

SYDNEY CENTRAL PLANNING PANEL

JRPP No	2017SCL015 DA
DA Number	DA 14/207/03
Local Government Area	Bayside Council
Proposed Development	Modification Application to modify Development Consent No. DA-14/207, which was determined by the Sydney East Joint Regional Planning Panel, by enclosing the undercroft area to create a 30 place childcare centre at ground level, enclosing the balconies across Levels 1 – 6 to create a second bedroom, enclosing the open terraces across Levels 1 – 6 to create an additional studio, incorporating 2 penthouse apartments on Level 7, providing 12 additional car parking spaces in the basement and several internal modifications to the loading area, office and plant rooms of the approved commercial building.
Street Address	53-79 Baxter Road & 67-79 Baxter Road, 62-66 Robey Street, Mascot
Applicant	Zauner Construction
Owner	Regional Express Holdings Ltd, Greatland Development Pty Ltd, & B W Davies Pty Ltd
Number of Submissions	No submissions
Regional Development Criteria (Schedule 4A of the Act)	The application is required to be reported to the Sydney Central Planning Panel for determination pursuant to Clause 3 of Schedule 4A of the <i>Environmental Planning and Assessment Act 1979</i> as the capital investment value exceeds \$20 million.
List of All Relevant s79C(1)(a) Matters	<ul style="list-style-type: none"> • <i>State Environmental Planning Policy 55 – Remediation of Land</i>; • <i>State Environmental Planning Policy 64 –Advertising and Signage</i>; • <i>State Environmental Planning Policy (Infrastructure) 2007</i>; • <i>Botany Bay Local Environmental Plan 2013</i>; • <i>Botany Bay Comprehensive Development Control Plan 2013</i>.
List all documents submitted with this report for the	<ul style="list-style-type: none"> • Planning Assessment report with Schedule 1 – refusal reasons

panel's consideration	
Report by	Kim Johnston/Brendon Clendenning – Senior Development Assessment Officer

RECOMMENDATION

It is RECOMMENDED that the Sydney Central Planning Panel resolve pursuant to Section 96(2) of the *Environmental Planning and Assessment Act 1979*, to refuse to modify Development Consent No. 14/207, at 53-79 Baxter Road & 67-79 Baxter Road, 62-66 Robey Street, Mascot, for the reasons outlined in Schedule 1.

EXECUTIVE SUMMARY

Development Application No.14/207 was approved by the Joint Regional Planning Panel (JRPP) on 14 May 2015 for the demolition of existing structures and the construction of a serviced apartment complex comprising the following:-

- One (1) level of basement car parking for 115 vehicles and bicycle storage, 18 car spaces at ground level (total car parking of 133 spaces) with 3 drop-off/pick-up spaces at the front of the building from Robey Street;
- Eight (8) storey building comprising 146 serviced apartments with a retail space, pool, guest dining area and meeting room on the ground floor;
- Loading dock and service areas on the ground floor accessed from Baxter Road;
- Through-site link between Baxter Road & Robey Street;
- Publicly accessible playground;
- Construction of 3 storey warehouse/office building fronting Baxter Road and loading dock at ground level and single storey warehouse fronting Robey Street.
- Lot consolidation and subdivision into two (2) lots; and
- Associated landscaping and stormwater drainage works, ancillary access and servicing works and minor relocation of existing services and facilities.

Prior to the determination of the development application by the then JRPP, amendments were required to reduce the gross floor area (GFA) which are discussed in this report. This proposed modification essentially seeks the

reinstatement of those changes which reduced the bulk and scale of the original development.

BACKGROUND

The original development application was lodged with Council on 30 October 2014 for the demolition of existing structures and the construction of a serviced apartment development comprising 160 apartments and an adjoining commercial office/warehouse development.

This original proposal involved significant variations to both the maximum height and floor space ratio (FSR) development standards pursuant to Clauses 4.3 and 4.4 of the *Botany Bay Local Environmental Plan 2013* (BBLEP 2013) respectively. The FSR variation originally requested was a 1,816.3m² (14.96% variation) exceedance and a 5.89 metres height exceedance. These exceedances were reduced (but not in their entirety) prior to reporting to the JRPP.

The original development application was reported to the JRPP on the 16 April 2015 by Council with a recommendation for deferral subject to the submission of amended plans which generally achieved compliance with the floor space ratio and building height development standards. The Panel made the following recommendation on 16 April 2015:

- 1) *The majority of the Panel (John Roseth, David Furlong and Julie Savet-Ward) resolves to defer the determination of the application to allow the applicant to submit amended drawings, which*
 - a) *reduce the FSR of the proposal to 1.5:1; and*
 - b) *reduce the plan area of the roof feature to no more than one-third of the plan area of the roof. The reason for this requirement is that a smaller structure is more easily accepted as an “architectural roof feature” as defined in clause 5.6 of the Botany Bay LEP 2013.*
- 2) *The Panel requests the applicant to lodge amended drawings by 24 April 2015 and the council assessment officer to provide a supplementary report, by 30 April 2015, that assesses whether the amended drawings comply with the requirement in 1(a) and 1(b) above. The Panel will consider the application again at a public meeting on 14 May 2015.*
- 3) *Peter Fitzgerald and George Glinatsis voted to refuse the application on the grounds that it does not comply with the FSR and height controls.*

This information was provided to Council in late April 2015 with a letter provided with the additional information stating that:

“This reduction in FSR has been achieved primarily by the deletion of apartment space and the introduction of further private balcony spaces to some apartments, as well as communal balcony spaces at the Eastern end of the building”.

In total, the following changes were made to the plans by the applicant to comply with the FSR of the original proposal:-

- Deletion of the child care centre and the gym and games/library rooms on the ground floor;
- Deletion of the two (2) penthouse apartments below the roof feature;
- Reduction in the lateral extent of the proposed architectural roof feature by approximately 7.9 metres at both the eastern and western ends to bring it under Clause 5.6;
- Deletion of studio units and 2 x 2 bed units at the eastern end on each level for levels 1 – 4 and replacement with a communal sun terrace and 2 x 1 bed units with a new balcony for each unit and reduction in unit size from a 2 bed to 1 bed unit and additional balcony in the north-western corner at the western end of the building;
- Deletion of a studio unit and 2 x 2 bed units at the eastern end and replacement with a communal sun terrace and 2 x 1 bed units with a new balcony for each unit and reduction in unit size from a 2 bed to 1 bed unit and additional balcony in north-western corner and reduction in unit size of 1 bed unit and additional balcony in south-western corner at the western end of the building on Levels 5 and 6;

These amended plans reduced the GFA by 525.4m² to achieve a compliant overall FSR of 1.49:1 (max FSR is 1.5:1). The application was subsequently approved by the JRPP on 14 May 2015 with a Notice of Determination issued by Council on 25 May 2015.

This proposed modification includes changes which seek to reintroduce these elements that were deleted under DA-14/207 to achieve compliance with the direction given by the JRPP.

SITE DESCRIPTION

The site is located on the northern side of Baxter Road between O’Riordan Street to the west (approx. 300m) and Botany Road to the east (approx. 275m). The site is bound by Baxter Road to the south, Robey Street to the north, and residential and commercial premises to the east and west. The subject site is located approximately 150m north of the northern boundary of Sydney Airport, and approximately 200 metres from a strategic bus corridor along Botany Road. Mascot Railway Station is located approximately 1km to the north of the site.

The site is a broadly rectangular-shaped parcel of land, with a total site area of 8,096m². The site has primary street frontages along Baxter Road (southern) and a boundary to Robey Street (northern) of approximately 120 metres. The eastern and western side boundaries to adjoining development are approximately 59 metres in length (**Figure 1**).



Figure 1: Location Map

The site is relatively flat with a slight fall of approximately 1.3 metres from the southwestern corner along Baxter Road to the north-east corner along Robey Street. The site is located in the B5 Business Development zone.

On the northern side of Robey Street consists of residential properties, with John Curtain Memorial Reserve located beyond those residential properties. To the east, on the southern side of Robey Street, are single and two storey dwellings. The eastern end of Robey Street contains recent residential flat developments with a building height of up to 5 storeys. An application for a further 5 storey residential flat development, at 19-25 Robey Street, is currently under assessment, with determination to be undertaken by the SCPP. The south eastern end of Robey Street contains predominately low density residential dwellings.

On the southern side of Baxter Road, there is currently an at-grade car parking area. Council has approved a multi-storey commercial car park on this land opposite the site. Further to the west, on the southern side of Baxter Road, an 8 storey hotel is currently under construction. Other development within Baxter Road consists of commercial and industrial buildings, with building heights between 2 and 4 storeys. The eastern end of Baxter Road is characterised by low density residential dwellings.

The mixed nature of surrounding development can be attributed to the mixed zoning around the site (**Figure 2**), which includes R2 Low Density Residential, B4 Mixed Use, B5 Business Development, RE1 Public Recreation, and SP2 Infrastructure (sewerage, classified roads, and Sydney Airport).

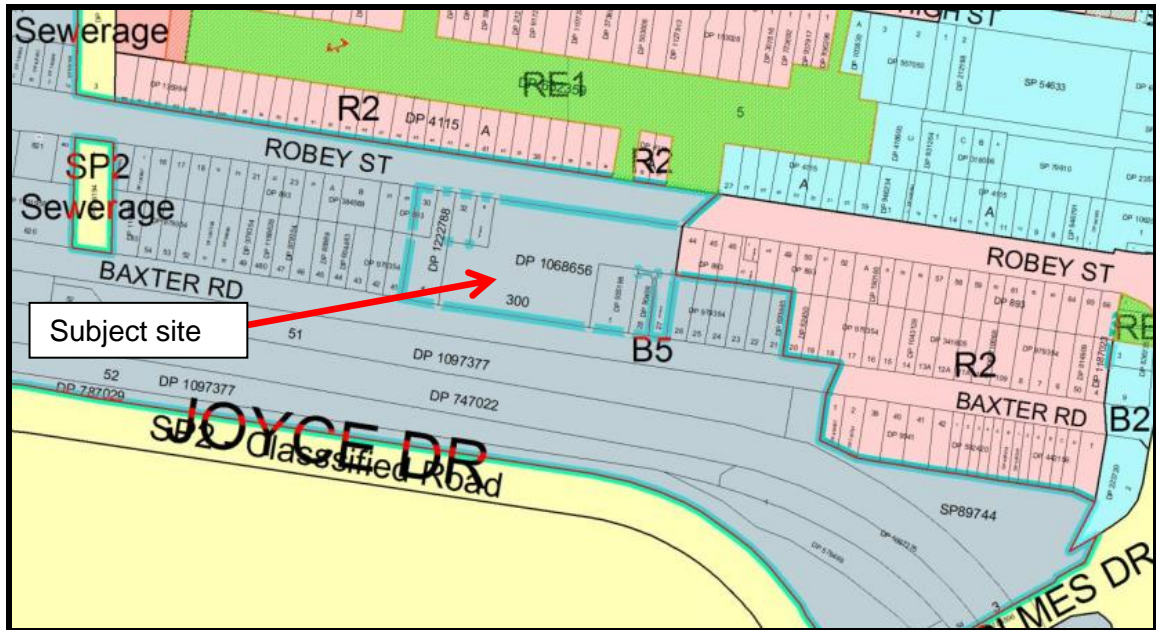


Figure 2: Zoning Map

A recent inspection of the site has revealed that the approved development is nearing completion as shown in the site photographs below.



Figure 3: The subject site looking west along Baxter Road toward O'Riordan Street



Figure 4: Photograph of the subject site with the approved building under construction from Baxter Road looking north toward Botany Road



Figure 5: Photograph of the subject site with the approved building under construction from Robey Street



Figure 6: Photograph of the subject site with the approved building under construction from Robey Street looking east

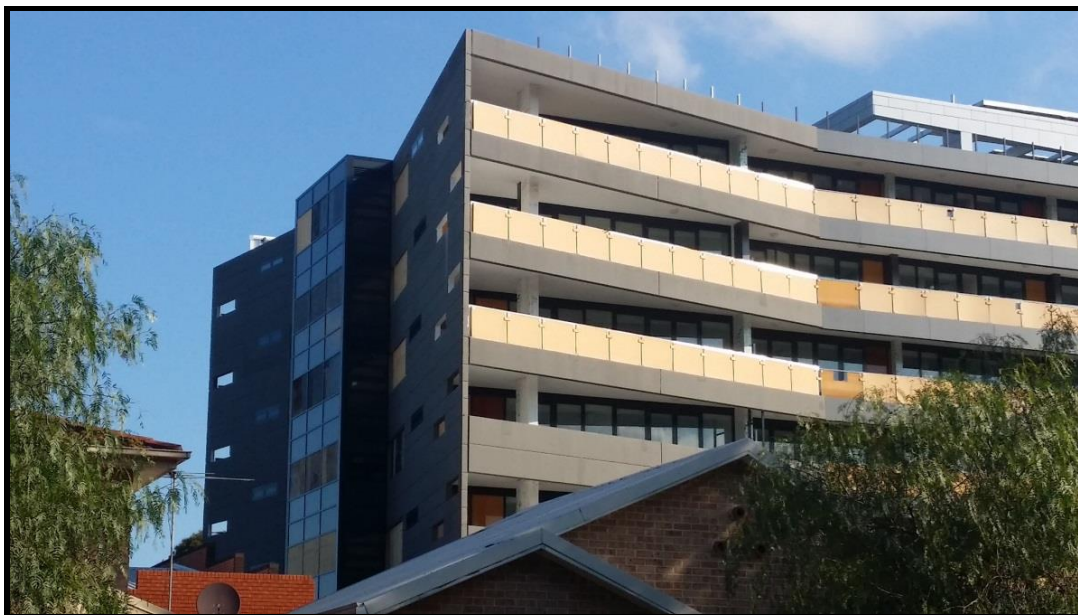


Figure 7: Photograph of the subject site with the approved building under construction showing an oblique view of the western elevation from Robey Street.

APPROVED DEVELOPMENT

Council received Development Application 14/207 on 30 October 2014, seeking consent for a serviced apartment building.

The development application was determined by the Joint Regional Planning Panel, pursuant to Clause 3 of Schedule 4A of the *Environmental Planning and Assessment Act 1979* (EP&A Act) as the Capital Investment Value of the development exceeds \$20 million.

The development is Integrated Development, pursuant to Section 91A of the EP&A Act as the development requires approval from the NSW Department of Primary Industries under the *Water Management Act 2000*, given the works on the subject site are proposed to enter groundwater and constitute aquifer interference activities. Concurrence was provided as part of the original application.

The development was amended prior to approval, and the approved development is described as follows:

- Demolition of existing structures;
- Construction of a serviced apartments complex:-
 - One (1) level of basement car parking for 115 vehicles and bicycle storage, 18 car spaces at ground level (total car parking of 133 spaces) with 3 drop-off/pick-up spaces at the front of the building from Robey Street;
 - Eight (8) storey building comprising 146 serviced apartments with retail space, pool, guest dining area and meeting room on the ground floor; and
 - Loading dock and service areas on the ground floor accessed from Baxter Road;
- Through-site link between Baxter Road & Robey Street;
- Publicly accessible playground;
- Construction of 3 storey warehouse/office building fronting Baxter Road and loading dock at ground level and single storey warehouse fronting Robey Street.
- Lot consolidation and subdivision into two (2) lots; and
- Associated landscaping and stormwater drainage works
- Ancillary access and servicing works and minor relocation of existing services and facilities.

The development has been modified once previously pursuant to Section 96(1A) of the EP&A Act (DA-2014/207/2), for additional signage, and changes to windows. A further Section 96(1A) is currently under assessment, seeking to provide signage to the warehouse (DA-2014/207/4), which is not part of this assessment.

DESCRIPTION OF MODIFICATION

The proposed modification seeks approval for internal and external amendments to the design, pursuant to Section 96(2) of the EP&A Act. The proposed modification involves the following changes to the approved development:-

- Addition of a 30 place child care centre by enclosing the undercroft area at the western end of the ground level (210.64m²);
- Enclosure of the gym, pool and pool deck with aluminium framed glazed and operable walls at the eastern end of the ground level (468.30m²);

- Enclosure of the small balconies at the western end of the building on Levels 1 to 6 to create a second bedroom for Units 1.01, 2.01, 3.01, 4.01, 5.01, 5.08, 6.01 and 6.08 (eight (8) additional bedrooms in total);
- An additional studio apartment on each level for Levels 1 to 6 (Units 1.21, 2.21, 3.21, 4.21, 5.22 & 6.22) by enclosing the open communal sun terraces at the eastern end of building (six (6) additional studio apartments in total);
- Increase to the size of the adjoining units on either side of the additional studio units at the eastern end of the building to two (2) bedroom units (previously one (1) bedroom) (Units 1.20, 1.22, 2.20, 2.22, 3.20, 3.22, 4.20, 4.22, 5.21, 5.23, 6.21 & 6.23);
- Addition of two (2) penthouse apartments on Level 7 (Penthouse East & West);
- Extension of the architectural roof feature laterally by 8.5 metres in each direction to accommodate the proposed penthouse apartments;
- Internal modifications to the loading area, office and plant rooms in the approved commercial/warehouse building comprising 162.5m² of additional office space, a reduction in warehouse space of 206m² and relocation of the plant room at Levels 2 and 3 to the roof top;
- A change to the external material to the balconies along the western elevation from the approved masonry finish to glass panels along the face of the balconies; and
- Twelve (12) additional car parking spaces in the basement.

The proposed modification involves an additional eight (8) serviced apartments (studio and penthouse apartments) and 1,897m² of additional GFA. The proposed changes to the eastern and western elevations are illustrated in **Figures 8 to 13**. While the overall height of the development is not proposed to be increased from the approved height of 26.78 metres (SE corner, RL 31.250), the actual height exceedance over the maximum height limit of 22 metres is increased to 4.78 metres (from 638mm at the eastern end for parapet) as this area of the building is no longer considered to satisfy the definition of an *architectural roof feature* pursuant to Clause 5.6 of BBLEP 2013, given the proposed penthouses constitute floor space. A comparison of the approved and proposed development is provided in **Table 1** below.

Table 1: Comparison of Approved Development and Proposed Modification

Criteria	Approved			Proposed		
Gross Floor Area	12,222sqm			14,119sqm		
Floor Space Ratio	1.49:1			1.73:1		
Car Parking	133			142 + two set down		
No of Apartments	146			154		
Unit Mix	Unit Type	No	%	Unit Type	No	%
	Studio	44	30	Studio	50	33
	1 Bed	36	25	1 Bed	16	10
	2 Bed	54	37	2 Bed	74	48
	3 Bed	12	8	3 Bed	14	9



Figure 8: Existing Eastern elevation with approved balconies boarded up (temporarily) which are proposed to become additional bedrooms



Figure 9: Eastern elevation (from Robey Street)



Figure 10: Photo inside the currently approved 'communal sun terrace', proposed to be a studio apartment (eastern elevation)



Figure 11: Photo inside the currently approved balcony, proposed to be a second bedroom (eastern elevation)



Figure 12: Existing 'as built' western elevation



Figure 13: Existing as-built 'balcony' on western elevation proposed to be converted to a second bedroom

ASSESSMENT OF MODIFICATION

The issues raised by the proposed modification include the following, which are considered in detail below:

- (a) Floor Space Ratio
- (b) Building Height
- (c) Car parking
- (d) Use of Child Care Centre
- (e) Serviced Apartments and Unit Mix
- (f) Potential unauthorised works

(a) Floor Space Ratio (FSR)

The maximum floor space permitted at the site pursuant to Clause 4.4(2) of the BBLEP 2013 (and Part 6.3.3 of BBDCP 2013) is 1.5:1, allowing a maximum gross floor area of 12,226.5m². The original proposal was initially reported to the JRPP with an FSR of 1.56:1, however, was subsequently amended (as outlined above), and later approved, with an FSR of 1.49:1, with a GFA of 12,222m² (serviced apartments comprising 10,864.7m² and office/warehouse component comprising 1,357.2m²).

This proposed modification seeks an FSR of 1.73:1 with a GFA of 14,119m², which exceeds the FSR development standard by 1,893m² (15% variation). Accordingly, although not strictly required for modification applications, the applicant has lodged a Clause 4.6 variation to the FSR development standard, with the following key justifications (as outlined in the SEE):

- *It would not change the overall height, bulk and scale of the development as the additional floorspace would be largely contained within the approved building envelope.*
- *It would improve the overall design and appearance of the development by enclosing the terraces at the eastern and western end of the building to create a uniform facade.*
- *It provides weather protection and better amenity for guests using the pool and gym facilities.*
- *It would not result in any additional impacts on the adjoining properties or the public domain in terms of overshadowing, privacy or view impacts*
- *The additional traffic generated by the proposal would not have any noticeable impact on the surrounding road network*
- *The increased parking demand can be accommodated within the basement parking area and complies with Council's minimum parking requirements.*
- *It would not result in any additional impacts on the surrounding area compared to a compliant development.*
- *It would reduce visual privacy impacts compared to the approved development by converting the communal terraces to private balconies.*
- *The lateral extension of the roof feature to accommodate the penthouse apartment will enhance the appearance of the development when viewed from above on the common northern approach to the airport.*

- *It would result in no visual change to the development from the public domain.*
- *The inclusion of a childcare centre on the site would have a significant public benefit for the local community.*

The proposed additional floor area results from the following proposed amendments to the design in this modification application:

- Increasing the area on the ground floor for loading/unloading areas in the warehouse;
- Enclosure of the ground floor terrace area for a childcare centre at western end of the building;
- Enclosure of the pool and gym at the eastern end of the building;
- Conversion and enclosure of balconies/terraces at the eastern and western ends of the building from Levels 1 to 6; and
- Provision of two (2) penthouse apartments below the architectural roof feature on Level 7.

This proposed additional floor space is illustrated below.

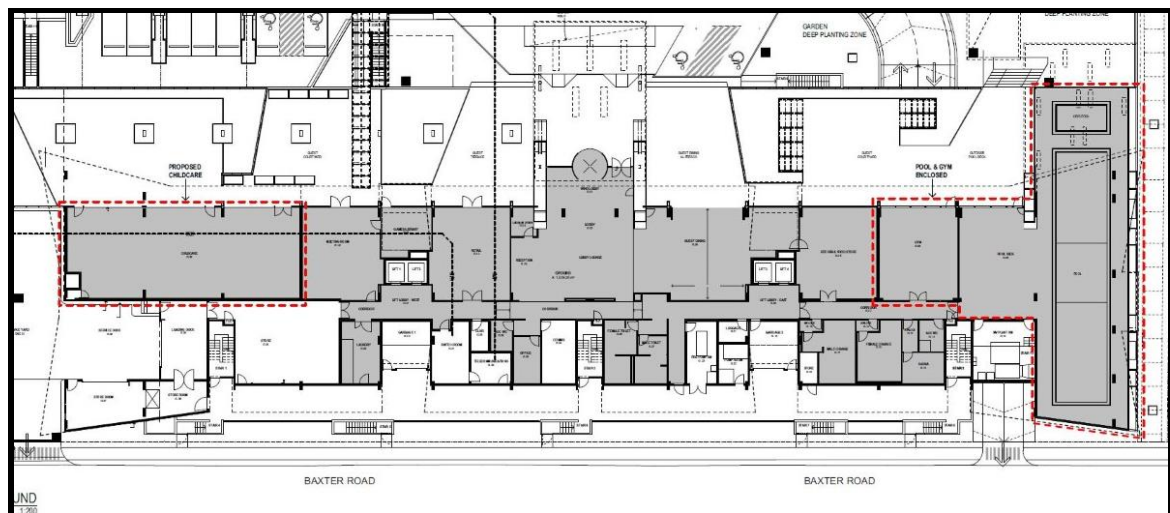


Figure 14: Proposed Ground Floor Plan - enclosure of the western and western ends
 (Source: Clark Keller, dwp Suters, December, 2016)

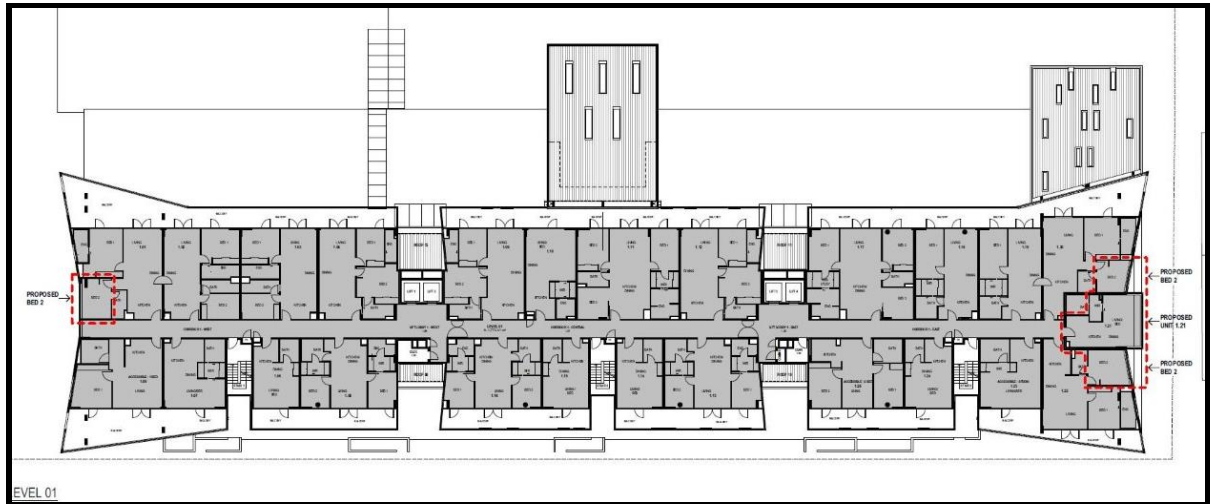


Figure 15: Proposed Level 1 Plan - enclosure of balconies at the eastern and western ends of the approved building (Source: Clark Keller, dwp Suters, December, 2016)

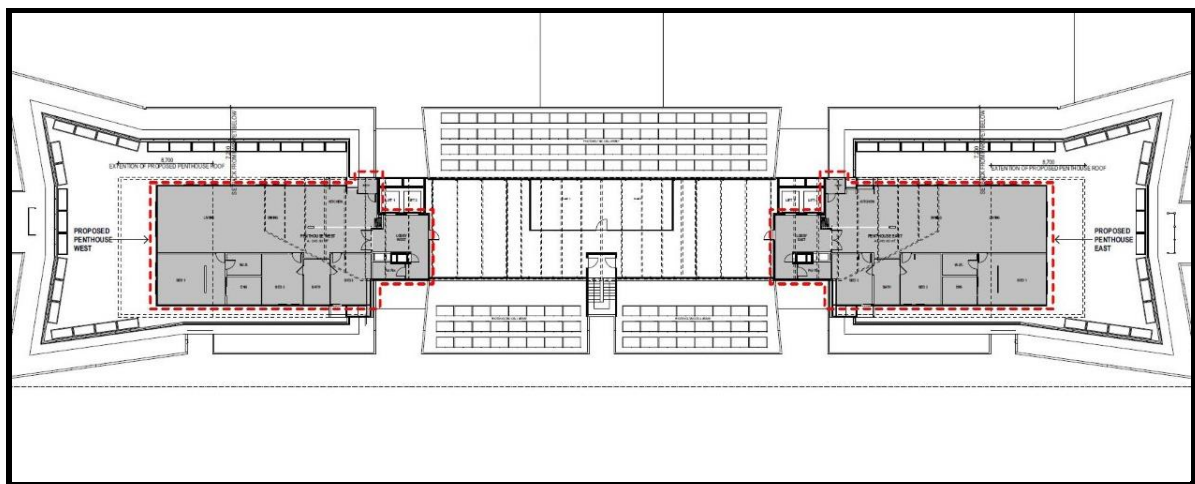


Figure 16: Proposed Penthouses -Level 7 (Source: (Source: Clark Keller, dwp Suters, December, 2016)

There are four (4) tests which need to be satisfied by the consent authority, being preconditions to the granting of development consent, which include the following which are discussed in detail below:-

- (1) *That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (CI 4.6(3)(a);*
- (2) *That there are sufficient environmental planning grounds to justify contravening the development standard (CI 4.6(3)(b);*
- (3) *The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) (CI 4.6(4)(a)(i)), and*
- (4) *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 (CI 4.6(4)(a)(ii)).*

The submitted Clause 4.6 variation states that the proposed modification and associated excessive FSR is consistent with the zone and development standard objectives and that there are sufficient environmental planning grounds upon which to vary the standard.

Reasons given for the justification of the non-compliance include that the proposal does not result in any change in the overall height, bulk and scale compared to the approved development and that the proposed additional floor space is largely contained within the approved building footprint. The same concerns which were raised with the original proposal are held in this regard, being that the resulting bulk and scale of the proposed additional GFA is unsatisfactory and will result in an unacceptable built form.

The Clause 4.6 variation is assessed below having regard to the tests outlined above and the applicant's Clause 4.6 variation:

- (1) *That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a))*

The reasons given in the Clause 4.6 variation are that the proposed modification satisfies the objectives of the FSR development standard due to the proposal not having adverse impacts on adjoining properties, the containment of the additional FSR within the approved building envelope, the lack of any view loss and the compliance with the car parking requirements.

These reasons are not supported in this instance as it is considered that the proposed additional floor space will have a detrimental impact on the surrounding properties and the public domain given the increased bulk and scale which will result from the additional FSR. This is particularly evident at the rooftop which has been approved with a lightweight architectural roof feature.

This feature, however, is proposed to be replaced with two (2) large penthouse apartments which not only require the addition of FSR at this sensitive, visually dominant portion of the building, but also the extension of the architectural roof feature, which in itself also increases bulk to the building.

Furthermore, the removal of balconies at both the eastern and western ends of the building reduce the articulation in the building form, such that the building will become a mass of floor space with little vertical relief.

The inconsistency with the FSR development standard objectives is considered in test No 4 below.

- (2) *That there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b))*

The Clause 4.6 variation indicated that there were sufficient environmental planning grounds to warrant varying the FSR standard. These reasons included:

- There will be no visual impacts resulting from the additional floor space,
- The new penthouse apartments are integrated into the roof feature and would not be readily visible from the immediate area,
- There would be no change to the overall height, bulk and scale of the development and that the height, bulk and scale of the development is not out of character with its locality.
- There would be no discernible visual change to the external appearance of the building from adjoining properties or the public domain
- The proposal would improve the overall design and appearance of the development by enclosing the terraces at the eastern and western ends of the building creating a more uniform building façade in accordance with the original design intent.
- The lateral extension to the roof feature to its originally well-conceived proportions would enhance the aeronautical character of its design and add visual interest when viewed from above on the common northern approach to Sydney Airport;
- The lack of any adverse impacts on the internal amenity of the building, the external amenity to adjoining properties and the limited additional traffic generation.

These reasons are not supported, with the exception of the likely limited impact on the amenity of adjoining properties in terms of view loss, overshadowing or privacy which is agreed would be minimal.

There will be visual impacts resulting from the proposal while there will be changes to the bulk and scale of the development when there is an additional 1,893m² proposed. The aeronautical character of the roof feature when viewed from above is of minimal streetscape value, which is the dominant angle from which the building will be viewed. It is also not agreed that the proposed penthouses will be integrated into the roof feature as it is considered that the visual benefits of the roof feature would be significantly lessened due to the additional floor space proposed within it.

(3) The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) (Cl 4.6(4)(a)(i))

It is acknowledged, following the decision in *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*, that the Council does not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly, by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary [39].

While it is acknowledged that the Applicant's Clause 4.6 has adequately addressed the matters required in Clause 4.6(3)(a), such reasons are not supported as outlined in this report.

- (4) *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 (CI 4.6(4)(a)(ii)).*

The objectives of the FSR development standard (CI 4.4(1) of BBLEP 2013) include:

- (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 considered to be inconsistent with Objectives (b), (c), (d) and (e) of the FSR development standard for the following reasons:-

- The proposal will be incompatible with the bulk and scale of the existing development in the area and the future desired character of the locality due to the inclusion of the additional floor space within the visually prominent areas of the building. The removal of balconies and terraces and the inclusion of the penthouses at the roof top level reduces the articulation of the built form and increases the bulk and scale such that the building will not be compatible with surrounding development. The proposed enclosure of the ground floor will also increase the bulk of the building, however, its impact is less than that of the upper level and the infilling of balconies.
- The proposed additional FSR will result in an inappropriate visual relationship between new development and the existing character of the area. The proposed additional FSR will have an adverse visual impact as outlined below.
- There is likely to be an adverse visual impact for the adjoining residential properties and the public domain due to the excessive bulk and scale proposed in this modification. The proposed additional FSR will be visible from various public and private vantage points, including John Curtin Reserve and the streetscapes of Robey Street and Baxter Road (refer to Figures 17 & 18).



Figure 17: View of approved development from John Curtin Reserve to the north of the site (Source: CI 4.6 (Height) Plandev, December 2016)



Figure 18: View of proposed modification from John Curtin Reserve to the north of the site (Source: CI 4.6 (Height) Plandev, December 2016)

- It is acknowledged that there is unlikely to be any significant adverse impacts from the additional floor space proposed on the amenity of adjoining properties in terms of view loss, overshadowing or privacy, however, an adverse impact is likely to occur in terms of visual amenity given the excessive bulk and scale proposed. The proposed additional FSR results in an inappropriate bulk and scale for the building.
- The proposal will adversely affect the streetscape in that the development has a greater bulk and scale, largely due to the filling in of the decorative roof feature and the removal of balconies and terraces from the ends of the approved building (illustrated in **Figures 19 - 22**).



Figure 19: Approved montage from the North along Robey Street (Source: Clark Keller, dwp Suters, December, 2016)



Figure 20: Proposed montage from the North along Robey Street (Source: Clark Keller, dwp Suters, December, 2016)

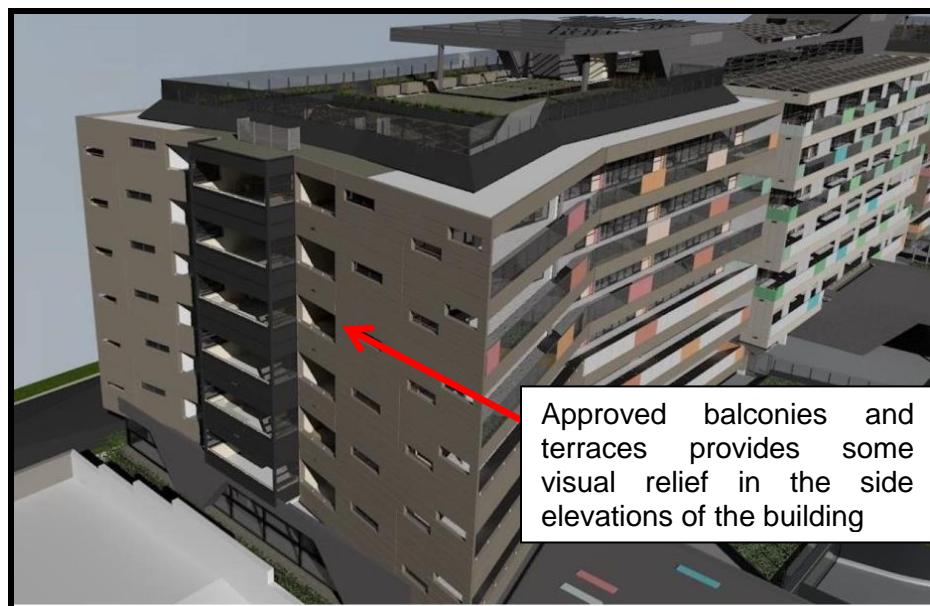


Figure 21: Approved North East Perspective with balconies and terraces (Source: Clark Keller, dwp Suters, December, 2016)

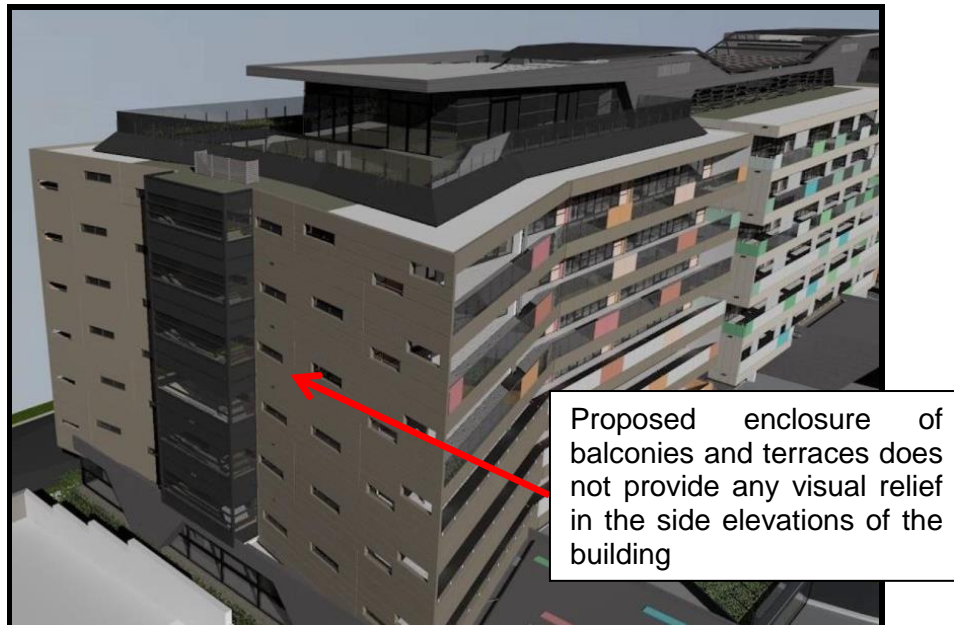


Figure 22: Proposed North East Perspective without balconies and terraces (Source: Clark Keller, dwp Suters, December, 2016)

- This adverse visual impact on the streetscape and surrounding properties and the public domain is likely to reduce the enjoyment of these properties due to the excessive bulk and scale of the proposed modification.

In the circumstances of the case, it is considered that the proposed modification is inappropriate and strict adherence to the development standard in this instance is not unreasonable or unnecessary.

The departing floor space results in an adverse visual impact due to the resulting excessive bulk and scale and is not supported. Such impacts are greatest for the proposed penthouse apartments, however, is equally inappropriate to enclose the balconies/terraces at the eastern and western ends of the building given these areas provide relief in the massing of the building.

Maintaining and enforcing the development standard in this case will not unreasonably prevent the orderly and economic development of this site as the site is capable of sustaining a compliant development. The approved development provides a high quality serviced apartments and commercial development that facilitates the orderly and economic development of the land in a manner that is appropriate in the Precinct and which complies with the relevant development standards.

Accordingly, it is considered that the variation to the FSR development standard sought in the applicant's Clause 4.6 is not supported as the departure is inconsistent with the objectives of this development standard and is not in the public interest. On the basis of this assessment, it is concluded that the variation cannot be supported.

(b) Building Height

The maximum building height permitted at the site pursuant to Clause 4.3(2) of the BBLEP 2013 (and Part 6.3.4 of BBDCP 2013) is 22 metres. The original proposal involved a building height of 27.89 metres (SE corner) to the lift and plant room, which was above the originally proposed penthouse apartments on Level 7 (now proposed again in this modification).

This originally proposed height was 5.89 metres above the maximum height limit. Subsequent amendments to the proposal, prior to reporting to the JRPP, reduced the overall height to 26.78 metres, 4.78 metres over the maximum height limit, with the removal of the penthouses and the provision of an architectural roof feature, which was reported to the JRPP.

The proposal that was later approved by the JRPP included the reduction in the overall size of the plan area of the roof feature to be approximately one third of the total roof area, as was sought by the panel. The Supplementary Council Report indicated that the maximum non-compliance of the amended proposal was 638mm at the eastern end, with the other protruding elements comprising an architectural roof feature pursuant to Clause 5.6 of BBLEP 2013.

The proposed modification seeks to reintroduce the elements that were earlier deleted to achieve compliance with the panel's direction, including the originally proposed penthouses which were removed prior to consideration by the JRPP, and thus the overall non-compliance is now proposed to be 4.78 metres above the maximum height limit.

This height exceedance has increased from 638mm to 4.78 metres as the area of the building above this height no longer satisfies the criteria, pursuant to Clause 5.6 of the BBLEP 2013, to be considered an architectural roof feature. This criteria requires that the architectural roof feature *does not include floor space area and is not reasonably capable of modification to include floor space area* (CI 5.6(3)(a)(iii) of BBLEP 2013).

This proposed modification seeks a maximum height of 26.78 metres, which exceeds the maximum height development standard by 4.78 metres (21% variation).

The proposed north elevation, south elevations, and roof plan are shown below, with the maximum height line and the additional non-complying elements highlighted in red on the plans.

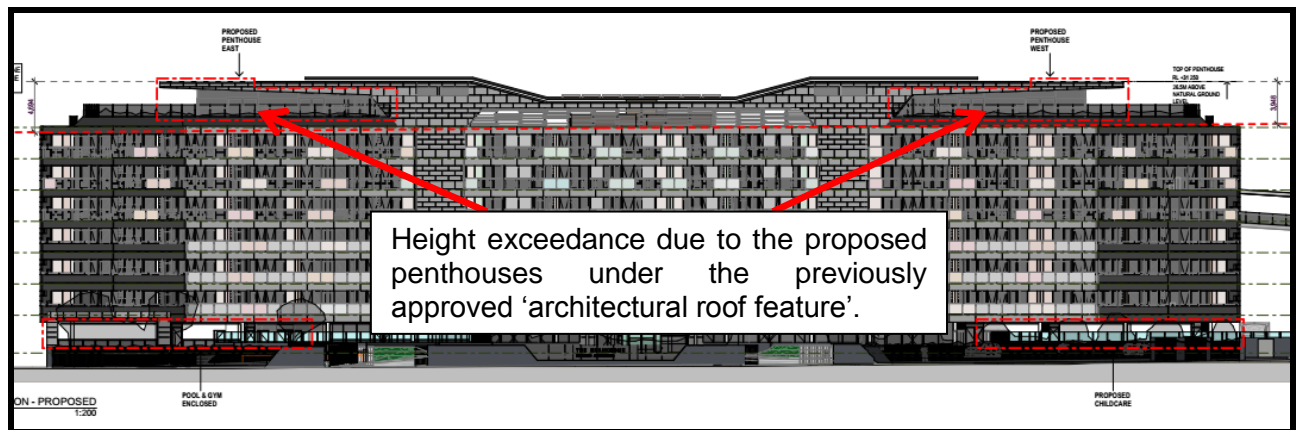


Figure 23: Proposed northern elevation (Source: Clark Keller, dwp Suters, December, 2016)

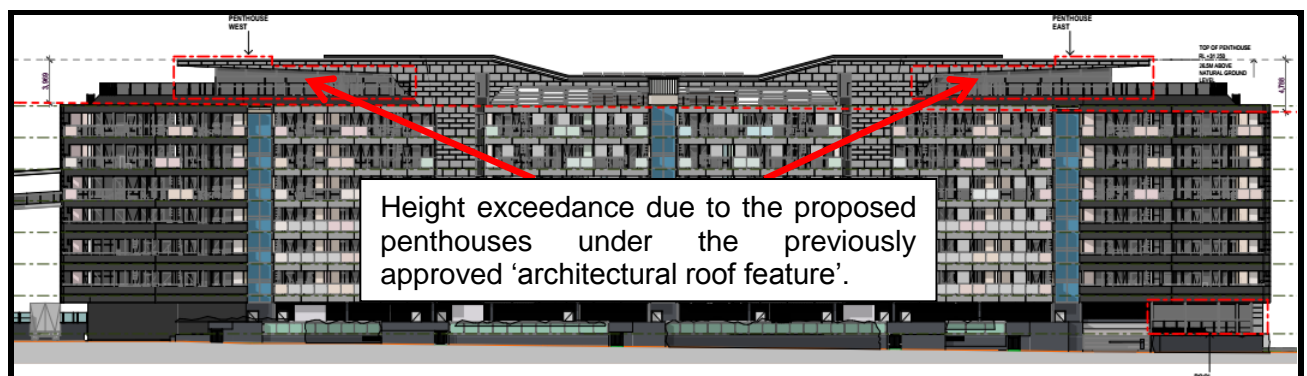


Figure 24: Proposed southern elevation (Source: Clark Keller, dwp Suters, December, 2016)

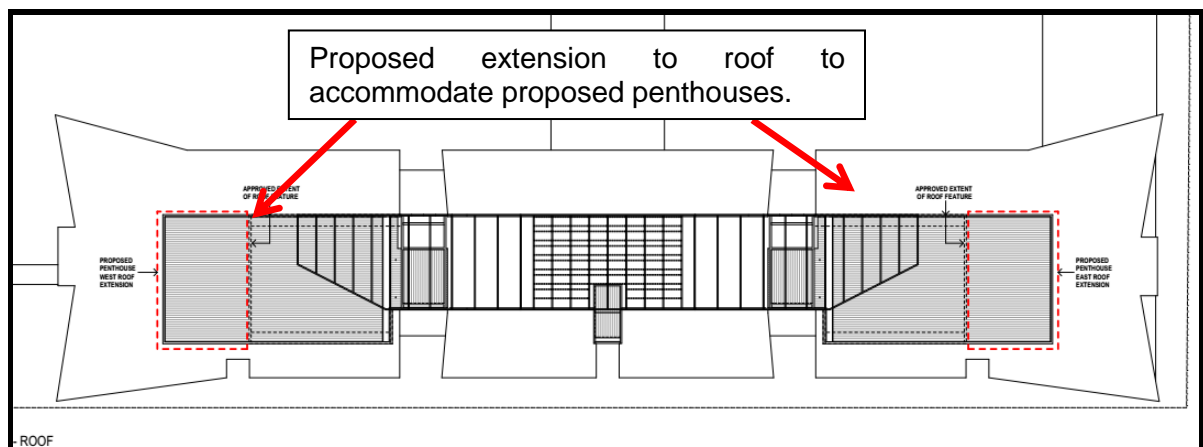


Figure 25: Proposed Roof Plan (Source: Clark Keller, dwp Suters, December, 2016)

Accordingly, although not strictly required for modification applications, the applicant has lodged a Clause 4.6 variation to the maximum height development standard, with the following key justifications (as outlined in the SEE):

- The proposed modification would result in a technical non-compliance above the 22m height control as there would be no change to the

overall height of the approved development when measured to the top of the roof feature.

- There would be no change to the scale of the development as the overall height of the building would not change.*
- It would not result in any notable change to the overall appearance of the building and would have no adverse visual impact on the surrounding area.*
- It would not result in any additional impacts on the adjoining properties or the public domain in terms of overshadowing, privacy or view impacts.*
- It is consistent with the desired future character of the area, which allows a range of bulky retail, commercial and warehouse uses.*
- It maintains the building transition between the low scale residential development to the north and east of the site along Baxter Road and Robey Street, and the high density commercial developments to the west and south of the site*

As outlined above, the proposed additional height results from the proposed inclusion of penthouses below the existing roof line in this modification application. The approved roof feature is also proposed to be extended 8.5 metres in both an eastern and western direction to accommodate the proposed penthouse apartments.

As with the FSR Clause 4.6 above, there are four (4) tests which need to be satisfied by the consent authority, being preconditions to the granting of development consent, which include the following which are discussed in detail below:-

- (1) That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a));*
- (2) That there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b));*
- (3) The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) (Cl 4.6(4)(a)(i)), and*
- (4) 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 (Cl 4.6(4)(a)(ii)).*

The submitted Clause 4.6 variation states that the proposed modification and associated non-complying height is consistent with the zone and development standard objectives and that there are sufficient environmental planning grounds upon which to vary the standard.

Reasons given for the justification of the non-compliance include that the proposal does not result in any change in the overall height, bulk and scale compared to the approved development, that the proposed height non-compliance would not alter the built form of the development and that the

orderly and economic development of the site is appropriate for the area. The same concerns which were raised with the original proposal are held in this regard, being that the resulting bulk and scale of the proposed additional floor space of the penthouses, which increases the height non-compliance to 4.78 metres, is unsatisfactory and will result in an unacceptable built form.

The Clause 4.6 variation is assessed below having regard to the tests outlined above and the applicant's Clause 4.6 variation:

- (1) *That compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a))*

The reasons given in the Clause 4.6 variation that the development standard is unreasonable and unnecessary in this instance include that the proposed modification satisfies the objectives of the height development standard. The Clause 4.6 states that the objectives are satisfied due to the proposal not changing the overall height, bulk and scale, there being no adverse impacts on adjoining properties, the lateral extension of the roof feature having beneficial visual impacts when viewed from above (aircraft) and that the roof feature would not be discernible from ground level.

These reasons are not supported as it is considered that the proposed additional floor space at the rooftop due to the proposed modification will have a detrimental impact on the surrounding properties and the public domain as a result consequence of the increased bulk and scale which will result from the additional floor space at this location.

While the overall height of the building (to the top of the roof) is not being increased, the additional floor space completely changes the visual characteristics of this portion of the building, going from a lightweight, slender aluminium feature to an area of 490m² with solid walls which 'fills in' the roof feature which was to define the top of the building. The proposed additional floor space essentially removes the effect of this feature from the building as the roof top essentially becomes another level of the building, albeit with a reduced footprint.

This additional floor space at this prominent area of the building will be readily discernible from surrounding sites and the public domain (refer to Figures 18 and 20) given this is currently approved only as a lightweight architectural roof feature. This feature was required to be amended by the JRPP to reduce its impact on the overall height and scale of the building. The provision of this additional floor space at this location, and the extension of the roof feature itself to accommodate the proposed penthouses, is still unsatisfactory. The extension of the architectural roof feature, on its own, also increases bulk to the building.

The visual benefits from above are considered to be a minor consideration, with the potential impact on the streetscape, the overall bulk and scale of the building being ascribed a higher priority.

The inconsistency with the height development standard objectives is considered in test No 4 below.

(2) That there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b))

The Clause 4.6 variation indicated that there were sufficient environmental planning grounds to warrant varying the height development standard. These reasons included:

- There will be no visual impacts resulting from the additional height/floor space.
- The new penthouse apartments are integrated into the roof feature and would not be readily visible from the immediate area,
- There would be no change to the overall height, bulk and scale of the development and that the height, bulk and scale of the development is not out of character with its locality.
- There would be no notable visual change to the external appearance of the building from adjoining properties or the public domain as it would be barely discernible in the context of the entire development, and would not materially change the appearance of the development.
- The lateral extension to the roof feature to its originally well-conceived proportions would enhance the aeronautical character of its design and add visual interest when viewed from above on the common northern approach to Sydney Airport;
- The lack of any adverse impacts on the internal amenity of the building, the external amenity to adjoining properties and the limited additional traffic generation.
- In the immediate vicinity of the building Council has previously approved buildings up to a height of 37.56 m.
- The proposal would have public benefits including not altering the environmental impacts assessed and approved as part of the existing development consent, would provide a recognisable architectural feature for airplane passengers arriving at Sydney Airport, would assist in satisfying the demand for high end corporate and business short stay accommodation close to Sydney Airport, would maintain the roof feature as a decorative element and provide a high quality design and improvements when viewed from above and it would continue to be compatible with the bulk and scale of existing commercial desired future character of the locality whilst maintaining an appropriate building transition at the residential interface.

These reasons are not supported, with the exception of the likely limited impact on the amenity of adjoining properties in terms of view loss, overshadowing or privacy. The provision of high end corporate and business short stay accommodation, the roof feature having positive visual effects from the air and the proposal not altering environmental impacts of the approved development are not public benefits. There is no public benefit arising from the proposed modification. The provision of limited environmental impacts are required by the planning controls.

It is also considered that the roof feature has been lost, given the proposed additional floor space provided at this level essentially removes the visual benefits of this feature being a lightweight visual structure on the roof of the building.

It is considered that the proposal will result in adverse visual impacts due to the resulting bulk and scale of the proposed additional floor space.

- (3) *The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) (Cl 4.6(4)(a)(i))*

It is acknowledged, following the decision in *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7*, that the Council does not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary [39].

While it is acknowledged that the Applicant's Clause 4.6 has adequately addressed the matters required in Clause 4.6(3)(a), such reasons are not supported as outlined in this report.

- (4) *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 (Cl 4.6(4)(a)(ii)).*

The objectives of the Height development standard (Cl 4.3(1) of BBLEP 2013) include:

- (a) *to ensure that the built form of Botany Bay develops in a coordinated and cohesive manner,*
- (b) *to ensure that taller buildings are appropriately located,*
- (c) *to ensure that building height is consistent with the desired future character of an area,*
- (d) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,*
- (e) *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.*

The proposal is considered to be inconsistent with Objectives (a), (d) and (e) of the height development standard for the following reasons:-

- The proposed modification does not represent a coordinated or cohesive response to the development of the built form given the proposed incremental changes to the floor space and height of this building beyond the approved development. The original proposal

involved these changes and was deemed unsatisfactory by the JRPP. Proposing additional floor space to a building that is nearing completion and which seeks to remove an architectural roof feature which was carefully considered and amended by the JRPP in the original application is not a coordinated approach to the built form.

The grounds in the Clause 4.6 variation that the proposed modification does not result in any change to the overall height, bulk and scale of the development is not supported. The height does change, in terms of the definition, as well as the need for a Clause 4.6 while the bulk and scale of the development certainly changes as outlined in this report.

- There is likely to be an adverse visual impact for the adjoining residential properties and the public domain due to the excessive bulk and scale proposed in this modification. The proposed additional floor space and the height will be visible from various public and private vantage points, including John Curtin Reserve and the streetscapes of Robey Street and Baxter Road (refer to Figures 18 & 20). The proposal will be incompatible with the bulk and scale of the existing development in the area and the future desired character of the locality due to the inclusion of the additional floor space within visually prominent areas of the building.
- The proposal will adversely affect the streetscape in that the development has a greater bulk and scale, largely due to the filling in of the decorative roof feature and the addition of the proposed floor space in the form of the penthouses (Figure 20).

In the circumstances of the case, it is considered that the proposed modification is inappropriate and strict adherence to the development standard in this instance is not unreasonable or unnecessary.

The departing height results in an adverse visual impact due to the resulting excessive bulk and scale and is not supported. Maintaining and enforcing the development standard in this case will not unreasonably prevent the orderly and economic development of this site as the site is capable of sustaining a compliant development.

Accordingly, it is considered that the variation to the height development standard sought in the applicant's Clause 4.6 is not supported as the departure is inconsistent with the objectives of this development standard and is not in the public interest. On the basis of this assessment, it is concluded that the variation cannot be supported.

(c) Car Parking

The proposed modification seeks to introduce the following design changes which have the potential to increase the car parking required by *Botany Bay Comprehensive Development Control Plan 2013* (BBDGP 2013):

- Eight (8) additional serviced apartments including six (6) studio apartments and two (2) penthouse apartments;
- Child care centre for 30 children; and
- Proposed changes to the floor area of the warehouse/office building.

The approved development provided surplus car parking for the proposal beyond the BBDCP 2013 requirements and accordingly, the car parking required for the proposed additional serviced apartments (studio's and penthouses) is generally able to be accommodated by this approved surplus of car parking spaces on the site.

The proposed modification includes the provision of an additional twelve (12) car parking spaces in the approved basement, which has been provided without any increases to the overall size of the basement. There are no changes proposed to the approved car parking at ground level.

Including these proposed additional car parking spaces, the total proposed car parking provided under this modification application comprises **148 car spaces**, including 127 spaces in the basement, 18 spaces at ground level and three (3) set-down/pick up spaces at the front of the building at ground level.

The proposed modification is assessed against the car parking requirements of Part 3A of BBDCP 2013 in **Table 2** below, which indicates the proposed modification is consistent with the requirements of BBDCP 2013 in terms of the quantity of car parking required.

There are potential concerns, however, with the compliance of the basement car parking level with the Australian Standard for car parking, *AS 2890.1 - Parking facilities Off-street Car Parking*. Council's Engineer did not have sufficient time to assess this aspect of the proposal given an amended basement plan was provided by the applicant after this report was due. Notwithstanding this, the amended basement plan provided with the modification application (received by Council on 19 May 2017) provides an additional three (3) car parking spaces beyond the initial modification plan submitted upon lodgement of this modification application in January 2017, resulting in a total of 12 additional car parking spaces proposing to be provided in the basement from the originally approved basement plan for the development.

These concerns include the aisle width in the NW corner now being only 3.9 metres wide instead of the previously approved 5 metres as there are additional spaces proposed at the end of each of the two aisles running in a North-South direction in this area of the basement. There are also concerns with the length of the main aisle of car parking, running in an East-West direction in the centre of the basement, which is very long and which was of concern in the original application. Given these concerns, it is considered that it has not been sufficiently demonstrated that the proposed modification complies with AS 2890.1, which is contrary to Part 3A.3.1 (Car Park Design) of BBDCP 2013.

Table 2: Car Parking Assessment under Part 3A of BBDCP 2013

Building Use	Car Parking Requirement		Car Parking Provision	Comply
Serviced Apartments – 154 units	1 space/1.5 units	103 spaces	145 spaces (127 spaces in basement + 18 spaces at ground level)	Yes (subject to detailed assessment of child care parking under separate application)
	1 space/2 employees	5 spaces		
	1 taxi pick-up/set-down/300 rooms	1 pick-up/set-down		
Child care centre – 30 children	1 space/2 employees	3 spaces (may change due to age distribution of children)		
	1 space/5 children +	6 spaces		
	1 pick-up/set-down space/20 children	2 set-down/pick up		
Warehouse – 369.52m²	2 spaces or 1 space/300m² GFA (whichever is greater) = 2 spaces			
Office – 1023.7m²	1 space/40m² GFA = 26 spaces			
Accessible parking	Part 3C: Serviced apartments - 1 accessible space/accessible room (Table D3.1 of BCA)		9 disabled spaces (included in total)	Yes
	Office/warehouse - 1 accessible vehicle space (up to 50 spaces) (Table 3.5 of BCA) Child care centre - 1 accessible vehicle space (up to 50 spaces) (Table 3.5 of BCA)			
Total	148 spaces (including the set down spaces and the 9 disabled spaces)			

(d) Use of child care centre

The proposed modification involves the enclosure of the western end of the ground floor and use for a child care centre for 30 children. This proposed child care centre, which did not form part of the original development consent, is considered to be contrary to the requirements of Section 96 of the EP&A Act, in that the proposal for a child care centre is not substantially the same development as that originally approved. The proposed child care centre is therefore not supported.

It is, however, possible for Council to approve the additional walls and gross floor area required to accommodate the centre (subject to a further application), pursuant to Section 96(2) of the EP&A Act. A condition would then be required that a further development application was required for the actual use and fit out of the proposed centre.

The FSR matter is considered in detail above and was found to be unsatisfactory. While the effect of the proposed additional floor space is greater at the upper levels, there are still adverse impacts of bulk and scale at the ground floor. The open areas on the ground floor assist with reducing the bulk and scale of the building when viewed from the street. Accordingly, the additional floor space proposed, which was to comprise a future child care centre, is not supported.

It should also be noted that the required parking for the childcare centre will be dependent on the age distribution of the children under care, and that this can be considered under any future application.

(e) Serviced Apartments and Unit Mix

BBDP 2013 provides controls relating to serviced apartments, which were considered in the original development application. The changes to the number of bedrooms and balconies are considered in this assessment in **Table 3**. It is noted that the requirement for a serviced apartment building containing more than 20 apartments to have a maximum of 60% of studio or 1 bedroom apartments has been removed from the BBDP 2013 controls.

The proposed modification is consistent with these controls and therefore the composition and layout of the serviced apartments proposed in this modification application is considered to be acceptable. As outlined above, however, the bulk and scale of the proposed modifications and the significant increase in gross floor area, makes the proposed modification unsatisfactory. Therefore, the proposed modifications are not supported.

Table 3: Consideration of Part 7L.2 General Requirements for Serviced Apartments

Control	Proposal	Comply
General		

C1 The maximum period for occupation of a serviced apartment is 3 months.	Provided as a condition of consent which is not proposed to be modified.	✓
C2 Occupants cannot use a serviced apartment as a permanent residential address.	Refer above.	✓
C3 Each bedroom shall not accommodate more than two persons.	Provided, no changes are proposed in this application.	✓
C4 If an application proposes to convert a serviced apartment development or a building that has been used as serviced apartments to a residential building then compliance with Clause 6.10 of the Botany Bay Local Environmental Plan 2013 and Part 4C of this DCP is required.	The proposed modification retains the use of the site for serviced apartments.	✓
Design		
C5 Sleeping rooms are to provide a minimum 5.5m ² per occupant where habitation is for more than 28 consecutive days.	The proposed new bedrooms range in size from 10.5m ² to 13.3m ² .	✓
C6 Sleeping rooms are to provide a minimum 3.25m ² per occupant where habitation is for less than 28 consecutive days.	Refer above.	✓
C7 Where a development proposes serviced apartments in conjunction with a residential flat building the entire development must address the requirements of <i>State Environmental Planning Policy No 65—Design Quality of Residential Flat Development</i> .	Cl 4(4) of SEPP 65 states that it does not apply to serviced apartments and there is not a residential flat building also proposed in this instance.	N/A
C8 Where a development proposes serviced apartments in conjunction with residential apartments, the units to be provided as serviced apartments must not be located on the same floor as permanent residential apartments. Communal open spaces are not to be accessible from serviced apartments. Separate ground floor lobbies and lifts for access to the different uses within the building must be provided.	There is not a residential flat building proposed in this instance.	N/A
C9 Developments are to be designed to minimise visual and acoustic privacy impacts to residential land uses within the immediate vicinity. (<i>The immediate vicinity includes residential buildings directly adjoining the boundary of the site and buildings on the opposite side of a road way or pedestrian/cycle link.</i>)	The proposed modification involves removing balconies and replacing them with units, which will not adversely impact on the privacy of adjoining properties. It is also unlikely that the proposed penthouse apartments will adversely affect the privacy of adjoining properties.	✓
C10 The main access point is to be located at the main street frontage of the property. <i>Note: Access points apart from emergency exits should be avoided at the boundaries of the property where an amenity impact could be created to adjoining developments.</i>	There are no changes proposed to the approved entry and exits form the building.	✓
Facilities		

C11 A wash tub, washing machine and clothes drying facilities are to be provided within each serviced apartment.	There are no changes proposed to the internal layout of the approved serviced apartments. The proposed new studio and penthouse apartments have laundry facilities provided.	✓
C12 Communal washing facilities, bathrooms and kitchen areas shall not be provided within a serviced apartment building.	There are no common facilities provided. There is a laundry in the back of house area on the ground floor, which was approved in the original development for use by staff. There are no changes proposed.	✓
C13 A refrigerator to maintain food below 5 degrees Celsius must be provided in each apartment.	No changes to the internal layout of the serviced apartments as originally approved.	✓
C14 If cooking facilities and food preparation areas are provided within individual apartments they must not be located in sleeping rooms.	No changes to the internal layout of the serviced apartments as originally approved. The proposed new studio units have a kitchen adequately separated from the sleeping area, while the proposed penthouses have a kitchen, and bedrooms are provided as separate rooms.	✓
C15 Tiered sleeping facilities (e.g. bunk beds) are not permitted within serviced apartments.	No changes to the internal layout of the serviced apartments as originally approved. Bunks are not proposed in this application.	✓
C16 A garbage room including recycling facilities is to be provided within the building or basement level/s.	There are no changes to the waste storage areas on the ground floor of the approved development.	✓
C17 Storage facilities are to be provided within each serviced apartment to cater for clothing and travel luggage.	There are no changes to the internal layout of the approved apartments. The proposed new studio and penthouse apartments are an adequate size to provide for storage.	✓
C18 Toilet and shower facilities within each serviced apartment shall comply with the provisions of the BCA.	Compliance with the BCA is a condition of the original approval which is not proposed to be modified.	✓
Plan of Management		

C19 A Plan of Management (POM) is required to be submitted with a development application. A POM is a written report which describes how the ongoing operation of serviced apartment development will be managed to reduce its impact upon the amenity of surrounding properties. The POM allows Council to exercise control over the ongoing operation of a premises by requiring, as a condition of consent, that the premises operate in accordance with the POM. A condition of consent may require that a POM be regularly revised and submitted to Council.	The original approval included a POM, which is not proposed to be amended in this application.	✓
C20 An Emergency Management and Evacuation Plan must be prepared.	Condition imposed on original approval which is not proposed to be modified.	✓
C21 Evacuation procedures for the building must be displayed within each apartment, lobby and public circulation space.	Condition imposed on original approval which is not proposed to be modified.	✓
Fire Safety		
C22 The building is to comply with Parts C, D and E of the Building Code of Australia.	Compliance with the BCA is a condition of the original approval which is not proposed to be modified.	✓
C23 Each serviced apartment is to comply with Parts C, D, E and F5 of the BCA so as to ensure there is adequate fire safety in the building and adequate sound insulation between apartments	Compliance with the BCA is a condition of the original approval which is not proposed to be modified.	✓

(f) Potential unauthorised works

A review of the site for the assessment of this proposed modification revealed that some of the works proposed by this modification may have already been completed. In particular, there were concerns with the balconies and terraces on the eastern and western elevations, which did not appear to have been constructed in accordance with the development consent.

Clarification was sought from the applicant, with images comparing the approved plans with the as-built structure provided which stated that the balcony areas were temporarily hoarded with plywood while construction was occurring. This was to protect the balcony areas while the tiling and waterproofing was being carried out above and below each balcony area. These comparison photos supplied by the applicant are illustrated in **Figures 264 & 27**). The boarded up balconies are also shown in **Figure 28** for the western elevation.



Figure 26: Applicant's explanation for works as completed and approved plans (Eastern elevation – Levels 1-6)

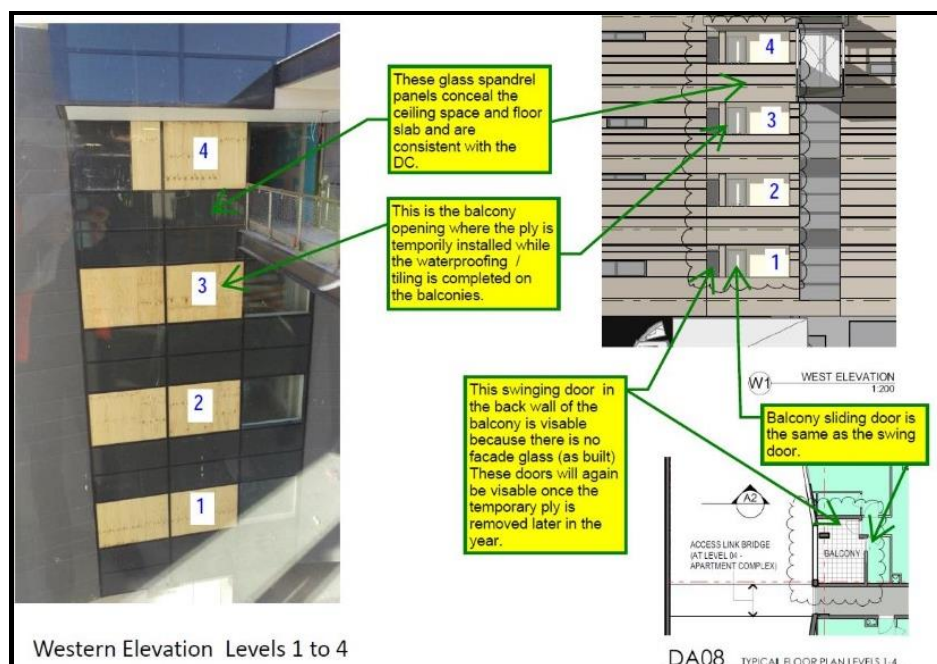


Figure 27: Applicant's explanation for works as completed and approved plans (Western elevation - Levels 1 - 4)

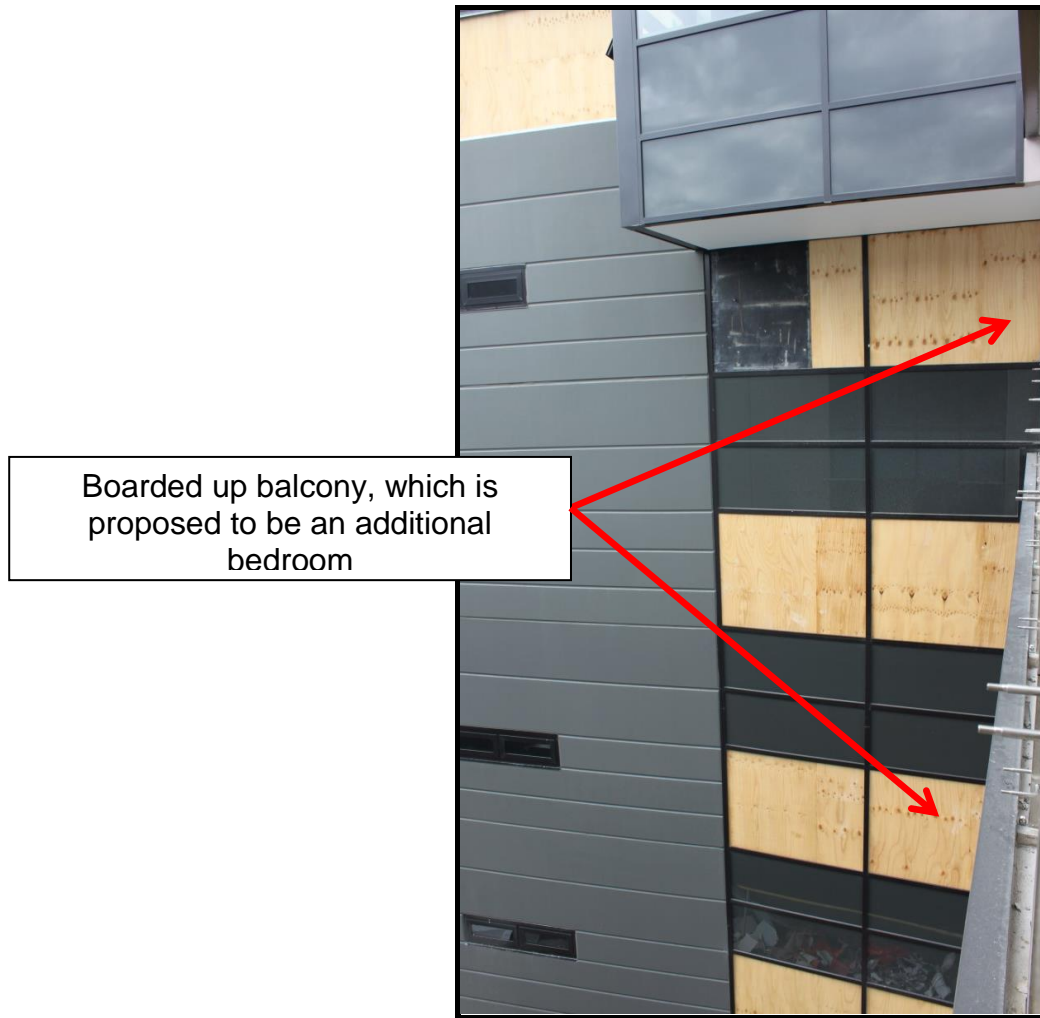


Figure 28: Western elevation

A site inspection was subsequently carried out on 15 May 2017 with the applicant and Council. This joint inspection revealed that the balconies along the western elevation have been built with glass panelling along the face of the balconies, instead of the approved masonry finish as shown on the approved plans (refer to **Figure 29**). Apart from this material change, which has now been added to this modification application and is included on the modification plans, the works are generally in accordance with the development consent.

While the building is generally being built in accordance with the approval, it is noted that the construction of the communal sun terraces on the eastern elevation and the balconies on both the eastern and western elevations have been constructed in such a way, that they can be easily converted to their use as proposed in this modification application.

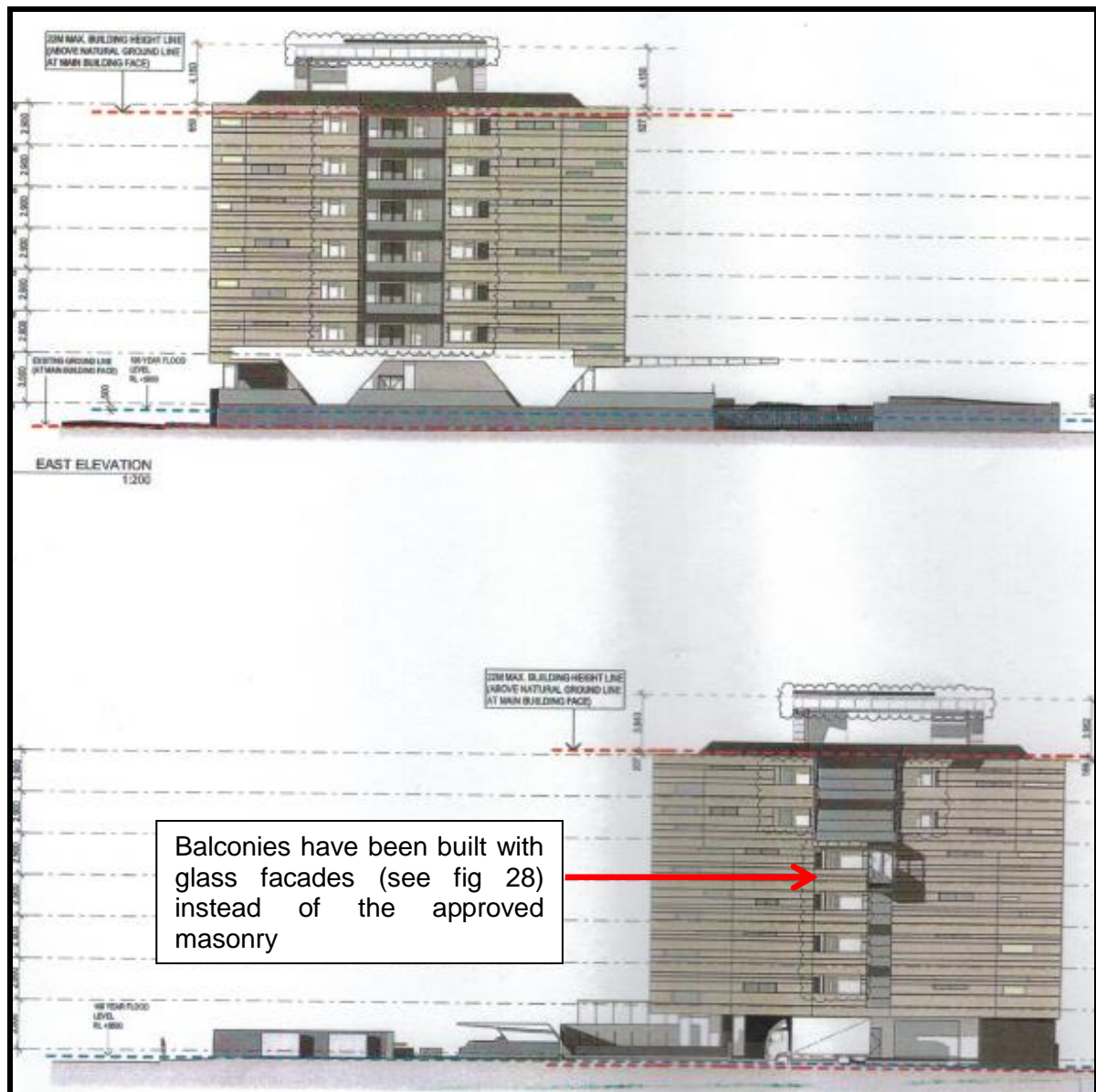


Figure 29: Approved Plans - Eastern and Western Elevations

SECTION 96(2) CONSIDERATIONS

In accordance with Section 96(2), a consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if:

- a) *it is satisfied that the development to which the consent as modified related is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and;*

The proposed modification is generally considered to be substantially the same development given the resulting development constitutes a serviced apartment development. However, the proposed child care

centre is not considered to be substantially the same development given it is for an entirely different land use to what was approved under the original development application. This part of the modification is not considered to be substantially the same development as was originally approved.

- b) *It has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 5) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and*

The original application was referred to the NSW Department of Primary Industries (DPI) given the proposal was for integrated development under the *Water Management Act 2000*. Concurrence was provided as part of the original application. The modification application does not relate to conditions of consent, or general terms of approval issued by DPI, and therefore no further consultation was undertaken.

- c) *It has notified the application in accordance with:*

- i. the regulations, if the regulations so require, and*
- ii. a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and*

The proposed modification was notified in accordance with the BBDCP 2013 for a period of 30 days from 1 March 2017 to 31 March 2017.

- d) *It has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.*

There were no submissions received.

In addition to Section 96(2), Section 96(3) requires:

In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 79C (1) as are of relevance to the development the subject of the application.

Pursuant to Section 79C(1) there are various matters for consideration to be taken into consideration as they are of relevance to the development the subject of the development application. These are outlined below.

(a) Impacts of the development (S79(c)(1)(b) of the EP&A Act)

The Environmental Planning Instruments (EPI) and Development Control Plans which are relevant to the proposal include the following (Section 79C(1)(a)(i) & (iii)):-

- *State Environmental Planning Policy (Infrastructure) 2007;*
- *State Environmental Planning Policy No 64 – Advertising and Signage*
- *State Environmental Planning Policy No 55 – Remediation of Land*
- *Botany Bay Local Environmental Plan 2013; and*
- *Botany Bay Development Control Plan 2013.*

The proposed modification does not raise any issues which affect compliance with the Infrastructure SEPP, SEPP 64 or SEPP 55, which were not considered in the original application. The matters of relevance under BBLEP 2013 are discussed above, while the relevant controls of BBDCP 2013 are also outlined above in the assessment of the proposed modification. The proposed modification does not raise any issues with the controls of Part 6 Employment Zones (Pt 6.2.4 or 6.3) of BBDCP 2013, apart from those outlined in this report.

There are no proposed instruments relevant to the site (Section 79C(1)(a)(ii)) and there are no relevant planning agreements under Section 93F of the EP&A Act (Section 79C(1)(a)(iii)). The matters prescribed by the Regulations include consideration of the *NSW Coastal Policy* and the Australian Standard for demolition, which are not relevant to the proposed modification (Section 79C(1)(a)(iv)). There is no coastal zone management plan relevant to the site which is required to be considered (Section 79C(1)(a)(v)).

(b) Impacts of the development (S79(c)(1)(b) of the EP&A Act)

The consideration of the impacts on the natural and built environments has been considered in the above assessment. It is considered that the proposed modification is unlikely to have any significant adverse environmental, social or economic impacts, however, is likely to have an adverse impact on the locality in terms of excessive bulk and scale as outlined above. The likely impacts of the proposed development have been considered in the assessment of this Modification Application.

(c) Suitability of the site for the development (S79C(1)(c) of the EP&A Act)

The subject site is affected by a number of environmental hazards, including flooding, aircraft noise, contaminated land and construction dewatering due to a high groundwater table. These hazards were considered in the assessment of the original development application by Council's specialist officers. There are no changes proposed in this modification application which affect these issues or any relevant conditions imposed on the original development

consent. The suitability of the site for the development was considered in the original development application and found to be acceptable.

(d) Any submission made in accordance with the Act or Regulations (S79C(1)(c) of the EP&A Act)

The proposed modification was notified in accordance with the BBDCP 2013 for a period of 30 days from 1 March 2017 to 31 March 2017. There were no submissions received.

(e) The public interest (S79C(1)(c) of the EP&A Act)

These matters have been considered in the assessment of the modification application. It is considered that approval of the proposed modification is contrary to the public interest given the adherence to the planning controls is in the public interest which has not been achieved in this proposal. Furthermore, the adverse impact resulting from the excessive bulk and scale of the development is contrary to the public interest.

CONCLUSION

This Modification Application (DA 2014/207/3) seeks consent for the proposed internal and external changes to the approved development. The modification application has been assessed in accordance with the relevant requirements of the *Environmental Planning and Assessment Act 1979* with the main issues being the proposed additional floor space and height, which exceeds the FSR and height development standards of BBLEP 2013, resulting in an unacceptable bulk and scale. This modification application is recommended for refusal.

RECOMMENDATION

It is RECOMMENDED that the Panel resolve pursuant to Section 96(2) of the *Environmental Planning and Assessment Act 1979*, in respect of Modification Application No. DA-2014/207/3 for the proposed internal and external changes to the serviced apartments development at 53-79 Baxter Road & 67-79 Baxter Road and 62-66 Robey Street, Mascot to refuse the application for the following reasons:

- (a) The proposed modification is considered unacceptable pursuant to the provisions of s.79C(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* in that the proposed modification fails to comply with the floor space ratio development standard pursuant to Clause 4.4(2) of the *Botany Bay Local Environmental Plan 2013* and the variation request is not supported as the proposed additional floor space is inconsistent with the objectives of the FSR development standard.
- (b) The proposed modification is considered unacceptable pursuant to the provisions of s.79C(1)(a)(i) of the *Environmental Planning and*

Assessment Act 1979 in that the proposed modification fails to comply with the height development standard pursuant to Clause 4.3(2) of the *Botany Bay Local Environmental Plan 2013* and the variation request is not supported as the proposed additional height is inconsistent with the objectives of the height development standard.

- (c) The proposed modification is considered unacceptable pursuant to the provisions of s.79C(1)(a)(iii) of the *Environmental Planning and Assessment Act 1979* in that the proposed modification fails to adequately demonstrate that the proposed car parking complies Part 3A.3.1 (Car Park Design) of *Botany Bay Development Control Plan 2013* which requires compliance with AS 2890.1.
- (d) The proposed modification is considered unacceptable pursuant to the provisions of s.79C(1)(b) of the *Environmental Planning and Assessment Act 1979* in that the proposed modification will have an adverse impact on the built environment given the resulting bulk and scale from the additional floor space and height will have an adverse visual impact in the area. This increased floor space and height exacerbates the bulk of the development which is inappropriate in the context of the area.
- (e) The application is considered unacceptable pursuant to the provisions of s.79C(1)(e) of the *Environmental Planning and Assessment Act 1979* in that the approval of the proposed modification would set an undesirable precedent for similar inappropriate development in the area and is therefore not in the public interest.