

Request to contravene a Development Standard – JRPP 15 - 2087

JRPP Reference **2015SYW194**

Property: 2-10 First Avenue, Blacktown

Development: 18 Storey "Shop Top" Housing Development

Development Clause 4.4(2) of Blacktown Local Environmental Plan 2015

Standard Reference: Floor Space Ratio

Prepared for: Penrith Village Square Pty Limited
C/- Austcorp Property Group
PO Box 1282
Strawberry Hills NSW 2012

Prepared by: Australian Urban Estate Pty Limited

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1. Introduction

This variation under Clause 4.6 of the Blacktown Local Environmental Plan 2015 (BLEP 2015) has been prepared by Australian Urban Estate Pty Limited on behalf of Penrith Square Village Pty Limited.

It is submitted to Blacktown City Council (Council) in support of a Development Application (DA) for a mixed use development including shop top housing at 2-10 First Avenue Blacktown.

This variation request made under Clause 4.6 has been prepared to support and justify a numerical variation to the floor space ratio development standard applying to the subject site.

Clause 4.6 of the BLEP 2015 allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The Clause specifically aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that 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.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under State Environmental Planning Policy 1 – Development Standards (SEPP 1) through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe). These tests and considerations can also be applied to the assessment of variations under clause 4.6 of the LEP and other standard LEP instruments.

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court. An additional principle was established in the recent decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (Four2Five), which was upheld by Pain J on appeal.

This Clause 4.6 variation request should be read in conjunction with the Statement of Environmental Effects (SEE) prepared in relation to the proposed and it specifically relates to the development standard detailed in Clause 4.4(2) Floor Space Ratio under BLEP2015 and has been prepared in light of commentary made by the Joint Regional Planning Panel on 22nd June 2016 and subsequent advice received from Council.

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2. Background

2.1 Floor Space Variation

The total proposed GFA having regard to the total site area of the development lots equates to a FSR in the order of 6.94 :1 (the applicable FSR development standard applying to the site under BLEP2015 6.5 :1).

The above analysis is a worst case with the proposed GFA involving 949.50m² being a 6.9% exceedance of the “standard” and is summarised in **Table 1** below.

Table 1 Calculation of GFA

Site Area	2,111.00 m ²	
FSR	6.5	
Total Permissible GFA	13,721.50 m ²	
Total Proposed GFA (As per Drawing A604, A605, A606 & A607)	14,671.00 m ²	
<i>Total Additional GFA</i>	949.50	6.9%

The distribution of GFA throughout the building is set out in Table 2 below:-

Table 2 Distribution of GFA

Level	m ²
17	823.47
16	823.47
15	823.47
14	823.47
13	823.47
12	823.47
11	823.47
10	823.47
9	823.47
8	823.47
7	823.47
6	823.47
5	823.47
4	823.47
3	823.47
2	809.77
1	838.14
Ground	670.79
Total GFA	14,670.77*

*See detailed GFA Drawings No A604, A605, A606 & A607
Revision DA03 Dated 1st July 2016.

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2.2 Development Standard to be varied?

2.2.1 Floor Space Ratio

Clause 4.4 (2) Floor Space Ratio of BLEP 2015 establishes the maximum floor space ratio (FSR) permitted for all development. Under the BLEP 2015 the site has a single FSR development standard of 6.5:1.

A variation to clause 4.4(2) of BLEP 2015 is sought.

2.2.2 Objective of the Standard to be varied?

Clause 4.4 specifies the maximum Floor Space Ratio applicable to the subject site.

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

(a) to establish maximum floor space ratios as a means of controlling the density, bulk and scale of buildings,

(b) to establish the maximum floor space available for development for commercial premises, taking into account the availability of infrastructure and the generation of vehicular and pedestrian traffic.

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

2.2.3 Is the Planning Control in Question a Development Standard?

Development Standard is defined under Section 4(1) of the EP&A Act as follows:

“development standards means provisions of an environmental planning instrument or the regulations in relation to the carrying out of development, being provisions by or under which requirements are specified or standards are fixed in respect of any aspect of that development, including, but without limiting the generality of the foregoing, requirements or standards in respect of: ...

.....(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work...”

The Floor Space Ratio standard prescribed under Clause 4.4(2) of the BLEP 2015 is clearly and unambiguously a development standard and has continually been applied in this manner by the consent authority.

2.2.4 Authority to contravene a development standard?

Clause 4.6 of BLEP 2015 allows the contravention of a development standard 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.

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- (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 Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Secretary 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 Secretary 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 all of these zones.

- (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).
- (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,

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- (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,*

2.2.5 Objective of the B4 Mixed Use Zone

The objectives of the B4 Mixed Use zone are as follows:

- *To provide a mixture of compatible land uses.*
- *To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.*

2.2.6 Any other relevant Provision of BLEP 2015?

Clause 7.12 of BLEP 2015 is relevant to development in Zone B4 as it is this provision that requires the provision of a two level podium (see subclause 3 below)

- (1) *The objective of this clause is to promote employment opportunities on the land to which this clause applies.*
- (2) *This clause applies to land in the Blacktown central business district that is within Zone B4 Mixed Use, identified as "clause 7.12 (2)" on the Key Sites Map.*
- (3) *Development consent must not be granted to the erection of a building, or to a change of use of a building on land to which this clause applies, unless the consent authority is satisfied that the ground floor and first floor of the building will be used for a purpose other than residential accommodation.*

3. Clause 4.6(3) (a) – Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

The Environmental Planning grounds and justifications offered in support of this submission are summarised and outlined in **Attachment A** of this submission.

Each matter raised is unique to the site and the proposed building; with those arguments specifically relevant to the circumstances of the case as follows:-

- The recent examination by Blacktown City Council of the removal of the FSR controls within the CBD Precinct and its proposal to allow Residential Flat Buildings, without the need to involving a "mixed use".

While the planning change is in its infancy it is reflective of the changing strategic role of Blacktown CBD as a residential hub for the Commercial Centres of Parramatta & Penrith.

In the circumstances, of this strategic change by Council it would seem unreasonable to require the strict compliance with the FSR controls, which in the medium term are likely to be removed. (see **Justification 1 – Attachment A**)

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- The site area was reduced from 2,214m² to 2,111m² – a reduction of 103m² between lodging the revised DA and Council finalising its report to the JRPP.

The site area (103m²) was excluded from the application without the credit of the Gross Floor Area. If the site area is credited to the application an additional 669.5m² GFA could be achieved.

The exclusion of this area is unreasonable given the circumstances of this application. The late exclusion of the site area accounts for 70% of the non-compliance of the FSR Standard (949.50 GFA). (see **Justification 2 – Attachment A**).

4. Clause 4.6(3) (b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

The Environmental Planning grounds offered in support of this submission are summarised in **Attachment A** of this submission. The Environmental Planning Grounds offered in support of the departure from the standard include:-

- Compliance with Clause 7.12(3) generates a need for a two level podium. To ensure that the upper level of the podium will be used for a purpose “... other than residential accommodation” requires the allocation of GFA to an extent greater than the economic returns on this space would warrant. (see **Justification 1 – Attachment A**)
- Definition Contentions – areas of the GFA that it is argued should be excluded from the calculation including:-
 - Waste/Garbage Room located in a half basement - (see **Justification 5 – Attachment A**)
 - Fire Isolated Egress Paths to Stairs - (see **Justification 9 & 10 – Attachment A**)
 - CPTED Design initiatives - (see **Justification 3 & 4 – Attachment A**)
 - Access to & Facilities within the Common Open Space - (see **Justification 7 & 8 – Attachment A**)
- Urban Design Initiatives – areas where space has been allocated to activate a street frontage where future connection and interaction of adjoining sites may be possible - (see **Justification 6 – Attachment A**)

Each of these departures are justifiable on planning and urban design terms. Notwithstanding the merits of each departure the proposed development is consistent with the objectives of the B4 Mixed Use Zone and Clause 7.12(3) of BLEP 2015.

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5. Clause 4.6(4) (a) (ii) – Is the proposed development in the public interest

The proposed development is considered to be in the public interest because:

- It is permissible with consent and complies with the relevant objectives and controls of both BLEP 2015 and BDCP 2015.
- It is consistent with the objectives of the zone and the development standard
- It will provide a vital and economic viable mixed use development where the business and retail uses proposed can be commercially sustainable
- It will provide a superior street activation solution, creating the opportunity for further innovation in future development solutions on the adjoining land to all three frontages of the subject site.
- Features of the design contributing to the additional GFA will provide a safe living environment for the future residents of the apartments from a CPTED and passive surveillance perspective.

6. Summary & Conclusion

The proposed development exceeds the FSR (Clause 4.4(2) of BLEP 2015 development standard by **949.50m²** (6.9% exceedance).

The reduction of the site area, as discussed in **Section 3** and **Attachment A** of the submission above, accounts for approximately 70% of the additional GFA exceedance – **669.5m²**

The Environmental Planning considerations surrounding the GFA definition application discussed in **Section 4** above as well as in more detail in **Attachment A** account for the balance of the exceedance/variation sought:-

- Waste/Garbage Room located in a half basement - (**Justification 5 – Attachment A**) - 111m²
- Fire Isolated Egress Paths to Stairs - (**Justification 9 & 10 – Attachment A**) - 87m²
- CPTED Design initiatives - (**Justification 3 & 4 – Attachment A**) – 46m²
- Access & Facilities within Common Open Space - (**Justification 7 & 8 – Attachment A**) – 56m²

The contentions outlined in **Section 3, 4 & 5** as well as **Attachment A** accounts for 969.50m² of GFA contained in the proposed development which is more than the exceedance sought.

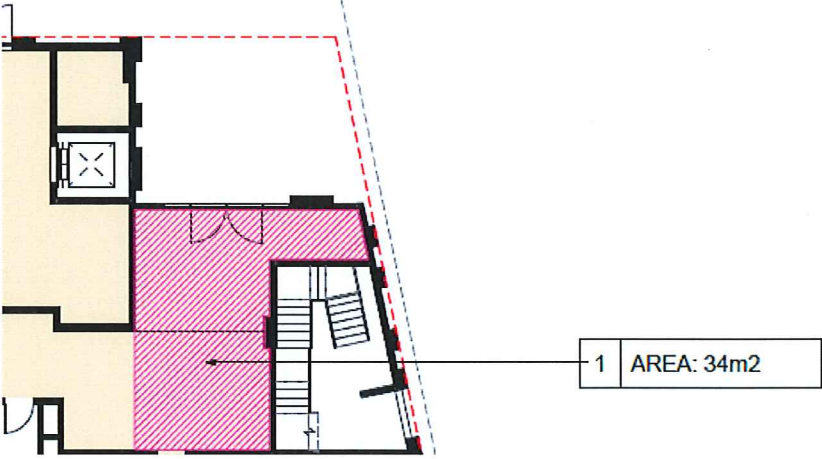
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ATTACHMENT A - ENVIRONMENTAL PLANNING JUSTIFICATIONS

Justification	Plan Reference	Environmental Planning Justifications
1	General Clause 7.12	The definition of “Shop Top Housing” describes “<i>shop top housing means one or more dwellings located above ground floor retail premises or business premises.</i>” The definition prescribes a single level of retail or business, while Clause 7.12 (3) mandates a two level podium “... <i>that the ground floor and first floor of the building will be used for a purpose other than residential accommodation</i>”. The need for a second level of retail or business is onerous and either results in token compliance or in this case a genuine desire to provide for a first floor tenancy that is viable and commercially feasible. A two level podium is a significant design challenge in view of the dimension and configuration of the subject site and the fact that it also has three road frontages. The need to activate the Level 1 along at least two street frontages – First Avenue & Zolyomi Lane results in additional GFA above that which is immediately commercially sustainable. If the GFA at Level 1 was any smaller or narrower, then it is contended Council would not be able to be satisfied that the building “...<i>will be used for a purpose other than residential</i>” – Clause 7.12 (3) BLEP 2015. To ensure the vitality as well as economic viability of such space at First floor level, the GFA need to be of sufficient depth and configuration to allow natural lighting. The challenge presented by both the “shop top housing” definition as well as the Clause 7.12(3) have been recognised recently by Blacktown City Council in its proposed deletion of the FSR controls within the CBD Precinct and its proposal to allow Residential Flat Buildings, without the need to involving a “mixed use”. While the planning change is in its infancy it is reflective of the changing strategic role of Blacktown CBD as a residential hub for the Commercial Centres of Parramatta & Penrith. In the circumstances, of this strategic change by Council it would seem unreasonable to require the strict compliance with the FSR controls, which in the medium term are likely to be removed. Approval of the application remains in the public interest as the subject application fulfils the objective of the B4 Mixed Use Zone and most certainly has been designed in a manner that Council can be satisfied that it can be used for a purpose other than residential. The volume and configuration of the GFA will ensure the economic and commercially viable development.

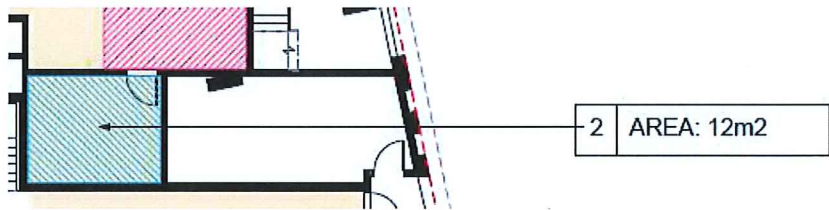
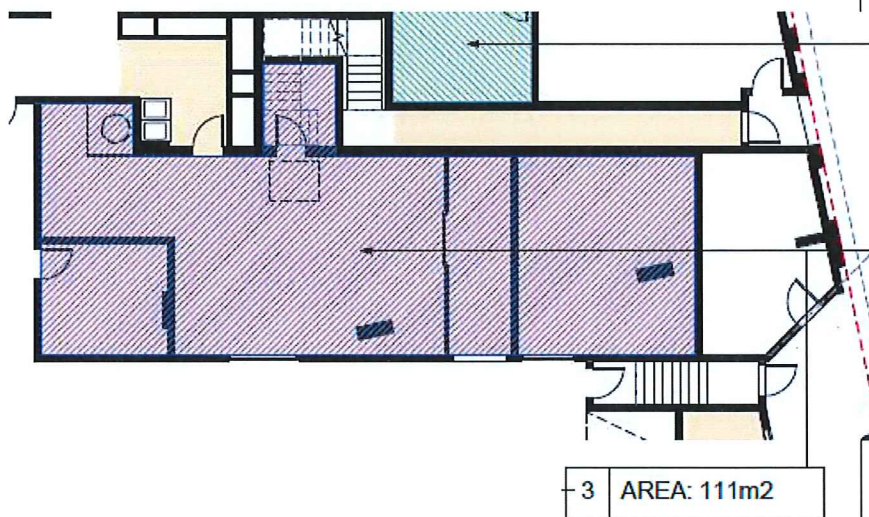
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ATTACHMENT A - ENVIRONMENTAL PLANNING JUSTIFICATIONS (*continued*)

Justification	Plan Reference	Environmental Planning Justifications
2	General Reduction of Site Area	The site area was reduced from 2,214m² to 2,111m² – a reduction of 103m². The reduction in site area arose from the dedication of additional road widening along Humphries Lane. The land formed part of the application but was excluded from the registered plan of subdivision. The site area (103m²) was excluded from the application without the credit of the Gross Floor Area. If the site area is credited to the application an additional 669.5m² GFA could be achieved. The exclusion of this area is unreasonable given the circumstances of this application. The late exclusion of the site area accounts for 70% of the non-compliance of the FSR Standard (949.50 GFA).
3	Drawing A604 Area 1 See also Drawing A104	The residential lobby area has been extended to achieve better outcomes based on principles of CPTED. An additional 34m² of GFA has been added to improve safety and surveillance of the entry to the residential tower from First Avenue. Extract identifying the area is shown below.  The provision of this space is sound urban design and in the “public interest”

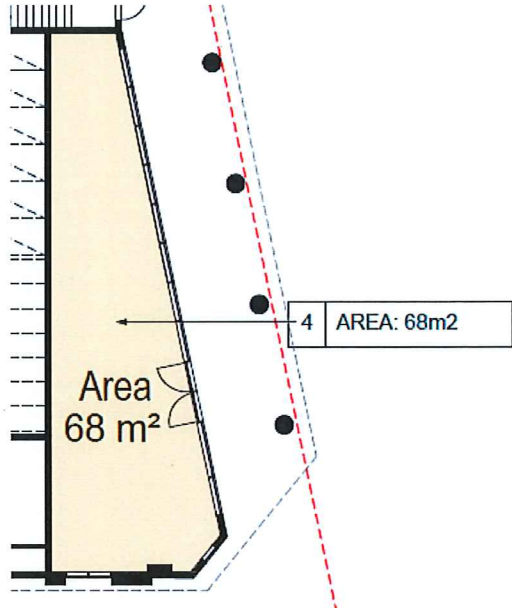
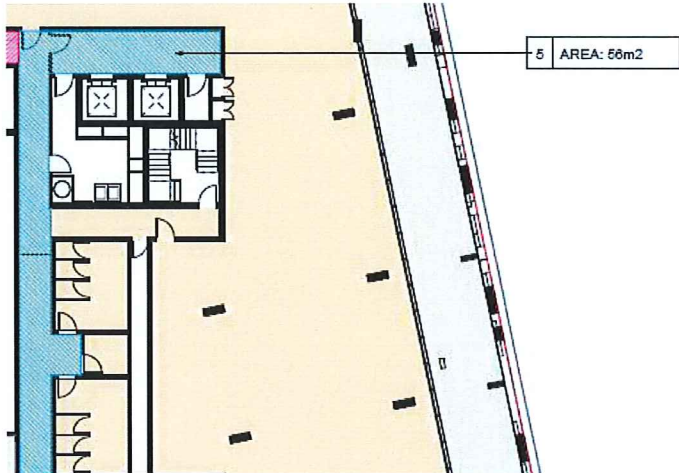
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ATTACHMENT A - ENVIRONMENTAL PLANNING JUSTIFICATIONS (*continued*)

Justification	Plan Reference	Environmental Planning Justifications
4	Drawing A604 Area 2 See also Drawing A104	A mail room has also been added off the Residential Lobby (12m²) from First Avenue. This area has been added to the GFA to comply with the CPTED Checklist produced by the NSW Police Force. Extract identifying the area is shown below. The provision of this space is sound urban design and in the “public interest” 
5	Drawing A604 Area 3 See also Drawing A104	The proposed waste rooms occupy 111m² of Gross Floor Area and are located in a “lower basement” level at the Ground Floor. While the areas have been included in the calculation of GFA in accordance with the “GFA definition” within the BLEP 2015, the areas are located at a lower level basement. The inclusion of the area as GFA is considered unreasonable; by definition the area would be excluded if located at a lower basement area.  A section through the Ground Floor of the building is shown in Drawing NO A301 Revision DA03 dated 1st July 2016. The waste rooms are located 1800mm below external street levels in a Lower Ground Floor Level.

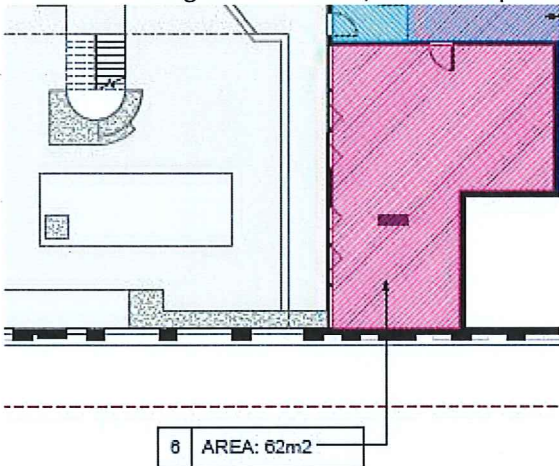
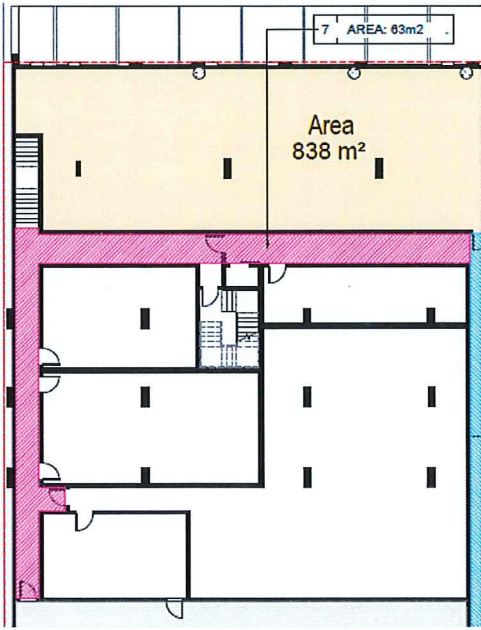
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ATTACHMENT A - ENVIRONMENTAL PLANNING JUSTIFICATIONS (*continued*)

6	Drawing A604 Area 4 See also Drawing A104	GFA (68m²) has been added to Ground floor in the vicinity of the corner of Zolyomi and Humphries Lane. The area has displaced “plant” in favour of a Coffee Shop and Open Terrace to ensure the activation of the ground level street frontage to provide passive surveillance. The area also gives opportunity for adjoining sites to provide similar areas to add vitality to the Lane system in this locality.  The diagram shows a yellow trapezoidal area labeled 'Area 68 m²'. A dashed red line runs along the right side of the area. A label '4 AREA: 68m2' points to the area.
7	Drawing A605 Area 5	A dedicated residential lift lobby and access corridor (56m²) is located on Level 1. The purpose of these facilities is to provide a secure access corridor for residents to the resident gymnasium facility located adjoining the proposed Common open space area on Level 1.  The diagram shows a blue rectangular area labeled '5 AREA: 56m2'. The area is adjacent to a yellow area and a blue area. A label '5 AREA: 56m2' points to the area.

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ATTACHMENT A - ENVIRONMENTAL PLANNING JUSTIFICATIONS (*continued*)

Justification	Plan Reference	Environmental Planning Justifications
8	Drawing A605 Area 6	The proposed Gymnasium area on Level 1 (62m²) has been enclosed by virtue of sliding stackable doors. The space opens out on to Common Open space area and is designed as “indoor/outdoor” space. 
9	Drawing A605 Area 7	There is 63m² of GFA allocated to fire corridors linking the fire egress stairs proposed in the northwest corner of the podium. The areas are an extension of the ‘stair’ and not able to be used for net lettable purposes. The area should be excluded from the calculation of GFA 

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ATTACHMENT A - ENVIRONMENTAL PLANNING JUSTIFICATIONS (*continued*)

Justification	Plan Reference	Environmental Planning Justifications
10	Drawing A605 Area 8	There is 24m² of GFA allocated to fire corridors linking the fire egress stairs proposed in the eastern section of the podium. The area is an extension of the 'stair' and not able to be used for net lettable purposes. The area should be excluded from the calculation of GFA 