

ANNEXURE 12

Applicant's SEPP 1 Objection

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SEPP NO.1 OBJECTION - FSR

Replacement application for a mixed use development
containing: retail, five (5) cinemas and residential

No.33 Cross Street Double Bay

Prepared for:

Scarborough Pacific Group

PO Box 1194

Double Bay NSW 1360

Prepared by:

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1.0 INTRODUCTION

This State Environmental Planning Policy No. 1 Objection (SEPP No. 1 Objection) has been prepared for the Scarborough Pacific Group for the property known as 33 Cross Street, Double Bay. The SEPP 1 Objection relates to the floor space ratio (FSR) control contained in the Woollahra Local Environmental Plan (WLEP) 1995. The objection incorporates material contained in the Pikes Lawyers letter dated 27 September 2011 and relies on the case law referred to in that letter, in particular, Lloyd J in *Winten Property Group Limited v North Sydney Council (2001) 130LGERA 79* and the decision of Preston CJ in *Wehbe v Pittwater Council (2007) 156 LGERA 446*.

This SEPP No. 1 Objection concludes that compliance with the FSR control, in the circumstances of this particular case, is unreasonable and unnecessary for the following reasons, which are relied upon in the alternative:

- 1.1 The objectives of the FSR control are met by the proposal despite the non-compliance. The objectives relating to a desirable density, desired future character and minimisation of environmental impact are satisfied. The building results in an appropriate density for the site, which is compatible with the desired future character of the locality and has minimal impact.
- 1.2 The FSR control on the LEP has little or no relevance to the site having regard to the existing building. The existing building has a large gross floor area (GFA) and any new building on the site must, as a matter of economics, generate a similar return to that generated by the existing GFA if it is to be viable. The limit on the FSR and GFA for the site is thus the existing GFA and not the LEP control.
- 1.3 The density and desired future character objectives of the control, which are to promote a vibrant and busy town centre, will be defeated by strict compliance with the control.
- 1.4 The Council has approved numerous other developments in the locality which breach the control and in doing so has set aside the control or at least the requirement for strict compliance.

Compliance with the FSR control in this application would tend to hinder the obtainment of objectives 5(a)(i) of the Act in that a requirement of strict compliance would discourage redevelopment of the site.

The remainder of this SEPP No. 1 Objection will adopt the Council's format and provide the relevant material in some detail. In particular clause 11.8 (a) of the WLEP containing the objectives for FSR are dealt with extensively and it is shown that the proposal satisfies these objectives.

2.0 WOOLLAHRA COUNCIL SEPP NO. 1 OBJECTION FORMAT

APPLICANT'S NAME: Scarborough Pacific Group

SITE ADDRESS: No. 33 Cross Street, Double Bay

PROPOSAL: Replacement application for a mixed use development containing: retail, five (5) cinemas and residential.

2.1.1 Name of the applicable planning instrument which specifies the development standard:

Woollahra Local Environmental Plan (WLEP) 1995

2.1.2 The number of the relevant clause therein:

Clause 11 – Floor Space Ratio

2.2 Specify the nature of Development Standard sought to be varied and details of variation:

Clause 11 of Council's LEP prescribes a maximum FSR of 2.5:1 for the site. The amended proposal with a gross floor area (GFA) of 18,210m² represents an FSR of 4.955:1, which exceeds the development standard.

Council approved the existing building on the subject site with an FSR of 3.84:1 based on the Model Provisions definition. However, if calculated based on the Woollahra LEP 1995 definition, the building has an FSR of 5.26:1 (19,331m²), which is 724m² higher than the proposal. The existing and proposed developments do not comply with the LEP standard.

3.0 RELEVANT FACTS

- There currently sits on the site an architecturally undesirable building with a FSR of 5.26:1 calculated according to current definitions of FSR and GFA.
- The current building was approved despite a then existing FSR control of 2.5:1, and the current control was imposed in full knowledge of the existence of the current building.
- The amended proposal has a FSR in the order of 4.955:1, significantly lower than the existing FSR. This FSR includes around 1300m² of void space and a 3000m² cinema.
- The cinema has been included in the proposal as a public benefit after discussions with Council and provides little return to a developer. The Double Bay town centre is sorely lacking in arts, cultural or community facilities and the cinema provides a tangible public benefit.
- If the void spaces and cinema are not included, the return-generating FSR is in the order of 3.62:1. This is comparable to, and indeed lower than, a number of recent approvals in the town centre, which do not have the same degree of public benefit which is a material matter under SEPP 1.
- The existing building would only be demolished if it could be replaced with a building yielding a similar return to that generated by adaptive re-use of the existing building. There is no other incentive for a developer to do so.
- The Double Bay town centre is a key strategic location in the Sydney East Sub-Region and the wider Sydney Metropolitan Region.
- The site is a key strategic site within the Double Bay town centre.
- Fundamental to the objectives of the FSR control are achieving an appropriate density of development and the desired future character in the town centre.

4.0 THE TESTS

The test for a SEPP No. 1 Objection includes the provisions of that document and the relevant judgements.

4.1 SEPP 1 Provisions

Clause 7 of SEPP 1 provides:

Where the consent authority is satisfied that the objection is well founded and is also of the opinion that granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3, it may, with the concurrence of the Director, grant consent that development application notwithstanding the development standard the subject of the objection referred to in clause 6.

Clause 3 provides:

This Policy provides flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Act.

Thus the question when assessing a SEPP No. 1 objection is whether the objection is well founded and whether strict compliance with the standard is unreasonable or unnecessary in the particular circumstances OR would tend to hinder the attainment of the objects in section 5(a)(i) and (ii) of the Act.

4.2 The Judgements

This is emphasised in the decision of Lloyd in *Winten* where His Honour describes the question arising as follows:

First, is the planning control in question a development standard? Second, what is the underlying object or purpose of the standard? Third, is compliance with the development standard consistent with the aims of the policy, and in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in s 5(a)(i) and (ii) of the EP&A Act? Fourth, is compliance with the development standard unreasonable or unnecessary in the circumstances of the case? (In relation to the fourth question, it seems to me that one must also look to see whether a development which complies with the development standard is unreasonable or unnecessary, as noted by Cripps J in the Hooker Corporation case.) Fifth, is the objection well-founded?

In the present matter it is accepted that the FSR control in the LEP is a development standard. The objectives of the control are specified at clause 11AA.

In *Wehbe* Preston CJ set out five methods of determining whether compliance with a standard is unreasonable and unnecessary and whether an objection is well founded and consistent with the aims of clause 3 of the SEPP. The methods proposed by His Honour are not mutually exclusive, nor are they exhaustive.

The tests set by Preston CJ are in the alternative, although there may be some overlap between them. **Thus only one test needs to be met in order to ground a finding that a SEPP 1 objection should be supported.** The observations and submissions made in this letter must be construed in this light.

Before setting out His Honour's tests we draw attention to the following passage which, in our view, is useful to bear in mind when considering any SEPP 1 objection:

development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives.

This is the fundamental rationale behind His Honour's decision and the tests he sets flow from it. They are as follows (see paragraphs 42-48), and as noted apply in the alternative:

- *establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard...*
- *if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)...*
- *establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary...*
- *establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable...*
- *establish that the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable...*
- *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"...*

We do not question the zoning of the site and accordingly the fifth test does not arise here. The other four criteria are, however, all established.

4.3 State the objective of the standard to be varied as it relates specifically to the subject site and proposal:

Clause 11AA of Council's LEP contains objectives for Floor Space Ratio (FSR), which are stated, inter alia:

- (a) *to set the maximum density for new development,*
- (b) *to control building density, bulk and scale in all residential and commercial localities in the area in order to achieve the desired future character objectives of those localities,*
- (c) *to minimise adverse environmental effect on the use or enjoyment, or both, of adjoining properties, and*
- (d) *to relate new development to the existing character of the surrounding built and natural environment as viewed from the streetscape, the harbour or any other panoramic viewing point.*

5.0 RESPONSE TO THE OBJECTIVES

Explain how the proposal, notwithstanding the non-compliance with the development standard, will achieve the objective of the development standard.

While the proposal exceeds the FSR development standard, it is considered to satisfy the objectives of Clause 11AA for the following reasons.

5.1 *Objective (a) - To set the maximum density for new development*

The objective is not a limit on bulk and scale, but rather the intensity of use, ie the extent of occupation or use relative to the site area. This is a reflection of the fact that FSR as a bulk control can only ever be a loose fit, particularly having regard to underground or void components of buildings which potentially undermine those bulk controls whilst still achieving a permissible FSR.

The SEPP No. 1 objection makes clear that the proposal, in moving from a hotel building to a residential flat building (both over retail), reduces the intensity of the use. The building will change from one comprising 144 short term stay rooms and suites to one comprising 74 residential apartments (as amended). The density decreases. Our instructions are that an operational short term stay room or suite in the current market would be let out at a 90% occupancy rate with a high turnover and high parking demand.

It is also noted that were the current building to remain and be adapted for re-use, that building would provide an equally intense, equally dense outcome to the hotel use.

Further, void space, whilst included in the calculations of GFA and hence FSR, is not used space in a density sense, and there are extensive voids throughout the proposed building.

A table was prepared to indicate the comparison between the current development, the Ashington Scheme (previously proposed Part 3A Major Project) and the proposal, based on the WLEP definition (see Table 1).

TABLE 1: GFA & FSR CALCULATIONS		
Scheme	GFA	FSR
Maximum WLEP	9,187m ²	2.5:1
Existing Building	19,331m ²	5.26:1
Ashington Scheme	19,545m ²	5.32:1
Original Proposal	17,614m ²	4.79:1
Amended Proposal	18,210m²	4.955:1

(Source: Extract from Council, 2009, Committee Meeting Report)

The existing hotel building, which has an FSR of 5.26:1 (GFA 19,331m²), is calculated in accordance with the WLEP 1995 definition. This is more than double the required FSR control. The existing building was approved on the basis of the public benefits achieved by the through site links and the desire of the Council of the day to encourage hotel development in Double Bay.

The proposed development (as amended) has a GFA of 18,210m² and an FSR of 4.955:1. While this exceeds this development standard, the proposal is 724m² less than the existing building. The proposed development is less than the existing calculated GFA within a more articulated and responsive built form, in accordance with the principles of the Double Bay DCP. Accordingly, the

amended proposal is considered to be an appropriate level of the density for the site. Permanent Residents also provide distinct benefits for Double Bay and satisfies the Council's intention for a vibrant centre.

The objective of limiting density is in our view met.

5.2 Objective (b) - To control building density, bulk and scale in all residential and commercial localities in the area in order to achieve the desired future character objectives of those localities.

This objective, conversely, does relate to bulk and scale, only to the extent that the objective is to achieve a desired future character for the locality. Desired future character is reflected not just by the controls, but also by the existing character (and the scope for movement away from that character) and what character the Council has imposed on the area by way of recent approvals.

To the extent that the desired future character is reflected in what Council has approved in the locality under and in response to the current controls, this relates to the fourth *Wehbe* test and will be dealt with in more detail below. We simply note here that there are sufficient recent approvals with an FSR well in excess of 2.5:1 to give a clear indication that a uniform 2.5:1 FSR is not what Council desires as the future character for the Double Bay town centre. The desired future character includes buildings of a bulk and scale well in excess of 2.5:1. This building is consistent with that character and the objective is met regardless of the non-compliance.

The existing character is also a relevant consideration when examining the desired future character and it cannot be avoided that the existing building is a part of that existing character, and a part that Council must have been aware of when imposing the control. We note that the current 2.5:1 FSR control is the same as that under which the building was approved, albeit that the definitions have changed. 2.5:1 then resulted in a much larger building (there being fewer things included in GFA) than would be the case now, and the current building was nevertheless approved at 3.84:1 (5.26:1 in current measurements).

Council, when imposing the current control must have been aware of the current building and cannot have reasonably expected that any developer would demolish or remove valuable floorspace, and that the building, at 5.26:1, would remain. For Council to have expected otherwise would have been unrealistic. There is an implicit acceptance of a building on this site with an FSR well in excess of 2.5:1 as part of the character of the town centre not only at the time of making the LEP but also into the future. Whilst there is a view that this renders the objective of this control irrelevant to the site, discussed under the second *Wehbe* test below, that building also informs the desired future character of the wider locality and the objective is met.

Development in the vicinity of the site is varied in density, bulk and scale. Within the area there are a variety of different uses including retail, commercial, hotel, place of public entertainment and residential, which characterise the Double Bay Centre. Recent development has occurred south of Cross Street. These developments include the: Palazzetti designed building, known as The Chancellor building on the corner of Bay and Cross Street, the Eeles Trelease designed building on the corner of New South Head Road and Knox Street; and the Cosmopolitan site, originally designed by Edwin Hauer and redeveloped by the Kann Finch Group, which has transformed the appearance of the southern side of Knox Street. The redevelopment of these key sites has enhanced the character of the area, with these modern mixed use buildings contributing to the streetscape and the locality in general.

The site is within the Cross Street locality, as defined in the Double Bay DCP, which identifies the street character by acknowledging the significant differences in allotment sizes and built form in Cross Street. It further suggests that the large buildings on the northern side are generally coarsely modelled and articulated. The amended proposal strengthens the street wall providing a solid base that relates to other buildings and provides a more accessible through site linkage to Galbraith Walkway. In particular, the proposed building will have a u-shaped built form which is recommended in the Double Bay DCP and incorporates the stepping back upper levels, particularly Cross Street in order to minimise bulk and scale. The amended proposal will substantially revitalise Cross Street. The site through link, cinemas and public domain, will be enhanced by the retail frontages and the internal courtyard area. This is further discussed in Section 6.0.

In our opinion, this objective is met.

5.3 Objective (c) - To minimise adverse environmental effect on the use or enjoyment, or both, of adjoining properties.

Satisfying this objective has been the subject of numerous meetings with Council officers and several design refinements. The design rational presented to Council confirms that the environmental effects on the adjoining and surrounding properties will be minimised.

It is sufficient here to note that with the amendments made to the proposal through the course of the application process adverse environmental impacts on adjoining properties have been appropriately minimised and this objective is met.

The subject site is located in the vicinity of predominantly retail and commercial uses, with some residential as part of mixed use developments. The proposed development has been designed in accordance with the DCP built form envelope, which requires a 'u-shaped' building. This results in a built form which is concentrated towards the Cross Street boundary and provides additional separation from adjoining residential properties to the north of the site, minimising impacts on scale, bulk, privacy and overshadowing. This is further enhanced through the staggering of setbacks for the upper levels and the numerous design refinements.

Adjoining the site to the north is residential development along William Street, which addresses Galbraith Walkway. By virtue to the orientation of the site, these dwellings will be unaffected in terms of sunlight access or overshadowing. Visual privacy at the northern boundary of the proposal will be maintained by landscaping with planter boxes and screens to minimise the potential for overlooking. In comparison to the existing building, which has 56 balconies along the northern elevation, the proposed development has been staggered at the upper levels to provide greater separation, as well as landscaped planters.

Accordingly, design and landscape elements have been included to units orientated to the north at the lower levels to provide visual separation and maintain privacy.

Adjoining the site to the east at Nos.19-27 Cross Street is an existing retail and commercial premises. While undeveloped at this stage, future plans for a potentially four storey mixed development are likely in accordance with the DCP (see Figure 1 on the following page). While there will be some overshadowing during the afternoon in mid winter, the additional shadowing will fall mainly on the roof of the existing buildings. In addition, the proposed development has included minimal private open space areas along the eastern boundary and provided window screens along the eastern façade to protect visual privacy. The proposed balconies from Level 1 apartments will contain landscape screening along the perimeter to provide visual separation.



Figure 1: Adjoining 'hypothetical' development at Nos. 19-27 Cross Street

Adjoining the site to the west is Nos. 45-51 Cross Street is a six (6) storey mixed use building. This building has responded to the existing design of the Stamford Plaza Hotel building. Accordingly, Nos. 45-51 Cross Street has orientated units and provided a great number of privacy measures such as pergolas, screens and landscaping to protect privacy. The design refinements confirm that privacy to the adjoining western property will be maintained.

Accordingly, the proposed development has been designed to minimise any potential impacts to adjoining properties. This objective is considered to be met.

5.4 Objective (d) - To relate new development to the existing character of the surrounding built and natural environment as viewed from the streetscape, the harbour or any other panoramic viewing point.

Objective (d) is closely related to objective (b) above, albeit that it more closely relates to views. Similar reasoning applies, however, and the objective has been met on an objective analysis based on the principles in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140.

The existing Cross Street character varies from two storey retail development to multi storey mixed use development, like the Stamford Plaza Hotel building. The porte cochere of the Stamford Plaza dominates the street frontage with two major openings providing a dark and cavernous appearance from Cross Street. The previous use of the building offered no streetscape activity and little incentive for the general public to venture into the ground floor circular shopping area. When viewed from the surrounding area, the existing building presents a podium base with upper levels dominated by balconies. The uppermost level is cluttered with plant and lift overrun and is visible from various locations in Double Bay and the wider area.

When viewed from Cross Street, the amended proposal provides an appropriate contextual fit in the Double Bay area (see Figure 2 on the following page). The amended proposal presents as a double height podium level to Cross Street to facilitate the retail, through-site link and cinemas with seven (7) levels of residential above. The Cross Street façade is articulated vertically and horizontally with a series of balconies providing the horizontal relief and scale when viewed from relevant points along Cross Street.

The surrounding existing character in Cross Street is described in the Double Bay Centre Development Control Plan (DBDCP) 2002 describes the northern side of Cross Street as follows, "the large buildings on the northern side are generally coarsely modelled and articulated". The strategy in the DBDCP for the northern side of Cross Street is relatively brief. Two specific components state inter alia:

- *"Unify the street on the north side with street wall buildings."*
- *"The amended proposal satisfied that the strategy and the upper levels step back from the street wall that will satisfy the DCP and relate to the adjoining property to the west at Nos 45 – 51 Cross Street (see Figures 2 and 3)."*



Figure 2: The proposed development as viewed from Cross Street.

When viewed from the surroundings, the proposed development is partly obscured by vegetation and the low lying topography of the Double Bay Town Centre. The proposed height of the building provides a good contextual fit with the visible neighbouring buildings from this view and in particular with the higher density residential flat buildings in the ridgeline of neighbouring Bondi Junction and Edgecliff centres.

When viewed from RL55.68 at 337 New South Head Road, Double Bay (Bibiringa), which provides a panoramic viewing point of the development over Double Bay, the proposed development results a minor increase in height, however, the majority of the water views at this level will be retained and the proposed impact is (see Figure 3 on the following page).

Further assessment of the visual impact of the proposed development in the context of regional, district and immediate views has been undertaken in the Visual Impact Assessment, prepared by GSA Planning (see Annexure I of the SEE).



Existing



Amended Proposal

Figure 3: The existing and proposed developments, as viewed from No. 337 New South Head Road.

6.0 Desired Future Character in the DBCDP

In addition to the built form strategy discussed in the previous section, the DBCDP contains a vision for Double Bay and the number of objectives/strategies. This section will respond to the vision, and the key objectives and strategies. A complete assessment of all of the development principles that determine desired future character forms part of this SEPP No. 1 Objection (see Annexure A).

6.1 The Vision

Our vision for Double Bay is as a vibrant centre that offers unique living, working and shopping experience with a pedestrian friendly and attractive built environment.

Response: The proposal will rejuvenate this part of Double Bay by providing a through site pedestrian link, and a pedestrian friendly environment. The Cross Street frontage will offer a shopping experience and the retail and cinema complexes will contribute to a vibrant centre offering unique living, working and shopping experiences. The proposal will contribute to achieving Council's vision for Double Bay.

6.2 General Objectives in the DBCDP

There are eleven (11) general objectives in the DBCDP which are to guide the built form controls. These objective include block connections and pedestrian access; encouraging diverse mix of uses; ensuring a high standard of architectural and landscape design; ensuring new development is compatible with the existing built form and streetscape and maintaining individual privacy. These objectives have been assessed in this SEPP No. 1 Objection. In our opinion the proposal (as amended) satisfies these objectives and the implied desired future character guidelines.

6.3 Objective/Strategy – Enhance and improve the public domain and provision of facilities

Assessment

The public domain in the vicinity of the existing building is unappealing, cavernous and presently vacant. The existing design is never offered an attractive or usable public domain or incentive for public activity. This can be observed by the restricted access to what was previously an unworkable retail arcade.

The amended proposal will enliven the streetscape in Cross Street and provide a north-facing area that will be a focal point for the through-site link from Cross Street to William Street. Overall the public area will be greatly enhanced.

This objective/strategy will be met.

6.4 Objective/Strategy – Ensure that the centre maintains its commercial viability and competitive position within the Sydney retail market

Assessment

The amended proposal will create an active street frontage and desirable pedestrian arcade. The proposed cinemas will contribute to the viability of the Double Bay Shopping Centre. The provision of residential and retail will greatly enhance the viability of the area.

It is considered that this objective/strategy will be met.

6.5 Objective/Strategy – Improve Double Bay’s built form to provide appropriate definition to the public domain

Assessment

The existing “walled donut” built form and the enclosed porte cochere offers a poor standard public domain to this part of Double Bay.

The proposal (as amended) will offer retail and pedestrian activity in Cross Street. The through site link and public space that forms part of the proposal will redefine and enhance the public domain in this locality.

This objective/strategy is considered to be met.

An assessment of the development principles that form part of the DBDCP are all dealt with as part of this SEPP No. 1 (see Annexure A). It is considered that the proposal, as amended satisfies the development principles contained in this document.

6.6 Will non-compliance with the development standard be inconsistent with any planning objectives for the locality? State why.

The non-compliance with the FSR development standard will not be inconsistent with any planning objectives of the locality. The subject site is located within the 3(a) Business General zone, and the relevant objectives are stated, inter alia:

- (a) to define the main commercial areas within the Council’s area which provide for a wide range of retail and commercial uses, ancillary light industrial uses, entertainment, social and recreational uses, tourist accommodation and residential development mixed with non-residential uses,
- (b) to encourage employment generating uses in accessible localities,
- (c) to allow for residential development in the form of mixed development so as to encourage urban consolidation and promote the vitality of business centres, and
- (d) to control the physical and functional characteristics of business centres in order to minimise their impact on neighbouring residential lands.

The subject site is located within the Double Bay Centre, which is an established mixed use area. The proposed development for a mixed use building will provide 5 cinemas and retail tenancies on the ground and first floor levels with residential units above. The proposed tenancies, which are anticipated to include a boutique grocer and a café, will encourage employment in the locality. The site is well located in the Double Bay Centre and is easily accessible via public transport. This has been discussed in detail in the Statement of Environmental Effects.

The proposed development will allow for a mix of residential units of varying sizes, which provides urban consolidation in a convenient and highly accessible location. The proposal increases the housing stock within the Double Bay Commercial Centre by providing additional quality residential dwellings. This is consistent with the objectives of the Metropolitan Planning Strategy and Draft East Subregional Strategy. The NSW State Government has directed all Councils in NSW to prepare new LEPs for their Local Government Areas (LGA) to provide opportunities for increased housing and employment. Woollahra is expected to provide 2,900 additional dwellings and 300 new jobs by 2031 and 2,175 dwellings and 225 jobs following the endorsement of the new LEP. In response to that direction, Woollahra Council is reviewing its planning controls and preparing a new LEP to replace the Woollahra LEP 1995. To help meet the housing target, Council proposes to change the planning controls for opportunity sites within the LGA.

Council has identified a number of sites to assist in meeting the target set by the Metropolitan Strategy. The Edgecliff Centre at Nos. 203-233 and 235-285 New South Head Road was identified as an opportunity site with a proposed FSR of 6.0:1 and a height of 17 storeys to provide an additional net yield of 400 dwellings.

During the consultation process on the opportunity sites, 71 submissions and a petition were received from stakeholders in the surrounding area expressing significant concern regarding the extent of impact of increased densities at the Edgecliff Centre. Given this community reaction, on 23 August 2010, Council resolved to remove the Edgecliff Centre from the list of opportunity sites.

As the Edgecliff Centre will not be able to provide 400 additional dwellings, in our respectful opinion, Council may have difficulties delivering the total 2,900 dwellings in the Woollahra LGA. The subject site is ideally located in the Double Bay Town Centre and could potentially to absorb some of the density initially proposed for the Edgecliff Centre.

The proposed development site is located within an established centre, which provides retail, commercial and residential uses. As indicated in the Statement of Environmental Effects, prepared by GSA Planning, the proposal is not likely to have an impact on the use and enjoyment of surrounding properties. Accordingly, the proposal is consistent with the planning objectives for the locality and the 3(a) Business General zone.

6.7 In the circumstances of the proposal, would strict compliance with the development standard:

- (i) **be unnecessary and unreasonable?**
- (ii) Strict adherence to the 2.5:1 FSR control would clearly fail to achieve the much needed increase in residents and commercial activity within the town centre, but also result in the deletion of the much needed cinema. In the context of a restrictive GFA, the 3000m² of floor space occupied by the cinema is quite simply too valuable for any developer to give it over to such a relatively low yield use.

Adherence to the FSR control would prevent the achievement of the strategic potential of the site, and more importantly the strategic potential of the Double Bay town centre. This site, given the existing building, the site-specific economic imperatives set out above and the practical FSR achievable for the site, has the greatest potential to meet those strategic outcomes. The future viability of the entire town centre, in the absence of a wholesale change to the planning controls, arguably hinges on the subject site. Strict observance of the FSR controls thwarts the achievement of the strategic outcomes and the underlying density and desired future character objectives.

Also compliance with the prescribed FSR limit in this instance would result in a building that is significantly reduced in scale and inconsistent with the scale of surrounding development and unlikely to result in a reasonable urban outcome. While the existing building already exceeds the maximum FSR, the proposed mixed use building not only reduces the overall FSR, but is consistent with surrounding developments in terms of height, bulk and scale, providing a more active street frontage and connection to the public domain. The proposal will have minimal impacts in terms of privacy, sunlight access and view loss. Should strict compliance of the development standard be sought for any future development of the site, it is unlikely that any redevelopment would occur.

Accordingly, it is considered that strict compliance with the FSR limit would be unnecessary and unreasonable in the circumstances of the case.

- (ii) tend to hinder the attainment of the objectives under Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979?

The relevant parts of Section 5(a) of the EP&A Act are stated inter alia:

- (i) *the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment,*
- (ii) *the promotion and co-ordination of the orderly and economic use and development of land,*

Strict enforcement of the FSR control in this instance would hinder the proper management of the site, the orderly and economic use as well as the development of the land and would not allow for the development of the land having regard to the betterment of social and economic welfare of the community to which it would form a part, contrary to the objectives prescribed by the EPA Act.

The current building is a poorly designed and redundant use. The site has been unoccupied for over 18 months and illustrates the need for the redevelopment into a more responsive and active use to enhance and encourage orderly and economic development of the land. Given that the proposal provides five (5) cinemas, retail tenancies and residential above will revitalise the site and encourage orderly and economic development of the land. On this basis, it is considered that the proposal would uphold the objectives underlying the development standard.

- (ii) "The underlying purpose or objective would be thwarted or defeated," the strategic significance of the site and the Double Bay town centre. Promotion of development, density and vibrancy within the town centre is the promotion of "the social and economic welfare of the community" not just in the Double Bay village, but across the city of Sydney.

It cannot be avoided that strict compliance with the FSR control, in the context of an existing building with an existing FSR of 5.26:1, discourages removal of the current building. No developer could be expected to demolish an existing building and replace it with a building having less than half the GFA. This is not reflective of our clients financial position or potential returns, but rather is reflective of simple and universal commercial reality. Any developer will seek to maximise their return and faced with a choice between 5.26:1 and 2.5:1, no reasonable developer would choose 2.5:1.

It is only with the introduction of a new building that necessary cultural facilities can be brought to the town centre and the desired commercial and residential reinvigoration be made to happen. To require strict compliance with the FSR control is implicitly to require the current building (with a far greater FSR than presently proposed) to remain. That in turn hinders the promotion of the social and economic welfare of the community and the orderly and economic development of the land.

Strict compliance with the FSR control is contrary to the objectives of clause 3 of SEPP 1 and should not be required.

Also the non-compliance with the FSR standard is considered unlikely to have any significant adverse effect on adjoining or surrounding properties. Strict compliance with the standard would unnecessarily complicate orderly and economic development of the land in accordance with the intentions of the zoning and the objectives of the Act.

6.8 Is the objection well founded?

In our opinion, strict compliance with the FSR standard is unreasonable and unnecessary in the circumstances of the case and the SEPP 1 objection is well founded. It is considered that granting of development consent would be consistent with the aims and objectives of the development standard.

7.0 Conclusion

In conclusion, strict compliance with the FSR control is unreasonable and unnecessary in the circumstances of this matter, including the unavoidable fact that the site is presently occupied by an existing building with an FSR well in excess of that permitted by the control.

In considering what the objectives of the control are as it would apply to the site, whether the control has any relevance to the site and whether the objectives are met, the existing building is an important consideration. It is only one consideration however, and must fit into the matrix of circumstances surrounding the proposal, including, significantly, how the proposal interacts with its neighbours, the locality and the wider metropolitan region.

Taking all of those matters together, it is clear that the current FSR control has limited relevance to the site, not only because of the current building, but also because Council has abandoned its control. Further, the objectives of the control are met by the proposal, but are likely to be thwarted if strict compliance is required.

Additionally, requiring strict compliance with the control would tend to hinder and undermine the objectives of the Act and prevent the orderly and economic development not only of the site, but also of the Double Bay town centre and the wider Sydney East Sub-Region and Sydney Metropolitan Region. It would also prevent rather than promote the social and economic welfare of the community in those regions.

The SEPP 1 objection is well founded and should be upheld.

ANNEXURE A: DOUBLE BAY CENTRE DCP COMPLIANCE

This Annexure is an assessment of all the relevant objectives, strategies and development principles in the DBC DCP. In our assessment, the proposal is consistent with those controls and it therefore follows that the amended proposal will satisfy the desired future character guidelines for development in Double Bay.

TABLE 1: DOUBLE BAY DCP - URBAN STRUCTURE

	Objectives/Strategies	Assessment	Consistency
3.2.1	Enhance and improve the public domain and provision of public facilities.	<p>The public domain in the vicinity of the existing building is unappealing, cavernous and presently vacant. The existing design has never offered an attractive or useable public domain or incentive for public activity. This is demonstrated by the provision of single width doors to the retail arcade.</p> <p>The amended proposal will enliven the streetscape in Cross Street and provide a north-facing public area that will be focal point for the through-site link from Cross Street to William Street. Overall, the public area will be greatly enhanced.</p>	Yes
3.2.2	Ensure that the Centre maintains its commercial viability and competitive position within the Sydney retail market.	The amended proposal will create an active street frontage and a desirable pedestrian arcade. The proposed cinemas will contribute to the viability of the Double Bay shopping centre. The provision of residential and retail will greatly enhance the vitality of the area.	Yes
3.2.3	Develop the particular qualities of different parts of the centre.	<p>Cross Street has for a number of years been the poor relation in Double Bay with Knox Street and Bay Street providing the focus of activity. The recent restaurants in Cross Street have assisted in attracting people to the street. However, the vacant site has been a distinct disincentive to travel to this part of Double Bay.</p> <p>The proposal, and in particular the cinema, will re-activate the current site and offer a different form of providore to attract customers. A New York deli or Fourth Village Providore, similar to that in Mosman, where customers can dine, have a coffee or purchase all types of quality delicatessen foods, is being considered (see Photographs 20 and 21). This type of facility would offer a new attraction to Double Bay and be part of the Cross Street activation, through-site link and proposed public domain.</p>	Yes
3.2.4	Retain and enhance pedestrian access and amenity in and around the centre.	The proposed through-site link remains a feature of the development and will reconnect Cross Street with the Galbraith Walkway and William Street. Importantly, people using this link will be offered a pleasant experience. From Cross Street a 6m wide double height arcade offering shopping on either side will lead to a central public area to pause or meet friends. This will replace the present unattractive, obscure and indirect link provided in the existing building.	Yes

3.2.5	Improve Double Bay's built form to provide appropriate definition to the public domain.	<p>The "walled donut" built form approach of the existing building and enclosed and covered porte cochere does not contribute to the quality of built form or an the public domain in Double Bay. In addition, the double height porte cochere contributes to the bulk significantly.</p> <p>The amended proposal will offer a well designed imposing building that will have pedestrian activity and a street wall in Cross Street. The u-shaped built form, which is recommended in the DCP, enhances solar access to the dwellings. The proposed cinemas will also promote the use of the public domain within the building and within Double Bay generally.</p> <p>The building from Cross Street will step back at an upper level diminishing the scale of the building when viewed from the street frontage. The building will also step back at the rear with landscaped balconies to retain privacy and enrich the amenity of those spaces for residents. The amended proposal will provide a signature building for Double Bay that will contribute to the public domain.</p>	Yes
3.2.6	Promotes sustainable design principles and objectives in the development and use of the built environment.	<p>In adopting the u-shaped built form in Council's DCP, the amended proposal maximises solar access to the north facing units and provides a high level of cross ventilation. A BASIX report accompanies this submission (see Annexure L). Landscaping is an integral part of the design and water features, planting and landscaped roofs contribute to these environmental qualities (see Annexure F).</p>	Yes

TABLE 2: DOUBLE BAY DCP – CONTROL PRICIPLES

DEVELOPMENT PRINCIPLES	ASSESSMENT	CONSISTENCY
6.2 Building Use		
P1 Encourage upper storey residential development within the centre to enhance the cosmopolitan character of the Double Bay Centre.	The proposed upper level residential will enhance the cosmopolitan character of Double Bay. The proposed cinemas will re-introduce the social and community character of Double Bay when residents visit the centre to view a movie and visit local cafes and restaurants.	Yes
P2 Encourage mixed-use development to reduce transport and travel requirements.	The amended proposal provides retail, cinemas and residential which will utilise public transport together with the existing carparking and councils nearby car-parking station.	Yes
P3 Encourage the continuation of retail and commercial uses at street level in the centre.	The proposal will replace the present covered porte cochere with an attractive retail and cinema complex with an enhanced pedestrian linkage.	Yes
P4 Encourage first floor retail and	The proposal provides five (5) cinemas at the first floor	Yes

commercial use.	level to satisfy market demand, with seating for up to 600 patrons at any one time.	
P5 Encourage arcades and double fronted shops that provide through block- connections for pedestrians.	The double height through-site link and arcade will have shops which will encourage pedestrian access and pedestrian usage. The five (5) cinemas will also encourage strong patronage from the immediate and surrounding residential area.	Yes
P6 Encourage limited width of retail frontage to preserve the small shop character of the centre.	Retail outlets are still being resolved. However, it is likely there will be perhaps a wine bar, café or provedore similar to the example provided in Mosman, as well as small scale retailers.	Yes
P7 Encourage multi-level dwellings on the upper storeys of development as a means of redeveloping small narrow allotments.	The proposal provides for seven (7) levels of residential accommodation above the double height podium level with a mixture of one, two, and three bedroom dwellings.	Yes
P8 Encourage activities with appropriate levels of noise or other environmental impacts.	The proposal will have retail at the ground, cinemas at the ground and first floor with residential above. Various ESD and environmental consideration have been taken into account in the design of this amended proposal.	Yes
6.3.1 Building Envelope		
P1 Development should contribute to the desired future character of streetscapes with consistent building forms built to the street alignment.	The proposed building will contribute to the desired future streetscape for Double Bay and Cross Street with the upper levels stepping back from the street wall. The u-shaped built form will also be consistent with the DCP. The cinemas will also contribute to the character and functionality of the building.	Yes
P2 Permit deep building footprints at ground and first floor level only.	The amended proposal generally follows the u-shape formation of built form contained in Council's DCP (see Figure 10). This u-shape form will enhance solar access.	Yes
P3 Promote building forms that allow natural day lighting, natural ventilation and privacy between dwellings or commercial premises.	The u-shaped form contained in the DCP and adopted in this design provides for a high level of natural daylight and ventilation. Also the provision of planter boxes, openings and selective screening will retain a high level of privacy.	Yes
P4 Encourage courtyards and light wells at ground and first floor level of deep blocks to allow natural lighting and ventilation.	The public courtyard is a focus for this site. The cinemas will also provide a focal point for patrons.	Yes
P5 Enable the provision of through-site links and arcades.	The through-site link and arcade is a feature of this development with a central public domain, providing a focal point for residents in transit, shoppers or locals simply gathering in this location for a coffee and a chat. The cinemas will be a major attraction in the Double Bay town centre.	Yes
P6 Encourage a variety of interior volumes, ie. split levels, double-height spaces and arcades.	The interior ground floor section of the building provides for a variety of internal volumes. In particular, the double height portion of the arcade will create a sense of arrival and encourage users into this public space.	Yes
6.3.2 Height		
P1 Encourage buildings to achieve	The proposal does achieve the heights along the street	Yes

the heights along street and lane frontages described by the control drawings.	<p>advocated in the DCP.</p> <p>The proposal does not satisfy the overall height provisions contained in the control drawings. However, the maximum height of the proposal will be less than the maximum height of the existing building on the subject site.</p>	No
6.3.3 Building Articulation		
P1 Promote buildings of articulated design and massing, with building facades that contribute to the character of the street, and provide useable external spaces.	The amended proposal will have a high level of articulation with the massing of the building adopting the u-shape form in the DCP and the recommended street parapet height. The street character will be enhanced by extensive glazing and modulated architecture, with the upper levels set back to contribute to the Cross Street built environment.	Yes
P2 Utilise building articulation to: <ul style="list-style-type: none"> - generate high quality architectural resolution - provide private open space which addresses and overlooks streets and lanes - provide environmental amenity such as noise reduction and visual privacy through building articulation - provide thermal amenity within buildings such as screening and balconies for summer sun shading and maximising solar access in winter, appropriately scaled to their use and context - encourage activity such as outdoor eating along street edges, to help animate the street 	<p>The building will utilise a high level of architectural resolution with private open space that overlooks streets and walkways. The building will also have high environmental amenity, visual privacy and noise attenuated materials. Thermal amenity within retail and residential spaces has been addressed and solar access and ventilation has been a key consideration. Importantly, the design incorporates an active street frontage which will be animated by the retail outlets and the through-site link.</p> <p>A Sustainability report has been prepared by Howe & Associates which identifies the initiatives that have been pursued with this application. This is attached as part of the submission (see Annexure O).</p>	Yes
6.3.4 Setbacks		
Principles		
P1 Encourage consistent 'build-to' lines to provide coherent streetscapes.	The amended proposal is consistent with the "build-to" line and will provide a streetscape that is consistent with the DCP.	Yes
P2 Where required in laneways introduce new setbacks at street level to improve pedestrian amenity.	Although there is not a laneway, the rear of the building does face Galbraith Walkway. The proposal provides an extensive setback from that walkway and the townhouses in the form of a public domain that will substantially improve pedestrian amenity.	Yes
P3 Where indicated provide street setbacks to the upper level of development to permit mid winter sunlight.	The building is setback at the upper level for streetscape and solar reasons. The loss of winter sun for buildings on the southern side of Cross Street has been reduced by the amended design.	Yes
6.3.6 Architectural Resolution		
P1 Promote high quality architectural design throughout the Double Bay Centre to create a desirable and memorable environment.	The amended proposal will provide high quality architectural design and promote a social and cultural environment.	Yes
P2 Encourage coherent streetscapes based on common design principles for each street	The proposed streetscape design includes high levels of articulation and a modulated glazed façade.	Yes
6.3.7 Roof Design		

<p>P1 Encourage highly articulated roof design that responds to building orientation and the location and character of Double Bay.</p>	<p>The roof will be highly articulated, which responds to the building and site orientation and the character of modern buildings in Double Bay.</p>	<p>Yes</p>
<p>P2 Encourage roof design that creates a distinctive silhouette to buildings.</p>	<p>The size and shape of building will certainly create a distinctive silhouette.</p>	<p>Yes</p>
<p>P3 Encourage a variety of articulated roof forms for the Double Bay Centre such as hips, gables, flat roofs, parapets and roof decks.</p>	<p>The sep backs of the building elevations and the built forms will create a degree of variety and articulation in the roof.</p>	<p>Yes</p>
<p>P4 Discourage the provision of air conditioning plant and equipment on the roofs of buildings.</p>	<p>Air conditioning, plant and equipment are not proposed on the roof.</p>	<p>Yes</p>
<p>6.4.3 Arcades, Courtyards and Walkways</p>		
<p>P1 Encourage new arcades and walkways that provide public access across private land, and provide connections between streets and other parts of the public domain.</p>	<p>The amended proposal will retain a new arcade and walkway in the form of a double height through-site link with a public space for people to gather. The proposed cinemas will provide an additional focus to the through site link.</p>	<p>Yes</p>
<p>P2 Create arcades with active retail frontages.</p>	<p>The proposed arcade will commence with an active retail street frontage in Cross Street that will stimulate retail activity in this location.</p>	<p>Yes</p>
<p>P3 Consider supplementing arcades with outdoor areas such as courtyards or outdoor rooms.</p>	<p>The public space or courtyard does supplement the arcade with an attractive public area that will have landscaping to enhance the amenity.</p>	<p>Yes</p>
<p>6.4.4 Outdoor Eating</p>		
<p>P1 Encourage outdoor eating establishments where they provide a pleasant outdoor eating environment with minimal disturbance to pedestrian circulation and where they comply with Councils associated codes and policies.</p>	<p>There are a number of opportunities to provide outdoor dining in Double Bay. There is likely to be a café, wine bar or Mosman style provedore within the proposed building. However, the intention is that the cinemas will provide patronage to the existing café and restaurants.</p>	<p>Yes</p>
<p>6.5.1 Visual Privacy</p>		
<p>P1 Ensure development protects the privacy of adjacent residential neighbours.</p>	<p>The design of the building maintains an acceptable level of visual privacy with the use of landscaped planter boxes and screening.</p>	<p>Yes</p>
<p>P2 Ensure residential apartments and private open spaces have adequate visual privacy.</p>	<p>The residential apartments will be separated by the space created from the public area. The apartments have been designed to maintain a level of privacy whilst still facilitating a level of surveillance over public spaces.</p>	<p>Yes</p>
<p>6.5.2 Acoustic Privacy</p>		
<p>P1 Ensure adequate acoustic privacy to residential apartments and private open spaces in the centre.</p>	<p>Acoustic privacy will be achieved with attenuated materials and the inherent design features in the apartments.</p>	<p>Yes</p>
<p>P2 Protect the acoustic privacy of residential neighbours adjacent to the centre.</p>	<p>Acoustic privacy of the residential area will be protected by noise attenuated materials.</p>	<p>Yes</p>
<p>P3 Ensure the viability of housing,</p>	<p>The amended proposal embraces high quality</p>	<p>Yes</p>

and greatly increase the amenity of dwellings, by utilising noise barrier planning principles.	architectural design, a variety of unit size to appeal to a wide variety of people in the community and a high level of noise attenuation and amenity in the dwellings.	
6.5.4 Private Open Space		
P1 Ensure every dwelling in the Double Bay Centre has direct access to private open space.	All of the dwellings in the proposed building have direct access to private open space.	Yes
P2 Encourage occupied roof areas with roof gardens behind parapets where private open space at ground level is not available.	Balconies have landscape planter areas and landscaping is also included where practicable on roofs.	Yes
6.6.2 Natural Daylight and Natural Ventilation		
P1 All buildings should be designed to achieve natural ventilation.	All of the north facing dwellings achieve a high level of natural ventilation.	Yes
P2 Design buildings with naturally light habitable rooms.	The building form provides natural light to habitable rooms to all of the north facing dwellings. Some of the south facing one (1) bedroom apartments will not receive natural light in mid-winter. The ESD report states that the natural light and ventilation is totally acceptable.	Yes
6.6.3 Solar Access		
P1 Minimise overshadowing of adjoining properties or publicly accessible spaces.	In assessing the overshadowing to adjoining properties, a comparison needs to be made between the shadows cast by the existing building, the original proposal and the additional shadow cast by the current proposal. The amended proposal reduces the additional shadow cast on the buildings on the opposite side of Cross Street during mid winter (see Solar Access Assessment Section 6.2.3)	Yes
P2 Building form, separation and plan layout should facilitate good solar access to internal and external living spaces, to maximise natural heating and cooling and minimise the use of artificial systems.	The building design and form facilitates good solar access internally and externally to the north facing dwellings, landscaped areas and public open space.	Yes
6.7.1 Pedestrian Access and Mobility		
P1 Provide for the needs of people with access difficulties.	Accessibility for persons with a disability is well catered for in the design. An Access Report forms part of this submission (see Annexure R).	Yes
6.7.2 On-site Parking		
P1 Council would prefer to accept a monetary contribution in lieu of car parking for retail and commercial development on narrow sites, where car parking can not be reasonably provided. This principle does not apply to the exemptions for certain development proposals, including change of use proposals, described in the Development Control Plan for Off-street Car Parking Provision and Servicing Facilities and the Woollahra Section 94 Contributions Plan 2002.	A monetary contribution has been made for 50 car parking spaces in lieu of the provision of car parking for retailing on the subject site. The applicant relies on that contribution which satisfies this particular principle in accordance with Development consent DA88/176.	Yes
P2 Ensure the impact of car parking on the site and streetscape is	The amended proposal will retain the existing two (2) levels of basement car parking and the access through	Yes

handled discretely.	to the adjoining site. Accordingly, there will not need to be extensive excavation which is major problem normally with new developments.	
P3 Ensure the design of on-site car parking is safe and efficient, and integrated with the overall site and building design.	The existing car park is designed in accordance with the Australian Standards and is safe and efficient. Car parking and traffic has been assessed in a report that accompanies this application (see Annexure E).	Yes
P4 Maximise natural light and ventilation to parking areas where possible.	It is not possible to provide natural light and ventilation to the two levels of existing underground car parking.	No
P5 Encourage co-operative approaches to car parking provision between adjoining small lots.	A Co-operative approach has been adopted with a provision of car parking by utilising shared access through the adjoining property. This was established as part of the earlier approval.	Yes
P6 Ensure underground car parking facilities do not collectively create a continuous barrier to subsurface water flow.	Water issues have been addressed as part of the design of the car park. This has been the subject of a separate report which forms part of this application (see Annexure H).	Yes
6.7.3 Vehicular Access		
P1 Maximise retail frontage in streets and lanes.	The proposal maximises the retail frontage in the street as the vehicular access to the car park is on the adjoining site. A loading area off Cross Street is required due to the limited head height of the existing access.	Yes
P2 Maximise pedestrian safety and amenity by minimising conflict between pedestrians and vehicles.	The design will incorporate safety features to minimise pedestrian and vehicle conflict.	Yes
P3 Encourage discrete access to car parking and servicing.	The access to the car park already exists. The service area is limited in size and designed to be a discrete element in the Cross Street façade. Again, it is opportune to note that the existing building with a covered port cochre was dominated by vehicular activity and certainly not discrete.	Yes
P4 Encourage cooperative approaches to car parking provision to reduce the number of vehicle access and egress points.	Again, the proposal utilises the existing basement car park and the existing access and egress points. An additional service access point is proposed closed to the vehicular access and provides a discrete entry whilst still allowing an extensive retail frontage to Cross Street.	Yes
P5 Coordinate vehicular access with the provision of active frontages to lanes.	Vehicular access is existing and co-ordinated with the adjoining property.	Yes