



Land and Environment Court  
New South Wales

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Case Name: Property Development Systems Australia Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1246

Hearing Date(s): 15 February 2022

Date of Orders: 26 May 2022

Decision Date: 26 May 2022

Jurisdiction: Class 1

Before: Harding AC

Decision: The Court Orders that:  
(1) The Applicant's written request, pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014, seeking a variation to the development standards for height of building and floor space ratio is upheld.  
(2) The appeal is upheld.  
(3) Development consent is granted for demolition of the existing structures and construction of a 5-storey mixed use development at 14 Cross Street, Double Bay with ground floor retail, residential units over four levels and with at grade parking off Knox Lane subject to the Conditions in Annexure "A" hereto.  
(4) The exhibits are returned with the exception of Exhibit B, Exhibit C and Exhibit E which are retained.

Catchwords: DEVELOPMENT APPLICATION - shop top housing – clause 4.6 objections to height and floor space ratio controls – parking layout and design

Legislation Cited: Environmental Planning and Assessment Act 1979 ss 4.15, 8.7  
Land and Environment Court Act 1979, s 34  
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Infrastructure)  
2007, cl 102  
State Environmental Planning Policy No 55 –  
Remediation of Land, cl 7  
State Environmental Planning Policy No 65 – Design of  
Quality Residential Apartment Development  
Woollahra Local Environmental Plan 2014, cl 2.3, 4.3,  
4.4, 4.6, 6.1, 6.2

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council  
(2008) 236 LGERA 256; [2018] NSWLEC 118  
RebelMH Neutral Bay Pty Limited v North Sydney  
Council [2019] NSWCA 130  
SJD DB2 Pty Ltd v Woollahra Municipal Council [2020]  
NSWLEC 1112  
Wehbe v Pittwater Council (2007) 156 LGERA 446;  
[2007] NSWLEC 827

Texts Cited: AS/NZS 2890.1.2004 : Australian/New Zealand  
Standard Parking Facilities, Part 1, Off Street Car  
Parking  
Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Property Development Systems Australia Pty Ltd  
(Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Counsel:  
M Wright SC (Applicant)  
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File Number(s): 21/130289

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## JUDGMENT

1 **COMMISSIONER:** This is an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act, 1979* (EPA Act) by Property Development Systems Australia Pty Ltd against the Respondent, Woollahra Council.

- 2 As part of the appeal process the Court directed the parties to a s 34 conciliation process. The conciliation, held on 28 September 2021, did not result in an agreement between the parties. The contested contentions, that are now before the Court, have been significantly reduced since that time.
- 3 I have concluded, because of the reasons set out below, that the written requests pursuant to cl 4.6 of Woollahra Local Environmental Plan 2014 (WLEP), that seek to justify variations to development standards for Height of Buildings (HOB) and Floor Space Ratio (FSR), are well founded. I have also concluded, on the merits of the matter, that the appeal should be upheld, and development consent should be granted to the development application, subject to the conditions set out in Annexure A.

### **The proposal**

- 4 Development application DA 355/2019/1, as now amended, seeks consent for the demolition of the existing structures and construction of a new five-storey shop top housing development comprising:
- ground floor retail shops with frontages to cross street and Knox Lane,
  - two 3 bedroom apartments and one 4 four bedroom apartment above (total of three apartments),
  - resident car parking for six cars on the ground level with access from Knox Lane,
  - a rooftop terrace with swimming pool, and
  - minor excavation to accommodate the lift shaft and footings.
- 5 On 24 November 2021, leave was granted by the Court to the Applicant to rely on amended plans and supporting material. On 17 December 2021, the Respondent filed Amended Statement of Facts and Contentions (ASOFAC's) setting out the revised contentions between the parties. The amendments to the application were summarised in the ASOFAC's as follows:

#### General

- External wall colours and finishes amended; aluminium 'strips' to east facing façade deleted.
- Lift shaft, fire stair, entry to apartment lobby, air conditioning condensers and fire hydrant booster pump moved from the eastern side to the western side of the building.

- Building setbacks to Cross Street and Knox Lane increased.
- Overall height of building increased by 1.42 metres but no change to overall roof parapet height of RL 20.05.
- Overall gross floor area reduced from 943m<sup>2</sup> to 852m<sup>2</sup>.

#### Ground Floor

- Fire egress corridor and door to Knox Lane deleted and new 32m<sup>2</sup> retail tenancy with full height glazed façade and entry door added to western side of Knox Lane façade.
- Tandem on-site car parking spaces reduced from 8 to 6 to accommodate new retail tenancy.

#### First and second floors

- North- and south-facing external balconies increased and external windows, doors, and walls amended.
- Internal light well and internal bedroom deleted, bedrooms numbers reduced from 4 to 3.

#### Third and fourth floors

- Apartment layout amended to integrate apartments over two floors to create 4 bedroom penthouse apartment.
- Building façade facing Cross Street amended.
- South-facing external balcony increased.
- Internal bedrooms deleted and light well amended to larger skylight on fourth floor over new internal staircase connecting third floor.
- External fixed windows with allowance to fire protection added to eastern façade on fourth floor.

#### Roof terrace

- Lift extended to the roof terrace to provide disabled access.
- Pool plant room added adjacent to lift shaft.
- Plunge pool relocated from western to eastern side of roof terrace.
- Area of roof terrace increased from 88.6m<sup>2</sup> to 106m<sup>2</sup>.

[Exhibit 2 – Amended Statement of Facts and Contentions]

- 6 On 21 December 2021, the Applicant filed an amended Statement of Facts and Contentions in reply.

## **Issues**

- 7 The amendments to the application resulted in a reduction in the Contentions before the Court. As a result of the narrowing of issues, only two Contentions

remained. Contention 1, dealing with parking layout, and dimensions and Contention 2, dealing with the public interest.

- 8 It is also relevant that the proposal exceeds the development standards for HOB and the allowable FSR as set out in cl 4.3 and 4.4 of the WLEP. The non-compliance with the development standards, and the objections made pursuant to cl 4.6 of WLEP, are not contested between the parties. It remains for me to be satisfied, or otherwise, as to whether the cl 4.6 objections are well-made and can be supported.

### **The Site and Locality**

- 9 The land which is subject of this appeal is legally described as Lot 2 DP 513005, otherwise known as 14 Cross Street, Double Bay (Site). The site is on the southern side of Cross Street and has dual frontages to both Cross Street and Knox Lane. Vehicular access is proposed via Knox Lane.
- 10 The site is rectangular in shape, with a street frontage to cross street of 12.215m, side boundaries of 27.460m and 27.465m and a rear boundary, to Knox Lane, of 12.215m. The site has a total area of 335.437m<sup>2</sup>.
- 11 Immediately to the west of the Site are recently constructed six-storey shop top housing developments at 16-18 Cross Street and 20 to 26 Cross Street. In addition, on 12 March 2020, the Land and Environment Court granted development consent for the construction of a six-storey shop top housing development at 28 to 34 Cross Street. This decision by Clay AC in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSW LEC 1112 ("*SJD*"), also dealt with, and supported, cl 4.6 objections to the HOB and FSR controls.
- 12 This hearing commenced on site at 14 Cross Street, Double Bay. At the site view I was taken to various locations along Cross Street to provide some context for the development with surrounding development. This included noting the development sites referred to in par 11, above. I was also taken to several locations in Knox Lane to view a variety of different parking arrangements. This included parking spaces that were provided perpendicular to the property boundary and accessed immediately off Knox Lane. The inspection also noted the provision of basement parking off Knox Lane that was accessed via driveways leading to basement parking.

## **Objector Evidence**

- 13 At the commencement of the hearing on site, oral evidence was given from a resident residing in the adjoining mixed-use development at 16-18 Cross Street, Double Bay. The site view included an inspection from two apartments in the adjoining development (at the interface with the site). Evidence was also taken from a representative of the Double Bay Progress Association. The issues expressed by both presenters ranged from immediate impacts, relating to privacy and view loss, to broader issues such as seeking strict compliance with the relevant planning controls, particularly as they relate to the height of the building, the floor space and parking requirements.
- 14 The application was advertised and notified during November/December and then again in January/February. Further notification was undertaken for material, including amended plans, that was filed with the leave of the Court on 24 November 2021. The issues raised in the submissions that were made are reflected in the oral submission summarised above and focused on, amongst other matters, compliance with Council's controls and amenity impacts. In reaching an opinion about the application, I have had regard to these matters pursuant to s 4.15 of the EPA Act.

## **The Assessment Framework**

- 15 The site is zoned B2 Local Centre under WLEP. Shop top housing is a permissible use with development consent.
- 16 The objectives of the zone, to which regard must be had in determining the development application (WLEP cl 2.3 (2)) are:

### **Zone B2 Local Centre**

#### **1 Objectives of zone**

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To attract new business and commercial opportunities.
- To provide active ground floor uses to create vibrant centres.
- To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.

- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

- 17 The site is located within the Double Bay Centre under Part D5 of the Woollahra Development Control Plan 2015 (WDCP).
- 18 The Australian/New Zealand Standard for AS/NZS 2890.1.2004, Parking Facilities, Part 1, Off Street Car Parking (AS 2890 Parking) was relevant in deliberations as to the suitability of parking provision and access to that parking.

### **Breach of Development Standards**

- 19 The proposal breaches both the HOB and the FSR development standards. The proposal has an FSR of 2.6475:1 (control 2.5:1) and a height, at the top of the lift shaft, of 20.19m (control 14.7m). The parties are not in dispute about the merits of these variations.
- 20 Development consent cannot be granted except in accordance with cl 4.6(2) of the WLEP. Clause 4.6 (3) and (4) both contain pre-conditions that must be satisfied to enliven the power of the consent authority to grant development consent.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

- (a) the consent authority is satisfied that:
  - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
  - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
- (b) the concurrence of the Secretary has been obtained.

- 21 Applying *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 (“*Initial Action*”), cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that:
- The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),
  - The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)),
  - The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)), and
  - The proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).
- 22 A further precondition in cl 4.6(4), which must be satisfied before the power can be exercised to grant development consent for development that contravenes a development standard, is that the concurrence of the Secretary has been obtained. The Secretary's concurrence can be assumed as a result of written notice dated 21 February 2018 attached to the Planning Circular PS 18-003 (*Initial Action* at [28]).

*Is Compliance with the Development Standard Unreasonable or Unnecessary*

- 23 *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 [44]-[48] detailed several approaches which may establish that compliance with a development standard is unreasonable or unnecessary for the purposes of cl 4.6(3)(a). Namely that: the objectives of the standard are achieved notwithstanding non-compliance with the standard (*Wehbe* test 1); the underlying objective or purpose of the standard is not relevant to the development (*Wehbe* test 2); that the objective would be thwarted if compliance was required (*Wehbe* test 3); that the development has virtually been abandoned or destroyed by Councils own actions in departing from the standard (*Wehbe* test 4); or that the zoning of the land is unreasonable or inappropriate.
- 24 The request identifies the objectives of the HOB development standard (cl 4.3 of WLEP) as:



- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,
- (b) to establish a transition in scale between zones to protect local amenity,
- (c) to minimise the loss of solar access to existing buildings and open space,
- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

- 25 The elements that offend the HOB limit include the recessive lift overrun and minor elements of balustrade that are located behind a parapet building edge. The cl 4.6 written request, prepared by Daintry Associates on 14 February 2022 [Exhibit E – Cl 4.6 Written Request], argues that as these elements are located behind the parapet of the building they do not contribute to the height, shape, bulk, or scale being inconsistent with the desired future character.
- 26 The written request set out the objection to the development standard for HOB's and the FSR. The request identifies two paths to achieve the Wehbe test, the first being that the proposal meets the objectives of the standard and the second being that the development standard has been abandoned.
- 27 The written request prepared by Daintry Associates outlines the ways in which the development still meets the objectives for the HOB standard. The objection notes that the proposed height is consistent, or even lower, than nearby developments, maintains acceptable solar access to developments to the south and minimises impacts on view, privacy and bulk and scale.
- 28 The request also relies, in part, on the recent decision by Clay AC in *SJD* which concludes at pars [92] – [93] that, “*the controls have been abandoned in this part of Cross Street and that satisfies the concept of abandoning the controls.*” The cl 4.6 request argues that, because the development subject to that appeal and the proposed development are within the same visual catchment and streetscape context, the same abandonment argument can apply in this instance.
- 29 As stated, the cl 4.6 requests rely, in part, on the “abandonment” of the development standards for both HOB and FSR within the Double Bay Centre. The objections also set out how the proposed development, including the non-

compliant elements of building height and floor space, remain consistent with the desired future character that has now been established in Double Bay. The cl 4.6 objection outlines the various development consents, some constructed and some not yet implemented, in the visual catchment of the site.

- 30 The request also identifies the objective of the FSR development standard, as it relates to buildings in the B2 Local Centre zone which is:

(b) ....“to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale”.

- 31 The written request outlines the relationship of a taller building with increased floor area and the surrounding context. The ways in which the development still meets the objectives for the FSR development standard are outlined through various graphic representations of surrounding developments and existing approvals. The increase in floor area is a design outcome that achieves compatibility of the development, in terms of height, bulk and scape, with both constructed and approved development in the immediate vicinity. The way in which the floor space is allocated has also led to the variation in height. It is also submitted that the design outcome, because of the height breach, is one of high amenity.

- 32 The objection deals with the zone objectives. The submission notes that the development, amongst other merits, provides a mixed-use development that activates Cross Street, provides employment opportunities and promotes the use of public transport. The scheme also provides the required urban design outcomes in terms of activation, ground floor uses and scale and character compatibility.

- 33 The written request deals with the environmental planning rounds to justify contravening the development standard. These are based on the following outcomes expressed in the written request relating to the environmental grounds supporting the variations and the proposals compliance with the zone objectives:

- (1) The building is lower than most contemporary buildings within its immediate vicinity.
- (2) The height exception results from the careful distribution of the gross floor area in the achievements of objectives for contemporary apartment

design and will deliver a well-designed and high amenity mixed use development achieving desired future character objectives.

- (3) The elements of the height exceedance are elements that will not detract from the desired future character of the area.
- (4) The proposal meets the objectives of the zone by providing a mixed use development that activates Cross Street.
- (5) The proposal provides for employment opportunities.

**The breaches of the development standards are upheld.**

34 In summary, I am satisfied that the cl 4.6 objection adequately addresses the matters in cl 4.6(3) because it has demonstrated that:

- (1) When applying *Wehbe* at [44]-[48], the controls have been abandoned and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a)). I accept, and adopt, the reasoning set out in the written request to establish this ground.
- (2) The proposal meets the objectives of the controls and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a)). I am also satisfied, because of the reasons set out above, and in the cl 4.6 written request, that:
  - (a) the proposal is consistent and compatible with the desired future character of the area consistently with the objective of the controls and therefore in the public interest (cl 4.6(4)(a)(ii));
  - (b) the proposal minimises its visual intrusion consistently with the objective of the controls and therefore in the public interest (cl 4.6(4)(a)(ii));
  - (c) the visual presence of the proposal is compatible with the amenity of the surrounding area and therefore consistent with the objective of the zone and in the public interest (cl 4.6(4)(a)(ii));
  - (d) the proposal is of a height and scale that achieves the desired future character of the neighbourhood and therefore consistent with the objective of the zone and in the public interest (cl 4.6(4)(a)(ii)).
- (3) there are sufficient environmental planning grounds, as described in the written request, to justify contravening the standards. I am satisfied that these outcomes justify varying the development standards as outlined.

35 I am therefore satisfied that the jurisdictional requirement of cl 4.6 has been met, and that the proposal is in the public interest, and any remaining merit issues can be determined. The written requests justifying breaches of the HOB and FSR development standards are well founded.

## Issues

### *The Design and Layout of the onsite parking.*

36 The Court was assisted by a joint report prepared by traffic experts being Mr Craig McLaren, on behalf of the Applicant, and Ms Ever Fang, on behalf the Respondent [Exhibit 3 - Joint Report by Traffic Experts]. The joint report dealt with the matters in contention under four headings as follows:

- (1) Parking provision;
- (2) Impact on Kerbside parking of Driveway;
- (3) Safety of Users of Knox Lane; and
- (4) Design of Parking Spaces.

### *Parking Provision*

37 At the time of the hearing the parties agree that contentions relating to the quantum of parking, and dimension of parking spaces, are either no longer pressed, or are resolved.

### *Kerbside Parking*

38 Kerbside parking was discussed in the traffic experts joint report. The experts agreed on the dimensional criteria that relate to the size and provision of on street parking. In the joint report Ms Fang had the stated position of not raising “*objection as long as the existing 1p timed parking spaces can be retained*” (par 3.3.1). An issue arose on the eve of the hearing as to whether one of the on-street parking spaces would prevent some manoeuvrability of vehicles entering or leaving the proposed car parking on the subject site.

39 In the Respondent’s argument, the potential conflict would result in the loss of one (1) on street parking space (based on the agreed dimensions for kerbside parking). Mr McLaren maintains the position, through both written and oral evidence, that there would be no loss of on street parking and that vehicle manoeuvrability could be undertaken without conflict.

### *Pedestrian Safety*

40 A prime issue before the Court is the acceptability, or otherwise, of the risk to pedestrians relating to the reverse manoeuvre that is required for vehicles to either enter, or leave, the parking spaces that are flush with the property boundary. Coupled with this risk, the Respondent was concerned with the

absence of “splays” on the driveway to assist with sight lines for both pedestrians and drivers.

- 41 The parties expressed views on the relevance, and weight, that should be given to WDCP and AS2890. Parking. Whilst the parties press opposing views as to the weight to be given to both the WDCP and AS2890, neither party has indicated that the controls create a “prohibition” to the granting of consent, just a difference in the weight to be given to this aspect of the development in an assessment of the merits of the application. The traffic experts subsequently expressed views, both written and in oral evidence, about the issues that arise from these deliberations.
- 42 The experts gave lengthy written and oral evidence in respect to the safety of pedestrians using Knox Lane. At the core of this issue is the concern raised by Ms Fang that an unacceptable risk arises from the need for vehicles to either enter/exit the site through a reversing manoeuvre creating an unacceptable risk to pedestrians using Knox Lane, exacerbated by the fact that the opening for the parking area was three (3) spaces wide.
- 43 Ms Fangs’ concern over the width of the “opening” for parking was in concert with the concern regarding the reverse manoeuvre. This was on the basis that there is an increased risk to pedestrians, when vehicles enter or leave the site in a reverse manoeuvre, because of the width of the garage opening and the absence of a pedestrian refuge across the width of the opening.
- 44 In particular, at par 4.3.2 through to par 4.3.4 of the joint report, Ms Fang makes a series of observations as to the circumstances that may arise in accessing parking. Ms Fang was concerned about the extent of reverse movements required as a result of the tandem parking arrangement, combined with the width of the car parking area. Ms Fang was concerned that this arrangement would lead to an unacceptable risk to pedestrians.
- 45 In contrast, Mr McLaren notes the low-speed nature of Knox Lane, its predominance as a service Lane, and the similarity between this design solution and other parking outcomes in Knox Lane. As a result of these observations, Mr McLaren considers that the risk to pedestrians is acceptable due to the awareness of the residents using the parking, the provision of

flashing lights and warnings, and the awareness of pedestrians that Knox Lane is a service-based road.

- 46 The experts also deal with the potential for Knox Lane to become a low-speed Shared Zone. This outcome remains a strategic objective of the Council. In oral evidence on this issue no firm dates could be provided as to implementation, or even certainty as to this being an agreed outcome, for implementation in Knox Lane. The experts disagree as to whether the Shared Zone outcome will heighten the potential risk to pedestrians, due to the ability of pedestrians to walk freely throughout the Lane area, or reduce the risk to pedestrians, because of the 10 km/hour speed limit which is generally imposed in Shared Zones.

#### *Design of Parking Spaces*

- 47 The experts agreed that the design of the parking, in terms of dimensions for tandem parking, meet the requirements for width and length in AS2890. The broader issue of tandem spaces and driveway widths were the basis of concerns raised by the Respondent in respect to the design of parking scapes.

#### **Considerations – Findings**

- 48 Irrespective of whether I take the Applicant's path, or the Respondent's path, on the technical interpretation of AS2890, they both lead to a circumstance where I am required to decide on the merits of this design outcome. Those merits hinge on the suitability of the proposed tandem parking design which will require an opening across three parking spaces at the property's frontage to Knox Lane and a subsequent reversing manoeuvre to either enter or leave the spaces.
- 49 The Respondent seeks to give extra weight to the application of AS2890 on the basis that the WDCP also seeks compliance with the standard in implementing the requirements and objectives and controls relating to car parking provision and design. The Respondent's position is that the risk to pedestrians is sufficient to warrant refusal of the application.
- 50 The evidence of the traffic experts includes significant discussion on the merits of the proposal irrespective of which technical path is taken. Quite simply, the Applicant says that the arrangement is safe and the Respondent say it is not.

- 51 In considering this evidence, and because of my obligation to consider the technical approach presented by both parties, I have had to consider the wording of both the WDCP and AS2890 in reaching a conclusion on this matter. As a result, the question of weight has diminished relevance when the two paths are simply a means to an end and I am obliged to decide on one, or the other, of the two outcomes regarding safety.
- 52 A preferred outcome of car parking design in both AS2890 and WDCP is that vehicles enter and leave a site in a forward direction. This is not a prohibition to approving a parking space, on a property boundary, which will require a reverse movement into the adjoining roadway.
- 53 I have reached the opinion that the parking layout and design is satisfactory because:
- (1) I prefer the evidence of Mr McLaren's, in terms of the assessment of risk, in that the potential for a scenario leading to pedestrian conflict is very low. The provision of warning systems, the fact that vehicles that are parked (and therefore stationary) when the door opens, combined with the most likely outcome that only one vehicle would leave the garage at any one time, all contribute to an acceptable outcome.
  - (2) A situation where all three vehicles leave the parking spaces at once is unlikely, not only in terms of timing, but also because of their inability to all access Knox Lane in unison. In this case, a pedestrian is not at risk across the full width of the opening from moving vehicles, only the single space where a vehicle is leaving. Vehicles entering the site have a clear view of pedestrians on the footpath and vice versa.
  - (3) The swept path diagrams demonstrate that it is generally possible to accommodate the same on street parking as currently exists. The AS2890 approach has built in a percentage of vehicles (15%) that will not make that turn. Small deviations from this small group that may arise from the location of a parked vehicle on Knox Lane are likely to be rare and I do not consider them fatal to the application. I note that the purchase of vehicles by residents, for this building, may factor in the location of parking and any perceived constraints.
  - (4) Knox Lane provides a service role to various residential and commercial developments. The context of this site is an access lane wherein there will be an expectation that vehicles will be travelling at lower speeds so as to access loading facilities and parking within the Lane. The recent development approvals will reinforce this character with access off Knox Lane.
  - (5) The vehicles in the parking spaces will start at a stationary position, either already at the property boundary, or one car space behind.

Vehicles in these spaces will be travelling at very low speeds. This contrasts with other locations in Knox Lane where driveways are provided. In those circumstances, the ramps from basement parking which will facilitate greater speed at the property boundary with greater risk to pedestrians than the current proposal.

- (6) The traffic experts agree that the provision of one garage door across the three parking spaces, at the boundary, will provide increased visibility to pedestrians and drivers.

#### *The Public Interest*

- 54 This contention is framed around the outcomes of contention 1 in that the Respondent says, for the reasons outlined regarding parking provision and design, the scheme is not in the public interest. Having assessed those matters and found them to be acceptable, both jurisdictionally and on merit, as well as my considerations of the matters at s 4.15 of EPA Act, it follows that I am satisfied that the proposal is in the public interest.

#### *Other Jurisdictional Matters*

- 55 As far as jurisdictional matters are concerned, the Applicant's bundle includes the relevant material addressing other jurisdictional aspects of the development, including matters relating to:
  - (1) State Environmental Planning Policy 55 – Remediation of Land (SEPP 55), the Preliminary Site Investigation Report prepared by LG Consult (dated 2 August 2019) concludes that the risk of contamination is low and that no further investigation is required and therefore cl 7 of SEPP 55 is satisfied.
  - (2) State Environmental Planning Policy 65 – Design of Quality Residential Apartment Development (SEPP 65), does not apply to the development as the amended application is a proposal for 3 apartments.
  - (3) A BASIX certificate has been provided in respect to the amended application.
  - (4) State Environmental Planning Policy (Infrastructure) 2007 – the land, whilst not on a classified road, is on land adjacent to New South Head Road and therefore has been provided with the required noise attenuation to satisfy the noise attenuation requirements of cl 102.
- 56 I am also satisfied, because of the Applicant's material or proposed conditions of consent, that the jurisdictional matters listed in the WLEP are adequately dealt with because:



- (1) In respect to cl 5.21 – Flood Planning, the proposed Stormwater Management Report prepared by CAM Consulting dated 2 July 2019 adequately deals with possible flooding and stormwater issues.
- (2) In accord with cl 6.1 – Acid Sulfate Soils, the Applicant also provided a report by LG Consult dated 2 August 2019 that satisfies the requirements of this clause. The report verifies that the land is Class 2 for Acid Sulfate Soils and that no issues arise cornering acid sulfate soils.
- (3) As required by cl 6.2 – Earthworks, the report by LG Consult also deals with geotechnical issues and proposed earthworks. The report notes that minimal excavation is required.

## Conditions

57 The parties remain at odds as to the wording of several conditions proposed for any development consent issued. These are as follows:

58 Condition C. 11(a) – The Respondent acknowledges that compliance with the sight distances required by cl 3.2.4 and Figure 3.3 of AS2890.1:2089 would require a redesign of the building. I am satisfied that the inclusion of such a condition in a development consent would create a situation where the plans being approved would not have sufficient certainty to underpin the grant of that consent. Further, I have already determined that the proposed site distances are acceptable. It follows that the proposed Condition C. 11 (a) is not required, and the orders reflect this.

59 Condition C. 4 - The disputed condition is as follows:

The applicant is to submit a written request to Council's Traffic Section for the adjustment/relocation of the existing parking signs. This matter is required to be referred to the Woollahra Traffic Committee for consideration and approval prior to the issue of a construction certificate. [emphasis added]

60 The Respondent seeks the condition in full whereas the Applicant seeks to delete the underlined sentence. The evidence that I have accepted is that the four (4) on street parking spaces can be retained, if required, by Council. It is therefore inappropriate, as a determinative matter for this development application, to transfer the decision-making to the Woollahra Traffic Committee by requiring their approval as a pre-requisite condition to allow any Development Consent to be implemented. The future “on-street” parking arrangement is a matter for Council and this application is not contingent on

that outcome. The proposed orders allow for the deletion of the second sentence.

## **Conclusion and Orders**

61 Property Development Systems Australia Pty Ltd.'s development application (as amended) should be determined by the grant of development consent subject to conditions.

62 The Court Orders that:

- (1) The Applicant's written request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 seeking a variation to the development standards for height of building and floor space ratio is upheld.
- (2) The appeal is upheld.
- (3) Development consent is granted for demolition of the existing structures and construction of a 5-storey mixed use development at 14 Cross Street, Double Bay with ground floor retail, residential units over four levels and with at grade parking off Knox Lane subject to the Conditions in Annexure "A" hereto.
- (4) All exhibits are returned with the exception of Exhibit B, Exhibit C and Exhibit E which are retained.

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**S Harding**

**Acting Commissioner of the Court**

**Annexure A (784491, pdf)**

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