

JOINT REGIONAL PLANNING PANEL
(East Region)

JRPP No	2013SYE084
DA Number	DA 13/173
Local Government Area	City of Botany Bay
Proposed Development	Redevelopment of the site in the following manner: <ul style="list-style-type: none"> • Demolition of existing industrial buildings, excavation and site remediation. • Removal of sixteen (16) existing trees along the southern and northern boundaries. • Construction of an 13 storey mixed use development comprising of 92 dwellings (7 studio, 24 x one bedroom units and 61 x 2 bedroom units), 344m² of commercial floor space fronting Coward Street and 175 car parking spaces. • Strata Subdivision to create 92 residential lots and 2 commercial lots.
Street Address	246 Coward Street, Mascot
Lot & DP Nos.	Lot 1 DP773899
Applicant	Imperic Pty Ltd
Capital Investment Value (CIV)	\$28,150,000.00
Number of Submissions	Nil
Recommendation	Conditional Consent
Report by	Rodger Dowsett, Director Planning and Development
Date	8 August 2014

Background

On the 19 August 2014 the Joint Regional Planning Panel – Sydney East considered the Assessment Report for Integrated Development Application No. 13/173 seeking consent for the following:

- demolition of existing industrial buildings;
- removal of sixteen (16) existing trees along the western boundary that now stand on the development site;
- excavation and site remediation;
- the construction of an 13 storey mixed use development comprising of 92 dwellings (7 studios, 24 x one bedroom units and 61 x 2 bedroom units), 344m² of commercial floor space fronting Coward Street and 175 car parking spaces, and
- Strata subdivision to create ninety two (92) residential lots and two commercial lots.

The Panel made the following decision:

1. *The panel acknowledges the recommendation for approval contained within the council assessment report, but notes that the applicant in its Clause 4.6 submission, failed to address all the objectives contained within Clause 4.4 of the Botany LEP relating to floor space ratio and the better planning outcome to be achieved under the proposal.*
2. *The Panel therefore requests the applicant to submit an alternate Clause 4.6 submission that properly addresses the relevant criteria. This information should be submitted to Council by 2 September 2014.*
3. *The panel further request the Council to provide a supplementary report regarding its assessment of the applicant's amended submission to the panel secretariat by 10 September 2014.*
4. *Following receipt of the above information, the panel will finalise this Development Application by electronic means of communication.*

In response, the applicant submitted an amended clause 4.6 to Council dated 23 August 2014 which addresses all the objectives contained within Clause 4.4 of BBLEP 2013 and a copy is attached to this report. Further, the amended Clause 4.6 demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard, thus meeting the provisions of Clause 4.6(3).

Clause 4.6 Exceptions to development standards

Under the provisions of the Botany Bay LEP 2013, the site is zoned B2 – Local Centre. The maximum FSR permitted by the BBLEP 2013 is 3.2:1 (7,920m²). The amended development application seeks an FSR of 3.88:1 (9,607m²) being an additional 1,687m² or 21.3%. The Applicant has submitted a Clause 4.6 variation to Clause 4.4 requesting a greater FSR which is also relied upon in the assessment contained within this report.

Clause 4.6 is reproduced as follows:

(1) The objectives of this clause are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*

- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (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 Director-General has been obtained.*
- (5) In deciding whether to grant concurrence, the Director-General must consider:*
- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) the public benefit of maintaining the development standard, and*
 - (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.*
- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production

Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.

- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*

Council keeps a record as per

- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*

- (a) a development standard for complying development,*
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy – Building Sustainability Index – BASIX (2004) applies or for the land on which such a building is situated,*
- (c) clause 5.4.*

In considering the variation of Clause 4.4 of BBLEP2013 Council through its assessment and with the concurrence of the Director General along with the applicants Clause 4.6 is able to provide an appropriate degree of flexibility in applying certain development standards to a particular development and this meeting the Objective of Clause 4.6(1)(a) where the requirements of Clause 4.6 are satisfied. Objective 4.6(1)(b) will be discussed in detail later in the report.

The development proposes a FSR of 3.88:1 which exceeds the maximum FSR of 3.2:1 under Clause 4.4 of the BBLEP 2013 and Council has received a written request from the applicant to vary this standard.

Assessment

Is the requirement a development standard and if so is it one to which subclause 8 of Clause 4.6 apply?

The requirement for floor space ratio is a development standard and is not a standard for complying development, Basix or additional controls relating to miscellaneous permissible uses (clause 5.4).

What is the underlying object or purpose of the standard?

Clause 4.4 of Botany Bay LEP 2013 contains the following specific objectives in respect of FSR.

- (1) *“The objectives of this clause are as follows:*

- (a) to establish standards for the maximum development density and intensity of land use,*

- (b) *to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
- (c) *to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,*
- (d) *to ensure that buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities,*
- (e) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
- (f) *to provide an appropriate correlation between the size of a site and the extent of any development on that site,*
- (g) *to facilitate development that contributes to the economic growth of Botany Bay.”*

Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

This may be found if one of the following applies:

- (a) ***the proposal meets the objectives of the development standard notwithstanding its non-compliance with the standard. In this instance one, must determine the objectives of the standard and if not expressly stated in the LEP what are the inferred objectives?***
- (1) *“The objectives of this clause are as follows:*
- (a) *to establish standards for the maximum development density and intensity of land use,*
 - (b) *to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality,*
 - (c) *to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing, and are not likely to undergo, a substantial transformation,*
 - (d) *to ensure that buildings do not adversely affect the streetscape, skyline or landscape when viewed from adjoining roads and other public places such as parks, and community facilities,*
 - (e) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain,*
 - (f) *to provide an appropriate correlation between the size of a site and the extent of any development on that site,*
 - (g) *to facilitate development that contributes to the economic growth of Botany Bay.”*

The underlying objective and purpose of the Floor Space Ratio control has been achieved as stated above, therefore the standard is relevant but strict compliance with the numerical requirement being a maximum FSR of 3.2:1 being unnecessary in this instance as the proposal meets the objectives of Clause 4.4 as follows:

- A maximum standard of 3.2:1 has been established for the site which limits the intensity and density of the permissible uses in the zone and is sought to be varied through the flexibility afforded by Clause 4.6 thus meeting Objective 1(a) of both Clause 4.6 and Clause 4.4;
- The proposed development is compatible with the existing and desired future character and reinforces the locality as a local centre;
- The proposed development is consistent with the pattern of development and maintains an appropriate visual relationship through its similarities in bulk and scale;
- The additional housing proposed is consistent with the aims and objectives of the NSW Draft Metropolitan Strategy for Sydney to 2036. In March 2013 Mascot Station precinct was announced as an area set to deliver more homes in places with access to infrastructure, transport, services and jobs through the Urban Activation Precinct Scheme;
- The applicant has also proposed to dedicate an additional 215m² of landscaped lane to the existing Nancy Bird-Walton Park and creation of a public toilet which is a positive contribution to the public domain amenity, and
- Further the proposed development incorporates commercial units at the ground floor which seeks to contribute to the economic growth of Botany Bay, whilst potentially fostering live work opportunities. The proposal seeks to further minimise its impacts, particularly in relation to traffic as its close proximity to Mascot Station promotes public transport patronage.

(b) The underlying objective or purpose is not relevant to the development

The underlying objectives and purposes of the FSR control remain relevant to the proposed development. The proposed development is consistent with the objectives of the FSR control in the BBLEP 2013 as detailed above.

(c) The underlying objective or purpose would be defeated or thwarted if compliance was required with the standard;

The following table provides a list of those variations approved by Council, the JRPP and the NSW Land & Environment Court in the Mascot Corridor.

Table 1 - List comparison table of other approved DA's FSR variations.

Address	FSR Control under BBLEP 2013	Approved FSR calculated under BBLEP 2013	Approval Date	Consent Body
5 Haran Street	3.2:1	3.1:1	June 2013	LEC
2-4 Haran Street	3.2:1	4:1	August 2013	JRPP
19-33 Kent Road	3.2:1	3.72	30 March 2014	JRPP
581-587 Gardeners Road	2.5:1	2.46:1	16 April 2014	JRPP
2-8 Sarah Street	3:1	3.19:1	22 July 2014	JRPP
13A Church Avenue	3.2:1	3.6:1	11 June 2014	Council
659 Gardeners Road	3.2:1	3.34:1	4 September 2014	LEC
39 Kent Road	3.2:1	4.2:1	16 July 2014	JRPP
113 Baxter Road	3:1	3.48:1	3 September 2014	JRPP

The floor space ratio control within the Botany Bay Local Environmental Plan 2013 has been, with justification together with the individual circumstances, varied in recognition of a need to meet the demands for housing and commercial development in the area. The proposed floor space ratio variation is not inconsistent with the extent of variations to which consent has previously been provided and demonstrates that in certain circumstances that compliance with the control is unreasonable or unnecessary.

(d) The development standard has been virtually abandoned or destroyed by Council's own actions

The development standard has been varied as demonstrated above in particular circumstances but is not considered to be virtually abandoned or destroyed especially as the Botany Bay Local Environmental Plan was gazetted on 26 June 2013.

The additional floor space created is a product of considered site analysis and careful spatial agreement of the built and landscape elements across the site as well as the development potential of the adjoining land to the west. Full

numerical compliance in this instance would not provide any additional benefits to the locality.

2) ***Are there sufficient environmental planning grounds to justify contravening the development standard?***

- The variation to the maximum FSR does present public benefits as outlined in the report;
- The variation is 21.3% over the site, where the maximum FSR permitted by the BBLEP 2013 is 3.2:1 (7,920m²). The proposed development seeks an FSR of 3.88:1 (9,607m²) being an additional 1,687m²;
- The B2 – Local Centre zone in which the site is located allows a range of uses including commercial buildings. If the development were offices, a compliant floor space would generate a parking requirement of 198 spaces as opposed to 175 spaces for the proposed development thus the proposal is less intensive than other permissible uses;
- The density of the proposed development is commensurate with the surrounding built form in this locality.
- The scale and bulk of the building reinforces the landmark qualities that are required for the locality to serve as a Gateway to Mascot Town centre when approached from the south;
- The overshadowing created by the development still maintains at least three hours of sunlight to neighbouring properties on June 21
- The buildings addresses the desired future character of the area and the site is located in an area that is consistent with the proposed development in the B2 – Local Centre Zone.
- This issue of acoustic amenity has been addressed through the provision of Council's apartment sizes which provide additional floor space for each unit beyond the minimum requirements of the RFDC. It is considered that occupiers of small units would rely more heavily on outdoor areas which are adversely affected by aircraft noise. The aim of Council's control is to provide larger apartment sizes so there is a lesser reliance upon outdoor communal open space areas that are adversely affected by aircraft noise.

Overall the additional floor space does not manifest itself in any substantive impact to adjoining properties in terms of residential amenity, overshadowing or visual impact To strictly apply the development standard in the absence of any tangible would be unreasonable and without basis.

3) ***Will the proposed development 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?***

In order to meet Clause 4.6 4(a)(ii) the proposed development must be consistent with the objectives of the zone and of the development standard as discussed above. These objectives of the zone are as follows:

B2 Local Centre:

- 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.*

Comment: The proposed development provides the potential for a range of uses. In this case as residential and commercial is proposed, there are a range of uses and employment opportunities are encouraged. The development is within walking distance to Mascot Station and Coward Street bus stops to the east of the site which due to its proximity will encourage the patronage of these modes of public transport. Further, a cycleway is located on the southern side of Coward Street which provides good connections to larger parts of Sydney.

As demonstrated, the proposal is consistent with the objectives of the zone and the floor space ratio control.

4)

(a) ***Whether or not noncompliance with the development standard raises any matter of significance for State or Regional environmental planning?***

There are no planning matters of state or regional significance that would result as a consequence of this variation to the development standard.

(b) ***the public benefit of maintaining the development standard?***

Pursuant to case law of *Ex Gratia P/L v Dungog Council* (NSWLEC 148), the question that needs to be answered is “Whether the public advantages of the proposed development outweigh the public disadvantages of the proposed development”.

There is not public benefit in maintaining strict compliance with the development standard given that there are no unreasonable impacts that will result from the floor space ratio exceedence, therefore, the benefits outweigh any disadvantage and as such the proposed modification to the approved development will have an overall public benefit.

(c) ***Any other matter required to be taken into consideration by the Director General before granting concurrence.***

It is considered that there are no other matters that need to be considered by the Director General before granting concurrence.

It is considered that the variation of the floor space ratio standard provides a better planning outcome through the additional public benefit provided by the applicant including greater amenity provided by the expansion of the existing park abutting the

site, the provision of a public toilet as well as well insulated apartments which are of a generous size. Thus the proposed development meets objective (1)(b) of Clause 4.6 and as such as demonstrated in the report all objectives of Clause 4.6 have been met.

As such, the Applicant has addressed the requirements of Clause 4.6 (3) and (4) and the granting of consent is consistent with the aims and objectives of Clause 4.6 of BBLEP 2013.

Further in regards to Clause 4.6(5), throughout the assessment it is evident that the proposed outcomes of the proposed development and the varying of the floor space ratio standard would not hinder or bias planning matters of state or regional significance.

It is considered that there is no public benefit in maintaining the standard as the departure allows for the orderly and economic development of the land given the site constraints which continues to meet the objectives of the zone and the floor space ratio standard.

Therefore, through this assessment and the Clause 4.6 variation provided by the applicant, it is considered that the variation to the floor space ratio control is appropriate in this instance.

Conclusion

The additional information submitted by the Applicant is considered to meet the intent of the JRPP resolution.

The Clause 4.6 Objection is considered to be well founded and worthy of support. The proposal does not result in any significant adverse impacts on the amenity of the neighbourhood and the application is recommended for approval subject to the imposition of appropriate conditions outlined in the original report.