

**Whitehouse Developments Pty Ltd v The Council of the City of Sydney - [2017]
NSWLEC 1391**

Land and Environment Court

New South Wales

Medium Neutral Citation: Whitehouse Developments Pty Ltd v The Council of the City of Sydney [2017] NSWLEC 1391

Hearing dates: 11, 12, 13 July 2017

Date of orders: 25 July 2017

Decision date: 25 July 2017

Jurisdiction: Class 1

Before: Dixon C

Decision: (1) Appeal is upheld.
(2) Development consent is granted to development application D/2016/1079 (as amended) seeking alterations and additions of an existing building known as the White House at 55 Macleay Street , Potts Point subject conditions specified in Annexure A.
(3) Exhibits are returned except Exhibit B which contains a set of the drawings identified in schedule 1A condition (2) of Annexure A.

Catchwords: APPEAL: Consent orders – development application for hotel and restaurant in a heritage item - impacts on the public’s view of artwork on adjoining heritage item – strata subdivision of hotel rooms - amenity impacts

Legislation Cited: [Environmental Planning and Assessment Act 1979](#), State Environmental Planning Policy No 10 (Affordable Rental Housing) 2009
Sydney Local Environmental Plan 2012

Cases Cited: Tenacity Consulting v Warringah Shire Council [\[2004\]](#) [NSWLEC 140](#) .

Category: Principal judgment

Parties: Whitehouse Developments Pty Ltd (Applicant)
The Council of the City of Sydney (Respondent)

Representation:**Counsel:**

Sandra Duggan SC (Applicant)

Adrian Singh (solicitor) (Respondent)

Solicitors:

Mr A Whealy, Mills Oakley (Applicant)

Ms K Tara, Sydney City Council

File Number(s):

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Publication restriction:

No

Judgment

1. This judgment concerns consent orders proposed by the parties in relation to the redevelopment of a private hotel known as the “Holiday Lodge Hotel” (or the ‘White House’) at no 55 Macleay Street, Potts Point. In summary, the development application D/2016/1079 proposes a new ground floor licensed restaurant (50 patrons) and upper floor hotel accommodation (15 rooms). The detail of the amended proposal can be understood from the architectural plans and agreed conditions of consent contained in Exhibit B.
2. The appeal was commenced by Whitehouse Developments Pty Ltd on a ‘deemed refusal basis’ under s97 (1) of the [Environmental Planning and Assessment Act 1979](#) (EPA Act) on 8 August 2016. At the time, the Sydney City Council had not determined the original DA. The history of the original application and the evolution of the amended plans are comprehensively set out in the Council’s Amended Statement of Facts and Contentions (ASOFC) (Exhibit 2). I do not propose to repeat that detail save to note that the amended statement strikes out all of the contentions raised by the Council in respect of the original DA apart from the matters raised by the objectors.
3. Simply stated, the Council has reversed its position after an assessment of the amended application and joins with the Applicant in asking me to grant conditional development consent to the amended DA. The only contradictors in the appeal are the local objectors.

White House and Yellow House

4. In order to understand the evidence it is necessary to give some background to the White House and its relationship with the adjacent terrace to the south known as the Yellow House at 57 -59 Macleay Street.
5. Both properties are within the Potts Point Heritage Conservation Area (C51) and are listed as local heritage items under the Sydney Local Environmental Plan 2012 (LEP).
6. They are two of five remaining 3-storey terraces (from an original set of 10 terraces) along Macleay Street between Challis Avenue and Macdonald Street, designed by Maurice Halligan, architect, in 1896. For that reason, they have been assessed as locally rare, as well as being fine representative examples of their period and style. Additionally, the Yellow House is also considered to be a heritage item of local significance under the LEP for its use as a former artist’s studio for well-known artists such as; Martin Sharp, Peter Kingston, Brett Whitley, Albie Thomas and Greg Weight, to name a few.

7. Despite their heritage listing, these terraces have undergone varying degrees of alteration over time. In 2001, the consent authority approved the demolition of the rear portion of the Yellow House and the addition of a modern four storey rear extension. The existing café/ restaurant at the front of the Yellow House was retained but the extension introduced a new single storey commercial space on the ground floor with raised skillion roof accommodating highlight windows and new upper levels comprised of four units with centrally placed terraces (Exhibit D p65 at 6.0).

Amended application

8. The applicant is now seeking approval to redevelop its site based on an amended application. The key features of the amended plans are:
 1. A 3 storey rear extension.
 2. The deletion of level 4 (5th storey) extension and (Pod) to the rear. This change means that there is no longer a non-compliance with the height control in the Sydney Local Environmental Plan 2012 (LEP) and the storeys control under the Sydney Development Control Plan 2012 (DCP) (contention 1 ASOFC).
 3. New internal lift.
 4. Refurbishment of front elevation including:
 1. new Balustrade;
 2. retractable awning;
 3. new and refurbished timber framed windows and doors;
 4. other internals changes.
 5. New roof with clerestory window to level 3 rear wing.
 6. Addition of one rear facing balcony to level 2 with a depth of 1.05 m.
 7. Proposed rear facing balcony to level 3 reduced in-depth from 1.5 m to 1.05 m.
 8. Amendment of the plans to indicate the retention of rear chimney and the location for mechanical plant (i.e. for air-conditioning) on the roof.
 9. Lowering of the three-storey rear extension by approximately 2.4m, and creation of part basement level. This results in the rear extension being approximately 1.7m higher than the existing brick boundary wall between the White House and the adjacent Yellow House. This amendment reduces the impact of the development on the public view of the Matthew

Johnson artwork (balcony screens) on the Yellow house, as it allows about two thirds of the lower balcony screens to remain visible from McDonald Lane.

10. Addition of covered walkway structure at ground floor level to the rear.
11. The setting back of the building from the 0.9m Right of Foot Way located at the rear of the White House at all levels, except for air conditioning units proposed to be positioned at a height of 3 m above ground in that area.
12. The proposal includes stratum and strata subdivision of the hotel rooms.

Expert evidence

9. The amended plans and conditions of consent proposed in the consent orders are supported by the parties' experts. They are:

- Mr Stuart McDonald, the Applicant's town planner;
- Mr Paul Davies, the Applicant's heritage specialist;
- Ms Erin Murphy, the Council's town planner;
- Mr Henry Wan, the Council's heritage specialist.

10. In fact, their joint report records no points of disagreement in relation to any contention raised by the Council (Exhibit 4). Moreover, they agree that the amendments adequately address the oral and written concerns raised by the objectors.

Role of the Court in a Consent orders hearing

11. Notwithstanding the agreed position of the parties, I am required to be satisfied that it is appropriate to make the orders requested by them. This requires me to undertake a merit assessment of the amended application under s79C of EPA Act. In considering the consent orders, the Courts Practice Note Class I Development Appeals also provides that I must consider any submissions made by any objector to the consent orders. In this case, the Council notified the proposed consent orders and agreed draft conditions to relevant objectors by email on 4 July 2017. The email invited each objector to attend and/or make representations at the consent orders hearing. Several objectors accepted the Council's invitation to address the Court onsite at the commencement of the hearing on Tuesday, 11 July. They were :

1. Andrew Woodhouse;
2. Debra Sandy;
3. Alexandra Riggs;
4. Graeme Brooks (heritage consultant retained by the Yellow House);
5. Giovanni Cirillo (town planner retained by the Yellow House);

6. Phillip Bartlett.

12. Not surprisingly, the local community and beyond have a keen interest in any development carried out in the Potts point Heritage conservation area (C51). The ASOFC records that some 38 written objections were received by the Council in response to the notification of the Applicant's original DA. A further 11 written submissions were received by the Council objecting to the amended application.
13. A number of the objectors in this appeal are either residents or owners of properties within the Yellow House or nearby streets. On the first day of the hearing the owners corporation of the strata scheme for the Yellow House (SP) of the Yellow House made application to the Court to be joined as a party to the proceedings. Although that application was refused by me for the reasons set out in a separate judgment, I remain satisfied that the issues raised by the SP, the individual lot owners the Yellow House and the other objectors have been sufficiently addressed by the evidence in the appeal. Not only have the objectors' written submissions to the Council been tendered and read, I allowed Mr Tomasetti SC, who appeared for the SP on the joinder application, an opportunity to address the Court at the view on behalf the SP. In order to better understand his client's concerns and the concerns of the individual lot owners who oppose the development I inspected five of the seven apartments in the Yellow House. Six of the individual lot owners gave oral evidence at that time. I also inspected the commercial art gallery space in that development and received oral evidence from Mr Bartlett, who among other matters controlled the redevelopment of the Yellow House in 2001.
14. When the hearing resumed in Court, I allowed Mr Brooks, the heritage consultant retained by SP who had earlier prepared a written objection on its behalf to give oral evidence about his clients concerns with the amended application. I also allowed Mr Cirillo, the town planner retained by the SP to prepare a written objection, to give oral evidence about the amended plans and the proposed conditions of consent. He raised concerns about odour, ventilation, the location of air-conditioners and kitchen exhaust, view loss and the characterisation of the hotel use a serviced apartment.
15. Having considered all of the written and oral evidence of the objectors in this appeal, including the two submissions prepared on behalf of the SP by its lawyers Dibbs Baker dated 5 September 2016 and 1 June 2017 respectively, it seems to me that their concerns can be summarised as follows:
 - heritage impacts of the development on both the White House and Yellow House – i.e. the chimney and front façade of the White House, and any impediment to the public view of the art work by Matthew Johnson especially from McDonald Lane and the side street; the development will have substantial and unacceptable heritage and amenity impacts on the setting and appreciation of 57 -59 Macleay Street ;
 - view loss to apartment 7 in the Yellow House;
 - loss of outlook and a sense of enclosure for apartment 3 and 6 in the Yellow House;
 - management of the construction works particularly in respect of any blockage of MacDonald Lane;
 - amenity concerns arising from extended trading hours - particularly the need for set up before 7am, unacceptable noise generated from the hotel and the proposed rear

balconies; the adequacy of the terms of the plans of management; garbage collection and storage onsite and offsite; offensive smells from the kitchen exhaust; ventilation location; air conditioning noise;

- the appropriateness of strata subdivision for the hotel rooms; the creation of residential units with poor amenity which will be used for permanent residence; the proper characterisation of the use as serviced apartments rather than a hotel; requirement to comply with the Apartment Design Guidelines;
- the need for geo-technical assessment of the impacts associated with the redevelopment of the White House - particularly impacts on the party wall the site shares with the Yellow House before works commence; dilapidation report prior to works commencing;
- substantial interference with the right of way, any impediment of the right of way by the proposed air-conditioning units; maintaining and the ability to access the roof by ladder from that area; by virtue of s28 of the EPA Act cl.9A of the LEP the consequence of approval of the DA would be to permit the applicant to limit the height of the right of way, despite propriety entitlement to have more than 3 m; the air conditioning units could obstruct access for large objects such as ladders and equipment;
- a concern that the Council has not approached its assessment of the amended DA as a new DA but instead assessed impacts in reference to an earlier DA D/ 2010/741/A for the White House; in the alternative the latter DA has lapsed;
- the need for a construction management plan– prepared in consultation with the community particularly those reliant on access via Macdonald lane before works start;

Consideration of the objector's concerns

Compliance with the relevant statutory controls

16. Before I address the concerns identified, it needs to be understood that the amended plans must be read subject to the proposed conditions of consent. When this is done a number of the issues identified by the objectors and their representatives and witnesses are satisfactorily addressed. Their concerns also need to be considered against the relevant statutory control. In this case there is no issue about the fact that the development (as amended) is permissible within the B4 Mixed Use Zone under the LEP. Moreover, the parties' planners agree that it meets the following zone objectives:

- To provide a mixture of compatible land uses.
- To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.

- To ensure uses support the viability of centres.

17. The LEP provides for a maximum floor space ratio (FSR) for the White House at 2.5:1. The maximum permitted height is 15 metres. Again, the parties' planning experts agree that the amended application complies with these controls (Exhibit 4). And, while Mr Cirillo, when speaking on behalf of the SP, raised a concern about a possible breach of the height control by plant/structures on the roof - the proposed exhaust vent/ air-conditioning units - he did not provide any satisfactory evidence to support such a conclusion. The plans do not indicate such a breach. I am not approving a breach. In those circumstances I accept the parties' expert agreed assessment and find that the development is compliant with all of the relevant LEP controls.

The right of way

18. The Yellow House has the benefit of a right of way (footway) over the land, the subject of the DA that is a 3 feet (0.9m) wide (ROW). The LEP contains a suspension of covenant clause: cl.9A. This means that the 0.9m ROW which benefits the adjacent Yellow House is suspended as far as it restricts the carrying out of development on the White House under development consent. Despite that legal position, the Applicant has sought to accommodate the current use of this area by Mr Bartlett and the residents of the Yellow House. In summary Mr Bartlett expressed concern about his use of the right of foot way across the White House land to access MacDonald Lane. He believes that the proposed installation of the 4 air conditioning units within the airspace over the ROW will impede his access. He told me that he brings smaller art works into the gallery via that access way and he also uses the area to place a ladder to the roof in order to maintain the roof top garden above his gallery

19. The amended plans now elevate the location of the 4 air-conditioning units to a height that is 3m above the path of the ROW, allowing for the manoeuvring of a ladder to access the roof or repairs and maintenance of the Yellow House. The Applicant has also freed up passage through that area to the Yellow House to allow the smaller objects which Mr Bartlett said were on occasion received via that access to move through the ROW. The amended plans also set the building back from the ROW at all levels. In my opinion the concerns expressed by Mr Bartlett and the other objectors in respect of unimpeded reasonable access along the ROW have been satisfactorily addressed by the amended plans. There is no evidence that additional unencumbered height beyond 3m is required or in fact unable to be achieved around the air-conditioning units which sit in one area only of the ROW such as to constitute substantial interference.

The Plans of Management (POMS) for the hotel and restaurant

20. The purpose of a POM is to establish performance criteria for various aspects of a development. In this case the Applicant relies upon the two separate POMs prepared by Design Collaborative, dated May 2016, for the operations of the hotel/restaurant. Importantly, they are incorporated into the consent under proposed condition (6). By

requiring the POMs to be a condition of the development consent, the objectors can rely on its terms as being a requirement of the operation of the premises. In the event of a breach of a term of the POM, there is a breach of the development consent and opportunity to take appropriate action in respect of that matter.

21. Obviously, the POMs need to be read in conjunction with the other conditions of consent. When read together I accept the parties' planning evidence that the Poms satisfactorily control the operation of the two uses. The POM for the restaurant deals with: hours of trade, signage, amenity of the neighbourhood, noise, behaviour of patrons, security measures, delivery and waste disposal, maintenance, removal of liquor from the premises, complaint handling and any future amendment to the POM. The POM for the hotel deals with administration, signage, room capacity, noise management, House rules, safety and security, maintenance of registers, general cleanliness, hygiene and waste management, fire safety procedures and first aid, review of the POM. The POM contains three Attachments; Appendix A is Room Capacity Schedule, Appendix B is Length of Stay Register, Appendix C is Noise and Nuisance Register.

Long term residency of the hotel

22. The POM for the hotel requires that the hotel is managed by a single operator and that the individual unit holders must abide by the terms of the POM. This aspect of the consent should give some comfort to the objectors who are concerned about long term residency of hotel rooms beyond the 90 day entitlement under the consent. The requirement for a single operator will help ensure that although the legal title is a strata/stratum title development (see conditions 41-44), the activities of the individual unit owners will be co-ordinated and controlled by one operator.
23. The POM for the hotel provides that the reception desk will be in operation for 12 hours per day with a 24 hour site manager on call. Importantly, the POM clearly states in Part 2 (5) that "*The maximum continuous stay of any one guest shall not exceed 90 days*". The residents' concern that the hotel will be used for permanent residential accommodation is also addressed by condition II of the consent. It requires a restrictive covenant be created and registered on title, mandating a maximum stay of 90 days and the management of all rooms in the hotel by a single manager.
24. In my assessment, the terms of the POM for the hotel together with condition II of the consent supports a characterisation of the development as a hotel as defined in the LEP. Under the terms of the development consent the covenant on title required by condition II will give any incoming purchaser notice that the building is only approved for use as a hotel (for a maximum stay of 90 days) and is not for permanent residential accommodation. In my opinion this condition addresses the objectors' concerns about the building being used for either serviced apartments or permanent residential accommodation at some time in the future. In any event, as Ms Murphy told the Court, the use applied for in this DA is for a hotel and any development consent issued by the Court can only be for that use. Simply stated, there is no application for development

consent to use the White House for serviced apartments or given by the proposed consent orders. For those reasons, Mr Cirillo's attempt to characterise the hotel as serviced apartments is not made out on the evidence. Therefore, there is no need to consider the requirements of the Apartment Design Guidelines (AGD) as they do not apply to hotel rooms. The parties' planning experts are satisfied with the amenity of each hotel room and I accept their expert opinion, based on the evidence before me.

Hours of operation

25. Condition 3 of the consent specifically regulates the hours of operation of the restaurant from 8am until 11pm for internal seating (Monday to Sunday), and 10am until 8pm for outdoor seating (Monday to Sunday). Some of the objectors are concerned about the extended hours proposed as a trial in particular early set up at 7am.
26. It is the case that the consent provides for a 1 year trial period for extended trading between 7am and 8am (1 hour) and 11pm and 12midnight (1 hour) for internal seating and 7am and 10am and 8pm and 10pm for external seating such an extension into the future is subject to assessment. The purpose of a trial period is to provide the local residents time to assess the impacts of extended trading (if any) and an opportunity to communicate any comment or concern to the Council before any extended trading is confirmed on a permanent basis. In fact the condition explicitly states that extended trading will terminate unless a further application is lodged and approved by the Council. Subclause (c) provides: "*Council's proposed continuation and /or extension of the hours permitted by the trial will be based on, amongst other things, the performance of the operator in relation to the compliance with development consent conditions, any substantiated complaints received and any views expressed by the police.*"

Noise

27. Some of the objectors are concerned about unacceptable noise from the restaurant and hotel use.
28. Condition (16) of the consent is the general noise condition directed to the control of all noise associated with the premises, including mechanical plant such as air conditioning. (In this regard I note that the amended plans provides for additional plant and exhaust on the roof to be further away from Apartment 7 – and closer to the neighbouring flat building than the original design).
29. Proposed conditions (25), (26) and (27) mandate that there is to be no speakers or music outside the premises, no spruiking noise or noise from glass removal.
30. The amenity of the neighbourhood is also addressed by condition (24). It requires placement of visible signs directing patrons to leave the premises quickly and quietly. Moreover, the condition states that the management/ licensee are to ensure that the

behaviour of patrons entering and leaving the premises does not detrimentally affect the amenity of the neighbourhood. Condition 5 of the consent provides for the maximum number of patrons in the restaurant at any one time at fifty (50). It also requires the manger /licensee to be responsible for ensuring the number of patrons in the restaurant does not exceed the number specified.

31. The noise conditions (17) and (18) impose noise emission standards, testing and compliance requirements in accordance with relevant legislation and guidelines, together with the recommendations of the report of Acoustic Consulting Engineers dated 22 July 2016, lodged with the DA.

32. While Mr Cirillo was critical of the fact that the acoustic report incorporated by conditions has not been updated since the amendment of the plans, he was unable to identify to my satisfaction why an update was required. As Mr McDonald explained to the Court, the amendments have improved noise impacts to the adjoining Yellow House by moving plant away from sensitive areas such as balconies and window. In the absence of any identified new acoustic issue or noise source proximate to a sensitive receptor, I must accept Mr McDonald and Ms Murphy's assessment that there is no need for an updated acoustic report.

Construction management

33. Mrs Sandy, a local resident, gave evidence onsite at the commencement of the hearing. She told me that she was supportive of the development but concerned about blockage of Macdonald Lane during the construction phase. I observed that her only garage access is through that Lane. Speaking on behalf of her family and neighbours, who share similar access issues, Mrs Sandy asked for a construction management plan to be prepared in consultation with the local community before any works started onsite.

34. In response to this concern, the Applicant said that there had been no final decision as to where construction vehicles might access the site (i.e. Macleay Street and the laneway). But in any event, condition 63 of the consent requires the submission and approval of a construction management plan prior to any construction certificate being issued. The condition also notes that an application for a works permit is required before any use is made of the public road. According to Ms Murphy, these conditions are the Council standard conditions. She was of the opinion that the requirement of a works permit application and approval from Council would provide sufficient opportunity for the local residents to make representations at that time about how construction might be managed to avoid blockage of the laneways and other such issues. Based on the evidence before me, I am satisfied that Mrs Sandy's concerns are addressed satisfactorily by condition 63.

Security

35. Some of the objectors were concerned about security. The consent requires CCTV surveillance cameras, with coverage of an area of 10m radius external to the public entrances to the premises, as well as within the premises in nominated areas: condition (9). This condition is a standard Council condition and together with the other conditions in the consent I am satisfied on the expert evidence of the parties' planners that all appropriate security measures will be in place.

The Art Gallery in the Yellow House

36. The commercial space on the ground floor of the Yellow House is presently used as an art gallery. The operator of the gallery, Mr Bartlett addressed the Court at the site view. As we stood in his gallery, Mr Bartlett said that he was responsible for the redevelopment of the Yellow House in 2001, and the artwork under the deed. He explained the artist Matthew Johnson's association with the Yellow House and the artist's inspiration for the screens on the balconies. When giving his evidence, Mr Bartlett pointed out the complete view of the Matthew Johnson artwork through the skylight window in the roof of the gallery. At that time he accepted that this view of the art work was not impacted upon by the proposed development. That said, he was concerned about any loss of public view of any part of that artwork from MacDonald Lane or the side street. (Mr Bartlett raised other concerns that I have addressed under other headings in this judgment.)
37. Let me focus on the artwork for the moment because the public view of the whole of the screens is a matter of concern to not only Mr Bartlett but several other objectors including the SP (and their witness Graham Brooks) and Mr Woodhouse.
38. Although the artwork/screens to the balconies were installed when the Yellow House was redeveloped in 2001, Mr Brooks agreed that they were not part of the artwork required by the deed under the development consent. He was referring the terms of the DA for the Yellow House. The development consent for the redevelopment of the Yellow House contained a deferred commencement condition requiring the Council and the developer to enter into a deed. The deed required a monetary contribution to meet the requirements of State Environmental Planning Policy No 10 (Affordable Rental Housing) 2009, and in recognition of the site's heritage significance, commemorative signage outlining the history of the site, and the provision of publically accessible art works. The artwork installed in satisfaction of the deed included the decorative balustrades on the front balconies of the Yellow House and artwork within the foyer entry to the building. The developer also included - although it was not required by the deed - decorative sliding privacy screens to the balconies of the rear apartments designed by the artist Matthew Johnson. The screens slide across the rear balconies and operate to provide both a privacy and decorative function. I am told that they were inspired by French pick up sticks – a game that Matthew Johnson apparently played in the terrace when he was a young child. In recent years, the artwork/screens have become an attraction for visitors to the area and the residents. The evidence is that about 2/3 of the artwork/screens attached to the lowest balcony will be obscured by the rear extension when viewed from MacDonald Lane and the side street.

39. The importance of the public's view to the screen was the subject of expert evidence. While the experts agreed that the screens were not part of the heritage listing for the Yellow House, they accepted that they held social heritage values. In fact, Mr Wan, the Council's heritage specialist, said that he had not supported the original development because it blocked too much of this public view. That said, he was satisfied with the amended proposal, which lowered the rear addition and removed the pod but retained the original chimney stack and the front façade of the terrace, preserved a larger part of the public view to the screen from McDonald Lane. The parties' heritage experts did not agree with Mr Brooks and Mr Cirillo evidence on behalf of the SP in respect of the screen artwork.
40. Both Mr Brooks and Mr Cirillo said that removing a part of the view to the screens on the lower balcony was akin to blocking part of the Mona Lisa portrait. They did not believe that the retention of the existing view of the screens on each level through the skylight of the art space was sufficient. That said, I have walked the area in the Lane from where the public view is presently available as well as the side street. I must agree with the Council's experts that the view is a moving view, depending on your height and where you are standing and whether the screens are open or closed, as they also move. Part of the view from the side street is impeded by the fence for the residential flat building / and existing car park. And, as the Council submits part of the lower screens, if open, will not be seen in certain location as they are not a static piece of art. The view to the screens is also impeded by the large planter boxes placed on the perimeter of the roof garden of the Yellow House. While I am told the screens are different, the distant public view from the lane makes this difficult to appreciate. That said, they are important according to both heritage experts and while Mr Brooks would like the whole view maintained, he agreed that the main view was that from the art gallery through the sky light. Importantly, the development will not impede the view available from the skylight in the art gallery which offers a complete view of the screens. On balance, accepting that most of the screens will be seen from the existing public viewing points and after a consideration of the evidence of Mr Brooks (who supported the redevelopment of the Yellow House and prepared the heritage impact statement for that DA), the parties experts and the residents' concerns, I am satisfied that an appropriate balance between the development of the site and the retention of the public view of the artwork (which was not part of the deed) is achieved by the redesign of the development. It is the case that the applicant has reduced the height of the rear building substantially and significantly to reduce impacts to the Yellow House. He has removed the original level 4, the Pod and lowered the 3 storey extension by approximately 2.4m and created a part basement. For those reasons I agree with the parties' experts' evidence as I believe that Mr Bartlett, the SP, and the residents' concern to retain the public view to most of the screens has been satisfactorily accommodated in the amended design.

Heritage

41. The applicant's heritage architect Paul Davies prepared the Heritage Impact Statement in respect of the 'White House' lodged with the DA. The statement forms

part of the development application and the Council accepts that it addresses all relevant controls under the LEP and DCP. I accept Mr Wan's expert assessment in this regard.

42. The SP complains, through its solicitor and based on the report of Mr Brooks, that there is a destruction of visual amenity through a change to the traditional rear setbacks of terraces. Despite that, in Court Mr Brooks, Mr Davies and Mr Wan all agreed that the important heritage items of the external building were the chimney and the front façade, both of which are retained by the amended proposal. In my assessment of the reports and oral evidence the heritage expert and the SP witness agreed that the existing rear building (like those demolished on the Yellow House in 2001) are not of any relevant heritage value or a basis to refuse this amended DA.

View loss - Apartment 7

43. At the commencement of the hearing, I inspected apartment 7 which is located on the top two floors of the five storey apartment building - the Yellow House. It is located immediately adjacent to the southern boundary of the proposed development. At the lower level, the apartment has a small partly enclosed balcony adjacent to a living area with an outlook to the north-west towards the White House and with a glimpse of the top arch of the Sydney Harbour Bridge, part of the pylons and sky above the existing building next door. Standing, I observed this view.
44. The impact of the development to this view was described by the SP witness, Mr Cirillo, as "devastating" and by Ms Murphy as 'significant" and by Mr McDonald as acceptable.
45. As noted, the apartment has another living area and larger outdoor deck and dining area with BBQ at the top floor, including a pergola. I inspected this area and observed the panoramic views of the Sydney Harbour Bridge, sails of the Opera House, the Milson Point/ North Sydney skyline. Importantly, the experts and the SP witnesses agree that these more expansive views from living areas and habitable rooms at this level are not significantly impacted upon by the development. There is no impact in relation to the iconic elements of the Sydney Harbour Bridge and Opera House and the loss of some immediate foreground view was generally considered by all experts and witnesses as being a negligible impact.
46. The owner of apartment 7, Ms Riggs, gave oral evidence from her apartment at the hearing. She was very concerned about the loss of her iconic view and she anticipated that after the development is constructed next door she will feel closed in. Ms Riggs told me that she uses the balcony on the lower level regularly and as she walks around this level area enjoys the sky view and the open feeling it creates and the beautiful iconic views. She described this lower level of the apartment as her main living area and stated that she was not concerned about any impact to the view from the top level she understood that it was generally preserved. (Ms Riggs was also concerned about

the proximity of any exhaust/plant on the roof of the new development generating noise or fumes. It was explained that the plant/ exhaust would be on the other side of the roof closer to the residential flat building).

47. The view impacts for apartment 7 were assessed by Mr McDonald and Ms Murphy against the planning principles in *Tenacity Consulting v Warringah Shire Council* [2004] NSWLEC 140. A report prepared by Mr Macdonald dealing with this view issue was tendered as Exhibit 8. Putting aside any comparison with any approved DA or s96 for the White House, I accept the analysis undertaken by Mr McDonald against the relevant view sharing principles in *Tenacity* and his conclusions with which Ms Murphy also agrees. The views losses are side views across buildings. The extent of the view relates to standing positions only and does include the top of the iconic Sydney Harbour Bridge and some sky view. The degree to which an impact is considered to be reasonable depends on the extent to which the development complies with the relevant planning controls and whether impacts could be mitigated by a more skilful design. Mr McDonald discusses each of these elements in (Exhibit 8 pp. 15 – 18). He concludes that the view loss after assessment is reasonable in the context of the planning controls and that a skilful design has been executed which maximises retention of views from the main living area and principal private open space of apartment 7 and compliance with the core planning controls in the LEP and DCP.
48. While Mr Cirillo referred to the *Tenacity* decision and view sharing principles in his oral evidence in Court, he did not provide the basis of his analysis to support his conclusion that the view impact for apartment 7 was devastating and therefore unacceptable. Without such analysis, I must prefer the transparent assessment undertaken by Mr MacDonald and Ms Murphy.
49. Following my inspection of the unit and a consideration of the parties' experts' evidence based on the view sharing principles in *Tenacity*, I am satisfied that the amended proposal which removes both the fourth level and POD and distributes the massing of the built form away from this apartment building satisfactorily reduces the view impact generated by the earlier design. Furthermore, I accept the evidence of Ms Murphy and Mr McDonald that there has now been appropriate consideration of the views and outlooks from this apartment in the final design as required under s 4.2.3.10 (Outlook) of the Sydney DCP. While these amendments do not negate the significant loss of views whilst standing in living and habitable rooms of the lower floor and balcony, this impact must be considered in the context of all views available to the impacted apartment. The apartment is set over 2 floors, and the more expansive iconic views and outlook from that main living area and larger balcony will not be significantly impacted. While I accept Ms Riggs said that she used the lower level as her main living room I must accept that the more expansive living area is more than likely to be considered the main living area of another occupant. I am required to consider the impacts of development on land, not on the individual use by a particular occupant of that land.

50. It is my considered opinion that the view impact on apartment 7 is not a basis for the refusal of this amended application.

View impacts - Apartments 3 and 6

51. The owner of Apartment 3 appreciates that they will not lose any view from the development. They are concerned about a loss of outlook from their deck and a resulting sense of enclosure; and the impact on the public view to the screens on their balcony. They also said that they were concerned about the use of the balconies on the hotel generating noise and impacts of overshadowing to the roof garden.
52. Again, I inspected apartment 3 which looks out onto the roof garden over the art gallery below. While I accept that the occupants will lose some outlook over the rear of the White House to some of the terraces in Potts Point, they will retain their sky view and a view to the roof top garden. There is no evidence that the rear extension will overshadow such as to impede the growth of the plants on the roof garden - they will receive adequate sun. It is also the case that the amended design improves the impacts to level 3 generated by the earlier design. The lowering of the 3 level rear extensions to a level proximate to the metal brace on the existing chimney stack better preserves some outlook and lessens the sense of enclosure they anticipate. On balance, I am satisfied that the compliant development does not unreasonably impact upon the views or amenity to unit 3.
53. Apartment 6, owned by Ms Burgess, will look down on the roof of the development, including its roof top garden. The owner of this unit expressed great concern about due process and the public view to the screens being lost but was otherwise understanding of the improvements generated by the amended design. I have dealt with the art screens earlier.
54. I also inspected unit 4. Mr Faithful, the owner of that unit, expressed concern about noise and light and ventilation impacts on the light well to his main bedroom. I have already addressed these matters which are covered by the conditions and the removal of plant away from his light well.
55. Ms Pennington owns unit 5 which is tenanted. For that reason I did not inspect her unit. It faces Macleay Street and she told me receives the brunt of the noise. She is concerned about more noise from the extended trading hours and the strata subdivision of the rooms in the hotel. I have already dealt with these matters.
56. Ms de Ven of unit 4 expressed concern about noise, the Matthew Johnson screens as part of the heritage tourist walks and the ROW. I have dealt with these matters.

57. Mr Woodhouse as president of the Potts Point and Kings Cross Heritage Conservation and Residents Society gave oral evidence on site and spoke to the written submission of the Society (Exhibit 10). I have read his submission. As is apparent from this judgment, I have not regarded a consent orders hearing as a rubber stamp for development. As stated at the outset, I must assess the proposal and have regard to the objectors concerns which I have done. I believe the concerns raised by Mr Woodhouse have been addressed.

Conclusion

58. When the conditions of consent are read with the amended plans I agree with Ms Murphy and Mr McDonald that the development is acceptable on its merits, as the concerns of the objectors have been adequately addressed for the reasons stated. The features of the building with heritage value will be assessed before any works in accord with the comprehensive conditions in the consent. The impacts on the Matthew Johnson artwork are acceptable for the reasons stated.

59. The integrity of the existing development and adjoining development (the party wall) is required by the conditions to be assessed by appropriate experts before any construction certificate or works permit is obtained. Mr Cirillo is content with the deferred conditions of consent in this regard.

60. The proposed strata subdivision is novel on one view but the Council has before allowed this form of legal title for a single hotel use. The conditions of consent ensure that this part of the development will remain in operation as a hotel with a single manger. The Council has turned its mind to noise impacts and other amenity impacts from garbage and ventilation by conditions including 49, 50 and 51 and the management plans. Furthermore, Ms Murphy has confirmed that all recommendations from internal referrals to the Council's health unit and other relevant departments have informed the terms of the proposed conditions of consent.

61. The objectors have been active in the appeal at the s34 conference and in this hearing. I have listened to their concerns and based on the evidence before me, I am satisfied that the development is acceptable on its merits and therefore I have decided to grant development consent in accordance with the consent orders filed (Exhibit B).

62. The Court orders are;

1. Appeal is upheld.
2. Development consent is granted to development application D/2016/1079 (as amended) seeking alterations and additions of an existing building known as the White House at 55 Macleay Street , Potts Point subject conditions specified in Annexure A.
3. Exhibits are returned except Exhibit B which contains a set of the drawings identified in schedule 1A condition (2) of Annexure A.

Commissioner Dixon

[38344I.I6 Dixon \(C\) \(358 KB, pdf\)](#)

[38344I.I6 Dixon - Plans \(4.06 MB, pdf\)](#)

Decision last updated: 25 July 2017