



Land and Environment Court
New South Wales

Case Name: Helm No. 18 Pty Ltd v North Sydney Council

Medium Neutral Citation: [2022] NSWLEC 1406

Hearing Date(s): 6-7 June 2022

Date of Orders: 29 July 2022

Decision Date: 29 July 2022

Jurisdiction: Class 1

Before: Sheridan AC

Decision: The Orders of the Court are:
(1) The appeal is upheld.
(2) The part of the Interim Heritage Order published in the NSW Government Gazette No 103 and dated 11 March 2022 over “The properties known as 131-133 Holt Avenue Cremorne” the land described in schedule B”, is revoked.
(3) The exhibits are retained.

Catchwords: INTERIM HERITAGE ORDER: whether an interim heritage order over two residential properties found not to reach the threshold for local heritage listing, should be revoked.

Legislation Cited: Civil Procedure Act 2005, ss 56, 62.3
Heritage Act 1977, ss 4, 4A, 25, 29, 30, Pt 3
Land and Environment Court Act 1979, s 39
North Sydney Local Environmental Plan 2013, Sch 5

Cases Cited: Byron Ventilink Pty Limited v Byron Shire Council (2005) 142 LGERA 215; [2005] NSWLEC 395

Texts Cited: NSW Heritage Office, ‘Assessing Heritage Significance’

Category: Principal judgment

Parties: Helm No.18 Pty Ltd (Applicant)
North Sydney Council (Respondent)

Representation: Counsel:
A Galasso (Applicant)
A Seton (Solicitor) (Respondent)

Solicitors:
Mills Oakley Lawyers
Marsdens Law Group (Respondent)

File Number(s): 2022/81671

Publication Restriction: Nil

JUDGEMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 30(1) of the *Heritage Act 1977* (NSW) (*Heritage Act*) against the making of an Interim Heritage Order (IHO), insofar as it relates to the properties at 131 and 133 Holt Avenue, Cremorne (the Site), by North Sydney Council (the Council), on 11 March and published in the NSW Government Gazette No. 103 (Exhibit 1, f 225-227). The IHO is scheduled to lapse on 11 October 2022.
- 2 The Council is authorised to make IHOs for items in the Council's area by an order made by the then Minister for Heritage on 12 July 2013 published in the NSW Government Gazette No. 90 (Exhibit 1, f 236A). The order is subject to the conditions in Schedule 2 for Local Councils to make IHOs (Exhibit 1, f 236C-236D). The IHO is made pursuant to subs 25(2) of the *Heritage Act*.
- 3 On appeal, pursuant to s 39(2) of the *Land and Environment Court Act 1979*, the Court, standing in the shoes of the Council, may revoke an IHO, under s 29(4) of the *Heritage Act*.

The Site and its context

- 4 The Site, subject of the appeal, consists of two allotments legally described as Lot 2 in DP 602238, commonly known as 131 Holt Avenue, Cremorne; and Lot 1 in DP 602238, commonly known as 133 Holt Avenue Cremorne.

- 5 The Site is generally rectangular in shape and zoned R4 – High Density Residential under North Sydney Local Environmental Plan 2013 (NSLEP 2013). The objectives of the R4 zone are expressed in NSLEP 2013 as follows:
- To provide for the housing needs of the community within a high density residential environment.
 - To provide a variety of housing types within a high density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To encourage the development of sites for high density housing if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.
 - To ensure that a reasonably high level of residential amenity is achieved and maintained.
- 6 The Site is located in a high density residential area which is characterised by a mix of late-twentieth and early twenty-first century residential flat buildings of between 3 to 6 storeys on the southern side and a group of modified late nineteenth-century/early twentieth-century dwellings on the northern side set amongst 3 to 10 storey late twentieth century residential flat buildings and commercial development.
- 7 The northern side of Holt Avenue contains commercial development on the corner of Military Road, a childcare centre at 139 Holt Avenue, two highly modified semi-detached dwellings at 135 and 137 Holt Avenue, a mid-twentieth century residential flat building at 129 Holt Avenue and a 10 storey residential flat building at the corner of Spofforth Street.

Legislative Framework

- 8 The relevant section of Part 3 of the *Heritage Act* provides:

Part 3 Interim heritage orders for items of State or local heritage significance

24 Minister can make interim heritage orders for items of State or local heritage significance

(1) The Minister may make an interim heritage order for a place, building, work, relic, moveable object or precinct that the Minister considers may, on further inquiry or investigation, be found to be of State or local heritage significance.

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.

29 Commencement, duration and revocation of IHOs

(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.

(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).

30 Appeal against IHO made by council

(1) An affected owner or occupier may appeal to the Court against the making of an interim heritage order by a council.

9 The *Heritage Act* relevantly includes the following definitions at ss 4 and 4A:

environmental heritage means those places, buildings, works, relics, moveable objects, and precincts, of State or local heritage significance

local heritage significance has the meaning given by section 4A.

4A Heritage significance

(1) In this Act:

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.

(4) The Heritage Council must use only criteria published in the Gazette under this section for the making of decisions as to whether or not an item is of State heritage significance.

Chronological background to the appeal

10 Between March 2021 and June 2021, the following six heritage experts undertook heritage assessments of the Site on behalf of the Applicant and produced the following heritage assessment reports (initial heritage assessments Exhibit C, Tabs 13-18):

- James Phillip, of Weir Phillips Heritage and Planning, June 2021 (Exhibit C, Tab 13)
- Stephen Davies, of Urbis, April 2021 (Exhibit C, Tab 14)
- Graham Brooks, of GBA Heritage, June 2021 (Exhibit C, Tab 15)

- Samantha Polkinghorne, of NBRIS, June 2021 (Exhibit C, Tab 16)
 - John Oultram, of John Oultram Heritage & Design, June 2021 (Exhibit C, Tab 17)
 - Kerime Danis, of City Plan Services, June 2021 (Exhibit C, Tab 18)
- 11 All six of the above initial heritage assessments concluded that neither 131 or 133 Holt Avenue meet the criteria for heritage listing.
- 12 I understand that on 17 June 2021, the Applicant sent a copy of the above heritage assessments to Council (Exhibit B SOFAC). On 24 June 2021, Council wrote to the Applicant confirming receipt of their letter of 17 June 2021 and the heritage assessments and that Council would undertake an assessment of the properties once a DA for the Site was lodged.
- 13 On 5 August 2021, the Applicant lodged Development Application 239/2021 (the DA) for the demolition of existing structures and the construction of a new mixed-use development accommodating ground floor business premises and 24 dwellings at 131, 133, 135, 137 and 139 Holt Ave, Cremorne which includes the subject Site.
- 14 During the public exhibition of the DA between 20 August 2021 and 24 September 2021, Council received several submissions objecting to the proposed development on heritage grounds.
- 15 I understand that on 15 September 2021 (Exhibit B SOFAC), Council issued a 'Request for Further Information' requesting the Applicant formally provide Council with the Applicant's initial heritage assessments as part of its DA. On 17 September 2021, the Applicant lodged on the NSW Planning Portal copies of the heritage assessments.
- 16 As outlined in the SOFAC (Exhibit B), between 1984 and 2007 the Council arranged for heritage studies to be completed in relation to the surrounding area including the Site. Heritage assessment reports were produced as a result of these studies including:
- 1981 report by Latona Masterman Associates (Exhibit C, Tab 6)
 - 1993 report by Godden Mackay (now GML Heritage) which detailed a heritage review of the area (Exhibit C, Tab 7)

- 1995 additions to Heritage Inventory by Godden Mackay to the 1993 report (Exhibit C, Tab 8)
 - 1999 report by The Australian Street Company with Paul Davies Architects, Spackman and Mossop (Exhibit C, Tab 9 and 10)
 - 2007 Heritage Review prepared by Architectus in conjunction with John Oultram Heritage and Design (Exhibit C, Tab 11)
- 17 The SOFAC notes in paragraph 40 that none of these heritage studies and reports identified 131 or 133 Holt Avenue as being worthy of heritage listing.
- 18 On 18 March 2021, Notice of Motion No, 4/21 was published as part of the agenda for the Council meeting on 24 March 2021, which sought:
- (a) That Council obtains 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 and 131, 133 Holt Avenue, Cremorne.
 - (b) That Council review whether a new Heritage Conservation Area ought to be identified and adopted in relation to the area bounded by Spofforth Street, Military Road, Cranbrook Avenue and Cabramatta Road, Cremorne and that such review consider the inclusion of the group of 9 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.
 - (c) That the review considers whether there are contributory items within any recommended conservation area.
 - (d) That Council allocate funds from the recently reported increase revenue in respect of fees and charges to facilitate the advice and review.
- 19 In March 2021, the Respondent received a number of submissions from residents in support of the Notice of Motion 4/21 regarding the proposed heritage review of the above properties (Exhibit 5 folio 3-29).
- 20 On 20 January, Council called for an extraordinary General Meeting for 24 January 2022. Notice of Motion 3/22 was listed on the Council meeting agenda.
- 21 On 24 January 2022, at the Council meeting, it was resolved:
- (1) That Council obtains urgent advice, including review of existing studies 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 and 131, 133 Holt Avenue, Cremorne.

- (2) That Council prepare an urgent report, including review of existing studies to assess whether a new Heritage Conservation Area ought to be identified and adopted in relation to the area bounded by Spofforth Street, Military Road, Cranbrook Avenue and Cabramatta Road, Cremorne and that such review considers 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 considers whether there are contributory items within any recommended conservation area.
- 22 Between January and February 2022, a number of submissions in support of the proposed IHO, including a petition, were received by the Respondent in relation to Notice of Motion 3/22 (Exhibit 5 folio 30-153).
- 23 On 7 March 2022, GML Heritage prepared a preliminary heritage assessment report for Council in response to Council's motion of 24 January 2022 (Exhibit C Volume 2, Tab 12). This report recommended, among other things, that an IHO be placed over 131 and 133 Holt Avenue in order to protect the dwellings from demolition whilst a detailed assessment of the heritage significance is undertaken to determine if the properties qualify for heritage listing in Schedule 5 of the NSLEP.
- 24 On 7 March 2022, Council resolved to make IHO 1/2022 for the Site and the additional properties.
- 25 On 11 March 2022, the IHO was published in the NSW Gazette Number 103.
- 26 On 17 March 2022, Council requested by letter that the Applicant withdraw the DA. The DA remains undetermined.
- 27 A detailed heritage assessment was subsequently undertaken by GML Heritage in June 2022, which concludes that 131 and 133 Holt Avenue meet the threshold for cultural significance for historic, aesthetic and rarity values as a pair of Victorian semi-detached dwellings which serve as rare surviving examples of their type. Accordingly, the GML report, recommends that 131 and 133 Holt Avenue, Cremorne be listed as heritage items under Schedule 5 of NSLEP 2013.

- 28 The Applicant objected to the detailed GML assessment being admitted on the basis that the assessment was prepared in June 2022 after the IHO was made. I admitted the GML Detailed Assessment (Exhibit 4).
- 29 Further heritage assessments (Exhibit C, Tabs 19-24) were provided by the Applicant with their bundle of documents, by the authors of the initial heritage assessments (Exhibit C, Tabs 13 -18) and referred to in [10]. These further assessments which provide a critique of the GML Preliminary Assessment were admitted. The Respondent objected to these reports on the basis that no leave was given or sought for the provision by the Applicant of additional expert heritage reports, and that s 56 of the *Civil Procedure Act 2005* describes the overriding purpose of the Act and the rules of the Court to facilitate the just, quick and cheap resolution of the real issues in the proceedings. Further, that s 62.3 of that *Civil Procedure Act 2005* provides that the Court can limit the number of expert witnesses, which it has done in this case in relation to the matters of the heritage contentions that are raised. The Respondent also raised the fact that the experts that prepared the report (except Mr Oultram) were not available for cross examination.
- 30 Whilst these further heritage assessments (Exhibit C, Tabs 19-24) were admitted by the Court as background documents, upon review I accept Council's argument that the experts who prepared them were not available for cross examination (apart from Mr Oultram). I therefore have given them no weight, and I am not referring to them again in my judgment. I will say no more about them. On the other hand, the Applicant's initial heritage assessment reports referred to in [10], were available to the Council to consider with the DA and were referred to by the two heritage experts in their Joint Expert Report (Exhibit D), and I have therefore considered them in making my findings.

On-site view

- 31 The Court had the benefit of a view of the site. The applicant relied on the expert heritage evidence of Mr John Oultram and the Council relied on the expert heritage evidence of Ms Lisa Trueman. The experts prepared a joint expert report (Exhibit D).

- 32 At the on-site view, the Court in the company of the parties and the heritage experts, was taken inside the two dwellings. Both experts agreed that the dwellings had been modified to divide the original single house into two dwellings and various alterations and additions have occurred at later dates, including the replacement of the roof cladding, removal of the chimneys and changes to the verandas.
- 33 The experts agreed that the internal fabric of the dwellings at 131 and 133 Holt Avenue (ceilings, skirtings and other joinery including part of the timber floors) have been substantially modified. The experts also pointed out that the single dwelling was originally constructed in or around 1893 and underwent modifications around 1911, including the conversion into two semi-detached dwellings and the addition of side and rear wings to each dwelling. Further alterations and additions occurred in 1979 (Exhibit H).
- 34 The Court was taken to a number of locations within the vicinity of the site and shown three other properties (115,117 and 119 Holt Ave) that were subject to the same IHO as the Site. The Court was also taken to a property at 125 Holt Avenue, which was previously listed as a heritage item under NSLEP 2013, and Mr Oultram pointed out that this property was removed from Schedule 5 of NSLEP 2013 in an earlier heritage review undertaken by North Sydney Council, due to the substantial alterations that had occurred to the property.

Expert Evidence

- 35 In the Joint Expert Report (Exhibit D) prepared by the two heritage experts, the following facts were agreed:
- The subject properties are not listed as a heritage item in Schedule 5 of NSLEP 2013 and are not within a heritage conservation area.
 - The Site is not within the immediate vicinity of any listed heritage items.
 - The Site is the subject of an Interim Heritage Order under Part 3 of the *Heritage Act* and under s 25 (2) of the *Heritage Act* “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.”

- The IHO was placed on the properties by North Sydney Council in response to a Council resolution and that resolution was informed by the GML Preliminary Assessment (Exhibit C, Vol 2, Tab 12).
 - As the properties are proposed for demolition under DA 293/2021, they are considered to be under threat and the IHO was made in order to provide time for further investigation.
- 36 The experts prepared a floorplan of the dwellings that identifies the percentage of the original building that has been altered at different stages since it was constructed in 1893 and that demonstrates that quantitatively the later additions make up 61.4% of the original building's footprint over time (Exhibit J). The evidence provided by the experts also identifies that a considerable proportion of the front (Holt Avenue) façade of the dwellings has been changed over time from the original single dwelling (Exhibit J).

The Issues

Heritage Significance

- 37 The applicant seeks the revocation of the part of the IHO applying to the site, on the basis that the existing buildings on the site on further inquiry or investigation do not reach the threshold for inclusion as heritage items the NSLEP 2013.
- 38 The heritage experts disagreed on the level of heritage significance of the properties. Both experts assessed the heritage significance of the property using the NSW heritage assessment criteria ('Assessing Heritage Significance' Heritage Division of the NSW Office of Environment and Heritage) (Exhibit 3). The Guidelines provide the following 7 criteria for assessing heritage significance:
- criterion (a) – historic significance
 - criterion (b) - historical associations
 - criterion (c) – aesthetic significance
 - criterion (d) – social significance
 - criterion (e) – technical/scientific significance
 - criterion (f) – rarity
 - criterion (g) – representativeness.

- 39 The heritage experts agree that neither 131 or 133 Holt Avenue meet the threshold for heritage listing under criterion (b) – associative significance, (d) – social significance, (e) – technical/scientific significance or (g) representativeness (Exhibit D). Based on the evidence presented, I concur with this assessment.
- 40 The heritage experts disagree regarding the other three criterion (a), (c) and (f), as set out in [41- 53] below.

Criterion (a) – Historical Significance

- 41 In Ms Trueman’s opinion, the properties are worthy of local heritage listing as they may on further inquiry or investigation, be found to be of local heritage significance based on the preliminary GML heritage assessment.
- 42 The later GML heritage assessment prepared for the Respondent, June 2022 (Exhibit 4) concludes that No 131 and 133 Holt Avenue were one of the earliest houses built in the Longview Estate and Cremorne area and the properties have cultural significance. The report also notes that historical assessment indicates that the dwellings underwent significant alterations in 1911 and were converted into semi-detached houses. Ms Trueman’s evidence is that while these additions decrease the legibility of the dwelling as a late Victorian house, the Federation additions provide an overlay to the dwelling rather than detracting from its historic character.
- 43 Mr Oultram’s evidence (Exhibit D) is that the properties do not meet the threshold under criterion (a) as the Long View Estate subdivision was of a type that was commonplace on the Thrupp Estate and the original house was a speculative, builder- built house of a style and detail typical of the time that is well represented in other areas of North Sydney. Mr Oultram was of the view that the later works of 1911, that divided the house into two dwellings, considerably altered the form, layout and detail of the original house but not in a manner that amplified its historical significance. Further, the later overlay detracted from the original house by obscuring the legibility of the original dwelling and overlaying a later style on the original.

Criterion (c) - Aesthetic Significance

- 44 Ms Trueman's evidence is that the GML Preliminary Assessment established that the properties may, on further investigation, have cultural significance at a local level. Ms Trueman is of the view that although the dwellings underwent substantial alterations in 1911 and Federation features were added to the primary façade, they do not detract from the architectural values of the dwellings. Further that given that these features are authentic to the Federation period and architectural style, they add an interesting historic and architectural overlay to the houses rather than detracting from their aesthetic value.
- 45 Mr Oultram's evidence, on the other hand, is that the properties do not have sufficient aesthetic significance under criterion (c) to warrant heritage listing. He notes that the later works of 1911, that divided the house into two dwellings, considerably altered the form, layout and detail of the original house but not in a manner that amplified its aesthetic significance. Mr Oultram noted that the later overlay detracted from the original house by obscuring the legibility of the original dwelling and overlaying a later style on the original.
- 46 Mr Oultram noted that the subsequent modifications to the dwellings further diminished the integrity of the dwellings at 131 and 133 Holt Avenue and the elements remaining are not enough for the dwelling to constitute a fine example of either Victorian or Federation typology and they are neither one thing nor the other in terms of a style (Exhibit D).

Criterion (f) – Rarity

- 47 Ms Trueman's evidence is that the GML Preliminary Assessment (Exhibit C, Tab 12) found that the properties have the potential to meet the threshold for heritage listing under criterion (f) and the properties, dating from the late Victorian Period are among the earliest surviving dwellings of the Longview Estate and in the Cremorne area overall.
- 48 Mr Oultram's evidence is that the properties do not meet the threshold for heritage listing under criterion (f) – rarity, noting that the Long View Estate subdivision was of a type that was commonplace on the Thrupp Estate and the wider LGA and development inevitably followed subdivision.

- 49 Mr Oultram notes that the original house was a speculative, builder-built house of a style and detail typical of the time that is well represented in other areas of North Sydney and that the 1911 additions were of a style typical of the time. Mr Oultram also noted that it is clear from Council's building records that the division of buildings to form multiple dwellings was also commonplace and that neither the original dwelling house nor the later additions to convert it to two residences are rare and the typologies are not under threat in the wider LGA (Exhibit D).
- 50 In addition to Mr Oultram's evidence, the initial heritage assessments referred to in [10] identify that there are several Victorian style houses in the North Sydney LGA that demonstrate greater integrity, than the subject properties which have been highly modified (Exhibit C Tabs 13-17). For example, the Weir Phillips Heritage Assessment of June 2021 (Exhibit C Tab 13) provides a comparative analysis which identifies five examples of dwellings constructed in the late Victorian period in the North Sydney LGA. These properties are either listed on the State heritage register and /or as local heritage items under NSLEP 2013. The Weir Phillips report notes these dwellings are all moderately to highly intact and retain key elements including their overall form, chimneys and veranda detailing. The report also notes that 131 and 133 Holt Avenue have been highly modified and have lost their original roof, cladding and chimneys and the verandah detailing of No 131 has been altered.
- 51 The Urbis Heritage Assessment dated 6 April 2021 (Exhibit C, Tab 14) notes that within the North Sydney LGA and in proximity to the subject dwelling there are several of late Victorian semi-detached style housing that demonstrate high integrity with limited modification and the subject site is one of many examples of its type and does not meet the threshold for heritage listing under the criterion (f) – rarity.
- 52 The GBA Heritage Assessment (Exhibit C, Tab 15) provides an analysis of the criterion rarity, stating that the style of the subject properties was a common architectural style in the early 20th century and the buildings are simplified examples they are not considered rare, uncommon or endangered. The GBA Assessment provides examples and a comparative analysis of other heritage

listed buildings in Cremorne and concludes that in comparison to selected heritage listed buildings which are mainly intact fine examples of their style, the subject properties at 131 and 133 Holt Avenue have a mixture of Victorian and Federation architectural features which differ between the two houses. The GBA assessment concludes that the subject buildings have undergone several alterations and additions internally and externally, making them less significant, with remnant surviving original elements and features.

- 53 The NBRHS Heritage Assessment, dated 11 June 2021 (Exhibit C, Tab 16) also provides a comparative analysis and provides examples of several single storey Victorian style cottages. The comparative examples provided illustrate a range of stylistic solutions, employing elements from different styles and periods. The NBRHS Heritage Assessment notes that the employment of different styles at 131 – 133 Holt Avenue is not considered rare.

Heritage Knowledge Skills and Experience of Author of GML Preliminary Heritage Assessment

- 54 The Applicant contends that the IHO is defective on the basis that the Council's authority to make the IHO was subject to the condition that the Council consider a preliminary heritage assessment of the item prepared by a person with appropriate heritage knowledge, skills and experience employed or retained by the Council

- 55 Section 25(1) of the *Heritage Act* provides that the Minister may by order published in the gazette, authorise a council to make interim heritage orders for items in the council's area. Further, s 25(4) of the *Heritage Act* provides that an authorisation under this section can be given subject to conditions and a council cannot act in contravention of the conditions of its authorisation.

- 56 Schedule 2(1)(b) of the Ministerial Order provides as follows:

“(1) a council must not make an Interim Heritage Order 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

- 57 It is my view that given the Council engaged GML, a company recognised for heritage expertise, to prepare the heritage assessment of the subject properties, they would have been satisfied that any preliminary heritage

assessment would have been authored by an appropriately qualified expert. It is also likely that the curriculum vitae of the GML staff working on the assessment would have been provided to the Council, prior to their engagement.

- 58 On the second day of the hearing, the Council produced a letter from GML, dated 7 June 2022, which identifies that the GML Preliminary Assessment had four authors, Ms Lisa Trueman, Ms Leonie Masson and Ms Shikka Swaroop and Ms Lucy King (Exhibit 6). The Applicant objected to the admission of this evidence, however, given that the evidence assisted the Court in making its decision regarding the IHO and that the main author of the report, Ms Trueman was available for cross examination, I allowed for the exhibit to be admitted.
- 59 Having reviewed the curriculum vitae of the above authors (Exhibit 6), I am satisfied that the requirement of Schedule 2(1)(b) of the Ministerial Order is met, as the GML Preliminary Assessment has been prepared by persons with appropriate heritage knowledge, skills and experience.

Public Interest

- 60 With regard to the public interest, a number of submissions and a petition (Exhibit 5) were received by the Respondent in March 2021 and again in January – February 2022 from residents in support of the imposition of an IHO over the subject properties and a submission from the owner of 115-119 Holt Avenue objecting to the proposed IHO, and these submissions have been considered by the Court.
- 61 The public interest has in fact been served with the operation of the statutory instrument - the IHO - which has provided protection to the subject properties while further investigations have been undertaken, so that the Council, or in this case the Court in the shoes of the Council, can make a decision as to whether the whether the subject properties should be heritage listed under NSLEP 2013.

Considerations

- 62 The power for making an IHO, under s 25(1) of the *Heritage Act*, depends on whether the Council considers that the item may, on further inquiry or investigation, be found to be of local (or state) heritage significance and that

the Council considers is being or likely to be harmed. Under s 29(4) of the *Heritage Act* the Council has the power to revoke the IHO.

- 63 A determination of local heritage significance affords statutory protection to an item when it is listed in Schedule 5 of the Local Environmental Plan (LEP). The purpose of an IHO is to protect the item while the item's local heritage significance is investigated to determine whether it reaches the threshold for listing at a local or state level (*Byron Ventilink Pty Limited v Byron Shire Council* (2005) 142 LGERA 215; [2005] NSWLEC 395 [56]).
- 64 Significance to an area in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item, as assessed against the NSW Heritage Office Guidelines (Exhibit 3), requires that the item reaches a threshold that warrants its inclusion as environmental heritage in Schedule 5 of the LEP.
- 65 The Respondent's heritage expert, Ms Trueman is of the view that on further detailed investigation that 131-133 Holt Avenue should be heritage listed under Schedule 5 of NSLEP 2013 as Victorian semi-detached houses as they meet the threshold for cultural significance for historic, aesthetic and rarity values (Exhibit 4).
- 66 Ms Trueman's evidence is that although the dwellings underwent substantial alterations in 1911 and Federation features were added to the primary façade, they do not detract from the architectural values of the dwellings. Ms Trueman noted that while these additions decrease the legibility of the dwelling as a late Victorian house, the Federation additions add an interesting historic and architectural overlay to the houses rather than detracting from their historic character. Contrary to this, I am of the view that the Federation additions to the dwellings are not an 'overlay', as suggested by Ms Trueman, but are instead an unhelpful intrusion of a period and style of another place and time that does not assist, but blurs the fabric record and diminishes, a reading of the underlying and altered Victorian fabric.
- 67 The Applicant's expert, Mr Oultram (Exhibit C, Tab 17) concludes that 131 and 133 Holt Ave are of some interest but do not meet the NSW Heritage Office Guideline's threshold for listing as heritage items.

- 68 In regard to the competing positions of the heritage experts on the heritage significance of the properties, I prefer and accept Mr Oultram's evidence. The considerable research and investigation that has been undertaken in relation to 131 and 133 Holt Avenue, has demonstrated that in quantitative (Exhibit J) and qualitative terms (Exhibit C Tabs 13-17), the heritage significance of the dwellings has been significantly compromised.
- 69 Having viewed the site and considered the evidence of the experts it is apparent that the original house has been subdivided into two dwellings, much of the internal fabric has been removed, the internal layout has been reconfigured, more recent modifications to the rear have occurred to the kitchens and bathrooms and the streetscape presentation of the house has been significantly altered with extensions on either side and to the rear, the replacement of the roof cladding, removal of the chimneys, changes to verandahs and removal of the front fences. Given the extent of changes that have occurred, I am of the view that neither dwelling provides a good example of Victorian or Federation period architecture.
- 70 I am satisfied with Mr Oultram's assessment that on further investigation the items are not likely to be found and do not reach a level for heritage listing that would satisfy any of the relevant criterion when assessed against the NSW Heritage Office Guidelines for inclusion on the heritage schedule of the Local Environment Plan.

Conclusion

- 71 I am satisfied that the IHO has served its statutory purpose in protecting the items allowing further research to be undertaken and that the further research has unequivocally established that neither 131 or 133 Holt Avenue are of heritage significance.
- 72 Having considered all of the evidence before me, I am not persuaded that the properties are worthy of a local heritage listing on any other subsequently discovered grounds. The research and reports that have been undertaken and provided to the Court in evidence are thorough and comprehensive and I am satisfied that any further investigation will not illicit additional information that

would change the finding that the items do not reach the threshold for local heritage listing. On that basis, it is appropriate to revoke the IHO.

73 There is no need to consider the second limb of s 25(2) of the *Heritage Act*, regarding the risk of harm to the item, as the first limb is not satisfied.

74 I am satisfied that the part of the IHO over the two properties, 131 and 133 Holt Avenue, can be revoked.

Orders

75 The orders of the Court are:

- (1) The appeal is upheld.
- (2) The part of the Interim Heritage Order published in the NSW Government Gazette No 103 and dated 11 March 2022 over “The properties known as 131-133 Holt Avenue Cremorne” the land described in schedule B”, is revoked.
- (3) The exhibits are retained.

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Lynne Sheridan

Acting Commissioner of the Court

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