

29 April 2022

The Presiding Commissioner
Land and Environment Court of NSW

**Re: Clause 4.6 Objection to Clause 4.3 of
Woollahra Local Environmental Plan 2014 (LEP)**
The Site: 14 Bay Street, Double Bay NSW 2028 (Lot 18 DP4606)





























I provide an amended written request under clause 4.6(3) of the LEP (**Further Amended Request**), to vary the height of buildings development standard under clause 4.3 of the LEP with respect to **Issue G** of the Plans as discussed in Joint Expert Witness Conferencing.

EXECUTIVE SUMMARY














Under DA449/2020, the Applicant seeks consent for the demolition of an existing terrace and the construction of a new 5 storey shop top development with a communal roof top terrace at 14 Bay Street, Double Bay (**Site**).

Consent is also sought for 2 small retail premises on the ground floor with services, a bin store and loading facilities to service 7 apartments above, over 4 levels.

The Applicant procured leave from the Court to amend DA449/2020 (**Amended Application**); that Amended Application is made by reference to the following amended plans:

-  DA 1.00-Cover Page + Drawing List-F.pdf
-  DA 1.01-Context Analysis-F.pdf
-  DA 1.02-Context Analysis - Built Form-F.pdf
-  DA 1.03-Site Analysis-F.pdf
-  DA 1.04-Existing Building + Controls-F.pdf
-  DA 1.05-Context - Recent Approvals-F.pdf
-  DA 1.06-Context - Party Wall Conditions-F.pdf
-  DA 1.07-Context - HOB + FSR Comparison-F.pdf
-  DA 1.08-Context - Unit 4.1 Terrace-F.pdf
-  DA 1.10-FSR Calculations-F.pdf
-  DA 2.00-Plan - Ground + Level 1-F.pdf
-  DA 2.01-Plan - Level 2 + 3-F.pdf
-  DA 2.02-Plan - Level 4 + Roof-F.pdf
-  DA 3.00-Elevations - Street-F.pdf
-  DA 3.01-Elevations - East + West-F.pdf
-  DA 3.02-Elevation - North-F.pdf
-  DA 3.03-Elevation - South-F.pdf
-  DA 3.04-Section A-F.pdf
-  DA 3.05-Section B-F.pdf
-  DA 3.06-Section A - Extended-F.pdf
-  DA 3.07-Elevations - Comparison page-F.pdf
-  DA 4.00-Facade Details + Materiality-F.pdf
-  DA 4.01-Photomontage-F.pdf
-  DA 5.02-Hourly June 21 Shadows (Sheet 1)-F.pdf
-  DA 5.03-Hourly June 21 Shadows (Sheet 2)-F.pdf
-  DA 5.04-Hourly June 21 Shadows (Sheet 3)-F.pdf
-  DA 6.00-View Analysis 1 - Unit 4.1 Terrace East-F.pdf
-  DA 6.01-View Analysis 2 - Unit 4.1 Terrace East-F.pdf

I have relied upon the following expert reports:

 Access Report - 090920 - 14 Bay St Double Bay.pdf
 BASIX Certificate - 290920 - 14 Bay St Double Bay.pdf
 DPIE Property Report - 14 Bay Street, Double Bay.pdf
 Flood Management Report - 14 Bay Street, Double Bay.pdf
 Heritage Impact Statement and Demolition Report - 14 Bay St Double Bay.pdf
 NatHERS Certificate - 250820 - 14 Bay St Double Bay.pdf
 NCC Report - 090920 - 14 Bay St Double Bay.pdf
 Quantity Surveyor Report - 19082020 - 14 Bay St Double Bay.pdf
 SEPP65 9 DQ Statement - 02092020 - 14 Bay St Double Bay.pdf
 SEPP65 DA DVS - 02092020 - 14 Bay St Double Bay.pdf
 Site Waste Minimisation and Management Plan - 02092020 - 14 Bay St Double Bay.pdf
 Stormwater Layout Plan 1 - 31082020 - 14 Bay St Double Bay.pdf
 Survey - 14 Bay St Double Bay.pdf

The Design Verification Statement (DVS) and Design Quality Statement (DQS) have been updated by the Architect to reflect the amended proposal (prior to Issue F and Issue G is addressed by the JER, see:

- DVS dated 2nd September 2021
- DQS dated 26th August 2021

Revision G make further improvements to the fenestration and material articulation of the building as discussed by the JER in these proceedings. These are considered minor changes that improve the outcomes for the proposal.

According to the Height of Buildings map referred to under clause 4.3 of the LEP, the applicable building height for the Site is: **14.7m**.

Mr Philip Thalys has also provided :

- DA 6.00-View Analysis 1 - Unit 4.1 Terrace East-G
- DA 6.01-View Analysis 2 - Unit 4.1 Terrace East-G

Determination of GL(E)

The three critical Ground Level (Existing) (GL(E)) points are

1. Northwest corner RL5.03m AHD
2. Mid-Block – northern boundary RL4.92m AHD
3. Northwest corner RL4.81m AHD

These RL's have been sources and interpolated from the Detail and Level Survey Ref: 414519 dated 29/7/16 by Registered Surveyors, Norton Survey Partners.

Elements Exceeding the Building Height Development Standard

The following elements of the proposed building as amended exceed 14.7m:

- (a) the top of the recessive steel framed pergola of Apartment 3.01 to Bay Street is RL21.10m AHD near GLE 4.81 having a HOB of 16.29m, which is a maximum variation of 1.59m (or a variation of 10.82%).
- (b) the top of the parapet above of Apartment 3.01 to Bay Street is RL21.5m AHD near GLE 4.92 having a HOB of 16.58m, which is a maximum variation of 1.88m (or a variation of 12.79%).

- (c) The top of the roof of the western wing of the building is also at RL21.35m near GL(E) 5.03m AHD, having a HOB of 16.32m, which is a maximum variation of 1.62m (or a variation of 11.02%). The extent of that portion of the building is limited in its footprint and is less than the maximum permissible building height at the western facade.

The maximum exceedance of the HOB is therefore 1.88m (or a variation of 12.79%) to the recessive parapet level above apartment 3.01 at its north-eastern corner.

This Amended Request demonstrates that compliance with the 14.7m height of building development standard for the non-compliant portion of the east facing parapet of the façade to Bay St (as referred to above at subparagraph (a)), would be unreasonable and unnecessary in the circumstances of this case. There are sufficient environmental planning grounds to justify such variation, which are set out below. The element that is further west (b) above is higher but so recessive that it will not be visually prominent from within the public domain within the immediate vicinity of the site.

This Amended Request demonstrates that compliance with the 14.7m height of building development standard for the non-compliant portion of the western roof of the building (as referred to above at subparagraph (c)), would be unreasonable and unnecessary in the circumstances of this case. There are sufficient environmental planning grounds to justify such variation, which are set out below..

Further, and notwithstanding the minor exceedances of the development height standard, the development proposed under the Amended Application would still satisfy the public interest test as it is consistent with the objectives for the height development standard and the zoning for the Site, contextually **consistent** with the desired future character as discussed below.

The Amended Application (as filed):

The Applicant has in the Amended Application, made the following changes to address the aspects or elements of the proposed development that actually contravene the development standard:

- a) The height of the lift and stair structure has been reduced by 2 storeys to comply with the permissible height under clause 4.3 of the LEP,
- b) The communal roof terrace was removed,
- c) Level 4 was set back from the Bay Street frontage of the Site,
- d) The top 2 x 1-bedroom apartments facing Bay Street were amalgamated into a single 2 storey, 2-bedroom apartment,
- e) The height of the ground to first floor was reduced from 4.2m to 4.0m, and the residential floor to floor heights were reduced from 3.1m to 3.05m.

Further, the Floor Space Ratio in the Amended Application is proposed at 2.38:1 (well below the 2.50:1 LEP control). As such there is no excess floor space, which would otherwise exacerbate the breach of the building height development standard.

This variation request will focus on the following, specific elements of the proposed development (as amended **Issue G**) which give rise to the 12.79% non-compliance with the maximum building height development standard:

- The upper most north-eastern recessive façade, and
- The eastern element of the western wing that exceeds HOB.

Issue G provides following amended schedule of plans:



DA 1.00-Cover Page + Drawing List-G.pdf
DA 1.01-Context Analysis-F.pdf
DA 1.02-Context Analysis - Built Form-F.pdf
DA 1.03-Site Analysis-F.pdf
DA 1.04-Existing Building + Controls-F.pdf
DA 1.05-Context - Recent Approvals-F.pdf
DA 1.06-Context - Party Wall Conditions-F.pdf
DA 1.07-Context - HOB + FSR Comparison-F.pdf
DA 1.08-Context - Unit 4.1 Terrace-F.pdf
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DA 2.02-Plan - Level 4 + Roof-G.pdf
DA 3.00-Elevations - Street-G.pdf
DA 3.01-Elevations - East + West-G.pdf
DA 3.02-Elevation - North-G.pdf
DA 3.03-Elevation - South-G.pdf
DA 3.04-Section A-G.pdf
DA 3.05-Section B-F.pdf
DA 3.06-Section A - Extended-G.pdf
DA 3.07-Elevations - Comparison page-F.pdf
DA 4.00-Facade Details + Materiality-G.pdf
DA 4.01-Photomontage-G.pdf
DA 5.01-Shadows - Equinox-G.pdf
DA 5.02-Hourly June 21 Shadows (Sheet 1)-G.pdf
DA 5.03-Hourly June 21 Shadows (Sheet 2)-G.pdf
DA 5.04-Hourly June 21 Shadows (Sheet 3)-G.pdf
DA 6.00-View Analysis 1 - Unit 4.1 Terrace East-G.pdf
DA 6.01-View Analysis 2 - Unit 4.1 Terrace East-G.pdf

Figure 1 - Schedule of Plans (Issue G)

Introduction

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following Amended Request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the NSW Land and Environment Court NSW Court of Appeal.

Clause 4.6 requires that a consent authority must be satisfied of 4 matters (set out below) before granting consent to a development that contravenes a development standard (see: cases footnoted¹)

This clause 4.6 request seeks to demonstrate that:

1. the proposed development will be **consistent**² with the objectives of the zone (cl 4.6(4)(a)(ii)),
2. the proposed development will be **consistent**³ with the objectives of the standard in question (cl 4.6(4)(a)(ii)),
3. compliance with the development standard is **unreasonable or unnecessary**⁴ in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)), and
4. there are **sufficient environmental planning grounds**⁵ to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

This Amended Request also addresses:

- The requirement for the concurrence of the Secretary as required by clause 4.6(4)(b), and
- The findings of Commissioner Gray in *Ricola Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1047, in which the Court held that (as relates to clause 4.6 of the LEP), the focus must be upon the aspect or element of the development that actually contravenes the development standard, and not on the development as a whole. That is there must be something that "tethers the stated environmental planning ground with the contravention of the development standard" (at [107]).

¹ Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130, Al Maha Pty Ltd v Huajun Investments Pty Ltd (2018) 233 LGERA 170; [2018] NSWCA 245) at [23], Baron Corporation Pty Limited v Council of the City of Sydney [2019] NSWLEC 61 at [76]-[80] and SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112 at [31].

² Moskovich v Waverley Council [2016] NSWLEC 1015 at 53

³ Moskovich v Waverley Council [2016] NSWLEC 1015 at 53

⁴ Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 [42-51] – 5 Tests but not exclusive tests

⁵ Preston CJ said at [88]: 'Clause 4.6 does not directly or indirectly establish this test. The requirement ...is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.'

The Methodology, including the case law which has been taken into consideration in preparing this Amended Request, is set out at **Annexure 1** to this Amended Request.

Documents Relied Upon

In preparing the Amended Request, I have relied upon:

1. The context analysis and architectural plans and other supporting documents for the proposal (**Issue G**) as well as my own context analysis as detailed by **Annexure 2**.
2. PS 18-003 – Department of Planning and Environment (Revokes PS17-006 (December 2017))
3. Varying Development Standards: A Guide August 2011 - NSW Department of Planning & Infrastructure.
4. Guidance provided by judgments of the Land & Environment Court (the Court) detailed by the methodology below, which also now includes the further judgments following on from the *SJD* cases that further clarify how one approaches and what weight ought to be given to the existing context in the determination of desired future character under the LEP.

The Site

A full description of the Site is set out in the Amended Statement of Environmental Effects filed with the Class 1 Application. In summary:

- (a) The Site is zoned B2 - Local Centre under the LEP, The objectives of the zone are to provide a range of retail, business, entertainment, and community uses that serve the needs of people who live in, work in, and visit the local area.
- (b) To encourage employment opportunities in accessible locations.
- (c) To maximise public transport patronage and encourage walking and cycling.
- (d) To attract new business and commercial opportunities.
- (e) To provide active ground floor uses to create vibrant centres.
- (f) To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
- (g) To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

Standard to be Varied

The building height development standard under clause 4.3 of the LEP is as follows:

“4.3 Height of buildings

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.”

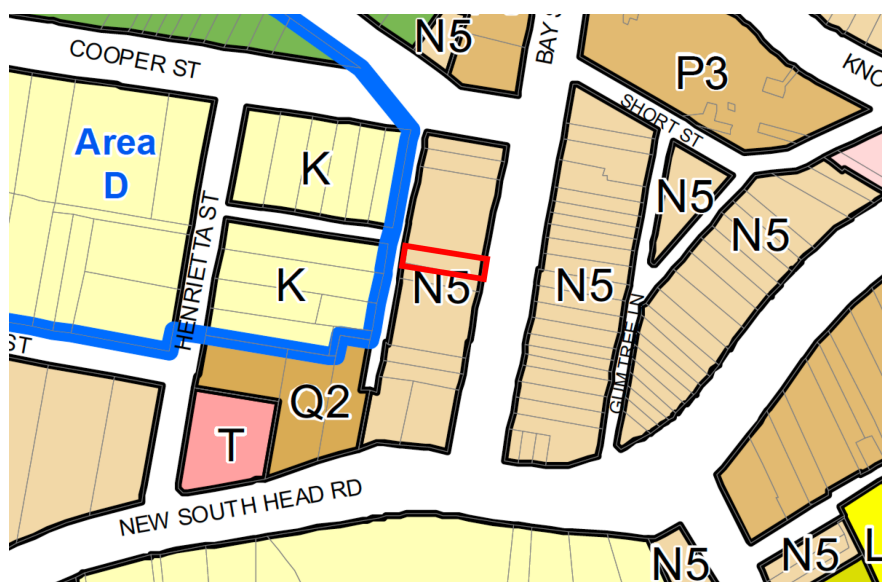


Figure 2 - Extract LEP HOB Map (Subject Site in Red)

The objectives of the Standard are as follows:

- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,
- (b) to establish a transition in scale between zones to protect local amenity,
- (c) to minimise the loss of solar access to existing buildings and open space,
- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

Extent of the Variation

The parts of the proposed building that exceed the maximum building height standard are as follows:

- (a) the top of the recessive steel framed pergola of Apartment 3.01 to Bay Street is RL21.10m AHD near GLE 4.81 having a HOB of 16.29m, which is a maximum variation of 1.59m (or a variation of 10.82%).

UNREASONABLE AND UNNECESSARY

This section sets out why compliance with the height development standard is unreasonable or unnecessary in the circumstances of this case, and as required by clause 4.6(3)(a) of the LEP.

The Court has held that there are at least 5 different ways and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

The 5 ways of establishing that compliance is unreasonable or unnecessary are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary:
3. The objective would be defeated, thwarted, or undermined (*Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 at [24]) if compliance was required with the consequence that compliance is unreasonable:
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; and
5. The zoning of the land is unreasonable or inappropriate

Only 1 of these ways (or other ways) need be demonstrated to satisfy clause

4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

Wehbe Test 1: The objectives of the development standard are achieved notwithstanding non-compliance with the standard:

<u>Objective</u>	<u>Submission</u>
(a) to establish building heights that are consistent with the desired future character of the neighbourhood	<p>The 5 storey height is consistent with the 4-5 storey height of the northern neighbour as demonstrated by the context analysis "DA 1.02 A Context Analysis - Built Form - 02092020 - 14 Bay St Double Bay" by hill thalis (Figure 10 - Bay Street Elevations (Extract Drawing DA 1.07 Issue F)).</p> <p>The proposed building height as measured to AHD is consistent with other buildings within the immediate vicinity of the Site. The rising topography of Bay Street to the south of the Site will also see higher building to the south as per the consent granted at 294-298 new South Head Road & 2-10 Bay Street, Double Bay (6 Storeys) <i>Loftex Commercial Pty Ltd v Woollahra Municipal Council</i> [2021] NSWLEC 1697 and at 2A Cooper Street (Cnr Bay Street), Double Bay (5 Storeys) - <i>Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council</i> [2022]</p>

	NSWLEC 1048 (FSR 3.44:1 (12%) HOB, among others detailed by Annexure 2.
(b) to establish a transition in scale between zones to protect local amenity	<p>The design has skilfully distributed complying GFA to the centre and eastern portion of the Site, allowing a transition in scale at the rear to the adjoining R3 Medium Density zone. The four (4) storey wall height to Brooklyn Lane and Henrietta Lane is compliant with the 14.7m HOB.</p> <p>I also note that Brooklyn Lane and Henrietta Lane provide additional separation between the Site and the adjoining R3 zone, that assists to define that zone boundary and facilitates a sensitive and appropriate transition in scale between the R2 and R3 zones further west to better protect local amenity.</p>
(c) to minimise the loss of solar access to existing buildings and open space,	<p>The proposal will maintain acceptable solar access to the existing mixed use developments to the south of the Site, as detailed by drawings:</p> <ul style="list-style-type: none"> • DA 5.00 A Shadows - June 21 - 02092020 - 14 Bay St Double Bay and DA 5.01 • A Shadows - Equinox - 02092020 - 14 Bay St Double Bay by hill thalis. <p>The proposed development will not likely impede the achievement of acceptable levels of solar access by the existing dwellings in the R3 zone, because of:</p> <ul style="list-style-type: none"> • The separation distance provided by Brooklyn Lane and the east-west orientation of the Site, and • The lowered roof form proposed to the western portion of the Site.
(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,	<p>The design shown in the Amended Application minimises these impacts as follows:</p> <p>Views – elevated properties to the south and south-west in particular have some views (over the existing two-storey building) to the 4-5 storey blank southern wall of No.16-20 Bay Street (known as No.18). No.18 to the north of the site is higher and is a blocking element to harbour views from properties to the south.</p> <p>Disruption of views and view loss are essentially the same of similar and ones analysis of whether the impacts are minimised is guided by the application of the well accepted planning principles in <i>Tenacity Consulting v Warringah Council</i> [2004] NSWLEC 140 at 25-29.</p> <p>While the proposed 5th storey element will extend further east and west of No.16-22 Bay Streets' 5th floor along the southern boundary of No.16-22 Bay Street, there are no views across the side boundary of the subject site of significance, that is no iconic, water, land-water interface, or other highly significant views).</p> <p>In the directly relevant recent appeal, also subject to clause 4.6 exceptions (2A Cooper Street (Cnr Bay Street), Double Bay (5 Storeys) - <i>Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council</i> [2022]</p>

	<p>NSWLEC 1048 (FSR 3.44:1 (12%) HOB 22.52 (53.2%)), the court held that with respect to the views from No.16-22 Bay Street</p> <p>“91 Both experts agree that there are no significant views from either terrace that would be impacted but rather, these areas enjoy an outlook. That outlook is one of a number of other views and outlooks that are available and unaffected by the proposal.”</p> <p>And with the benefit of further detail in the judgement:</p> <p>“95 The first test is to determine the baseline and what will be impacted by the new development. The impact from the terraces is to those views available from the terraces to the north, north east and north west and primarily comprises district views and vegetation. There is no doubt that the building would impact on those views however, what has to be determined is whether that impact has been minimised. In relation to visual intrusion, I follow the findings of Clay AC and find that the proposed building, due to its good design, coherent form and scale and the mitigating landscaped elements introduced is not a visual intrusion.</p> <p>96 Having regard to the evidence <u>and the benefit of the site view [emphasis added]</u>, I am satisfied that the impact of the development on views and visual intrusion has been minimised.”</p> <p>Buildings south and west of the site have their views impacts by the cumulative impacts in the delivery of buildings consistent with the desired future character within Double Bay that is detailed by the context analysis of Mr Philip Thalys and Daintry Associates. This is predominantly a 6 storey character within Double Bay to the north and north-east of the Site. This character affects those views, already blocking any harbour or water views.</p> <p>Further, to the north-east, is the 7 storey InterContinental Sydney, Double Bay at No.33 Cross Street, Double Bay and the 6 storey building form along Cross Street. These buildings are the final line of built form that obstruct harbour views from buildings south of the site.</p> <p>View across the side boundary from 16-22 Bay Street towards the ridge line south and above Edgecliff Road are effectively removed to a significant extent by the recent development consent at 294-298 new South Head Road & 2-10 Bay Street, Double Bay (6 Storeys), see: <i>Loftex Commercial Pty Ltd v Woollahra Municipal Council</i> [2021] NSWLEC 1697.</p> <p>Drawing DA 6.00 demonstrates the views affected by <i>Loftex</i> and the subject proposal.</p>
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View with Outline of Proposed DA (14 Bay Street) and Approved DA (2-10 Bay Street)

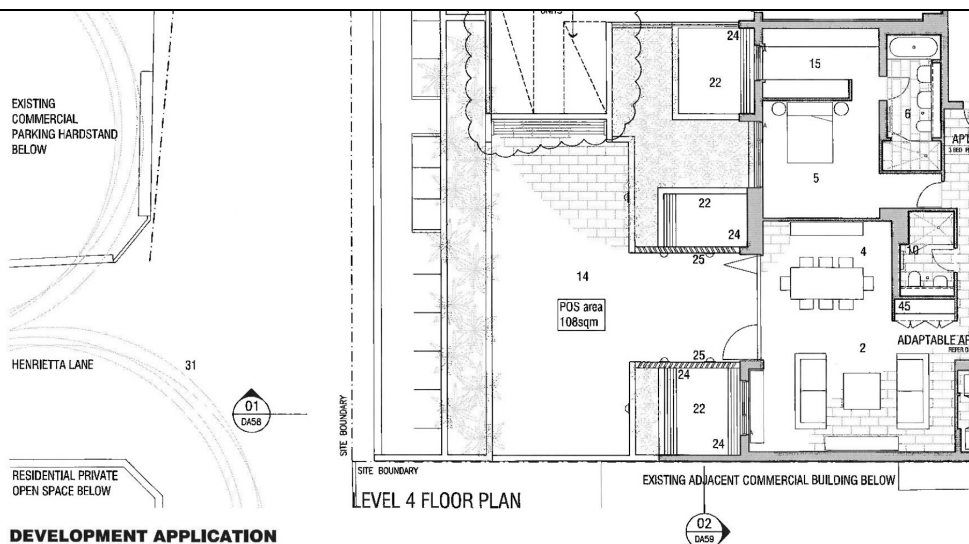
View SE f

Figure 4 - View from Apartment 4.1 to SSE (Issue F)

It must be observed that **Issue G** further reduces the extent of the views impacted as shown in Figure 3 above.

The contentions in the appeal raise, as an impact, the loss of views from Apartment 4.1 at No.18 Bay Street, aka, 16-22 Bay Street, Double Bay. Apartment 4.1 benefits from two large, elevated areas of private open space (POS) with eastern and western orientations as detailed by the plans "BN Attachment 2 - 41/16-22 Bay Street - s96 + CC" (extracts included below).

The primary POS for Apartment 4.1 is the 108m² terrace at FFL14.88m. There is a negligible loss of views from this primary POS, that opens from the main living room and kitchen of apartment 4.1. The extent of views retained from this primary area of POS and the primary living areas within Apartment 4.1 is unfettered in a western and northern western aspect, overlooking Brooklyn Lane, and having a gun barrel view down Henrietta Lane with views to ridge line of Darling Point further to the west of Double Bay (primarily comprising district views and vegetation). There will be a negligible loss of sky views to the south, but the unfettered northern access to the sky also retains full solar access. A row of tall trees (on-structure planting) providing privacy to Apartment 4.1, also limit views to the south.



DEVELOPMENT APPLICATION

The Bay Residences

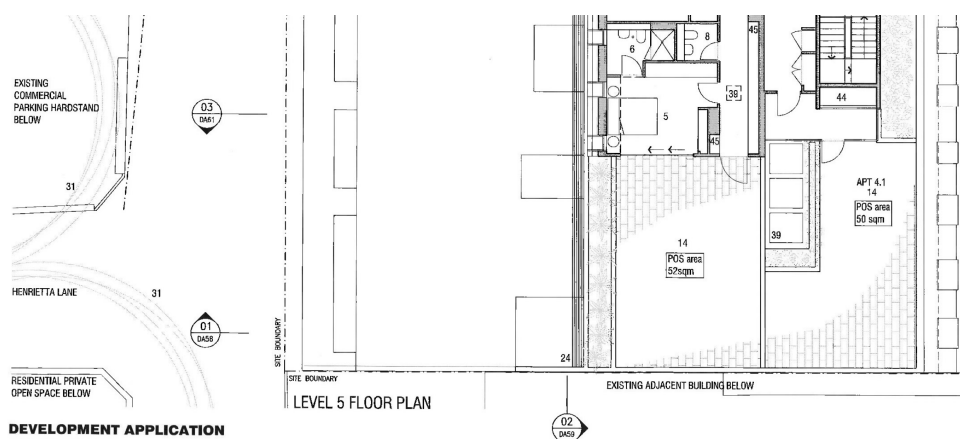
16-22 BAY STREET, DOUBLE BAY

architect Kann Finch Group
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principal OCEANIA PROPERTY

Figure 5 - Primary POS Apartment 4.1, 16-22 Bay Street, Double Bay

The secondary POS for Apartment 4.1 is a 50m² terrace located a storey above Apartment 4.1. Access to this secondary POS is disconnected from the apartment, being via the fire stairs between FFL 14.88 and FFL 18.46. The significant view from this POS is a narrow water view of Sydney Harbour along the alignment of Bay Street over the top of the 18 Footer Club (77 Bay St, Double Bay NSW) at the Northern end of Bay Street. This is a high amenity views as water views are highly valued. This view is unfettered by the proposal.



DEVELOPMENT APPLICATION

The Bay Residences

16-22 BAY STREET, DOUBLE BAY

architect Kann Finch Group
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principal OCEANIA PROPERTY

Figure 6 - Secondary POS Apartments 4.1 and 5.1, 16-22 Bay Street, Double Bay

There will be, as shown in the drawings by Mr Brett Newbold (BN Attachment 5 - Top storey + view impact - 22 04 11) to filed with the Joint Expert Report, what in my submission is, a minor loss of views to the southeast caused by the element exceeding the HOB at the

subject site. This view can be characterised as primarily comprising district views and vegetation. Nevertheless this loss of view is in the context of the views retained, including the preservation of the water views to the north from this secondary terrace, minimal and the disruption of views is minimised by the proposal.

This will be confirmed by the consent authority (Court) having the benefit of a site view, as was observed as important in the Court forming a view as to whether the recent consent at 2 A Cooper Street (Corner Bay Street) should be granted consent, as detailed at par 96 in *Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council* [2022] NSWLEC 1048.

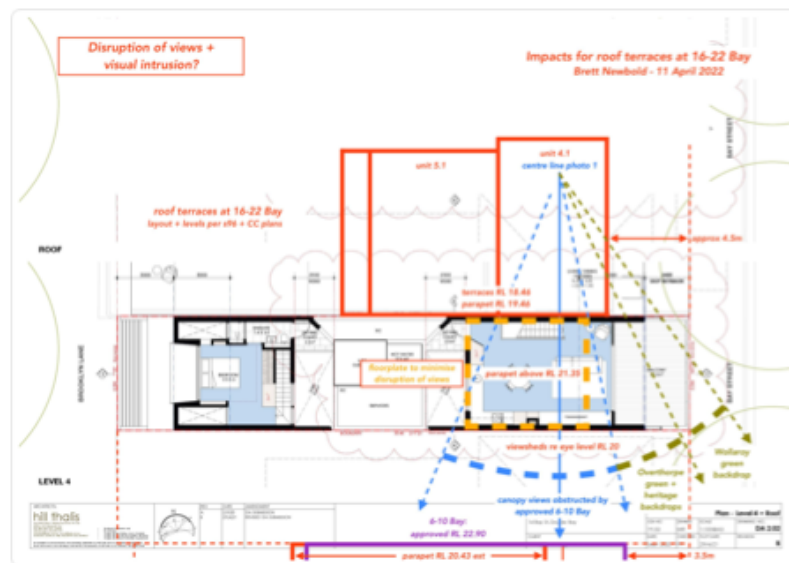


Figure 7 – Extract BN Attachment 5 - Top storey + view impact - 22 04 11 (based upon Issue F)

Most significantly, the northern views from the secondary POS to the water view of Sydney Harbour are unaffected by this proposal.

These water views can also be improved by sensible pruning of the roof top garden within 16-22 Bay Street, to the north of this secondary POS. (Refer to BN Attachment 2 - 41/16-22 Bay Street - s96 + CC).

With respect to Apartment 5.1 at 16-22 Bay Street, the primary POS is on the northern side, off the kitchen and living areas, of that Apartment. The gap between the eastern and western tower elements of the subject proposal maintain a southern view to the ridge line above Edgecliff Road in the vicinity of Alberts Street, Woollahra. The extent of view loss from Apartment 5.1 is considered negligible for similar reason to Apartment 4.1 above.

I observe with respect to both Apartments 4.1 and 5.1 at 16-22 Bay Street, that the large areas of POS (well in excess of minimum ADG areas) and their northern access to sun light provide very high and continued amenity outcomes for existing and any future occupants of these Apartments, including minimum disruption of views by this proposal.

The above analysis of views affected, being negligible to minor applying a quantitative and qualitative assessment consistent with *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 at 25-29, and submission can be supported by a site inspection by the Consent Authority.

See: Context Analysis "DA 1.02 A Context Analysis - Built Form - 02092020 - 14 Bay St Double Bay" by hill thalis

Loss of Privacy - Brooklyn Lane provides additional separation that will assist to maintain privacy between the Site and its western neighbours in the R3 zone.

Bay Street provides sufficient separation between the Site and the existing and future dwellings to the east. The design shown in the Amended Application provides recessive balconies with blade walls that are designed to achieve both acoustic and visual privacy across the side boundaries. The translucent glass walls as detailed by **Issue G** of the Plans provide mutual privacy between POS in neighbouring apartments.

Overshadowing – There is very limited additional overshadowing of No.12 and No.4-10 to the south as demonstrated by drawing DA 5.02 to 5.04 by hill thalis. The orientation of the lots (east-west) and the density of development permitted in this town centre mean that access to sunlight is limited to eastern (morning) and western (afternoon) periods for all sites in this locality and this is the inevitable consequence of lot orientation and density.

Overshadowing is further minimised by the lower and recessive built form at the western end of the Site where the side walls have been further setback from the side boundaries under **Issue G** of the Plans.

The private open space of No.4-10 Bay Street to the south of the Site will also maintain acceptable levels of morning and afternoon solar access in mid-winter. This was addressed and detailed within the assessment, appeal, and determination of development consent in *Loftex Commercial Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1697.

Visual intrusion – The occupants of No.12 and No.16-20 Bay Street (aka No.18) will perceive some increase in visual bulk and scale; however this is minimised noting that any building consistent with the existing and desired future character under the LEP and any reasonable development of the site would likely have a similar impacts.

The rear (western portion) of the proposed roof is splayed to the west to reduce any visual intrusion to the south and south west from the immediately adjoining apartments. The wall height of the façade to Brooklyn Lane is compliant with the HOB.

The side walls at the rear are recessive, setback from the boundary.

The occupants of No.16-22 will maintain existing east, west and northern views (which are the most highly valued views with

	<p>Apartment No.4.1 at No.16-22 enjoying glimpse of Sydney Harbour down Bay Street from its eastern secondary elevated POS and unimpeded access to northern sunlight.</p> <p>The impacts of the proposed development in terms of visual intrusion, are minimised as a result of the proposal's compliant GFA distributed where it minimises such intrusion. The gap in the two tower elements of the proposal minimises visual intrusion upon Apartment 5.1 at 16-22 Bay Street.</p>
(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.,	Views from the public domain to the harbour and surrounding areas views will not be impeded by the Amended Proposal Issue G .

Wehbe Test 2: The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary:

Submission: The underlying objective or purpose is relevant to the development and therefore is not relied upon.

Wehbe Test 3: The objective would be defeated, thwarted, or undermined if compliance was required with the consequence that compliance is unreasonable:

Submission: The height development standard contains express objectives (addressed above) and there is no utility seeking to go behind the objectives. This test is not relied upon with respect to the HOB objectives. As for the zone objectives, the proposal is consistent with the desired future character and contextually consistent with other development in the immediate vicinity.

Wehbe Test 4: The development standard has been virtually abandoned or destroyed:

Submission: Whilst this proposal complies with the FSR control, many contemporary developments in the vicinity of the Site have been approved with significant exceptions to both the building height and FSR development standards as detailed by the context analysis (Annexure 2) and "DA 1.02 A Context Analysis - Built Form - 02092020 - 14 Bay St Double Bay" by hill thalis and Figure 6.

Of relevance to the evolving character and context in Double Bay is the Judgment of the Chief Judge of the Land & Environment Court of NSW Preston CJ, in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, where at [63], he observed:

"On this construction, the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the

development standards themselves, but also other factors, including approved development that contravenes the development standard".

The issue of desired future character has been further refined by Commissioner O'Neil at [57] in *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021]:

"The desired future character of the locality can be evaluated by reference to matters other than the development standards that determine the building envelope for the site, including the existing development that forms the built context of the site (Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115 (SJD DB2) at [54]). The desired future character of an area is not determined and fixed by the applicable development standards for height and FSR, because they do not, alone, fix the realised building envelope for a site. The application of the compulsory provisions of cl 4.6 further erodes the relationship between numeric standards for building envelopes and the realised built character of a locality (SJD DB2 at [62]-[63]). Development standards that determine building envelopes can only contribute to shaping the character of the locality (SJD DB2 at [53]-[54] and [59]-[60]).

Contextually, the most relevant buildings to the context issue, is the existing northern neighbour at 22.52 (53.2%) 16-22 Bay Street, Double Bay, Double Bay (5 Storeys) - HOB 18.1m FSR 3.15:1), which is a 5 storey building with a maximum RL of 22.39m AHD. This northern neighbour is more than 1m higher than the proposal shown in the Amended Application. That is despite its location being lower down on Bay Street.

The further and more recent consents granted by the Court in the immediate vicinity that all breach HOB and/or FSR include:

- 294-298 new South Head Road & 2-10 Bay Street, Double Bay (6 Storeys) *Loftex Commercial Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1697.
- 2A Cooper Street (Cnr Bay Street), Double Bay (5 Storeys) - Pallas Development Management Pty Limited trading as *Fortis Development Group v Woollahra Municipal Council* [2022] NSWLEC 1048 (FSR 3.44:1 (12%) HOB.
- 30-36 Bay Street, Double Bay (6 Storeys) *Anka Double Bay Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1051
- 21-27 Bay Street, Double Bay - *Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council* [2021] NSWLEC 1585 - 17.715m to the top of the central roof plant screen and a height of 17.09m to the top of the upper-level parapet and FSR of 3.25:1.
- Further removed but still within the visual catchment, the approved DA at 30-36 Bay Street (*Anka Double Bay PL v Woollahra Municipal Council* (2019) NSWLEC 1051), which is now under construction, breaches the (permissible) height standard at the street wall, by 1.86 metres. The lift overrun was approved at 3.16 metres above the height standard . The approved development at 30-36 Bay Street is located only 70 metres to the north of the Site, and is on the same side of Bay Street.

In *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85, Justice Robson concluded that previous development consents were relevant instruments

to be considered for the purpose of s 39(4) of the *Land and Environment Court Act* 1979.

The Court held that prior consents granted on the same site or in the locality ‘may be instructive for the purpose of an ‘abandonment’ argument or in informing the desired character or future streetscape of a locality’.

The the context analysis “DA 1.02 A Context Analysis - Built Form - 02092020 - 14 Bay St Double Bay”, by hill thalis, demonstrates the Council (firstly) and the Court (following) have approved numerous developments with significant exceptions to the building height and FSR development standards.

I conclude that those approved but non-compliant developments form a ‘*pattern of abandonment such that the development standard can no longer be said to represent the existing and/or desired character of the locality*’.

Whilst there are other consent as detailed by Annexure 2 in the Double Bay Town Centre, the above examples are within the immediate vicinity.

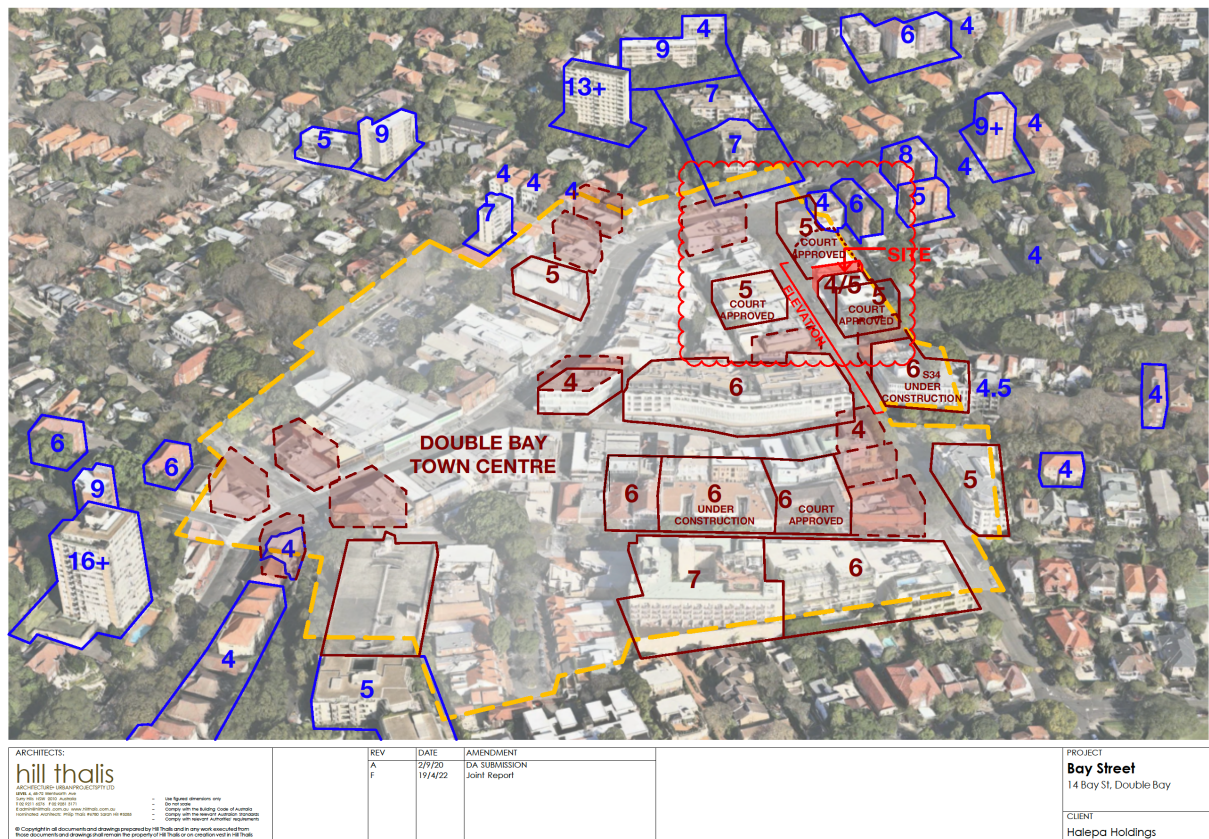
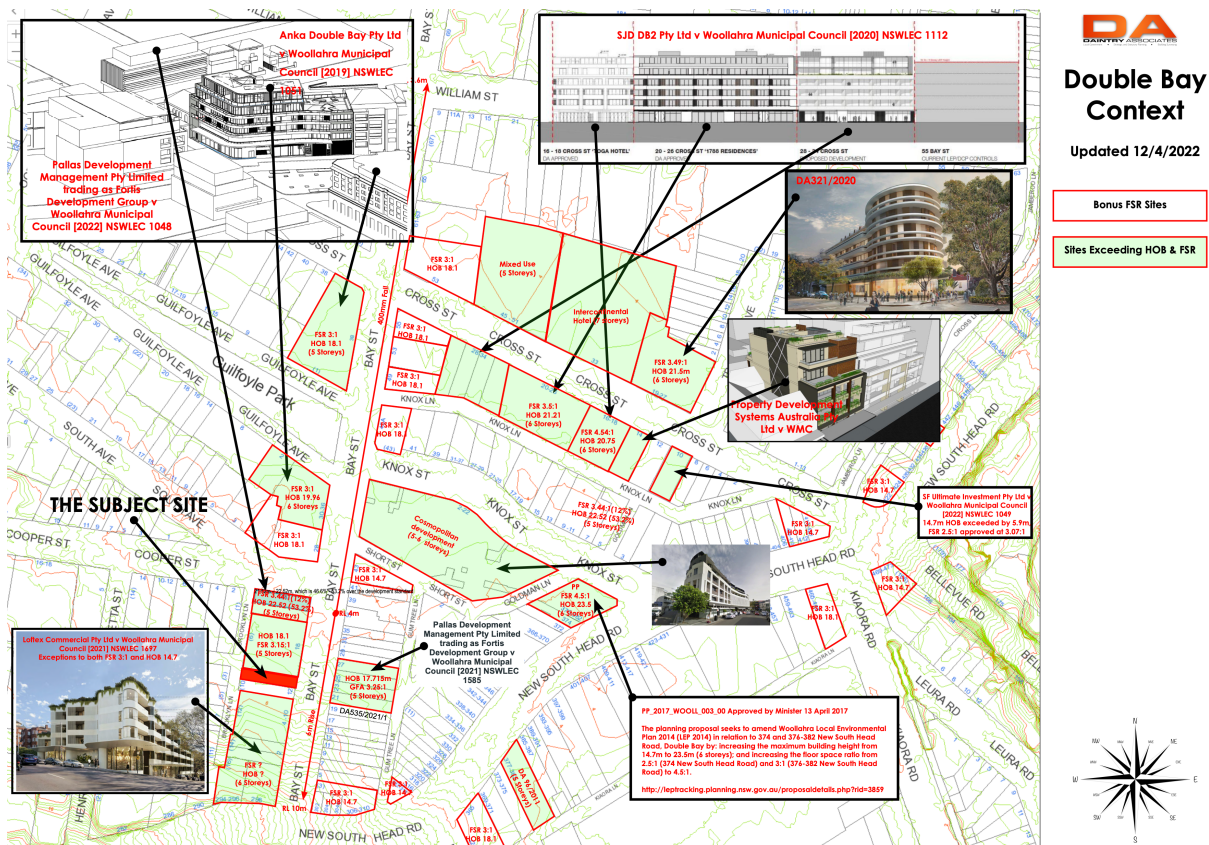
This clause 4.6 also applies the approach taken in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, (SJD) an appeal under s 56A of the *Land and Environment Court Act* 1979 (“the Court Act”) with respect to *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112. This is the seminal case in the Double Bay Town Centre, with most appeals following the same approach. These cases are directly relevant to Double Bay.

Applying *Abrams v The Council of the City of Sydney (No 2)* [2018] NSWLEC 85, a finding that a development standard has been abandoned requires evidence of a ‘*pattern of abandonment such that the development standard can no longer be said to represent the existing and/or desired character of the locality would mean that the development standard had been “virtually abandoned or destroyed....It will be a matter of fact and degree in the circumstances of each case.*’

I submit that there is ample evidence in the context analysis “DA 1.02 A Context Analysis - Built Form - 02092020 - 14 Bay St Double Bay” by hill thalis and in our own review of the Court’s Judgements and Council’s files, to show numerous exceptions to both the building height and FSR development standards in Double Bayt as summarised by the following map at Figure 6.

The map at Figure 2 demonstrates a *pattern of abandonment such that the both the building height and FSR development standards that have been approved throughout Double Bay can no longer be said to represent the existing /or desired character of the locality.*

This proposal shown in the Amended Application (Issue G) complies with FSR development standard and only seeks by this Amended Request, a variation to the building height development standard.



Wehbe Test 5: A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 97.

Submission: I do not rely upon this test.

Further to the 5 Wehbe tests above:

Wehbe is not the only way one may find that compliance with development standard is unreasonable or unnecessary.

The burden placed on the owners of the development (by requiring strict compliance with the height development standard) would be disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant portions of the proposed development (relying on comments made in an analogous context, in *Botany Bay City Council v Saab Corp* [2011] NSWCA 308 at [15]).

Compliance with the HOB would result in a built form outcome that is discordant with the desired future character discernible through numerous consents and completed buildings, not only in the immediate vicinity, but throughout Double Bay.

Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as proposal is consistent with the zone and HOB objectives and consistent with the desired future character. Further, Compliance with the HOB would result in a built form outcome that is discordant with the desired future character and disproportionate to the (non-existent or inconsequential) adverse consequences attributable to the proposed non-compliant portions of the proposed development.

SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

Sufficient “*environmental planning grounds*”⁶ to justify contravening the development standard (clause 4.6(3)(b)) are found on the following bases:

- a. The proposed five (5) storey building is lower than most contemporary buildings within its immediate vicinity (including its northern neighbour, which is 1.04m higher than the proposed building height). This is detailed by Annexure 2 - Daintry Associates - Double Bay Context Analysis and the Architect's Context Analysis.
- b. The height exception results from the careful distribution of 435.9m² of GFA, that is 22.6m² less GFA than that permitted under clause 4.4 of the LEP (Max 2.5:1 = 458.5m²). That is the FSR proposed is 2.38:1 (See Drawing DA 1.10 Issue G) being 0.12:1 less FSR than permitted. I note that issue G does not affect the GFA or FSR.
- c. The elements that exceed the height standard as detailed above are: (a) the recessive eastern façade (parapet), (b) the pergola and glass wall at the top level street frontage, and (c) the eastern portion of the western

⁶ *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26] and “that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act”.

roof and glass blade wall, (d) the further recessive parapet at RL21.5m AHD. These elements are consistent with the desired future character and indeed the height of the northern neighbours.

- d. The proposed building height complies with the LEP at the rear lane (on the 4 storey western elevation). This element is a transitional element at the zone interface (further separated by the Lane) between the B2 and the R3 zone further west. The roof slopes to the east creating a recessive elements, which reads as a 4 storey building when viewed from the immediate vicinity (visual catchment) of the Site. As, such, the impacts upon the R3 zone are minimal.
- e. The proposed building has been designed in such a way that it is truly adaptable for mixed residential or commercial use at any level, which is consistent with the objectives of the zone and building depth and ceiling height provisions (refer to Figure 4C.1 of the ADG).
- f. Section 1.3 of the EPA Act provides:

(c) to promote the orderly and economic use and development of land,

This Site and No.12 to the south are two sites, both effectively isolated whether or not consolidated as No.4 to No.10 to the south is already consolidated and No.16-20 (No.18) to the north is already consolidated. The orderly and economic use of the Site includes the highest and best use capable, which is also consistent with the zone objectives. We have demonstrated above that the proposal is consistent with the zone objectives.

(g) to promote good design and amenity of the built environment,

As shown in the plans accompanying the Amended Application, the Design Verification Statement dated 2 September 2021 and Design Quality Statement dated 26 August 2021 and Materials Schedule (DA 4.00 A Details + Materiality - 02092020 - 14 Bay St Double Bay) by Hill Thalys, the Amended Application promotes good design and as such, will also promote good amenity outcomes for future residents of the proposed building and any neighbours.

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

The design delivers the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants (NCC Report - 090920 - 14 Bay St Double Bay).

The glass blade walls and pergola to the Bay Street elevation are required to act as a fire wall to the northern and southern boundaries as the openings would otherwise be within 3m of the fire source feature under the National Construction Code (NCC) and Building Code of Australia. These elements are recessive and necessary to provide fire separation and amenity to future occupants.

The proposal provides “sufficient environmental planning grounds” to justify contravening the development standard, in particular the exceedance of the HOB development standard is a justified in response to the existing and approved built context of the site ⁷ as detailed above by reference to the context analysis of Mr Thalís and myself. (Figure 8 & 9 Above))

The concurrence of the Secretary of the Department can be assumed under clause 4.6(4)(b). This is because:

- a. Concurrence may be assumed by written notice given to the consent authority (as per clause 64(1) of the *Environmental Planning and Assessment Regulation 2000*).
- b. Such written notice was given by means of planning circular PS 18-003 ‘Variations to development standards’ dated 21 February 2018.

In any event (when considering the factors set out in clause 4.6(5):

- c. the contravention of the development standard does not raise any matter of significance for State or regional environmental planning;
- d. there is no public benefit in ensuring development standard is maintained in the circumstances of this case and the proposal is consistent with the Act and LEP objectives. This outweighs the benefit of maintaining the development standard.

See: [PS 18-003 – Department of Planning and Environment \(Revokes PS17-006 \(December 2017\)\)](#).

Submission in Full

1. The proposed development will be consistent with the objectives of the zone (clause 4.6(4)(a)(ii)) on the following bases:
 - a. To provide a range of retail, business, entertainment, and community uses that serve the needs of people who live in, work in, and visit the local area.

Submission: The proposal provides a mixed use development that activates the Bay Street frontage and shop top housing.
 - b. To encourage employment opportunities in accessible locations.

Submission: The proposal will provide employment opportunities increasing the number of shops from 1 to 2 at ground floor also supporting activation of the retail precinct. Apartments have also been designed such that they are adaptable to offices.
 - c. To maximise public transport patronage and encourage walking and cycling.

⁷ Similar to O'Neill C, at Par 37 in *Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council* [2021] NSWLEC 1585, a site within the immediate vicinity (visual catchment).

Submission: The proposal provides no parking other than a loading dock, therefore, it maximises public transport patronage and encourage walking and cycling. One (1) bicycle parking space is provided to each apartment and three (3) bicycle parking spaces are provided at ground floor level. With additional bicycle parking at each entry to each apartment.

- d. To attract new business and commercial opportunities.

Submission: The existing premises contains one shop; the new premises will contain two shops and encourage new business and commercial opportunities.

- e. To provide active ground floor uses to create vibrant centres.

Submission: The ground floor use will activate the Bay Street streetscape frontage with a new fine grain narrow shop front. The use of a flood gate maximises the retail frontage on what is a narrow Site.

- f. To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.

Submission: This objective relates to the interface between the B2 and R3 zones. The proposal complies with the FSR standard by a proposed GFA of 22.33m² less than the maximum GFA permissible under the LEP. The scale and type of building proposed is compatible with the amenity of the surrounding residential area; it will present as a 4 storey façade to the zone boundary at the rear lane, with a highly recessed 5th level.

The proposed building height at the zone interface complies with the permissible building height under the LEP and is racked and recessive. Therefore, the proposed building will achieve the *desired future character*⁸ as defined by the LEP and discernible from the existing and approved built forms.

- g. To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

Submission: There is a fundamental issue in that the desired future character in the LEP is not defined. The Court held in *SJD* that the consent authority **is not**:

“...legally obliged to construe the term “desired future character” in WLEP by reference to the desired future character provisions of WDCP⁹”

The proposal complies with the FSR standard with a proposed GFA less than the maximum under the LEP thus achieving the desired future character (a bulk and scale) evidenced by existing and approved building that have been commenced in more than a minimal way in the immediate vicinity. Compliance with the FSR must be given some weight in determining the desired future character and discernible from the

⁸ Also see *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] at [57]

⁹ Par 46 in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115

existing and approved built forms. This was made clear by the Court in SJD:

“...the term “desired future character” is not defined in WLEP. Its meaning is to be derived from the text and context of the provisions of WLEP in which it is used and the other provisions of WLEP that frame the urban character and built form of the neighbourhood or area.¹⁰”

The SJD judgement goes further:

“In the objective of the FSR development standard in cl 4.4(1)(b), the referent of “desired future character of the area” is used in order to ensure that buildings in particular zones, including the B2 zone, are compatible in terms of bulk and scale. The FSR for land in those zones that the clause establishes and that is shown on the Floor Space Ratio Map is compatible with the desired future character in terms of bulk and scale. This means that the desired future character establishes the FSR of buildings in these zones and not the other way around, that the FSR of the buildings in those zones establishes the desired future character.¹¹”

The existing character is one that has evolved from the abandonment of the development standards for many sites in Double Bay by the Council's own actions. See: **Annexure 2 – Context Analysis** and the Architect's context analysis (Figure 9 - Extract Drawing DA1.02 (F).).

I submit that the proposed building height is the result of the sensible distribution of (better than) complying GFA throughout the proposed building such that the resultant built form as proposed, has specific regard to the evolving character of Double Bay that has resulted from the numerous consents and buildings identified by the context analysis “DA 1.02 A Context Analysis - Built Form - 02092020 - 14 Bay St Double Bay” by hill thalis am my own analysis (**Annexure 2**).

The proposal is consistent with the existing and the desired future character as shown in Figure 10 - Bay Street Elevations. It must be observed that the proposal is more than 1m lower than its northern neighbour (at 16-22 Bay Street). Developments now approved by the Court on appeal at 4-10 Bay Street and 24 Bays Street (aka 2A Cooper Road, Double Bay) are significantly higher in GFA and building height.

Also within the immediate vicinity (visual catchment) of the Site is 30-36 Bay Street, Double Bay. 30-36 Bay St comprises a 6 storey building which was approved by the Court in *Anka Double Bay Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1051.

In *Tuite v Wingecarribee Shire Council (No 2)* [2008] NSWLEC 321 (Preston CJ), found that the obligation on the Commissioner was to determine the particular DA before the Court. The task involved assessing the impacts of the DA on the environment existing at the time of determination of the application.

¹⁰ Par 52 in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115

¹¹ Par 57 in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115

In *Kinloch v Newcastle City Council* [2016] NSWLEC 109 (Sheahan J) found that a previous consent for a site, having achieved commencement only in a minimal way, was not a relevant consideration in a merits assessment. [144])

In the case of 30-36 Bay Street, Double Bay, it is a six (6) storey building, it had been physically commenced in more than a minimal way and should in my submission be afforded significant weight in discerning the desired future character within the immediate vicinity (visual catchment) shown in Figure 1.)

These are among numerous recent consents granted by the Court in the immediate vicinity that all breach HOB and/or FSR.

This is shown diagrammatically by Drawing DA 1.07 Issues F which is extracted below (Figure 7).

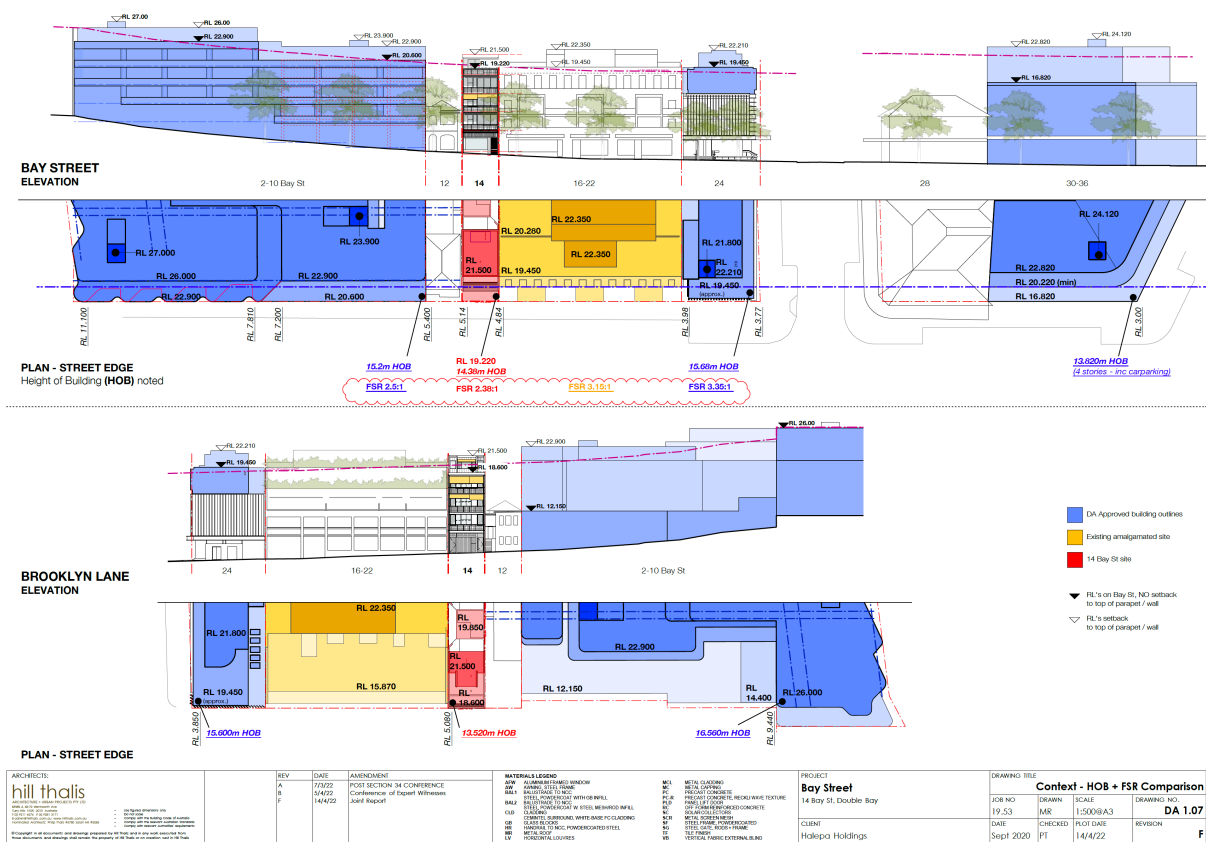


Figure 10 - Bay Street Elevations (Extract Drawing DA 1.07 Issue F)

2. The proposed development will be consistent with the objectives of the development standard (clause 4.6(4)(a)(ii)) as detailed in the table above.

The proposal is consistent with the development standard and zone objectives as detailed above.

3. Compliance with the development standard is unreasonable or unnecessary¹² in the circumstances of the case (clause 4.6(3)(a)) the objectives of the

¹² Ibid [5].

development standard are achieved notwithstanding non-compliance with the standard as detailed above: 1st **Wehbe** test at [42] and [43].

Submission I have addressed the building height objectives to the standard above and submit that the proposal is consistent with these objectives.

The proposal demonstrates why compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

I submit that this clause 4.6 exception should prevail to the extent that it allows a merit assessment to proceed as this clause 4.6 the consent authority can be satisfied that there are proper planning grounds to warrant the grant of consent, and that the contravention is justified.

Conclusion

The proposal depicted in the Amended Application (**Issue G**) demonstrates and this written (clause 4.6(3)) request that an exception to the development standard is justifies:

1. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)).
2. sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)) and the primary justification is that the proposal is consistent with the desired future character and the built for context as detailed above..
3. that the exception is in the public interest because it is consistent¹³ with the objectives of the development standard and the objectives of the zone (clause 4.6(4)(a)(ii)), as detailed above.
4. The Court on appeal can assume concurrence and can be reasonably satisfied that there is no public benefit in ensuring development standard is maintained in the circumstances of this case. (clause 4.6(4)(b)).

The proposal is consistent with the existing and desired future character that has evolved by the abandonment of both FSR and the HOB development standards in the vicinity of this Site. This proposal distributes Gross Floor Area (that is the design proposes less GFA than permitted by the LEP) so as to provide the best possible amenity for future occupants and acceptable impacts upon the streetscape and neighbours in the achievement of the Act and LEP aims and objectives.

The design depicted in the Amended Application (**Issue G**) provides sufficient environmental planning grounds to justify contravening the development standard as the complying FSR is sensibly distributed by the design to minimise in particular disruption of views, loss of privacy, overshadowing or visual intrusion.

The proposed development is compatible with the bulk, scale, streetscape, existing character, and desired future character of the locality.

¹³ Ibid [3].

Yours faithfully,



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Annexure 1 – Clause 4.6 Methodology

Annexure 2 – Context Analysis update 12/4/2022

Annexure 1 – Clause 4.6 Methodology

Guidance as to the proper clause 4.6 methodology is provided by judgments of the Land & Environment Court (LEC) and Court of Appeal (NSWCA) detailed by the methodology below. including:

1. *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, (SJD) an appeal under s 56A of the Land and Environment Court Act 1979 ("the Court Act") with respect to *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 (**also directly relevant to Double Bay**)
2. *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, (RebelMH)
3. *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (Baron)
4. *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245 (Al Maha)
5. *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (Initial Action) an appeal under s 56A of the Land and Environment Court Act 1979 ("the Court Act") with respect to *Initial Action Pty Ltd v Woollahra Council* [2017] NSWLEC 1734
6. *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 (Gejo)
7. *Randwick City Council v Micaul Holdings Pty Ltd* 225 LGERA 94; [2016] NSWLEC 7 (Micaul)
8. *Moskovich v Waverley Council* [2016] NSWLEC 1015 (Moskovich)
9. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 (Four2Five)
10. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 (Four2Five)
11. *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (Webhe)

With respect to the guidance provided by the Courts above, there was apparent tension between the approach adopted by *Al Maha* and *Initial Action*. *RebelMH* and *Baron* further clarified the requirements for clause 4.6 requests and sought to unify the approaches in *Initial Action* and *Al Maha*.

It now appears settled, at [51] in *RebelMH* that:

"... in order for a consent authority to be satisfied that an applicant's written request has "adequately addressed" the matters required to be demonstrated by cl 4.6(3), the consent authority needs to be satisfied that those matters have in fact been demonstrated. It is not sufficient for the request merely to seek to demonstrate the matters in subcl (3) (which is the process required by cl 4.6(3)), the request must in fact demonstrate the matters in subcl (3) (which is the outcome required by cl 4.6(3) and (4)(a)(i))."

This clause 4.6 submission specifically responds to the above and demonstrates it is also the public interest to support the exception.

The Objectives of Clause 4.6

The objective of Clause 4.6(1) of the LEP are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

Preston CJ clarified the correct approach to the consideration of clause 4.6 requests including that clause 4.6 does not require that a development that contravenes a development standard must have a *neutral or better* environmental planning outcome than one that does not. (*Initial Action*). Arising from *Initial Action*, In the second class 1 appeal in *Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1097 decided 12 March 2019 .

In *AI Maha*:

21. "A consideration of legal error should start by identifying the criterion as to which the Commissioner was to be satisfied. On a literal reading, subcl (4)(a)(i) merely required that she be satisfied that the applicant had taken two steps, namely, that it had, first, made a written request to be excused compliance with the development standard and, secondly, "adequately addressed" the matters set out in subcl (3). On that (narrow) reading, the Commissioner did not need to form any view herself about the justification for failing to comply with the development standard.
22. The alternative reading is that the matters would not be "adequately" addressed unless they in fact justified the non-conformity. In other words, the Commissioner had to be satisfied that there were proper planning grounds to warrant the grant of consent, and that the contravention was justified.
23. The second reading is attractive for three reasons. First, in its terms, it gives work to the evaluative requirement implicit in the need to be satisfied that certain matters have been "adequately" addressed. Secondly, this is not a gateway provision prior to public consultation or further assessment; it is a criterion for the ultimate grant of consent¹⁴. Thirdly, the narrow approach fails to give separate work to subcl (3) and (4). Thus, subcl (3) requires the consent authority to have "considered" the written request and identifies the necessary evaluative elements to be satisfied. That is, to comply with subcl (3), the request must demonstrate that compliance with the development standard is "unreasonable or unnecessary" and that "there are sufficient environmental planning grounds to justify" the contravention. It would give no work to subcl (4) to simply require the Commissioner to be satisfied that the demonstration required under subcl (3) had occurred. The additional step is that the request satisfied the Commissioner that it should be granted.
24. However, it is not necessary to resolve this issue in this case, because it should be accepted that the Commissioner did not form either state of satisfaction. Further, it is not appropriate to determine the issue in the absence of submissions as to the purpose and extent of the departures of the language

¹⁴ Compare s75H(2) (repealed in 2011) using a similar criterion with respect to an environmental assessment prior to public release.

of cl 4.6 from its predecessor, State Environmental Planning Policy No 1—Development Standards, cl 7 and 8.”

The Court of Appeal decision in *RebelMH* and Preston CJ's decision in *Baron* support *Al Maha* and Initial Action. *Gejo Pty Ltd v Canterbury-Bankstown Council* [2017] NSWLEC 1712 (at [27-29]), suggested the following approach:

27. Clause 4.6 of the CLEP 2012 [a standard instrument LEP] allows development standards to be applied flexibly in certain circumstances. In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7, Preston CJ found that in applying the provisions of cl 4.6, the power to allow an exception to a development standard can be exercised where the Commissioner is satisfied that:

1. the proposed development will be consistent¹⁵ with the objectives of the zone (cl 4.6(4)(a)(ii)) (at [7]),
2. the proposed development will be consistent¹⁶ with the objectives of the standard in question (cl 4.6(4)(a)(ii)) (at [7]),
3. the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary¹⁷ in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) (at [38]), and
4. the written request adequately demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)) (at [38]). [underlining added]

28. Clause 4.6(4)(a)(ii) presumes that if the proposed development is consistent [emphasis added] with the objectives of the zone and of the standard (i.e. meets (1) and (2) above), then it is in the public interest. I also note that nothing in cl 4.6 requires the consistency with the objectives to be established in or by the written request.

29. Further, in outlining (3) and (4) above, regarding the requirements for the written request, Preston CJ stated that the Court need not be directly satisfied that compliance is unreasonable or unnecessary and sufficient environmental planning grounds exist, but rather “only indirectly by being satisfied that the applicant's written request has adequately addressed” those matters.

I note that the above observation at [29] has been further clarified by *RebelMH* and *Baron*.

¹⁵ *Moskovich v Waverley Council* [2016] NSWLEC 1015 at 53:

53. The threshold of “**consistency**” is different to that of “**achievement**”. The term “consistent” has been considered in judgements of the Court in relation to zone objectives and has been interpreted to mean “**compatible**” or “**capable of existing together in harmony**” (*Dem Gillespies v Warringah Council* (2002) 124 LGRA 147; *Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190) or “**not being antipathetic**” (*Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21). Whichever interpretation is adopted the test of “**consistency**” is less onerous than that of “**achievement**”.

¹⁶ *Moskovich v Waverley Council* [2016] NSWLEC 1015 at 53.

¹⁷ *Webhe* [42-51] and noting that in Initial Action [22] “These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be **sufficient to establish only one way**, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.”

The most recent guidance of the LEC arises from *SJD* where Preston CJ held:

46. "... the provisions of a development control plan cannot be used to interpret the provisions of a local environmental plan unless the provisions of the local environmental plan expressly refer to the provisions of the development control plan for that purpose. ..."

47. The fact that the principal purpose of a development control plan is to provide guidance on certain matters referred to in s 3.42(1) of the EPA Act does not make it permissible to construe the provisions of a local environmental plan by reference to a development control plan.

49. So understood, the Commissioner did not err on a question of law by not construing the "desired future character" in the objectives of the height and development standards in cl 4.3 and cl 4.4 and the objective of the B2 zone of WLEP by reference to the desired future character provisions of WDCP.

As at the date of writing this clause 4.6 submission I note that Woollahra Municipal Council have not obtained any Gateway approval or exhibited any LEP to expressly refer to the provisions of the development control plan for the purpose of "desired future character" under the LEP.

I have reviewed PP-2020-4096¹⁸ it is a draft policy document that should be given little weight as despite its review commencing 22 December 2020 the proposal remains under assessment by the Eastern City Regional Team of the Department of Planning, Environment and Infrastructure and there remains no published decision to allow public exhibition.

Therefore, this clause 4.6 will limit itself to the express objectives of the zone and development standard. I note that Clay AC in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 made important observations about the abandonment of the LEP in Double Bay.

Determinative weight ought reasonably to be given to the evolving character demonstrated by approved, commenced, and completed buildings in the locality.

Finally, the consent authority retains a very broad discretion under clause 4.6 and there are no numerical limits placed upon the dispensing power, either by clause 4.6 or by the interpretation of clause 4.6 by the Courts.

¹⁸ <https://www.planningportal.nsw.gov.au/ppr/under-assessment/interpretation-desired-future-character-woollahra-lep-2014>

Anka Double Bay Pty Ltd v Woollahra Municipal Council [2019] NSWLEC

Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council [2022] NSWLEC 1048

SJD D82 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112

DA321/2020

Fortis Development Systems Australia Pty Ltd v WMC

15 Ultimate Investment Pty Ltd v Woollahra Municipal Council [2022] NSWLEC 1049

Lohax Commercial Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1497

Exemptions to both FSR 3.1 and HOR 14.7

THE SUBJECT SITE

Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council [2021] NSWLEC 1585

PP 2017 WOOL 003.00 Approved by Minister 13 April 2017

The planning proposal seeks to amend Woollahra Local Environmental Plan 2014 (LEP 2014) in relation to 374 and 376-382 New South Head Road, Double Bay by increasing the maximum building height from 14.7m to 23.8m (8 storeys), and increasing the floor space ratio from 2.6:1 (374 New South Head Road) and 3:1 (376-382 New South Head Road) to 4.6:1.

<http://lepptracking.planning.nsw.gov.au/proposals/details.php?id=3859>



Double Bay Context

Updated 12/4/2022

Bonus FSR Sites

Sites Exceeding HOB & FSR