**Double Bay Residents’ Association**

Protecting Sydney’s Stylish Bayside Village

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**Your Ref: SC6287 Submissions**

Dear Craig

**Draft Woollahra Development Control Plan DCP 2015 (Amendment No 18)**

Thank you for the opportunity to provide comments on the proposed hydrology amendments to the Woollahra Development Control Plan. Our members have a great interest in the proposals given their concerns about:

* the extent of excavation and dewatering particularly in recent years and associated damage to surrounding properties;
* the inadequate, misleading, incomplete, non-complying,[[1]](#footnote-1) hydrogeological and geotechnical reports provided to Council with DA applications; and
* the failure in the DA assessments reports to adequately scrutinise these reports in DA assessments and the failure to call out inadequate, misleading, incomplete, non-complying reports ;
* the failure to accurately identify the adverse environmental impacts in the DA assessments due in part to the flawed nature of the hydrogeological and geotechnical reports; and
* the excessive amounts of excavation in particularly vulnerable areas.

***Objectives (Amendment 1.3)***

We support the aims of Amendment 18 as expressed in 1.3 namely: to strengthen the objectives and controls; to minimise the impacts of groundwater drawdown; and to ensure there are no adverse hydrogeological impacts on surrounding properties during and after construction.

However we consider that objective b) is unduly limited in referring to hydrology as a number of the proposed amendments relate to both geotechnical as well as hydrogeological reports required for excavation and associated water drawn down.

***New objectives O3 -O6*** *(****Amendment 2 4.2)***

The stated aims of Amendment 2.4.2 are to strengthen the objectives and to achieve consistency with the LEP.

We support the fact that the proposed amendment is designed to cover more than hydrogeological impacts.

However we are not convinced that objective O1 as drafted actually strengthens the objectives. Objective 01 replaces the broad objective that there be *no adverse hydrogeological impacts on surrounding properties both during and after construction* with 4 specific impacts. The way in which these impacts are drafted narrows the scope of the objective. It fails to cover the relevant impacts that could occur and introduces a degree of confusion.

To give one example new objective O1 refers to there being *no adverse impacts on environmental* *functions and processes*. Presumably environmental impacts that are not functions or processes are no longer covered. But what precisely are these excluded environmental impacts?

*Consistency with the EP&A Act s 4.15*

In terms of describing the impacts we would have thought that it is desirable to have some consistency with EP&A Act s 4.15 which refers to the impacts of development including *environmental impacts on both the natural and built environments*.

Section 4.15 also refers to *the suitability of the site for development.* We consider a useful objective would be *to ensure* *the site is suitable for excavation and associated dewatering,* given that the more vulnerable sites in low lying areas of Double Bay may not be suitable for excavation and dewatering as acknowledged in item G of Council Resolution of 26 April 2021 (see below).

*Consistency with the DCP general controls*

We are also a little concerned about the relationship of the objectives O1 with comparable objectives in the general controls of DCP *B3.4 Excavation*.

We are unaware of how Council rationalises the range of different impacts described in the Act, the LEP and DCP. We suggest that Council undertakes a re-examination and rationalisation of them. We would not however want this to hold up Council’s implementation of the Amendment 18.

***Condition C3 Groundwater must not be discharged into Council’s stormwater network (Amendment 2.4.6)***

As you are probably aware members and other residents have complained to Council and to the Environment Protection Authority about Council’s apparent lack of enforcement of the current comparable DCP and EPA requirements not to discharge into the stormwater network.

In recent times these complaints have centred on that fact that for many months groundwater, including that containing sludge from identified acid sulphate sites, has been pumped into the stormwater network from developments in Cross Street and William Street.

The EPA advised complainants of their concerns at this practice, particularly in relation to acid sulphate sites, and stated that they consider this a matter for Council (and not EPA) enforcement where the development is for residential purposes.

Council consent on a regular basis to discharge to the stormwater system under powers in the EPA suggests Council is undermining this provision and leads to a lack of confidence in Council. It would be helpful for public understanding the public were given an indication of when Council may use these EPA Act powers – and a reference to this is in Amendment 18 is recommended.

In addition to proper enforcement by Council (and by EPA where relevant), we consider that this provision should strengthened. We recommend amending proposed conditions C4 to C6 (see Amendment 2.4.7) to require that the DA documentation *must* demonstrate how the ground water is to be disposed of *without* using Council’s stormwater system.

***Condition C4 Dilapidation reports (Amendment 2.4.7)***

The proposed Condition C4 states Council may, for DAs involving below ground structures, require dilapidation reports for neighbouring properties. We are of the view that for these DAs dilapidation reports should be required by Council not only for neighbouring properties but for all the surrounding properties where is it is likely they could be adversely impacted.

The proposed objectives in clause 1.3 and the proposed Condition C1 (see Amendment 2.4.4) correctly recognise that damage from excavation including dewatering vibration extends well beyond the neighbouring properties, for example damage from the Patterson Street development.

We are also of the view that the developer *must*provide Council with dilapidation reports prior to commencing work. The experience of some of our members is that developers are not always be prepared to get dilapidation reports prior to commencing work when requested – choosing instead to plough ahead. As a result, residents, not warned that demolition is about to happen, obtain their own reports which have reduced evidential value as they have had to be obtained after work has commenced. Our experience is that some certifiers often have no interest in ensuring that dilapidation reports are obtained for all neighbouring properties and for surrounding properties likely to be affected.

***Conditions C4 -C7 Hydrogeological and technological reports (Amendment 2.4.7)***

*Issue—unreliable, incomplete, misleading and flawed reports*

Unreliable, inaccurate, incomplete, misleading and flawedhydrogeological geotech reportscausessome of the greatest concerns to our members.

They prevent an accurate assessment of whether the excavation is likely to result in adverse impacts.

It is our experience that Council is invariably presented with seriously flawed, incomplete, inaccurate and misleading geotechnical and hydrogeological reports attached to DAs. These reports make little attempt to meet the information requirements in the Guidelines for these report in the current DCP controls. These information requirements are mirrored in Amendment 18.

These flawed reports are not independent reports. The consultants are paid by the developers to write the reports.

Moreover it is widely acknowledged (including by the geotech and hydro consultants themselves by developers and construction foremen) that the universal practice is to never complete a site investigation but instead to simply lodge a preliminary report recommending further action. Consistent with this practice no final report is given to Council, thereby ensuring the adverse impacts are never actually identified. And thereby also ensuring the consultant is not likely to be sued for inaccurate reports in litigation for damage of surrounding properties.

A member of our Committee Mary Fisher engaged geotechnical and hydrogeological experts to conduct peer reviews of reports given to Council for a particular DA (DA 368/2020/1). The peer review assessments are damning accounts of the inadequacy and incompleteness of the geotechnical and hydrogeological reports, their misleading nature, and their non-compliance with existing DCP requirements. These peer review assessments[[2]](#footnote-2) are attached for your information.

*Issue—failure to make any real assessment of the likely impacts of excavation and dewatering*

The above failings make it difficult for Council to effectively scrutinise the accuracy of the reports let alone evaluate the likely adverse impacts of excavation and dewatering. However we are concerned that Council does not appear to be expressly rejecting these reports in its DA assessment reports nor requiring the errors and omissions, and the non-compliances with Council’s guidelines, to be rectified before proceeding further with the DA.

Our members have been told on numerous occasions that Council does not have engineering staff with the precise technical expertise to rigorously scrutinise these reports or conduct the investigations into the likely adverse excavation and dewatering impacts of a DA. In one instance several of our Committee members were present in the L&E Court[[3]](#footnote-3) when Council staff were precluded from asking questions of the developer’s expert geotechnical witnesses. This was because Council could not produce anyone from Council who had the expertise to be questioned in Court on these matters, and told the Court that Council had no one with sufficient expertise.

In this case the DA was approved by the Land and Environment Court despite the fact there was no final report, no assessment of geotechnical and hydrogeological adverse impacts, no investigation of the acid sulphate soils, no acid sulphate soils management plan and no compliance with Council requirements for these reports.[[4]](#footnote-4) Council did not provide the Court with Council’s rigorous assessment of the flaws in the hydrogeological and geotechnical reports or make any assessment of the environmental impacts. The Court clearly did not have the necessary information to consider (and did not attempt to consider) the adverse impacts of the excavation and dewatering proposed in the DA.

*Issue— failure to consider adverse impacts and suitability*

The consent authority has an explicit obligation under the EP&A Act s 4.15 to consider:

*(b) the likely impact of the development including environmental impacts on both the natural and built environments and social and economic impacts in the locality;*

*(c) the suitability of the site for development.*

Without the necessary information, the impacts and suitability cannot be considered, and consent cannot be granted. And without the necessary information case law (*Schroders Australia Property Management v Shoalhaven,* CC [2001] NSWC 74) suggests that any consent by the consent authority could breach of s4.15.

*Some suggested reforms*

The process for DA excavations has been debased by the flawed hydrogeological and geotechnical reports and Council’s uncritical acceptance of these reports. The failure of Council to allude to deficiencies in these reports in the staff assessments have undermined the confidence of our members in Council’s handling of DA excavations.

The peer reviews referred to above were not even mentioned in the staff reports for DA 368. And no analysis of long term structural damage with damage being described as temporary.

The unreliability of the hydro and geotech reports and lack of scrutiny, the problems of requiring construction to halt where excavation adverse effects arises or stabilisation procedures are not complied with points strongly to the need for clear cut controls, such as prohibitions on excavation in certain clearly defined circumstances, that are not dependent on consultant’s assessments (see further below).

We also consider that there are some steps Council could take immediately to restore public confidence including:

1. to actively scrutinise all geotechnical and hydrogeological reports to ensure they are accurate, complete and comply with the DCP requirements for these reports; and
2. to demonstrate in its DA assessment that Council has considered the findings of any reliable alternative peer reviews; and

(c) to including these findings/considerations referred to in (a) and (b) in all the relevant DA assessment reports;

(d) to oppose the approval of DAs where inaccurate, incomplete and non-complying reports are not corrected by the applicant;

(e) to oppose the approval of DAs where there is insufficient information for the consent authority to consider the impacts required to be considered under EP&A s4.55; and

(f) to engage sufficient number of geotechnical and hydrogeological engineering staff to ensure that the above steps are met and to ensure they can take place cross examinations in judicial proceedings.

It would also help considerably if the practice of invariably permittingexcavation that well exceeds the maximum cubic metres permitted for the site under Woollahra DCP 2015 were to cease, particularly in sensitive areas where there are likely to be adverse effects.

***Additional requirements for the Double Bay Settlement Area (Amendment 2.4.8 and 2.4.9)***

Accordingly it follows that we very much support the new requirement that temporary changes to ground water level must not exceed 0.2 from the average monitored pre-construction level.

However we have two concerns. Firstly this requirement does not apply if the results of field tests support a greater change and demonstrate that change will not induce settlement greater than the characteristic surface movement of a Class S site. Given the above problems with reliance on flawed hydrogeological and geotechnical reports we are not confident that Council will be presented with accurate and complete fields tests or that Council would be in a position to rigorously assess the accuracy and integrity of these ‘developer-paid’ field tests. We can comment further when we have been able to see Clauses 2.1.2 and Clause 2.3 of the Australian Standard which we do not yet have access to.

Secondly should there be settlement greater than the character surface movement of a Class S site and consequent damage, it is again the residents, not the developer who will suffer. And judicial action for compensation for the damage is well beyond the financial means of most residents.

***MATTERS STILL TO BE ADDRESSED***

***Insurance (Part E of Council Resolution*** ***of 26 April 2021)***

Part E of this Council Resolution refers to further work to be done on insurance for those who suffer damage from excavation.

We have concerns whether residents will be adequately covered in any developer obtained insurance – for example, whether their insurers will be prepared to insure for this, and whether coverage will be comprehensive in terms of damage and in terms of the range of surrounding properties that could be impacted.

We think it could well be more appropriate to require developers to provide surety bonds to persons likely to be affected so that they can draw on the surety to repair the damage caused by developer excavation. Copies of this surety bond should be provided to Council, along with dilapidation reports, prior to the commencement of any work.

As you will be aware surety bonds are commonly used in the construction industry. Council requires bonds for potential construction and excavation damage to its footpaths and roads before consenting to public domain works. The same should be required to be provided by developers to those likely to be affected by excavation and dewatering.

We say this as the additional stress, high legal costs, and no guarantee of success, associated with litigation against mega-wealthy developers and their insurers are major deterrents to residents. These residents have already experienced the stress of damage and endured months, if not years, of excessive noise and vibration from excavation including from 24/7 operation of dewatering pumps (including pulse pumps).

***Excavation prohibitions applying to the ‘most impacted zones’ of the Double Bay Settlement area (Part G of Council Resolution of 26 April 2021)***

We strongly support the intention of Part G of this Council Resolution that there be mechanisms (including amending the LED, DCP and rezoning) to prohibit excavation and dewatering in the ‘most impacted zones’ in Double Bay.

Outright prohibitions in the most vulnerable areas are essential. They are the only way to proceed given that flawed hydrogeological and geotechnical reports prepared by consultants paid by the developer can no longer be relied on.

We are naturally keen that the relevant amendments for the above two remaining matters are made as soon as possible given the rush of proposed developments in Double Bay flowing from the extremely large financial gains to be made from the sale of up newly constructed up-market apartments.

***Conclusion***

In conclusion we are pleased at the progress that is being made in this matter, but have reservations about the amendments improving the inappropriate reliance of the flawed hydro and geotech reports.

We urge that all the above amendments, the two outstanding matters and our suggested reforms proceed as a matter of urgency and would not want our comments to unduly hold up this matter.

We would very much like to continue to be consulted.

Yours sincerely

Mary Fisher

Committee Member

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1. Not complying with the requirements in Council’s Guidelines for these reports. [↑](#footnote-ref-1)
2. Lee Douglas Reditus Consulting Pty Ltd*: Hydrological Hydrogeological & acid sulphate soil assessment, Proposed offsite development at 27 William St, Double Bay, NSW assessment, 8 November 2020*. Jeremy Murray, ACT Geotechnical Engineers Pty Ltd *Existing residence-25 William Street, Double Bay, NSW; Geotechnical review of potential impacts from neighbouring development, 10 November 2020.* [↑](#footnote-ref-2)
3. See *Initial Action v Woollahra Municipal Council* [2019 LEC 1097] approving the DA for 16 William St. [↑](#footnote-ref-3)
4. Ibid. [↑](#footnote-ref-4)