

Double Bay Residents' Association

Protecting Sydney's Stylish Bayside Village

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

4th December 2022

Dear Sir,

DA 453/2022/1 55 Bay Street, Double Bay

We have inspected the drawings and other material filed by the applicant in support of this DA for a six storey development on the above tiny site. Many of our members will be directly affected by the proposed additional sixth office floor and we object to it on the following grounds:

- 1) The application should be rejected as seeking to reagitate matters the subject of the Land and Environment Court's decision in Doonside Holdings Pty Ltd v Woollahra Municipal Council (2021) NSWLEC 1736 (6th December 2021)**
- 2 a) Breach of the Height development standard in the Woollahra Local Environmental Plan**
- 2 b) The clause 4.6 request in respect of that breach should be rejected**
- 3 a) Breach of the Floor Space Ratio development standard in the WLEP**
- 3 b) The clause 4.6 request in respect of that breach should be rejected**
- 4) Breaches of the Woollahra Development Control Plan**
- 5) Impacts on views, privacy and oppressiveness**
- 6) Car parking and traffic issues**
- 7) Excavation, Contamination and Acid Sulphate Soil issues**

We address each of those issues below in the sequence set out above.

1 The application should be rejected as seeking to reagitate matters the subject of the Land and Environment Court’s decision in Doonside Holdings Pty Ltd v Woollahra Municipal Council (2021) NSWLEC 1736 (6th December 2021)

In the above case the present applicant appealed to the Court in a Class 1 appeal against Council’s refusal of consent to a part six/part seven storey shop and office development of largely identical design on this very small site. After a s34 conference the applicant amended its plans to reduce the height of the development to five storeys so that the roof height (ignoring plant items such as lift overrun) complied with the Height development standard of 18.1m and the Court granted approval to those amended plans. Now it seeks to add another sixth office floor to the development. There has been no change in the applicable development standards or other material Council controls.

We say that the panel should follow in such circumstances for the following two reasons:

- (a) There is a public interest in the finality of Court (including Court approved) planning decisions and against applicants being permitted to reagitate essentially the same issues all over again. It is analogous to the principle of law laid down by the NSW Court of Appeal in *Russo v Kogarah Municipal Council (1998) NSWCA 303, 105 LGERA 290* per Davies AJA at (14) – (15):

“Nevertheless, it is an abuse of process for an applicant to bring repeated applications to a court, such as the Land and Environment Court, seeking to reagitate issues which as a matter of substance already been determined in prior decisions.

The application of this principle is not precluded by the making of some minor changes to a town planning application or by reliance upon an argument which could have been put (but) were not previously put. If there has been no significant change in circumstances, the new application ought not to be brought. Otherwise, the application will appear to be a collateral attack on the prior decision or decisions of the Court.”

See also *Edwards v The Hills Shire Council (2009) NSWLEC 187* per Biscoe J.

- (b) There is the associated public interest principle, relating particularly to the s34 process, that parties, which include the applicant in this case, should be held to their agreements. It is part and parcel of such conferences that concessions will have been made in their favour (in particular being allowed to build right on the boundary contrary to the DCP, have extra FSR and less than the required parking) in return for the reduction in height to the required five storeys. In effect what the applicant now seeks to do is retain all the concessions made in its favour but withdraw the concession they made.

The future development of this site, particularly in relation to height and the fact that the height standard should be upheld, had been the subject of dicta in two recent Land and Environment Court decisions prior to the decision in *Doonside*. In *SJD DB2 Pty Ltd v Woollahra Municipal Council (2020) NSWLEC 1112* at paragraph 73 Acting Commissioner Clay in his judgment granting consent to a six storey shop-top housing development at the adjoining 28 – 34 Cross Street stated:

*“There was some debate about whether the building to the west, a corner site requiring emphasis, would also need to breach the controls in order to provide a proper context for the proposal. That, it was said by the Respondent, was not orderly planning. First, it should be noted cl 4.6 of WLEP is as much part of WLEP as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome. **Second, it became clear during the evidence of Ms Frecklington that the corner building to the west can be emphasised without breaching the height control, by having a greater street wall height than the four storeys street wall height proposed for development on the Site.**” (our emphasis)*

This paragraph was quoted with approval in paragraph 40 of the judgment of Commissioner Gray in *Ricola Pty Ltd v Woollahra Municipal Council (2021) NSWLEC 1112* when she refused consent to a six storey development on the other site immediately adjoining the subject, being 49 – 53 Bay Street, on 28 January 2021.

In relation to an abandonment argument she dismissed on the cl 4.6 request relating to the height breach, she held at (102):

*“However, the findings of the Commissioner (Clay) do not apply to the site the subject of the proposed development. The first reason that the findings do not apply to the site is that the standard being referred to by the Commissioner is not the same standard that applies to the subject site. The development standard that is referred to by the Commissioner is a height development standard of 14.7m in the area marked N5 on the height of buildings map. **The development standard that applies to the site is a height development standard of 18.1m, in the area marked P3. A finding that one height development standard has been abandoned does not mean that another height development standard referable to another site has been abandoned. The second reason that the findings of the Commissioner concerning the abandonment do not apply to the site is because the findings are confined to the block of Cross Street, and do not extend to the corner sites that front Bay Street and Knox Lane. This is confirmed by his observations that the evidence concerning the corner site, where the proposed development is located, was that it could still comply with the applicable standard and achieve a prominent corner building design (see (73)).**” (our emphasis)*

These passages are curiously ignored in the SEE and clause 4.6 requests.

Importantly therefore, not only did the Court approve, as an appropriate redevelopment of this site, a five storey building in *Doonside* in a case where higher heights were originally sought by the applicant, but the appropriateness of a building limited to five storeys on the subject site has been found in the earlier Court judgments relating to the two adjoining sites in *SJD DB2* and *Ricola*.

2(a) Breach of the Height development standard in the Woollahra Local Environmental Plan

The effect of clause 4.3 of the Woollahra Local Environmental Plan (WLEP) when read together with the accompanying Height map is that development of the site is subject to a maximum height limit of

18.1m, effectively five storeys. The proposed development has a height of 22.35m measured in accordance with the WLEP. The development is thus **23.5% over the maximum height allowed**.

It follows that absent a successful clause 4.6 request in relation to this breach the consent authority has no power to approve it.

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

As we discussed above, in regard to the clause 4.6 objection we submit the consent authority should follow the compelling decision of the Land and Environment Court in respect of the adjoining 49-53 Bay Street as well as the 5 storey approval granted for the subject site. In *Ricola Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1047* Commissioner Gray refused consent to a six storey development proposed for the 49-53 Bay Street site. On this adjoining site, which has the same height controls (18.1m) as the subject property, the applicant proposed a building with a height of 21m, less than the proposed. In *Ricola* the Court rejected a height standard exceedance of 2.9m, substantially less than the exceedance of 4.25m proposed for the subject site. Commissioner Gray findings and those of Acting Commissioner Clay in *SJD DB2 Pty Ltd v Woollahra Municipal Council (2020) NSWLEC 1112* are discussed above in section 1 of our submission. They hold that additional height over the 18.1m limit is not required to add definition to this corner site.

In relation to the recent developments along the southern side of Cross St referred to in the applicant's clause 4.6 height of buildings request, they all have setbacks and articulation to reduce their bulk and scale. Although extending above the height standard they all provide a 4 storey street wall as set out in the Woollahra DCP. For the approved adjoining development at 28-34 Cross Street their level 5 setback is approximately 4m-6m on its Cross St frontage, and similarly opposite at 53 Cross St there is an approximate setback of 6.01m fronting Cross St. These setbacks are substantially more than the 1.4m-2.5m (approximate) setback of the proposed at level 5 on the site.

The assertion by the applicant in their 4.6 height request (GS Planning p. 11) that the proposal aligns with the Draft Double Bay Centre Planning and Urban Design Strategy should be dismissed. The Strategy has been the subject of intense local opposition from residents of the Centre and its surrounds. It is still in the community consultation stage and not a relevant head of consideration under section 4.15 of the Environmental Planning and Assessment Act 1979.

Accordingly, we would submit that this DA is to be determined by the principles relating to clause 4.6 objections as stipulated by the Court in *Four2Five P/L* and *Initial Action*. These judgments have made clear an Applicant has to satisfy the consent authority:

- (a) That compliance, (in this case) with the 18.1m (five 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 neighbourhood”.

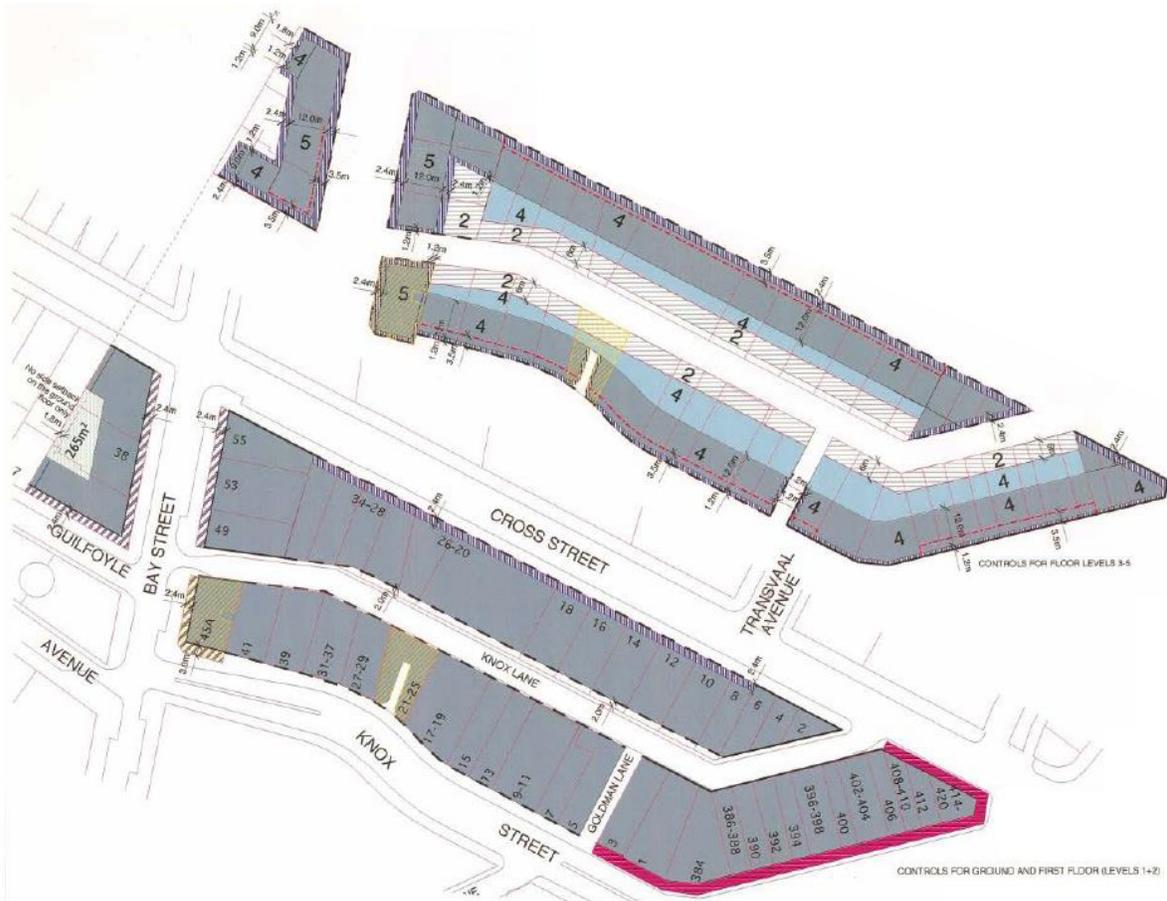
The desired future character for this site is set out in words and diagrams in the Woollahra Development Control Plan (DCP) at D5.4.5 Bay Street (centre) and D5.4.7 Cross St, along with D5.5.8 Control drawing 4 (see next page) to be read with 5.6.3 Urban Character on the same page.

The building envelope is to be restricted to 5 storeys (see Control drawing 4) defined as a maximum overall height of 18.1m. Along both Bay Street and Cross Street the Applicant has proposed a street wall of 18.1m (see drawing DA301 and DA302). However, under the DCP the maximum street wall height along the southern side of Cross St is 3 storeys or 11.5m (see DCP - D5.4.7 Cross St accompanying diagram). The section also specifically states for development on the south side of Cross Street “Set back level 4 development from the street boundary” with a setback of 2.4m for storeys 3-5. Along Bay Street there is a 2.4m setback along Bay Street for storeys 1-5.

The DCP has specifically outlined the “Desired future character of Bay St (centre) in D5.4.5. The Applicant has failed two of these points:

- a) Lot amalgamations on blocks in proximity to Guilfoyle Park.*
- b) Expand the public domain at street level and improve the civic character with street level building colonnades that face central Bay Street and Guilfoyle Park. Provide a built form that responds to the scale and civic importance of Guilfoyle Park.*

In relation to “a) Lot amalgamations” there is no question that this site is in proximity to Guilfoyle Park. It was obviously intended by the draftsman of the LEP’s Height map and this part of the DCP that this site would be amalgamated with the adjoining 51-53 Bay Street which shares the higher 18.1m height limit afforded corner sites. With a site area of 320.5m², less than half of a home site, the property is unsuited for this scale of development. The site has a strange configuration with a 30.015m long frontage along Cross Street and a short 13.46m frontage upon Bay Street, with a splay of 2.178m linking these frontages. The south boundary is 29.97m (adjoining 53 Bay Street) and the east is only 5.965m adjoining 28-34 Cross St. For such a small and difficult shaped site an 18.1m height as approved was pushing it to the limits already.



(Woollahra Development Control Plan, Chapter D5 Double Bay Centre, D5.5.8 Control drawing 4, 2015)

Additionally, the development also does not satisfy the requirements of “b)” as quoted above. The development fails to expand the public domain along Bay St or provide the required colonnades to Bay Street. It fails to “respond to the scale and the civic importance of Guilfoyle Park”. We note that a fine colonnade exists at The Chancellor building directly opposite the subject site.

Similarly, the applicant has failed to achieve d) explicitly outlined in D5.4.7 for the “Desired future character” of Cross Street:

“d) Encourage arcades and courtyards on the southside that cater for outdoor eating and informal gathering.

There are no arcades or courtyards included in the proposed development, which if included would have enriched the streetscape, enhanced the site, provided amenities for outdoor dining and promoted informal gathering to the area.

A 2.5m setback is required along Bay St, east side, on ground to level 4 as indicated in D5.4.5 and D5.5.8 Control drawing 4. The proposed development is grossly non-compliant with this, having a setback of 0m on the ground floor, 0m-0.4m on the level 1 and a setback ranging 0.4 to 0.7m for levels 2-4.

Similarly, a 2.5m setback is required along Cross St on levels 2 to level 4 as indicated in D5.4.7 and D5.5.8 Control drawing 4. The proposed development again is seriously non-compliant with a setback of 0.4 to 0.7m for levels 2-4 along Cross Street. The top floor should simply not be there.

Building articulation contributes to the character of the street and contributes to the street façade. It helps establish passive surveillance and promote open space. D5.5.8 Control drawing 4 shows the site specific articulation area, a 2.4m articulation zone is required to both Bay Street (ground-level 4) and Cross Street (level 1-4). Control 1 of 5.6.3.3 Building articulation determines the percentages of internal and external space to be incorporated into the building design. These are summarised below:

- Along Bay Street only 40% allowed to be internal space for levels 2-5 according to Figure 26 (5.6.3.3 Building articulation).
- For the south side of Cross street only up to 40% of the articulation zone is allowed for either internal or external space according to Figure 25 (5.6.3.3 Building articulation) for levels 2-5.

There is an almost complete failure to provide the articulation required along either Bay St or Cross St, in turn negatively impacting future amenity and the public domain.

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

Objective (c) of the Height standard is:

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

The Applicant has failed to provide their shadow diagrams for assessment within their architectural plans.

According to the Applicant’s Statement of Environmental Effects (pp 43-44) the proposed development will reduce solar access to the balconies and windows in the winter morning at 38 Bay Street, Double Bay on the opposite side of that street. In particular, 38 Bay Street (known as “The Chancellor”) will suffer overshadowing to its more southerly units fronting Bay Street in the winter morning. There is also a reduction in solar access at 28-34 Cross Street in the winter afternoons. If the development were compliant, the reduction in solar access and overshadowing impact to neighbouring residential buildings would be reduced.

The development is inconsistent with objective (c) of the Height standard.

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”.

Existing views enjoyed to properties on the upper most level of the Cosmopolitan building would have their northerly views including towards Sydney Harbour compromised by the excessive and non-compliant height of the proposed development. In discussing view impacts, it is vital to remember and follow what Commissioner Gray found in *Ricola*. A devastating 60-75% of northerly views enjoyed by the top floor apartment in the nearby Cosmopolitan Centre (Unit 7C in 2-22 Knox Street) would have been destroyed by the refused development. This building, is higher than that proposed for 49-53 Bay Street

in *Ricola* and a great deal wider from east to west. It follows that it will create as great a loss of views from that unit as caused the Commissioner to find that the clause 4.6 objection failed objective (d) of the Height standard. Please see attached annexure "A" to this report which includes view from unit 7C as discussed (see figure 3) and the Commissioner's conclusions on this issue at paragraphs 97 and 98 of her judgment.

Actual measurable views will be lost from the proposed development. Ridgeline, water and land views enjoyed by residents from windows and balconies will be reduced to a narrow keyhole. In assessing the reasonableness of the proposal causing view impact, a development which complies with all planning controls it would be considered reasonable. However, this development application does not comply with LEP height, FSR and DCP controls and as a result there is no reason for its approval. Furthermore, the finished building will be higher than the approved developments along the south side of Cross Street. The unacceptable view loss, is not insubstantial and therefore does not "minimise impacts of new development on adjoining or nearby properties from disruption of views".

The proposed development will reduce solar access and overshadow the adjoining approved 28-34 Cross Street private open space (north facing balconies) between 12.00pm and 4.00pm, as demonstrated by the applicants shadow limited diagrams. Morning overshadowing will impact balconies and windows of 38 Bay Street, Double Bay. In terms of loss of privacy the sixth level office and its proposed terrace will look directly into units at 38, Bay Street ("The Chancellor") and the balconies of 45, Cross Street ("Gallery Apartments").

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

We submit there are no sufficient environmental planning grounds to justify the contravention from the height limit – again a double test (cl 4.6 (3)(b) and cl 4.6 (4)(a)(ii)) and we argue that the height is excessive and will produce poor planning outcomes to the streetscape and surrounding area. In effect it seeks to extend further west the six storey 'wall' that has been caused by the "abandonment" decisions on 16-18, 20-26 and 28-34 Cross Street into an area where there has been no abandonment of those controls. This created wall, quite apart from its devastating impact on neighbours as identified above, shuts off forever harbour views from the amphitheatre slopes to the south of the Centre.

As the Court held in *Ricola*, the Applicant's grounds fail to justify both the vertical and lateral extent of the breach of the Height development standard.

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

Under cl 4.4 and 4.4A with its associated map the maximum FSR for the site is 3:1 or 960m² of building area (3 x site area 320m²). Assuming the Applicant's gross floor area calculations totalling 1240.8m² are correct and subject to Council officer's check, the development has an FSR of 3.87:1 and is **247.25m** or **25% over the maximum allowable gross floor area.**

It follows that absent a successful clause 4.6 request the development cannot be approved.

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

We repeat what we said about the tests to be applied to a clause 4.6 objection under section 2(b) above. The question then is whether the bulk and scale of this DA fulfils the objective of the development standard.

The site of the proposal is in B2 a zone of Double Bay, under clause 4.4 (1)(b) the objective of the B2 zone in regards to bulk and scale is as follows:

“to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale”.

As seen in the description and drawings of the “desired future character” in bulk terms at D 5.4.5 Bay Street Centre and D 5.4.7 for Cross Street the proposed development is incompatible with what is envisioned for the site. Also looking at control drawing 4 at D5.5.8 one can see how the proposal is unsuited for the location.

Moreover, taking the written part of the DCP description of desired future character in D5.4.5 Bay St (Centre), we have already noted that the development neglects to:

“Expand the public domain at street level and improve the civic character with street level building colonnades that face central Bay Street and Guilfoyle Park. Provide a built form that responds to the scale and civic importance of Guilfoyle Park”.

The development has not provided colonnades along Bay Street, required in D5.5.8, nor does it expand the public domain. The DCP explains further to clarify that this is to be achieved by providing a 2.4m articulation area at ground level for colonnades along Bay Street as well as a 2.4m articulation zone for a maximum of four upper floors (at Bay and Cross St). As discussed above, the articulation zone for levels 2-5 requires the first 2.4m from the building line only 40% can be occupied by internal built space at Bay St, and for Cross St only 40% can be occupied by either internal or external built space. Together these controls go directly to the issue of oppressiveness and bulk seen from Bay Street. Neither the 2.4m articulation zone nor the colonnade have been provided. 38 Bay Street (The Chancellor) opposite and 53 Cross Street (as existing) demonstrate how colonnades can be used to enhance the public sphere, promote corner buildings and respond to the locality.

The required setbacks have not been provided along Bay Street and Cross Street as indicated in D5.5.8 Control drawing 4, this has been discussed extensively in section 2b above (pp. 5-7). The additional 5th level, which should not exist, will be visible from the street and has a setback ranging from a measly 1.5-2.3m (approximate) along Cross Street. In reality, this setback is almost identical to the 1.45m-2.25 setback along Cross Street previously rejected by council.

Whilst the non-complying bulk at height may have been forgivable on account of the small lot size and its substantial compliance with the 18.1m height limit in the s34 approval granted, this additional bulk is completely incompatible with the desired future character.

The clause 4.6 request in relation to the FSR breach must be dismissed.

4 Additional breaches of the Woollahra DCP

In assessing of the proposal's non-compliance with the "desired future character" objective of the Height and FSR standards, we have already covered the building's non-compliance with the envelope controls in the Woollahra DCP – see above. In short it does not comply with:

- The DCP's height limit of 5 storeys or 18.1m
- DCP's setback of 2.5m for levels 2-4 at Cross Street and 2.4m setback to all levels at Bay St
- The DCP's articulation controls along Bay Street and Cross Street (2.4m on levels 1-4)
- The DCP requirement for provision of courtyards and arcades
- The DCP's requirements for a front setback at ground level for outdoor eating as per the required future character of Bay Street and for a colonnade that faces Bay Street and Guilfoyle Park.

Parking breaches are dealt with below under section 6.

5.6.3.1 Building envelopes

Objective 1 Development should contribute to the desired future character of streetscapes with appropriate and consistent building forms. The building envelope does not correspond to the surrounding development nor is its building form consistent with it. Absent are the setbacks and articulation found in surrounding buildings such as 28-34 Cross St and The Chancellor (38, Bay Street) opposite.

5.6.3.2 Height

5.6.3.2 Height – control 2 compels that the floor level of the uppermost habitable storey is required to be at least 3.5m under the maximum permissible building height. The proposed development has not achieved control 2, going beyond the maximum building height set out and also failing control 3. Control 3 requires the entire building which includes the lift tower machinery plant rooms and storage space to be contained within the height envelope.

5.6.3.4 Setbacks

The development does not meet the Setback Objectives or Controls as outlined below:

Objective 1 *"Encourage consistent building lines to provide coherent streetscapes."*

Without the articulation, 2.4m colonnades at ground floor and the required upper floor setbacks, the building protrudes out into and closes off the Bay Street streetscape looking north, contrasting ill with the setback and articulations form on the southern side of Cross St. It also contrasts ill with the deep floor setbacks of 53 Cross Street on the opposite side of that street. We submit that the consent

authority should tread cautiously and require building lines substantially as prescribed within the DCP controls.

5.6.4.2 Colonnades

As described in the Desired future character of Bay St (centre) in D5.4.5 the site requires colonnades to facing Bay Street. This would correspond to the adjacent developments at 38 Bay Street and 53 Cross Street. The DCP has specific controls in 5.6.4.2 Colonnades relating to their design the applicant has failed the following controls:

- C1 Colonnades should be provided at ground floor level to the Bay Street frontage as indicated on the control drawings, Section 5.5.5—5.5.11 and the street sections.
- C2 Colonnade width must be 2.4m, no colonnades have been provided
- C3 Colonnades must have a minimum soffit height of 3.6m, the applicant has only provided a soffit height of 3.55m
- C5 Colonnade design must respond to the articulation of adjacent buildings, and the broader desired future character. Colonnade design and articulation is evident in adjacent buildings at 38 Bay Street and 53 Cross Street, which have been ignored by the Applicant.

5. Overshadowing, oppressiveness, loss of privacy and view impacts

As to overshadowing impacts on nearby properties and the public domain we repeat what we have said on that issue under “Objective (d)” under section 2(b) above.

As to oppressiveness the building with its extreme height and bulk at height will have an awful impact to the units in the Gallery Apartments at 45 Cross Street, proposed building at 28-34 Cross St and 53 Cross Street opposite. The blank southern wall up to 6 storeys high will also loom over pedestrians, in particular at the popular junction of Bay Street and Guilfoyle Park with its weekly produce market.

In terms of impact of views we repeat what we have submitted in terms of impacts on nearby residences discussed in section 2(b) under objective (d) above. However, the impact on views is not restricted to the properties mentioned in Bay Street, Guilfoyle Avenue and Cross Street. Hundreds of us living on the amphitheatre that surrounds Double Bay will lose parts of our much-valued harbour views. In effect, as stated, this will lengthen a six storey “wall” being built across the northern edge of the Centre in an east/west direction forever shutting off such views.

As the 6 storeys of this development impinges much more on local views because of its location near the harbour on the northern edge of the Centre than would a similar scale development located, say, on New South Head Road.

In terms of overshadowing, oppressiveness and loss of privacy we refer to our submissions at pp7/8 above.

6. Car parking and traffic issues

The following comments should be seen against the background of horrendous experience of the unavailability of on-street parking in and around the Centre. Our resident members constantly find that they cannot find parking for themselves in the street where they live, let alone find it for visitors or tradespeople.

The applicant has provided insufficient parking for the proposed site. The applicant has proposed a measly 4 parking spaces for a proposed GFA of 1,40.8m². According to the Applicant's GFA drawing DA003 the proposed development will consist in 186.4m² in retail space and 1054.4m² in office space. Using the calculations provided in DA003 the following minimum parking spaces are required using WDCP 2015 E1.5.2 Non-residential parking generation rates:

Retail at a rate of 3.3 per 100m² (186.4m²) = 6.2, including Double Bay B2 multiplier of .6 = 3.7

Business at a rate of 2.5 per 100m² (1054.4²) = 26.4, including Double Bay B2 multiplier of 0.6 = 15.8

Using the minimum provision of car parking spaces for commercial development as set out by the DCP the proposed development would require a total of **20 spaces**. Only 4 stacked spaces are to be provided and thus there is a shortfall of **16 spaces**.

According to council records previous monetary contributions were made in lieu of the previous development on the site for a 10 car shortfall. That would still require 10 spaces on the proposed site. With only 4 stacked spaces provided, this would be still a shortfall of 6 spaces.

Secondly, under 1 of E1.7 Motorcycle parking rates, the development is required to provide 1 motorcycle space per 10 car spaces or a total of two spaces. The applicant has failed to provide any motorcycle spaces for the development.

Thirdly, we submit that we have safety concerns about the use of a stacker in such a busy part of Bay St. It would create safety risks to pedestrians and other vehicles along Bay Street, requiring vehicles to line up along the footpath. The stacker could add to the traffic difficulties in the local area. The DCP's E1.9.3 Tandem parking explains that tandem parking is not preferred by the council and that they should only be provided in the event that side by side parking is not possible. We question the extreme increase in FSR and the lack of safe and sufficient parking for the commercial development.

In conclusion, for all these reasons the car parking provided is very inadequate and the DA should be rejected on that account.

7. Excavation, Contamination and acid sulphate soils issues

There is an issue with the excavation of such a small site and the building of car parking right to southern and western site boundaries. The proposed parking fails the excavation control found in WDCP B3.4 Excavation which in Fig 16 provides:

“For a residential flat building, multi dwelling housing, attached dwellings and any other land use not addressed in controls C1 to C2 of section B3.4 Excavation, basement walls can be no closer to the boundary than 1.5mMinimum excavation setback 1.5m” (our emphasis)

The control is integral as excavation too close to boundaries have risks associated with the of loss of soil, stabilisation, support and amenity to properties along the boundary. Indeed, this principle is enshrined in a statutory duty of care not to do anything on or in relation to land that removes the support provided by the supporting land to any other land (Conveyancing Act NSW s 177(2)).

According to the Council website no geotechnical or contamination reports have been filed with this DA.

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.”

Cl 6.1(4)(a) and (b) provide an exception where a preliminary assessment of the proposed works prepared in accordance with the Acid Sulphate Soils Manual indicates that such a plan is not required for the works and such assessment has been provided to and confirmed by the consent authority in writing. We are not aware of any such exemption having been granted to this current DA by the Council. In a report on an earlier DA in 2018 we note that Geotechnique P/L admitted that there were potential acid sulphate soils in an excavation that they assumed would be only 6m deep (pp6/7), but opined that an ASSMP was not required. Only two bore holes had been dug at that time, both in the SW corner of the site.

A similar point arises in relation to clause 7 of SEPP 55 (Contamination). There is no issue but that SEPP 55 applies since this is the former site of a petrol filling station from 1949 until a date which the Applicant’s consultant in its “Preliminary Contamination & Assessment Report” of 29/06/18 vaguely refers to as “1970’s/1980’s” (p4). As the Geotechnique report concedes the EPA guidelines require a minimum of 5 sampling locations but only the 2 aforementioned boreholes in the SW corner of the site were dug where “only surface samples were recovered for analysis” (p7). “Assessment of soils beneath the existing features was beyond the scope of the assessment”, they say at p12.

The plans of the old petrol filling station which are annexed by Geotechnique show that no boreholes have been dug or site investigation carried out where the contaminants are likely to be found i.e. in the area of the old petrol bowsers and service building.

Clause 7(2) of SEPP 55 has not complied with and the consent authority is incapable of doing what it has to do under cl 7(1)(a) namely of deciding whether the land is contaminated or of being satisfied of the matters in cl 7(1)(b) or (c).

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 “B”). 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 either asking the consent authority to deal with the matter in this impermissible way or ignore cl 6.1(3) altogether. Mr McEwen goes on to say that without the requisite management plan and SEPP55 report any purported consent granted would be **invalid**.

Conclusion

For all the above reasons our Association says that the subject application should be refused.

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

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