

# Double Bay Residents' Association Inc

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The General Manager,  
Woollahra Municipal Council,  
PO Box 61,  
Double Bay NSW 1360.

2 March 2018

Dear Sir,

**DA 25/2018/1      49-53 Bay Street, Double Bay**

We have examined the drawings and reports filed in support of the above 7 storey mixed development.

Our Association and its members oppose the grant of consent to this DA. If approved it would create a gross overdevelopment in breach of Council's LEP 2014 development standards and the fine-grained set of controls in its DCP 2015. It would be out of keeping with the scale of development in Bay Street (Centre) and that surrounding Guilfoyle Park.

The principal grounds on which we say this DA should be refused are (following the sequence of s 79C):

- 1(a) Excessive height;**
- 1(b) The clause 4.6 objection to compliance with the LEP's height standard must be dismissed;**
- 2(a) Excessive bulk/FSR;**
- 2(b) The clause 4.6 objection to compliance with the LEP's FSR standard must be dismissed;**
- 3 Breaches of the storey, envelope, setback and other controls in the Woollahra DCP 2015;**
- 4 Breaches of SEPP 65 and the Apartment Design Guide;**
- 5 Overshadowing impacts;**
- 6. Inadequate car parking;**
- 7 Failure to comply with the mandatory requirements of cl 6.1 of the Woollahra LEP (Acid Sulphate Soils Management Plan) and cl 7 of SEPP 55 (Contamination);**

We shall deal with each of these in the sections below.

## **1 (a) Excessive height**

Under clause 4.3 of the Woollahra LEP and its accompanying Height Map the maximum permitted height is 18.1m for this site. Measured in accordance with the LEP the given height is 24.1m or **33%** in excess of the maximum height allowable. (Almost certainly that 5 storey height limit was set on this site on the principle that it would be a true main street corner site amalgamated with 55 Bay Street on the corner of Bay and Cross Streets. It is not so amalgamated and therefore not the envisaged main corner site).

Being 6 metres in excess of the maximum height allowed it follows that the consent authority has no power to approve it absent a successful objection under clause 4.6 of the LEP.

## **1(b) The clause 4.6 objection to compliance with the LEP's Height standard must be dismissed**

The recent Land & Environment Court decision in *Four2Five P/L v Ashfield Council (2015) NSWLEC 90* has established that on a cl 4.6 objection the applicant has to prove that:

(a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (the old SEPP 1 test to which *Wehbe* is applicable);

and in *addition* that

(b) There are sufficient environmental planning grounds to justify contravening the development standard; and

(c) 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 (cl.4.1(4)(a)(ii)).

The developer's consultant has chosen to mount its case on the argument dealing with (a) above that the LEP's height standard has been abandoned. He refers to two consents granted in Cross Street. With respect exceptions granted to those two sites, against staff advice, do not amount to an abandonment when there are of the order of a hundred properties in the Centre the subject of that height standard. Two swallows do not a summer make.

When one looks at the objectives of the height standard it is clear that the development fails to fulfil more than one of the objectives of the standard.

*Objective (a) – to establish building heights that are consistent with the desired future character of the neighbourhood.*

Firstly, the development fails the first element of the "desired future character" of Bay Street Centre as set out in D5.4.5 of the DCP – "Lot amalgamations on blocks in proximity to Guilfoyle Park". These two properties were clearly given the additional height of max 18.1m (5 storeys) – as opposed to the general 14.7m (or four storeys) - on the assumption they would be part of a strong corner of Bay St and Cross St. Because of the failure to amalgamate with 55 Bay St, they will leave instead a hopelessly non-complying

7 storey non-corner structure alongside the 2 storey corner building (55 Bay St) to its north and the 4 storey DCP-identified “character building” (45A Bay St) to its south.

The return frontage of the proposal is to Knox Lane and here the development is hopelessly inconsistent with the “desired future character” of the Lanes as set out in D5.4.8 – “setting buildings back on one side and preserving natural daylight to the lanes” and “Enhance the spatial definition of lanes with ground and first floor building lines and buildings up to two storeys in height”. Instead of two storeys here we have seven storeys casting Knox Lane and the neighbours opposite into shadow and gloom.

*Objective (b) – to establish a transition in scale between zones to protect local amenity*

It should be borne in mind that in the whole of Bay Street from its southern end to the northern end of the Centre there are only two buildings exceeding four storeys in height with two storeys the prevailing height in Bay Street South. The Cosmopolitan Apartments are said to be six storeys which, whilst literally true, is misleading because two of the upper floors are parking floors of barely 2m in height whilst the residential floors have limited ceiling heights of 2.1 to 2.3m. In height the building is five storeys. The other building is The Chancellor (38, Bay Street), diagonally opposite the subject site. It presents as four storeys since the top/fifth floor is so deeply set back that it can hardly be seen from the opposite sides of Bay Street or Cross Street.

Then there is the residential zones along Guilfoyle Avenue where the main prevailing height of development is 2/3 storey.

The point is that this property being located on the NW edge of the Centre it is all the more important that it observes the transitional principle. In flagrant disregard of this objective 7 storeys are proposed. They will appear, if built, utterly discordant with Bay Street as summarised above and with the transitional objective. Whilst an attempt is made to argue the setback of the upper two floors will disguise the 7 storey appearance, this really cannot wash. The balconies, blade wall and top floor slab are set back from the Bay Street boundary by little over 1 m, the roof by little more. It will present as a 7 storey structure from Guilfoyle Park, from the opposite side of Bay St, Cross St and Knox Lane and to the diagonal viewer on the same sides of the two streets.

*Objective (c) – to minimize the loss of solar access to existing buildings and open space*

The shadow diagrams indicate that the development hopelessly fails this objective. Knox Lane is cast wholly into shadow and indeed the shadows climb up the rear walls of the buildings on the far side of that lane throughout the day. At 9 am in winter the critical public space across Bay Street is cast into shadow and even part of the park itself overshadowed. A complying development would much better satisfy this objective.

*Objective (d) – to minimize the impact of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion*

The Chancellor opposite, the Cosmopolitan Apartments and 45 Cross Street (the “Georges Centre”) will lose district and neighbourhood views which would be vastly less impacted by a development complying with the height standard. The failure to set back from Knox Lane represents a breach of both the ADG and the parallel provisions in the DCP relating to minimum separation distances between habitable rooms/balconies and boundaries(6m to four storeys and 9m for floors 5,6 and 7). In this context the

development has by reason of its non-complying uppermost two floors devastating impacts on the properties on the other side of Knox Lane in terms of loss of privacy, visual intrusion and overshadowing. These impacts would not be there (or would be substantially lessened) if the height complied.

At 7 storeys the development particularly because of its location on the northern edge of the Centre, close to the harbour, will impact on the harbour views of literally hundreds of homes situated on the footsteps of the Edgecliff and Woollahra parts of the amphitheatre surrounding Double Bay. Because the angle of these views gets shallower the closer the obstruction is to the harbor, a building exceeding the complying 5 storeys in this location destroys far more views than if it were, for example, located on the south side of New South Head Road.

The Applicant therefore fails to satisfy the first limb of cl 4.6 (3)(a) in respect of several of the objectives of the height standard (and any one failure would be fatal). There are no sufficient environmental planning grounds to justify the contravention – the extra “illegal” two floors provide extra residential units but those units could be provided under the zoning on any other site in the Centre (see *Four2Five* at para 7 quoting para 60 of the Commissioner’s judgment below). Likewise, in terms of cl 4.6 (4)(ii), there is no public interest in upholding the objection because it has not been shown that it is consistent with the objectives of the zone and anyway as held by Pain J that does not anyway overcome a failure to satisfy either 4.6(3)(a) or (b).

## **2 (a) Excessive Bulk/FSR**

Under cl 4.4 of the LEP the maximum FSR for the no 53 Bay St part of the site is 2.5:1. It is similarly 2.5:1 for the 49 Bay St part of the site unless the development satisfies clause 4.4A in which case it is increased to 3:1.

Clause 4.4A only permits an increase to 3:1 on no 49 “if the consent authority is satisfied that the development will be compatible with the desired future character of the zone in terms of bulk and scale”.

We would submit however that this development fails to satisfy at least two of the objectives of the B2 zone and accordingly the no 49 part of the site does not qualify for the 3:1:

*“to provide for development of a scale and a type that is compatible with the amenity of the surrounding residential area”*

As noted above the surrounding residential area is generally a mixture of 2 storey homes and 3 storey residential flat buildings. The height limits for the surrounding residential lands are 3 storey (10.5m). That is why the maximum height in the Centre is generally limited to 14.7m with some areas 18.1m and why the FSR is generally a maximum of 2.5:1 – to ensure that compatibility with the surrounding residences. This development on 49 Bay St is conceded to have an FSR of 4:1 (Cl 4.6 objection, p2). That is “incompatible” in “scale” and “type” with that surrounding residential amenity on any view.

*“to ensure that development is of a height and scale that achieves the desired future character of the neighbourhood”.*

We refer to all we have said above under section 1(b) dealing with Objective (a) of the Height standard. The development is inconsistent with the desired future character of both Cross Street and Knox Lane as respectively set out in the DCP.

It follows that, with an acknowledged GFA of 2,852m<sup>2</sup> (we will rely on staff to corroborate that claimed figure) on a site area of 803m<sup>2</sup>, the true FSR is 3.55:1 **or 42% in excess of the FSR development standard.**

Absent a successful cl 4.6 objection the application must be refused.

**2 (b) The cl 4.6 objection to compliance with the FSR development standard must be refused.**

Once again the Applicant's consultant first tries the argument that the development standard has been abandoned. As stated on the Height issue the standard and the breaches must be considered in the context of the whole of the Centre to which it applies. Two exceptions to a standard, allowed in the teeth of staff's recommendations for refusal, being 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 applicant has to prove under cl 4.6(3) (a) 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."

The desired future character of the area is as stated in the accompanying DCP.

As we have already noted the proposal well exceeds the 5 storey limit for this part of Bay St Centre and the desire for lot amalgamations leaving 36 Cross Street on the corner with dimensions entirely unsuitable for redevelopment. The development is at odds with both (b) and (c) of the Desired Future Character of The Lanes (D5.4.8):

*(b) Improve pedestrian amenity by providing adequate footpaths, limiting the width and numbers of vehicle crossovers, setting buildings back on one side and preserving natural daylight to the lanes*

Comment – the setback is only just over 1.5m, barely enough for pedestrians to pass and the majority of the frontage is taken up with vehicle crossings and service areas. The setback which the DCP requires limits development to two storeys for at least half the Lane frontage. This is ignored totally (see under DCP comments below). Natural daylight is not preserved – it is totally destroyed in winter.

*(c) Enhance the spatial definition of the lanes with ground and first floor building lines and buildings up to two storeys in height.*

Comment – instead of two storeys this development plonks five storeys right on the lane with no setback at all (see again under DCP comments below) and the two topmost storeys with minimal setback.

If one then goes to the specific desired future character of Knox Lane at D5.4.8 the same “(b)” and “(c)” are repeated to the letter and the same comments apply.

Accordingly, the building is not compatible with the desired future character of the area in two important respects and the cl 4.6(3)(a) test is therefore failed. That is fatal to the application but, we note, that the additional burden of satisfying cl 4.6(3)(b) is not satisfied anyway. There are no planning grounds to justify putting a building of this bulk and scale in this location. It is out of keeping with Bay Street South and Centre and particularly its two neighbours, the two storey 36 Cross Street and the four storey “character building” 45A Bay Street (with its heavily set back top floor). It flagrantly breaches the fine grain controls for Knox Lane. It would stick out like a jagged outsize tooth in both Bay Street and Knox Lane and be destructive of the sunny, village atmosphere of the Centre.

### **3 Breaches of the storey, envelope, setback and other controls in the Woollahra DCP.**

In short we note the following breaches of Woollahra DCP 2015:

- It grossly breaches the 5 storey (18.1m) maximum in the built form envelopes – see D5.5.4, D5.5.8 and D5.4.5.
- Instead of the rear or northern half of both no 49 and 53 being limited to 2 storeys these areas are developed to a mix of 5 and mainly 7 storeys – see D 5.5.4, 5.5.8 and note also 5.4.5.
- As noted in breach of the desired future character for Bay Street (Centre) in D5.4.5 “(a)” the lot has not been amalgamated with the true corner site being 36 Cross Street.
- In breach of “b” in the Desired Future Character of both Knox Lane and The Lanes generally (D5.4.8 and 5.4.9) the development grossly fails either to set its buildings back from Knox Lane or to preserve natural daylight to the Lane.
- In breach of “c” in the Desired Future Character of both Knox Lane and The Lanes generally (D5.4.8 and 5.4.9) the development fails to define the Lane with buildings “up to two storeys in height” and fails to set the third and fourth floors by 8m as there required.
- Instead of building up to 50% of the Knox Lane frontage with buildings up to 4 storeys with the balance 2 storey it builds to 7 storeys (D5.4.9).
- It grossly impinges the 2m minimum setback from Knox Lane (D5.4.9).
- It fails to provide any arcade or courtyard to Knox Lane (D5.4.9 (c) and D5.6.4.3).
- In breach of D5.6.3.8 Control C1 it is not compatible in any way with the listed “character building” being 45A Bay Street. Its 7 storeys dwarfs that 4 storey building and its lack of upper floor setbacks is inconsistent with the very pronounced setback of 45A’s top or 4<sup>th</sup> floor.
- With dire consequences for future privacy (visual and acoustic), visual oppressiveness and overshadowing it fails to provide the minimum separations between habitable rooms and

balconies across Knox Lane under D5.6.5. This is also dealt with below as a breach of the ADG.

- Balconies to Bay St fronting units have less than the 1.8m minimum depth in breach of D5.6.5.4 Control C2.
- Proposed south facing units 104,204,304 and 404 have no solar access either to their external or internal living space in breach of D5.6.6.1 Control C4. Solar access to units 105,205,305 and 405's habitable rooms in compliance with Controls C3 and C4 is dubious (see below under section 4).
- The failure to comply with the control drawings identified above in Section D5.5 and the consequent disastrous overshadowing of Knox Lane and the building on its far side are also a breach of D5.6.6.1 Control C2.

#### **4 Breaches of SEPP 65 and the Apartment Design Guide (“ADG”)**

We have not attempted an exhaustive assessment of the proposed development's compliance with the ADG. We do however raise the following issues which greatly concern us, stating first in italics the applicable ADG design criteria and then the perceived non-compliance. It should be remembered that this is a state-wide guide applying to the humblest apartment block in Liverpool or Campbelltown:

- *Communal open space is provided having a minimum area of 25% of the site area – 3D1 design criteria 1.* It would appear to us that there is no communal open space provided since no access is shown to the void in the NE corner at the first upper floor level. Indeed, if this space were intended as communal open space it not only be a small fraction of 25% of the site area but trigger other non-compliances with the ADG.
- *Deep soil zones to be provided to a minimum of 7% of the site area – 3E1 DC1.* No deep soil zone is provided at all.
- *Minimum separation distances to the side boundary for habitable rooms and balconies -3F1 DC1:*
- *Up to 4 storeys           6m*  
*5 to 8 storeys           9m*

As discussed under earlier headings there is nil setback at Levels 1,2,3 and 4 and a derisory setback of only about 1.2m at Levels 5 and 6. The consequences for ambience and views in the public domain are disastrous. Overshadowing of Knox Lane would be complete and would extend to the existing buildings on the opposite side of the Lane and any subsequent redevelopment of those buildings. We repeat all we have said above on this issue.

- *Communal open space and common areas should be separated from windows to apartments, particularly habitable room windows – 3F2 DC1.* We refer again to the paved void in the NE corner at first floor level. If, contrary to our understanding, that is intended as communal space or a common area it would look directly into the bedrooms of Unit 101 in direct breach of this criteria.

- *Separation distances – habitable room to habitable room – F2.* Another concern in this area is that Apartment 105 and Apartment 101 would appear to have bedrooms looking into one another and vice versa, and similarly with 205 and 201, 305 and 301 and again 405 and 401.
- *Receipt of direct sunlight in mid- winter 4A1 and DC1,2 and 3.* Obviously, as appears to be conceded, Apartments 104,204,304 and 404 receive no midwinter sunlight in their habitable rooms. That alone appears to breach DC3 which requires a maximum of 15% of units receive no midwinter sunshine (4 of 24 units = 16.67%). However, we would challenge whether Apartments 105,205,305 and 405 will in practice receive the required 2 midwinter hours. 28 Cross Street is seeking approval for a 6 storey structure currently and it must be assumed that 36 Cross Street may be able to build to the permitted 5 storeys. That being the case and the angle of mid-winter sun being only 33 degrees little or no sun will get into the light well facing the rear of the units we have queried. This being the case the building would not achieve DC 2 – namely less than 70% of units would receive 2 hours of sun on 21 June.
- *Natural ventilation -All habitable rooms are naturally ventilated - 4B1, 4B2 and DG.* Clearly, as is conceded, Apartments 104,204,304 and 404 are not cross ventilated. However, we would query whether apartments 102,202,302 and 402 are naturally cross ventilated as required by these provisions. On the inner side the cross ventilation source is claimed to be an internal fire "window" over the front door giving on to the lift lobby. That is non-compliant because the area of the window opening should be 5% of the floor area served and if light wells are discouraged as a ventilation source then an enclosed lift lobby hardly qualifies!
- *Sustainability issues - 4V1 and 4V2.* Contrary to these ADG objectives there is no provision for the collection, storage and reuse of rainwater on site nor any treatment before it is discharged to receiving waters.

## **5 Overshadowing issues**

We repeat what we have said under the italicized sub-heading "Objective (c)" under section 1(b) above. In pedestrian terms the overshadowed section of Bay Street, Guilfoyle Avenue and Guilfoyle Park itself is one of the busiest intersections and meeting places in the Centre. Effectively it is the forecourt to the weekly market that is set up at the eastern end of Guilfoyle Park and a key section of the annual street fair. It is also used for the occasional public meeting.

## **6 Inadequate car parking**

Only 2 car parking spaces are supplied for the retail component whereas the Woollahra DCP requires a minimum of 5.4 (or 5) spaces. This Association has long urged the Council to require the DCP minima for commercial uses in the Centre. Our members living in and around the Centre are daily finding it impossible to park their own cars (or for their visitors and tradesmen to park) on the streets on which they live. Every morning a flotilla of cars of persons employed in Double Bay Centre cruise the streets looking for an unrestricted place to park in the residential streets that surround the Centre. These

streets and the public car parks are parked out. The Applicant's consultant refers to the availability of public transport but the minimum of 5.4 spaces was set out in the DCP taking that availability into account.

Only 25 spaces are supplied for the residential component which is plainly inadequate given there are 24 units of which 8 are 3 bedroom units with an obvious likelihood of generating two spaces each.

The proposal is plainly inadequate in terms of on-site parking.

## **7 Failure to comply with the mandatory requirements of cl 6.1 of the Woollahra LEP (Acid Sulphate Soils Management Plan) and cl 7 of SEPP 55 (Contamination)**

It is not in issue that this site is within Class 2 of land affected by cl 6.1 of the Woollahra LEP (Acid Sulphate Soils) and that consent is required for any works involving excavation below natural ground surface.

Cl.6.1(3) of the LEP 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 the 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 (“ASS”). At pages 36/37 of the SEE the Applicant's consultant talks about the possibility of preparing the ASS management plan called for by cl 6.1(3) post demolition of the existing improvements and says further investigation is required.

The SEE also discusses possible contamination within the meaning of cl 7 of SEPP 55 (Contamination) and referring to the Douglas Partners' report takes the same view that further investigation is required post demolition of the improvements.

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

“ Contamination and remediation to be considered in determining development application

- (1) A consent authority must not consent to the carrying out of any development on 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.”

At the time of debate over the earlier DA’s for 16-18 and 20-26 Cross St, this Association obtained and supplied to Council the advice of Peter McEwen SC (copy annexed as annexure “A”). 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 of SEPP 55) to be dealt with by some sort of deferred commencement condition. The Applicant is effectively asking the consent authority to deal with the matter in this impermissible way. Mr McEwen goes on to say that without the requisite management plan and report any purported consent granted would be **invalid**.

When this silk’s advice was tendered to Council the Council sought advice from Lindsay Taylor, solicitor, who in substance agreed with Mr McEwen’s advice.

### **Conclusion**

This Association accordingly urges the consent authority to refuse this Application. We would ask to be given reasonable advance notice of the meeting of the consent authority at which the DA will be considered and the opportunity to address such meeting. We would also ask for the courtesy of an early supply of Council’s staff report.

Yours faithfully,

**DOUBLE BAY RESIDENTS ASSOCIATION INC**

Per Malcolm Young, Vice President.

