



Land and Environment Court

New South Wales

Case Name: SJD DB2 Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2020] NSWLEC 1112

Hearing Date(s): 4-5 February 2020

Date of Orders: 12 March 2020

Decision Date: 12 March 2020

Jurisdiction: Class 1

Before: Clay AC

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development consent is granted for demolition of the existing buildings and construction of a six-storey shop top housing development at 28-34 Cross Street, Double Bay with ground floor retail, twenty-one (21) residential units over five (5) levels above and two (2) levels of basement parking for thirty-six (36) vehicles and four (4) motorbikes with vehicular access from 20-26 Cross Street, Double Bay upon the conditions Annexure 'A' hereto.
(3) The exhibits are to be returned other than Exhibits A and 3.

Catchwords: DEVELOPMENT APPLICATION – residential flat building – clause 4.6 objections to height and floor space ratio controls – desired future character – economic impact – precedent

Legislation Cited: Environmental Planning and Assessment Act 1979
Woollahra Local Environmental Plan 2014

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council (2008) 236 LGERA 256; [2018] NSWLEC 118
RebelMH Neutral Bay Pty Limited v North Sydney

Council [2019] NSWCA 130
Wehbe v Pittwater Council (2007) 156 LGERA 446;
[2007] NSWLEC 827

Texts Cited: Macquarie Dictionary (online)
Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: SJD DB2 Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
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File Number(s): 2019/91041

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JUDGMENT

- 1 **COMMISSIONER:** Double Bay is considered by many to be a very desirable place to live. It is the Applicant's proposal to provide residential accommodation in the heart of Double Bay which is the subject of the dispute before the Court.
- 2 This is an appeal pursuant to s 8.15 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by the Sydney Eastern City Planning Panel (the Panel), exercising the power of the Respondent, of a development application for demolition of existing buildings and construction of a six storey shop top housing development at 28-34 Cross Street Double Bay (the Site).
- 3 The proposal exceeds the controls for height and floor space in the Woollahra Local Environmental Plan 2014 (WLEP). The Council says that the appeal should be dismissed because the objections made pursuant to cl 4.6 of WLEP do not adequately address the non-compliances, that the proposal is inconsistent with the desired future character of the area and that the loss of significant commercial floor space is unacceptable.

- 4 The Applicant relies upon two recent approvals adjacent to the Site which exceed the current controls to establish in particular the desired future character in this part of Double Bay, which means that the proposal is appropriate and that the loss of commercial space is not a determining reason for refusal.
- 5 For the reasons which follow, I accept that the clause 4.6 objections are made out and that on the merits the appeal should be allowed.

The Site and locality

- 6 The Site presently comprises four allotments being Lot 2 DP 512299, Lot 2 DP 510714, Lot 2 DP 509670 and Lot 2 DP 508760, together known as 28-34 Cross Street Double Bay. The Site is on the southern side of Cross Street and has rear access to Knox Lane.
- 7 With an area of 1041 square metres, the Site has a frontage to Cross Street of 35.385m, a length of boundary to Knox lane of 36.785m, an eastern boundary of 28.53m and a western boundary of 33.44m.
- 8 The Site has no vehicular access and is currently developed with a one and two storey retail/commercial building in a horseshoe shape with a central courtyard fronting Cross Street. Generally, the retail uses are at ground floor and commercial uses at the first floor. There is pedestrian access through the Site from Cross Street to Knox Lane.
- 9 Directly opposite on the northern side of Cross Street is a part 2, mostly 5 storey mixed use development with residential uses above the ground floor (45-51 Cross Street). A little to the east of 45-51 is the Intercontinental Hotel (generally 6-7 storeys) and then a Council carpark.
- 10 To the south are three to four storey buildings on the other side of Knox Lane.
- 11 Adjacent to the Site and to the east are two developments under construction - each to be ultimately of six storeys (20-26 Cross Street and 16-18 Cross Street). They are discussed in a little detail later.

The Proposal

- 12 The existing buildings are to be demolished and, in their stead, constructed a six storey shop top housing development. There will be retail on ground floor

and twenty one residential apartments above. There are two levels of basement parking proposed, with parking for thirty six cars and four motorbikes.

- 13 Access to the basement is from the development to the east, 20-26 Cross Street. That is, vehicles will enter 20-26 Cross Street from Knox Lane, descend to its basement before then crossing through an opening to the basement of the subject proposal. Appropriate easements are proposed.
- 14 Because the present development has commercial uses on its first floor and the proposed development does not, the Site will provide about 1000 square metres less in retail/commercial uses than the development on the site at the present time.
- 15 The height proposed is 19.71m to the main roof and 21.21m to the plant/lift overrun. The proposed floor space ratio is 3.54:1. The height and floor space proposed is equivalent to the two developments under construction to the east.
- 16 The proposed building is intended to continue the line of development commencing at 18-20 Cross Street, by adopting the heights and general form of those developments. The street wall height is four storeys and the top two storeys are recessed and less visible from the street. The proposed Cross street elevation is shown below:



The history of the application

- 17 The application was lodged on 14 December 2017. The Council staff assessment report recommended approval, but on 4 October 2018 the Panel refused the application. The Panel did not accept that the approved developments to the east of the Site on Cross Street amounted to an

abandonment of the development standards and determined that the clause 4.6 objection was not well founded.

- 18 The Applicant sought a review pursuant to s 8.2 of the EPA Act. An assessment report was prepared by a consultant planner (the Council witness in this case Ms Frecklington) and recommended refusal. On 19 March 2019, the Panel, differently constituted, by majority (2-1) again refused the application, on essentially the same grounds as previously. The Chair of the panel, the minority, accepted the Applicant's arguments.
- 19 The original development application and the application for review were both notified in accordance with the Respondent's notification requirements. Twenty submissions opposing the application were received after the original notification and fourteen after the second notification. The issues raised by objectors included non-compliance with height and floor space ratio standards, bulk and scale, visual intrusion, loss of views and outlook, traffic and parking impacts, precedent, inconsistency with desired future character.

The planning regime

- 20 The Site is zoned B2 Local Centre under WLEP. Shop top housing is a permissible use with development consent.
- 21 The objectives of the zone, to which regard must be had in determining the development application (WLEP cl 2.3(2)) are:

Zone B2 Local Centre

1 Objectives of zone

- 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.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To attract new business and commercial opportunities.
- To provide active ground floor uses to create vibrant centres.
- To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

- 22 WLEP has development standards for height (cl 4.3) and floor space ratio (FSR) (cl 4.4). The height control for the Site is 14.7m and the maximum FSR is 2.5:1. The controls and heights of adjacent and nearby developments and the objectives of the controls are dealt with when dealing with the clause 4.6 objections.
- 23 The Site is located within the Double Bay Centre under Part D5 of the Woollahra Development Control Plan 2015 (WDCP). The relevant provisions of WDCP are set out in the discussion of the issues.

The recent approvals

- 24 It is the recent approvals of the two developments under construction to the east of the Site to which the Applicant points as demonstrating the desired future character and, although said to a lesser degree, the abandonment of the controls in this part of Double Bay.
- 25 The development immediately to the east is 20-26 Cross Street. The building presently under construction was approved by the Council (not the Panel) on 12 September 2016, notwithstanding a recommendation for refusal by Council officers. It was subject to the same controls as the present application. The proposed height was 21.21m (control 14.7m) and an FSR of 3.5:1 (control 2.5:1).
- 26 To the east and adjoining 20-26 Cross Street is 16-18 Cross Street. The building presently under construction on that site was approved on the same day as 20-26 Cross Street – 12 September 2016. The proposed height was 20.7m and the proposed FSR 4.54:1. The present controls did not apply in terms because that development application was lodged prior to their commencement by virtue of WLEP, but the controls which did apply had the same effect, albeit the FSR control was in the earlier local environmental plan and the height control in the then development control plan.
- 27 A plan showing the actual heights of 16-18 and 20-26 together with the proposal and the controls in the vicinity follows:



28 As is apparent, there is a clear "block" of Cross Street from its intersection with Bay Street, to the point at which Knox Lane intersects with Cross Street. The properties on Cross Street to the east of Knox Lane front New South Head Road and do not address Cross Street in any material way. Bay Street is a wide street and that part of Cross Street to the west of Bay Street is in a different physical and planning context.

Breach of development standards

29 As set out above, the proposal breaches both the height and the FSR development standards, with a FSR of 3.54:1 (control 2.5:1) and a height of 21.21m (control 14.7m).

30 As such, consent cannot be granted except in accordance with cl 4.6(2) of the WLEP 2014. Clause 4.6 provides, at (3) and (4):

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

31 In order for there to be power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that:

- The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)),
- The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)),
- The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)), and
- The proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)).

(Initial Action Pty Ltd v Woollahra Municipal Council (2008) 236 LGERA 256; [2018] NSWLEC 118 ("Initial Action"))

32 The Court, in exercising the functions of the consent authority, must "in fact" be satisfied of the above matters (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130). The state of satisfaction that compliance is "unreasonable or unnecessary" and that there are "sufficient environmental planning grounds" to justify the contravention (the first two dot points above) must be reached only by reference to the cl 4.6 request. Whilst the evidence in the proceedings can assist in understanding the request and in considering the adequacy of the request, it cannot supplement what is in the request.

33 On the other hand, the state of satisfaction that the proposed development is in the public interest (the last two dot points above) can be reached by

considering the evidence before the Court, without being limited to what is contained in the cl 4.6 request.

34 A further precondition in cl 4.6(4), which must be satisfied before the power can be exercised to grant development consent for development that contravenes a development standard, is that the concurrence of the Secretary has been obtained. The Secretary's concurrence can be assumed as a result of written notice dated 21 February 2018 attached to the Planning Circular PS 18-003 (*Initial Action* at [28]).

35 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]-[51] ("*Wehbe*") and repeated in *Initial Action* at [17]-[21]. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6 (*Initial Action* at [16]):

- (a) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
- (b) the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
- (c) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
- (d) the development standard has been abandoned by the council;
- (e) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* at [22]).

36 In this case, the Applicant points to (a) and (d) to demonstrate compliance is unreasonable or unnecessary.

37 The objectives of the height development standard are (cl 4.3 of WLEP):

- (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. to ensure the height of development is appropriate to the condition of the site and its context,

38 The objective of the FSR development standard is relevantly (cl 4.4 of WLEP):

...

- (b) to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale ...

Objector evidence

- 39 At the outset of the hearing evidence was given by three residents of 45-51 Cross Street (directly across Cross Street from the Site), Mr Malcolm Young as Vice President of the Double Bay Residents Association, and Mr Brian O'Dowd, a former resident of Double Bay who maintains an interest in development proposed in Double Bay.
- 40 The oral evidence encapsulated the range of matters in the written submissions referred to at [19] above.
- 41 There was in addition the opportunity to observe the site and consider the proposed development from those vantage points on the fourth and fifth floor southern balconies of apartments at 45-51 Cross Street. What was apparent was that there was enjoyed an outlook south across Double Bay and the "amphitheatre" created by the hill towards Edgecliff. It is that outlook which will be interrupted by varying degrees depending upon the relative height of the apartment.
- 42 It should also be recorded that each of the apartments the Court inspected, and presumably all of the apartments, have a northern aspect in addition to the southern outlook. The northern aspect, or view, is towards, and includes, Sydney Harbour, receives the northern sun, and, subject to exception, is the focus of the principal living area of the apartments. Each apartment has a large terrace on its northern side.

43 The interruption of outlook to the south is relied upon by the Council as one of the reasons to refuse the appeal. That impact is said to constitute a visual intrusion as that phrase is understood in the objectives of the height standard. I have taken into account the written and oral evidence of the objectors and the site inspection in forming the opinions in this judgment.

Expert evidence - economics

44 Mr Duane was retained by the Applicant and Mr Leyshon by the Respondent to assist the Court on the issue of the loss of commercial floor space.

45 In their joint report they record agreement on a number of matters, the most pertinent being:

- (a) the Town Centre was impacted by the redevelopment of Westfield Bondi Junction and Sydney City about ten years ago but has undergone a renaissance in recent times as a consequence of the Kiaora Lane development (on the southern side of New South Head Road);
- (b) office space vacancy is about 6.5% or 1500 square metres, lower than typical long term averages;
- (c) post development the Site will generate something in the order of 26-33 fewer jobs, or 0.65% - 0.8% of employment within the Town Centre; 2.3% - 2.9% of office jobs within the Town Centre;
- (d) the proposed development will not materially impact upon the overall commercial viability of the Centre;
- (e) the residential market which the Centre serves is projected to continue to grow and support the viability of the Centre in retail terms in particular.

46 Mr Leyshon says the proposal:

- (a) is an unacceptable loss of employment opportunities;
- (b) sets a precedent which will be counterproductive to achieving continued long term viability of the Centre;
- (c) is contrary to the various provisions of WDCP;
- (d) an approval on this site could operate as a precedent ultimately putting the viability of the centre at risk.

47 Mr Duane takes issue and says:

- (a) the loss of commercial floor space is very minor and can be accommodated in future commercial developments as demand arises;

- (b) as redevelopment occurs each site will have a variable mix and no individual development will operate as a precedent;
- (c) there is no requirement in the DCP but rather it is an encouragement in words alone.

Discussion

48 The focal point of the analysis is the DCP, the most relevant provision of which is in section D5.6.2 - Controls (for the Double Bay Centre):

“Objectives

...

O4 Encourage first floor retail and commercial use.

...

Controls

...

C1 Design for a mix of uses within buildings

...

C3 Design for retail, commercial and community uses at ground and first floor levels. Consider design solutions that promote retail, commercial use at first floor level such as galleried arcades”

49 These objectives and controls are within a broader context of the objectives for development in the Double Bay Centre which includes at D5.1.3:

“O3 To encourage a diverse mix of uses in the Double Bay Centre and maintain retail uses at ground level.”

50 The strategies for development in the Double Bay Centre (Clause D5.3.2) include to

“Ensure that the centre maintains its commercial viability and competitive position within the Sydney retail market [by]:

(a) Foster[ing] the existing mix of uses of the centre such as hotels, retail and commercial and upper level residential.

(b) Encourage a flexible built form that can potentially support a diverse mix of uses in the centre

...”

51 Mr Leyshon also referred to the objectives of the chapter of the DCP dealing with Double Bay Centre (5.1.2 and 5.1.3), but I take them as statements of what the chapter of the DCP is intended to achieve rather than independent objectives which development must meet. They are broad statements and are subject to the specific objectives and controls to which I have referred above.

- 52 There is no provision within WLEP or the DCP which provides any incentive which matches the "encouragement" in the DCP. That is, there is no bonus provision which one might find to support the encouragement for first floor commercial development.
- 53 I accept the evidence of Mr Duane that the reduced commercial space is not a reason for refusal of the application.
- 54 There is no doubt that the loss of this commercial space will not affect the viability of the Double Bay Centre. Some of the businesses presently existing at the site may relocate within Double Bay and some (or potentially all) may not. Be that as it may, the potential loss of employees and office space is so small as not to have a measurable impact on the viability of the Double Bay Centre.
- 55 The retail component on the site will be enhanced by the provision of higher quality retail space with the capacity to attract a range of retail uses including food, services and boutiques. The increased residential population at the site will also add, at least in a small way, to the vitality of the Centre and the use of retail and commercial facilities.
- 56 The DCP does not command first floor commercial uses, but simply, without incentive, encourages that use as an objective to maintain the viability of the Centre and its mix of uses. It is not necessary for every development to provide the whole mix of development. The proposal provides a mix of retail and residential uses, it is a mix of uses. There will be other opportunities within the Centre to develop mixed uses, including more commercial space, particularly as suggested by Mr Duane, on or closer to New South Head Road.
- 57 Indeed, Mr Leyshon accepted in cross-examination that in future developments there will be variations in the mix of uses within buildings. That is, there is the likelihood of some developments with greater retail and commercial components than residential, or at least a greater proportion than provided here.
- 58 That quite proper concession demonstrates that the planning controls are focused on a Centre-wide outcome, rather than an absolute requirement for

each particular development within the Centre. Whilst Mr Leyshon, and the Council in submissions, relied on precedent, I do not accept that approval of this development application will operate as a precedent for future development in the Double Bay Centre. Logically, each application will be treated on its own merits having regard to the commercial viability and mix of uses within the Double Bay Centre at the time of that assessment. It is true that there may come a point of time at which the economics of the Centre are such that a development application should not be approved because of its economic impact on the Centre. This is not such a development application.

- 59 Two other observations should be made. First Control C3 of D5.6.2 says that a proponent should "design" for retail, commercial and community uses at ground and first floor levels, even if they are not actually required to be used for that purpose. Retail and commercial uses in particular require a higher floor to ceiling height than a residential use. That means that a proponent could have designed a first floor to accommodate such use which does not in fact eventuate and there will then be a residential use which occupies unnecessary height within a development. Further, in the context of this application, as otherwise evident in this judgment, the proposed building continues the "line" of each storey of the development to the east, and to design for a higher floor to ceiling height on the first floor would mean that the "lines" would not follow and there would be a discordant urban design outcome.
- 60 Second, the Applicant referred to the significantly increased commercial activity as a result of the Kiaora Lane development since the DCP was adopted. That is, the Applicant argued that the commercial objectives of the DCP have been achieved already and therefore less weight should be given to the controls encouraging the first floor commercial use. I do not accept that argument. The DCP continues to operate in its terms. If the Council considered that it was no longer necessary to have the identified objectives and controls, in whole or in part, then it could have amended the DCP. It has not done so.
- 61 The absence of commercial uses proposed at the first floor is not a reason for refusal.

Height and Floor Space Ratio breaches

62 Mr Lidis gave evidence on behalf of the Applicant. He also wrote the clause 4.6 objections. Mr Frecklington gave evidence on behalf of the Respondent.

63 Inevitably the height breach and the FSR breach are related. There is greater building form with the additional height and therefore there is more floor area. In addition, there is a little over 100 square metres of floor space available, which would ordinarily not be available, because there is no driveway and vehicular access on the subject site itself. Accordingly, for the most part the clause 4.6 objections can be treated together.

64 The elements of cl 4.6 in issue between the experts and the parties are:

- (a) whether the controls have been abandoned and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));
- (b) whether the proposal meets the objectives of the controls and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));
- (c) whether or not the proposal is consistent and compatible with the desired future character of the area consistently with the objective of the controls and therefore in the public interest (cl 4.6(4)(a)(ii));
- (d) whether or not the proposal minimises its visual intrusion consistently with the objective of the controls and therefore in the public interest (cl 4.6(4)(a)(ii));
- (e) whether the visual intrusion of the proposal is compatible with the amenity of the surrounding residential area and therefore consistent with the objective of the zone and in the public interest (cl 4.6(4)(a)(ii));
- (f) whether the proposal is of a height and scale the achieves the desired future character of the neighbourhood and therefore consistent with the objective of the zone and in the public interest (cl 4.6(4)(a)(ii)).

65 These issues can be distilled as:

- (a) have the controls been abandoned?
- (b) what is the desired future character?
- (c) is the proposal consistent/compatible with that desired future character?
- (d) has any visual intrusion been minimised?

I will deal with (b), (c) and (d) first, then (a).

- 66 Central to the principal issues is the weight to be given to the fact of the recently approved developments now under construction to the east of the Site. Mr Lidis, both in the clause 4.6 objections and his evidence, says that those developments set the existing character, and the desired future character, and that the approvals demonstrate the controls have been abandoned. He limits the question of character and abandonment of controls to the particular block of Cross Street from Bay Street to Knox Lane. He says that the proposal being a continuation of the form of the developments to the east is a better planning outcome than a development on the Site which complies with the controls. A complying development would be discordant in the street he says because the height of development would be reduced from the east to the subject site then increase to the Site to the west when it is redeveloped.
- 67 Mr Frecklington looks at the character and abandonment issue more broadly. She looks at the whole of Double Bay Centre and says in that context the controls have not been abandoned. She says that the approvals to the east do not reflect the existing and desired future character of this part of Cross Street when considered in the wider context and having regard to the LEP controls. She also refers to the complementary controls in the DCP.
- 68 The existing character is created by the buildings under construction to the east, the two-storey development to the west, together with, albeit to a lesser degree, the large buildings on the other side of Cross Street. The Site is perceived largely in its context on the southern side of Cross Street. I agree with Mr Lidis that the focus of the assessment of character is the more immediate context of the Site. Whilst the broader area of the Double Bay Centre can have some relevance, in the present circumstances, this portion of Cross Street is a well-defined component of the Centre, and has created its own character, a character which still forms part of the overall character of the Centre and is not an anathema to it.
- 69 The desired future character in my opinion must take into account the form of the buildings to the east which the Council approved under effectively the same controls as present. Those buildings exceed the height and floor space ratio

controls. As the Applicant pointed out in submissions, this is not a case where there is an adjacent development approved and constructed many years ago which sits as an anomaly in the street. The developments under construction represent the recently expressed attitude of the Respondent to the controls and what is desired in this part of Cross Street.

- 70 The approved developments to the east are the driving force for development on the southern side of Cross Street. They are large and occupy in the order of half the relevant block. Those developments are obviously also the most proximate to the Site and set the built form context of the Site, together with the likely development to the west of the Site, which is shown on the image above. It is the expectation of the experts that the site to the west will be redeveloped in due course, generally consistently with the controls to at least five storeys in height as distinct from its present two storeys.
- 71 For these reasons I agree with Mr Lidis, as stated in the cl 4.6 objections, that the approvals and buildings under construction to the east of the Site establish the desired future character of this part of Cross Street. Therefore, they set the desired future character for the purpose of the cl 4.6 objections. It is worthy of note that those buildings are also consistent with the broader objectives for Cross Street in the DCP. They are referred to below.
- 72 The design of the proposed development should sit comfortably with its neighbours to the east, and its neighbour to the west in order to meet the objective of the standards to be consistent with, and compatible with, the desired future character. The development on the Site is only perceived in that context. It is not readily visible from any location other than within this block of Cross Street. Although one should not exclude from consideration in a more general sense the broader locality, it is here the immediate locality of this defined block on the southern side of Cross Street which is determinative of the preferred form of development for the Site.
- 73 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 a 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 from Mr 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 the development on the Site.

- 74 The proposed building is an excellent response to its context. It follows the "lines" of each storey of the building to the east, has the same street wall height and the same upper level setback and height. The streetscape as a consequence is coherent and consistent. Ms Frecklington, who gave her evidence very fairly and frankly, agreed that putting the controls to one side there were no issues with the design of the building.
- 75 I am therefore satisfied that the proposed building meets:
- (a) objective (a) of cl 4.3 (height standard) in that it is consistent with the desired future character of the neighborhood;
 - (b) objective (b) of cl 4.4 (FSR standard) in that it is compatible with the desired future character of the area in terms of bulk and scale;
 - (c) the seventh objective of the B2 zone in that it is of a height and scale that achieves the desired future character of the neighbourhood.
- 76 The other issue relating to the clause 4.6 objection is the question of visual intrusion, that is whether the objective of the height control to minimize visual intrusion is satisfied. The southern outlook of apartments on the northern side of Cross Street will see, to varying degrees, an apartment building including two levels of apartments above the height control, rather than the roof of the proposed building and an outlook across Double Bay Centre and to the amphitheatre of Edgecliff. The change in outlook will clearly vary depending on the level of the apartment. Some will see above the proposed building and some will not.
- 77 The objective of the height control is "to minimise the impacts of new development on adjoining or nearby properties from disruption of views...or visual intrusion".

- 78 The first question is whether the building, including that part above the height control, is a visual intrusion. A visual intrusion is not a disruption of a view, because that is a separate potential impact identified in the objective. The proposal does not disrupt "views"; it is common ground that the southern outlook is not a view.
- 79 The Macquarie Dictionary defines "intrusion" as the act of intruding and *intrude* as *to thrust or bring in without reason, permission, or welcome*. A visual intrusion must be an unwelcome form which intrudes into the available outlook. It would appear to me that a new building of itself will not necessarily be a visual intrusion. There must be something unwelcome about it. It could be the form of the building itself, or it could be its relationship to the viewer and what lies beyond.
- 80 There is no doubt that the form of the building itself does not constitute a visual intrusion. It is an attractive well-designed building with coherent form and scale.
- 81 The building does intrude into the outlook of some apartments on the northern side of Cross Street. Part of a pleasant outlook will be replaced by closer building, albeit of excellent design. That amounts to a visual intrusion. The question then is whether the development minimises the visual intrusion, because even a complying building will be a visual intrusion to some apartments in Cross Street.
- 82 Ms Frecklington says that the intrusion is moderate, and because the height in excess of the height control it is an unreasonable impact, inconsistent with the objective of the control.
- 83 Mr Lidis says that the proposed building itself, being of high architectural merit, is an improvement in the outlook.
- 84 I do not agree with Mr Frecklington. It cannot be that simply being in excess of the height control means that the objective to minimise visual intrusion is not met. If that was the case, then there would be very great difficulty in ever establishing consistency with the objective.
- 85 That said, I do not agree with Mr Lidis that the outlook is necessarily improved by the building.

- 86 In my opinion, however, the visual intrusion of the development is minor and has been minimised. The upper levels of the proposed building are set back, increasing their separation from the apartments across Cross Street. The overall height is consistent with an appropriate urban design for the site.
- 87 It is the "impact" of visual intrusion which is to be minimised, which also requires an assessment of the context of what is enjoyed by the affected viewer. The outlook to the south cannot be considered in isolation of its role in the amenity of those apartments. Each of the affected apartments has a view to the north, including Sydney Harbour, and almost all have their living areas to the north. For the most part, it is second bedrooms and studies which have the outlook to the south. The affected outlook does not add greatly to the amenity of the affected apartments.
- 88 It follows then that I am satisfied that the development meets objective (d) of cl 4.3 (height control). There is no equivalent objective in cl 4.4 (FSR control).
- 89 There is also the related question as to whether the proposal is consistent with the zone objective to provide for "development of a scale and type that is compatible with the amenity of the surrounding area". Having regard to the above reasons, and in particular the amenity of the affected apartments to the north, the proposal is compatible with the amenity of the surrounding area. The Respondent did not identify any other uses in the surrounding area where the amenity will be affected.
- 90 The environmental planning grounds relied upon to justify contravening the standards are the improved urban design outcome of consistency and coherent streetscape as a consequence of the additional height and consequential floor space. For the same reasons the objectives of the height control and floor space ratio control are satisfied, I agree there are sufficient environmental planning grounds to justify the contraventions.
- 91 Having concluded that the development meets the objectives of the standards notwithstanding the breach of the controls, one way to demonstrate the application of the standards is unreasonable or unnecessary, it is not strictly necessary to decide whether or not the controls have been abandoned. For completeness, I will do so.

- 92 In essence, the difference between the experts and the parties was whether to look at the recent approvals only in the immediate context or in the broader context of the Double Bay Centre. That is, the Respondent says that the Council has not abandoned the controls because only the two developments on Cross Street have been approved outside the controls, and so the controls which apply to the Double Bay Centre, including the Site have not been abandoned. The Applicant says that the controls have been abandoned in this part of Cross Street and that satisfies the concept of abandoning the controls.
- 93 I agree with the Applicant. The concept of abandoning a control can apply to a part of an area the subject of the control, subject to the circumstances of the case. For example, approving two developments on New South Head Road which exceed the controls does not mean the controls are abandoned for development on New South Head Road.
- 94 Here there is a discrete section of Cross Street the subject of the approvals. The Site falls within that section. The approvals were not for the purpose of meeting an urban design imperative in existence at that time, but rather were deliberate decisions to allow buildings of a significantly greater height and floor space in this locality than the controls envisaged. The abandonment is confined to this block of Cross Street on the southern side. That much is plain from the approvals and the configuration and uses in Cross Street between Bay Street and Knox Lane.
- 95 The Council deliberately and knowingly decided that larger buildings were appropriate in the block of which the Site forms part. That, in my view, amounts to an abandonment of the controls for this part of Double Bay.
- 96 In summary therefore, having regard to the matters in issue between the parties I am satisfied that the clause 4.6 objection adequately address the matters in cl 4.6(3) by demonstrating to my satisfaction that:
- (a) the controls have been abandoned and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));
 - (b) the proposal meets the objectives of the controls and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));

- (c) there are sufficient environmental planning grounds to justify contravening the standards.

97 Further, I am satisfied that:

- (a) the proposal is consistent and compatible with the desired future character of the area consistently with the objective of the controls and therefore in the public interest (cl 4.6(4)(a)(ii));
- (b) the proposal minimises its visual intrusion consistently with the objective of the controls and therefore in the public interest (cl 4.6(4)(a)(ii));
- (c) the visual intrusion of the proposal is compatible with the amenity of the surrounding residential area and therefore consistent with the objective of the zone and in the public interest (cl 4.6(4)(a)(ii));
- (d) the proposal is of a height and scale the achieves the desired future character of the neighbourhood and therefore consistent with the objective of the zone and in the public interest (cl 4.6(4)(a)(ii)).

98 The Applicant has therefore satisfied the jurisdictional requirement and any remaining merit issues remain to be determined.

99 The Respondent says (Contention 4) that the development should be refused because it is inconsistent with the built form envelope controls for the Double Bay Centre under the DCP. Of course, as Ms Frecklington says in the joint report at par 23.2 these issues overlap with those raised in relation to desired future character. The DCP identifies building envelopes which reflect the height and FSR controls in WLEP. Having determined that the clause 4.6 objections are well founded, the provisions of the DCP have a lesser role to play.

100 Section D5.3.2 sets out the Key Strategies for the Double Bay Centre which includes:

“Improve Double Bay's built form to provide appropriate definition to the public domain

- a) Provide direction and certainty of outcome in relation to built form to ensure:
 - a coherent street scale;
 - compatibility with existing urban fabric;
 - a variety of building types;
 - a high level of environmental amenity.
- b) Promote high quality architectural design throughout the centre that positively contributes to the streetscape.

c) Ensure that new development is compatible with the existing built, streetscape and village character

d) Establish building envelopes that define building height and building lines (at lower and upper levels) to provide coherent street definition.

e) Reinforce continuous active retail frontages along street boundaries.

f) Reinforce the presence of corner buildings addressing the public domain, recognising their importance in the centre in terms of street vistas, urban scale and identity.

g) Encourage view sharing and privacy.

h) Encourage discrete vehicle access from rear lanes, while retaining some active use and address to those lanes.

i) Preserve the 'small shop' urban character of the centre by limiting the width of retail frontages.”

(Emphasis added)

101 There are strategies which are common for all streets set out in D5.4.2:

“Strengthen the spatial definition of streets by encouraging building to the street boundary.

Provide continuous active retail frontage at ground floor level.

Increase street surveillance and promote a safe environment.

Strengthen all built form on corner sites.”

102 The provisions for Cross Street are D5.4.7:

“Desired future character

a) Unify the street on the north side by building to the street boundary.

b) Retain street level connections to Knox Lane.

c) Allow 4 storeys on 50% of each site frontage to Knox Lane. See Control Drawings for more information.

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

e) Strengthen built form on corner sites.”

103 The provisions include a sketch which shows three levels with no setback to Cross Street; that is a three-storey street wall height with the fourth level set back.

104 There are also general provisions for lanes in the Double Bay Centre in D5.4.8:

“Desired future character

a) Facilitate the service role of lanes, while encouraging increased active retail frontage.

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

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

105 The provisions for Knox Lane are at D5.4.9:

“Desired future character

a) Retain and enhance the varied spatial definition of Knox Lane.

b) Retain and enhance the honeycomb of arcades and courtyards which connect Knox Street to Cross Street.

c) Encourage visual and physical connections between Knox and Cross Streets using:

- arcaded and/or outdoor connections;
- north oriented courtyards; and
- arcade and courtyard creating buildings, which may vary from the control drawings in Section 5.5.8.”

106 The strategies are achieved with the proposed building notwithstanding it exceeding four storeys. Without repeating the detail of the reasons above, there will be a coherent street scale, compatible with existing urban fabric. It is a high quality architectural design that positively contributes to the streetscape. A coherent street definition is provided. Aside from the sketch of Cross Street, the text provides little guidance for the desired future character. The sketch does provide for a three storey street wall however.

107 Mr Frecklington, again very fairly, accepted that as a matter of urban design she was not concerned whether the street wall height was three storeys as required by the DCP or four storeys as proposed here. In my view, the proposed street wall height of four storeys is preferable because it matches the wall height to the east and thereby creates a more coherent streetscape.

108 The provisions in the DCP about that part of the development facing Knox Lane was said by Mr Lidis, Ms Frecklington and the Applicant in submissions, to be ambiguous. The Respondent said in submissions that its meaning was clear. The provisions are not brimming with clarity, but probably intended to generally create four storeys to Knox Lane for no more than 50% of the frontage to the Lane and two storeys for the remainder.

109 It is not necessary however to determine precisely what is the proper construction of the provisions, because the principal goal of the provision is clear - to retain and enhance the varied spatial definition of Knox Lane. It was with that in mind that Mr Frecklington said in cross-examination that what is proposed is a creative response to the control and consistent with the intent of the control. I agree. The Knox Lane frontage is varied and articulated, defines the Lane and provides spatial variation. An image of what is proposed follows:



110 The built form achieves the objectives of the controls in the DCP for the reasons I have set out in relation to the DCP above and the preceding paragraphs dealing with the clause 4.6 objections.

111 The Council also argues (Contention 5) that as a matter of merit, the "visual intrusion" of the building to the apartments at the upper levels of 45-51 Cross Street, opposite the Site is unreasonable. For the reasons I have set out above, I do not regard that impact as an unacceptable one.

112 I do note that Mr Frecklington does not suggest there is any amenity impact upon an apartment on Knox Street to the south of the Site and says at [26.5] of the joint report that the "proposal is not considered to give rise to any unacceptable amenity impacts on any adjoining land in terms of views, privacy and solar access". I concur.

113 The final merit contention is "Public Interest" but appropriately limited to the public submissions which are consistent with the contentions of the Respondent. I have dealt with those contentions and therefore there is nothing related to the Public Interest contention which requires further comment or warrants refusal of the application.

Conclusion

114 I am satisfied that the provisions of cl 4.6 have been satisfied in relation to the breaches of height and FSR. There are no other merit reasons why consent should not be granted.

115 For the preceding reasons, I make the following orders:

- (1) The appeal is upheld.
- (2) Development consent is granted for demolition of the existing buildings and construction of a six-storey shop top housing development at 28-34 Cross Street, Double Bay with ground floor retail, twenty-one (21) residential units over five (5) levels above and two (2) levels of basement parking for thirty-six (36) vehicles and four (4) motorbikes with vehicular access from 20-26 Cross Street, Double Bay upon the conditions Annexure 'A' hereto.
- (3) The exhibits are to be returned other than Exhibits A and 3.

.....

P Clay

Acting Commissioner of the Court

[Annexure A \(798 KB, pdf\)](#)

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