



Land and Environment Court New South Wales

Case Title: Dove & Lee Investments Pty Ltd v
Woollahra Municipal Council

Medium Neutral Citation: TBA

Hearing Date(s): 20, 21 August 2013

Decision Date: 30 August 2013

Jurisdiction: Class 1

Before: Brown C

Decision: On filing of amended plans and amended conditions that reflect the findings in the judgment, the Court will make the following orders in chambers:

1. The appeal is upheld.
2. DA559/2012 for the demolition of an existing single storey timber cottage and outbuilding and the construction of a part 3 storey and part 4 storey dwelling with pool and single garage at 6 Hargrave Street (also 8 Hargrave Lane) Paddington is approved subject to the conditions in Annexure A.
3. The exhibits are returned with the exception of exhibit 5.

Catchwords: DEVELOPMENT APPLICATION: demolition of an existing single storey timber cottage and the construction of a part 3 storey and part 4 storey dwelling – impact on heritage significance of the Paddington Heritage Conservation Area - bulk and scale

Legislation Cited: Environmental Planning and Assessment Act 1979
State Environmental Planning Policy No 1
Woollahra Local Environmental Plan 1995

Cases Cited: Helou v Strathfield Municipal Council [2006]

Texts Cited:

Category: Principal judgment

Parties: Dove & Lee Investments Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation

- Counsel: Mr J Doyle, barrister (Applicant)
Mr P Rigg, solicitor (Respondent)

- Solicitors: Makinson D'Apice Lawyers (Applicant)
Norton Rose Fulbright Australia
(Respondent)

File number(s): 10451 of 2013

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the refusal of DA559/2012 by Woollahra Municipal Council for the demolition of an existing single storey timber cottage and outbuilding and the construction of a part 3 storey and part 4 storey dwelling with pool and single garage at 6 Hargrave Street (also 8 Hargrave Lane) Paddington (the site).
- 2 The council contends that the development application should be refused because:
 1. the demolition of the single storey timber cottage will adversely affect the heritage significance of the Paddington Heritage Conservation Area (the Paddington HCA), and
 2. the bulk and scale of the proposal is inconsistent with adjoining and nearby buildings, particularly the rear building line.

- 3 The council raised additional contentions in relation to loss of privacy, loss of views, impact on existing trees, access to the garage and the location of the pool however these contentions were not pressed by the council following additional evidence and minor amendments to the plans (see par 57).
- 4 A number of local residents provided evidence on the site inspection and supported the council's contentions, particularly the demolition of the existing cottage.

The site

- 5 The site is Lot 47, Section 4 in DP180. It is 6.059 m wide and 32 m long, with frontages to both Hargrave Street and Hargrave Lane and an area of 195.1 sq m. The site has an approximate fall of 3 m from Hargrave Street, with a sandstone retaining wall on the boundary. From the toe of the retaining wall at Hargrave Street to the kerb of Hargrave Lane there is an approximate fall of 1.7 m.
- 6 The existing building is a single storey 2 bedroom timber cottage originally built around 1882. It is currently vacant. The cottage is orientated to Hargrave Lane, with no structure at the Hargrave Street frontage beyond a metal fence on the boundary and a spiral staircase that leads to the rear of the cottage.
- 7 The surrounding lands are occupied by terrace housing of 3 to 4 storeys fronting Hargrave Street, most of which have garaging from Hargrave Lane.

Relevant planning controls

- 8 The site is zoned Residential 2(a) under *Woollahra Local Environmental Plan 1995* (LEP 1995). The proposed use is permissible with consent in this zone. Clause 8(5) states:

(5) The Council shall not grant consent to the carrying out of development on land to which this plan applies unless the Council

is of the opinion that the carrying out of the development is consistent with such objectives of this plan and of the zone within which the development is proposed to be carried out as apply to that development.

9 The relevant plan objectives are:

- (2) The objectives of this plan are:
 - (a) in relation to residential development:
 - (i) to promote the development of land to which this plan applies as a comprehensively planned residential community providing recreational, commercial, retail and community facilities of a type which are appropriate to meet the needs of the population to be accommodated,
 - (g) in relation to heritage conservation:
 - (i) to identify heritage items and heritage conservation areas and to provide measures for their conservation, protection and enhancement,
 - (ii) to ensure that new development is undertaken in a manner that is sympathetic to and does not detract from the heritage significance of heritage items and their settings and of heritage conservation areas,
 - (iii) to encourage the restoration or reconstruction of buildings or works which are heritage items or buildings and works that contribute to the character of heritage conservation areas,
 - (iv) to enable the adaptation of existing non-residential buildings of heritage significance in a manner which is compatible and sympathetic with the fabric and character of the building or works and the use and fabric of neighbouring lands,
 - (v) to provide for the detailed control of development associated with or in proximity to heritage items and heritage conservation areas,
 - (vi) to require, when considered necessary, the consideration of a statement of heritage significance or a conservation plan before consent is granted for development relating to a heritage item or development within a heritage conservation area, and
 - (vii) to protect sites of archaeological significance,

10 The zone objectives are:

- (a) to maintain the amenity and existing characteristics of areas predominantly characterised by dwelling-houses,
- (b) to allow certain non-residential development of low intensity which is compatible with the residential character and amenity of the locality,
- (c) to improve access to and along the Sydney Harbour foreshore where opportunities arise, and
- (d) to protect the environmental attributes of the coastal and foreshore lands.

11 Clause 12 provides for a maximum height of 9.5 m. The proposed development has a maximum height of 11.59 m and an objection under *State Environmental Planning Policy No 1 – Development Standards* (SEPP 1) was provided to show that strict compliance with the development standard is unnecessary and unreasonable in the circumstances of this case. The SEPP 1 objection was seen by the council as being well founded and after reading the SEPP 1 objection, I concur with the council's conclusions.

12 Clause 28(2) states:

(2) The Council shall not grant consent to an application required by subclause (1) unless it has taken into consideration the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage conservation area.

13 *Paddington Heritage Conservation Area Development Control Plan 2008* (the DCP) applies. Section 2.3 provides the Desired future character of the Paddington HCA, s 2.5 provides requirements for Contemporary design in Paddington, s 4.3.1 provides requirements for Single-storey buildings and s 4.4 provides requirements for Infill developments.

Should the cottage be demolished?

The Paddington Heritage Conservation Area

14 Section 2 of the DCP describes the significance of the Paddington Heritage Conservation Area. Section 2 relevantly states:

Paddington is a unique urban area which possesses historical, aesthetic, technical and social significance at a National and State level. An important factor in the significance of Paddington is its exceptional unity, encompassing, scale, character, history, architecture and urban form.

The built environment of Paddington is an excellent example of the process of nineteenth century inner city urbanisation of Sydney where the process was largely completed by 1890. The predominant Victorian built form is an excellent representative example of the phenomena of land speculation and a 'boom' building period between 1870 and 1895.

The terraces of Paddington clearly trace the evolution of the imported English Georgian and Regency terrace models into the distinct Australian style evident in the Victorian era terraces

Paddington retains many significant types of buildings that represent all phases of the suburb's historical development. These building types range from modest, small-scale workers' cottages, to remnant examples of former gentry mansions, boom style middle-class terrace houses, apartment blocks and contemporary infill development all of which are set in a varied network of streets, lanes and pedestrian accessways which reflect the phases of subdivision and development.

Paddington provides vast opportunity for research, education and interpretation through the physical layout of its road network, its subdivision pattern and the varied form of buildings. These buildings provide an excellent record of past technologies and domestic lifestyles through features such as original external and internal building fabric, detailing and room layouts. The terrace houses show the evolving attitudes towards families and the home from the early nineteenth century to the late twentieth century.

15 Section 2.3 of the DCP describes the Desired future character of the Paddington HCA in the following terms:

This Plan seeks to achieve a desired future character for the Paddington Heritage Conservation Area which:

- retains the unique National heritage significance of Paddington and recognises it as a rare and distinctive urban area
- reinforces the area as a special residential precinct
- retains and promotes evidence of the historical development of the area and enables interpretation of that historical development
- retains the cohesive character evident in the low scale, high density built form
- retains distinctive features such as parapets, chimneys, mixture of roofs, complex of roads, laneways and alleyways, consistency of colours, subdivision patterns and buildings which follow the landform and the distinctive patterns of terrace house groups
- continues to cater for varied uses and building types within the residential area
- enables people to walk or cycle to shops, public transport, schools, parks and entertainment facilities in a safe, pleasant and healthy environment
- shares street spaces more equitably between pedestrians and various transport modes

- provides attractive and purposeful shopping areas for locals as well as tourists
- provides cleaner streets and footpaths, enhances views and preserves vistas
- exhibits contemporary design excellence

The timber cottage

- 16 The Revised Heritage Impact Statement prepared by Mr Richard Mackay (the Revised HIS)(Annexure A, Exhibit 3), for the applicant, provides the following Statement of Significance for the cottage:

The cottage at 6 Hargrave Street / 8 Hargrave Lane is an example of a late nineteenth-century Victorian weatherboard cottage. However, it has been altered and added to unsympathetically, which has resulted in compromised integrity and intactness of the original cottage fabric.

It has some historic significance as part of the second (1875) subdivision of the James Underwood Paddington Estate, and as a cottage constructed in the late nineteenth century (1882). However, this significance is not to an extent that has warranted it being listed individually as a heritage item.

Neither of the standing buildings on the site (the cottage and the outbuilding) has been assessed as having heritage significance at a local level.

- 17 The contribution to the Paddington HCA is described as:

The subject building is an example of a Victorian weatherboard cottage from the late nineteenth century. It provides evidence of the early development of Paddington. The building's historic and aesthetic values contribute to the heritage significance of the Paddington HCA, notwithstanding the previous alterations, its location in a secondary street/lane and its immediate streetscape context comprising mostly garages, etc. The building is therefore assessed as being a contributory item to the HCA.

Planning principle

- 18 The planning principle in *Helou v Strathfield Municipal Council* [2006] NSWLEC 66 addresses the demolition of a contributory building and provides 6 principles, being:

1. What is the heritage significance of the conservation area?
2. What contribution does the individual building make to the significance of the conservation area?

The starting point for these questions is the Statement of Significance of the conservation area. This may be in the relevant LEP or in the heritage study that led to its

designation. If the contributory value of the building is not evident from these sources, expert opinion should be sought.

3. Is the building structurally unsafe?

Although lack of structural safety will give weight to permitting demolition, there is still a need to consider the extent of the contribution the building makes to the heritage significance of the conservation area.

4. If the building is or can be rendered structurally safe, is there any scope for extending or altering it to achieve the development aspirations of the applicant in a way that would have a lesser effect on the integrity of the conservation area than demolition?

If the answer is yes, the cost of the necessary remediation/rectification works should be considered.

5. Are these costs so high that they impose an unacceptable burden on the owner of the building? Is the cost of altering or extending or incorporating the contributory building into a development of the site (that is within the reasonable expectations for the use of the site under the applicable statutes and controls) so unreasonable that demolition should be permitted?

If these costs are reasonable, then remediation/rectification (whether accompanied by alteration and/or extension or not) should be preferred to demolition and rebuilding.

6. Is the replacement of such quality that it will fit into the conservation area?

If the replacement does not fit, the building should be retained until a proposal of suitable quality is approved.

- 19 The heritage experts addressed *Helou* and stated that the heritage significance of the Paddington HCA is agreed between the experts and is appropriately summarised in the Revised HIS (Planning Principle 1). There is general agreement about the contribution made by the individual building to the significance of the Paddington HCA, (Planning Principle 2). The building is not structurally unsafe (Planning Principles 3 and 4) and while there is some disagreement about the cost of required works, the experts agree that decisions regarding the retention or removal of the timber cottage should not depend on the cost of the works which would be required to return the extant building to a habitable standard (Planning Principle 5). Lastly, and in the event that the Court forms the view that the existing cottage on the site may be demolished, the experts agree that the height, bulk and scale of the proposed building is not excessive from a heritage perspective (Planning Principle 6).

The dispute

- 20 Expert evidence for the council was provided by Mr Stephen Davies, a heritage consultant and for the applicant by Mr Richard Mackay AM, a heritage consultant and Mr Peter Lonergan, a heritage architect. Mr Mackay's evidence focused on the heritage aspects of the proposal and its significance with the Paddington HCA, as set out in the Revised HIS. Mr Lonergan focused on the existing condition of the cottage and the likely need for reconstruction of part of the cottage, but in a heritage context. He prepared a document titled Fabric Analysis Report (Annexure C, Exhibit 3). The applicant also relied on a report from Matt Shuter+Associates (the Shuter Report) on fire safety compliance and remedial works necessary to render the cottage safely habitable, particularly in relation to the BCA (Annexure D, Exhibit 3). Reference was also made to the Demolition Report and Management Plan (the Demolition Report) submitted with the development application (Exhibit A).
- 21 There was considerable agreement between the experts, including agreement on the extent of fabric that requires repair and that the timber cottage is a contributory item to the Paddington HCA. They also agree that, as a general principle, buildings, which contribute to conservation areas, including the Paddington HCA, should be retained and conserved.
- 22 Where the experts differ is on the question of whether or not the reconstruction of the cottage (using some recycled materials), in a manner that would make the building habitable and compliant, would result in meaningful conservation and a worthwhile continuing contribution to the Paddington HCA. This involves the following areas of disagreement:
- the contribution the cottage makes to the Paddington HCA,
 - whether the cottage is habitable and BCA compliant,
 - amount of existing building fabric that can remain,
 - costs to undertake necessary work, and
 - appropriateness of a garage to Hargrave Lane.

Contribution the cottage makes to the Paddington HCA

- 23 Mr Davies states that the timber cottages of Paddington, including the subject cottage, have been specifically recognised in planning documents since 1976 and have been subsequently referred to in all updates of the planning controls, including DCPs, since that time. There are at least 67 timber cottages in the Paddington HCA on the Woollahra side of Oxford Street. Whilst timber dwellings are also found in principal streets they are more likely found in the subservient streets or rear lanes where there have been generally smaller subdivision lots. Although this dwelling is not a smaller or half lot it does represent one in a collection of 14 cottages in Hargrave Lane, mostly constructed of timber. This is therefore a strong characteristic of the Paddington HCA and one, which contributes to the significance of the area.
- 24 Mr Davies consider the building, as a timber cottage, makes as important a contribution to the significance of the Paddington HCA as any of the original buildings that make up the original subdivided estates of Paddington. He disagrees with the assessment of the significance of the property based on the *NSW Heritage Manual Guidelines* used in the Revised HIS of Mr Mackay in that the building is not uncharacteristic of the houses constructed in the late 19th century in Paddington as even the subject lane has a number of small timber dwellings of the period (Historical significance). Whilst it is not characteristic of the "terraces" that were built in the late 19th century, it is still aesthetically significant as a variation to those terraces and being a representative example of the timber cottage of the period and of Paddington (Aesthetic significance). Mr Davies also believes it is rare for such a dwelling to have such an intact interior and therefore the dwelling has research significance as to type and style of construction (Technical/Research significance). Mr Davies does not agree that the building is so highly altered and compromised that conservation is not worthwhile in this case. This has been shown in the evidence of the MBA Report and Mr Lonergan's Fabric Analysis. Whilst it is agreed that the building does not reach the threshold for individual listing that does not

mean it is any less significant as a contributor to the area for its representativeness (Representativeness).

- 25 Mr Lonergan states that the contribution of the building to the Paddington HCA, should be assessed in its current state of intactness and condition, not its potential conserved, restored or reconstructed state. On this basis, its contribution is its anachronistic persistence and its imperfection and should be considered in the context of all the single storey buildings as referred to in the DCP (s 4.3.1). In particular, timber cottages are significant because of their rarity and their historical association with the evolution of the early Paddington Village and the artisan community that developed at the junction of Glenmore Road and New South Head Road. In this group, the contribution of this one building would be little. Single storey buildings and timber cottages in the Paddington HCA are not so rare that they are endangered and the associative value of the cottage is represented in other cottages in the Paddington HCA. Mr Lonergan states that the cottage makes no contribution to Hargrave Street.
- 26 In relation to the *NSW Heritage Manual Guidelines*, Mr Mackay states that the cottage is not of sufficient heritage value to warrant listing as a heritage item, but does contribute to the Paddington HCA. In his Revised HIS, Mr Mackay states that the property is uncharacteristic of the terrace houses constructed in the late 19th century but has some historical significance of the historic development of Paddington (Historical significance). The cottage is typical of a Victorian weatherboard cottage and does not display any particularly remarkable or special aesthetic features (Aesthetic significance). Mr Mackay states that the cottage, because of its integrity and intactness, has little to yield in terms of useful information (Technical/Research significance) and while timber cottages are becoming rarer, he notes that there are approximately 80 in Paddington, with the majority in better condition and are more representative of 19th century timber cottage than the subject cottage (Rarity). The multitude of internal and external alterations and additions and the current condition of the cottage make it a highly altered and compromised 19th century timber

cottage (Representativeness). For these reasons, there is insufficient reason for listing as a heritage item.

Whether the cottage is habitable and BCA compliant

27 Mr Davies considers the dwelling is fit for human habitation, with minor works, as the dwelling was lived in and comfortably furnished in the last 12 months as illustrated in the Revised HIS. This is confirmed by the works recommended in the Standard Building Inspection Report 8 Hargrave Lane, Paddington, prepared by NSW Master Building Inspectors (the MBA Report), dated 17 January 2012, which provides for relatively minor expenses to make the building habitable.

28 Mr Lonergan and Mr Mackay consider that the dwelling is not fit for habitation and is not compliant with the BCA particularly in relation to fire safety compliance based on the comments in the Shuter Report.

Amount of existing building fabric that can remain

29 Mr Davies relies on the MBA Report as submitted by the applicant and submitted with the development application. As the Demolition Report has aspects of BCA compliance that need to be tested Mr Davies is unable to rely on this report. He agrees with Mr Lonergan that much of the fabric could be retained in situ however he does not agree that the cottage is at the end of its useful life and certainly not at the end of its desirable life.

30 Mr Lonergan states that all of the fabric could be retained in situ, however it is not in good condition nor does it comply with current fire safety standards. It does not follow that it could not be retained, but clearly the cottage, after 135 years of occupation with little or no adequate maintenance, is at the end of its useful or desirable life.

31 Mr Mackay relies on the information contained in information provided in the Fabric Analysis, MBA Report and Demolition Report in forming his opinion that the building is not able to be used safely without substantive works that will prejudice the heritage significance of the cottage.

Costs to undertake necessary work

32 Mr Davies refers to the MBA Report and concludes that the costs of making the building habitable and comfortable for occupation obviously varies from a simple refit to a complete upgrade. In his opinion, and having regard to Mr Lonergan's evidence, Mr Davies remains unconvinced that the costs to rectify the building are not within reasonable expenditure in this area. The interior lining of the cottage, much of it cedar, is original and is in good condition. The frame is hardwood and is sound and the floors are hardwood. Mr Davies maintains that the timber roof structure is able to be made good. The boards on the eastern side are also able to be repaired and primarily retained and painted. For these reasons, Mr Davies considers that the building could be restored to comfortable and safe habitable condition for up to \$300,000, being on the lower end of Mr Lonergan's estimate and higher than the MBA Report. This would include the replacement of the western wall if this was to be considered necessary. If the building were to be made good by repair and new fittings then Mr Davies understands that the building would not need to be brought up to current BCA standards. This upgrade would not preclude a new and contemporary pavilion built on the Hargrave Street frontage in association with the retained cottage, either linked or separate.

33 Mr Lonergan notes that the cost estimated in the MBA Report and would generally concur with the scope of the work, but probably double the cost depending on the nature and extent of the works, materials and finishes; \$300, 000 - \$500, 000 including a landscape setting to the yard.

Appropriateness of a garage to Hargrave Lane

34 Mr Davies considers that a garage is not appropriate at Hargrave Lane as the site frontage has been occupied by the subject timber cottage, albeit with alterations since 1882 and the cottage should be conserved. The form, materials and presence of the gable-ended cottage has been in existence on the lane for approximately 131 years. Garages are typical of laneways in Paddington and in principle Mr Davies does not consider a garage to be an

intrusive building form in laneway locations and should the Court determine that the subject cottage may be demolished, Mr Davies has no objection to a garage in this location.

- 35 Similarly, Mr Lonergan and Mr Mackay conclude that if the Court forms the view that the building on the site may be demolished a garage form at the rear, as designed is appropriate.

What is the impact on the heritage significance of the Paddington Heritage Conservation Area?

- 36 Mr Davies maintains that the building can be repaired and made habitable. It was habitable a year ago and, despite being left unlocked and able to be generally accessed, it still remains habitable with a reasonable upgrade of services and repair. Timber buildings are relatively easy to repair and rebuild in part. No timber building of the subject age in Paddington has not been repaired or is without need of some repair. This is part of the conservation process of preservation, restoration, reconstruction and adaptation. Even with a new western external wall, Mr Davies believes the rest of the cottage can be conserved in some form and the building would make a meaningful contribution to the Paddington HCA as an extant early timber dwelling in accordance with its assessed significance and the current planning controls.

- 37 Mr Lonergan states that the contribution of the building is ethereal, and does not warrant reconstruction. Also, the missing elements, such as windows, doors are unknown, so any restoration and reconstruction could only be conjectural and this would not be a meaningful contribution to the Paddington HCA and in some ways could confound the meaning of the building.

- 38 Mr Mackay states that the Fabric Analysis, the Shuter Report, the MBA Report and Demolition Report indicate that retention of the existing cottage would necessitate substantial amendments and major structural works to be undertaken for the building to be habitable and meet BCA and fire safety

requirements. The essential new work would compromise the integrity of the building to the extent that it would lose nearly all of its contributory value. It would in effect become a reconstruction using some re-cycled original materials. This would not deliver a meaningful or appropriate conservation outcome.

Will the proposal unacceptably affect the heritage significance of the heritage conservation area?

- 39 The experts agree that the cottage does not warrant listing as a heritage item under the *NSW Heritage Manual Guidelines* but accept that the cottage has heritage significance. Mr Davies places this significance higher than Mr Mackay and Mr Lonergan.
- 40 The fundamental difference between the parties is whether the cottage should be demolished and in accordance with cl 28(2), whether “the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage conservation area”. The council raised no issue with the form of the proposed building that fronts 6 Hargrave Street and its relationship with the Paddington HCA beyond the extension towards Hargrave Lane and which is addressed later in the judgment.
- 41 In considering the expert evidence and with the benefit of an inspection of the cottage and the surrounding area, I am satisfied that the conclusions of Mr Mackay and Mr Lonergan are reasonable in the circumstances, for a number of reasons. First, and accepting the view of the experts that the potential retention of the cottage is the starting point in any consideration of the development application, it does not necessarily follow that a contributory item in the Paddington HCA should be preserved for this reason alone. It is necessary to look at the particular condition and other aspects of the building in question and in this case, whether the extent of reconstruction required affects its significance as a contributory item.

42 Second, I do not accept that the cottage can reasonably be used as a dwelling without some significant reconstruction and repairs. Even though the cottage was occupied some 12 months ago, and contrary to the evidence of Mr Davies, the MBA Report identifies that many repairs are required. The MBA Report states that "considerable repairs" are required to the roof and exterior of the house. The floors, front balcony, bathroom, laundry, kitchen and exterior are described as being in "poor condition". The MBA Report concludes (at p6) by stating:

Repairs to this house as detailed above constitute a major renovation undertaking that may involve costs in excess of demolishing this house and constructing a new dwelling. Furthermore, some safety risks are present in relation to the presence of asbestos containing materials, subsidence of the floors, poorly supported roof and unsafe electrical wiring.

43 Third, the Fabric Analysis Report is comprehensive and as I understand, is generally accepted by Mr Davies although his opinion that the cottage need not be demolished remained. The Fabric Analysis raises the following main points:

- the fabric is not consistent with the 1886-95 water board plans or the 1956 plans,
- the weatherboards are continuous for the current length of the house (except the north and south verandah) the roof pitch and frame is consistent with this being original fabric. The form is original.
- the two brick fireplaces and chimneys sit on a sandstone rubble base as do the bearers. At their mid-spans, there is evidence that the bearers have been packed from time to time but are original as are all the structural timbers. These are in varying condition from poor to decrepit and have been altered along the eastern elevation.
- all of the window openings, window glass, are altered probably around the 1970's. The southern weatherboards were replaced around the same time. These are in very poor condition and are not proportioned sympathetically with the type or period of the house.

- the front door is around 1982 or later. The cast iron decoration is not original, possibly around 1961-1977 but is old and in very poor condition. It has been attached to the verandah when the verandah boards were replaced which appear to be in the 1960's. The stone base is original, the cement render is not, and is in poor condition.
- the room layout is original until the kitchen and bathroom were reconstructed during the 1970's where a new infill slab has been poured and cork tiles placed on top.
- the tap ware and sanitary ware is early 1970's (except for the shower-rose and the iron bath evidently once in the bathroom has been discarded along the side passage of the cottage).
- the plumbing is plastic but the wall linings are asbestos and consistent with the time of 1974-77. The rear elevation is softwood machined weatherboards and double glass doors of the same vintage.
- the internal joinery has been installed over the internal lining and the skirting boards predate this but are not original. The ceiling in the front room predates but is also not original.
- all of the pressed metal vents are early but are not original, but probably early.

44 In my opinion, the extent of non-original fabric or fabric that needs repair and reconstruction supports the conclusions of Mr Mackay and Mr Lonergan.

45 Fourth, the Shuter Report and the Demolition Report address the consequences of upgrading the building to satisfy the minimum requirements of the BCA for a Class 1a building (or detached house). As set out in the Shuter Report, these are:

(a) Western Wall - The existing western wall would need to be completely demolished and replaced with a minimum 90mm masonry fire resisting wall. Note, that it would not be possible to re-clad the existing timber framing with fire rated material, as such fire rating must be installed to the external side of the frame to prevent fire spread TO the subject building to meet BCA Clause 3.7.1.5(a). This is not possible as there is no external access along

the western boundary due to the close proximity of the neighbouring building.

(b) Eastern Wall - The existing weatherboard cladding would need to be stripped from the eastern timber-framed wall and replaced with a fire resisting board that provides for at least 1 hour protection against the spread of fire (60/60/60 FRL) tested in accordance with Australian Standard AS1530.4-2005 "*Fire Resistance Test of Elements of Construction*" to meet BCA Clause 3.7.1.5(a). The existing weatherboard could not be installed back over the top of the fire rated board as such fire rated boards must be installed strictly in accordance with the tested prototype to ensure the required fire resistance is not compromised.

(c) Eastern Windows - The three existing window openings in the eastern elevation would need to be replaced with non-openable fire windows to satisfy BCA Clause 3.7.1.5(b). This causes a subsequent non-compliance as two of the windows in this elevation serve habitable rooms and are relied upon to provide natural ventilation (which is required under the BCA for all habitable rooms).

- 46 There was some discussion by the experts on how the minimum requirements of the BCA for a Class 1a building could be achieved and at the same time maintaining the existing walls however there was no agreed solution. While Mr Lonergan had some experience in the BCA through his architectural practice, Mr Davies indicated his lack of detailed experience in this area. In my view, the Shuter Report has been prepared by a person with expertise in the BCA and should be given considerable weight in the assessment of BCA requirements particularly given the absence of any contradictory evidence.
- 47 I agree with Mr Mackay and Mr Lonergan that works that need to be undertaken for the building to be habitable and meet BCA and fire safety requirements would compromise the integrity of the building to the extent that it would lose nearly all of its contributory value. It would in effect become a reconstruction, even using some re-cycled original materials, and would not provide a meaningful or appropriate conservation outcome for the cottage.
- 48 Fifth, and while Mr Rigg, for the council, submitted that the existing cottage could be retained and used in conjunction with the proposed building

facing Hargrave Street, I do not accept that this is practical solution given the absence of any reasonable areas of landscaping and private open space and any proper assessment against the councils planning controls.

49 In accordance with cl 8(5), I find that the proposed development is consistent with the objectives of LEP 1995 and of the 2(a) zone that apply to the development.

50 In accordance with cl 28(2), I find that the demolition of the existing cottage will have a small negative impact on the heritage significance of the Paddington HCA but the negative impact is not so significant that it would warrant the refusal of the development application.

The rear building line

51 The rear building line for the proposed dwelling was addressed by Mr Lonergan and Mr Stuart McDonald, a town planner, for the council. The extension of the rear building line of the proposed dwelling beyond the adjoining terrace houses was also raised by a number of residents when they provided evidence on the site inspection.

52 Mr McDonald maintains that the rear building line for the proposed dwelling should be reduced to align with the adjoining row of terraces whereas Mr Lonergan accepted that the building could be changed to align with the adjoining terrace but his preferred position is an extension of around 1 m. This extension would allow better utilisation of the floor space in the proposed development and at the same time, not overly impact on the consistency of the rear alignment of the existing terraces.

53 Clause 4.4 of the DCP addresses Infill developments and relevantly states:

Explanation

The term 'infill development' refers to new development within an existing urban context.

The opportunities for infill development in Paddington provide the chance for the continuing enrichment of the area by adding new built form which is an expression of contemporary life.

As the opportunities for infill development are rare the design for such sites will be required to demonstrate an appropriate response to context and an approach which enhances the character of Paddington and its cultural significance.

Council does not necessarily advocate replication of historical architectural styles for infill development. A contemporary design approach which respects the historic context and achieves a cohesive relationship between the existing and new urban fabric is required.

54 The objectives are:

O1 To encourage development on infill sites which reflects contemporary values and employs contemporary design, and through a design idiom, materials and construction technique provides an appropriate response to relevant aspects of the historical context of Paddington.

O2 To ensure that new development on infill sites is designed and located to achieve a cohesive relationship between new and existing urban fabric and which retains and enhances the cultural significance of the area.

O3 To ensure that infill development respects the scale and setting of adjacent contributory buildings.

55 In considering s 4.4, I agree with the conclusions of Mr McDonald in that the objectives are best served by a rear building line that aligns with the adjoining row of terraces. In this way, the building will “achieve a cohesive relationship between new and existing urban fabric” and “respect(s) the scale and setting of adjacent contributory buildings”. Even though there are terraces which appear to extend beyond the rear line of the adjoining terraces, these are further along Hargrave Street. In my view, the appropriate buildings to test the relationship between new and existing urban fabric are those adjoining.

56 I agree with Mr McDonald and Mr Lonergan that an architectural framing structure at the rear is appropriate but should not include any floor area and should not exceed 500mm in depth.

Directions

57 As the judgment requires some amendments to the plans and other amendments arose during the hearing, it is more efficient have a final set of plans that address these amendments. These plans can then be referred to in the development consent to avoid any confusion. The changes relate to:

- a rear building line that aligns with the adjoining row of terraces,
- details of the architectural framing at the rear,
- reduced garage length,
- details of the new open elevated decking supported by piers near tree T3,
- details of the fill on the yard southwest of tree T3,
- details of the retaining wall on the eastern boundary, and
- additional requirements to condition 4, B4 and E8 as set out in Exhibit 7.

58 On filing of amended plans and amended conditions that reflect the findings in the judgment, the Court will make the following orders in chambers:

1. The appeal is upheld.
2. DA559/2012 for the demolition of an existing single storey timber cottage and outbuilding and the construction of a part 3 storey and part 4 storey dwelling with pool and single garage at 6 Hargrave Street (also 8 Hargrave Lane) Paddington is approved subject to the conditions in Annexure A.
3. The exhibits are returned with the exception of exhibit 5.



G T Brown

Commissioner of the Court

Proposed amendments to Paddington HCA controls

As shown in Draft Woollahra DCP 2014

Part C - Heritage Conservation Areas

C1 - Paddington

Note: Proposed additional text for timber cottages is shown underlined.

1.1.4 Objectives

The objectives of this chapter are:

- 01 To facilitate the implementation of the objectives and provisions relating to heritage conservation contained in the Woollahra LEP.
- 02 To acknowledge and conserve the unique National heritage significance of the Paddington Heritage Conservation Area.
- 03 To conserve the significant types of buildings within the Paddington Heritage Conservation Area.
- 04 To provide guidelines and controls which seek to protect the significant character of the Paddington Heritage Conservation Area and which encourage contemporary design which responds appropriately to that character.
- 05 To encourage and promote public awareness, appreciation and knowledge of heritage conservation.
- 06 To enhance amenity and heritage values within the Paddington Heritage Conservation Area.
- 07 To ensure that development is consistent with the heritage significance of the Paddington Heritage Conservation Area.

1.2.1 The significance of the Paddington Heritage Conservation Area

Paddington is a unique urban area which possesses historical, aesthetic, technical and social significance at a National and State level. An important factor in the significance of Paddington is its exceptional unity, encompassing, scale, character, history, architecture and urban form.

The built environment of Paddington is an excellent example of the process of 19th century inner city urbanisation of Sydney where the process was largely completed by 1890. The predominant Victorian built form is an excellent representative example of the phenomena of land speculation and a 'boom' building period between 1870 and 1895.

The terraces of Paddington clearly trace the evolution of the imported English Georgian and Regency terrace models into the distinct Australian style evident in the Victorian era terraces.

Paddington retains many significant types of buildings that represent all phases of the suburb's historical development. These building types range from modest, small-scale, single storey timber and masonry cottages, to remnant examples of former gentry mansions, boom style middle-class terrace houses, apartment blocks and contemporary infill development, all of which are set in a varied network of streets, lanes and pedestrian accessways which reflect the phases of subdivision and development.

Paddington has a multitude of important historical and social associations. It is linked with the early transport routes along South Head Road (Oxford Street) and Point Piper Road (Jersey Road), the construction of Victoria Barracks in the 1840s, the gentry estates, prominent figures of the early colony, the speculative building boom between 1870 and 1890, and the development of Australian tennis at the White City site. Its historical and social associations extend to the periods of occupancy by immigrant groups and minority groups including the Chinese market gardeners, the Jewish community around the turn of the century, the European immigrants in the 1950s and an alternative artistic and intellectual population in the 1960s and 1970s. Today Paddington has a high level of social esteem and is regarded as one of Sydney's most desirable inner-city urban areas. The changing sociology of Paddington demonstrates phenomenal variations in status and changes in community attitudes to the 19th century suburb.

Paddington has important associations with the evolution of the conservation movement in Australia, in particular with the actions by the National Trust and the Paddington Society, which ensured its conservation at a time of redevelopment threat in the 1960s. It is significant as the first suburb classified by the National Trust, a community based, non-government organisation committed to promoting and conserving Australia's heritage.

Paddington has a unique aesthetic significance due to the superimposition of the built form on a sloping topography which overlooks Sydney Harbour and its foreshores. The coherent and extensive Victorian built form comprising groups of terrace buildings on narrow allotments which step down hills, turn corners or sit in ranks along tree lined streets produces a singularly recognisable image.

Paddington provides vast opportunity for research, education and interpretation through the physical layout of its road network, its subdivision pattern and the varied form of buildings.

These buildings provide an excellent record of past technologies and domestic lifestyles through features such as original external and internal building fabric, detailing and room layouts. The terrace houses show the evolving attitudes towards families and the home from the early 19th to the late 20th century.

1.2.2 Building types in Paddington

The built environment of Paddington reveals the historic development of the area. Building types and styles exemplify stages of development and support the overall cultural significance of the area.

Examples of the 1840 to 1870 phase of development include small workers' cottages and boldfaced terraces from the original Paddington village, and grand mansions from the large gentry estates built along the ridgelines, such as Juniper Hall. Rows of Victorian boom style terraces were built between 1870 and 1910 on the subdivisions of the early land grants and large estates.

Later development which occurred on further subdivisions, vacant blocks, or on redeveloped sites includes Federation era terraces, Inter-War apartment buildings, 1960s and 1970s high rise style units, and more recently some excellent examples of contemporary infill.

The building types most commonly found in Paddington include multi-storey and single-storey terrace house rows, single-storey timber and masonry houses, freestanding houses, mixed commercial and residential buildings, commercial and industrial buildings, pubs and contemporary infill buildings. To ensure that development proposals recognise and respect the particular characteristics of particular building types, Section 1.3 of this chapter sets out specific objectives and controls for these and other building types.

1.2.3 Character elements

The character elements represent the distinguishing features of the area that are to be retained. Applications to change the character elements will be assessed against the desired future character controls.

Introduction

Paddington has a valuable historic and predominantly 19th century residential character, which is represented by late-Victorian terrace houses, modest worker's cottages, including single-storey timber and masonry houses, and former mansions. It contains a mix of shops and hotels, commercial buildings and a few surviving light industrial and warehouse buildings with many being adapted to residential uses.

To protect the heritage significance of Paddington it is important to retain and conserve the many building types that represent the significant phases of the suburb's historical development. These are significant buildings and many have original outbuildings, fences and garden settings that are important elements to preserve.

Other townscape features such as significant trees and historical sandstone kerbs and gutters also contribute to the significance of the Paddington HCA.

It is particularly important to conserve the significant fabric and layout of the original front building section which contains the main rooms. This section, including its roof, is referred to as the "principal building form", and commonly faces the street front, with a secondary section behind. The main rooms often contain the most significant details such as plaster work, timber joinery and fireplace surrounds.

Many terrace houses have a small setback from the street. This area, referred to as the "street front zone", provides an important setting for buildings. The setting for freestanding buildings, including timber cottages, is established with their front, side and rear setbacks.

Additions and alterations to existing buildings and the construction of new buildings should be designed with respect to the architectural character of the building and the context of the significant streetscapes of the Paddington HCA. Retention of original fabric and detail is a key objective.

Reconstruction and reinstatement of missing details and building elements is important and encouraged. This includes the removal of inappropriate building elements.

Even small changes to buildings in Paddington require careful consideration. This is critical when changes are visible from the street or from other public spaces.

Alterations to the rear of properties require detailed consideration so as not to alter the proportion, scale and the cohesion in groups of buildings. Due to the topography and the subdivision patterns, rear elevations are often highly visible from the public domain.

In Paddington, the aim should always be to establish a cohesive relationship between new work and the existing building fabric. Contemporary design must respond appropriately to relevant aspects of the historical context.

Natural and built character elements

The existing distinguishing natural and built character elements of the Paddington HCA include:

- ▶ A topographical form which is shaped into a natural amphitheatre facing north over flatlands and former swamps allowing views to Rushcutters Bay, Sydney Harbour and westwards to the city. This land form also enables internal views of secondary ridges and gullies.
- ▶ A variable and intricate street, lane and pedestrian network. The western side of Paddington, originally the Paddington Village, is characterised by short, angled narrow roads with closed vistas and dogleg junctions influenced by the boundaries of early land grants. Dense rows of cottages and terrace housing often have zero setback.

Later street patterns in the eastern half of Paddington were laid out in the Victorian building boom period. The subdivisions are more strictly ordered with alternating wide streets and rear lanes and set out on a rectangular grid. Development on corner sites is usually sensitive to the pivotal position they occupy in both streetscapes. Streets provide long vistas. Road surfaces are asphalt and kerbing and guttering is a mix of sandstone and concrete.

- ▶ A strong pedestrian character which is reflected in the multitude of passageways, rear and side interconnecting lanes, narrow streets and intermix of residential and non-residential uses. Footpath pavement material is a mixture of asphalt, fly ash concrete and modern concrete.
- ▶ A land use character which is predominantly residential but which also contains a mix of shops and hotels (often located on corners), some commercial buildings, and a few remaining light industrial and warehouse style buildings.
- ▶ Terrace housing which forms continuous facades along the streets and steps down the hillside.
- ▶ Modest housing forms such as single-storey timber and masonry cottages.
- ▶ Variable building heights between terrace groups, one-off buildings and different building types, including timber and masonry cottages.
- ▶ Terrace housing, predominantly in distinguishable groups, which displays similar character in terms of form but variation in architectural styles, surface decorative details, verandahs and balcony design, window, door, roof forms and chimney treatments.
- ▶ A strong contrast between the formal and frequently more decorative front of the terrace to the street and the simple and utilitarian back of the terrace.
- ▶ A street front which in many terraces is characterised by a cast iron palisade fence returning to form side party fencing, a small front garden and path, recessed verandah on the ground floor and balcony on the upper level enclosed by a cast iron balustrade. Other terraces have only a small setback from the street, no front garden, and a cast iron fence to the verandah. Some terraces are built to the front boundary and have an upper floor balcony which cantilevers the footpath. Many Victorian boom style terraces terminate with a street front parapet.
- ▶ Some laneways which retain culturally significant fabric including paling fencing, pedestrian gates, brick lavatories and backyard planting.
- ▶ A restricted palate of materials including stone, painted stucco, cast iron and tessellated tiles, corrugated roof materials and slate, nearly universal to all street frontages.
- ▶ A perceived homogeneity of a Victorian era terrace built form which on close examination is made up of a diversity of building types reflecting the historical development of Paddington.
- ▶ A variety of open space and landscape features which are represented in:
 - flatland parks and playing fields - Trumper Oval, Weigall Sportsground, White City
 - escarpment areas - Trumper Park
 - public open space created by street closures

- early municipal street tree plantings
- pocket parks often created on gap sites within the terrace streetscape;
- remnant established gardens from earlier gentry estates such as the former Scottish Hospital grounds;
- private open space within institutions - Sydney Grammar's Weigall grounds, White City; and
- private gardens which contribute significantly to the townscape quality of streets and laneways.

1.2.4 Desired future character

The desired future character is a vision statement about the future image and function of the Paddington HCA. Applications will be assessed, among other matters, against their ability to satisfy those outcomes relevant to the development proposal.

This chapter seeks to achieve a desired future character for the Paddington HCA which:

- a) retains the unique National heritage significance of Paddington and recognises it as a rare and distinctive urban area;
- b) reinforces the area as a special residential precinct;
- c) retains and promotes evidence of the historical development of the area and enables interpretation of that historical development;
- d) retains the cohesive character evident in the low scale, high density built form;
- e) retains distinctive features such as parapets, chimneys, mixture of roofs, complex of roads, laneways and alleyways, consistency of colours, subdivision patterns and buildings which follow the landform and the distinctive patterns of terrace house groups;
- f) continues to cater for varied uses and building types within the residential area;
- g) retains the diversity of building types including multi-storey and single-storey terrace house rows, single-storey timber and masonry cottages, freestanding houses, commercial buildings, hotels, former industrial buildings, ecclesiastical buildings and public buildings.
- h) enables people to walk or cycle to shops, public transport, schools, parks and entertainment facilities in a safe, pleasant and healthy environment;
- i) provides attractive and vibrant shopping areas for locals and tourists;
- j) provides for sharing of views and vistas; and
- k) exhibits contemporary design excellence.

As Paddington is a living place and will be subject to change over time, Council seeks to encourage new development of a high design standard which respects the significance of the area.

The statement below on contemporary design emphasises the role that modern day design plays in the evolution of Paddington. Issues of contemporary design are relevant to development in the public and private domains.

1.3.1 Single storey buildings

Single storey buildings include timber, stone, brick and weatherboard cottages, terraces, semi-detached houses and single storey shops.

Architectural styles include Georgian, Victorian and Federation. The scale of buildings generally range from the typical small and narrow fronted buildings to, medium to large houses ranging in date from 1840s to 1920s.

Single storey buildings, in particular the timber cottages, are significant because of their rarity. Many single storey buildings are also significant because of their historical association with the evolution of the early Paddington village and the artisan community that developed at the junction of Glenmore Road and New South Head Road.

Additions to these single storey buildings need to be carefully considered. Refer to Figures 2 and 3 for examples of intrusive and non-intrusive extensions.

Objectives

- O1 To retain and conserve single storey buildings.
- O2 To conserve the settings of single storey buildings.

Controls

- C1 Principal building forms and original external materials are to be retained.
- C2 Retain or reinstate façade details and open verandahs.
- C3 Where alterations are required to meet Building Code of Australia requirements, preference should be given to materials that are consistent with traditional materials and finishes.
- C4 Additional storeys are not permitted to the principal building form where the existing roof height will be increased, and changes to the existing roof pitch and eaves height will occur.
- C5 Roof space within the principal building form may be used where there will be no change to the existing roof height, roof pitch, eaves height or ceiling below.
- C6 The addition of dormers or skylights in the rear roof slope of the principal building form is to comply with controls in Section 1.5.1 Dormers and skylights.
- C7 Ground floor additions and pavilion extensions to the rear of single storey cottages must not compromise the principal building form of the cottage.
- C8 Existing setbacks from the front and side boundaries for the principal building form are to be retained.
- C9 Additions of an appropriate form and scale are permitted at the rear of the principal building form if:
 - a) the addition is consistent with the traditional pattern for secondary wing extensions or employs a pavilion style extension;
 - b) the addition has an appropriate roof form that is consistent with the principal building form of the building and its roof;

- c) the addition, other than a pavilion extension, does not exceed a height 300mm below the ridge level of the principal building form; and
 - d) the addition is consistent with the traditional pattern for secondary wing extensions or employs a pavilion style extension.
- C10 Additions to single storey semi-detached and terrace groups must not compromise the architectural character of the pair or the group of houses.

Rear pavilion extension

- C11 A pavilion extension may be permitted if:
- a) it would not have an adverse impact on the heritage significance of the existing building, adjoining properties, or the group of buildings, where the building forms part of a group;
 - b) it is not visible, directly or obliquely, from any part of the street to which the property's street front zone abuts and from the front yard within the street front zone;
 - c) it will have a negligible impact on the amenity of neighbouring properties in terms of loss of sunlight, ventilation and privacy;
 - d) it will not adversely affect the setting of the existing building; and
 - e) it is ancillary to the existing building and will not dominate the existing building in terms of bulk, height and scale.
- C12 A pavilion extension should generally be single storey in height.
- C13 A two storey pavilion extension may be permitted if it meets the requirements of C11.
- C14 Where a pavilion extension is appropriate:
- a) a linking structure should be provided between the principal building form and the pavilion;
 - b) the height of the linking structure must be below the eaves of the principal building form; and
 - c) the linking structure should use lightweight construction to differentiate the new work from the original.
- C15 Where proposed as part of a dwelling house, a pavilion extension is to be designed so that it is not capable of being used as a separate dwelling.

FIGURE 1 Generic version of a single storey terrace

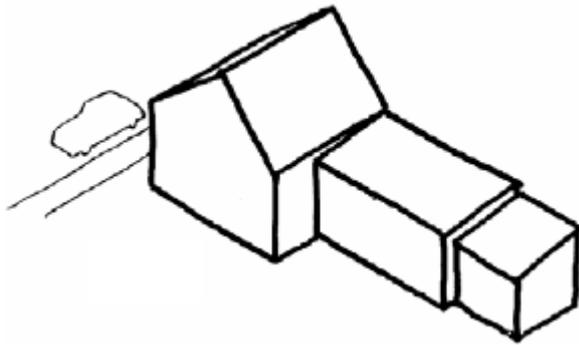


FIGURE 2 Intrusive development

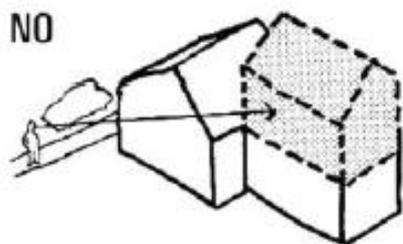
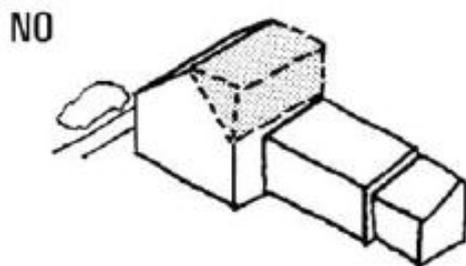
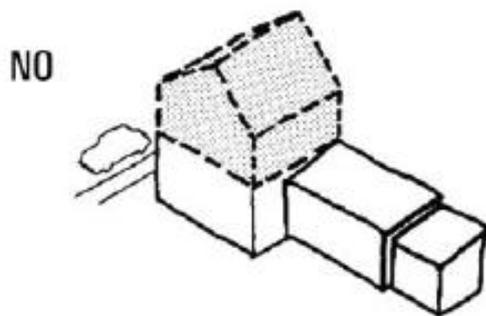


FIGURE 3 Non-intrusive development

