



Land and Environment Court  
New South Wales

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Case Name:	Skermanic Pty Limited v Blue Mountains City Council
Medium Neutral Citation:	[2024] NSWLEC 1031
Hearing Date(s):	22 – 24 November 2023, written submissions 28 November 2023, 15, 20 December 2023
Date of Orders:	01 February 2024
Decision Date:	1 February 2024
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is dismissed.</p> <p>(2) Development application X/1436/2021 for the demolition, additions and alterations to an existing residential care facility including landscaping, retaining walls, basement car parking and a new substation at the Ritz Nursing Home at 203-233 Leura Mall, Leura (Lot 20 DP 1076123) is refused.</p> <p>(3) The exhibits, other than Exhibits B, G and 2 are returned.</p>
Catchwords:	DEVELOPMENT APPLICATION – demolition and alterations and additions to an existing heritage item – use as an aged care facility – whether the development application will have an adverse and unacceptable impact on the heritage significance of “The Ritz” a local heritage item – public interest – appeal dismissed
Legislation Cited:	<p>Blue Mountains Local Environmental Plan 2005, Sch 6 Pt 1</p> <p>Blue Mountains Local Environmental Plan 2015, cll 6.19, 4.3, 4.6, 5.10, 7.1, 7.8, Pt 7, Sch 5</p> <p>Environmental Planning and Assessment Act 1979, ss 8.7, 4.15, 4.17</p>

Land and Environment Court Act 1979, s 34

Cases Cited:

Australian Protein Recyclers Pty Limited v Goulburn  
Mulwaree Shire Council [2006] NSWLEC 641  
Baron Corporation Pty Limited v Council of the City of  
Sydney (2019) 243 LGERA 338; [2019] NSWLEC 61  
Bunnings Properties Pty Ltd v Ku-ring-gai Council (No  
4) [2017] NSWLEC 1238  
PJM Group Pty Ltd v Ku-ring-gai Council [2022]  
NSWLEC 1170  
Toga Penrith Developments Pty Ltd v Penrith City  
Council [2022] NSWLEC 117

Texts Cited:

Australia ICOMOS, The Burra Charter, October 2023  
Australian Uniform Building Regulations Co-ordinating  
Council, Building Code of Australia, December 1988  
Blue Mountains Development Control Plan 2015  
Department of Planning and Environment, 'Assessing  
Heritage Significance', June 2023  
State Heritage Inventory, "The Ritz and interiors"  
[https://www.hms.heritage.nsw.gov.au/App/Item/  
ViewItem?itemId=1170453](https://www.hms.heritage.nsw.gov.au/App/Item/ViewItem?itemId=1170453) accessed 24 January 2024

Category:

Principal judgment

Parties:

Skermanic Pty Limited (Applicant)  
Blue Mountains City Council (Respondent)

Representation:

Counsel:  
P Larkin SC/ H Grace (Applicant)  
A Seton, Solicitor (Respondent)

Solicitors:  
HWL Ebsworth Lawyers (Applicant)  
Marsdens Law Group (Respondent)

File Number(s):

2023/30525

Publication Restriction:

No

## JUDGMENT

- 1 **COMMISSIONER:** The Applicant appeals pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* against the actual refusal of their development application X/1436/2021. The development application seeks consent for demolition, additions and alterations to an existing residential

care facility including landscaping, retaining walls, basement car parking and a new substation at the Ritz Nursing Home. The works are proposed at 203-233 Leura Mall, Leura (Lot 20 DP 1076123) (site).

2 The matter was listed for conciliation on 13 June 2023 pursuant to s 34 of the *Land and Environment Court Act 1979*. The conciliation was terminated. On 6 October 2023 the Applicant was granted leave to amend their development application and rely on amended plans and documents.

3 As amended the development application seeks consent for:

*Demolition work:*

- (1) Demolition of the existing rear additions to the Ritz, laundry building, shed/outbuildings and chimney to a previously demolished boiler house;
- (2) Removal of existing internal structures as follows:
  - 'Ritz Hotel' (Building A1): partial removal of internal walls to create new openings and the like as shown on Revision H of the architectural plans.
  - South wing (Building A2): removal of interior fabric on the upper level as shown on Revision H of the architectural plans and partial demolition of the ground floor interiors.
  - West wing (Building A3): removal of interior fabric across all 3 levels as shown on Revision H of the architectural plans.

*Proposed work:*

- (1) Retention and conservation of the previous managers residence for use as a wellness centre consisting of a gymnasium to the lower ground level and a spa, beauty salon and meditation room on the ground level. (Building C).
- (2) Retention and conservation of the previous education offices for use as a staff room. (Building D).
- (3) Restoration of the historic gardens on the site.
- (4) Site preparation works including tree removal, earthworks, stormwater and drainage.
- (5) Construction of a below ground pedestrian connection between the residential aged care facility and the proposed wellness centre.
- (6) Construction of a basement parking level consisting of a total of 40 carparking spaces, service rooms, waste room, laundry room including associated loading bay/ambulance parking space, cool room for kitchen operation, staff locker area, 3 lifts to upper levels, training room, cinema, mechanical plant room and storage areas.

- (7) The construction of a 3-storey residential aged care facility comprising 123 beds, each room with en-suite facilities constructed above the basement parking level.
- (8) Partial retention of the original portion of the Ritz Hotel (Building A1) and the external façades of the 1910-1913 wings (Buildings A2, A3). The development proposes continued use of these buildings as part of the residential care facility.
- (9) Construction of two new three storey wings (west A and west B) adjoining the south and western boundaries to Wascoe Street.
- (10) Construction of two new three storey wings (south A and south B) adjoining the south and south eastern boundaries of the site.
- (11) Closure of general access from Leura Mall (with the exception of emergency vehicles) and creation of a new vehicular access off Wascoe Street providing for access to the basement level; and
- (12) New substation to be provided to the Wascoe Street frontage alongside the basement entry/exit.

### **The Issues**

- 4 Despite amendments to the development application, the Respondent maintains that the development warrants refusal on the following grounds:
  - (1) That the effect of the proposed development on the heritage significance of the heritage item 'The Ritz and interiors' is unacceptable.
  - (2) That the development fails to exhibit design excellence as required by cl 6.19 of the Blue Mountains Local Environmental Plan 2015 (LEP 2015).
  - (3) That the extent of proposed demolition proposed by the development application is not justified or acceptable.
- 5 In totality the Respondent argues that the development as proposed in the development application should be refused as it will have severe and irreversible impacts on the significance of the heritage item 'The Ritz and interiors'. The Respondent argues that these impacts arise from the proposed demolition of internal fabric within Ritz Hotel (Building A1), the upper level of Building A2 (the South Wing) and both levels of Building A3 (the West wing), along with the proposed demolition of the boiler house chimney (located adjacent building A5).

### **The site**

- 6 The site is a single allotment of land described as Lot 20 DP 1076123 with a street address of 203-223 Leura Mall, Leura. The site has an approximate area

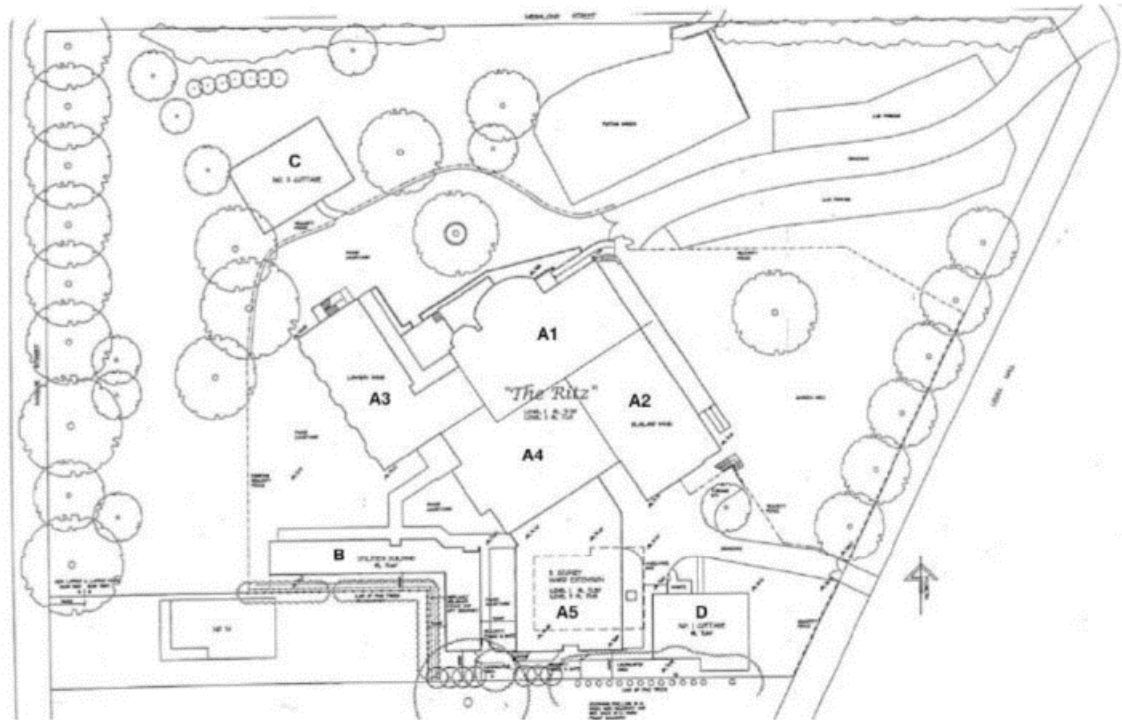
of 11,300m<sup>2</sup> and is bounded by Megalong Street to the North and Wascoe Street to the West. The site is identified in the following aerial photograph:



Figure 1: Aerial photo of site, source: <https://maps.six.nsw.gov.au/>

7 The site consists of several historical buildings which are depicted in the following extract from the Applicant's Conservation Management Plan (Exhibit J). The building numbers correspond with the following descriptors:

- A1: The Ritz Hotel (1892 Building)
- A2: The Ritz South wing (circa 1910)
- A3: The Ritz West wing (circa 1910)
- A4: The Ritz nursing home – Infill wing
- A5: The Ritz nursing home – Modern extension
- B: Laundry
- C: Managers Residence
- D: Education Offices



- 8 The whole of the site is listed as a local heritage item in Sch 5 of the LEP 2015. The listing is nominated as 'The Ritz and interiors'. The statement of significance record on the State Inventory states:

"The earliest, grandest and longest lived of all Leura tourist establishments, The Ritz has state significance as a major hotel for three quarters of a century, a landmark from the western railway third only to the Carrington and the Hydro Majestic, attracting tourists from many places, and an important catalyst in the commercial and tourist development of Leura and the adjacent scenic walks.

The garden and grounds of the Ritz are of historic significance on a local level for their evidence of the principal characteristics of a garden associated with a large Blue Mountains hotel.

The Ritz has a unique character among the former Blue Mountains guesthouses created by the use of gothic elements of steeply pitched roofs, chimneys, gables and dormers. While most of its interiors were apparently lost in its conversion to a nursing home, it retains much of its fine exterior detailing, particularly the variety of joinery and the generous verandahs. The fine gardens enhance the building providing interesting views to and from the home.

The chimney of the boilerhouse has importance through its great height and fine quality brickwork, reminiscent of the better known landmark at the Carrington Hotel in Katoomba.

The Education Centre is also an important element in the group as a fine and interesting example of an inter-war California bungalow residence.

The garden and grounds of the Ritz are of aesthetic significance on a local level for their evidence of the principal characteristics of a garden associated with a large Blue Mountains hotel or guesthouse, viz. formal entrance drive,

treed grounds, croquet lawn and tennis court. The early plantings including the landmark Monterey pines (*Pinus radiata*) and the boundary plantings are also aesthetically significant.”

Source: NSW Heritage Inventory

- 9 Applying the NSW Heritage Office, NSW Heritage Manual, ‘Assessing Heritage Significance’ (2001) (Heritage Guidelines) the site is nominated as meeting the following criteria at a local level:

SHR Criteria (a): Historical Significance

“The earliest, grandest and longest lived of all Leura tourist establishments, the Ritz has state significance as a major hotel for three quarters of a century, a landmark from the western railway third only to the Carrington and the Hydro Majestic, attracting tourists from many places, and an important catalyst in the commercial and tourist development of Leura and the adjacent scenic walks.

The garden and grounds of the Ritz are of historic significance on a local level for their evidence of the principal characteristics of a garden associated with a large Blue Mountains hotel.”

SHR Criteria (c): Aesthetic Significance

“The Ritz has a unique character among the former Blue Mountains guesthouses created by the use of gothic elements of steeply pitched roofs, chimneys, gables and dormers. While most of its interiors were apparently lost in its conversion to a nursing home, it retains much of its fine exterior detailing, particularly the variety of joinery and the generous verandahs. The fine gardens enhance the building providing interesting views to and from the home.

The chimney of the boilerhouse has importance through its great height and fine quality brickwork, reminiscent of the better known landmark at the Carrington Hotel in Katoomba.

The Education Centre is also an important element in the group as a fine and interesting example of an inter-war California bungalow residence.

The garden and grounds of the Ritz are of aesthetic significance on a local level for their evidence of the principal characteristics of a garden associated with a large Blue Mountains hotel or guesthouse, viz. formal entrance drive, treed grounds, croquet lawn and tennis court. The early plantings including the landmark Monterey pines (*Pinus radiata*) and the boundary plantings are also aesthetically significant.”

SHR Criteria (f): Rare Assessment

“The Ritz is an uncommon and fine example of the use of the Federation Gothic style for a guesthouse.”

**Public submissions**

- 10 In determining the development application, the Court is to take into consideration any submissions made during the notification of the development application. The submissions received by Blue Mountains Council since the

lodgement of the development application were tendered in the proceedings as part of the Respondent's evidence. I have read and considered those submissions.

- 11 The development application was notified to adjoining land owners and published in the local paper for the period 8 July to 7 August 2021. Following the notification 18 submissions were received, including 5 in support of the application noting the benefits to the community of an aged care facility and the proposed retention of heritage items. The submissions in objection raised the following concerns:
  - The impact of the proposed western wings and basement car park entry on adjoining and nearby properties in Wascoe Street and the streetscape and character of the area.
  - The impact on vegetation on the site and adjoining site.
  - Impact on the heritage item on the site and adjoining land.
  - Impacts arising from construction.
  - Inadequate information.
- 12 The development application was amended during the assessment by Blue Mountains Council. Following the notification 22 submissions were received raising matters consistent with the previous notification.
- 13 During the hearing, provision was made for a number of objectors to address the Court directly and give evidence of their concerns in relation to the proposed development. These objections emphasised many of the concerns summarised in the proceeding.

### **Expert evidence**

- 14 The following experts gave evidence in the proceedings:
  - Heritage: John Oultram (for the Applicant), Vanessa Holtham (for the Respondent).
  - Town Planning: Juliet Grant (for the Applicant), Paul Anzellotti (for the Respondent).
  - Structural Engineering: Alex Been (for the Applicant), Hari Gohil (for the Respondent).
  - Fire Engineering: Colin Thomson (for the Applicant), Carlos Quaglia (for the Respondent).



- BCA Consultant: Anthony Doherty (for the Applicant).
  - Access Consultant: Simon Hearn (for the Applicant), Ben Young (for the Respondent).
- 15 The experts prepared joint reports which were tendered in the proceedings. The heritage, structural and fire engineers, and BCA and Access consultants were called for cross examination and oral evidence.

### **Planning Controls**

- 16 Relevant to the issues in contention, the following planning controls are applicable.
- 17 LEP 2015 applies to the land and zones it R1 General Residential. The development application seeks consent to use the site for the purposes of a 'residential care facility'. A residential care facility is a type of 'seniors housing', a proposed use which is permitted with consent in the zone. The objectives of the zone, to which consideration must be given are:
- To provide for the housing needs of the community.
  - To provide for a variety of housing types and densities.
  - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
  - To ensure that building form and design does not unreasonably detract from the amenity of adjacent residents or the existing quality of the environment due to its scale, height, bulk or operation.
  - To enhance the traditional streetscape character and gardens that contribute to the attraction of the area for residents and visitors.
  - To provide opportunities for the development of a variety of tourist-oriented land uses within a predominantly residential area.
- 18 Pursuant to the Height of Buildings Map referred to in cl 4.3(2) of LEP 2015 the maximum permissible height of buildings on the site is 8m. The proposed development relies on a variation to the maximum height standard pursuant to cl 4.6 of LEP 2015. The existing Ritz building currently has a height of 14.96m. The proposed extensions to the south and west of the original Ritz building exceed the 8m height standard by 1.05m (13.1%) to 4m (50%). The Applicant has prepared a written request to vary the standard. The Court is required to be satisfied that the preconditions contained in cl 4.6 of LEP 2015 are met prior to the grant of consent to the development application.

- 19 Pursuant to the Floor Space Ratio Map referred to in cl 4.4(2) of LEP 2015 the maximum permissible floor space ratio on the site is 0.4:1. The site has an area of 11,300m<sup>2</sup>. The existing onsite development has an FSR of 0.31:1. The proposed development seeks an FSR of 0.64:1. The Applicant has prepared a written request to vary the standard. The Court is required to be satisfied that the preconditions contained in cl 4.6 of LEP 2015 are met prior to the grant of consent to the development application.
- 20 In addition to being individually listed as a heritage item under LEP 2015, the site is also adjoining the Leura South heritage conservation area (HCA) to the south and the Central Leura HCA to the north.
- 21 Further, 2 properties adjoining the site to the south, 24-26 Wascoe Street, are listed as heritage items. The properties at 24-26 Wascoe Street, Leura are deferred matters and remain zoned under the earlier local environmental plan known as Blue Mountains Local Environmental Plan 2005 (rather than LEP 2015). Part 1 of Sch 6 of Blue Mountains Local Environmental Plan 2005 lists “24–26 Wascoe Street “Kanowna” group LA024” under the heading Leura as a heritage item.
- 22 The statement of significance for the Leura South HCA is:

“The Leura HCA is of historic, historical associational, aesthetic and representative significance to the local government area of the Blue Mountains. It is also has the potential to be of social and technological/research significance.

The town of Leura is one of the most significant towns in the Blue Mountains. Although one of the last to be established, Leura quickly gained a reputation as an exclusive residential area through the quality of the houses and gardens which were established by affluent families seeking relief from the heat and humidity of Sydney's summer months.

The streetscapes of Leura are notable for their maturity and very high aesthetic quality, most being dominated by the gardens, hedges and towering conifer windbreak trees. Most streets have some street tree planting but the quality and scale of the adjacent gardens mean that in many cases the street trees contribute to the streetscape rather than dominate it. The prevailing aesthetic character of Leura's landscape is a private, secluded one, with many houses largely hidden from casual view by the density of garden and street vegetation.

The topography of the town also plays an important role in establishing the aesthetic quality and character of its cultural landscape, with the buildings draped over the rolling hills and valleys and creating very good quality serial

views when travelling through the area, particularly along the east-west streets in autumn when the trees have turned colour.

Visual links between the streets of the town and the panoramas to the valleys of the Blue Mountains are generally limited to the outer ring of local roads and semi-formal viewing points. Good distant views can also be enjoyed from higher in the town, where the escarpment effectively terminates streetscape views.

The main period of development was from the late 19th century to the middle of the 20th, and a high proportion of the buildings of Leura provide substantially intact or sympathetically altered evidence of the styles popular with affluent families during this period. Many properties have been extended or altered over the years but in most cases the additions have been made to sit comfortably with the original form and streetscape qualities and the properties continue to demonstrate the heritage values of the town and the community that formed it.

The earlier buildings are characterised by their use of lightweight materials such as timber weatherboard and corrugated iron. This is representative of development throughout the towns and villages of the Blue Mountains.

Most of these properties have survived substantially intact, including their original garden settings. These gardens continue to play an important role in demonstrating the values of Leura's contemporary cultural landscape by establishing the sense of spaciousness and graciousness that is an important characteristic of the town. The Leura South HCA includes many very good examples of more modest cottages and houses, most of which are also set in good gardens and contribute to the aesthetically powerful streetscape. The HCA also includes precincts with houses that date from the mid-late 20th century but which are set in mature gardens that make a positive contribution to the local streetscape and the overall values of the HCA."

## 23 The statement of significance for the Central Leura HCA is:

### "Criterion (a): Cultural and Natural History

The commercial section of Leura Mall is of State significance because of the integrity of the assemblage of commercial and public service buildings which grew up rapidly after the railway station opened in Leura in 1890. This is also significant, like Katoomba, in having a major church building within the commercial precinct. The roadway itself is of significance because of the difficulties which it presented to the municipal authorities to maintain and beautify.

### Criterion (c): Aesthetic

The central Leura Conservation Area retains a substantial number of early twentieth century buildings that combine to give the streetscape a distinctive character. A large number of early shopfronts with their recessed entries, metallic framing, marble and tiled work survive and provide important pedestrian interest. This aspect of the streetscape has been reinforced by mid twentieth century buildings with their chrome shopfronts and curved glass entries. The compactness of the commercial centre reinforces the village atmosphere of the precinct.

### Criterion (f): Rarity

Leura Mall is a rare example of a high quality small commercial centre retaining very substantial integrity. Criterion

(g): Representativeness The Central Leura Urban Conservation Area retains the typical character of an early twentieth century commercial centre in a small town.

#### Criteria a) Historical Significance

The commercial section of Leura Mall is of State significance because of the integrity of the assemblage of commercial and public service buildings which grew up rapidly after the railway station opened in Leura in 1890. This is also significant, like Katoomba, in having a major church building within the commercial precinct. The roadway itself is of significance because of the difficulties which it presented to the municipal authorities to maintain and beautify.

#### Criteria c) Aesthetic/Technical Significance

The central Leura Conservation Area retains a substantial number of early twentieth century buildings that combine to give the streetscape a distinctive character. A large number of early shopfronts with their recessed entries, metallic framing, marble and tiled work survive and provide important pedestrian interest. This aspect of the streetscape has been reinforced by mid twentieth century buildings with their chrome shopfronts and curved glass entries. The compactness of the commercial centre reinforces the village atmosphere of the precinct.

#### Criteria f) Rarity

Leura Mall is a rare example of a high quality small commercial centre retaining very substantial integrity.

#### Criteria g) Representative

The Central Leura Urban Conservation Area retains the typical character of an early twentieth century commercial centre in a small town.

Integrity/Intactness: High”

- 24 The objectives of cl 5.10 of LEP 2015, ‘Heritage Conservation’ at subcl (1), are to conserve the environmental heritage of the Blue Mountains and the heritage significance of heritage items and heritage conservation areas, including associated fabric, setting and views, to conserve archaeological sites and to conserve Aboriginal objects and Aboriginal places of heritage significance. The consent authority must, before granting consent in respect of a heritage conservation area, consider the effect of the proposed development on the heritage significance of the area, at subcl (4).
- 25 Clause 6.19(3) ‘Design Excellence’ of LEP 2015 imposes a jurisdictional requirement on the consent authority not to grant consent to development to which the clause applies unless it forms the opinion that the proposed

development exhibits design excellence. Clause 6.19(4) specifies the mandatory relevant considerations in considering whether the development exhibits design excellence. The list of matters at cl 6.19(4) of LEP 2015, whilst mandatory are not exhaustive: *Toga Penrith Developments Pty Ltd v Penrith City Council* [2022] NSWLEC 117. The Court is required to be satisfied that the precondition contained in cl 6.19 of LEP 2015 is met prior to the grant of consent to the development application.

- 26 Clause 7.1 'Development in villages' states that development consent must not be granted for development on land identified in Pt 7 unless the consent authority is satisfied that the development on land is consistent with the objectives of the development. The relevant provision for this development is cl 7.8 (3) 'Leura Precinct' which states:

(3) The objectives for development on land identified as "Leura Precinct R1-LE03" on the Built Character Map are as follows—

- (a) to promote the tourism role of Leura village,
- (b) to accommodate a diverse mix of dwellings and retail and other business-related services that service the local community as well as visitors,
- (c) to maintain and enhance the historically distinctive pattern of detached cottages that are surrounded by gardens and freestanding garages by conserving existing trees that provide visually significant streetscape features and ensuring that landscaping complements and extends the established pattern of tall canopy trees that are located primarily alongside property boundaries,
- (d) to promote high levels of residential amenity for both future residents and existing neighbouring properties,
- (e) to promote new buildings that are consistent or compatible with the scale, bulk and architectural character of existing houses and cottages,
- (f) to encourage restoration of traditional architectural forms and details for existing early 20th century cottages and houses,
- (g) to provide on-site parking that does not dominate the street frontage and that is integrated with the design of surrounding garden areas.

- 27 Part D of the Blue Mountains Development Control Plan 2015 (DCP 2015) contains controls relevant to Heritage Management. Those controls are discussed as relevant to the evidence in the following.

**Is the impact of the proposed development on the heritage significance of ‘The Ritz and interiors’ acceptable?**

*Expert evidence: demolition*

- 28 The extent of demolition proposed in the development application is summarised at [3].
- 29 The Conservation Management Plan (CMP) details the ranking of significance of fabric from exceptional through to intrusive. Where relevant those diagrams are extracted later in the judgment.
- 30 The grading terms used in the CMP are those defined in the NSW Heritage Manual as follows:
- “Exceptional: Rare or outstanding element directly contributing to a place or object’s significance.
- High: High degree of original fabric. Demonstrates a key element of the place or object’s significance. Alterations do not detract from its significance.
- Moderate: Altered or modified elements. Elements with little heritage value, but which contribute to the overall significance of the place or object.
- Little: Alterations detract from its significance. Difficult to interpret.
- Intrusive: Damaging to the place or object’s significance.”
- 31 The Respondent’s concern in relation to the extent of demolition is centred on the Boiler House Chimney and the degree of demolition and change to 1892 Ritz Hotel (A1) and the 1913 South (A2) and West (A3) wings. The expert evidence on these items is summarised in the following:

*Boiler House Chimney*

- 32 The development application proposes the demolition of the existing boiler house chimney.
- 33 In his evidence Mr Oultram notes that the chimney is noted in the statement of significance of the item ‘The Ritz and interiors’ as having importance through its height, fine brickwork and the fact it is reminiscent of the landmark chimney at the Carrington Hotel at Katoomba. He disagrees with this assessment noting:

“This is simply incorrect. The chimney is no higher than the ridge to the south wing of the Hotel and can only been seen in a narrow view corridor from Leura Mall.

...

The chimney does not have finally detailed brickwork and is relatively crude as could be expected for such a structure. It has no landmark qualities in the manner of the chimney at the Carrington Hotel at Katoomba that is of considerable height and that be seen from considerable distances.”

(Exhibit 7)

34 Further, Mr Oultram argues that the boiler house chimney are likely post World War 2 structures, and do not relate to the original Ritz Hotel.

35 The Applicant’s CMP notes the chimney as being of moderate significance.

36 The structural assessment of the existing buildings prepared by ABVD Design for the Applicant makes the following comments about the chimney:

“this brick chimney is far too high to be supported in any safe manner. It currently does not comply with the masonry nor loading code. Unless a significant steel frame is added around this chimney in order to brace it up, then it can only be considered a hazard. Significant wind or earthquake events will certainly topple the structure. It is strongly recommended that it is removed. Preferably, it will be the first item removed after CC is granted, as construction vibrations will create an unsafe work zone for all those in its vicinity due to risk of collapse.”

(Exhibit B)

37 In the alternative, Ms Holtham supports the nomination of the importance of the chimney in the statement of significance of the item ‘The Ritz and interiors’. Her evidence supports the retention of the chimney in the proposed development. She argues:

“A chimney is utilitarian in nature and can have landmark qualities without being visible from vast distances. I disagree that the chimney is “crude” as noted by Mr Oultram, which contradicts his rating of ‘Moderate’ significance in the CMP and the NSW Heritage Inventory.

...

The chimney was not constructed using common bond (header course every sixth course) but rather (presumably) an adaptation of coursing to accommodate the widening based. In my opinion the chimney is unlikely to have been constructed in its current form in the late 1950s, given the technological progression in Australia Post War II.

...

Given the contemplated extent of development across the site and the visual interest provided by the chimney as well as its recognised significance, it is a relevant layer of the heritage item, which could and should be easily retained.”

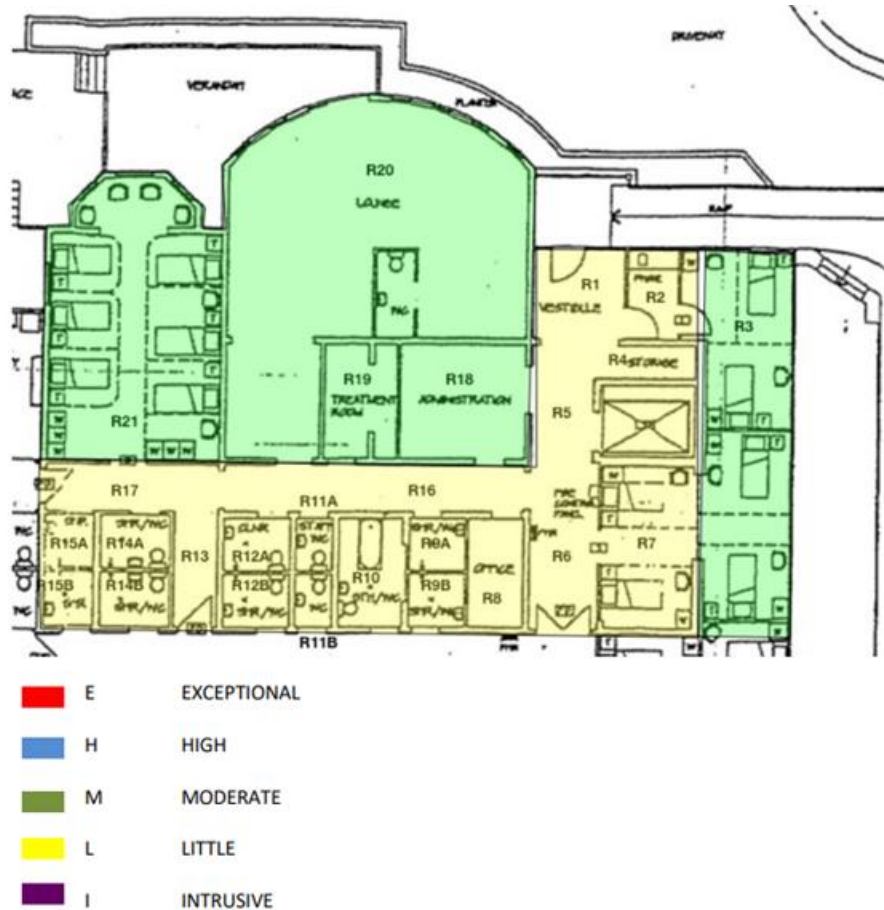
(Exhibit 7)

*1892 Ritz Hotel (Building A1)*

38 No excavation or works are proposed below Building A1.

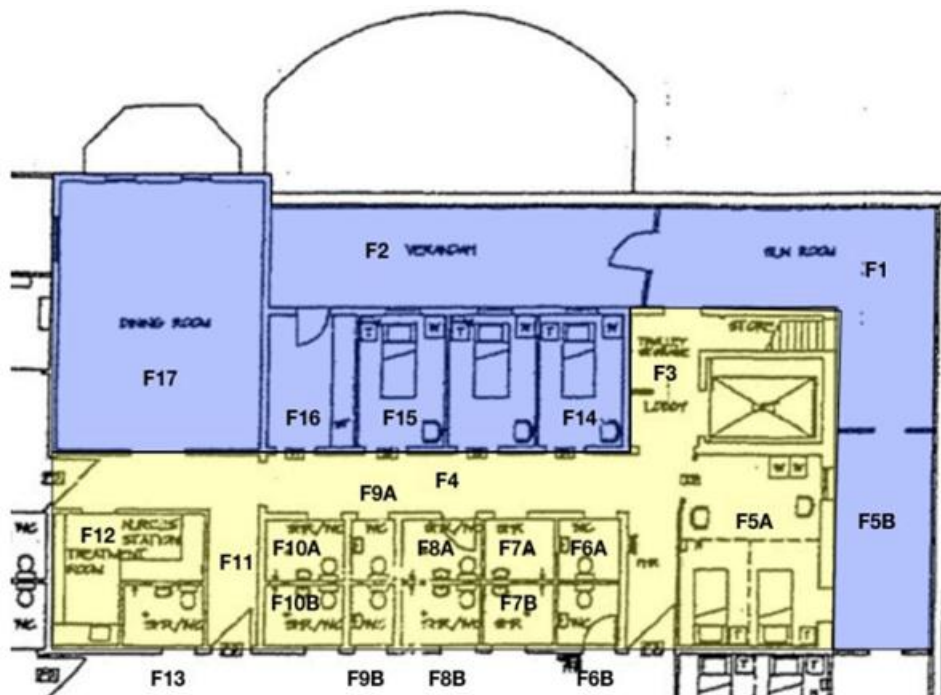
- 39 The structural report prepared by ABVD design concludes that Building A1 is structurally sound and can generally support the proposed new loads.
- 40 Section 6.4 of the CMP provides ranking of significant spaces and fabric as extracted below:

Ground floor:





First floor:



Second floor:



(Exhibit J)

- 41 The conservation approach to The Ritz (Building A1) is described in the CMP as follows:

“Policy A1.4 ‘Fabric that may be demolished’

The Ritz

- All fabric introduced after 1970 except where it is identified as significant fabric

- Significant fabric where it is only a remnant of a previous configuration or detail.

...

#### 8.5.9 Restoration and Reconstruction

Considering the level of change that has occurred, the Ritz is unlikely to be returned to its original layout and detail, though early plans are available. The works would be based on available physical evidence, early photographs and conjecture.

Some of the changes to the external façade are reversible, and the reinstatement of some elements would enhance the significance of the place. The infill of the original verandah would be relatively easy to remove, and the detail is recorded in early photographs, the columns remain, layout is readable and there are extant doors to match. Reversal of other external alterations (joinery and gablets) may also be feasible. The original stair has been salvaged and stored on site and its original location is known.

The level of internal change is very extensive particularly to the original hotel (new walls, removal of detail) though the south and west wings retain parts of their original layout and detail. Some reconstruction may be feasible through the extent of this has not been assessed in this report. Later wall and ceiling coverings could also be removed where there are original ceilings above.

...

Policy A15: Allow the restoration or reconstruction of significant fabric that has been removed or altered and in particular:

The Ritz

- Original, ground and first floor verandah
- living room door to the verandah
- internal room layouts
- internal and external joinery
- original stair

..."

(Exhibit J)

42 At the Ground floor the development application seeks to demolish the curved lounge element in Room R 20 as the CMP argues this element is a later addition. Some internal demolition is proposed to facilitate the proposed room layouts, as well as infill with new walls.

43 The demolition plan for the Ground Floor of Building A1 includes the following note in relation to the original stair:

"Retain and assess the potential re-use of original stair from Ground floor to Level 1 of the Ritz Hotel to be coordinated with the Heritage Architect"

(Exhibit B)

- 44 The proposed ground floor plan of Building A1 indicates the stair as new work, indicating the original stair is to be demolished as part of the proposed works. (Exhibit G).
- 45 The proposed ground floor plan does not include the reinstatement of the original verandah, despite the inclusion of these works in the Schedule of Conservation works in Exhibit B. Instead the development application proposes to retain the existing enclosed corridor (R3) and reuse these spaces as rooms G.01, G.02 and G.03.
- 46 In relation to the non-reinstatement of the verandah at ground floor Mr Oultram argues in the joint report that the retained infill will remain identifiable as non original fabric given the maintenance of columns from the original verandah.
- 47 In the joint report Mr Oultram reiterates his overall assessment detailed in the CMP that the extent of alteration to the fabric of the Ritz Hotel (Building A1) is extensive. He notes that:
- “the 1892 Hotel has an ungainly sun lounge to the main frontage that removed the original verandah at the ground floor and there are extensive later and modern additions and outbuildings to the south. Some of the exterior joinery detail to the 1982 hotel has been removed and the side verandah to the south wing incorporated into the aged care rooms and the former external wall largely removed. The corner of the first floor verandah has been infilled.”
- (Exhibit 7)
- 48 In the joint report Mr Oultram notes that at the first floor some alterations are required for new door openings and to insert a new stair from the first to second floor.
- 49 By reference to the architectural plans, the extent of demolition proposed at the first floor of the Ritz Hotel (Building A1) is unclear and inconsistent. The demolition plans indicate a larger extent of demolition than is indicated in the proposed Level 1 floor plan. Importantly this inconsistency extends to the extent of original verandah fabric proposed to be demolished, retained or reinstated. The demolition plans and the proposed floor plans are nominated as plans for which consent is sought in the development application.
- 50 In the amended plans prepared after the joint reporting the size of the proposed rooms at Level 1 of the Ritz Hotel (Building A1) were reduced to

allow for greater retention of the existing corridor alignment and wall fabric. In addition, the proposed void between the ground floor and first floor at the entry was deleted. (Exhibit G).

51 The development application proposes minimal changes to the second floor as alteration to aged care rooms is not proposed and the works proposed are predominately repairs.

52 In considering the overall works proposed to the Ritz Hotel (Building A1) Mr Oultram concludes they are acceptable and should be considered in the context of the conservation works proposed by the development application, including works to the Managers Residence and the Education office.

53 In contrast Ms Holtham argues that the extent of demolition and works proposed to the Ritz Hotel (Building A1) is inappropriate. In particular she argues the following changes are not supportable from a heritage perspective:

- The lack of reinstatement of the ground floor verandah to the central and South wings (Building A1 and A2 respectively). Ms Holtham argues that these elements should be reinstated given their former visual prominence and architectural importance to the building. Further she argues that evidence exists both on site with retained elements and from historical materials to facilitate reconstruction of these building components.
- The lack of retention of the corridor arrangement of the original building at ground floor through a reduction in demolition.
- The proposed void over the entry way which Ms Holtham argues will reduce the integrity of the original fabric by removal of the original floor fabric.
- The proposed re-enclosure of the verandah and demolition of the original building corner at the ground floor.
- The complete demolition of the original verandah fabric at the first floor along with most of the internal walls, the corridor which is likely original, the buildings north-eastern corner and the floor over the proposed entry way.

54 Whilst Ms Holtham acknowledges that a combination of issues needs to be addressed to allow for the adaptive reuse of the building, including structural considerations such as integrity, accessibility, fire compliance and the existing floor slope, she concludes that the proposed development has too great an impact on the significance of the heritage item. She argues that “internal demolition, often referred to as ‘gutting’ and reconstruction of a different

configuration, and demolition and reconstruction of external elements such as the verandah does not equate to conservation". (Exhibit 7).

- 55 In the joint report Ms Holtham argues that despite the assertion by the Applicant that the conservation works proposed are extensive, the development application lacks detail and clarity of those works. Further, she notes a concern about a number of the notes on the architectural plans leaving the final outcome of the development uncertain, for example (emphasis original):

"Notations like '**proposed void space over facility entrance for appreciation of the scale of original Ritz Hotel at entrance area**' and 'Retain original fabric of the Ritz Hotel where possible and identified by the project heritage consultant on site' on DA026..."

(Exhibit 7)

- 56 The notations that Ms Holtham identifies in the joint report remain on the architectural plans for which consent is sought.
- 57 Finally, Ms Holtham argues that the heritage listing of the site as 'The Ritz and Interiors' in LEP 2015 makes it clear that it is the totality of the building fabric and the space it encloses that is central to its heritage significance. She concludes that the proposed extent of demolition proposed is substantial and the impact on the significance is severe.
- 58 The parties filed agreed conditions of consent on 15 December 2023. Those conditions include a condition requiring design changes, likely responsive to questioning from the Court during the proceedings about the feasibility of reinstatement of the original verandah to the eastern side of the Ritz Hotel (Building A1) at the ground floor. The condition states:

"12A The following design changes must be implemented:

i) the infill to the northeastern corner of the ground floor to the 1892 Hotel is to be removed with the original ground floor verandah to the eastern side of the 1892 Hotel to be reinstated.

Plans and details of the above must be submitted to Council prior to the issue of the relevant construction certificate."

- 59 The effect of this condition is that if the Court was to grant consent to the development application Condition 12A modifies details of the development the subject of the development application to include the reinstatement of this

section of the ground floor verandah: s 4.17(1)(g) of the EPA Act. I have considered the effect of this condition in the assessment and determination of the development application.

*Expert evidence: South (A2) and West (A3) wings*

- 60 The development application proposes a new lower ground floor to be constructed below the South (A2) wing.
- 61 The ground floor plan indicates the demolition of all of the interior walls of the ground floor of the South (A2) wing. The plans also indicate demolition of the verandah fabric, with the exception of the cast iron columns. Retention of existing fabric is limited to part of the exterior walls to the west and south of the building.
- 62 As noted at [3], the interior fabric of the South (A2) wing is proposed to be removed at Level 1. The exterior walls are nominated on the architectural plans as retained, with the exception of the infill on the existing verandah which is to be removed. Although not specifically noted in the CMP, Figure 7A in the CMP and the architectural plans indicate the original windows on the eastern façade of the South (A2) wing are to be removed and replaced with new doors to access the verandah. The fabric of the original verandah is nominated for demolition and reinstatement. However, it is shown on both the floor plans and elevations as new work. The original bay windows on the western elevation are nominated on the architectural plans to be retained ‘where possible’.
- 63 In the joint report Ms Holtham argues that despite the ground floor of the South (A2) wing being the most internally modified area, it retains its original form. In relation to the ground floor verandah Ms Holtham notes that there is clear evidence of the original arrangement. She argues that, in lieu of demolition and reconstruction of the verandah, the extant fabric should guide the proposed development.
- 64 Ms Holtham notes, consistent with her comments extracted at [55], that the notation in relation to the retention of bay windows at Level 1 of the South (A2) wing on the architectural plans is uncertain. The requirement for their retention “where possible” is open ended and unresolved. She argues that if the loss of

the bay windows occurred as part of the development it would be entirely unacceptable from a heritage perspective.

- 65 Finally, in relation to the proposed insertion of the lower ground floor under the South (A2) wing Ms Holtham argues:

“... like the west wing, there is no detail about how this new floor will be sleeved in underneath and what the resulting appearance, which is an external elevation of the heritage item, will be.”

(Exhibit 7)

- 66 As part of the development application the Applicant filed an updated Heritage Impact Assessment (HIA) prepared by John Oultram Heritage & Design. In the HIA Mr Oultram summarises the overall impact of the proposed development as follows:

“The former Ritz is a place of considerable cultural significance that should be conserved. It contains built and landscape elements of high significance that should be conserved.

It is clear that there is potential for additional development at the site that can occur without impacting the significance of the place. There are also elements of lesser significance, or that are intrusive, that can be removed, or replaced to ensure a successful adaptive reuse of the place.

We consider the proposed development is very well considered and are a high quality response to the site and its heritage components.

The proposal:

- Maintains the major heritage buildings on the site and proposes an appropriate adaptive reuse.
- Maintains the major landscape components with well controlled change.
- Limits the scale of buildings to maintain the visual setting and views to the retained heritage buildings.
- Places development to the rear and west of the site to maintain the most significant garden setting of the former Hotel and maintain views to the period buildings.
- Allows good separation between the new elements and the period buildings.
- Limits the impact of the development on heritage items in the vicinity with appropriate mitigation measures.
- Limits the impact of the development on the heritage conservation areas in the vicinity.

We also consider that:

- The proposal meets the aims and objectives of the BLEP
- The proposal meets the heritage provisions of the BMDCP

In heritage terms we would strongly support the proposal and consider that, in heritage terms, the current proposal should be approved.”

(Exhibit B)

67 The HIA concludes that, when assessed against the statement of significance (extracted at [8]), the proposed development provides a good balance of retention over development, provides for an appropriate treatment of heritage buildings and maintains the garden setting of the place and its important plantings and former leisure spaces.

68 Appendix C to the HIA addresses the retention of the existing internal walls of the South (A2) and West (A3) wings. Based upon the information provided in the structural feasibility report and the construction methodology Mr Oultram draws the following conclusions:

“- In terms of stud and joist sizes, the upper internal structure is adequate to meet the proposed loading.

However:

- The structural integrity of the timber floors has been compromised by the inadequacy of the timber bearers in the sub floor.
- This has led to considerable level changes at the ground and first floors that cannot be reversed by levelling of the bearers.
- the external walls require to be fire rated or become non loadbearing.
- the internal ‘columns’ (hall walls) require fire rating.
- the timber floors require replacement.
- the hall needs to be widened at both levels to meet BCA requirements and provide access for the Fire Brigade.
- Some physical alteration of the floor levels would be required the requirements for access for people with a disability.
- A designed solution to access widths and for people with a disability is not supportable.”

(Exhibit B)

69 In reply to the concerns raised by the Respondent and Ms Holtham about the extent of demolition, Mr Oultram argues that whilst the loss of fabric was unfortunate it should be placed in the context that has already occurred to the buildings. He notes that the layout of the South (A2) and West (A3) wings have been reconfigured, internal joinery removed and earlier material overlaid with modern finishes. In the joint report Mr Oultram particularises these changes as follows:



“The west wing largely retains part of its internal layout of cellular bedrooms.

In both wings, the walls and ceilings have been covered with plasterboard and the extent of this is note in the Appendix C diagrams [annexed to the HIA]. Both wings retains external doors and windows (including bay windows) apart from the ground floor of the south wing.

The level of internal change has been extensive.

The works to the interiors should be placed in context with the extensive conservation works that are proposed to the heritage buildings (including the Manager’s Residence and Education Office) that are in relatively poor condition and that have lost significant detail.”

(Exhibit 7)

- 70 Mr Oultram notes that the work undertaken to determine structural feasibility, fire ratings and compliance with the Building Code of Australia establishes that change would be required if some building elements (such as the interiors of the South and West wing) are to be retained. He concludes that, in his view, the proposed rebuilding works are good conservation practice as they address these issues of compliance and safety which will ensure the long term conservation of the wings. He argues:

“This is not facadism and the new internal arrangements for the wings are strongly reflective of the current layouts with cellular rooms set each side of a corridor (albeit wider), dividing walls placed between door and window opening on their current alignments and floor inserted at the current levels maintaining room and sill heights”

(Exhibit 7)

- 71 Mr Oultram notes that the fabric of the verandah of the South wing (A2) and its original joinery are noted in the CMP as being of high significance. In the joint report he details his understanding that this original fabric will be retained and repaired.
- 72 Overall Mr Oultram argues that the South (A2) and West (A3) wings were poorly built and that, in his view, the level of settlement would suggest that deterioration has occurred over a long period of time. Further, he notes that the metal lath utilised in the original external wall fabric is exposed and rusting in parts.
- 73 Despite accepting that the original layouts largely remain in the two floors of the West (A3) wing and the upper floor of the South (A2) wing he maintains his view that the intrinsic heritage value of the layouts is not high. Further, he argues that the use (and presence) of plaster and lath in these components of

the site is not particularly significant given its widespread use from the Victorian period onwards. The exception to this overall conclusion is the front rooms of the Ritz Hotel (Building A1) at the first floor, in that case he concludes that the plaster and lath construction is significant as it is original and has not been overlain with other material. These materials are retained.

74 In the joint report Mr Oultram discusses that the insertion of the basement under the South (A2) wing and West (A3) wing is driven by the following issues:

- (1) The insertion is partly a requirement of the need for a 'critical mass' of rooms for the aged care facility;
- (2) That the planning and heritage considerations applicable to the site, had the effect of restricting the remaining areas of the site that are available, or appropriate, for new development.
- (3) The proposed new basement and lower ground levels provide the opportunity to repair the failing substructure and provide a sound base to the upper levels. The structural engineers are in agreement that the construction of the proposed lower ground levels are structurally feasible.

75 Mr Oultram concludes the proposed basement and lower ground level are acceptable from a heritage perspective. Contrary to Ms Holtham, he argues these changes will only be visible in the internal courtyards to the west of the South (A2) wing and the west of the West (A3) wing. He concludes that the basement will have little to no visual impact on the overall form of the pitched roof wings and their primary presentation to the east, north and northwest.

76 In response to the concerns of the Respondent and the evidence of Ms Holtham in relation to the reinstatement of the verandah Mr Oultram's evidence is that it may be feasible, but was not considered. He explains as follows:

"Reinstating the verandah to the east side of the south wing may be feasible but was not considered as the works would require the rebuilding of the 'external' wall that would have been based on conjecture and all of the original doors and windows have been removed. The metal columns along the lower façade will be retained and the infill will remain readable as such. Verandahs are retained at both of the upper levels to the south and west wings, the verandah infill to the northeast corner of the original hotel reinstated along with the verandah to the front of the ground floor of the 1892 building reinstated where the new, main entry is proposed. As noted, the level of conservation works to the period buildings is very extensive and it is an aspect of the place that the Applicant wishes to celebrate."

(Exhibit 7)

- 77 Ms Holtham's assessment of the approach to the West (A3) wing mirrors that to the South (A2) wing detailed in the preceding paragraphs. Further, her concerns pertaining to the presentation of the proposed lower level and basement in the façade of the West (A3) wing being the impact to façade proportion and feasibility of fabric retention apply, they are summarised at [65, 88] and [92].
- 78 In the joint report Ms Holtham notes that the joint report of the BCA, Access, Fire and Structural experts conclude the proposed development is feasible. However, she argues that the development application fails to consider the feasibility of greater original fabric retention. For example, Ms Holtham argues that it would be feasible to retain further internal walls, in particular the corridor which frame the internal spaces, and portions of the extant floors through localised levelling. I note this matter was the subject of discussion by the structural engineers, fire engineers, BCA and accessibility experts as detailed at [86].

*Structural feasibility and construction methodology:*

- 79 I note that the architectural plans proposed to form part of approved documents of the development application, nominate the external walls of buildings A3 (the West wing) and A2 (the South wing) are to be retained.
- 80 The structural report prepared by ABVD design assessed the existing condition of buildings A3 (the West wing) and A2 (the South wing). The report identified two primary structural concerns with Building A3, namely the external walling system and the floor framing. The report concludes Building A3 requires additional strength and bracing to be structurally suitable going forward and that the floors are unlikely to comply with current loading requirements. Further, the report identifies that the faceted bay windows on the west elevation of both wings provide insufficient space for bracing due to the width of the existing glazing. The report notes the internal floor framing is uneven, dilapidated and bouncy in some areas. In relation to Building A2, the report finds the same conclusion in relation to the requirement for additional strength and bracing to the building. However, additionally the report raises structural concern about

the eastern external wall and its structural stability going forward. The report states:

“... There eastern elevation of this building consists of a veranda to the first floor, which overlies an internal area on the ground floor which was previously a veranda.

...

This veranda has been filled in at some point in time, and converted to an internal area. The eastern external wall on the ground floor consists of low height timber spandrels upon which windows sit. The windows extend from the spandrels to the ceiling. Existing cast iron posts, spaced at approximately 3 m centres, break up the façade.

Due to the size of these windows, there is no observable safe load path for wind and other loads prescribed in capital AS 1170. This entire wall is not suitable to resist out of plane forces, and, due to the fact that there is clearly no bracing to this elevation, it also cant resist in plane racking forces. It will not be structurally suitable going forward.”

(Exhibit B)

81 The development application includes a structural feasibility report on the construction of the lower ground floor and basement below the existing South (A2) and West (A3) wings and a construction methodology. Both documents are proposed to form part of approved documents of the development application in the agreed conditions of consent. The construction methodology detailed in those documents to implement the works contained in the development application can be broadly summarised as follows:

- Sandstone bedrock is expected to be found at a shallow depth below the existing ground level.
- That to enable the support of the façade framing and construction of the basement it is 'expected' that the existing ground, first floor framing, internal walls, and existing piers and footings will be required to be dismantled.
- If the roof structural systems are to be maintained in place during construction, they must be fully braced by façade bracing systems. If the internal walls are currently supporting the roof framing, alternate means of support will be required to allow for the construction of the basement.
- The façade retention structures will require substantial connection to existing façade framing. Such connections will require the removal of sections of the internal and external finishes in the existing South (A2) and West (A3) wings.
- The original verandah structure (currently infilled) along the east side of the South (A2) wing consists of glazed panels. Such panels are difficult for the façade retention framing to attach to and are unlikely to be retained without significant risk of failure. The structural feasibility report concludes that the

fabric of the verandah should be dismantled, stored and reconstructed, with temporary bracing installed for the verandah roof.

- That the eaves of the existing South (A2) and West (A3) wings will most likely control the proposed locations of the soil retention and propping systems. Sheet piling rigs will be required to underpin the main building and the size and manoeuvrability of these rigs will likely require an offset from the eaves of 1m or more.
- That the construction methodology report, prepared by a separate consultant, considered the structural feasibility report and its approach to the method of construction to insert the new basement and lower ground floor were valid. The only additional work or bracing that appears to be identified in the construction methodology report is to the existing roof fabric. The report states:

“The roof of the south wing is supported on the external and internal walls. We expect the roof framing of the west wing to be similarly supported. Additional temporary support framing will be required to support the roofs and enable removal of the internal walls in each wing. The support framing can be installed progressively while the internal walls and floors are removed and can be supported off the façade retention structures. We note the existing sarking and tiled roof cladding is damaged and water is penetrating through the roofs. Consequently, we expect that the roof cladding of the wings will need to be removed and replaced or substantially repaired as part of the development works. Temporary framing to support the roof could therefore also be installed after removal of the roof cladding (prior to removing the internal walls).”

(Exhibit B)

- 82 The structural feasibility report includes two distinct construction methods (Top-Down and Bottom-up) that could be implemented. Neither the development application nor Condition 49 of the agreed conditions of consent delineate which approach is to be implemented if consent is granted to the proposed development.
- 83 The construction methodology report concludes that the existing roof fabric (sarking, flashing and tiles) in both the South and West wings (buildings A2 and A3) will be required to be removed and potentially replaced with new fabric, or reinstalled.
- 84 As part of the proceedings the parties structural engineering, fire engineering, BCA and access experts prepared a joint report addressing the Respondent's contentions in relation to the South (A2) and West (A3) wings, broadly:
- (1) the condition and structural soundness of the existing fabric;
  - (2) the potential for impact on the stability of the wings from the proposed works, in particular the excavation;

- (3) whether a more flexible approach, or alternative solutions, are available to reduce impact on heritage fabric;
- (4) whether further information is required.

85 In considering the question of whether the impact of the proposed development on the heritage significance of 'The Ritz and interiors' is acceptable, I have read and understood the joint report of these experts. I note the agreement of the structural engineers that the works and the construction methodology proposed are achievable.

86 Further, I note that during the hearing the parties structural engineering, fire engineering, BCA and access experts were requested to undertake further joint conferencing in relation to the feasibility of retention, or partial retention, of the interior walls and floors in the South (A2) and West (A3) wings. The outcome of that conferencing was Exhibit H. The oral evidence of these experts indicated that a scheme may be possible which retains more fabric on these components of the heritage item. A fair understanding of their evidence however is that such an approach would need further detailed and coordinated design and documentation. Further, this is not the development application before the Court, nor the scope of works proposed by the Applicant.

*Expert evidence: new work*

87 In their joint report the heritage experts agree that the design of the new buildings are generally sited and designed to respond to the heritage context in terms of form and materials. However, Ms Holtham argues that the design and presentation of the external façade of the new lower ground level of the West wing building (A3) is unacceptable.

88 In the joint report Ms Holtham firstly criticises the inaccuracy of the architectural plans, in particular the depiction of the fabric proposed to be retained, demolished and the new work. For example, if taken on their face, the architectural plans indicate the external walls of Building A3 as new work, not retained heritage fabric. Secondly, Ms Holtham argues that the addition of a lower ground level in the west elevation of Building A3 changes the presentation and proportions of the façade. Ms Holtham concludes that the insertion of a lower ground floor that changes the external presentation of the heritage building should be avoided.

- 89 In response to the joint report the development was amended in the final set of architectural plans so that the new external walls of the proposed lower ground level of Building A3 is noted as rendered blockwork and the fenestration simplified to glazing inset in a planar wall.

*Expert evidence: consideration of impact of the whole development*

- 90 During the proceedings the heritage experts were asked to prepare an addendum report outlining their assessment of the proposed development as a whole against the provision at cl 5.10(4) of LEP 2015 (extracted at [24]).

- 91 Ms Holtham's evidence in her addendum report can be summarised as follows:

- A future use of the site, and its potential for revitalisation within the Blue Mountains community, is a positive outcome from a heritage perspective. However, that positive benefit does not outweigh the impact of the considerable destruction of the heritage item that is proposed in the development application.
- That the proposal will result in loss of internal and external fabric and the destruction of spaces that are intrinsic to and representative of the heritage item. The proposed level of intervention is too high to be supported.
- The only area where internal conservation works are proposed in the three wings is in the Ritz Hotel (Building A1).
- The development application does not include the obvious opportunity to reinstate the original and extant wrap around the verandah at the ground level. This element is highly visible and architecturally significant.
- The proposed conservation works are selective and better described as maintenance and repair works.
- Accepting that the structural engineers agree that the proposal is achievable, the insertion of the basement and new lower ground floor is not an approach that is supportable on a heritage listed building.
- That the new works proposed are neutral, but that they occupy a significant portion of the curtilage of the heritage item. Such incursions into the curtilage could be accepted as part of a wider proposal where the heritage item was better conserved and revitalised.

- 92 Ms Holtham concludes that (emphasis original):

“The impact on the heritage item that is ‘The Ritz and interiors’ is not acceptable. If approved in its current form, the proposal ultimately results in the substantial removal of one aspect of the heritage item as it is specifically described on Schedule 5 [of LEP 2015], being the “interiors” and this in turn leads to the undermining of the item as a **building**, which by nature is a composition of internal and external elements. The two cannot be divorced. The applicant focusses on extensive external conservation works however this

description and their approach is flawed as noted above. Moreover, the development contemplated includes an extensive lower ground floor, changes [to] principal external facades and affects the external integrity and presentation of the building. Effectively this does not equate to the conservation or even retention of the historic facades. The application could be refused on these grounds along as changing historic elevations in the manner proposed is simply not good heritage practice.”

(Exhibit 9)

- 93 It is Ms Holtham’s evidence that in applying the test at cl 5.10(4) of LEP 2015, the impact of the proposed development on the heritage significance of the item warrants the refusal of the development application.
- 94 In contrast, applying the same test, Mr Oultram concludes that the proposed development is an outstanding response to the heritage significance of the site. His reasoning for this conclusion can be summarised as follows:
- Most elements of the existing heritage item that are nominated as being of exceptional, high or moderate significance are retained and conserved. These elements include buildings, landscape, setting and site features.
  - In heritage terms the proposal provides for an appropriate use of the site.
  - Elements that are of moderate significance are only proposed to be removed where the significance of these areas has been obscured by later changes or alteration/replacement is required due to deterioration or to address structural/fire or access issues.
  - Where substantial change is proposed, it is mitigated by:
    - (a) the retention of internal/external elements of high significance to signal the original detail with layouts that reflect the original.
    - (b) works that will provide a better outcome in terms of the long term conservation of the building.
    - (c) increasing the level of conservation of the 1892 Hotel (Building A1) by the reconstruction/ restoration of previous layouts and removal of intrusive elements.
  - The spaces and interior fabric of the second floor of the Ritz Hotel (Building A1) will be conserved with change limited to that required to provide access.
- 95 Mr Oultram emphasises that the repair and conservation works proposed under the development application are extensive and once completed will return the primary heritage buildings and their setting to ‘their former glory’ and facilitate the long term conservation of the site and its local heritage significance.



- 96 Mr Oultram concludes that any detrimental impact on the significance of the item should be considered in the context of the proposed conservation and repair works. He argues when this approach is taken it is clear, in his view, that the development application is acceptable from a heritage view point and should be approved.

### *Submissions*

- 97 In their written submissions the Applicant emphasises that the heritage experts are agreed that something is urgently needed to protect the site and concordantly its heritage significance. In addition to this overarching agreement the Applicant emphasises the heritage experts also agree that the new work proposed in the development application (comprising the new West wing A, B and new South wing A, B) is acceptable on heritage grounds.
- 98 Mr Larkin SC submits that in considering the provisions at cl 5.10(4) of LEP 2015, and the acceptability of the development application on heritage grounds, the Court should consider and balance any detrimental impacts with the positive maintenance, conservation and restoration works proposed within the development application. He argues when this approach is taken the Court should accept the evidence of Mr Oultram, as detailed in the HIA, the joint report and his oral evidence, that the development has an overall positive impact on the heritage significance of the site.
- 99 The Applicant's submissions detail the importance of assessment of the heritage impacts and benefits being undertaken against the statement of significance contained in the state heritage inventory (extracted at [8]). Referencing that statement of significance, and the embedded assessment against the heritage criterion, Mr Larkin SC notes the following:
- The statement of significance states "most of its interiors were apparently lost in its conversion to a nursing home".
  - The interiors are not assessed as having "historical", "aesthetic" or any other form of significance.
  - The recommended management measures noted in the Inventory are:
    - "Conserve the external forms of the Ritz, it's garden setting and the outbuildings.
    - Conserve and enhance the gardens through adequate maintenance".

- The recommended management focuses on the external form of the building, it does not specify the conservation of the interiors of the heritage item.

- 100 Mr Larkin SC submits that the development application is consistent with the rankings of significance in the CMP and the recommended management approach in the Heritage Inventory.
- 101 Further, Mr Larkin SC argues the Court should assess the significance of the interiors consistent with the Court's reasoning in: *Bunnings Properties Pty Ltd v Ku-ring-gai Council (No 4)* [2017] NSWLEC 1238 and *PJM Group Pty Ltd v Ku-ring-gai Council* [2022] NSWLEC 1170. Mr Larkin SC submits that doing so the Court would conclude the interior fabric of the South and West wings (Buildings A2 and A3) are not of such significance that warrant its retention.
- 102 The relevant sections of the preceding judgements cited in the Applicant's written submissions are extracted below:

Bunnings Properties Pty Ltd v Ku-ring-gai Council (No 4) [2017] NSWLEC 1238

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

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

PJM Group Pty Ltd v Ku-ring-gai Council [2022] NSWLEC 1170

"[56] The Court is required for the purposes of assessment of the consequences of demolition of a heritage item to undertake an actual assessment of the evidence in relation to the significance of the Heritage Item.

The starting point is the Statement of Significance which needs to be read as a whole.

..."

- 103 In addition to the above Mr Larkin SC argues the Court should give weight to the fact that all of the structural engineering, fire engineering, BCA and access experts agree that the proposed development is acceptable. Further, he notes

that the structural engineers also agreed that work is urgently needed to avoid further deterioration. In this context, Mr Larkin SC argues the Court would accept that the extent of demolition proposed is necessary and acceptable.

104 Finally, Mr Larkin SC argues the Court should assess the extent of demolition against the totality of the evidence before the Court including:

- The assessment of Ms Grant in the planning joint report that concludes there are no other practical alternative uses for the existing buildings;
- The conclusion of the engineers that the structural issues pertaining to the heritage buildings are likely to be consistent regardless of use.
- The evidence of the fire experts that alternative uses do not alleviate the need for fire upgrades to the heritage buildings given the expected requirement to bring the building into conformity with the BCA. Further, the use of the building as an aged care facility will require upgrade to Type A construction. They agree that any alternative use would also require such an upgrade and likely the need to incorporate service shafts, lift shafts, and fire isolated stair shafts and the like.
- The need to upgrade the interior fabric by the application of “fire check” sheeting would mean the existing walls are no longer visible. This will impact the ongoing heritage significance of this interior fabric.

105 In their submissions the Applicant emphasises that in cross examination the heritage experts agreed that something is required urgently to protect the site. Further, they note that Ms Holtham gave evidence that the heritage buildings continue to deteriorate and that the rate of deterioration appears to be escalating. In this context they argue that the extent of demolition is necessary to facilitate the redevelopment and repurposing of the heritage item to allow for its conservation, retention and protection.

106 In response to the submissions of the Respondent, Mr Larkin SC argues the proposed development adopts a cautious approach consistent with the Burra Charter. He submits the proposed development will conserve all elements of exceptional and high significance, involves substantial conservation works including works to the managers residence, the Ritz Hotel (Building A1) and substantial repair works to the both the South and West wings. He argues the proposed demolition of the internal fabric is necessary to address established failures in the primary structure to the South and West wings and allow the buildings to comply with current regulations in regard to fire ratings, structural adequacy and access. In relation to the assessment required by cl 5.10 of LEP

2015 Mr Larkin SC argues it requires the Court to have regard to the impact of the proposed development on heritage significance as a whole. The approach advanced by the Respondent to focus on only one aspect of the development to the exclusion of others in doing this assessment is not correct.

- 107 In conclusion Mr Larkin SC submits the Respondent has unrealistic expectations about what is possible, and those expectations should not stand in the way of a reasonably appropriate and adapted development that would have an overwhelming positive impact on the heritage significance of the item and arrest its further deterioration. On the preceding basis he concludes that the development application should be approved.
- 108 In his submissions Mr Seton argues it is not the Respondent's case that the use of the site as a residential care facility is inappropriate. Rather, he argues it is the adverse and unacceptable irreversible impacts arising from the specific development application that warrant the refusal of consent. His submissions supporting this conclusion can be summarised as follows:
- It is acknowledged that the site is in a vulnerable state having not been maintained or repaired for several years. However, the granting of development consent to the development application does not ensure conservation or protection of the heritage items as there is no legal obligation to implement the consent. In effect Mr Seton submits that any weight given to the vulnerability of the site and buildings should be tempered by the lack of certainty in the implementation of any conservation or maintenance works post the grant of consent.
  - The extent of demolition of significant fabric is inconsistent with the cautious approach advanced by the Burra Charter, namely "changing as much as necessary but as little as possible".
  - That the approach of maintaining only the external fabric of the heritage buildings and demolishing the internal fabric creates irreversible changes by removing an integral part of the item and then replacing that fabric with something else. He concludes that doing so will mean the item is no longer capable of being recognised for its heritage significance.
  - In addition to the demolition of extensive interior fabric:
    - (a) The development application proposes unsympathetic changes to the external elevations of the South (A2) and West (A3) wings by the introduction of a new, visible level under the historical wings.
    - (b) The demolition of the boiler house chimney referred to in the statement of significance of the item.

- That in totality the changes proposed in the development application go well beyond what is necessary to reintroduce an aged care use and conserve the heritage significance of the item.

109 In addressing the contentions and evidence relating to the internal fabric of the first floor of the South (A2) wing and both levels of the West (A3) wing, Mr Seton emphasises firstly that most of the original fabric remains in place. Secondly in the CMP it is graded as moderate or high and by deduction this fabric contributes to the overall significance of the item.

110 Mr Seton accepts it is likely some internal wall fabric may need to be moved, or demolished but he concludes the extent proposed in the development application goes beyond the extent necessary. Mr Seton argues:

“44. While some of the walls may need to be moved to meet current accessibility and fire safety requirements for an aged care facility, the oral evidence of the fire engineers and accessibility experts confirmed that it was not necessary to remove all of the walls or rooms.

45. For example, in order to create a wider corridor, the wall on one side of the corridor could be moved leaving the rooms on the other side intact. The structural work required to strengthen the corridors could be achieved by applying ply bracing to 25% of the wall area. Further, any fire resistant material could be laid over existing material on the walls.

46. The engineers produced a written document in a very short period of time during the course of the hearing at the direction of the Court setting out the minimum scope of works that would need to be carried out assuming the brief was to maintain as much of the existing internal fabric and configuration is possible on the first floor of the South Wing on the ground and first floor of the West wing. The scope of works was recorded in Exhibit H.

47. It is plain from Exhibit H that it would not be necessary to undertake a complete demolition and removal of internal fabric within the first floor of the South Wing on the ground and first floor of the West wing to upgrade those things to current standards in terms of structural integrity, accessibility or fire safety.”

(Respondent's written submissions dated 15 December 2023)

111 Mr Seton concludes that it's clear, by reference to Exhibit H, and the oral evidence of the structural engineers, fire engineers, BCA and access experts, that the upgrading requirements to comply with the BCA and achieve structural stability can be achieved by retaining substantial portions of the internal heritage fabric of the South (A2) and West (A3) wings. He argues that the proposed demolition and removal of internal fabric in these portions of the heritage buildings is clearly more than minor demolition and is not conservation as defined by the Burra Charter.

112 Further, Mr Seton emphasises the non-compliance of the application with the heritage objectives and controls in DCP 2015, in particular Part D 1.19. Those controls state:

Objective 02:

“To ensure that the maximum possible heritage fabric is retained during upgrading processes for access, fire safety and bushfire protection measures”.

Control C3:

“Alternative solutions, deemed to satisfy provisions and negotiated agreements with fire safety and access experts are to be applied wherever possible to maximise positive heritage outcomes”.

113 Mr Seton argues that when the Court gives weight to the specific heritage controls in DCP 2015, it should prefer the evidence of Ms Holtham about the detrimental impact of the insertion of development below the South (A2) and West (A3) wings. He submits that the evidence is clear that the alterations being made to the original elevations of the principal building forms of the South and West wings go well beyond what is necessary for restoration and reconstruction. He references the development controls in Part D 1.9.3 of DCP 2015 which state:

Objective 01:

“To retain the original built form characteristics of significant items as the predominant elements when viewed from all angles ...”

Control C1:

“Alterations and additions are not to significantly alter the appearance of principle and significant façades, except to remove detracting elements”.

114 Mr Seton concludes that the proposed development relies on a variation to the controls in DCP 2015 as it is not compliant with them (as it significantly alters the appearance of principle façades) and applying s 4.15(3A) of the EPA Act, the development application is not an alternative that meets the objective of the control.

115 In conclusion, Mr Seton argues in determining the application the Court should give significant weight to two matters. Firstly, the fact the proposed development is contrary to specific heritage controls and objectives in Part D of DCP 2015 and secondly, the evidence of Ms Holtham that the development will have a detrimental impact on the significance of the item ‘The Ritz and interiors’. In doing so he submits the Court would conclude that the likely

heritage impacts of the development are sufficiently detrimental to warrant the refusal of the development application.

### *Findings*

- 116 Clause 5.10(4) of LEP 2012 asks the consent authority to consider the impact of the proposed works on the significance of the heritage item. In these proceedings that item is 'The Ritz and interiors' and encompasses the whole of the site. In undertaking an assessment of impact, the Court considers the totality of the proposed development against the provision, balancing those positive, neutral and detrimental impacts that arise from the development application. The assessment focuses on the statement of significance (see par [8]) and the criteria against which the item was found to be of local significance (see par [9]), those being: historical significance (criterion A), aesthetic significance (criterion C), and rarity (criterion F).
- 117 The Court must then balance that assessment of impact as part of the overall assessment of the application under s 4.15 of the EPA Act.
- 118 At the conclusion of this process, I find that the development application warrants refusal on two principal grounds. Firstly, the impact of the works proposed in the development application on the significance of the item 'the Ritz and interiors' is significantly detrimental even when balanced against the conservation works proposed in the application. In my view those impacts are sufficient to warrant the refusal of the development application. Secondly, the development application as a whole is inconsistent and uncertain in relation to the outcome that would follow if consent was granted. This uncertainty weighs against the grant of consent for the development application as the likely impacts of the development that would arise from the grant of development consent are unclear.
- 119 Taking the first ground supporting the determination of the application by way of refusal I accept and prefer the evidence and reasoning of Ms Holtham that the detrimental impact of the proposed development on the heritage item warrants the refusal of the development application. My reasoning follows.

- 120 The proposed development will detrimentally impact on the heritage significance of the item 'The Ritz and interiors' through the loss of internal and external fabric and the spaces that are central to its significance. In particular:
- The proposed fabric loss in Building A1 is significant, including some internal walls, the original stair and the impact arising from the likely loss or dismantling and rebuilding of the upper level verandah.
  - I am satisfied that the proposed insertion of a lower ground floor and basement which extends below the South (A2) and West (A3) wing results in a construction and structural stability requirement that requires the removal of internal fabric in its totality. Consent is sought for the removal of that internal fabric. The basement created in these areas provides service spaces such as kitchens, laundries, storerooms and a cinema. At the lower ground level additional aged care rooms are also proposed.
  - The replacement of the fenestration on the eastern façade of the South (A2) wing is a change to a key public facing façade that detracts from its heritage significance. These works are proposed in combination with the demolition and reinstatement of the original fabric of the verandah in this location. Further, as noted at [62], the architectural plans nominate the original bay windows on the western façade of this South wing are to be retained "where possible". These façade works represent a notable detrimental impact to key building façades.
  - Finally, I note my findings at [128]-[131] about the likely further fabric removal and impacts to original fabric beyond that assessed in the heritage documents accompanying the development application and detailed in the architectural plans.
- 121 Further, I accept the evidence of Ms Holtham that the proposed insertion of the basement and lower ground floor under the West (A3) wing is unacceptable for two additional reasons. Firstly, doing so changes a principal elevation of the heritage building in a way that is detrimental to its proportion and architectural presentation. Secondly, the works associated with constructing the lower ground and basement levels have concordant detrimental impacts arising from the need to stabilise, underpin, and brace the retained fabric. These impacts arise, in my view, principally from the desire to build under the heritage wing. In considering the acceptability of these impacts I have given weight to the fact the heritage item listing includes "the interiors" and the development as a whole represents a variation to the FSR control.
- 122 When considered collectively the level of fabric removal proposed by the development application results in the removal of spaces which contributed to the historical significance of the site and its use. I accept the evidence of Ms



Holtham that in listing the site and its buildings as a heritage item the spaces and their use have a significance that is beyond the fabric through which those spaces are enclosed. The heritage significance of the site, and its buildings, is more than skin deep. Demolishing everything but the external fabric of a building removes all evidence of how a building was used, its layout and arrangement, and the methods and materials of its construction – many of the things that made that building or place significant.

- 123 However, in preferring her evidence it is my view Ms Holtham places too little weight on the conservation works proposed to the Managers Residence and the Education building in her conclusions. There are significant positive benefits to the conservation works proposed to the Managers Residence and the Education Centre. Accordingly, in determining the overall impact of the development on the significance of the item I have given weight to the conservation works proposed in these two buildings as well as those proposed in the Ritz and the heritage wings themselves. Further, the development application incorporates commitments to maintenance and repair work which are clearly positive in reinforcing and ensuring the ongoing significance of the heritage item.
- 124 It is clear that the implementation of a development consent that incorporated repairs, reconstruction and conservation would have a positive impact on the significance of the heritage item. I have given these works weight in my assessment.
- 125 However, I accept the submission of Mr Seton that there is no certainty that any consent granted by the court will be implemented. While these matters are relevant, lack of certainty affects the weight I can give this consideration.
- 126 Overall, subject to Condition 12A which requires the reinstatement of the ground floor verandah and the addition of a condition of consent that required the retention of the original stair, the works proposed to Building A1 (the Ritz Hotel) are, in my assessment, supportable. The removal of detracting elements such as the semi-circular extension to the dining room, the conservation works proposed and the securing of an adaptive reuse of the building are positive outcomes for the site that will assist in securing its heritage significance.

Further, the conservation works proposed to reinstate the gardens, conserve and restore the Managers Residence and the Education Centre are positive heritage elements of the development application. However, it is the direct impacts that arise from the proposed insertion of a basement and lower ground floor level below the South (A2) and West (A3) wings that in my assessment have an unacceptable heritage impact on the significance of the site. These impacts are material and expansive. This detrimental impact is exacerbated by the uncertainty of the extent of interference to original fabric that will arise from the methodology proposed to stabilise and brace these wings during demolition, excavation and construction. This matter is further discussed below.

- 127 When these positive and detrimental impacts are assessed collectively, I find the likely impacts of the development warrant refusal of the application. It is my assessment that the development application fails to adequately conserve the heritage significance of the item. I am satisfied that the detrimental impact on the heritage significance of the item is sufficient to warrant refusal under s 4.15(1) of the EPA Act.
- 128 Taking the second ground supporting the determination of the application by way of refusal it is important to review the totality of the documents that form the development application to determine what development consent is sought for. Having done so I find a number of inconsistencies between the architectural plans, the CMP, the schedule of conservation works, the structural feasibility report and the proposed construction methodology. I have noted a number of these inconsistencies in the judgement but the following specific inconsistencies bear noting:
- When read in totality, the architectural plans leave open that consent is granted to the demolition of the original stair in Building A1 'the Ritz Hotel'. Refer pars [43, 44].
  - There is uncertainty whether the original verandah fabric at the first floor of Building A1 'the Ritz Hotel' is retained in situ, or dismantled and reinstalled. Refer par [49].
  - I accept the evidence of Ms Holtham that many of the notations on the architectural plans are uncertain or ambiguous, or both. Refer pars [55, 62, 64].

- The structural feasibility report proposes two distinct approaches to the construction of the proposed development, including the insertion of the basement. Neither the statement of environmental effects, or the various heritage assessments, nor the agreed conditions delineate which approach is to be taken. This is despite the significant difference in approach, and the potential and actual impacts that may arise from the two options advanced by the engineers.

129 In my view there is a fundamental disconnect between the structural feasibility and construction methodology reports and the scope of development assessed in the HIA and the schedule of works in the CMP. I accept the conclusions of the structural report summarised at par [81]. It is clear that the heritage buildings, in particular building A2 and A3 require additional strength and bracing. What is not clear is what is specifically proposed to achieve that outcome, what work is proposed in this development application and how it is to be constructed.

130 When the structural feasibility and construction methodology are read together in my view the implications of the proposed development are that:

- There is a risk that the verandah to the first floor of Building A2 will be structurally unstable due to the existing timber spandrel sizes, large, glazed elements in the column spacing, refer to par [81, 82]. However, I note this element is proposed to be retained in situ when reference is given to the architectural plans in Exhibit G and the schedule of conservation works Exhibit B. The potential impact of the dismantling and reinstallation proposed in the structural feasibility and construction methodology on heritage significance has not been determined or assessed.
- According to the structural feasibility and construction methodology to facilitate the insertion of the proposed basement below the South and West wings (building A2 and building A3 respectively) it is expected, or necessary, for the existing ground and first floor framing, internal walls and existing piers to be dismantled.
- The existing roof framing needs to be stabilised by façade bracing. I note that the construction methodology report expects the existing roof fabric to require removal (refer par (81)).
- The use of façade bracing requires “substantial connection” to the heritage fabric of the façade, requiring sections of façade fabric to be removed.
- The potential impact on heritage significance of the dismantling of existing piers, the removal of roof fabric and the installation of façade bracing has not been quantified or assessed.
- Sheet piling rigs will be required to be positioned close to the façades of the heritage building to allow for the underpinning of the structure.

- The interaction between the proposed façade bracing and the sheet piling rigs with the retained bay windows (which occupy much of the South (A2) and West (A3) wing western façades on the upper levels) has not been studied or assessed.
- The insertion of new structural transfer beams in the South and West wings is required to allow for excavation to occur below these wings and the construction of the basement. However, any impact on the retained fabric from the insertion of these beams has not been quantified or assessed.

131 In circumstances where the development application incorporates a structural report, structural feasibility assessment and a construction methodology to detail the implementation of what is proposed in the architectural plans and the supporting heritage documents it is appropriate to give these documents weight. In effect they demonstrate the means by which the proposed buildings will be realised. The items particularised in the preceding paragraph are likely to result in greater impact to the heritage fabric than is documented or assessed in the HIA, CMP or discussed in the joint report. Isolating just the requirement for façade retention structures, which is necessary in both the options advanced in the structural feasibility report, the likely impact on the retained heritage façades of the South (A2) and West (A3) wing will be significant. The report itself notes:

“The façade retention structures will require substantial connection to the façade framing, necessitating the removal of sections of the internal and external wall finishes of these façades. Connection of façade support structures will require removal of the lower portion of the internal and external wall finishes.”

(Exhibit B)

132 The focus of s 4.15 of the EPA Act is on an assessment of the development application in terms of what development is sought, focusing on the use of the land, the erection of buildings, the carrying out of works, demolition of buildings et cetera. As noted by Preston CJ in *Baron Corporation Pty Limited v Council of the City of Sydney* (2019) 243 LGERA 338; [2019] NSWLEC 61 at [5], in determining a development application, a consent authority is required to consider the matters of relevance to “the development the subject of the development application” (see s 4.15(1)). The means of construction of the proposed development and how the development application intends to deliver the outcome detailed in it is a key matter of relevance.

- 133 Given the inconsistency internal to the development application noted in the preceding, the scope of work for which development consent is sought is unclear and uncertain. The impacts arising from those works is also uncertain. This uncertainty tends away from a determination of the development application by the grant of consent. As held by Preston CJ in *Australian Protein Recyclers Pty Limited v Goulburn Mulwaree Shire Council* [2006] NSWLEC 641 at [2], an Applicant for development consent always bears a persuasive burden of proof: the applicant must persuade the consent authority, whether it be the Council at first instance or the Court on appeal, that development consent ought to be granted. This persuasive burden includes providing information that details the extent and form of development as well as arguments that relevant environmental impacts can be satisfactorily addressed.
- 134 In circumstances where the development application proposes demolition and work on a heritage listed site such uncertainty weighs against the grant of development consent for the development application. In my view this is particularly the case in circumstances where the retention of existing fabric is uncertain given the listing is founded, in part, on the criterion of aesthetic significance and rarity.
- 135 I find the Applicant has not discharged a persuasive burden of proof and the uncertainty and inconsistency within the development application supports a determination of the application by way of refusal.

## **Conclusion**

- 136 For the reasons articulated in the preceding, following an assessment under s 4.15 of the EPA Act, I find that for the likely impacts arising from the development on the heritage significance of the site, even when considered against the positive benefits of the development, it warrants the refusal of consent.

## **Orders**

- 137 The orders of the Court are:
- (1) The appeal is dismissed.
  - (2) Development application X/1436/2021 for the demolition, additions and alterations to an existing residential care facility including landscaping,

retaining walls, basement car parking and a new substation at the Ritz Nursing Home at 203-233 Leura Mall, Leura (Lot 20 DP 1076123) is refused.

- (3) The exhibits, other than Exhibits B, G and 2 are returned.

**D Dickson**

**Commissioner of the Court**

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