

Double Bay Residents' Association Inc

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The General Manager,
Woollahra Municipal Council,
PO Box 61,
DOUBLE BAY NSW 1360.

10th January 2021

Dear Sir,

Re DA 469/2020/1 357-359 New South Head Road, Double Bay

We have inspected the drawings and reports filed for the Applicant in support of this DA for a five storey commercial development on the above site. Our Association and its over 300 resident 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. We submit it should be rejected on the following grounds:

- 1(a) Excessive Height in breach of clause 4.3 of the Woollahra LEP;**
- 1(b) The cl 4.6 request in relation to the breach of the Height standard should be rejected;**
- 2 (a) Excessive FSR/Bulk in breach of clause 4.4 of the Woollahra LEP;**
- 2 (b) No cl 4.6 request filed in relation to the FSR breach;**
- 3 Breaches of the Woollahra DCP;**
- 4 Loss of solar access and overshadowing issues, oppressiveness, view, privacy impacts;**
- 5 Grossly inadequate parking provision in breach of the Woollahra DCP.**

We will deal with those grounds in the above sequence.

1(a) Excessive Height in breach of clause 4.3 of the Woollahra LEP

Under Clause 4.3 of the Woollahra Local Environmental Plan with its accompanying height map the maximum allowable height on this site is 14.7m. The height of this development is at least 18.25m (see Table 1 at p3 of the Applicant's cl 4.6 Request) measured in accordance with the LEP **or over 23% in excess of the maximum height.**

It follows that absent a successful request under clause 4.6 the building cannot be lawfully approved.

1(b) The cl 4.6 request in relation to the breach of the Height standard should be rejected

Much play is made in the Applicant's request on the fact that a five storey development was approved for the subject site on 4 October 2018 against vehement opposition from this Association and surrounding residential owners. However, that was a totally different development being for four shops with eleven units over and it was also substantially lower in height than the subject application. Its obvious defects in design make it no surprise that it has not advanced to the construction stage.

Accordingly, we would submit that this DA being wholly commercial in character falls to be determined de novo by the application of the principles relating to clause 4.6 objections as laid down by the Court in *Four2Five P/L* and *Initial Action*. These decisions have made it clear that an Applicant has to satisfy the consent authority:

- (a) That compliance, (in this case) 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 the objectives of the development standard are achieved.

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 objectives of the Height standard are set out in clause 4.3 (1) of the LEP.

Objective (a) is:

“to establish building heights that are consistent with the desired future character of the area”.

The desired future character for this site is set out in the Woollahra DCP at D 5.4.3 (New South Head Road) and particularly at D5.5.5 Control drawing 1 (which includes 5.6.3 Urban character and 5.6.5 Amenity). (For convenience copies annexed as Annexure “A”). Notably the building envelope is to be restricted to 4 storeys (defined in D5.5.2 to mean a maximum overall height of 14.7m) and on a smaller building footprint than the subject application, the DCP providing for a specific landscaped area in the SW corner of 50m² (see the words under 5.6.5 on the Control drawing: *“357-359 New South Head Road includes 50m² of landscaped area”*).

Importantly, under the heading “desired future character” in D5.4.3 it provides:

“Retain green vistas at each end of New South Head Road”.

This site is at the very western end of this section of New South Head Road and of course the additional height over the permissible four storeys blocks out green vistas across this corner both from the public and private domains.

The smaller permissible footprint with the 50m² of landscaping is a key element in protecting the amenity of the adjoining three storey residential development on the southern and western sides of the property from overdevelopment of the subject site which is transitional in nature.

Furthermore, Control drawing D5.5.5 requires that the external walls on all sides above the ground and first floors be articulated to a depth of 2m from the NSH Road and Manning Road frontages and variously 1.8 and 1.2m on the western and southern sides with 80% internal space and 20% external space. Levels 2 and 3 as described in the Applicant's plans make little or no attempt to comply with this requirement.

Not only therefore is the proposal very substantially over the building envelope's Height controls as described in the desired future character but it greatly exceeds the permissible building footprint by ignoring the site specific landscaping requirement and the articulation requirement and its excessive height limits the required preservation of green vistas across this site.

The proposal is not consistent therefore with objective (a) of the Height standard.

Objective (b) of the Height standard is:

"to establish a transition in scale between zones to protect local amenity".

This formalises what is a trite planning principle that where you have a site such as this which borders residential land with lower height controls (in fact three storey) than the commercial, the development should taper in height and bulk towards the controls governing its residential neighbours ("**the transitional principle**"). The four storey height limit for this isolated commercial site is important as providing a true transition between the three storey limit on the neighbouring R3 lands and the 5 storeys permitted on the opposite corner of Manning Road and beyond. It is also important that the dominant gateway into the Centre be the opposite corner across Manning Road since all one is looking at with this building as one descends NSH Road towards it is the unsightly rear, SW wall of the development which is largely blank.

This development fails to establish that transition and fails the objective.

Objective (c) of the Height standard is:

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

We do not accept that this issue is fairly addressed, as the Applicant seeks to do, by saying that the overshadowing is not much worse than caused by the 2018 approved development. The fact is that that building never has been built and very likely never will be built. The consent authority has a responsibility to consider this issue afresh and ask whether this development has met the standard's objective. The shadow diagrams are unsatisfactory, referencing some unidentified and unproved model and taken at only three hours of the mid-winter day.

No 3 Manning Road has its northern and eastern (front) elevation windows on all floors cast into shadow with the exception of one or two windows at 3pm. The northern windows are in shadow by noon. No 355 NSH Road has all of its eastern side units' windows cast into shadow with the exception of one or two top floor windows late in the day. In addition, the whole of Manning Road including the east side footpath in the area of the bus stop is cast into shadow in the afternoon.

Patently a building which observed the standard and DCP controls to which we have referred would have much less impact on solar access.

Again, the proposal fails to meet or be consistent with the objective.

Objective (d) of the Height standard is:

“to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion”.

The view loss from windows on the north side of 3, Manning Road will be total. The same applies to the views from eastern windows in 355, NSH Road. In addition, views from the lower floors in “Bibaringa” and some of the units at the NE end of “Overthorpe” will be blocked in part. Views from buildings such as 10, Manning Road, 3A, 5, and 9 Manning Road will be affected.

In terms of overshadowing and visual intrusion the impact on no 3, Manning Road will be catastrophic with overshadowing already discussed under objective (c) above. The southern side of the proposed building, which is not even setback the required 1.8m required by the DCP Control drawing, will loom over and be intensely oppressive to any resident looking out of their presently sun-filled northern side windows. The DCP required 50m² landscaping that might have partially mitigated the impacts of course is not provided. Similarly with 355, Manning Road, we refer to what we have said under objective (c) above in relation to the overshadowing of its eastern wall windows. Again, on that side the blade walls infringe on the required 1.8m setback worsening visual intrusion and oppressiveness.

Accordingly, the development fails to achieve objective (d).

Having failed to satisfy the first limb of the clause 4.6(3)(a)/ 4.6 (4)(ii) test as identified in “(a)” on page 2 above, that is fatal to the Applicant’s request. Additionally, we would submit it also fails the additional hurdle identified as “(b)” on page 2. There are no “sufficient planning grounds” to justify the contravention. As in *Four2Five* there are ample other sites in the Double Bay Centre on which this additional office accommodation could be built. Its excessive height in this location has the unfortunate consequence that the person entering Double Bay from the Edgecliff lights will be confronted by the high, largely blank back wall of this building whereas the intent of Woollahra’s planning controls is that a 5 storey building on the opposite corner should be the gateway building to the commercial centre.

2(a) Excessive Bulk/FSR in breach of clause 4.4 of the Woollahra LEP

We refer to the Applicant’s drawing DA002A “Floor Space Ratio Diagram” which assumes an entitlement to an FSR of 3:1 (of which more in a moment). It shows a total building area of 1056.4m² against a 3:1 allowable building area of 1055.16m². This is not a flexible control but a planning law and close enough is not good enough. The fact is that even on the Applicant’s calculation of areas the building does not comply with the LEP’s maximum. Absent a successful cl 4.6 request it cannot be approved.

The other point is that we would challenge whether the Applicant is entitled to the bonus 0.5:1 to lift the FSR from 2.5:1 up to 3:1. Clause 4.4A(3) provides:

“Despite clause 4.4, development consent may be granted to development on land to which this clause applies that results in a floor space ratio that does not exceed:

(a) In respect of area 1 - 3:1

.....

***if the consent authority is satisfied that the development will be compatible with the desired future character of the zone in terms of building bulk and scale.”** (our emphasis)*

The objectives of the B2 zone that are relevant to bulk and scale are as follows;

“To provide for development of a bulk and scale that is compatible with the amenity of the surrounding residential area.” AND

“To ensure that development is of a height and scale that achieves the desired future character of the area.”

We submit that the bulk and scale of this development is not compatible with the immediately surrounding residential area where the height limit is to 3 storeys (10.5m) and we refer again to the appalling amenity impacts on those surrounding residences as referred to above, particularly under Objective (b) on page 3 above.

As to the development’s incongruence with the desired future character of the area we repeat what we have put under Objective (a) on pp2/3 above.

Accordingly, we say that properly analysed the development is not entitled to the bonus FSR of 3:1, but only the standard 2.5:1 which it well exceeds.

2(b) No cl 4.6 objection filed in relation to the FSR breach

If our submission in **2(a)** above (that the development breaches the FSR standard) is accepted, it follows that the consent authority has no power to approve the development in the absence of a successful cl 4.6 request. No such written request appears to have been filed by the Applicant and accordingly the application must be refused.

3 Breaches of the Woollahra DCP

In dealing with the issue of the proposal’s non-compliance with the “desired future character” objective of the Height standard, we have already covered the building’s non-compliance with the envelope controls in the Woollahra DCP – see from half way down page 2 above to the top of page 3. In short it does not comply with:

- The DCP’s height limit of 14.7m or 4 storeys;
- The DCP’s requirement that an area of 50m² in the SW corner of the site be landscaping;
- The DCP’s setback controls on its southern and western boundaries – the proposed blade walls infringe the required 1.8m setback;
- The DCP’s requirement for articulation on all four sides of the building above the bottom two floors;
- The DCP’s requirement to retain green vistas across the site;
- The DCP’s requirement that on the ground floor of the south side of NSH Road only up to 40% of the street façade should be internal space with the remainder to be part of the shop or building entry – see D5.6.3.3 Building articulation Control C1 and Figure 24.

Then there is the matter of acutest concern to local residents, namely the proposal’s abject failure to comply with the DCP’s controls relating to the provision of on-site parking for cars and motor cycles. This is dealt with separately under the heading of **Section 5** below.

4 Loss of solar access and overshadowing issues, oppressiveness and view impacts

Loss of solar access and overshadowing issues

We refer to our submission above dealing with objective (c) of the Height standard and repeat what we put there half way down page 3 above about impacts on 3, Manning Road, 355, NSH Road and the public domain in Manning Road.

Oppressiveness

We refer to what we have said under objective (d) of the Height standard at the top of page 4 above. The building will be utterly oppressive to the residents of 3, Manning Road whether looking out of the northern or eastern (or front) windows in that building. Likewise, it will come close to shutting out the sky from eastern windows in 355, NSH Road. These impacts would be nothing like so great if the building complied with the height and setback controls and provided the 50m² of landscaping required by the DCP. The impacts are markedly worse than the 2018 approval.

View impacts

We refer to what we have said about view impacts under objective (d) of the Height standard at the top of page 4 above. In addition to the properties identified there whose views will be impacted are numerous other residences which sit on the amphitheatre slopes stretching up towards Edgecliff Road south west of the subject site.

6. Grossly inadequate parking provision in breach of the Woollahra DCP

This issue should be seen against the daily on-street parking nightmare suffered by residents of the surrounding area, the nightmare of not being able to find on-street parking for their own cars, those of their visitors or tradesmen. Each day surrounding streets are toured by a flotilla of early morning cars as their drivers (presumably people who work in Double Bay) search for parking spots in streets such as Forest Road and Epping Road. So bad has the situation become that a couple of years ago some 500 Double Bay residents petitioned the current Council complaining of the situation and requested that the planning controls require developers to provide sufficient on-site parking for the parking generated by each development. The writer lives in Pine Hill Avenue and my partner only dares move her car (parked on-street) on Sundays for fear of not getting a park in or near her street on her return.

In this context it is to be hoped that the staff and Panel members are not deceived by the anonymous parking survey included at pages 8/10 of the TEF parking report filed by the Applicant. We have walked the parking areas alleged by them to have been surveyed on 22 October 2020, but before setting out our observations area by area can we make the following threshold points:

- (a) There was very little point in conducting a survey in the depths of the Covid restrictions when many shops were closed, office workers worked from home and residents had food deliveries rather than go to the shops:
- (b) What one should be looking at is the availability of day long on-street parking because that is what the great preponderance of those working in this shop/office building will need. This will become important, because what the authors have failed to point out is that 99% of the spaces surveyed in their 24 zones are time restricted (varying ½ hr to 2hr max) and thus of no utility to those who will work in the proposed building.

We note the numbers of spaces said to have been available appear in the middle row of the table (“No of spaces”) on p10 of the report. We strongly disagree with those numbers having walked the streets

and counted them. We also do not understand how one or even two counters could on each half hour see how many cars were parked or not parked in 24 differently located zones. In the table below we set out our comments on each of their numbered zones as set out on the map on page 9 of their report. Rather than follow their numbering in strict numerical sequence we have dealt with them in 3 categories “South of New South Head Road”, “On New South head Road” and “North of New South Head Road”.

South of New South Head Road

Area 1

This is said to provide 7 spaces and is defined on p9 as “Area 1 is kerbside parking along the property frontage”.

Comment: There is no legal “kerbside parking along the property frontage” – the whole area is either “No Standing” or “Bus Zone” so it provides **0** spaces. (Even if the author’s note on p9 defining area 1 is an error and it includes down to House number 23 there are only 6 spaces and they have a 2 hr time limit).

Area 3

This is said to provide 9 spaces.

Comment: Only **7** spaces: one space has a ½ hr limit, and the rest have a 1hr time limit.

Area 4

This is said to provide 4 spaces.

Comment: **0** spaces. There is not a single legal parking space in the whole of Kiaora Lane, seven-eighths of which is bollarded off to vehicles from 10am to late at night. In Area 4 there are only 4 loading zone spaces which obviously are not legally available for day long parking.

Area 5

Acknowledged as a “No Parking” area on p10.

Area 12

Said to provide 4 spaces.

Comment

All the spaces are subject to either 1hr or 2 hr parking restrictions.

Area 13

Said to provide 11 spaces.

Comment

7 spaces only in the area marked on plan, three of which are subject to 2hr limit.

Area 14

Said to provide 1 space.

Comment

0 spaces – the one parking space is expressly on the sign restricted to car share scheme vehicles.

Area 15

Said to provide 8 spaces

Comment

In truth **0** spaces -see our comments on Kiaora Lane under Area 4 above.

Along New South Head Road

We regard it as extraordinary that parking on this main road, one of the most heavily trafficked in the State and subject to Clearway restrictions, should even be considered for parking availability.

Area 2

Said to provide 15 spaces.

Comment

In fact only **12** spaces – two in front of no 355 are subject to 2 hr restrictions and the other 10 are subject to Clearway restrictions from 6-10am and at other times to a ½ hour parking limit

Area 16

Acknowledged as “No Parking”

Area 24

Said to provide 4 spaces

Comment

Number agreed but no parking because of Clearway 6-10am and at other times ½ hr parking limit.

Area 23

Acknowledged as “No Parking”

Area 6

Said to provide 20 spaces

Comment

In truth only **10** spaces – two more are marked “Loading Zone” – and those 10 spaces are time restricted and marked “No stopping 4.30 pm – 6 pm”.

Area 17

Acknowledged as “No Parking”.

North of New South Head Road

Area 18

Said to provide 12 spaces

Comment

Number agreed but all spaces have a 2 hr limit.

Area 7

Said to provide 6 spaces

Comment

Number agreed but all spaces have parking meters with a 2 hr limit

Area 8

Said to provide 8 spaces

Comment

Number agreed but all are metered spaces with a 2 hr parking limit.

Area 19

Said to provide 21 spaces

Comment

We count 5 spaces – all are metered spaces with a 2 hr maximum.

Area 20

Said to provide 8 spaces

Comment

We count 7 but in any case all are metered spaces with a 2 hr parking limit.

Area 9

Correctly noted as “No Parking”

Area 10

Correctly noted as “No Parking”

Area 11

Correctly noted as “No Parking”

Area 21

Said to provide 5 spaces

Comment

Agreed but all spaces have a maximum ½ hr parking limit.

Area 22

Said to provide 3 spaces

Comment

Only 2 spaces – both restricted to maximum ½ hr parking.

Area 23

Correctly noted as “No Parking”.

In conclusion on that misleading parking survey, the truth is that there is not a single parking spot within 150 m of the subject property where it is legal to park for longer than two hours (office and shop tenants will not be entitled to residents’ parking stickers). Even within 250 m of the subject property there are only 4 parking spaces which allow all day parking and they are on the south side of Court Road in the survey’s zone 13 and are invariably parked out to our observation.. Nothing could better make the case for the necessity for adequate parking provision on site.

The Woollahra DCP E1.5 requires the following parking provision for the subject development:

Ground floor retail	195.7m ² at the rate of 3.3 spaces per 100m ²	= 6.46 spaces
Upper Office areas as per DA002	860.7m ² at 2.5 spaces per 100m ²	= 21.52 spaces
Total		= 27.98 spaces
Apply 0.6 Double Bay Centre discount		= 16.8 or rounded 17 spaces.

Only 2 car parking spaces are proposed to be provided with dangerous access off New South Head Road close to the traffic lights – there is therefore a shortfall of **15 spaces**.

In addition, under E1.7 there should be **2 motor cycle parking spaces** provided – none are.

There is no excuse for this under provision. The site is not within the acid sulphate soil zones so there is no reason why a basement parking floor could not be built with access off Manning Road.

The claim is made that there is good public transport available. Firstly, it is not that good. Buses only go to Edgecliff or along Park Street and not to the heart of the City. The Bondi Junction service is so infrequent and follows such a tortuous route as to be disregarded. Secondly, that was all taken into account anyway when the Woollahra DCP controls were fixed in 2015.

For the above reasons and so as to avoid a local disaster the DA should be rejected for its totally inadequate parking provision.

Conclusion

For the above reasons our members say the application should be rejected.

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, President