

**SUPPLEMENTARY REPORT TO THE JOINT REGIONAL PLANNING  
PANEL  
(Sydney East Region)**

<b>JRPP No</b>	<b>2012SYE117</b>
<b>DA Number</b>	<b>DA12/230</b>
<b>Local Government Area</b>	<b>City of Botany Bay</b>
<b>Proposed Development</b>	<b>Integrated Development and Joint Regional Panel Application comprising the construction of a twelve (12) storey hotel containing 238 rooms with ancillary facilities (restaurant, bar etc), retail space and commercial area, four levels of basement car parking to accommodate 93 car spaces, associated landscaping and public domain works.</b>
<b>Street Address</b>	<b>210 O’Riordan Street, Mascot</b>
<b>Applicant/Owner</b>	<b>Isak Investments Pty Ltd</b>
<b>Report by</b>	<b>Christopher Mackey, Senior Planner, City of Botany Bay</b>

## **1.0 Background**

This development application seeks consent for the construction of a twelve (12) storey hotel containing 238 rooms with ancillary facilities (restaurant, bar etc), retail space and commercial area, four levels of basement car parking to accommodate 93 car spaces, associated landscaping and public domain works.

The development application was reported to the JRPP on the 24 September 2014 with a recommendation for approval.

The Panel made the following recommendation on 24 September 2014:

- 1. The Panel has considered the planning assessment report and concluded that the SEPP 1 Objection to justify the variation of Floor Space Ratio (FSR) from 1.5:1 to 6.6:1 is not well founded, notwithstanding the fact that there exists a valid 2009 consent on the subject site for a commercial building with a FSR of 7.28:1.*
- 2. The Panel notes that the Gross Floor Area (GFA) of the approved application includes car parking. On the basis that the existing approval is a circumstance of the case that should be taken into account, the Panel would accept a variation of the FSR standard, such that the GFA not devoted to parking in the current*

*application is similar to the GFA not devoted to parking in the application approved in 2009.*

3. *The Panel request the applicant to submit, by 24 October 2014, amended drawings that comply with the above criterion.*
4. *The Panel notes that the site adjoining the subject site to the east, 131 Baxter Road, as well as 125 Baxter Road, both qualify as isolated sites. The Panel also notes that the Land & Environment Court of NSW has established a planning principle to deal with isolates sites in assessing development applications. (see Melissa Grech v Auburn Council (2004) NSWLEC 40). That principle states:*
  - a. *Firstly, where a property will be isolated by a proposed development and that property cannot satisfy minimum lot requirements then negotiations between the owners of properties should commence at an early stage and prior to the lodgement of the development application.*
  - b. *Secondly, and where no satisfactory result is achieved from the negotiations, the development application should include details of the negotiations between the owners of properties. These details should include offers to the owner of the isolated property. A reasonable offer, for the purposes of determining the development application and addressing the planning implications of an isolated lot, it is to be based on at least one recent independent valuation and may include other reasonable expenses likely to be incurred by the owner of the isolated property in the sale of the property.*
  - c. *Thirdly, the level of negotiation and any offers made for the isolated site are matters that can be given weight in the consideration of the development application. The amount of weight will depend on the level of negotiation, whether any offers are deemed reasonable or unreasonable, any relevant planning requirements and the provisions of s 79C of the Environmental Planning and Assessment Act 1979.*
5. *The Panel requests the applicant to follow the procedures required by the above planning principle.*
6. *The Panel request the planning assessment officer to provide a supplementary report, within two weeks of receiving the amended drawings and additional information, on whether the amended drawings comply with the criterion set out in paragraph 2 and whether the applicant has followed the procedures set out in paragraph 4. Following receipt of the supplementary report, the Panel will determine the application by electronic means unless it considers that a further public meeting is required.*

## **2.0 Applicant's Response to JRPP Resolution**

The Applicant submitted a response prepared by consultants Neustein Urban to the Panel's resolution to Council on the 23 October 2014.

Although the Panel in point 3 of its resolution on 24 September 2014 indicated that the application needed to be amended, the applicant's response does not amend the drawings, but provides a further response to the issues raised on the preliminary decision of the Panel including a further assessment of the SEPP 1 objection and the issue of the allegedly isolated

site". On page 5 of the submission, Neustein Urban indicate that "Amended plans have not been lodged for the hotel as requested...because the loss of GFA jeopardises the proposal."

### **Issues raised in the Neustein Urban Report**

#### *SEPP 1 and appropriate GFA*

The Applicant has identified that the total GFA dedicated to car parking under DA09/132 is 4,401m<sup>2</sup>.

The Applicant states that implementation of Point 1 of the Panel's resolution would reduce the hotel by approximately 3 floors (or 2,995m<sup>2</sup>) and would reduce the hotel from 238 rooms down to 181 rooms. The Applicant states that this would not be sufficient rooms to support conference facilities required for a 3.5 to 4.5 star hotel.

Additional information has been provided to support the SEPP 1 objection to the development, being, in summary:

- At the time of lodgement of the hotel DA, there were strategic studies prepared for the LEP that recommended an FSR of 3.0:1 to 3.5 :1 for the site, and as this was pre the Standard Instrument definition of GFA and under the Model Provisions definition of GFA, this would have equated to and FSR of 3.3:1 to 3.8:1.
- Council has approved comparable buildings in the Mascot Precinct with FSRs up to 4.2:1, in a zone that allows 3:1.
- The envelope is smaller than that of the approved office building, as indicated in the Appendix to the document
- The relevant general objectives of the Botany Bay LEP have been met and is consistent with section 5 of the Act, resulting in the orderly development of the site, and that the GFA reduction will jeopardise the services provided by the hotel, leading to a non-economic outcome
- Council's officers indicated that no environmental harm will result from the development, and the site is a unique location at the gateway to the airport, and the concessions will be distinguishable from other sites
- The council supported the additional FSR due to the strategic gateway nature of the site.
- The height reduction would result in a building that would be either at or one storey above the Quest hotel, but this would not result in a gateway building, in terms of visual prominence.
- Removal of the three floors would change the building's proportions, result in a building of squat appearance, compromising the architecture.

## Comment

As noted in the Council's report to the Panel dated 10 September 2014, and in particular in the support for the SEPP 1 objection, Council has acknowledged the need for a built form at the subject site similar to that at 241 O'Riordan Street (Airport Central), opposite to the immediate west. The design proposed will be of an identical scale and height to establish an eastern "gatepost" and to complement the Airport Central Building.

Whilst not reflected by the new development standards contained in BBLEP 2013, this has been supported by Council's approval in 2009 for the office development on site. The new FSR of 3:1 permitted under BBLEP 2013 is a precinct wide control and does not take into account the exceeded FSR of any site in the precinct, even the FSR at 241 O'Riordan Street, which is approximately 7:1.

The proposal will result in a change in use to a less intense use and will be of a marginally reduced FSR to that already approved. The estimated GFA as reduced by the Panel will be 10,826 sq m, being a FSR of 5.2:1.

In addition to the discussion in Council's report to the Panel regarding the justification for FSR over the standards, the development costs associated with the proposed development at this site are extensive. The site is significantly affected by:

- Road widening, which necessitates land dedication, relocation of services (including the undergrounding of overhead cables) and other public domain works;
- Aircraft noise, which requires attenuation measures to the building both internally and externally;
- Road traffic noise, which requires attenuation measures to the building;
- Railway noise, which requires attenuation measures to the building;
- Railway vibration, which requires attenuation measures to the building;
- Shallow contaminated groundwater observed at RL3.3m to RL4.0m, which requires dewatering, remediation and validation;
- Soil contamination, which requires remediation, off site removal and validation;
- Acid sulphate soils, which requires ongoing management;
- Is located within the zone of influence of an underground railway tunnel (Airport Line Tunnel), which requires additional methods for basement construction at a depth of RL-8.15m including:
  - A 900mm thick steel reinforced diaphragm wall to be keyed into 2m of medium to high strength sandstone rock;
  - The diaphragm wall will be continuously propped during construction by a 400mm thick basement slab, as it is located 8.0m away from the outer edge of the tunnel at a 45 degree angle;
  - And then by a permanent structure (a series of 300mm thick slabs and a 1000mm thick basement slab);
  - Dilapidation surveys of the tunnel, both pre and post construction;
  - Electrolysis report;
- Is located within the zone of influence of a high pressure gas pipeline;
- Is located within the zone of influence of Sydney Airport in terms of Wind Turbulence Impacts, Obstacle Limitation Surface (height), Pans Ops (Air Navigation Control and Radar Infrastructure);

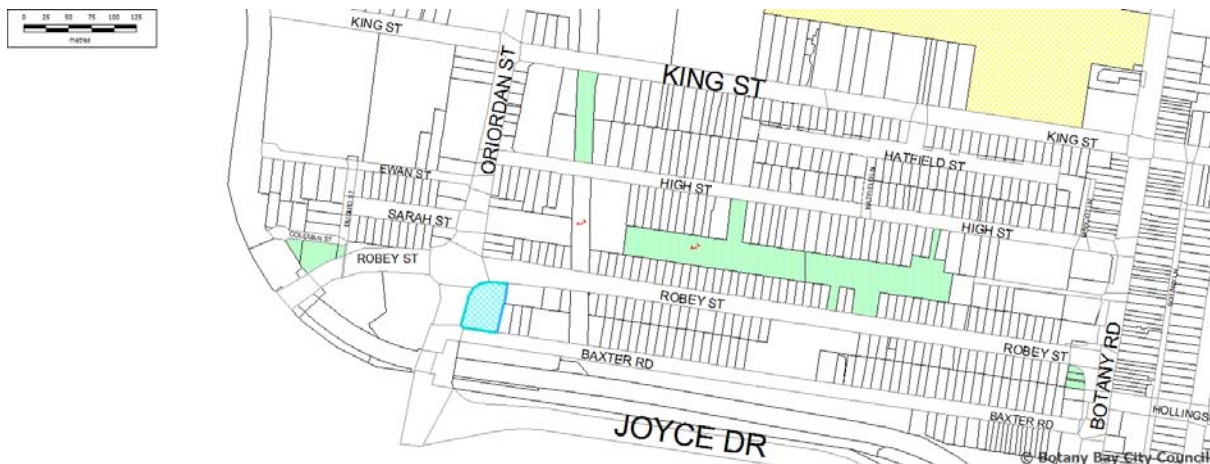
- Is located adjacent to a major arterial road intersection at Robey Street and O’Riordan Street, which requires particular geotechnical methods during construction; and
- A sewer easement which traverses the subject site, which requires deviation.

The proposed development has been designed to address impacts on and or from the above affectations and Council’s conclusion was that the development satisfactorily achieved this. Following assessment of the development application it is reasonable to say that the cost of construction is now far greater than that initially stated in the development application. Council’s recommendation for approval is based on the above arguments.

### ***Isolation Sites Points 4 and 5***

The site is located within the Mascot Business Development Precinct and the site is largely vacant with two existing single storey residential dwellings, one of which is known as No. 118 Robey Street and the other No. 133 Baxter Road.

Immediately adjoining the site to the east on Baxter Road is a serviced apartment development and a mixture of commercial / industrial uses with low density residential development on its northern side. The neighbouring site to the immediate east along Robey Street is a single storey residential dwelling at 131 Baxter Road, with commercial / industrial uses further east at 125 and 127 Baxter Road. 113 Baxter Road lies to the east of 125 Baxter Road was recently the subject of an approval by the JRPP for a hotel development on the 3 September 2014.



The subject site is identified on the map above.

### **Site Isolation**

The proposed development is situated on an allotment of land which was recently consolidated from seven allotments (Lot 3, 4 and 5 in DP 262141, Lot 67 in DP 979354, Lot 1 in DP 135997, Lot 4 in DP 653471, and Lot 133 in DP 1030495) into one allotment, now identified as Lot 1 in DP 1190559.

Three (3) separate allotments of land will remain to the east of the site being 125, 127 and 131 Baxter Road, with a total combined area of 1,100sqm, being a suitable opportunity for amalgamation as a separate entity to the subject site. Therefore, there is no site isolation of 131 Baxter Road, as a result of the proposed development. Further, to avoid discrimination, and in accordance with the planning principles for site isolation, property ownership has not

been considered in the assessment of the development application, however it is noted that the owner of the subject site also owns No. 127 Baxter Road.

Notwithstanding that the site is not isolated, Council in the past, held the view that No. 131 Baxter Road could be amalgamated with the subject site or if not, then could alternatively be similarly amalgamated with the adjoining sites to the east. Council when assessing Development Application No. 08/132 had commenced obtaining an independent valuation, which was based on a signed Memorandum of Understanding between the two parties. Council then resolved at its meeting on the 15 October 2008 to commence the valuation process. At that time, the minimum lot size for an industrial development under DCP 33 was 1,500sqm. There is no longer a minimum lot size for industrial development in the new BBDCP 2013 and a site of 1,100sqm is suitable to achieve the orderly and economic use and development of the land.

The Applicant has demonstrated in their response to the Panel of the various efforts and negotiations in attempting to purchase 131 Baxter Road. The applicant has addressed the Cornerstone principles established by the NSW Land and Environment Court in proceedings of Cornerstone Property Group Pty Ltd v Warringah Council [2004] NSWLEC 189. This is not dissimilar to Melissa Grech v Auburn Council [2004] NSWLEC 40 or Karavellas v Sutherland Shire Council [2004] NSWLEC 251. The three Grech principles are:

- 1. Firstly, where a property will be isolated by a proposed development and that property cannot satisfy the minimum lot requirements then negotiations between the owners of the properties should commence at an early stage and prior to the lodgement of the development application.*
- 2. Secondly, and where no satisfactory result is achieved from the negotiations, the development application should include details of the negotiations between the owners of the properties. These details should include offers to the owner of the isolated property. A reasonable offer, for the purposes of determining the development application and addressing the planning implications of an isolated lot, is to be based on at least one recent independent valuation and may include other reasonable expenses likely to be incurred by the owner of the isolated property in the sale of the property.*
- 3. Thirdly, the level of negotiation and any offers made for the isolated site are matters that can be given weight in the consideration of the development application. The amount of weight will depend on the level of negotiation, whether any offers are deemed reasonable or unreasonable, any relevant planning requirements and the provisions of s79C of the Environmental Planning and Assessment Act 1979.*

The applicant has provided documentation that all attempts to acquire the site have been unsuccessful. The applicant submitted evidence including a valuation report and letters to demonstrate that the appropriate steps had been taken to attempt to acquire the site. The information included:

**In the case of principle 1** above, evidence from the applicant to suggest that negotiations had commenced between the applicant and owner of 131 Baxter Road since 2009. This includes:

- Letter from Council dated 15 April 2009 to Preston Rowe Paterson Valuers to obtain a valuation of 131 Baxter Road including a reference that Council understood that the applicant had already made an offer to purchase 131 Baxter Road, was not aware of the terms of the offer however understood that that offer was rejected;
- A copy of the signed Memorandum of Understanding between the two parties signed on 18 March 2009;
- A copy of Council's Valuation Brief dated 29 October 2009;

In the case of principle 1 above, Council has been provided with documentary evidence from the applicant to suggest that negotiations commenced between the applicant and owner of 131 Baxter Road since 2009.

**In the case of principle 2** above, documentary evidence provided by the applicant includes the following:

- A copy of Development Consent No. 08/132 dated 26 March 2009;
- Letter dated 9 June 2009 from Council to the applicant advising that the terms of the MOU will be formalised into a Deed of Agreement;
- Copy of a Valuation Assessment prepared by Theo Stamoulis & Associates Pty Ltd dated 9 November 2009, which valued the property at between \$480,000 to \$520,000; **Note:** this valuation contained an incorrect site area, quoting 342sqm, not 429sqm, which was known at the time.
- Email dated 13 October 2014 from estate agent Mr G. Golfin to Messrs Isak outlining that he had made verbal offers on behalf of the Isak's to Mr R. Boyd between 2009 to 2010 to purchase the property. The offers made were \$550,000, \$600,000, \$700,000, \$800,000 and finally \$850,000, all of which were rejected.
- Email dated 4 August 2010 from Mr S. Isak to Mr J. McGee (acting on behalf of the Boyd family) with a further offer to purchase 131 Baxter Road, Mascot, that offer being \$790,000. This was a direct result of the incorrect site area in the valuation report.

In regard to principle 2, the submitted documents satisfy the court requirements that an offer be based on at least 1 recent independent valuation of the isolated property (notwithstanding the error in the valuation, which was later addressed by Mr Isak in his further offer to Mr McGee in 2010).

**In the case of principle 3** above, there is evidence to suggest that negotiations were undertaken to resolve the amalgamation with the owner of No. 131 Baxter Road including an offer made based on a valuation of the property. The owner of 131 Baxter Road has failed to set a price. The Deed of Agreement between the two parties was never executed and the resulting negotiations between the parties ceased.

In regard to principle 3 therefore, it is considered that the court requirements have been satisfied.

Given the evidence provided, the applicant has demonstrated that they have made attempts to purchase 131 Baxter Road at a reasonable value and that this offer was not accepted by the owner. It must therefore be accepted that the applicant has acted in accordance with the Land and Environment Court Principles relating to site isolation and that these attempts were

fruitless in this instance. However an opportunity still remains for 131 Baxter Road to be amalgamated with 125 and 127 Baxter Road.

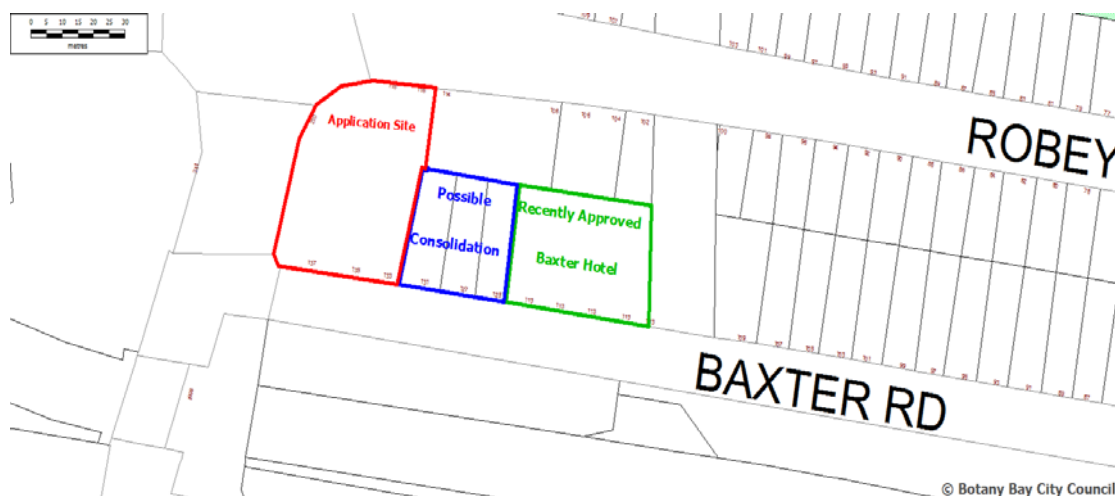
Therefore, a refusal of the proposal based on site isolation is not warranted.

It should also be stated that the Land and Environment Court in *Cornerstone Property Group Pty Ltd vs. Warringah Council* [2004] NSWLEC 189 added another principle to site isolation issues that must be considered. That is:

- 4. Can orderly and economic use and development of the separate site be achieved if amalgamation is not feasible?*

In this regard, the applicant has provided a design concept for a redevelopment of Nos. 125, 127 and 131 Baxter Road, which creates a site with a total area of 1,100sqm, and based on the permitted FSR of 3:1 for the amalgamated site, would equate to a 3,300sqm of gross floor area (GFA) and a building of up to 6 storeys in height. The indicative concept demonstrates acceptable building envelopes can be achieved with possible height, setbacks, basement level, landscape setback and drive thru access.

Therefore, it has been demonstrated that the orderly and economic use of the site can be achieved where amalgamation with the subject site is not feasible. The following diagram indicates the most suitable amalgamation of 131, 125 and 127 Baxter Road.



Even where 131 Baxter Road is not capable of being amalgamated with 125 and 127 Baxter Road, there are no longer any minimum lot sizes in Council's planning controls that would restrict redevelopment of this site. The subject site is regular in shape, has a total site area of 429sqm, a frontage of 13.70m and a depth of approximately 32.50m. A variety of uses are permissible with Consent and the Applicant has identified these uses together with the relevant Clauses of the LEP, which do not restrict development of the site to any great extent other than height and FSR.

### 3.0 Other Matters



The Panel should note that since its deferral of this matter, Council has received a further submission from the representative of the owners of 131 Baxter Road. A copy of this submission is provided separately to the Panel.

The main issues raised in this further submission, are the failure of the entire negotiation process between the two parties, the remaining need for site consolidation, however now also including 125 and 127 Baxter Road as one site with 131 Baxter Road and 210 O’Riordan Street. The submission states that no effort has been made by the applicant to make an offer to purchase 131 Baxter Road.

As stated above, there is no longer any need to consolidate the eastern Baxter Road properties with the subject site. The three remaining allotments at 125, 127 and 131 can be separately amalgamated into one entity for redevelopment. The proposed FSR at 6.6:1 is less than that already approved for the site and the proposed change from a commercial building to a hotel will result in a less intense use on site. The Panel’s request to reduce the proposed GFA by that equal to the GFA of the car parking GFA of the previously approved DA does not create any tangible benefit.

The inclusion of the eastern adjoining allotment at 131 Baxter Road, and the properties at 125 and 127 Baxter Road altogether as one consolidated site with 210 O’Riordan Street would indeed reduce the FSR of the current proposal, providing that no additional built form is further proposed. However, this would also open up opportunity for additional built form on the residual part of a consolidated allotment, essentially increasing the FSR across the site, thereby increasing the intensity of the hotel use and creating adverse impacts within the locality. It was never the intent of Council that a landmark built form would extend east along Baxter Road. The subject site was however identified for a landmark building within this gateway location at the edge of O’Riordan Street.

#### Section 96(2)

The Panel should note that the Applicant concurrently lodged this development application with a Section 96(2) Application to DA08/132, to place the above ground car parking below ground. This has the effect of reducing the GFA of the approved development with a resulting reduction in FSR from 7.28:1 down to 7.1:1. When calculated under BBLEP 2013, this equates to an FSR of 6.4:1. As with this application, Council was waiting for concurrence from Sydney Trains and is now able to complete its assessment and determine the Section 96(2) application. The Applicant has requested that this be determined at a meeting of the Council’s Development Committee in the first week of December 2014. This information is provided as advice to the Panel, as should the Council resolve to approve the Section 96(2) application, this may have bearing on any reasons for refusal, should the Panel be of the view to refuse this development application.

## **4.0 Conclusion**

In accordance with Point 6 of the JRPP resolution of the 24 September 2014, the Application is referred to the the Joint Regional Planning Panel Sydney East Region (JRPP) for determination.

The Applicant has provided a Supplementary submission in respect of Point 2, 3, 4 and 5 of the Panels resolution, which demonstrates that the requested reduction in GFA is not feasible and would not represent the orderly or economic use and development of the land.

Further, the Applicant has addressed the planning principles in relation to site isolation and has provided documentary evidence of negotiations between the land holders and of offers made to purchase 131 Baxter Road.

The proposal has been assessed in accordance with Section 79C of the *Environmental Planning and Assessment Act 1979* and *Botany Local Environmental Plan 1995*. The proposal is permissible in the 4(c2) zone, is consistent with the objectives of the 4(c2) zone, the objectives of the B5 – Business Development zone under BBLEP 2013 and the Desired Future Character of the precinct as stated under BBDCP 2013 and is considered to result in a development which is suitable in the context.

Based on the above matters, it is therefore recommended that the Panel grant approval to the application subject to the draft conditions.

#### **4.0 RECOMMENDATION**

In view of the preceding comments, it is RECOMMENDED that the Joint Regional Planning Panel (JRPP) for the Sydney East Region, as the Consent Authority, resolve to:

- (a) Grant consent to the SEPP 1 Objection under Botany Local Environmental Plan 1995 to permit a maximum FSR of 6.6:1; and
- (b) Approve Development Application No. 12/230 for the construction of a twelve (12) storey hotel containing 238 rooms with ancillary facilities (restaurant, bar etc), retail space and commercial area, four levels of basement car parking to accommodate 93 car spaces, associated landscaping and public domain works at 210 O’Riordan Street, Mascot.