess Street is excessive and inconsistent with the predominate form, bulk and scale of development in the surrounding area and will result in adverse visual and character impacts on the locality. The proposal will have a major detrimental

impact on the setting of the draft Princess Street Heritage Conservation Area (draft Princess Street HCA).

- The proposed changes to the Berry Hotel result in an adverse heritage impact on the fabric and setting of the hotel, as it involves the removal of excessive amounts of the original fabric of the heritage listed building, including original walls, internal layout and original features. The interior of the hotel will be substantially altered at the ground and first floor levels, and its original layout and footprint will be unable to be readily understood.
- The proposal will have an adverse impact on the setting of the Berry Hotel due to the siting and scale of the rear and side additions, the length, form, massing, architectural expression, materials, details and the removal of the heritage listed Lilli Pilli trees. The proposed bistro and outdoor dining additions at the eastern side of the hotel will be highly visible from Queen Street and will impact on the separation of the hotel and adjacent heritage listed former CBC Bank building, including diminishing the ability to understand the original subdivision pattern.
- The proposal has an adverse impact on the character and significance of the special streetscape of the Berry Town Centre Heritage Conservation Area (Berry Town Centre HCA) due to the siting, scale, form and details of the new additions and alterations to the hotel.

The location and design of the hotel accommodation building on the eastern boundary will result in adverse amenity impacts on the adjoining residential property.

- The swept paths for the waste vehicle to access the loading dock requires 3 car parking spaces to be unoccupied. This is intended to be managed by the requirements of the Plan of Management and signage, which is impractical.
- Although the Council consented to the making of the application which includes an allotment owned by the Council, the Council does not consent to the works being carried out on the allotment.

The site and its context



Figure 1 The site outlined in blue, taken from the Statement of Facts and Contentions Exhibit 4

- 8 The site is legally described as Lot 1 DP 578257, SP 93194, Lots 1-3 DP 342913 and Lot 1 DP 209665.
- 9 The site is located at the south-western corner of Queen and Prince Alfred Streets and has frontage to Princess Street to the south. The site includes the parcel of land owned by the Council at 77 Princess Street, Berry. The site is irregular in shape and has an area of 4,992m² (excluding Lot 2 SP 93194 and parking forming part of Lot 1 SP 93194). It has a frontages to Queen Street of 60.16m to Queen Street, to Prince Alfred Street of 30.1m, and to Princess Street of 55.32m, including the Council owned lot. The site is relatively flat.
- 10 The site contains the following existing development:

- 120 Queen Street (Lot 1 DP 578257) contains an existing part one, part two storey hotel known as the Berry Hotel.
- 122 Queen Street (SP 93194) contains the following:
 - A two storey former CBC Bank building situated on the Queen Street frontage and along the frontage to Prince Alfred Street with associated gardens and a swimming pool to its south-west (part Lot 1 SP 93194). The building is used for commercial office purposes.
 - To the rear of the parcel is the Berry Inn (known as 17 Prince Alfred Street) situated on the western boundary (part Lot 2 SP 93194). The Berry Inn is a former stable building which has been converted to tourist accommodation containing 6 units and a manager's residence.
 - A parking area accessible off Prince Alfred Street is situated in the south-eastern part of the parcel. It contains 15 car spaces with 7 spaces allocated to each lot in the SP and one shared accessible parking space.
- 79-83 Princess Street (Lots 1-3 DP 342913) to 79-81 Princess Street is occupied by a single dwelling house with a separate garage, small outbuilding and several trees.
- 83 Princess Street is vacant.
- 77 Princess Street (Lot 1 DP 209665) is owned by Council and contains gravel surfaced driveway access and unmarked, informal public car parking for some 16 cars perpendicular to the western boundary.

The proposal

11 The proposal includes the following (Amended Statement of Facts and Contentions Exh 4):

- Demolition of the existing dwelling house, associated structures and removal of vegetation at 79-81 Princess Street.
- Internal and external demolition at the Ground and First Floor of the Berry Hotel building, demolition of the separate garage building, removal of existing vegetation/trees and rear parking area.
- Demolition of existing external works in the western/south-western part of 122 Queen Street, including swimming pool, paving, deck/ramp and removal of existing vegetation/trees (excluding trees to be transplanted).
- Internal and external alterations and additions to the Ground Floor of the Berry Hotel including reconfiguration and refurbishment of the existing spaces and conversion of the rear courtyard to internal space to provide upgraded lounge bar, lounge dining (opening onto front verandah), sports bar (opening onto new rear terrace), lounge, private dining and amenities.
- Minor internal and external alterations to the First Floor of the Berry Hotel including reconfiguration of spaces to provide back-of-house office and staff facilities, including new stair off the Queen Street frontage at the western end.

- New, contemporary single storey addition to the east of the Berry Hotel extending onto the western/south-western part of 122 Queen Street (part Lot 1 SP 93194) comprising bistro, bar, dining pavilion, kids play, kitchen and back-of-house facilities set behind a pergola covered outdoor dining area facing Queen Street.
- Use of part of 122 Queen Street as a pub.
- Construction of a new 2 storey hotel accommodation building at 79- 83 Princess Street containing 313 accommodation rooms (29.5m²-45m²), rooftop swimming pool and basement parking for 23 cars (including 2 accessible spaces) with vehicular access off Princess Street via the rear car park;
- Provision of parking and access off Princess Street to the rear of the Berry Hotel and the new accommodation building and on 77 Princess Street (Lot 1 DP 209665), owned by the Council. The rear carpark contains at-grade parking for 44 cars (including 2 accessible), comprising 34 hotel spaces, 2 staff spaces and 810 accommodation spaces. Works on Council's land include new hardstand to access driveway and 17 parking spaces, together with new kerb, associated line marking and drainage works;
- Consolidation of Lot 1 DP 578257 (existing Berry Hotel) with Lots 1-3 DP 342913 (79- 83 Princess Street); and
- Site works and landscaping.

Planning framework

- 12 The site is zoned part E1 – Local Centre, SP2 – Infrastructure - Car Parking and Servicing, and R2 – Low Density Residential under the Shoalhaven Local Environmental Plan 2014 (LEP 2014) and the proposal is permissible with consent. The objectives of the zones, to which regard must be had, are:

Zone E1 Local Centre

1 Objectives of zone

- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.
- To encourage investment in local commercial development that generates employment opportunities and economic growth.
- To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To ensure that development is of a scale that is compatible with the character of the surrounding residential environment.

Zone SP2 Infrastructure

1 Objectives of zone

- To provide for infrastructure and related uses.
- To prevent development that is not compatible with or that may detract from the provision of infrastructure.

Zone R2 Low Density Residential

1 Objectives of zone

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide an environment primarily for detached housing and to ensure that other development is compatible with that environment.

- 13 Clause 5.10 of LEP 2014 Heritage Conservation applies to the proposal. The Berry Hotel and the former CBC Bank are local heritage items (Pt 1 Sch 5 to LEP 2014 and Map HER_019E), as follows:

Item 87 120 Queen Street Berry, Two storey Victorian hotel and detached kitchen including *Acmena smithii* (Lilly Pillies-2)

Item 88 122 Queen Street Berry, Former CBC bank including fence and trees

- 14 The site (excluding the lots fronting Princess Street) is within the Queen Street Heritage Conservation Area (Queen Street HCA) (Pt 2 Sch 5 to LEP 2014 and Map HER_019E).

- 15 The heritage inventory sheets from the State Heritage Register are attached to Exhibit 5. The statement of significance and physical description for the Berry Hotel is as follows:

Late Victorian Free Classical style hotel which retains historic, aesthetic and streetscape interest as part of the main street in Berry. Local significance.

The hotel is a [2] storey brick building, constructed in 1888 and extensively remodelled in the 1930s. Parapet and entablature of cement render, featuring raised central arch with date "1888". Skillion roofed verandah has at one end been converted into a two storey balcony with archways between engaged piers. At the other end the verandah has been enclosed, and an awning suspended over the footpath. The walls under the waning have been tiled to balustrade height...

- 16 Subclause 5.10(2)(b) of LEP 2014 requires development consent for 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 Sch 5 in relation to the item.

- 17 Subclause 5.10(4) of LEP 2014 requires the consent authority, or the Court exercising the functions of the consent authority, to consider the effect of the proposal on the heritage significance of the item or area concerned before granting consent under cl 5.10.
- 18 At subcl 5.10(6) of LEP 2014 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 heritage conservation management plan before granting consent under cl 5.10.
- 19 Shoalhaven Development Control Plan 2014 applies to the proposal at Chapter 1, section 7.
- 20 Chapter G17 Business, Commercial and Retail Activities of DCP 2014 includes the following relevant objectives, controls and acceptable solutions at sections 4 and 5:

4. Objectives

- ii. Safeguard the amenity of the area and, in particular, immediately adjoining and adjacent property owners.

5. Controls

P2 Building exteriors, structures, awnings and fences are robust, complementary of the existing character and make a positive contribution to the streetscape, especially pedestrian thoroughfares and public spaces.

P3 Commercial development in town and village centres contributes to street activity and provides engaging and safe streetscapes.

A3.1 Active uses are included at the ground level along: The primary frontage. The secondary frontage/s on corner allotments.

- 21 Chapter G18 Streetscape Design for Town and Village Centres of DCP 2014 applies to Berry at section 2 and states that the relevant Area Specific DCP Chapter for Berry is N2 Berry Town Centre. Chapter G18 includes the following relevant performance criterion at 5.1 Streetscape Character and Function:

P1.1 Improve the quality of the streetscape in nominated town and village centres and subject streets as identified by Supporting Map 1 [includes the three street frontages of the site].

- 22 Chapter N2: Berry Town Centre of DCP 2014 applies to the site at section 2. The purpose of the chapter at section 1 is to reinforce the role of Berry as a service centre and ensure that development in Berry Town Centre is

compatible with the historic character of Berry. Section 1 includes the following advisory note:

In addition to the provisions outlined in this chapter, you must refer to the supporting map for supplementary development controls.



The supporting map to Chapter N2 of DCP 2014.

23 The relevant objectives for Chapter N2, at section 4, are:

- i. Maintain the economic viability of the town centre.
- ii. Ensure that new development is complementary to, and respects, the heritage characteristics of the town.
- iii. Retain the visual importance and setting of heritage items and conservation areas.
- ix. Provide for outdoor dining, sitting and viewing in active and safe public spaces.
- x. Provide for commercial uses on the properties facing Queen Street and residential uses on properties facing Princess Street.
- xi. Encourage development which is of a suitable bulk and scale to adjoining development.

24 The performance criteria and acceptable solutions under controls for development in the Berry Town Centre include, at section 5.1, the following:

P1 Development in the Berry Town Centre minimises conflict between residential and commercial activities.

A1.1 Properties which face onto Princess Street should be used for housing and should complement the residential streetscape.

- 25 The performance criteria and acceptable solutions under controls for built form and character include, at section 5.2, the following:

P1 New buildings, or additions to existing buildings, are complementary in form to the heritage characteristics of the town centre.

A1.1 Buildings generally: Have a pitched roof and the form, pitch and parapet height of new buildings/additions should match or be similar to adjoining and adjacent buildings (generally between 32 and 45 degrees); Have verandah elements such as awnings to active shopfront areas; visual interest; Have facades that are varied and articulated to provide visual interest; Are built of a mix of lightweight materials, timber weatherboards and masonry and have corrugated metal roofs; and Have service area walls and similar site features that are designed to compatible with the architecture of the main building(s).

P2 The design of new buildings, or additions to existing buildings, is in keeping with the existing height, bulk and density of their location.

A2.1 Buildings generally: Single storey in height as measured from the natural ground level; Retain the existing residential and commercial setbacks; and Minimise bulk by varying the roof form.

P3 New buildings, or additions to existing buildings, are compatible with adjoining and adjacent heritage items.

A3.1 Buildings maintain the visual importance and setting of heritage items through minimising overshadowing and privacy, landscape and visual impacts.

- 26 The performance criteria under controls for the protection of heritage significance include, at section 5.3, the following:

P1 New development complements existing heritage structures in a modern context.

P2 Development retains, preserves, and recycles the existing heritage buildings and trees in a sympathetic way to make a positive contribution to the character of the locality.

- 27 The controls for Precinct 2, which is the block that includes the site, include at 5.9.1 of DCP 2014, the following:

If your development fronts onto Princess Street, it should be used for residential and be designed to complement the residential streetscape.

- 28 Section 5.10 Precinct 3 – Berry Hotel of DCP 2014 includes the following:

Precinct 3 consists of Lot 1 DP 578257 which is the Berry Hotel site at 120 Queen Street Berry... The intent of this section of this chapter is to provide the opportunity for mixed use development which fits into the local context and contributes to the Hotel's heritage character.

5.10.1 Controls

New development on this site is to be visually appropriate respecting the desired future and local character of the town centre and the heritage significance of the hotel.

The built form should respond to the existing and proposed pattern of the surrounding context so as to produce a cohesive form by establishing a unique character for the area.

Public submissions

29 A number of objectors made submissions at the commencement of the conciliation onsite and at the commencement of the hearing in court and via AVL. The notes from the objectors' oral evidence are attached to the Notice of Objectors filed with the Court (Exh 8). There were 378 written submissions made regarding the original application (Exh 2). The concerns of the objectors can be summarised as:

- The applicant did not consult sufficiently with the Berry community.
- The proposal will result in an increase in patrons to the hotel and there is insufficient parking provided onsite to accommodate those additional patrons. The proposal will result in a loss of on-street parking in Princess Street.
- The traffic in Princess Street will be substantially increased as the driveway access to the site from Queen Street is to be closed and the only driveway access to the site is from Princess Street.
- An underground carpark beneath the accommodation building is inappropriate. The excavation of the site for the underground carpark will potentially compromise the structural stability of other heritage buildings in the vicinity of the site.
- The accommodation building is not necessary as there is plenty of accommodation in Berry. The accommodation building is out of character with the village and will dominate the Princess Street streetscape.
- The loading zone onsite is inconvenient and it is impractical for the loading area to be a shared area.
- The bulk and scale of the additions to the hotel represent an overdevelopment of the site and will negatively impact on the heritage significance and amenity of the town centre.
- The additions to the hotel on the existing driveway will result in a loss of setting for the hotel and the former bank building.
- The proposal will threaten the economic viability of other businesses in the town centre.

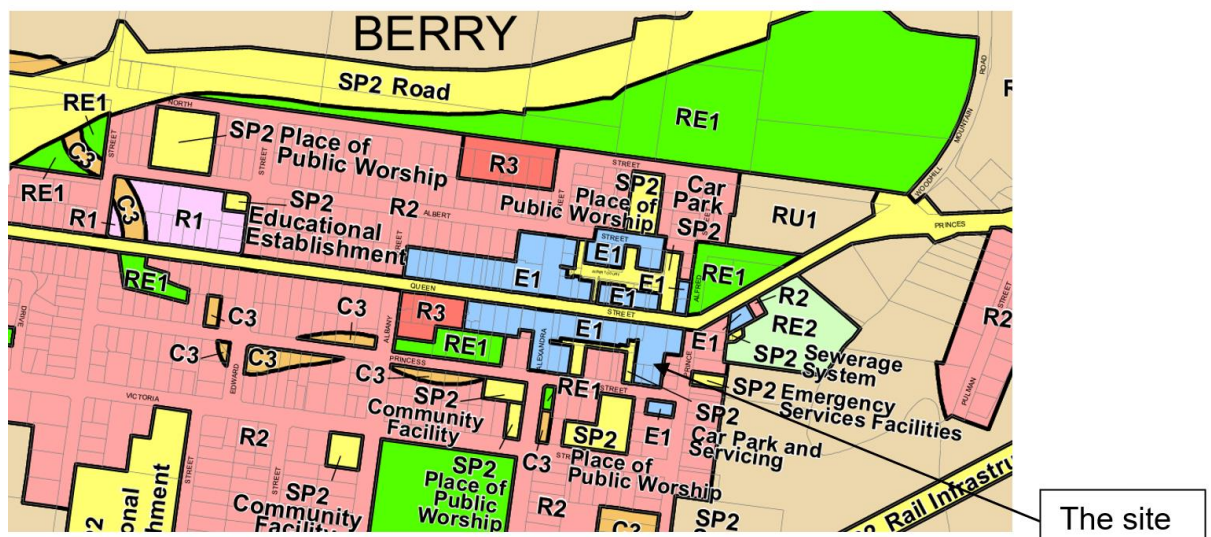
Expert evidence

30 The applicant relied on the expert evidence of Jeremy Swan (planning), Lisa Trueman (heritage) and Paul Corbett (traffic).

- 31 The Council relied on the expert evidence of David Rippingill (planning), John Oultram (heritage) and Ken Hollyoak (traffic).
- 32 The heritage experts prepared a joint report (Exh 5) and the planning experts prepared a joint report (Exh 6) and those experts gave oral evidence.
- 33 The traffic experts prepared a joint report (Exh 7) and reached agreement on all of the contentions regarding traffic and parking raised by the Council in the Amended Statement of Facts and Contentions (Exh 4). Consequently, the Council did not press the traffic and parking contentions, other than to raise an issue with the conflict between the swept path of the waste vehicle to the loading zone and 3 car spaces, which is proposed to be managed under the Plan of Management and the use of signage to require those parking spaces to be unoccupied prior to 11am.

Submission regarding conflict between the objectives of the E1 zone and a DCP control

- 34 The applicant submitted that the control for the Berry Town Centre (quoted at [24]), stating that development fronting onto Princess Street should be used for residential and be designed to complement the residential streetscape, is contrary to the zoning of the three allotments on which the accommodation building is proposed of E1. The objectives for the N2: Berry Town Centre (quoted above at [22]) also include, at x., “provide for... residential uses on the properties facing Princess Street”.
- 35 The Land Zoning Map for the site, Map LZN_019E of LEP 2014, is as follows:



- 36 There are the three allotments zoned E1 on which the Hotel accommodation building is proposed, and two allotments further to the west of the site within Precinct 2 zoned E1. I accept the submission of the applicant, to the extent there is a conflict between the objectives of the E1 zone (quoted at [10]) and the control for the Berry Town Centre for Precinct 2 at 5.9.1 of DCP 2014 (the DCP control), the statutory provision would prevail (s 3.43(5)(b) of the EPA Act). However, I do not accept that there is necessarily a conflict between the objectives of the E1 zone and the DCP control. The DCP control applies to all the allotments within Precinct 2 fronting Princess Street, which together have 3 different zonings, and so the DCP control is a generic one whereas the objectives for the E1 zone apply specifically to those allotments zoned E1. Whatever the use of the land, a development can be designed to complement the residential streetscape of Princess Street. Furthermore, the DCP control uses “should” in relation to residential uses on those allotments fronting Princess Street in Precinct 2, which is discretionary.

The proposal would result in an unacceptable impact on the heritage significance of the Berry Hotel

- 37 I accept and agree with the applicant’s submission that it is reasonable that the applicant has an intention and expectation to redevelop the Berry Hotel and to develop the allotments fronting Princess Street. The hotel building includes intrusive and detracting accretions and additions and there is clearly an opportunity for sympathetic alterations and additions to the existing hotel building and the development of the site. I accept the applicant’s submission that the redevelopment of the hotel and site is important to maintain and improve the economic viability of the business and the town for the benefit of the community.
- 38 I am persuaded by the Council’s submissions and Ms Trueman’s evidence that the proposed alterations and additions to the hotel building would result in an adverse heritage impact on the fabric and on the legibility of the hotel, as the proposal involves the removal of an excessive amount of existing fabric of the hotel. The extent of demolition of rooms R19, R12 and R13 (Exh 5, p 13) and the transformation of these spaces into a component of a large sports bar with an internal division within these rooms to create a bar to the adjoining bistro

addition, are overwhelming changes that would destroy the scale and form of the hotel building and the legibility of the historic hotel at the Ground Floor. The proposed sports bar bears little relationship to the fabric and room proportions of the existing hotel.

- 39 The Ground Floor additions overwhelm the scale of the existing hotel building as the proposed built form adjoins the existing footprint requiring substantial demolition for new openings in the existing façade. It is as though the brief for a new hotel on the Ground Floor has been prioritised over the opportunity to allow the fabric and proportions of the existing hotel to generate a solution that respects the many layers of the development of the hotel over time.
- 40 I do not accept the applicant's submission that the change proposed is justified by the extent of change that has already occurred. I agree with Mr Oultram's evidence that hotels have necessarily been subjected to significant changes over time which are reflected in the changes made to those buildings, and as a consequence of changing needs many alterations and additions have been carried out to the Berry Hotel. The extensive remodelling of the hotel in the 1930s is a significant part of the history and the aesthetic qualities of the hotel. The layers of development of the hotel should be appropriately interpreted and respected in planning any contemporary alterations and additions.
- 41 I do not accept that the fabric of the interior of the hotel building is not of heritage significance, because it is not identified in the brief description under Sch 5 to LEP 2014. The whole of the site is identified as a local heritage item by the LEP (Map HER_019E). The heritage experts agreed that the fabric of many of the internal rooms of the hotel is of high and moderate heritage significance, as follows (evidence of Ms Trueman given in relation to the ranking of internal spaces by Mr Oultram in the Heritage Impact Statement, reproduced in Exh 5 at p 13):
- The rooms identified as R02, R01, R03 and R23 are of high significance.
 - The rooms identified as R06, R07, R08, R10, R13, R14 are of moderate significance.
 - The accretions attached to the eastern façade and rear of the hotel, R17 and R18, and R15 and R16 and the roofed courtyard, R22, are intrusive fabric.

- 42 According to Ms Trueman, R04 is of high significance and according to Mr Oultram, it is of little significance because of the level of change that has occurred. According to Ms Trueman the fabric of the front bar identified as R09 is of moderate significance and according to Mr Oultram, it is of little significance, again because of the level of change that has occurred.
- 43 I accept and agree with Mr Oultram's evidence that the removal of the driveway to the east of the hotel building off Queen Street is positive, as it does not contribute to the setting of the hotel and there is an opportunity for an addition to the hotel in this location. I agree with Ms Trueman's evidence that the proposed built form in this location extends too far into the visual curtilage of the former CBC Bank building by stepping behind the bank building and intruding on the open space at the rear of the property and blurring the historic subdivision pattern.
- 44 I accept and agree with Mr Oultram's evidence that the trees identified in the description of the heritage item under Sch 5 to LEP 2014 did not particularly relate to the Berry Hotel and so they were a curious addition to the listing, and that they are no longer a significant element in the setting of the hotel building. Evidence was adduced that consent has been granted and was commenced permitting the removal of the trees (Exh D). I accept and agree with Mr Oultram's evidence that Queen Street is an urban town centre and that there should not be an expectation of a generous landscaped setting for the hotel building. The small areas of landscaping proposed are appropriate and would soften the setting of the hotel and additions. I agree with Mr Oultram that the landscaped setting is of importance for the streetscape character of Princess Street.
- 45 Given the issues raised in the appeal, a Conservation Management Plan (CMP) for the Berry Hotel should have been required by the Council under cl 5.10(6) of LEP 2014 as part of the application or early in the assessment of the application. Ms Trueman, in her advice to the Council dated 18 December 2023 recommended that a CMP be required to assess the application as the Heritage Impact Statement "does not provide the level of information appropriate for a development of this scale and nature" (Exh 1, tab 31, p 8). A

CMP would have documented and analysed the heritage significance of the item and its contribution to the collective heritage significance of the Queen Street HCA and identified appropriate conservation policies to enable the significance fabric of the hotel to be interpreted and retained, which would have informed the design of the substantial alterations and additions. The ranking of the heritage significance of rooms in plan only and overlaid over the demolition plan (Exh 5, p 13) is insufficient detail to understand the heritage significance of the fabric of these rooms. Furthermore, the extent of demolition was already decided by the time the ranking of spaces was provided, instead of the ranking of spaces informing the proposal. A detailed schedule of conservation works should also have been required by the Council for substantial alterations and additions to the hotel, prior to the determination of the application, to document and provide certainty as to what fabric was going to be retained, repaired, reinstated, or removed. Ms Trueman in her advice to the Council of 18 December 2023 recommended that a detailed schedule of conservation works be required (Exh 1, tab 31, p 16).

- 46 I accept the applicant's submission that a schedule of conservation works was not raised by the Council and if it was a matter of great significance, it ought to have been sought. I have given no weight in my decision to the absence of a CMP or a schedule of conservation works, as they were not requested by the Council in assessing the application. The applicant has offered to provide a schedule of conservation works as a condition of consent (Exh J).

Princess Street accommodation building

- 47 I accept the applicant's submission that the draft Princess Street HCA is neither certain nor imminent at this stage. I have had regard to the planning proposal to make heritage amendments to LEP 2014 as matter for consideration pursuant to s 4.15(1)(a)(ii) of the EPA Act.
- 48 The hotel accommodation use proposed for the Princess Street frontage is a nominate use permitted with consent in the E1 zone. I accept and agree with Mr Oultram's evidence that hotel accommodation is a typology and need not resemble a residential building. The built form should be legible as hotel

accommodation and be compatible with the historic residential character of Princess Street, including the landscaped setting to buildings within the street.

- 49 I accept and agree with the applicant's submission that despite being zoned as part of the local centre, an active street frontage to Princess Street is not necessarily desirable on this part of the site given the residential character of the street. The hotel accommodation can still contribute to a vibrant and active local centre with a landscaped setback to the street.
- 50 Despite being able to tick off the list of attributes under A1.1 for new buildings to be complementary in form to the heritage characteristics of the town centre, at section 5.2 of DCP 2014, I accept and agree with the Council's experts' opinion that the terrace-like extruded form of the proposal with little articulated relief is not compatible with the residential character of Princess Street. The proposed accommodation building's elevation to Princess Street is too repetitive, the footprint is unrelieved, and the gables are uniform. I agree with Ms Trueman that the proposed hotel accommodation building is urban and overtly different to the style of development in the streetscape. The hotel accommodation building requires a skilful design to house the required accommodation in a built form with nuanced volumes, that complements the historic residential character of Princess Street and with landscaped setbacks to the street and to the east.
- 51 In principle, I accept the applicant's experts' view that a two storey building is consistent with the zoning, appropriate within the streetscape and compatible with the residential character of Princess Street. Ms Trueman, in her advice to the Council of 18 December 2023, stated that a two storey building was acceptable, and it should be single storey at the front with the second storey set back (Exh 1, tab 31, p 16). I do not accept the applicant's position that there is a perceived tension between the "acceptable solution" of "buildings generally: Single storey in height..." under section 5.2 of DCP 2014 (quoted at [23]) and the height of buildings development standard of 8.5m. The development standard permits a maximum height above natural ground level of 8.5m, which is not a uniform height across the whole site of 8.5m as the proposed built form is also subject to other relevant standards and controls.

The “acceptable solution” is qualified by “buildings generally” and as such is merely a possible solution to achieve the P2 performance criterion.

Social impact

- 52 I accept and agree with Mr Rippingill’s evidence regarding the Council’s version of condition 1A (Exh 9). A condition imposing a ‘complaints register’ in the Plan of Management (where the complaint of a local resident is recorded, provided to the Council/Police/Gaming NSW as appropriate, responded to and resolved) is an appropriate condition and the process is sustainable into the future.
- 53 The resident objectors’ opinions regarding the insufficiency of consultation leading up to the lodging and during the assessment of the application relates to the proposal and is not cured by requiring the applicant to hold public meetings following the granting of a consent.

Conclusion

- 54 The proposed alterations and additions to the hotel building would result in an adverse heritage impact on the fabric and on the legibility of the hotel, as the proposal involves the removal of an excessive amount of existing fabric of the hotel, contrary to the objective of the heritage clause to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views, at cl 5.10(1)(b) of LEP 2014.
- 55 The proposed hotel accommodation building is not compatible with the historic residential character of Princess Street; and contrary to the objective for the Berry Town Centre at Chapter N2 of DCP 2014, to ensure that new development is complementary to, and respects, the heritage characteristics of the town.

Orders

- 56 The orders of the Court are:
- (1) The appeal is dismissed.
 - (2) Development Application No. RA/23/1002 for alterations and additions to the Berry Hotel at 79-83 Princess Street, Berry, including expansion onto 122 Queen Street, Berry, construction of new hotel accommodation, consolidation of 4 lots, associated parking and

landscaping, and formalisation of access and parking on 77 Princess Street, Berry, is refused.

(3) The exhibits, other than Exhibits 4 and C, are returned.

Susan O'Neill

Commissioner of the Court

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