



Land and Environment Court
New South Wales

Case Name: Holt Avenue Cremorne Pty Ltd v North Sydney Council

Medium Neutral Citation: [2022] NSWLEC 1428

Hearing Date(s): 18 and 19 July 2022

Date of Orders: 17 August 2022

Decision Date: 17 August 2022

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The appeal is dismissed.
(2) All exhibits are returned, except for Exhibits A, B and 6.

Catchwords: INTERIM HERITAGE ORDER: appeal against the making of an interim heritage order – assessing heritage significance – whether item is likely to be found of local heritage significance

Legislation Cited: Heritage Act 1977, ss 4, 25, 26, ,27, 29, 30, 57, 58, 63, Sch 2
Land and Environment Court Act 1979, s 39
Local Government Act 1993
Mosman Local Environmental Plan 2012
North Sydney Local Environmental Plan 2013, cl 5.10, Sch 5
Uniform Civil Procedure Rules 2005, r 31.19

Cases Cited: Byron Ventilink Pty Limited v Byron Shire Council (2005) 142 LGERA 215; [2005] NSWLEC 395
Forte Construction Group Pty Ltd v Inner West Council [2018] NSWLEC 1400
Newcastle & Hunter Valley Speleological Society Inc v

Upper Hunter Shire Council (2010) 210 LGERA
126; [2010] NSWLEC 48

Texts Cited: NSW Heritage Office, NSW Heritage Manual,
'Assessing Heritage Significance' (2001)

Category: Principal judgment

Parties: Holt Avenue Cremorne Pty Ltd (Applicant)
North Sydney Council (Respondent)

Representation: Counsel:
T Roberston SC (Applicant)
A Seton (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Marsdens Law Group (Respondent)

File Number(s): 2022/81791

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This Class 1 appeal is brought under s 30(1) of the *Heritage Act 1977* ("*Heritage Act*"), against the making of an interim heritage order (IHO) by North Sydney Council (the Respondent) with respect to land at 115, 117 and 119 Holt Avenue, Cremorne (the sites).
- 2 While the IHO the subject of this appeal applies to those three sites listed above, a total of eight properties on Holt Avenue are cited in the evidence before the Court in these proceedings. It is helpful to explain at the outset why this is the case.
- 3 A total of eight properties at Nos 115, 117, 119, 121, 123, 125, 131 and 133 Holt Avenue are considered by the Respondent to share certain characteristics.
- 4 Those properties at Nos 115, 117 and 119 Holt Avenue, and at Nos 131 and 133 Holt Avenue are subject to separate development applications proposing the demolition of the buildings on those sites.

- 5 No development application applies with respect to those properties at Nos 121, 123 and 125 Holt Avenue. Accordingly, those properties at Nos 121, 123 and 125 Holt Avenue are not considered by the Respondent to be threatened by prospective development.
- 6 I understand the properties at Nos 131 and 133 Holt Avenue are considered to be threatened, but as those sites are the subject of a separate development application, those sites are not the subject of these proceedings.

Background to the making of the IHO

- 7 The parties agree the following relevant facts with respect to the sites:
- (1) On 12 July 2013, the Minister for Heritage authorised local councils in NSW to make IHO's in accordance with s 25 of the *Heritage Act*, and subject to conditions listed in Sch 2 of the authorisation (Exhibit 2, Tab 15).
 - (2) The conditions listed at Sch 2 are in the following relevant terms:
 - (1) A council must not make an Interim Heritage Order (IHO) unless:
...
(b) it has considered a preliminary heritage assessment of the item prepared by a person with appropriate heritage knowledge, skills and experience employed or retained by the council and considers that:
 - (i) the item is or is likely to be found, on further inquiry and investigation, to be of local heritage significance;
...
(5) An IHO made by a council must contain the following condition:
"This Interim Heritage Order will lapse after six months from the date it is made unless the local council has passed a resolution before that date; and
 - (i) in the case of an item which, in the council's opinion, is of local significance, the resolution seeks to place the item on the heritage schedule of a local environmental plan with appropriate provisions for protecting and managing the item; or
..."
 - (3) On 17 March 2014, the Respondent delegated that authorisation to the General Manager, (Exhibit 2, Tab 18), consistent with the terms of the Delegations of Authority - General Manager (Ex 2, Folio 542).
 - (4) On 9 August 2021, the Applicant in these proceedings lodged development application DA 243/21 for the demolition of existing structures and the construction of a residential flat building with basement parking.

(5) On 24 January 2022, the following motion was endorsed by the Respondent:

“1. That Council obtain urgent advice in relation to whether an Interim Heritage Order(s) can be supported in respect of a group of dwellings known as 115, 117, 119, 121, 123, 125, 131 and 133 Holt Avenue Cremorne.

2. That Council prepare an urgent report to assess whether a new Heritage Conservation Area ought be identified and adopted in relation to the area bounded by Spofforth Street, Military Road, Cranbrook Avenue and Cabramatta Road Cremorne and that such a review consider the inclusion of the group of dwellings at 115, 117, 119, 121, 123, 125 and 131, 133 Holt Avenue, Cremorne and be informed by the provisions relating to Mosman Council’s Holt Estate Conservation Area.

3. That the review consider whether there are contributory items within any recommended conservation area.”

8 On 7 March 2022, the Respondent received a Preliminary Heritage Assessment Report prepared by GML Heritage (GML Preliminary Assessment).

9 On the same day, the Respondent made the IHO, which was subsequently published in the NSW Government Gazette No 103 on 11 March 2022 (Exhibit 2, Tab 8).

10 On 15 March 2022, the Respondent notified affected owners and occupiers as to the making of the IHO (Exhibit 2, Tab 9), published a notice on the Respondent’s website (Tab 10), and the Mosman Daily on 17 March 2022 (Tab 11).

The sites and their context

11 The sites are located on the north eastern side of Holt Avenue, close to the intersection with Spofforth Street, and are individually identified as follows:

- 115 Holt Avenue is legally described as Lot 1 in DP 929395.
- 117 Holt Avenue is legally described as Lot 1 in DP 980449.
- 119 Holt Avenue is legally described as Lot 1 in DP 929074.

12 The sites are also located within the R3 Medium Density zone, in accordance with the North Sydney Local Environmental Plan 2013 (NSLEP).

13 In its Statement of Facts and Contentions in Reply (Exhibit 1), the Respondent identifies the sites as a group of detached Federation era Bungalow style

houses, set on large allotments with wide frontages to Holt Avenue, and with the following common features or characteristics:

- An asymmetric front façade with projecting gable and open verandah
- High pitched roof, originally terracotta tiled (some have been replaced)
- Centrally located front door and hallway
- Bay window within casement windows to the projecting gable
- Timber shingles to gables (except 119 Holt Avenue)
- Timber joinery and fretwork to the verandah, with variations to the stylistic detailing.
- Original timber windows and doors
- Coloured glass fan light windows
- Rough cast render chimneys
- Formal front gardens

14 In summary, it is useful to particularise each of the dwellings on the sites as follows:

- No 115 Holt Avenue is a detached Federation bungalow with face brick façade and a hipped roof form, finished in terracotta tiles.
- No 117 Holt Avenue is a detached Federation bungalow with rendered façade and a hipped roof form, finished in terracotta tiles.
- No 119 Holt Avenue is a detached Federation bungalow with painted brick façade and a gabled roof form, at 90 degrees to the street, finished in corrugated iron roof sheeting.

15 The sites are not identified as heritage items, nor are they located within a Heritage Conservation Area (HCA) under Sch 5 of the NSLEP, and are not listed as State Heritage items within the terms of the *Heritage Act 1977*.

16 That said, the sites are within the vicinity of the Holt Estate HCA and a number of items listed for their heritage significance in the Mosman Local Environmental Plan 2012. The closest of these is identified as item I379, and described as 'Divided Road, Holt Avenue, Mosman...(between Cowles Road and Spofforth Street)'.

17 The sites are also in the vicinity of the border separating the North Sydney local government area (LGA) from the Mosman LGA, demarcated by Spofforth Street.

- 18 Existing development on the southern side of Holt Avenue is generally residential apartment development.
- 19 The proceedings commenced with an onsite view at which the Court, in the company of the parties and their experts, entered the sites at Nos 115-119, and viewed the sites in context with other sites in the street, including Nos 121, 123 and 125 Holt Avenue.
- 20 The Court observed the interior of the dwellings, and stood in the rear yard of No 117 to observe the rear roof forms of adjoining sites at Nos 115 and 119.
- 21 The Applicant sought leave for the owner of No 123 Holt Avenue to make an oral submission objecting to any listing of the property as a heritage item, that was opposed by the Respondent. As the IHO against which the appeal is lodged does not apply to the property at No 123 Holt Avenue, leave was not granted, pending opening submissions after which the Court would consider whether a submission or site view of No 123 Holt Avenue would assist.
- 22 Instead, at the close of proceedings, the Court directed the Applicant to invite a written submission from the owner of No 123 Holt Avenue to be provided to the Court, which was received on 20 July 2022.
- 23 Finally, the Court was taken to parts of Holt Avenue in the Mosman LGA to the east of the sites, and properties at Nos 108-110, and 116 Holt Avenue were identified by the Applicant as demonstrating a degree of alteration that was common to the area, and a consistency of character evident on both sides of the street, which Ms Trueman describes as commonplace in an area identified as a HCA such as the Holt Estate HCA.

Submissions on heritage significance

- 24 On 21 April 2022, the Applicant filed a Statement of Facts and Contentions (Exhibit C) identifying four contentions, and the Respondent filed its Statement of Facts and Contentions in Reply on 17 May 2022 (Exhibit 1), identifying two further contentions.
- 25 In closing submissions, the Respondent no longer contends that the sites are, individually, of heritage significance but instead that the sites are likely to be found, following further inquiry and investigation, to be of sufficient local

heritage significance, collectively, to warrant the listing of the sites as a group, or part of a group, within this portion of Holt Avenue, Cremorne.

26 Furthermore, while an assessment of the merits can be undertaken by the Court on the basis of the evidence before the Court, the Respondent submits the Court need not proceed further than to find, on the basis of the Preliminary Heritage Assessment prepared by GML Heritage dated June 2021, that the sites are likely to be found, on further inquiry and investigation, to be of local heritage significance and so dismiss the appeal.

27 Such a finding is also supported by the conclusions of the Heritage Assessment prepared by GML Heritage dated 3 June 2022 (Exhibit 2, folios 448-451), and is not inconsistent with prior heritage assessments that acknowledge the addition and deletion of items is an ongoing process (Ex B, Tab 7, p12), and that further research may reveal additional sites (Tab 8, p16).

28 Such an approach is also consistent with the decision of Pain J in *Byron Ventilink Pty Limited v Byron Shire Council* (2005) 142 LGERA 215; [2005] NSWLEC 395, where, at [56], her Honour expressed the role of the Court on an appeal under s 30 of the *Heritage Act* as follows:

“It is not my role to determine whether the building is of local heritage significance and should be included in a planning instrument but rather whether the necessary threshold test under Sch 1(1)(b)(i) of the Minister’s order and cl 5.5.2(1)(b)(i) of the Guidelines has been met, namely, that on further investigation the item is likely to be found to be of local heritage significance. To require more certainty about the likelihood of local heritage significance, that it will be likely to be an item of local heritage significance, would appear to defeat the purpose of issuing an IHO in the first place, which is to enable protection of an item while further enquiries are made.”

29 As summarised by Commissioner Gray in *Forte Construction Group Pty Ltd v Inner West Council* [2018] NSWLEC 1400, at [26]-[28], the Court has consistently approached the threshold test at what is now Sch 2(1)(b)(i) of the Ministers Authorisation as permutations of questions expressed by Gray as follows:

- Firstly, if there is further inquiry or investigation to be carried out, whether the building is likely to be found to be of local heritage significance, or
- Secondly, if there is no further inquiry or investigation to be carried out, whether the building is of local heritage significance.

- 30 It is commonly held that the Court, pursuant to s 39(2) of the Land and Environment Court Act 1979 (“LEC Act”) exercises the functions and discretions of the Council in determining whether to issue the IHO. However, the parties are apart on the degree to which the Court need consider the merits of the assessment undertaken in respect of the heritage significance of the sites.
- 31 The Applicant submits that the proceedings are by their nature a merit appeal, in which merit is decided on the facts and evidence at the date of the Court’s decision. Put another way, pursuant to s 39(3) of the LEC Act, it is by way of rehearing, in which fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given.
- 32 In the circumstances of this case, the Applicant’s invitation for the Court to exercise the powers and discretion of the Respondent to revoke the IHO is an invitation made well after the making of the IHO, and in respect of sites located in an area for which a plethora of assessments have been completed.
- 33 Those assessments prepared prior to the current proceedings, contained in Exhibit B, include:
- North Sydney Heritage Study, prepared by Latona Masterman and Associates, December 1981 (Tab 7)
 - North Sydney Heritage Study Review, prepared by Godden Mackay, July 1993 (Tab 8)
 - North Sydney Heritage Study – Addition to Heritage Inventory, prepared by Godden Mackay, December 1995 (Tab 9)
 - North Sydney Heritage Review 2007 (including Heritage Review Inventory Sheet) prepared by Architectus Sydney Pty Ltd, December 2008 (Tab 10)
- 34 Despite the number of heritage assessments undertaken, the sites were not found to have heritage significance. Likewise, two Heritage Assessment Reports prepared by Urbis on behalf of the Applicant, dated July 2021 (Tab 13) and July 2022 (Urbis 2022 Assessment) (Tab 15) reach the same conclusion.
- 35 Additionally, two further heritage assessments completed by GML on behalf of the Respondent have now been completed and a meeting of the North Sydney Local Planning Panel (NSLPP), held on 13 July 2022, has considered a Planning Proposal in respect of the sites.

- 36 Given such extensive assessment, and consideration by the NSLPP, the Respondent can no longer hold that the item is likely to be found, on further inquiry and investigation, to be of local heritage significance as that further inquiry and investigation has run its course and the Court's role is now to determine whether the building is of local heritage significance.
- 37 It is convenient at this point to state that the Applicant sought to rely upon a bundle of documents that included two additional heritage assessments objected to by the Respondent on the basis that the Court had not directed such expert evidence to be prepared and so was contrary to Rule 31.19 of the Uniform Civil Procedure Rules 2005 (UCPR).
- 38 The first document, at Tab 14, is a Heritage Assessment Report prepared by Weir Philips dated July 2022 (Weir Philips Assessment 1), updating an earlier Heritage Assessment Report by the same author, prepared in support of the DA at [7(4)] pursuant to cl 5.10 of the NSLEP, dated July 2021 (Weir Philips Assessment 2) (Tab 12) and cited in the Amended Statement of Environmental Effects, tendered by the Respondent (Exhibit 2, Tab 2).
- 39 I accept the Applicant's submission that the Weir Philips Assessment 1 is cited in the Amended SEE. While I note the Court is not tasked to consider the DA in these proceedings, I admitted the Weir Philips Assessment 2, subject to weight.
- 40 The second document was a Revised Heritage Assessment prepared by Mr John Oultram dated June 2022 (Oultram Assessment) (Tab 16), the purpose of which, I am advised, is to assist the Applicants' expert, Mr Davies, by reference to certain figures and images in the document that are more clearly rendered than in the Urbis 2022 Assessment.
- 41 As I note the plans and images in the Oultram Assessment, and the Urbis 2022 Assessment are similar, and in some cases identical, I consider the Oultram Assessment of no assistance to the Court and so I admitted the Applicant's Bundle (Exhibit B), excluding the Oultram Assessment.

Statutory framework

- 42 The making of an IHO is provided for by the terms of the *Heritage Act*

43 Local heritage significance is defined, at s 4A(1) of the *Heritage Act* in the following terms:

local heritage significance, in relation to a place, building, work, relic, moveable object or precinct, means significance to an area in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item.

44 I note the term 'area' has the same meaning in the *Heritage Act*, as in the dictionary of the *Local Government Act 1993*, being a local government area.

45 Section 25 of the *Heritage Act* provides the means by which an IHO is to be made in the following terms:

25 Minister can authorise councils to make interim heritage orders for items of local heritage significance

(1) The Minister may, by order published in the Gazette, authorise a council to make interim heritage orders for items in the council's area.

(2) A council authorised under this section may make an interim heritage order for a place, building, work, relic, moveable object or precinct in the council's area that the council considers may, on further inquiry or investigation, be found to be of local heritage significance, and that the council considers is being or is likely to be harmed.

(3) An interim heritage order made by a council is of no effect in so far as it applies to any of the following items—

(a) an item to which an interim heritage order made by the Minister applies,

(b) an item listed on the State Heritage Register.

(4) An authorisation under this section can be given subject to conditions and a council cannot act in contravention of the conditions of its authorisation.

(5) The Minister may at any time by notice published in the Gazette withdraw a council's authorisation or change the conditions of its authorisation. The withdrawal of a council's authorisation does not of itself affect any interim heritage order made before the authorisation was withdrawn.

46 Section 26 of the *Heritage Act* provides, in effect, that notice is not required to be given prior to the making of an IHO.

47 Section 27 of the *Heritage Act* also provides that the IHO may apply to the curtilage of a building or the site of a building.

48 Section 29 deals with the commencement, duration and revocation of IHO's in the following terms:

(1) An interim heritage order takes effect on the date of publication of the order in the Gazette.

- (2) An interim heritage order remains in force for 12 months or such shorter period as may be specified in the order, unless it is revoked sooner.
- (3) The Minister may revoke an interim heritage order made by the Minister or by a council.
- (4) A council may revoke an interim heritage order that the council has made (but cannot revoke one made by the Minister or by another council).
- (5) When an interim heritage order is revoked, the Minister (in the case of an order revoked by the Minister) or the council that revoked the order (in the case of an order revoked by a council) is to do or cause the following to be done—
 - (a) notice of the revocation of the order is to be published in the Gazette,
 - (b) as soon as possible after the notice of revocation is published in the Gazette, notice of the revocation of the order is to be given to the Chairperson and to each person who appears to the Minister or the council to be an affected owner or occupier,
 - (c) within 7 days after notice of the revocation of the order is published in the Gazette, notice of the revocation of the order is to be published in a manner that the Minister or the council is satisfied is likely to bring the notice to the attention of members of the public in the area in which the item is situated.
- (6) The listing of an item on the State Heritage Register revokes any interim heritage order in respect of that item.

49 Section 30 of the *Heritage Act* provides for an affected owner or occupier to appeal the making of an IHO, within certain terms.

50 Section 57 of the *Heritage Act* sets out the effect of an IHO on a place, building, work, relic, moveable object, precinct or land in the following terms:

- (1) When an interim heritage order or listing on the State Heritage Register applies to a place, building, work, relic, moveable object, precinct, or land, a person must not do any of the following things except in pursuance of an approval granted by the approval body under Subdivision 1 of Division 3—
 - (a) demolish the building or work,
 - (b) damage or despoil the place, precinct or land, or any part of the place, precinct or land,
 - (c) move, damage or destroy the relic or moveable object,
 - (d) excavate any land for the purpose of exposing or moving the relic,
 - (e) carry out any development in relation to the land on which the building, work or relic is situated, the land that comprises the place, or land within the precinct,
 - (f) alter the building, work, relic or moveable object,
 - (g) display any notice or advertisement on the place, building, work, relic, moveable object or land, or in the precinct,

(h) damage or destroy any tree or other vegetation on or remove any tree or other vegetation from the place, precinct or land.

...

51 For completeness, an approval of the sort referred to in s 57(1) of the *Heritage Act* is dealt with under Subdiv 1 of Div 3.

52 Section 58(1) applies to an application for approval in respect of the doing or carrying out of an act, matter or thing referred to in s 57 (1), and in respect of which s 63(2) of the *Heritage Act* states that:

(2) Where—

(a) an application for approval is made to demolish the whole of a building or work, or

(b) an application for approval is made which would, if it were approved, necessitate the demolition of the whole of a building or work,

the approval body shall determine that application by refusing approval.

Expert evidence

53 As an appeal against an IHO necessarily deals with heritage significance, the Court was assisted in its consideration of the contentions by the evidence of experts in built heritage, Ms Lisa Trueman for the Respondent and Mr Stephen Davies for the Applicant, who conferred in the preparation of a joint expert report (Exhibit 5).

54 The heritage experts agree that assessment of heritage significance in NSW is undertaken in accordance with guidelines issued by Heritage NSW as part of the NSW Heritage Manual, titled 'Assessing Heritage Significance' (the Guidelines) (Exhibit 2, Tab 16).

55 The Guidelines provide criteria against which to assess significance. An item will be considered to be of State (or) local significance if, in the opinion of the Heritage Council of NSW, it meets one or more of the criteria.

56 In the circumstances of this case, the experts agree that the relevant criteria include:

“Criterion (a)- Historic Significance An item is important in the course, or pattern, of NSW's cultural or natural history (or the cultural or natural history of the local area)

...

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

...

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

Criterion (g)- Representativeness An item is important in demonstrating the principal characteristics of a class of NSW's Cultural or natural places; or Cultural or natural environments"

- 57 It is this agreed criteria that sets the framework for the Court's consideration in respect of those questions posed at [29].
- 58 Mr Davies accepts that while there are close similarities between the bungalows on the sites, each varies in both form and finish. Furthermore, the alterations evident in both plan and roof form, and variation in materials and finishes affect the significance of the buildings within the group and so preclude elevation of any one or more of the group to status as a heritage item.
- 59 Mr Davies is of the opinion that the sites are mere remnants of what was once a larger cohesive subdivision that has been so altered or demolished that the remaining group can only be said to be typical of speculative development by a builder of a particular period, in a particular style. However mere survival does not constitute significance, absent a superlative quality or qualities.
- 60 The group is not a particularly fine example of the style or period, and cannot be said to be rare. Instead, the Federation style is well represented in the North Sydney LGA, and in the eastern portion of Holt Avenue, within the Mosman Council LGA.
- 61 Where the style and period are evident in group listings under the NSLEP, these are generally in areas designated as heritage conservation areas, such as at 49-67 Edward Street, North Sydney (Ex B, Tab 16, pp 43-44) or 85-95 Kirribilli Avenue, Kirribilli (p44) where the examples are more intact and more representative of the style, period, type and detailing than the subject sites, or at 4-12 Harrison Street, Neutral Bay that demonstrate more substantial examples in a larger group (p44).

- 62 Ms Trueman regards the examples listed above to demonstrate the range and diversity of types and styles captured within the Federation classification. These include modest semi-detached dwellings for workers, single detached dwellings intended for the middle class, and larger, sometime bespoke villas for more wealthy owners.
- 63 In the case of these sites, Ms Trueman considers the sites likely to be the work of the same architect/builder pairing, and still visually evident to be so. She concludes the group is a rare surviving example in the area that remains intact notwithstanding past alterations that she considers to be minor when viewed from the street, and considers no other group in North Sydney LGA to be so cohesive and intact, other than for the Cranbrook Avenue Group (Exhibit 2, folios 423-424).
- 64 Furthermore, the surrounding medium density development has also left the group largely unaffected, and so the context, or setting, has not been so eroded that the heritage significance of the group is adversely affected by the surrounding development.
- 65 In summary, the Applicant submits that an assessment of the sites' setting, intactness, aesthetics, history, representativeness and rarity reveals buildings that are not more than speculative development, typical of the time, and that there are more intact, better examples with greater integrity found in the North Sydney LGA, and nearby within the visual catchment to the east of Holt Avenue, Mosman.

The item(s) is likely to be found of local heritage significance

- 66 While the decision of the NSLPP was pending at the commencement of the hearing, a document titled 'Determinations of the North Sydney Local Planning Panel' was received by the parties on the cusp of closing submissions being heard. The Court directed that a copy of the decision be provided to the Court, later marked Exhibit 6.
- 67 While the outcome of the NSLPP is described as a Determination, it concludes with the following recommendation:

“Panel Recommendation:

The Panel recognises its role in this matter is limited to making a recommendation only to the Council. In the opinion of the Panel the subject properties require a more thorough and lengthy inquiry to fully review and reconcile whether these 8 properties warrant being listed as heritage items and meet the necessary threshold for heritage listing under the North Sydney Local Environmental Plan. Numerous heritage studies have been undertaken over the years by both the Council and heritage experts, suffice to say the advice differs significantly.

On the information before it, the Panel is not persuaded the properties meet the threshold for listing under the Heritage Assessment Guidelines and that the current Planning Proposal lacks both site specific and strategic merit and does not meet the objectives of the Act.”

- 68 I note the recommendation of the NSLPP is in respect of the eight properties listed at [3], and is not particularised with respect to the sites the subject of this appeal. Consequently, it is unknown what weight the NSLPP has given in its recommendation to the sites the subject of the appeal, compared to the weight of the five properties that are not subject to these proceedings.
- 69 Furthermore, I accept the Respondent’s submission that Court does not have before it all of the evidence, including public submissions, on which the NSLPP relied in forming its decision.
- 70 While numerous heritage assessments have been undertaken in the North Sydney LGA, including evidence of assessment in Holt Avenue, on the whole, those assessments listed at [33] were assessments covering the entire LGA.
- 71 The Heritage Assessments completed by Urbis and GML provide a more focused and detailed assessment of the sites themselves.
- 72 On the basis of the 2022 GML Assessment, I am of the view that there may be further inquiry or investigation to be carried out, after which the sites may likely be found to be of heritage significance.
- 73 In this respect, I understand the meaning of the term ‘likely’ to be a like term for ‘a real chance or possibility’, as established by Preston CJ in *Newcastle & Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* (2010) 210 LGERA 126; [2010] NSWLEC 48 at [84].
- 74 While I acknowledge the Applicant has undertaken research that reaches a conclusion to the contrary, and has sought peer review to the same effect, I consider it a real chance, on the basis of the degree of research contained in

the 2022 GML Assessment, that further inquiry may support a finding that the sites at Nos 115-119 Holt Avenue are of heritage significance.

75 I have formed this view for the following reasons:

- (1) Firstly, while I accept that there may be grander and more bespoke examples of Federation dwellings in the North Sydney LGA, I am not persuaded by the evidence before me, or by a close read of the guide 'Assessing Heritage Significance', that a building, or a group of buildings, should be excluded from being considered to have local heritage significance by virtue of it or them lacking sophistication, or by demonstrating similar characteristics to an item or items that may have already been identified to have heritage significance, or unless it is a poor example, or being an example of its type.
- (2) Secondly, I accept Ms Trueman's assessment that the dwellings on the sites the subject of this appeal remain substantially intact notwithstanding past alterations that are minor when viewed from the street. I note that those alterations appear similar in their scope and effect, particularly in respect of Nos 115 and 117.
- (3) Accordingly, as a group, the sites may achieve rare or representative status within the North Sydney LGA, consistent with guidelines for inclusion under criterion (g) of the Guidelines because the group displays principal characteristics of an important class or group of items, and are part of a group which collectively illustrates a representative type.
- (4) Thirdly, while the eastern portion of Holt Avenue, in Mosman Council LGA, is unquestionably of the same Federation period and style as the sites the subject of this appeal, I accept Ms Trueman's evidence that the subdivision pattern, dwelling type and streetscape vary from the detached dwellings on larger allotments as is the case here. As I understand it, the sites are not to be compared with those in the eastern portion of Holt Avenue as they demonstrate distinct qualities from the subdivision, dwelling type and streetscape setting of those in another LGA.
- (5) Finally, while the 2022 GML Heritage Assessment was referred to during proceedings as the 'Final Assessment', I regard this as a shorthand reference to the last, or most recently completed, report prepared on behalf of the Respondent, in support of its Report to the NSLPP. While it may have been cited as the 'final assessment', I consider finality to be determined, ultimately by the terms of the IHO that confirm the IHO will lapse after six months, being 11 September 2022, unless the Respondent has passed a resolution before that date; and where the resolution seeks to place the item on Sch 5 of the NSLEP with appropriate provisions for protecting and managing the item.

76 Finally, I note whether or not the further inquiry or investigation can be undertaken, completed and considered before the scheduled lapse of the IHO on 11 September 2022 is not a material consideration for the Court to make in this case.

Orders

77 The Court orders that:

- (1) The appeal is dismissed.
- (2) All exhibits are returned, except for Exhibits A, B and 6.

.....

T Horton

Commissioner of the Court

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