

## 1. INTRODUCTION

Clause 4.6 of Botany Bay Local Environmental Plan 2013 (LEP) provides the framework for consideration of proposed variations to development standards.

This Clause 4.6 variation request forms part of the Statement of Environmental Effects supporting documentation for the proposed Development Application DA 2016/150/1.

The proposed development seeks approval for a mixed use development with residential apartments, retail space and a child care centre.

The details of the proposal are included in Section 4 of the Statement of Environmental Effects report prepared by Meriton and reflected on the amended plans prepared by Crone.

## 2. PROPOSED VARIATION

The proposal seeks variation to Clause 4.4(2) of the LEP, which states:

*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.*

The Floor Space Ratio Map nominates a maximum Floor Space Ratio (FSR) of 3.2:1 for the site. FSR is defined in the LEP as follows:

*The floor space ratio of buildings on a site is the ratio of the gross floor area of all buildings within the site to the site area.*

Gross Floor Area is defined in the LEP as follows:

*means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes:*

- (a) the area of a mezzanine, and*
  - (b) habitable rooms in a basement or an attic, and*
  - (c) any shop, auditorium, cinema, and the like, in a basement or attic,*
- but excludes:*
- (d) any area for common vertical circulation, such as lifts and stairs, and*
  - (e) any basement:*
    - (i) storage, and*
    - (ii) vehicular access, loading areas, garbage and services, and*
  - (f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and*
  - (g) car parking to meet any requirements of the consent authority (including access to that car parking), and*
  - (h) any space used for the loading or unloading of goods (including access to it), and*
  - (i) terraces and balconies with outer walls less than 1.4 metres high, and*
  - (j) voids above a floor at the level of a storey or storey above.*

The following paragraphs provide clarity on interpretation of part (g) of the Gross Floor Area (GFA) definition, which states 'car parking to meet any requirements of the consent authority'.

Pursuant to section 4.9 (Car and Bicycle Parking and Vehicle Access) of the Botany Bay DCP, development that is located within 800 metres of Mascot Station must comply with the car parking requirements of the ADG (the site is located approximately 100 metres from the Mascot Station). Part 3J-1 of the ADG states that the minimum car parking requirement for residents and visitors is set out in the Guide to Traffic Generating Developments (RMS rates). Table 1 below shows the minimum RMS car parking requirements for residents and visitors, for the proposed development.

**Table 1: Proposed Apartment Mix and Parking Requirement**

Unit Type	Proposed Mix	RMS Parking Rate	Minimum Required
1 Bedroom	91	0.6/unit	54.6
2 Bedroom	174	0.9/unit	156.6
3 Bedroom	75	1.4/unit	105.0
Visitors	340 units	1 per 7 units	48.6
<b>Total</b>			<b>365</b>

In order to provide car parking to 'meet any requirements of the consent authority', it is proposed to satisfy the above minimum car parking requirements by providing a total of 464 car parking spaces. Although this is 99 more spaces than the minimum 365 required, it is still 'car parking to meet any requirements of the consent authority' and, therefore, is excluded from the calculation of GFA. It is reiterated that this is because the RMS car parking rates are a minimum requirement – so parking must be provided to at least satisfy those rates.

On the basis of the above, the proposal seeks approval for a Gross Floor Area of 35,523 sqm, and a resulting FSR of 3.20:1.

However, Council and the Joint Regional Planning Panel (JRPP) have indicated the RMS rates are to be applied to the development statically. In other words, any parking provision below the RMS rates does not comply, and anything above the rates is allocated as GFA. Applying this position of Council and the JRPP, the proposal would have a GFA of 36,819 sqm, and a resulting FSR of 3.32:1. This amounts to 1,287 sqm above the maximum and is based on the calculations shown in Table 2 below.

**Table 2: Total Gross Floor Area of Proposed Development**

Unit Type	Proposed Mix
Residential, Retail and Childcare	35,532 sqm
Car parking*	1,287 sqm
<b>Total</b>	<b>36,819 sqm</b>

\* Based on each parking space exceeding the minimum requirement being 13m<sup>2</sup>.

On the basis of the above, it is submitted that there is no 'technical' non-compliance with FSR, but there is some disagreement on the interpretation of the definition of GFA. Notwithstanding, Council has instructed that it requires consideration of the proposal with the 3.32:1 FSR outlined above. To support this variation to the FSR control, this Clause 4.6 written statement has been prepared.

### 3. MATTERS FOR CONSIDERATION

**a) Is the requirement a development standard?**

The variation sought relates to the FSR of the proposal. The FSR control is a development standard, as it provides a numerical restriction to a particular aspect of the development, rather than a prohibition.

**b) Is the development standard excluded from the operation of this clause?**

Clause 4.6(8) outlines the exclusions of the operation of Clause 4.6, which are:

- Complying Development;
- Statement Environmental Planning Policy (Building Sustainability Index: BASIX) 2004;
- Clause 4.3(2A) – Height controls for certain sites on land in Zone R3 Medium Density Residential or Zone R4 High Density Residential.
- Clause 4.4B(3) – Exceptions to floor space ratio in Zone R3 and Zone R4.
- Clause 5.4 - Controls relating to miscellaneous permissible uses.

As the proposal does not relate to any of these types of developments, the variation to the Clause 4.4(2) FSR control sought is not excluded from the operation of Clause 4.6.

**c) What is the underlying objective or purpose of the standard?**

The objectives of the FSR control in clause 4.4 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 proposal is consistent with the above objectives, in that:

- a) The proposal results in an overall development density of 3.32:1. This is 1,287m<sup>2</sup> above the maximum GFA, being 3.6% over the permissible density control. A variation of this scale in the context of the site and surrounding development will be unperceivable in the overall scale and built form of the development. All GFA exceeding the FSR control

relates to parking provided above the RMS minimum parking rates. The parking spaces are located within the basement and podium levels of the building, which have been designed to support the proposed tower forms above. Therefore the utilisation of these building elements to accommodate parking does not contribute to an increase in bulk and scale of the building.

- b) The site is located within the Mascot Town Centre. The 1,287m<sup>2</sup> variation to the FSR control will not alter the built form from what can be supported in a compliant development. The building has been designed to address the street edges – particularly Bourke Street, with a single podium form with four apartment towers above. The inclusion of 99 parking spaces above the RMS minimum requirement are located wholly within the podium and basement form, and exclusion of these parking spaces would not alter the overall scale and design of the podium structure.

Accordingly, the proposed development will still deliver a built form that is compatible with the bulk and built form envisaged by the desired future character planned for the Mascot Town Centre.

- c) The site is located within a precinct undergoing transition from a predominantly industrial area, to a mixed-use town centre. There are a number of developments proposed or under construction surrounding the site.
- d) The departure from strict compliance with the numerical FSR control will not result in bulk or scale that is unacceptable. The proposed development includes the creation of a public park. This park will not be adversely affected by the proposed FSR of the development.
- e) The proposal will have a positive relationship with the new public park and will not have any adverse impacts on its amenity.
- f) The proposed development has an overall site area of 11,104m<sup>2</sup>. The scale of the site has been reflected in the scale and built form proposed for the development. The scale of the non-compliance with the FSR control in the context of the overall development is reflected in the variation being approximately 3.6% above the permissible density control.

The development has been designed having regard to the scale of the site, including the creation of a basement and podium for car parking and other services, which are screened from the streetscape through sleeved apartments within the podium structure. The majority of the apartments within the development are contained within four towers located above the podium structure, and these have been designed in accordance with the Apartment Design Guide (ADG) providing appropriate tower separation and floorplate designs which reflect the scale and location of the site.

- g) The proposal will deliver a total of 340 apartments, and retail and childcare. This will positively contribute to the economic development and viability of the Mascot Town Centre through:
- Redeveloping a currently under-utilise site;
  - Providing new residential housing stock within 100 metres of the Mascot train station; and
  - Providing new retailing to the future residential population.

**d) Is compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?**

In *Wehbe v Pittwater Council* (2007) NSWLEC 827 Preston CJ set-out the five ways of establishing that compliance with a development standard is unreasonable or unnecessary in support of justifying a variation. These are:

- 1) *Establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development are achieved notwithstanding noncompliance with the standard.*
- 2) *Establish that the underlying objective or purpose is not relevant to the development with the consequences that compliance is unnecessary.*
- 3) *Establish that the underlying objective or purpose would be defeated or thwarted if compliance was required that the consequences that compliance is unreasonable.*
- 4) *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 unreasonable and unnecessary.*
- 5) *Establish that 'the zoning of particular land' was 'unreasonable or unnecessary' so that 'a development standard for that zoning was also unreasonable or unnecessary as it was applied to that land' and that compliance with the standard in that case would also be unreasonable and unnecessary.*

In applying the test in *Wehbe v Pittwater Council*, only one of the ways of establishing the development standard is unreasonable and unnecessary needs to be demonstrated. As outlined in Section 3(c) above, the proposed development is able to achieve the objectives of the height development standard, even though the development results in a non-compliance with the numerical standard. On this basis, the development is able to demonstrate that the development is unreasonable and unnecessary in accordance with the first way Preston CJ outlines in *Wehbe v Pittwater Council*.

In the recent decision of *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 Pain J upheld the decision of Pearson C which indicated that a variation must be justified on sufficient environmental planning grounds particular to the circumstances of the proposed development and development site rather than grounds that would apply to a similar development on the site or a development in the vicinity.

However, in a the more recent case of *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 Preston CJ stated that the consent authority did not have to be satisfied directly that compliance with each development standard was unreasonable and unnecessary in the circumstances of the case, but only indirectly by being satisfied that the appellant's written request adequately addressed the matter in Clause 4.6(3)(a) that compliance with each development standard was unreasonable and unnecessary. This decision indicates a move away from the more prescriptive approach to consideration of Clause 4.6 variation requests taken in *Four2Five v Ashfield Council*.

Applying Preston's CJ decision in *Randwick City Council v Micaul*, the proposed development is able to demonstrate that strict compliance with the numerical FSR development standard is unnecessary in the particular circumstances of the proposal, as the development is able to:

- Meet the objectives of the development standard as outlined in Section 3(c);
- Meet other built form development standards;
- Satisfactorily address all relevant planning considerations as detailed in section 3(e); and
- There are various other examples of previously approved developments in the Mascot Station area that exceed (significantly in some instances) the 3.2:1 FSR control. These are shown in the table below.

The table above clearly demonstrates that the development standard has been virtually abandoned or destroyed in this instance. It also demonstrates that the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary, and that the underlying object of purpose would be defeated or thwarted if compliance was required, and therefore compliance is unreasonable.

Site	FSR
671-683 Gardeners Road	3.43:1
7-9 Kent Road, Mascot	3.78:1
19-33 Kent Road, Mascot	3.72:1
214 Coward Street, Mascot	4.24:1
230 Coward Street, Mascot (25 John Street)	3.60:1
7 Bourke Street & 30-32 John Street, Mascot	3.75:1
8 Bourke Road & 37 church Avenue	3.82:1
208-210 Coward Street, Mascot	4.00:1
2-4 Haran Street, Mascot	3.79:1
246 Coward Street, Mascot	3.88:1
39 Kent road, Mascot	4.26:1

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

The variation to the FSR development standard is considered well founded and reasonable for the following reasons:

- The proposed development is consistent with the underlying objectives and purpose of the development standard as demonstrated above;
- The proposed non-compliance relates to the LEP 2013 provisions for FSR will not have any adverse impact on the bulk and scale of the development when viewed from surrounding properties;
- Despite the non-compliance with the FSR control, the proposal is consistent with the scale of development anticipated in the locality, including the overall height of building, and the front, side and rear setbacks. It is noted that the site has the ability to support basement levels, which enable additional FSR to be accommodated on the site without resulting in an increased built form than contemplated by the planning controls;

- The proposal will support the delivery of a communal open space with public access during the day, which will positively contribute to the establishment of the Mascot Town Centre; and
- The provision of the additional car parking beyond the minimum required can be supported on traffic planning grounds, as evident in the Traffic Report prepared by Arup.

**f) Will the proposed development be in the public interest because it is consistent with the objectives of the particular standard and objectives for development within the zone in which the development is proposed to be carried out?**

As outlined throughout the SEE and this Clause 4.6 Variation Statement, the proposal is consistent with the objectives of the FSR development standard and objectives of the B4 zone.

The principle aim of the proposal is to provide new residential apartments complemented by a new childcare centre. The provision of a new public park is also proposed.

The proposed variation to the FSR control does not result in the loss of amenity to the neighbouring properties as a result of overshadowing or visual impact and the proposed FSR is therefore considered to be acceptable particularly when balanced against the benefits of the project which are:

- Provision of new housing and employment opportunities on land zoned for this purpose within the short term.
- Development of an under-utilised site (being currently occupied by industrial warehouses) identified for future mixed use development (being zoned B4 Mixed Uses).
- Contribution to the delivery of key infrastructure through the payment of the relevant Section 94 contributions.
- The proposal will provide positive social outcomes through the provision of on-site housing, child care facilities and a new public park.

**g) Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.**

The proposed variation to the FSR development standard does not conflict with any matters of State or regional environmental planning significance, nor does it conflict with any State Planning Policies or Ministerial directives. The significance of the non-compliance is acceptable in the context of the overall development of the Mascot area and the broader Bayside Council area.

**h) The public benefit of maintaining the development standard.**

It is considered that due to the absence of any demonstrable adverse impacts arising from the proposed development, adherence to the subject development standards would hinder the attainment of the objectives of the Act. Further, the proposed development is consistent with the objectives of the development standard. Therefore, such adherence would not be in the public interest in this instance.

## **4. CONCLUSION**

The proposal seeks variation to the FSR development standard. The proposal will have no adverse impacts and will have no conflict with any matters of State or regional environmental planning significance. Nor does it conflict with any State Planning Policies or Ministerial directives.

Overall, it is considered that the proposed variation to the FSR control (Clause 4.4) can be justified on the following grounds:

- The proposed variation is minor in scale, resulting in an 3.6% variation to the FSR control.
- There are numerous other examples of developments that have been approved in the Mascot Station area that exceed the maximum FSR – some significantly.
- The proposal will result in a development, which remains consistent with the objectives of the B4 Mixed Use zone of the site.
- The proposal remains consistent with the objectives of the FSR development standard.
- The proposed development will deliver a public park, which will positively contribute to the residential amenity of the Mascot Town Centre.
- The proposal is consistent with all other relevant development standards.
- The public benefit of maintaining the development standards in this particular proposal is not put at risk by allowing a departure in this particular instance.

On the basis of the above, support should be given to the proposed variation to the FSR development standard under the provisions of clause 4.6 of the LEP.