

CLAUSE 4.6 VARIATION REQUEST CLAUSE 4.4 FLOOR SPACE RATIO

1-3 BRUNKER ROAD, BROADMEADOW (LOTS AND 2101 AND 2102 DP755247)



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DATE: 25 August 2023

PREPARED BY:





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1. OVERVIEW OF PROPOSAL

This submission seeks a variation to Clause 4.4 of the Newcastle Local Environmental Plan (LEP) 2012 which prescribes a maximum floor space ratio (FSR) of 2:1 to the subject site. This Clause 4.6 variation request has been prepared in support of a development application (DA) in respect to the demolition of the existing licensed premise (Premier Hotel) and commercial building and the erection of a nine (9) storey mixed use development on land known as 1-3 Brunker Road, Broadmeadow, NSW 2292 (Lots 2101 and 2102 DP755247) (the site). The proposal is detailed in the Architectural Plans prepared by JSA Studio Architects.

Measured in accordance with the definitions of FSR and gross floor area (GFA) in the Newcastle LEP 2012, the proposal has a total GFA of 6,897.8m² – an exceedance of 2,185.8m² (45% variation) over the maximum floor space ratio (FSR) of 2:1.

2. WHAT IS THE NAME OF THE ENVIRONMENTAL PLANNING INSTRUMENT THAT APPLIES TO THE LAND?

The environmental planning instrument (EPI) that applies to the site is Newcastle Local Environmental Plan (LEP) 2012.

3. WHAT IS THE ZONING OF THE LAND AND WHAT ARE THE OBJECTIVES OF THE ZONE?

The site is zoned MU1 Mixed Use Zone (refer to *Figure 1*).

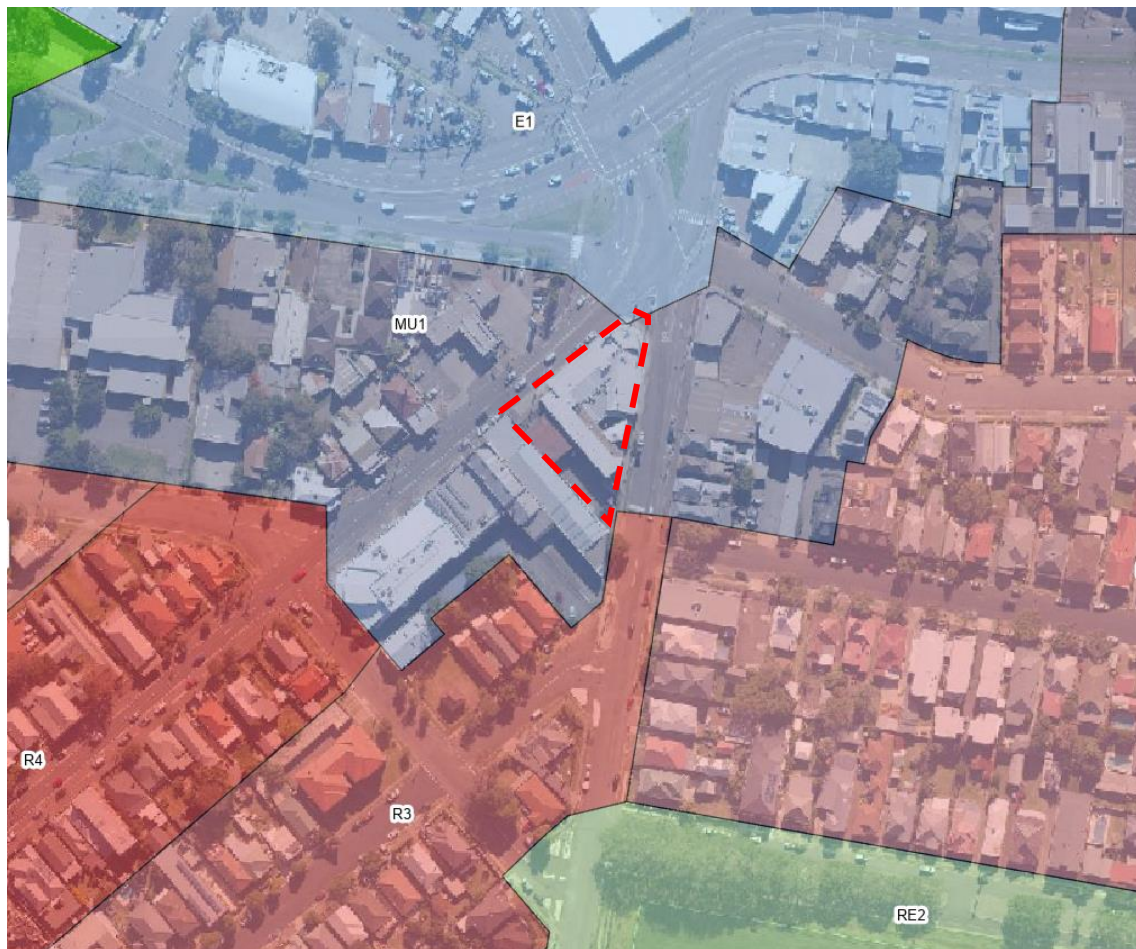


Figure 1: Land Zoning Map – subject site outlined in red (Source: NSW Planning Portal)

The objectives of the MU1 zone are:

- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
- To minimise conflict between land uses within this zone and land uses within adjoining zones.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.

The proposal's consistency with the zone objectives is discussed in Section 8.1 of this report.

4. WHAT IS THE DEVELOPMENT STANDARD TO WHICH THIS CLAUSE 4.6 VARIATION APPLIES AND WHAT ARE THE OBJECTIVES OF THE DEVELOPMENT STANDARD?

The development standard to which this variation relates to is Clause 4.4 Floor space ratio, which reads as follows:

"4.4 Floor space ratio

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

(a) to provide an appropriate density of development consistent with the established centres hierarchy,

(b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.

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

(2A) Despite subclause (2), the maximum floor space ratio for a building on land in any zone in this Plan is to be determined as if the area of the access laneway of a battle-axe lot were not part of the area of the lot.

Note—

See clause 7.10 for the maximum floor space ratio for a building on land in Newcastle City Centre.

A maximum FSR of 2:1 applies to the subject site, as per Figure 2 below.

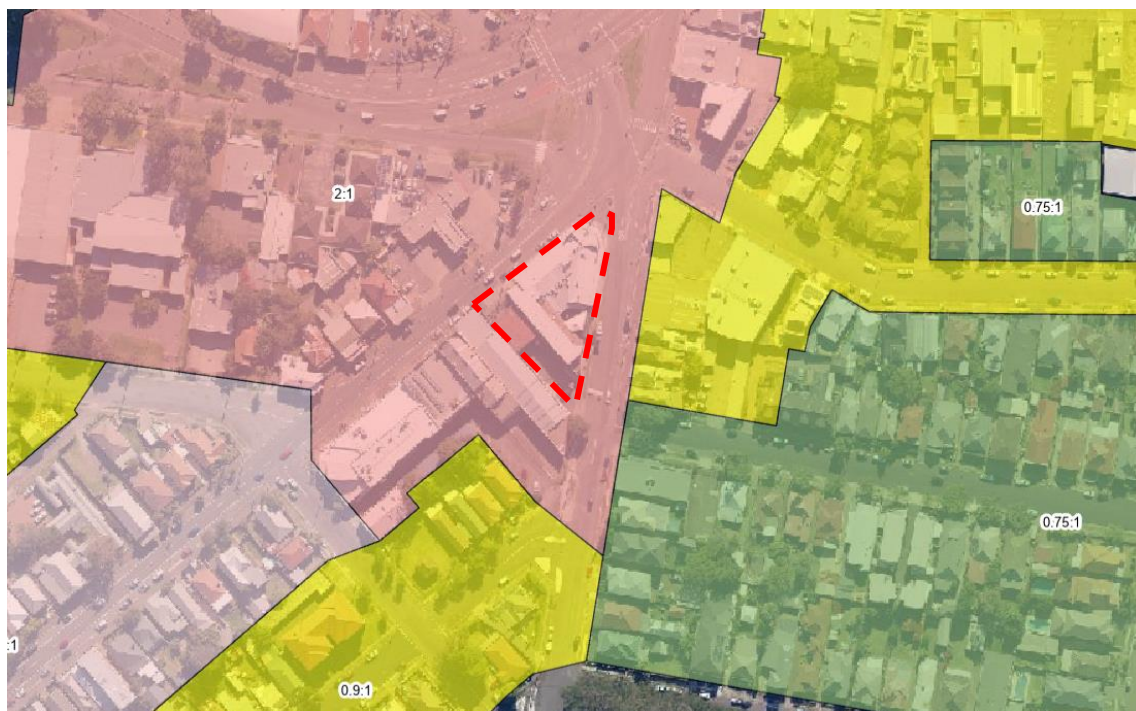


Figure 2: Floor Space Ratio Map – subject site outlined in red (Source: NSW Planning Portal)

5. WHAT IS THE EXTENT OF THE VARIATION?

Referring to the Architectural Plans prepared by JSA Studio Architects (dated 19/06/2023) the maximum GFA is displayed as 6,897.8m², being a 2,185.8m³ (45%) exceedance to the development standard.

6. CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS

Development standards are a means to achieve an environmental planning objective and can be numerical or performance based. Some developments may achieve planning objectives despite not meeting the required development standards. The planning system provides flexibility to allow these objectives to still be met by varying development standards in exceptional cases.

As detailed in this request, the proposed development is considered to meet the requirements prescribed under Clause 4.6 of the Newcastle LEP 2012, as the development standard is considered unreasonable, the development displays sufficient environmental planning grounds to warrant contravention of the development standard, and the development will be in the public interest because it is consistent with the objectives of the standard and the subject zone.

Clause 4.6 states the following:

“4.6 Exceptions to development standards

- (1) The objectives of this clause are as follows:*
 - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) the consent authority is satisfied that:*
 - i. the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - ii. the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) the concurrence of the Planning Secretary has been obtained.*
- (5) In deciding whether to grant concurrence, the Planning Secretary must consider:*
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) the public benefit of maintaining the development standard, and*
 - (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.*

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note. When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition or Zone R5 Large Lot Residential.

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

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

- (a) a development standard for complying development,
- (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
- (c) clause 5.4
- (caa) clause 5.5,
- (ca) clause 8.1 or 8.2..”

7. JUSTIFICATION FOR PROPOSED VARIATION

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument and LEP should be assessed contained in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 11 & *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the judgement states:

“Clause 4.6 of (the LEP) imposes **four preconditions** on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be **consistent with the objectives of the zone** (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be **consistent with the objectives of the standard in question** (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a **written request that demonstrates that compliance with the development standard is unreasonable or unnecessary** in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are **sufficient environmental planning grounds** to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).” [paragraph 27] [emphasis added by author]

This written request satisfies the four preconditions in the following way:

- **Precondition 1: Consistency with zone objectives:** As described in Section 8.1.
- **Precondition 2: Consistency with the objectives of the standard:** As described in Section 8.2. Consistency with the objectives of the standard is demonstrated when establishing that compliance is unreasonable or unnecessary (specifically the first invocation of the “5 Part Test”).
- **Precondition 3: Compliance with the development standard is unreasonable or unnecessary:** As described in Section 8.3 utilising the accepted “5 Part Test”.

- **Precondition 4: Sufficient environmental planning grounds:** As described in Section 8.4.

As demonstrated throughout this report, the use of Clause 4.6 to enable an exception to this development standard is appropriate in this instance and the consent authority should be satisfied that all requirements of the clause have been suitably addressed via the content in this formal request.

7.1 IS THE PROPOSAL CONSISTENT WITH THE ZONE OBJECTIVES?

The objectives of the MU1 zone are:

- *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*
- *To support nearby or adjacent commercial centres without adversely impacting on the viability of those centres.*

In relation to the **first zone objective**, the proposal is a mixed use development that expands upon the long standing use of the site as a licenced premise (hotel) and associated hotel rooms. New retail, food and drink and residential uses are proposed. *Figure 3* below illustrates the distribution of uses. The proposed retail component will provide further diversity of uses and activation within the area, as well as ongoing employment opportunity. In this regard the proposed development is consistent with the first zone objective.

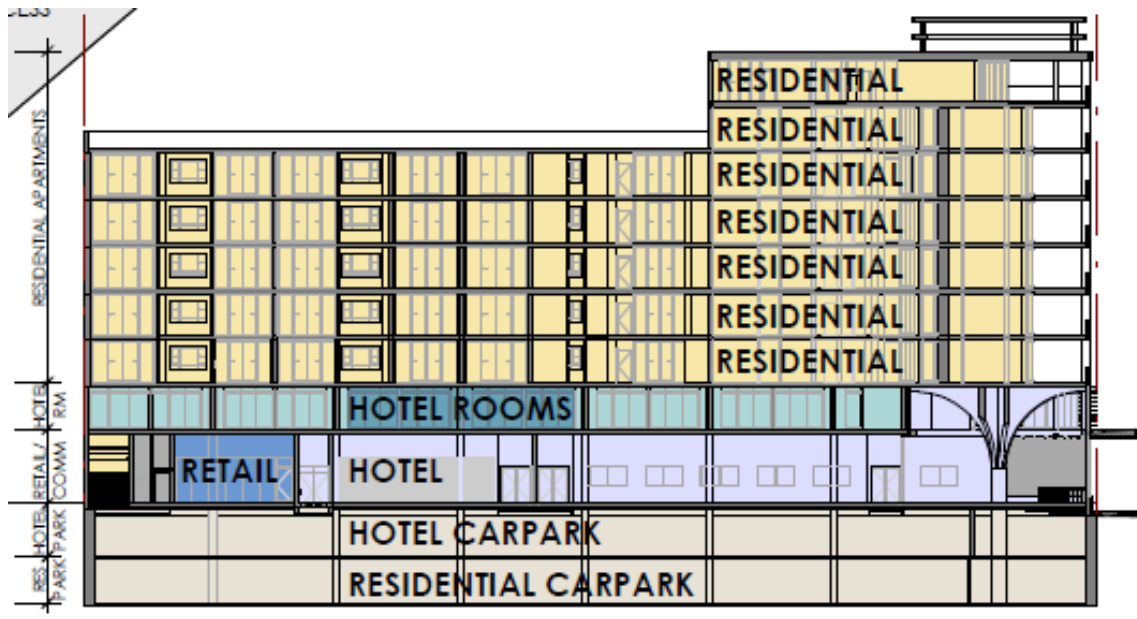


Figure 3: Spatial distribution of commercial, hotel and residential uses (Source: JSA Studio Architects)

The proposed development is consistent with the **second zone objective** in terms of its ability to generate active street frontage (refer to *Figure 4* and *5*). The ground floor comprises retail, café and hotel use. The uses have been distributed to optimise connection to the Brunner Road frontage and the commercial core of Broadmeadow. The materiality reflects the usage, with large open louvres, glazing and double doors at ground floor along the commercial and retail edge. Along the Brunner Road frontage a cantilevered awning with street planting provides a functional and inviting pedestrian environment. A new, shaded beer garden at the apex provides further activation of what is presently an underutilised and inviting streetscape. Along the Chatham Street frontage, where the built form and opportunities for activation take a lower scale respectful of the more residential nature of land uses to the south and east, a covered colonnade breaks the

facade to a landscaped oasis and new softer urban presentation to the street. A café provides a more intimate scale of activation and a place for nearby residents and workers to gather. Again, awnings are provided to enhance pedestrian comfort. For these reasons the development is consistent with the second zone objective to provide diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.

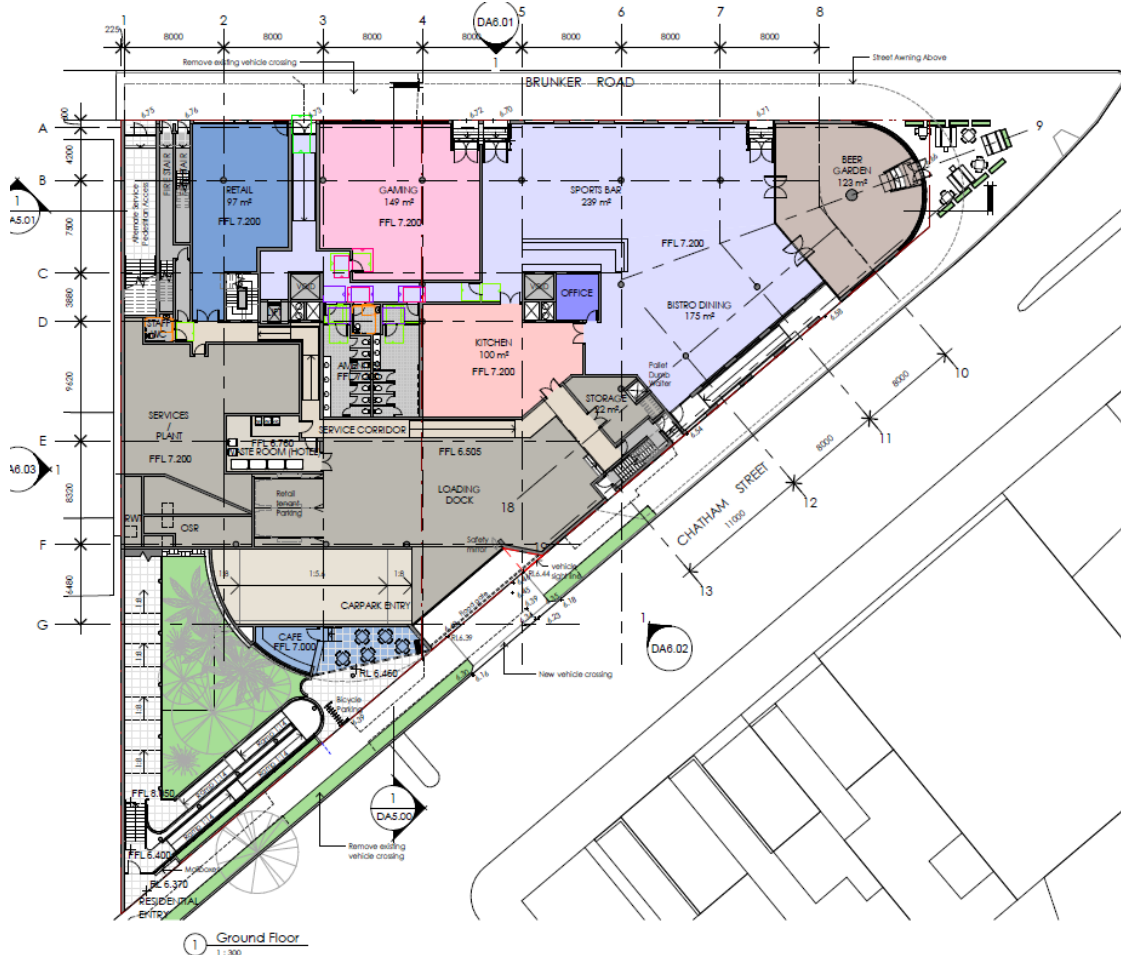


Figure 4: Street activation and amenity (Source: JSA Studio Architects)



Figure 5: *Street activation and amenity – view of proposed development looking south-west at the intersection of Brunker Road and Chatham Street (Source: JSA Studio Architects)*

The **third zone objective** seeks to minimise conflict between land uses within this zone and land uses within adjoining zones. The proposal responds to this objective by weighting the building bulk to the northern edge and street intersection, and maximising the street presence and active edges facing Brunker Road and the commercial core of Broadmeadow. This reduces the shadow impact of the additional floor space to the residences on the eastern side of Chatham Street and the R3 Medium Density Residential zone to the south. Further discussion on solar access to surrounding properties is provided in Section 8.

As well as a reduction in building scale, the intensity of use is reduced on the southern edge of the development. A landscaped open courtyard and café are located on the eastern extent, sleeving parking, loading and servicing which are all located internal to the site to minimise visual and acoustic impact to surrounding land uses. Further discussion on traffic and noise impact is provided in Section 8.

The **fourth zone objective** encourages business, retail, community and other non-residential land uses on the ground floor of buildings. As referred to above, the ground floor accommodates non-residential uses including hotel, retail and café. The proposal builds on the existing pub and hotel with more diverse and expansive facilities in response to the evolving needs of the community, and Broadmeadow's position as a growth area within the strategic land use planning framework. Accessible and visible, a perimeter awning provides amenity to the public realm and creates the opportunity for an alfresco dining area at the corner to enhance activation at the street level.

The proposed development is consistent with the **fifth zone objective**, to support nearby or adjacent commercial centres without adversely impacting on the viability of those centres. The ongoing use of the site as a licenced premise and hotel, combined with a compatible mix of additional uses (retail, food and drink and residential) will complement, but not compete with, the range and scale of uses available in the Newcastle City Centre as the regional hub for business and commercial activities. The development achieves a scale commensurate with Broadmeadow's status within the planning framework as a 'strategic centre'; where higher order services, cultural and recreational facilities and high density commercial and residential uses are encouraged (refer to Section 8.2). The proposal also creates a distinction between the scale and nature of development typically expected to find in surrounding local centres and neighbourhood centres, also without impacting the viability of those centres.

Therefore, the development is entirely consistent with the objectives of the MU1 Mixed Use zone.

7.2 IS THE PROPOSAL CONSISTENT WITH THE OBJECTIVES OF THE STANDARD?

The development standard to which the development relates is Clause 4.4 Floor space ratio. The objectives of this clause are as follows—

- (a) to provide an appropriate density of development consistent with the established centres hierarchy,
- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.

In response to **objective (a)** of the Floor space ratio development standard, reference is made to the established centres hierarchy as defined by the strategic planning framework and implemented by Newcastle LEP through land use zoning.

The strategic planning framework within which the site operates consists of the Hunter Regional Plan 2041, the Greater Newcastle Metropolitan Plan 2036 and the Newcastle Local Strategic Planning Statement (Figure 10).

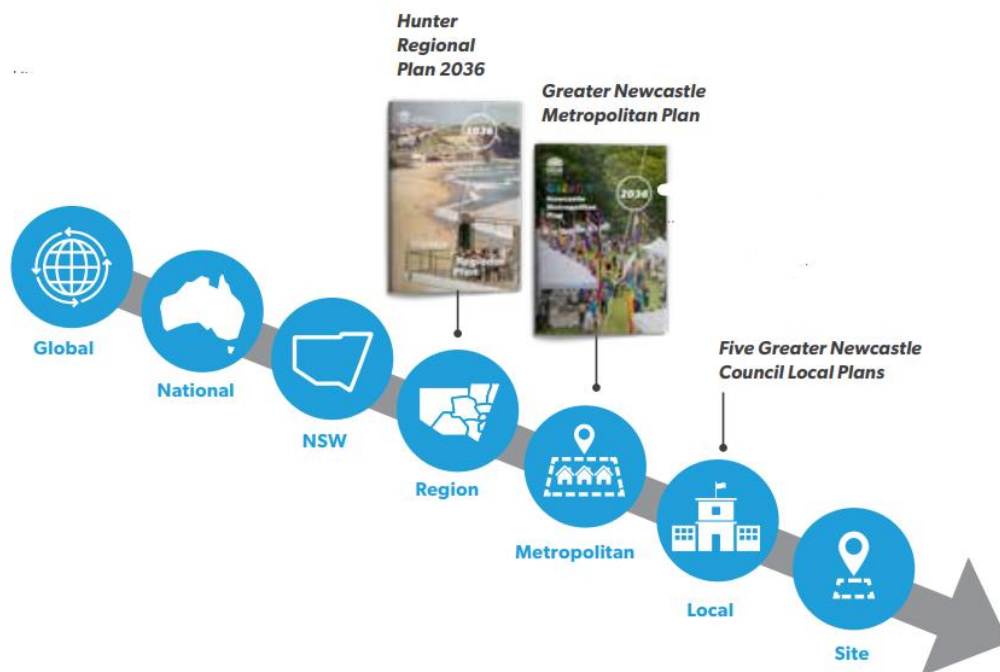


Figure 10: Strategic planning framework (Source: Department of Planning and Environment)

In its discussion on the centres hierarchy, the Hunter Regional Plan 2041 identifies the Newcastle City Centre as the Metropolitan capital of economic significance to NSW. Strategic centres that are the heart of the surrounding district provide a range of civic, retail, commercial and recreational services. It notes that the potential for increased housing and employment in these areas will be determined by councils. Broadmeadow is identified as a strategic centre.

The Greater Newcastle Metropolitan Plan 2036 identifies Broadmeadow's role in Greater Newcastle as a Nationally significant sport and entertainment precinct and a catalyst area for growth. Catalyst areas are places of metropolitan significance and include **Broadmeadow**, Callaghan, East Maitland, John Hunter Hospital, Kotara, Newcastle City Centre, Glendale and Cardiff, Beresfield–Black Hill, Tomago, Newcastle Airport at Williamtown and Newcastle Port. These locations are intended to underpin new job opportunities for Greater Newcastle, including in the health, defence and education industries and help to meet the expected demand for diverse housing options close to jobs and services.

The Newcastle Local Strategic Planning Statement (LSPS) defines the commercial hierarchy as comprising strategic centres, local centres (major), neighbourhood centres and local centres (minor). Broadmeadow is identified as a strategic centre, intended to service the Hunter region with higher order administration,

education, health services, cultural and recreational facilities with high density commercial and residential uses (Figure 11).

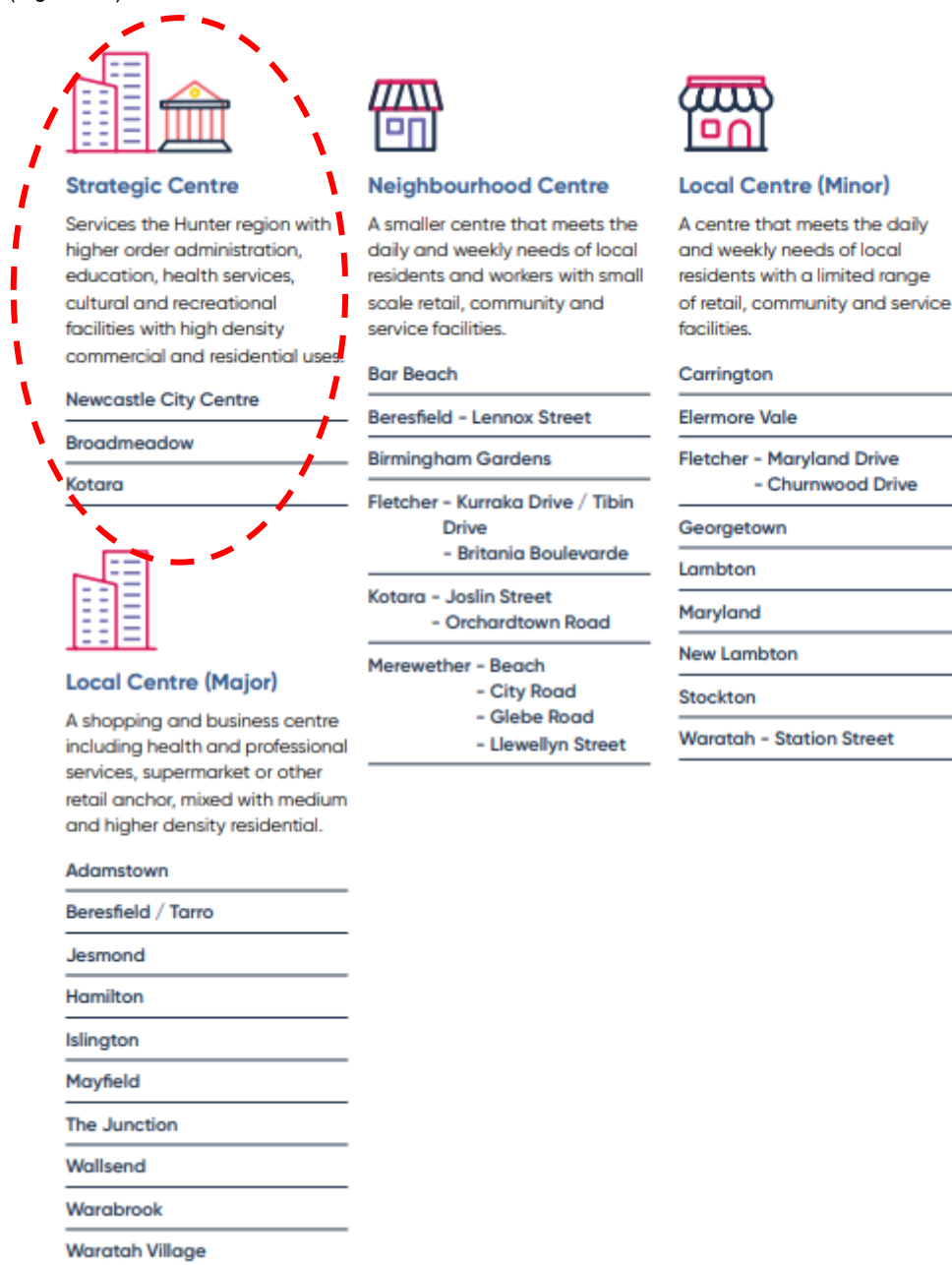


Figure 11: Centres hierarchy (Source: Newcastle Local Strategic Planning Statement, City of Newcastle)

Newcastle LEP assigns the MU1 Mixed Use Development zone to the site, which allows for the range of commercial, recreational, residential and other uses consistent with those envisaged for higher order centres by the strategic planning framework. The proposed development includes a licensed premise, hotel accommodation, retail, food and drink premise (café) and residential, all of which are consistent with the types of uses encouraged within a strategic centre and catalyst area.

Objective (a) calls for an appropriate **density** of development commensurate with a strategic centre. The LSPS identifies a strategic centre as an area of **high density** residential and commercial use. It is considered that the proposed development is a **high density** development incorporating residential and commercial use (it is our contention that the term 'commercial' is intended to encompass a range of employment generating activities including those proposed as part of the DA). Key measures of density include floor space, height, number of storeys and number of units. Each of these measures is addressed below.

Table 1: Density measures of proposed development

Density measure	Proposed development
<i>Floor space</i>	
Pub (sports bar, gaming, beer garden, bistro dining), retail and café (Ground floor)	1178.7m ²
Residential entry lobby (Mezzanine)	214.4m ²
Hotel accommodation (Level 1)	603m ²
Residential (Levels 2-8)	4,901.7m ²
TOTAL	5,897.8m²
<i>Height</i>	31.3m
<i>Number of storeys</i>	9
<i>Number of units</i>	
Residential	48
Hotel rooms	16

It is therefore concluded that the proposed development is of a density that is consistent with the established centres hierarchy (in this case, a strategic centre) and is therefore consistent with **objective (a)** of the development standard.

Objective (b) of Clause 4.4 requires the building density, bulk and scale to make a positive contribution towards the desired built form as identified by the centres hierarchy. The LSPS does not explicitly identify the desired built form for strategic centres. In the absence of an explicit statement, the following references have been lifted from the LSPS:

- A liveable city (pg 10): “We have diverse housing types and tenures in our neighbourhoods for a variety of household types, income levels and life stages. We have greater housing choice in our suburbs with more single, dual occupancy, terrace and manor houses. In Catalyst Areas, Strategic Centres and Urban Renewal Corridors we have a mix of terrace houses and apartment buildings”. This indicates a range of residential types are encouraged. The proposed units are consistent with the referenced typology.
- Prioritise active transport (pg 32): “Prioritise active and public transport in the City, particularly in Catalyst Areas, Urban Renewal Corridors and Strategic Centres. Encourage uptake of active transport by planning for short trips (distance of 400m to 4km).” This encourages a diverse and dense urban fabric to promote walking and cycling as a means of transport. The proposed development is consistent with this intent in terms of its built form. In addition, the development promotes cycling through the provision of ample bike parking / storage and promotes pedestrian activity through the provision of awnings and lighting along each frontage.

The Statement goes on to say “Intensification of land use, increases in housing and employment in Urban Renewal Corridors, Strategic Centres and Catalyst Areas are needed to support extensions to the Light Rail and rapid bus transport or other new mass transport technologies.” Again, the proposed development represents the intensification of land use through denser built form close to existing mass transport infrastructure (bus routes and Broadmeadow train station) and the slated light rail extension.

- Reduce carbon emissions and resource consumption (pg 36): “In the Urban Renewal Corridors (including Stage 2 corridors), Catalyst Areas, Strategic Centres and Housing Release Areas, proposals will incorporate mechanisms to achieve excellence in sustainable and urban building design.” The development has been designed to achieve a high standard of energy efficiency and design. The development achieves solar access and natural ventilation targets and includes solar panels and provision for water reuse.

In addition to the above, urban design Blakely Global has endorsed the design and its contribution to the urban fabric:

The original Premier Hotel was imposing and of a dominant scale in comparison with the surrounding buildings. The new Premier Hotel approach is to deliver a contemporary building as a new civic beacon. Historically, the site functioned as the area's magnet with its height, bulk and texture. Thus, the current design performs a similar function creating a benchmark for surrounding buildings, that will eventually increase in size. This design is ideal for increased height planes relative to other strategic centres. It will act as the beacon, and the building's visibility will increase across streets when approaching the Nine Ways centre. In addition, the gradual rise of the building opens vistas for its residents and prevents unnecessary shadowing, thus opening green space to the south and aligning to lower-height residential areas too. This improved design reflects the continuation of the building's historical role, and the new design shapes the ground rules for the future of Broadmeadow.

The development is therefore able to demonstrate consistency with **objective (b)** of the development standard by proposing building density, bulk and scale that makes a positive contribution towards the desired built form as identified by the centres hierarchy.

7.3 IS COMPLIANCE WITH THE STANDARD UNREASONABLE OR UNNECESSARY?

The proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court (LEC) in *Wehbe v Pittwater Council (2007) NSWLEC 827*.

In the decision of *Wehbe v Pittwater Council (2007) NSWLEC 827*, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded, and that approval of the objection may be consistent with the aims of the policy. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

Table 2: “5 Part Test” established under *Wehbe v Pittwater Council (2007) NSWLEC 827*

Test	Description
1	The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development provides an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.
2	The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.
3	The underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.
4	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 unnecessary and unreasonable.

Test	Description
5	"The zoning of particular land" was "unreasonable or inappropriate" so that "a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land" and that "compliance with the standard in that case would also be unreasonable or unnecessary".

Satisfactorily demonstrating that compliance with a development standard is unreasonable or unnecessary in any one of these ways is sufficient for meeting the requirement in Clause 4.6(3)(a) of LEP 2012.

This variation determines compliance is unnecessary and unreasonable considering the first and third tests in particular. The following discussion is provided in response to each of the above tests.

7.3.1 Are the objectives of the standard are achieved notwithstanding non-compliance with the standard (Wehbe Test No.1)

The objectives supporting the floor space ratio control identified in Clause 4.4 are discussed below. Consistency with the objectives and the absence of significant environmental planning impacts, would demonstrate that strict compliance with Clause 4.4 would be unreasonable in this instance.

As previously stated, the objectives of the standard are:

- (a) to provide an appropriate density of development consistent with the established centres hierarchy,*
- (b) to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy.*

As discussed in Section 7.2 the proposed development is consistent with **objective (a)** and the established centres hierarchy, which identifies the site as part of a *strategic centre* where higher order services with high density residential and commercial uses are located. Whilst there is strong alignment between the established centres hierarchy and the Newcastle LEP insofar the site's zoning is concerned, the numerical provision applied to the site by Clause 4.4 is vastly out of alignment with the established centres hierarchy. This clause 4.6 request contends that, not only is the proposed development consistent with **objective (a)** notwithstanding the non-compliance with the numerical standard, a development with a compliant floor space ratio of 2:1 *would not* result in a scale of development that makes a positive contribution towards the desired built form envisaged for this high order centre. We contend that a compliant built form would in fact be inconsistent with objective (a) (refer to Section 7.3.3). In accordance with the first test in Wehbe, the proposed development provides an alternative means of achieving the objective, and strict compliance with the standard would be unnecessary and unreasonable. This is explored in further detail below.

Objective (a) is achieved notwithstanding the variation

- The proposed development seeks to accommodate residential and commercial density typical of the nearby strategic centre being the Newcastle City Centre. The floor space provisions in Newcastle City Centre range from 1:1 immediately adjacent the Newcastle Harbour Foreshore to 8:1 around Honeysuckle and Newcastle West.

While the Local Strategic Planning Statement encourages the intensification of land use and an increase in housing and employment in the strategic centres, the 2:1 FSR standard significantly constricts built form akin to development within local centres (minor).

- Unlike Kotara, the other strategic centre with lower FSR, the subject site is not a vast landholding where additional FSR could lead to an unreasonably high density of development if the FSR was to increase.
- The site is unconstrained by physical limitations and is not in a location considered to be sensitive to higher density development in terms of view sharing, solar access, impact on public domain etc (refer to discussion on objective (b)). It is our contention that the site is eminently suitable for denser built form due to the separation from surrounding sites by the local road network and favourable orientation, both which limit potential privacy and solar access impacts to surrounding development.

- The scale of the development will make a positive contribution towards the desired built form by:
 - Accommodating a suitable mix of uses
 - Achieving a higher density of commercial and residential uses commensurate with a strategic centre
 - Achieving transit oriented development objectives with the potential to stimulate further investment in public transport infrastructure such as the revitalisation of Broadmeadow train station and the light rail extension
 - Carefully and considerably locating the tallest element at the site's apex adjacent the confluence of Brunker Road, Chatham Street and Denison Street. The rotunda tower builds up from both residential wings to a peak at the street corner creating a prominent visible presence from within Nineways
 - Activating the Brunker Road frontage where the site is oriented towards the commercial core
 - Providing a lower scale of activation, bulk and scale along the Chatham Street frontage where the site interfaces an area of lower scale residential, commercial, and mixed-use development
 - Providing cantilevered awnings to the perimeter to provide amenity to pedestrians and create an inviting public-private interface. A grand covered colonnade along the southern edge breaks the façade to a gated landscaped oasis to the public and new softer interface to the street
 - Demonstrating to other developers and investors that this is a place worth investing in and trigger compounding revitalisation. Broadmeadow has been identified as a Catalyst growth area in the Greater Newcastle Metropolitan Plan 2036 and Local Strategic Planning Statement and is earmarked as an area for significant urban transformation. The community and market expect to see change in Broadmeadow, particularly given the declining urban fabric and development potential of the area. The proposal has the potential to facilitate catalytic development in the area, firstly by initiating street front activation of Brunker Road and secondly by indicating strong investment in a quality mixed use product.

To summarise, strict compliance with Clause 4.4 would be unreasonable in this instance as the proposed density of use and extent of built will achieve the intent of **objective (a)** notwithstanding the variation.

As addressed in Section 7.2 the proposed development is consistent with **Objective (b)** which is to ensure building density, bulk and scale makes a positive contribution towards the desired built form as identified by the established centres hierarchy. The development provides a high quality outcome consistent with the implied built form objectives described in the LSPS by:

- Encouraging active transport use. The development densifies land use within a walkable catchment of a major train station and bus routes. The proposed awnings and lighting at street level provide amenity for pedestrians. Proposed bike storage facilities encourage cycling
- Intensifying land use and increasing housing and employment to support extensions to the Light Rail and rapid bus transport or other new mass transport technologies
- Diversifying housing types
- Achieving sustainable design outcomes:
 - 69% of residential units have natural cross ventilation, which reduces artificial cooling demand
 - 90% of units receive over and above the 2 hours sunlight mandated by the ADG whilst also having uninterrupted views. Daylight penetration also occurs for bedrooms, retail, hotel rooms and commercial space, thus reducing powered lighting demand.
 - A combined open space area of 626m², 6% over the minimum ADG standards with a deep soil area is just under 7% of the open space zone.
 - Provision of electric vehicle charging stations and circuitry for future charging infrastructure

In this regard, the intent of objective (b) is achieved notwithstanding the variation.

7.3.2 The underlying objective or the purpose of the standard is not relevant to the development (Wehbe Test No.2)

The underlying objective or purpose of the standard is relevant to the development. Therefore, this test is not applicable.

7.3.3 The underlying object or purpose would be defeated or thwarted (Wehbe Test No.3)

Compliance with the development standard would be overly restrictive and could result in outcomes that are both unsuitable to the locality and of lesser or poor quality. On balance, the proposed development provides a better means to achieve the object of the standard, when compared with a compliant built form.

As previously established, the first object of the FSR standard is to ensure the scale of development that makes a positive contribution towards the desired built form, consistent with the established centres hierarchy. A compliant built form would be constricted to three storeys. It is our contention that a three-storey built form would not make a positive contribution and would in fact be inconsistent with the centres hierarchy, therefore defeating or thwarting the object of the standard.

The site's atypical shape and location at the confluence of several major and local roads makes a larger bulk and scale of building necessary to have a positive impact on the streetscape. Detailed design studies documented in the State Environmental Planning Policy (SEPP) 65 Design Report (and replicated in *Figure 12*) demonstrate how scale is a positive factor in placemaking at this particular location.

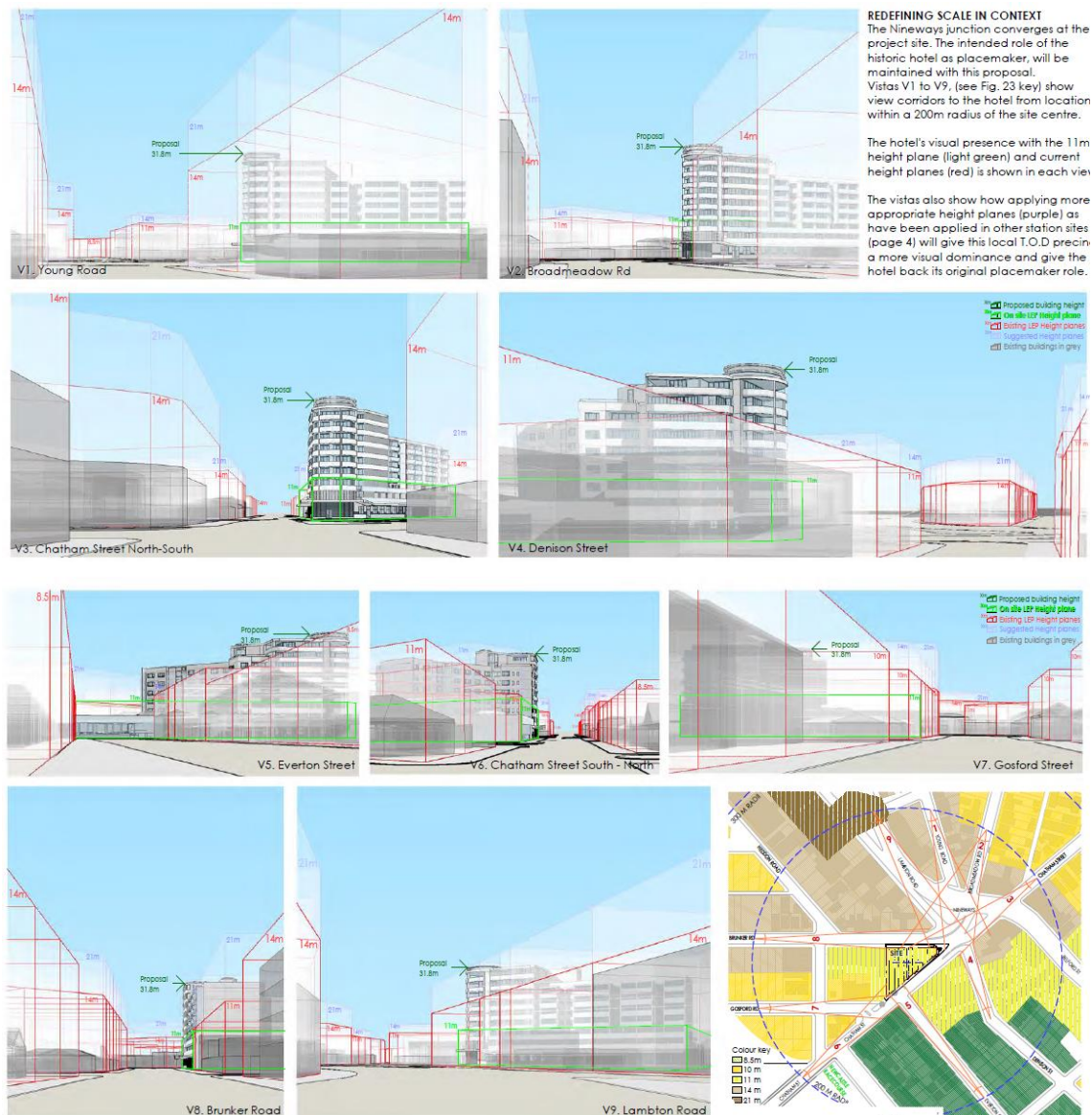


Figure 12: Scale in context study (Source: JSA Studio Architects)

The site's historical built form is much larger scale than the current FSR limit. An historically larger built form represents the importance of the site as a community hub and gateway to surrounding suburbs (Figure 13). In the 1930s the Premier Hotel was a town centre landmark, twice the height of the surrounding context. It was and still is a well frequented spot for racegoers en route from Broadmeadow station. The public park at the roundabout centre is now lost. Today the Premier Hotel still sits in a favourable location as a local pub and hotel accommodation for visitors and locals alike. The legacy of its historical activities and usage, will be maintained and enhanced for future generations and create a more prominent community space akin to its value in the past. In the spirit of the original architect's vision and later designs, the aim is to give Broadmeadow an iconic legacy that restores its prominence at this important urban interchange.

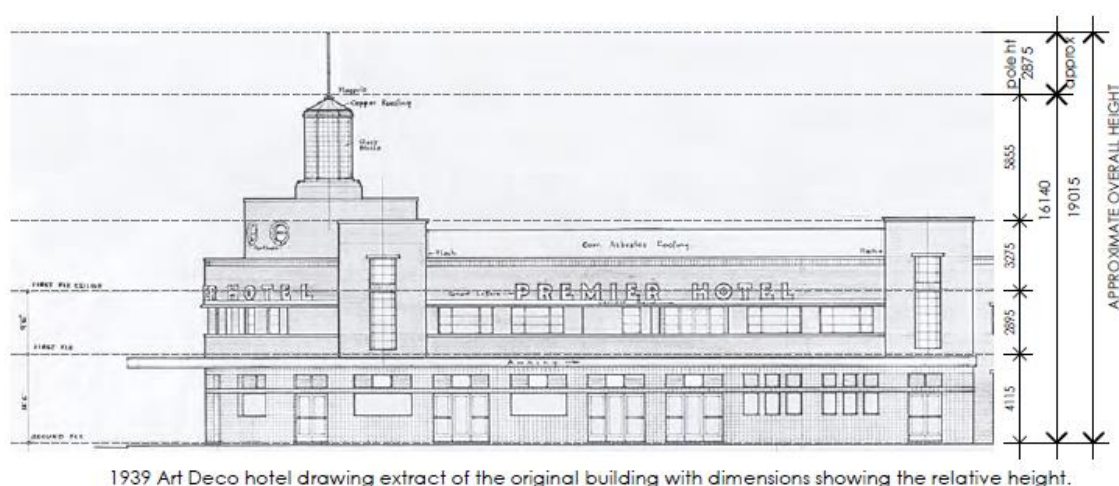


Figure 13: Historical built form (Source: JSA Studio Architects)

As discussed in Section 7.2 the design has been reviewed and endorsed by urban design expert Blakely Global. The design was commended for its potential to catalyse increased density and the renewal of Broadmeadow.

To summarise, a lower scale building would not achieve the desired density, bulk or scale relative to the surrounding built form, reflective of the need for the building's visibility to be maintained from each street corridor. A compliant built form would not result in a more positive outcome for the desired built form.

It is noted that **objective (a)** refers to being “consistent” which is often considered as being “compatible” with when discussing the context of development. In *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191, Roseth SC considers “compatibility”, finding that “compatible” is different from “sameness” and that development can harmoniously coexist within the urban context whilst projecting different built forms and outcomes (paragraph 22 reproduced below):

"There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve." [paragraph 22]

Council has not adopted specific character objectives for each category of the centres hierarchy, instead relying on development controls and guidelines such as the LEP, DCP and Apartment Design Guide to encourage a particular built form. However, Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (Paragraph 54) where the desired future character is not defined, the desired future character is subjective and can include the existing, recently approved and proposed buildings within

the neighbourhood. Despite the proposed FSR variation, the proposed development is consistent in scale to developments in other strategic centres, and that which ought to be encouraged within Broadmeadow.

A building that complies with the 2:1 FSR limitation would defeat or thwart the object of the standard being to encourage development that makes a positive contribution to the desired built form. The proposal in its current form is more appropriate in its context than a development that complies with the standard.

7.3.4 The development standard has been virtually abandoned or destroyed (Wehbe Test No.4)

Council has approved various DAs in the suburb of Broadmeadow and throughout the Newcastle local government area (LGA) with FSR variations. Whilst Council encourages compliance with standards, the previous variations indicate Council has historically applied a suitable level of flexibility to the standards where appropriate. We would argue that the same level of flexibility is being sought here.

The strength of the proposed development's ability to meet the objectives of the standard notwithstanding the variation, the unique site configuration, the site's history of placemaking and strong environmental planning grounds for the proposed height, warrant a level of flexibility suited to this particular development. Therefore, the development can be supported without abandoning the standard. In this instance, compliance with the standard is unnecessary and unreasonable in the context of the locality.

7.3.5 The zoning of the land is unreasonable or inappropriate (Wehbe Test No.5)

The zoning of the site is appropriate therefore this test is not applicable. We contend that the underlying issue for this particular case is that the prescribed FSR standard is not commensurate with the zone and objectives.

8. ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

"The environmental planning grounds relied on in the written request under cl 4.6 must be "sufficient". There are two respects in which the written request needs to be "sufficient". First, the environmental planning grounds advanced in the written request must be sufficient "to justify contravening the development standard". The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31]." [paragraph 24]

Further, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what a Clause 4.6 variation request does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

"It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development". [paragraph 86]

"I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard." [paragraph 86]

The assessment in the preceding sections and as shown throughout the supporting documentation demonstrates that the resultant environmental impacts of the proposal will be satisfactory, subsequently providing the justification for contravening the development standard. The proposal is consistent with the relevant objectives of the zone and the development standard, and it has been established that compliance with the standard is unreasonable or unnecessary.

There are sufficient environmental and planning grounds to justify contravening the development standard and are summarised from the preceding sections as follows:

- The proposed development meets the zone objectives (Section 7.1) and the floor space objectives (Section 7.2).
- The proposed development is compatible with existing and future built form within the surrounding locality. The building bulk has been directed to the north and north west with a reduced scale to the east and south where the site adjoins lower density development. The distribution of floor space is clearly demonstrated in *Figure 14*.

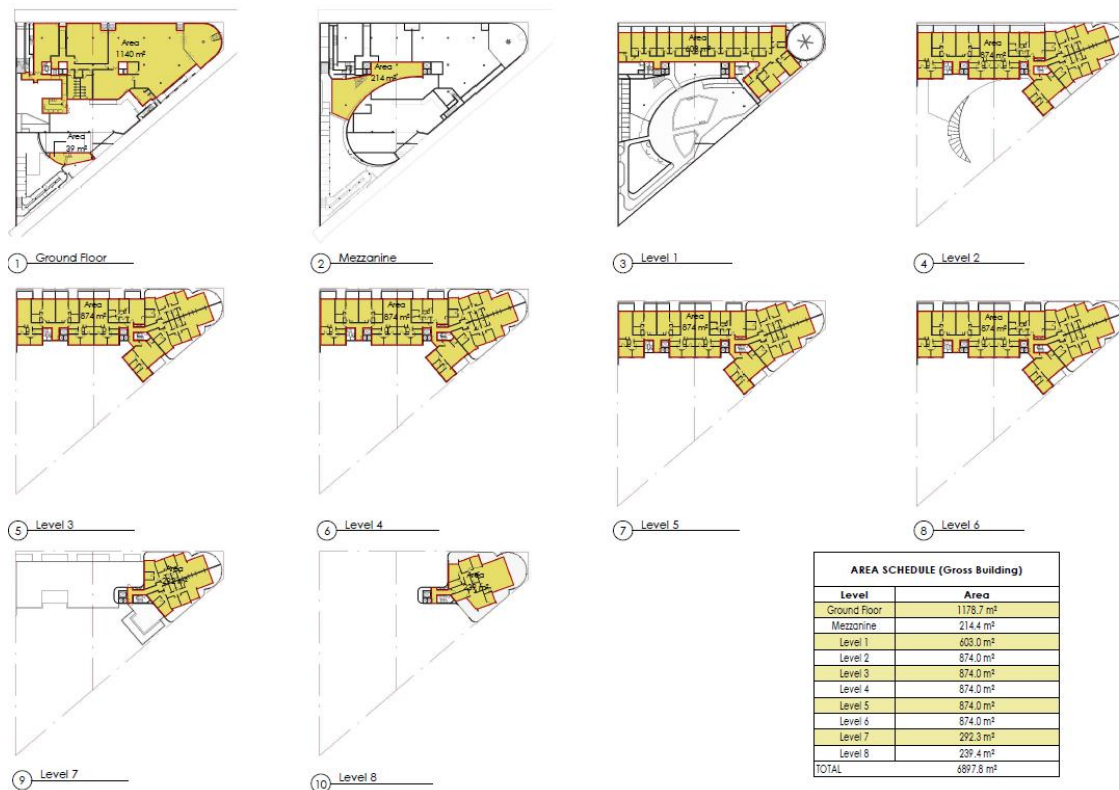


Figure 14: Distribution of floor space towards Brunker Road and Nineways, away from adjoining residential and lower density land use.

- The proposed development will provide a high level of internal and external environmental amenity for future residents of the building. The proposed development does not result in unfavourable or negative visual impact resulting from density, height or scale, and the works are expected to significantly improve the visual perception of the site. The development both maintains and enhances the neighbourhood character, landscape character, streetscape and amenity of the locality. The site will be returned to its historical function as a community hub and a placemaker.
- The additional bulk, scale and density will have a negligible effect on solar access. The shadows created by the development are considered to be satisfactory in regard to impacts to adjoining sites, the public domain and also within the development site. The minimal impact on surrounding development and public domain is demonstrated in the shadow diagrams which show that no surrounding property is overshadowed for more than 3 hours during the winter solstice (*Figure 15*).



Figure 15: Shadow diagrams (Source: JSA Studio Architects)

- The additional floor space will not impact privacy of adjoining residents due to the careful and considered approach to massing and orientation.
- The additional floor space will not impact on view sharing.
- The additional floor space will not detrimentally impact traffic or parking conditions as demonstrated in the traffic and parking assessment prepared for the proposed development.

The proposal will not result in any unreasonable amenity or environmental impacts as detailed in the supporting documentation and this request. Notwithstanding the variation, the proposed works represent a well-considered development that addresses the unique character of the site, streetscape appearance and public domain interface, solar access, privacy, and relevant objectives of both the development standards and the MUI Mixed Use zone. Given the nature of the variation, the proposal will continue to maintain high levels of amenity within the development and to the surrounding context. The proposal continues to make a positive contribution to the desired built form of the locality and has been skilfully designed in consideration of its surrounding context and land uses.

As outlined above, it is considered that the proposal will provide for a quality outcome. In this case, we submit that there are sufficient environmental planning grounds to justify contravening the development standard.

9. OTHER MATTERS THAT MUST BE SATISFIED

9.1 IS THE VARIATION IN THE PUBLIC INTEREST?

As detailed above, Clause 4.6 (4)(a)(ii) of the LEP requires demonstration that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard (described and addressed in Section 8.1.1 above) and the objectives for the zone in which the development is proposed to be carried out (as described and addressed in Section 4). The demonstration of compliance with both the objectives of the standard and the land zone in turn confirm that the proposal is in the public interest.

9.2 CONCURRENCE OF THE PLANNING SECRETARY

Clause 4.6(4)(b) requires that a development consent must not be granted for development that contravenes the development standard unless the concurrence of the Planning Secretary (of the Department of Planning and Environment (DPE)) has been obtained.

Planning Circular PS 20-002 states that the consent authority may assume the Secretary's concurrence, subject to conditions attached to the circular. The conditions are not applicable to this development, being decisions made by independent hearing and assessment panels (of which this DA would not be assessed by) and therefore, the secretary's concurrence can be assumed by Council.

9.3 WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING

The variation sought does not raise any matter of significance for State or regional environmental planning.

9.4 PUBLIC BENEFIT OF MAINTAINING THE STANDARD?

It is considered that there is no benefit to the public or the community in maintaining the development standard. As established, there are no unreasonable or adverse impacts that can't be appropriately mitigated. As such, there would be no public benefit in maintaining strict numerical compliance the standard.

10. CONCLUSION

The proposal does not comply with the FSR control prescribed by Clause 4.4 of the Newcastle LEP 2012. Having evaluated the likely effects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of LEP 2012 are met, as compliance with the maximum FSR are unreasonable and unnecessary

in the circumstances of this case as the development meets the objectives of both the development standard and the land zone. Further, this request has demonstrated that there are sufficient environmental planning grounds to support the exceedance.

Based on the above, it is reasonable to conclude that strict compliance with the maximum FSR is not necessary and that a better planning outcome is achieved for this development by allowing flexibility in the application of the development standard. Consequently, the use of Clause 4.6 of the LEP 2012 to vary this development control is appropriate.

The consent authority should be satisfied that all requirements of the clause have been suitably addressed via the content in this formal request and the proposal is worthy of favourable consideration.