Double Bay Residents' Association Inc

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The General Manager

Woollahra Municipal Council

PO Box 61

Double Bay NSW 1360

1st February 2019

Dear Sir,

DA 617/2017/1 28-34 Cross Street, Double Bay (Review Application)

Our Association examined the drawings and reports filed in support of the above 6 storey mixed development. By its letter of 8 February 2018 it set out on behalf of its some 300 members its strong opposition to the grant of consent. At the Panel hearing on 4 October 2018 I addressed the Panel supplementing what we had put in the February letter. Other submissions opposing were made by owners of units in 45, Cross Street (Ms Minbashian and Mr Peter Tonkin), ward councillor Mark Silcocks and a consultant town planner (Brian O'Dowd).

Our Association wholeheartedly supports the decision of the Sydney Eastern City Planning Panel and urges it be upheld by this review. In that unanimous decision and two others made last year (2018SCL021 DA 33/2018/1 21-27 Bay Street (which was decided on the same day as this) and 2017SCL050 DA 359/2017/1 30-36 Bay Street and 2 Guilfoyle Avenue) the Panel has set a precedent for upholding the height and FSR standards in this zoning in the Double Bay Centre and not allowing development which exceeds the standard by two storeys. Approval of this application would undermine that clear line of authority and make it more difficult to uphold those standards for future applications for other sites in the Centre. Furthermore, in those determinations the SECPP specifically rejected any argument that the height and bulk standards had been abandoned.

Our Association members just do not understand why the staff report before the October panel ignored its own Urban Design Planner's recommendation for refusal.

Approval would turn Cross Street into an unrelieved 6 storey canyon with no relief from visual oppressiveness and loss of outlook, no gaps between structures on this south side to allow for glimpses or views, or to allow the summer nor' easterly to penetrate to properties to the south and west. No gaps to allow street noise reverberation to be attenuated.

We just did not understand staff's 100% reliance on just two DA's granted to the property's east (one of which -no 16-18 - was granted under the previous controls which had no height development standard).

Both consents were granted against staff recommendations for refusal at the time. Staff told the Panel that these two consents did not usurp the height and FSR standards and controls when the Panel were earlier ruling on 28 & 30-36 Bay Street & 2 Guilfoyle Avenue, with staff recommending refusal of that DA. Staff insisted on the same thing on 4 October 2018 on 21-27 Bay Street when recommending refusal of that 6 storey DA. Bay St and Cross St are in the same zone with the same standards but staff were recommending a different outcome for a 6 storey development in one street compared to the other.

The principal grounds on which we say this DA should be refused remain as put in our objection letter of 8 February 2018. The grounds relating to the clause 4.6 objections have been reorganised to follow the approach and sequence approved in recent judicial authority in *Four2Five Pty Ltd v Ashfield Council (2015) NSWLEC 90* and *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118.* Since the date of the letter of February 2018 Council has resolved to amend its LEP and DCP to mandate that first floor space be kept commercial, not residential, and accordingly we have added the inconsistency of this DA with that change of controls as a ground.

The grounds of objection are:

1(a) Excessive height (in breach of clause 4.3 of the LEP);

1(b) The clause 4.6 objection to compliance with the height standard should be dismissed;

2(a) Excessive bulk/FSR (in breach of clause 4.4 of the LEP);

2(b) The clause 4.6 objection to compliance with the FSR standard should be dismissed;

3 Breach of the envelope, setback and other controls in the Woollahra DCP 2015;

4 Inconsistency with current Planning Proposal to amend the LEP and DCP so as to mandate commercial, not residential, on first floors;

5 Breaches of SEPP 65 and the Apartment Design Guide;

6 Overshadowing impacts;

7 The completely inadequate parking for the retail component;

8 Failure to comply with the mandatory requirements of cl 6.1 of the LEP (acid sulphate soils management plan) and cl. 7 of SEPP 55 (contamination).

We deal with each of these in the sections below.

1 (a) Excessive height (in breach of cl. 4.3 of the LEP)

Clause 4.3 of the LEP with its accompanying height map allows a maximum height on this site of 14.7m. The height of this development is 21.21m measured in accordance with the LEP. **It is therefore over 44% in excess of the LEP's maximum height.** Absent a successful written objection in accordance with cl.4.6 the consent authority has no power to approve it. For reasons set out in 1(b) below the cl.4.6 objection to compliance must be rejected.

The excess height over the LEP's 4 storey limit will have a disastrous impact on the ambience of Cross Street and Knox Lane in terms of public views in those streets. In Cross St we have already referred to the canyon-like impact of a sheer 6 storey wall of building. The setback of the upper two floors on the Cross St side is minimal and is nullified by the continuous intrusion of balconies and their dividing walls along the whole frontage. Knox Lane will become an area of perpetual gloom with shadows from the development stretching well up the rear facades of buildings on the other side of the lane (and compromising their future redevelopment).

Residents in 45 Cross St opposite will be oppressed by this continuous 6 storey wall across the street, shut out from their existing neighbourhood and district views to the south and west.

There will be a particularly disastrous impact on harbour views from residences on the slopes of the ampitheatre surrounding Double Bay, particularly Edgecliff and Woollahra. This development would be more damaging to those views than the developments at 16/18 and 20/26 Cross St because to an extent views across the first of those sites (and the second partly) were blocked anyway by the bulk of the Intercontinental Hotel. However this site lies further to the west and, as it were, clear of the Intercontinental.

1 (b) The clause 4.6 objection to compliance with the height standard should be dismissed

The decisions in *Four2Five P/L* and *Initial Action* referred to above have made it clear that an Applicant has to satisfy the consent authority:

(a) That compliance with the four storey height limit is unreasonable or unnecessary in the circumstances of the case. The first and most commonly invoked way is to prove that notwithstanding the non-compliance because the objectives of the development standard are achieved notwithstanding the non-compliance.

    This is a double hurdle as explained by the Chief Judge at *Initial Action* at 26. Firstly, the consent authority must be satisfied the applicant has adequately addressed this issue (cl 4.6(3)(a)). Secondly the consent authority must itself be satisfied that the objectives of the height standard are achieved notwithstanding the non-compliance (cl 4.6(4)(a)(ii)). AND

(b) That there are sufficient environmental planning grounds to justify the contravention – again a double test (cl 4.6 (3)(b) and cl 4.6 (4)(a)(ii)). AND

(c) That the development is consistent with the objectives for development within the relevant zone (cl 4.6(4)(a)(ii)). Again, the focus is on the element of the development which contravenes the standard (*Initial Action* at 24).

The developer's consultant has chosen to mount his case on the argument that the height standard has been abandoned, referring to the 16/18 and 20/26 Cross Street consents. The former could not possibly be any such evidence since it was a consent granted under the preceding controls, as stated. The consent granted for no 20/26 could not possibly amount to abandonment when there are at least a hundred properties in the Centre the subject of this height standard. One swallow does not a summer make and the Panel's rejection of this argument cannot be challenged.

Objective (a) of the Height standard is:

> "*to establish building heights that are consistent with the desired future character of the neighbourhood".*

That desired future character for Cross Street is set out at D5.4.7 of the DCP and that for Knox Lane at D5.4.9. See also Control drawing 4 at D5.5.8. If one looks at the section drawing in D5.4.7 under Fig 17 for the south side of the street it is a 4 storey character, not 6 storey. As Council's Urban Design Planner says: "However the top two levels which rise above the height limit do not conform to the desired future character of the location". It is unarguable and he says the same thing in due course in relation to the FSR exceedance. Note in that DCP section the words and drawing require that the 4th level be set back 3.5m from the street boundary. This building's 4th level is virtually not set back at all.

Going back to the 1st page of D5.4.7 it says: "Encourage arcades and courtyards on the south side that cater for outdoor eating and informal gathering". This development gets rid of a very popular courtyard and has no space for informal gathering.

Turning to the "desired future character" of Knox Lane as set out in D5.4.9, here the discrepancy is off the scale.

The section drawing and words at the foot of the page on the right in D5.4.9 only allow one to build to 4 storeys for 50% of the frontage if the balance is 2 storey. Apart from its sixth storey this building is to be built right on the laneway. We will come to the Urban Design Planner's comments on the overshadowing consequences later. At D5.4.8 the desired future of the Centre's Lanes generally is set out and its "(b)" requires – "setting buildings back on one side and preserving natural daylight to the lanes". Here daylight is gone forever for nearly the whole of the day.

Council's Urban Design Planner says this; "at 10am in the middle of winter… the subject building would overshadow the lowest three levels of a similar building on the other side of the Knox Lane, even if that building were setback to match".

Clearly the development is inconsistent with Height standard objective (a), namely the desired future character of both Cross Street and Knox Lane.

Objective (c) of the Height standard is:

> *"to minimise the loss of solar access to existing buildings and open space."*

As to the overshadowing of "existing buildings" we repeat the words of Council's Urban Design Planner three paragraphs above. The same comment applies to overshadowing of existing buildings. As to the loss of solar access in Knox Lane it is complete, meaning that in mid-winter the Lane becomes an area of perpetual gloom.

The development is hopelessly inconsistent with that objective of the Height standard.

Objective (d) of the Height standard is:

> *"to minimise the impact of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion."*

The contravening 5th and 6th floors will have a disastrous impact on views south and west from the Gallery Apartments opposite at 45, Cross Street (and also be visually intrusive). They will also block

north easterly harbor views from upper units in the Cosmopolitan Centre as well as buildings at New South Head Road such as Overthorpe, Bibaringa and 290 New South Head Road. It will intrude into harbour views enjoyed by many of us living on the ampitheatre because of its proximity to the Double Bay beach. These views would be retained if the building were a complying 4 storeys.

We have already highlighted the overshadowing of buildings on the other side of Knox Lane.

The development's contravening 5th and 6th storeys are inconsistent with objective (d) of the Height standard.

There are no sufficient environmental planning grounds (as opposed to the commercial profitability to the developer) to justify the contravening 5th and 6th levels. The mere supply of additional apartments is not such a ground. Complying units could be built on other sites in the Centre. In contrast there is a huge public interest in continuing to uphold this control.

Going then to the third of the issues the Applicant has to justify as set out at the beginning of this section, it fails this as well. The development is inconsistent with the following zone objectives:

> *"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."*
>
> The community loses the upstairs shops and offices that serve locals and visitors and the employment they represent.
>
> *"To encourage employment opportunities in accessible locations"*
>
> This proposal destroys employment that is currently generated by the 1st floor shops and offices.
>
> *"To attract new business and commercial opportunities"*
>
> By getting rid of first floor commercial this precludes such opportunities.
>
> *"To provide active ground floor uses to create vibrant centres"*
>
> We lose a popular sunny courtyard and two storey shopping for a long, thin and comparatively uninviting arcade.
>
> "*To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area"*
>
> The surrounding residential area is predominantly 2 and 3 storey – the 5th and 6th floors are incompatible with that.
>
> *"To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood"*
>
> We repeat our submissions above.

Since it fails all three limbs of the cl 4.6 test, as the Panel found, the objection must be dismissed.

2(a) Excessive bulk/FSR

Under cl.4.4 of Woollahra LEP 2014 the maximum FSR for this site is 2.5:1. At p21 of the Statement of Environmental Effects ('SEE') it is conceded that the FSR of the proposed development is 3.48:1 **or almost 40% in excess of the maximum allowed**.

In section 3 below we highlight in relation to non-compliance with the DCP controls the SEE's Fig 24, a copy of which we annex as annexure 'A'. The red outline on the annexure shows what would be permissible under the DCP envelope controls. This overlay demonstrates that it is not only the impermissible upper two floors that fail to comply with the required limits but also the next two floors below fail seriously to comply with the DCP setbacks on both Cross St and Knox Lane.

This excess in height (the upper two floors) leads to all the environmental harm that we have outlined under the Height heading above. The excess bulk at lower levels contributes to the sheer wall/canyon effect on Cross St and the appalling over shadowing of Knox Lane and buildings beyond to which we have referred.

2(b) The clause 4.6 objection to compliance with the LEP's FSR standard must be dismissed

Once again in its written objection the applicant's consultant poses the argument relating to cl.4.6(3)(a) that compliance is unreasonable etc. because the development standard has been abandoned. As we have said in relation to this argument on Height the standard and breaches of it must be considered in the context of the whole area of the Centre. One exception to the application of a standard applying to a hundred or so sites cannot be said to amount to abandonment.

The standard way of trying to prove what the developer has to prove is to show that the objectives of the standard are fulfilled notwithstanding the breach.

The objective of the standard under cl.4.4 is:

'*… to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale*.'

When the applicant deals with this matter it ignores the DCP's statements about 'desired future character'. This is impermissible. The LEP was clearly intending to refer to the desired future character as stated in the cognate DCP. It has not even satisfied the test under cl 4.6(3)(a) of addressing the issue of whether compliance is unreasonable etc.

As we said in relation to the cl.4.6 issue on height, the DCP in its 'desired future character' for Cross St has a 4 storey height limit on Cross street and allows 4 storeys on up to 50% of each site that fronts Knox Lane with the balance of such frontage to be 2 storey. This development is totally inconsistent with that. It has 4 storeys to the whole frontage to Knox Lane with a somewhat setback 5th and 6th storey above that. There is no setback of the 4th floor by 3.5m from Cross Street as required.

Again, the DCP encourages courtyard development on the south side (of Cross St) to encourage outdoor eating and informal gathering. The present development on the site has a large and popular courtyard area. The proposed development has none, only along a narrow corridor between shops. There is nowhere on site for 'outdoor eating and informal gathering'.

Since the development fails to fulfil the bulk and scale objectives of the FSR standard, it fails the first leg of a cl.4.6 objection. No sufficient planning grounds are shown under cl 4.6(3)(b) to justify the contravention.

It similarly fails the test under cl 4.6(4)(a)(ii) of showing that the development is consistent with the zone objectives. We repeat what we have said indented on p5 above on this issue in section 1(b) above.

As the Panel correctly determined the cl 4.6 objection to compliance with the FSR standard must be rejected.

3 Breach of the envelope, setback and other controls in the Woollahra DCP 2015

We shall deal with car parking separately under its own heading below.

In its SEE the applicant includes a copy of its section drawing A08.001 on which it has superimposed faintly a red dotted line showing what is said to be a DCP-compliant structure. A copy is annexure 'A' to this submission. As stated above it demonstrates serious non-compliance with the DCP envelope controls in that the top two floors should not be there and the floors beneath seriously encroach upon the minimum setbacks required by the DCP.

In short, we note the following breaches of the Woollahra DCP:

- The 6 storeys breaches the 4 storey maximum permissible height limit for the front part of the site (D5.5.4 and 5.5.8);
- The mainly 6 storey, part 4 storey proposed for the rear half of the site breaches the requirement that not more than 50% be 4 storey with the balance being 2 storey (D5.5.4, 5.5.8 and 5.4.9);
- It conflicts with the Desired Future Character which only allows 4 storeys on 50% of the frontage to Knox Lane (otherwise 2 storeys) (D5.4.7);
- It destroys and does not replace the courtyard encouraged on the south side of Cross St (D5.4.7 item (d) and 5.6.4.3 Control C1);
- It fails to setback the fourth storey by 3.5m from the Cross St frontage (D5.4.7 Fig 17);
- On Knox Lane it fails to setback the building above ground and first floor levels by 6m as required by D5.5.8 and fails to setback the first floor level by 2m;
- It fails to provide 75% active frontage to Knox Lane in breach of D5.6.4.5 control C1;
- The maximum built depth of the third and fourth levels (levels 02 and 03 on the plans) greatly exceeds the maximum building depth of 15.6m (D5.6.6.2).

4 Inconsistency with the current Planning Proposal to amend the LEP and DCP so as to mandate commercial, not residential, on first floors

Annexed as annexure "B" is a copy of Council's resolution of 29 October 2018 resolving to seek a gateway determination for its planning proposal to introduce a minimum FSR of 1.3:1 for commercial space in the Centre. We are informed by Ms White of Council that the planning proposal is with the Department awaiting consent to its public exhibition.

The subject development by getting rid of the shop and commercial first floor and replacing it with residential on that floor conflicts with this proposal. Whilst it may not have reached the status under

Section 4.15 (1)(ii), we say that it is to be taken into account under s 4.15 (1) (b) – "(the) social and economic impacts in the locality" – of the loss of much valued commercial space serving the local community and the loss of employment.

We refer also to what we said on this issue under section 1(b) above about the development's inconsistency with the zone objectives.

5 Breaches of SEPP 65 and the apartment Design guide ('ADG')

The Association's greatest concern is with the external envelope of the building and its impact on other existing and future residents.

The building breaches on the Knox Lane side the ADG minimum separation distances between habitable rooms/balconies of:

Up to four storeys	12m
Fifth and sixth storeys	18m

Design Criteria 1 to Objective 3F specifically requires that habitable rooms and balconies on the top two floors be setback from the rear boundary by 9m and the lower floors by 6m.

Consistent with the first of these requirements in our DCP's requirement of a 6m setback for levels above the ground and first floor levels (D5.5.8).

The same infringements of the DCP setbacks on the Knox Lane side mean that the first, third and fourth and fifth and sixth levels all infringe the ADG minimum buildings separation distances, distances that apply to the humblest apartment building in Campbelltown or Liverpool.

The consequences in terms of overshadowing and loss of privacy and acoustic amenity are totally unacceptable.

We also note that, in contrast with the sunny courtyard to the existing commercial development, no communal open space whatsoever is to be provided, let alone the 25% of the site recommended by Objective 3D-1 of the ADG.

Similarly, no deep soil zone is to be provided whatsoever let alone the minimum 7% of the site area required by Design Criteria 1 of the ADG.

Moving to the amenity of the individual units themselves, we note that there are a number of units which would appear to receive little or no mid-winter sunlight (cf Objective 4A-1) – namely unit 1A on level 1 and 1B units on each of levels Two and Three, all located in the SW corner.

In terms of the ADG requirements for natural ventilation, the maximum overall depth of a cross-over or cross-through apartment under 4B3 no2 is 18m. We note that of units of this type the preponderant 3 bed units have an excessive depth of 20.9m.

Furthermore, given the reliance on open plan layouts i.e. combining living and dining rooms and kitchen, the units breach the requirement in 4D-2 that the maximum habitable room depth from a window is 8M. Though the dimensions are not entirely clear, this appears to us to be breached by the following

units on Levels One, Two and Three – 3A, 3B, 3D, 3E, 3G and 3H. We note the applicant's consultant concedes some room depth are as great as 11.75m measured in accordance with the ADG.

We note the development also contravenes the requirement that all common circulation spaces above ground should be provided with natural ventilation (4F1). Only mechanical ventilation is provided to lift lobbies.

We note that in the past some councillors have mistakenly thought that some developments, approved against staff recommendations for refusal, were somehow justifiable as providing lower cost or affordable housing. 4K1 of the ADG does call for 'a variety of apartment types'. In this case there are no studio apartments and only 3 one bedroom apartments. Overwhelmingly the provision is of three bedroom apartments of which there are 13 with 2 four bedroom apartments and just 3 two bedroom apartments.

Finally, the sustainability principles in the ADG seem to be ignored. There is no proposal in accordance with 4V2 to capture, store and reuse rainwater collected from the roof and balconies.

6 Overshadowing impacts

It is worth contrasting the maximum building envelope allowed by the DCP (see red line on annexure 'A') with the subject development which will tower over Knox Lane placing it in shadow for most of the day and indeed overshadowing the rear walls of buildings on the opposite side of Knox Lane up the first floor level.

A development which complied with DCP's setback and envelope controls, with at least 50% of the rear part of the building being only 2 storey and the balance a maximum of 4 storey, would allow winter sunshine into Knox Lane.

It would be extraordinary if a Council which a year or so ago had a picture of people dining at sunlit tables in Knox Lane on the front page of the Wentworth Courier were not to reject a development which renders that scene impossible.

6 The completely inadequate parking for the retail component

The DCP requires the provision of a minimum of 19 car parking spaces for the retail space in the building. Against this it is proposed to provide **only 3 car parking spaces in respect of the six retail outlets or less than one sixth of the required parking.**

It is inconceivable that the proprietors and staff of those shops will not alone generate a demand far in excess of those three spaces. Then of course the 6 retail outlets will attract customers many of whom will come by car and need somewhere to park. Not a single space is to be provided for them.

The parking situation in and around the Centre is dire and steadily getting worse. The Woolworths car park is frequently full, particularly in the afternoons. The Cross St car park is reaching the same point. In the surrounding residential streets residents pray for a space to become vacant for their own vehicles or

those of their visitors. The parking difficulties in Double Bay threaten not only the prosperity and viability of the Centre but also the quality of life of residents in and around it.

7 Failure to comply with the mandatory requirements of cl.61 of the Woollahra LEP (acid sulphate soils management plan) and cl. Of SEPP 55 (contamination)

It is not in issue that this site is within Class 2 of land affected by cl.61 of the Woollahra LEP (Acid Sulphate Soils) and that consent is required for any works involving excavation below natural ground surface.

Cl6.1(3) of the WLEP provides that:

> 'Development consent must not be granted under this clause for the carrying out of works unless an acid sulphate soils management plan has been prepared for the proposed works in accordance with Acid Sulphate Soils Manual and has been provided to the consent authority.'

No acid sulphate soils management plan has been provided by the Applicant notwithstanding that the Douglas Partners' report filed for the Applicant acknowledges the possible presence of acid sulphate soils. At page 23 of the SEE the Applicant's consultant talks about the possibility of preparing the acid sulphate soils management plan called for by cl6.1(3) above post demolition of the existing improvements.

The SEE also discusses possible contamination within the meaning of cl.7 of the SEPP 55 (Contamination) and at p32 says 'further investigation is required'. See also the Douglas Partners' report referred to at p37 of the SEE as saying further investigation of this issue is warranted. The adjoining site was formerly a petrol filling station and garage.

Cl.7 of SEPP 55 is in not dissimilar terms to cl.6.1. It provides:

> '7 Contamination and remediation to be considered in determining development application
>
> (1) A consent authority must not consent to the carrying out of any development n land unless:
> (a) It has considered whether the land is contaminated and
> (b) If the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose which development is proposed to be carried out, and
> (c) If the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.
>
> (2) Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subclause (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.'

There is no evidence of soil testing having been carried out on the subject site even though parts of the site are clear of buildings.

At the time of the debate over the earlier DA's for the sites to the east in Cross St, this Association obtained and supplied to Council the advice of Peter McEwen SC (copy annexed as annexure 'C"). His advice was to the effect that Council could not leave the need for an acid sulphate soils management plan (and the equivalent contaminated soils report under cl.7(2) of SEPP 55) o be dealt with by some sort of deferred commencement condition. By not providing an acid sulphate soils management plan under cl.6.1(3) of the LEP nor a soil investigation report under cl.7 of SEPP 55 the Applicant is effectively asking the consent authority to deal with the matter in this impermissible way. Mr McEwen went on to say that without the provision of this management plan and soil investigation report any purported consent granted would be **invalid**.

When this silk's advice was tendered to Council at the time of debate over 16/18 Cross St the Council sought advice from Lindsay Taylor, solicitor, who is substance agreed with Mr McEwen's advice.

Conclusion

For the above reasons our association asks that the Panel decision of 4 October 2018 be upheld and the application refused. We would also request the courtesy of being provided with a copy of any staff report prepared for the review as well as early notice of the date and time of this matter coming before the Panel since we would wish to supplement this submission with oral submissions.

Yours faithfully,

DOUBLE BAY RESIDENTS ASSOCIATIN INC

Per Malcolm Young, Vice President