



Land and Environment Court
New South Wales

Case Name: Karimbla Properties (No. 59) Pty Limited v City of Parramatta Council

Medium Neutral Citation: [2023] NSWLEC 1365

Hearing Date(s): 19-21 April 2023

Date of Orders: 13 July 2023

Decision Date: 13 July 2023

Jurisdiction: Class 1

Before: O'Neill C

Decision: Proceedings 2022/142290:
The orders of the Court are:
(1) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application, as agreed or assessed, pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979.
(2) The appeal is upheld.
(3) Development Consent No. 314/2017 for a 30-storey mixed use tower building with a five-storey basement (concept approval only) is modified by Modification Application No. 314/2017/A, subject to the consolidated conditions of consent at Annexure A.
(4) The exhibits, other than exhibits 1, 2, 3, A, B, C and Q, are returned.

Proceedings 2022/142281:
The orders of the Court are:
(1) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application, as agreed or assessed, pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979.

(2) The appeal is upheld.

(3) Development Application No. 1128/2021 for the Stage One early works associated with the construction of a mixed-use development, including site clearing and removal of 12 trees including two street trees, excavation to accommodate a five-storey basement, and construction of associated shoring, retaining walls and drainage works, is determined by the grant of consent, subject to the conditions of consent at Annexure B.

Proceedings 2022/142308:

The orders of the Court are:

(1) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application, as agreed or assessed, pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979.

(2) The appeal is upheld.

(3) Development Application No. 1/2022 for a Stage Two detailed design of the concept approval (as modified by Modification Application No. 314/2017/A) for the construction of a 30 storey mixed use building comprising five levels of basement parking providing 299 car parking spaces (264 residential and 31 visitor spaces), two storey commercial podium (containing one retail unit, a 60 place centre-based child care facility and commercial office space) and residential tower above, comprising 204 residential units, landscaping and public domain works, is determined by the grant of consent, subject to the conditions of consent at Annexure C.

Catchwords:

MODIFICATION OF CONCEPT APPROVAL, STAGED DEVELOPMENT APPLICATIONS – shop top housing development with concept development approval – modification of the concept development approval – development application for Stage One early works – development application for Stage Two detailed design – whether the modified development is substantially the same as the original concept approval – proposed car parking exceeds maximum car parking rate – design excellence – a written request to contravene a development standard is not required when there is a

concept development approval in force for the development, pursuant to s 4.24(2) of the Environmental Planning and Assessment Act 1979

Legislation Cited:	Environmental Planning and Assessment Act 1979, Div 4.4, ss 4.5, 4.15, 4.21, 4.24, 4.55, 8.7, 8.9, 8.15 Hornsby Local Environmental Plan 2013, cll 4.3, 4.6, 6.8 Land and Environment Court Act 1979, s 34 Parramatta Local Environmental Plan 2023, cl 1.8A Standard Instrument (Local Environmental Plans) Order 2006, cl 4.6 State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development, cll 4, 30 State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.122
Cases Cited:	Arrange v Inner West Council [2019] NSWLEC 85 Pirasta Pty Ltd v Parramatta City Council [2019] NSWLEC 1627
Texts Cited:	Department of Planning & Environment, Apartment Design Guide, 2015 Great Sydney Commissioner, Greater Sydney Regional Plan, March 2018 Hornsby Development Control Plan 2013 Roads and Traffic Authority, Guide to Traffic Generating Developments, October 2002
Category:	Principal judgment
Parties:	Karimbla Properties (No. 59) Pty Limited (Applicant) City of Parramatta Council (Respondent)
Representation:	Counsel: I Hemmings SC with J Farrell (Applicant) A Seton (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Marsdens Law Group (Respondent)
File Number(s):	2022/142281, 2022/142290, 2022/142308
Publication Restriction:	Nil

JUDGMENT

- 1 **COMMISSIONER:** These are three appeal pursuant to the provisions of ss 8.7(1) and 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of a modification application and two development applications, at 37-41 Oxford Street, Epping (the site), by the City of Parramatta Council (the Council). The Court has previously ordered that the three matters be heard together with the evidence in one matter being evidence in the others. The three matters are as follows:
 - (1) The modification application (2022/142290): The Modification Application No. 314/2017/A seeks to modify the concept approval of Development Consent No. 314/2017 granted by the Sydney Central City Planning Panel on 12 March 2018 for development described as a “30 storey mixed use tower building with a four-storey basement (concept approval only)”. The concept approval comprised four levels of basement car parking, two commercial levels, and 28 residential levels. The modification of the approval proposes an increase in the number of basement levels from 4 to 5, an adjustment to the height for floor to ceiling levels and a lift overrun, a centre based childcare facility for 60 children, and changes to landscaping and conditions.
 - (2) The early works development application (2022/142281): Development Application No. 1128/2021 seeks consent for stage one early works associated with the construction of a mixed-use development, including site clearing and removal of 12 trees including two street trees, excavation to accommodate a five-storey basement, and construction of associated shoring, retaining walls and drainage works.
 - (3) The development application (2022/142308): Development Application No. 1/2022 seeks consent for a stage two detailed design of the concept approval (as modified by the modification application) for the construction of a 30 storey mixed use building comprising five levels of basement parking providing 299 car parking spaces (264 residential and 31 visitor spaces), two storey commercial podium (containing one retail unit, a 60 place centre-based child care facility and commercial office space) and residential tower above, comprising 204 apartments, landscaping and public domain works.
- 2 The appeals were subject to conciliation on 9 November 2022, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated, pursuant to s 34(4) of the LEC Act.

Issues

- 3 The Council’s contentions can be summarised as:

The modification appeal:

- The development as proposed to be modified is not substantially the same development as the concept approval pursuant to s 4.55(2)(a) of the EPA Act.
- The development as proposed to be modified is inconsistent with the reasons for the grant of development consent for the concept approval.
- The modification application seeks consent for one additional level of basement parking, which is capable of accommodating excessive car parking and likely to have an unacceptable traffic impact on the surrounding road network which is not consistent with that planned for the locality.
- The proposal is inconsistent with the aims of Hornsby Local Environmental Plan 2013 (LEP 2013), the objectives of the zone and the strategies of the Greater Sydney Region Plan.
- The proposal does not exhibit design excellence pursuant to cl 6.8 of LEP 2013 as a result of the additional basement level which is likely to accommodate excessive car parking. The additional basement level is inconsistent with Strategy 12.2 of the Greater Sydney Regional Plan which seeks to promote reduced private parking and encourage use of public transport.
- The modification application seeks a further increase in height to enable amendments to the tower envelope.
- The concept approval approved only an envelope for a 30-storey mixed use tower building with a four-storey basement and did not approve a number of car parking or bicycle parking spaces.
- The proposed 299 car parking spaces will create an undesirable precedent for future development.

The early works Stage One Development Application appeal:

- The proposed volume of excavation is such that it could accommodate more car parking than permitted having regard to the parking rates in Part 1C.2.1 of the Hornsby Development Control Plan 2013 (DCP 2013).

The Stage Two Development Application appeal:

- The height of the proposal is excessive and does not comply with the height of buildings development standard. The written request to justify the contravention of the height of buildings development standard is not well founded.
- The proposal must be refused because the floor space ratio (FSR) exceeds the maximum FSR permitted and a variation to the FSR development standard is not permitted pursuant to cl 4.6(8A) of the LEP 2013.
- The proposal is inconsistent with the aims of LEP 2013, the objectives of the zone and the strategies of the Greater Sydney Region Plan.
- The proposal does not comply with the maximum car parking rates in the DCP 2013.

- The proposal does not exhibit design excellence pursuant to cl 6.8 of LEP 2013.

The applications are amended

- 4 The Applicant, by Notice of Motion in each appeal, sought to amend the applications to rely on an amended proposal (Ex Q). The amendments proposed changes to the scheme based on matters arising in the experts' joint reports, including:
 - Additional windows in the northern and southern facades.
 - Sliding doors added to the study rooms in certain units.
 - An increase in adaptable 3-bedroom units and a reduction in the number of adaptable 2-bedroom units.
 - Amended stormwater engineering plans.
 - Amended landscape plan and report.
- 5 The motions were not opposed, and the orders in the Notices of Motion were made, subject to the Applicant paying the Council the costs thrown away as a result of the amendment pursuant to s 8.15(3) of the EPA Act, as agreed or assessed.
- 6 The amended proposal is for a two-storey commercial podium (containing one retail unit, a 60-place centre-based childcare facility and commercial office space), five levels of basement for 299 car parking spaces, a residential tower over comprising 204 apartments, and landscaping and public domain works.

The site

- 7 The site is an irregularly shaped allotment with a frontage to Oxford Street of 57m and a total site area of 4,967m².

Planning framework

- 8 Division 4.4 of the EPA Act applies to concept development applications. The division applies to concept development applications and consent granted on the determination of those applications, at s 4.21. Section 4.24(2) is in the following terms:

(2) While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.

- 9 LEP 2013 applies to the proposed development, pursuant to cl 1.8A of the Parramatta Local Environmental Plan 2023 (LEP 2023), as the applications were lodged and not yet finally determined at the commencement of LEP 2023 on 2 March 2023. LEP 2023 is a matter for consideration, pursuant to s 4.15(1)(a)(ii) of the EPA Act.
- 10 The site is zoned B2 Local Centre pursuant to LEP 2013. The proposal is permissible with consent in the zone. The objectives of the zone, to which regard must be had, are:
- 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.
- 11 The height of buildings development standard for the site is 72m. The maximum height of the proposal is 99.9m. The objective of the height of buildings development standard, at cl 4.3(1) of LEP 2013, is:
- (a) to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.
- 12 The floor space ratio development standard for the site is 0.45:1. The proposal has a FSR of 0.45:1, according to the Applicant. The site is within an area identified as “Area 9” on the Floor Space Ratio Map – Sheet FSR_0011.
- Clause 4.6(8A) and (8B) of LEP 2013 is in the following terms:
- (8A) This clause does not allow development consent to be granted for development that would contravene clause 4.4 for a building on land in Zone B2 Local Centre within the Epping Town Centre, identified as “Area 9” on the Floor Space Ratio Map for the following purposes—
- (a) boarding houses,
 - (b) group homes,
 - (c) hostels,
 - (d) shop top housing,
 - (e) tourist and visitor accommodation,
 - (f) a mixed use development comprising a combination of uses specified in paragraphs (a)–(e).
- (8B) Subclause (8A) and this subclause are repealed at the beginning of 31 July 2024.

13 The design excellence clause of LEP 2013 applies to the proposal at cl 6.8(2).

Sub-clauses (3) and (4) are in the following terms:

(3) Development consent must not be granted to development to which this clause applies unless the consent authority considers that the development exhibits design excellence.

(4) In considering whether the development exhibits design excellence, the consent authority must have regard to the following matters—

(a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,

(b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,

(c) whether the development detrimentally impacts on view corridors,

(d) whether the development achieves transit-oriented design principles, including the need to ensure direct, efficient and safe pedestrian and cycle access to nearby transit nodes,

(e) the requirements of the Hornsby Development Control Plan,

(f) how the development addresses the following matters—

(i) the suitability of the land for development,

(ii) existing and proposed uses and use mix,

(iii) heritage issues and streetscape constraints,

(iv) the relationship of the development with other development (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,

(v) bulk, massing and modulation of buildings,

(vi) street frontage heights,

(vii) environmental impacts and factors such as sustainable design, overshadowing and solar access, visual and acoustic privacy, noise, wind, reflectivity, water and energy efficiency and water sensitive urban design,

(viii) the achievement of the principles of ecologically sustainable development,

(ix) pedestrian, cycle, vehicular and service access and circulation requirements,

(x) the impact on, and any proposed improvements to, the public domain,

(xi) achieving appropriate interfaces at ground level between the development and the public domain,

(xii) integration of landscape design, including the configuration and design of communal access and communal recreation areas, to incorporate exemplary and innovative treatments and to promote an effective social atmosphere.

- 14 State Environmental Planning Policy (Transport and Infrastructure) 2021 applies to the development at s 2.122 (1), as the development is traffic-generating. The consent authority must take into consideration the following, at s 2.122(4)(b), before determining a development application:

- (i) any submission that RMS provides in response to that notice within 21 days after the notice was given (unless, before the 21 days have passed, TfNSW advises that it will not be making a submission), and
- (ii) the accessibility of the site concerned, including—
 - (A) the efficiency of movement of people and freight to and from the site and the extent of multi-purpose trips, and
 - (B) the potential to minimise the need for travel by car and to maximise movement of freight in containers or bulk freight by rail, and
- (iii) any potential traffic safety, road congestion or parking implications of the development.

- 15 State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) applies to the development at cl 4(1)(a). Development control plans cannot be inconsistent with the Apartment Design Guide (ADG) for ventilation, at cl 6A(1)(g). Clause 30(1)(a) is in the following terms:

30 Standards that cannot be used as grounds to refuse development consent or modification of development consent

(1) If an application for the modification of a development consent or a development application for the carrying out of development to which this Policy applies satisfies the following design criteria, the consent authority must not refuse the application because of those matters—

(a) if the car parking for the building will be equal to, or greater than, the recommended minimum amount of car parking specified in Part 3J of the Apartment Design Guide,

- 16 The DCP 2013 applies to the proposal. Part 1C.2.1 Transport and Parking within City of Parramatta LGA has the following relevant desired outcomes and prescriptive measures:

“a. Development that manages transport demand around transit nodes to encourage public transport usage.

b. Car parking and bicycle facilities that meet the requirements of future occupants and their visitors.

...

Car parking

...

o. Car parking must be provided on site in accordance with parking rates in Tables 1C.2.1(d) and (e). Parking spaces are for cars, unless otherwise specified. The minimum parking rates in Tables 1C.2.1(e) should apply for development within 800m of Epping Railway Station...

q. The car parking rate for sites less than 800 metres from a railway station in Tables 1C.2.1(d) and (e)”

- 17 Table 1C.2.1(d) of DCP 2013 specifies a minimum car parking rate of 1 space per 4 children for a Child Care Centre.
- 18 Table 1C.2.1(e) of DCP 2013 is as follows for shop top housing on land within 800m of Epping Railway Station, giving a total of 221 car parking spaces for the proposal:

Studio	Maximum 0.4 space/dwelling
1 Bedroom	Maximum 0.4 space/dwelling
2 Bedrooms	Maximum 0.7 spaces/dwelling
3 or more Bedrooms	Maximum 1.2 spaces/dwelling
Visitors	Maximum 1 space per 7 dwellings
Business or Office Premises	Maximum of 1/50m ² of GFA
Shops	Maximum of 1/30m ² , GLFA

- 19 The desired outcome and prescriptive measures for the desired future character of the Epping Town Centre are at 4.6.1 of DCP 2013.

The concept approval

- 20 The concept approval for Development Consent No. 314/2017 was determined by the grant of consent by the Sydney Central City Planning Panel on 12 March 2018 for a “30 Storey Mixed Use Tower Building with 4 Storey Basement (Concept Approval Only)” (Ex 4, tab 3).
- 21 The conditions of consent of the concept approval relevantly include the following:

“General Matters

1. Any future detailed development application related to this concept approval is to be generally in accordance with the following concept plans endorsed with Council’s Stamp as well as the documentation listed below, except where

amended by other conditions of this consent and/or any plan annotations and subsequent separate development applications as part of future detailed Development Applications:

...

Traffic Impact Assessment Report Ason Group 01/12/17

...

Reason: To ensure future detailed application [sic] are in keeping with the approved concept.

2. No approval is given for any work on the site...

3. The Concept Plan approved envelopes do not guarantee that a future building form will be approved in that form...

...

5. The recommendations outlined in the specialist reports listed in Condition 1 shall be incorporated into the plans and documentation accompanying the future detailed development application subject to the satisfaction of Council officers.

Reason: To ensure a suitable level of residential amenity."

- 22 The Statement of Environmental Effects – Addendum Report (Ex 4, tab 3, ff 169-170) relevantly includes the following text:

"4.5 Indicative 'Reference' Design

An amended indicative reference design has been prepared by Candalepas Associates and is detailed in the drawings at Appendix D... Consent is not sought for this reference design as part of the Stage 1 concept DA. The detailed floor layout and design of the building will be determined through the Stage 2 DA process.

The reference design illustrates the layout of apartments and retail/commercial tenancies within the podium, common circulation areas, location of balconies, operation of building services and infrastructure, ingress and egress points, storage spaces, including of communal open space areas and the design of basement levels including the number [of] car parking spaces required to meet the relevant requirements.

The accompanying reference design includes:

257 residential apartments with the following mix.

82 x 1 bed/studio

158 x 2 bed

17 x 3 bed

299 car parking spaces including 32 accessible spaces."

- 23 The Traffic Impact Assessment Report (Ex 4, tab 3, f 210) relevantly includes the following:

"2. Proposed Development

A detailed description of the proposed development is included in the Statement of Environmental Effects (SEE). In summary, the development for which approval is sought is a single residential tower above a lower level retail commercial podium and basement car parking consisting of:

Four levels of basement car parking, including:

2 x parking spaces (including 32 accessible spaces)

12 x motorcycle spaces

148 bicycle parking spaces”

- 24 The Traffic Impact Assessment Report, at “4 Parking Requirements” (Ex 4, f 218), included an estimate of parking requirements/provisions based on the DCP 2013 at the time of the assessment as 286-296 car parking spaces.

Submissions

- 25 The Council submitted that there is no minimum car parking rate, in reference to the terms of cl 30 of SEPP 65, only a maximum rate, and therefore cl 30 of SEPP 65 does not apply to the proposal. In support of this submission, the Council relied on *Pirasta Pty Ltd v Parramatta City Council* [2019] NSWLEC 1627 at [33], and Planning Circular PS 15-002 (Ex 18) which relevantly states:

“If council has only a maximum parking requirement in their LEP or DCP (with no minimum) then the minimum car parking requirement continues to be taken as zero. In this case, the maximum requirement continues to apply to the development application.”

- 26 The Applicant submitted that written request to contravene the height of buildings development standard is not required, pursuant to s 4.24(2) of the EPA Act.
- 27 The Applicant submitted that the maximum numbers for off-street resident parking for the proposal in DCP 2013 are the same as the minimum numbers for off-street resident parking required by the RTA “Guide to Traffic Generating Developments” and dated October 2002 (Ex U).

Expert evidence

- 28 The Applicant relied on the expert evidence of Ken Hollyoak (traffic), David Waghorn (planning) and Nigel Dickson (urban design).
- 29 The Council relied on the expert evidence of Tom Steal (traffic), Alex McDougall (planning) and Gabrielle Morrish (urban design).

Consideration

The modification appeal

Substantially the same development

- 30 The modifications proposed by the modification application of the approved concept proposal includes the following:
- An increase in the number of basement levels from 4 to 5. The additional basement provides 299 car parking spaces, as set out in the Ason Traffic Report (listed as a document of the concept approval, condition 1 of the conditions of consent DA/314/2017) (Ex 4, f 112).
 - An increase in the maximum height of the proposal to RL 195.85 (Ex Q, DA203). The proposed maximum height is 99.9m above existing ground level, which exceeds the 72m height of buildings development standard for the site by 27.9m. The concept approval is for a maximum height of 95.67m (Ex 4, f 27). There is no overall storey change above ground as the change in height is an adjustment to the height for floor to ceiling levels and a lift overrun.
 - A 2-storey podium with a 28-storey residential tower, from the concept approval with a 3-storey podium with a 27-storey residential tower.
 - The mix and overall number of residential units has been reduced from 257 to 204.
 - A centre based childcare facility for 60 children, and changes to landscaping and conditions.
- 31 I am satisfied that the statutory test for the modified development proposed, being substantially the same development as the originally approved development (*Arrange v Inner West Council* [2019] NSWLEC 85 at [25]-[31]), is met. I accept and adopt the agreement of the urban design and planning experts that the modified development as proposed is substantially the same development as the development originally approved by the concept approval (Ex 8, par 4.1.2). I accept and adopt Mr Dickson's analysis of the quantitative and qualitative changes when the two schemes are compared (Ex 8, pars 4.1.7, 4.1.7.1 – 4.1.7.9).

Consideration of the reasons for the grant of consent for the concept approval

- 32 Section 4.55(3) of the EPA Act is in the following terms:

(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

- 33 An applicant is entitled to lodge a modification application to modify a concept approval, pursuant to s 4.55 of the EPA Act, and to have that application determined on its merits, with consideration to be given to the relevant matters under s 4.15(1) and the reasons given by the consent authority in determining the grant of consent that is to be modified, pursuant to subs (3). I have considered the reasons for the Sydney Central City Planning Panel's decision at ff 107-8 of Ex 4. I accept the Applicant's submission that there is no test of consistency under s 4.55(3).

Traffic impacts

- 34 The traffic experts agreed, and I accept their agreement, that the traffic to be generated by the proposal, when the proposal is considered individually, is not substantial and will not have an unacceptable effect on the performance of nearby roads or intersections. Mr Steal qualified this agreement by adding that the proposal will generate additional traffic at the nearby intersections which are expected to be at or beyond capacity by 2026 based on the Epping Town Centre Study.
- 35 The Council's contention that the additional level of basement parking is likely to have an unacceptable traffic impact on the surrounding network is not made out by the agreed evidence of the traffic experts. I accept the Applicant's submission that the issue of the performance of nearby roads or intersections is a locality-wide and cumulative issue.
- 36 I accept the Applicant's submission that the provision of the additional basement level does not change the planned density of the concept approval. The basement proposed by the modification application provides for the requisite number of car spaces referred to in the Ason Report, which is incorporated into the concept approval by conditions 1 and 5 of the conditions of consent, quoted above at paragraph [21]. It therefore cannot be said that the modification application will have the effect of generating "additional traffic".
- 37 DCP 2013 expressly permits the consideration of a Car Parking Demand Assessment. Mr Hollyoak prepared a Car Parking Demand Assessment, and he concluded that the quantum of car parking provided for the site is suitable, as it will allow for car ownership to occur whilst the site is suitably located to

encourage residents to use public transport for their daily commute; and the likely consequence of providing lower on-site car parking in the proposed development would simply result in an increased usage of unrestricted car parking spaces offsite and on the street.

- 38 As the planned density of the concept approval is not being changed, the modification application will not create an undesirable precedent for future development.

Design excellence

- 39 The Council contends that the proposal does not exhibit design excellence pursuant to cl 6.8 of LEP 2013 as a result of the additional basement level, which is likely to accommodate excessive car parking, as the additional basement level is inconsistent with Strategy 12.2 of the Greater Sydney Regional Plan which seeks to promote reduced private parking and encourage use of public transport.
- 40 I accept the agreement of the urban design experts that the (amended) proposal achieves the objective of the design excellence clause at cl 6.8(1) of LEP 2013, to deliver the highest standard of architectural and urban design, having regard to the matters listed under subcl (4). I accept and adopt Mr Dickson's analysis of the matters under cl 6.8(4) of LEP 2013, at pars 8.1.7 – 8.1.10 of Ex 8.
- 41 I am satisfied, on the basis of the evidence before me, that the proposal exhibits design excellence pursuant to cl 6.8 of LEP 2013, as follows:
- The proposal achieves a high standard of architectural design, materials and detailing appropriate to the building type and location, because the podium/tower form is compatible with the desired character for the area set out for the Epping Town Centre Core – East Precinct and is consistent with the desired 2-3 storey podium/street wall in the town centre. The proposed envelope, the provision of an articulation zone, and the well-articulated side and rear façades provide a high standard of design, materials and detailing appropriate to the building type and location. The podium and tower are clearly delineated.
 - The form and external appearance of the proposal will improve the quality and amenity of the public domain because the podium tower form is compatible with the desired character for the area. The proposed street wall height is integrated with the street wall heights established on adjoining properties. The setback of the podium to the street provides more space for pedestrians and

opportunities for outdoor dining, with an awning for weather protection. The proposal achieves an appropriate interface at ground level between the building envelope and the public domain.

- The proposal is consistent with the requirements of DCP 2013 because it achieves an appropriate street wall, consistent with the desired 2-3 storey street wall/podium and setback tower under DCP 2013. The proposal incorporates commercial floor space as sought by DCP 2013. The proposal includes active street frontages and awnings as sought by DCP 2013.
- The proposal does not detrimentally impact on view corridors, and no contention is raised regarding impacts on view corridors.
- The proposal achieves transit-orientated design principles, as the proposal allows for direct access to the public domain from the retail tenancy and residential lobby to nearby transit nodes. The proposal achieves direct and convenient pedestrian, cycle, vehicular and service access and circulation requirements. The location of the site within 300m of the railway station encourages public transport patronage, as it is so convenient to the site with links to major employment centres.
- The site is suitable for the proposal as demonstrated by the concept approval granted.
- The proposed uses and use mix are appropriate to the business zone, and the location of the site. The proposal provides retail and community uses that will serve the needs of people who live in, work in and visit the local area and encourage employment opportunities in this accessible location.
- The site has no heritage constraints, and no contention is raised regarding heritage impacts.
- The proposal achieves an appropriate relationship with neighbouring development in terms of separation, setbacks, amenity and urban form, because the podium height sits between the podium heights of adjoining development, creating a consistent street wall. The proposal provides setbacks that respond to the immediate context by contributing to building separation equitably with neighbouring buildings consistent with the Apartment Design Guide (ADG) objective 3F-1.
- The modification application does not result in unreasonable adverse overshadowing impacts on the adjoining properties.
- The ESD experts agreed that the modification application does not result in a reduction of the environmental performance of the concept approval (Ex 12, p 1). I am satisfied, on the basis of their agreement, that the proposal achieves the principles of ecologically sustainable development.
- The proposal achieves a high-quality urban design to communal areas by providing two well-defined spaces, one that is co-located with areas of deep soil for landscaping. The rooftop communal area provides a quality space for residents with district views.

Increased height

- 42 The maximum height of the proposal is RL 195.85 (Ex Q, DA203). The proposed maximum height is 99.9m above existing ground level, which exceeds the 72m height of buildings development standard for the site by 27.9m. The concept approval is for a maximum height of 95.67m (Ex 4, f 27).
- 43 I accept the agreement of the planning experts that the additional height proposed, when compared to the concept approval which already exceeds the height of buildings development standard for the site for the reasons outlined by the consent authority (Ex 4, ff 30, 48-49), does not have any adverse impacts on the amenity of adjoining properties or the streetscape in terms of solar access, privacy, views and visual impact. I accept their evidence that a lack of adverse amenity impacts is compelling in demonstrating the acceptability of the small proportional increase in the overall height of the proposal, when compared to the height of the development the subject of the concept approval (Ex 8, par 7.1.3).
- 44 The addition of a level of basement to accommodate a portion of the 299 car parking spaces, being the unchanged planned density of the concept approval, does not impact on the height of the proposal.

The Stages One and Two Development Application appeals

Stage One Development Application

Volume of excavation

- 45 The Council contends that the proposed volume of excavation to a maximum depth of approximately 20m is such that it could accommodate more car parking than permitted, having regard to the parking rates in Part 1C.2.1 of DCP 2013. As the planned density of car parking approved by the concept approval is not being changed, this contention is not made out. The additional basement level is required to provide the total 299 car parking spaces cited by the Ason Report, incorporated into the concept approval by condition.

Stage Two Development Application

Increased height of the proposal

- 46 The Council contends that the height of the proposal is excessive and does not comply with the height of buildings development standard and the written

request to justify the contravention of the height of buildings development standard is not well founded.

- 47 The modification application seeks a further increase in height of the proposal to enable amendments to the tower envelope.
- 48 I accept the Applicant's submission that upon the proper construction of the EPA Act, a written request to vary a development standard pursuant to cl 4.6 of the Standard Instrument Local Environmental Plan is not required for a subsequent development application following a concept approval under Div 4.4 of the EPA Act. The subsequent development application for the detailed proposal of a site, or part of the site, cannot be inconsistent with the consent for the concept proposal for the development of the site for consent to be granted, pursuant to s 4.24(2) of the EPA Act.
- 49 The height of the proposal is fixed by the concept approval. The height of the concept approval (prior to the modification application) exceeded the height of buildings development standard for the site. The consent authority determined the application pursuant to cl 4.6 of LEP 2013 and granted consent to the concept development application. The modification application modifies that consent to increase the height of the proposal, while the increase in height maintains the same number of storeys as the original concept approval.
- 50 Section 4.24(2) of the EPA Act provides that while the concept approval remains in force, the determination of any further development applications in respect of the site cannot be inconsistent with the concept approval for the development of the site. Development consent may be granted to the Stage Two Development Application by the operation of s 4.24(2) of the EPA Act, not subject to cl 4.6 of LEP 2013, because that consideration under cl 4.6(3) and (4) was undertaken when consent was granted to the concept approval pursuant to cl 4.6 of LEP 2013 (Ex 4, ff 30-32, 48-49).

No exceedance of the FSR development standard as a result of the addition of a basement level

- 51 The Council contends that the proposal must be refused because the FSR exceeds the maximum FSR permitted and a variation to the FSR development standard is not permitted pursuant to cl 4.6(8A) of LEP 2013.

52 The gross floor area (GFA) definition in LEP 2013 is as follows:

gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—

...

but excludes—

...

(e) any basement—

(i) storage, and

(ii) vehicular access, loading areas, garbage and services, and

(f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and

(g) car parking to meet any requirements of the consent authority (including access to that car parking)

53 I accept the Applicant's submission that the "consent authority" under the definition is the Panel (s 4.5(b) of the EPA Act). Their "requirement" is imposed through the conditions of the concept approval. The additional basement level is necessary to provide the total 299 car parking spaces cited by the Ason Report, which is incorporated into the concept approval by conditions 1 and 5. As a result, the whole of the car parking is excluded from the calculation of GFA under the definition and does not contribute to the FSR calculation. The proposal is compliant with the FSR development standard for the site.

The proposal exceeds the maximum car parking rates in DCP 2013

54 The maximum car parking rates under DCP 2013 do not apply to the proposal, because the proposal is consistent with the concept approval (as modified). Section 4.24(2) of the EPA Act provides that the determination of any further development applications in respect of the site, while any consent granted on the determination of a concept development application for a site remains in force, cannot be inconsistent with the consent for the concept proposal.

Cross-ventilation

55 50% of units below the tenth storey are provided with natural cross ventilation, which is below the ADG criterion for 60% of apartments. I accept the agreement of the cross-ventilation experts that a comfortable indoor environment can be achieved within a single aspect unit, which meets the

objective 4B-3 of the ADG, notwithstanding Mr Che's evidence that a single aspect unit will not provide the same level of cross-ventilation as a dual aspect unit. I accept the Applicant's submission that the approved floorplate of the concept approval places a constraint on the spatial planning of the floor plates, because replanning the floor plates to achieve 60% of units that meet the ADG's 60% of apartments naturally cross-ventilated would require significant replanning.

Conclusion

- 56 I am satisfied that it is appropriate to modify the concept approval and that Stages One and Two Development Applications are not inconsistent with the concept approval (as modified) pursuant to s 4.24(2) of the EPA Act.

Orders

Proceedings 2022/142290:

- 57 The orders of the Court are:
- 58 The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application, as agreed or assessed, pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- 59 The appeal is upheld.
- 60 Development Consent No. 314/2017 for a 30-storey mixed use tower building with a five-storey basement (concept approval only) is modified by Modification Application No. 314/2017/A, subject to the consolidated conditions of consent at Annexure A.
- 61 The exhibits, other than exhibits 1, 2, 3, A, B, C and Q, are returned.

Proceedings 2022/142281:

- 62 The orders of the Court are:
- (1) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application, as agreed or assessed, pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- 63 The appeal is upheld.

- 64 Development Application No. 1128/2021 for the Stage One early works associated with the construction of a mixed-use development, including site clearing and removal of 12 trees including two street trees, excavation to accommodate a five-storey basement, and construction of associated shoring, retaining walls and drainage works, is determined by the grant of consent, subject to the conditions of consent at Annexure B.

Proceedings 2022/142308:

- 65 The orders of the Court are:

- (1) The Applicant is to pay those costs of the Respondent thrown away as a result of the amendment of the application, as agreed or assessed, pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- (2) The appeal is upheld.
- (3) Development Application No. 1/2022 for a Stage Two detailed design of the concept approval (as modified by Modification Application No. 314/2017/A) for the construction of a 30 storey mixed use building comprising five levels of basement parking providing 299 car parking spaces (264 residential and 31 visitor spaces), two storey commercial podium (containing one retail unit, a 60 place centre-based child care facility and commercial office space) and residential tower above, comprising 204 residential units, landscaping and public domain works, is determined by the grant of consent, subject to the conditions of consent at Annexure C.

Susan O'Neill

Commissioner of the Court

Annexure A

Annexure B

Annexure C

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.