

210 O'Riordan Street, Mascot (aka 133-137 Baxter Road)

Clause 4.6 Variation Request to Floor Space Ratio Development Standard of
Bayside Local Environmental Plan 2021

On behalf of
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1 Introduction

This Clause 4.6 variation request accompanies a Development Application (**DA**) submitted to Bayside Council (**Council**) for the erection of hotel and specialised retail development at 210 O’Riordan Street, Mascot, also known as 133-137 Baxter Road (**the site**).

This Clause 4.6 variation request seeks to vary the maximum Floor Space Ratio (**FSR**) development standard which applies to the site under Clause 4.4 of the *Bayside Local Environmental Plan 2021* (**the LEP**).

The request demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case and that justification is well founded. The variation allows for a development that represents the orderly and economic use of the land in a manner which is appropriate for the context of the site and as such is justified on environmental planning grounds.

This Clause 4.6 variation request demonstrates that, notwithstanding the non-compliance, the proposed development:

- Is consistent with and achieves the objectives of the development standard in Clause 4.4 of the LEP (Wehbe Test 1).
- Is consistent with the objectives of the B5 Business Development zone under the LEP.
- There are sufficient environmental planning grounds to justify the minor contravention of the development standard. Specifically, the proposal:
 - will create an appropriate building envelope for the site which complies with the applicable height standard, will be compatible with the surrounding context and will create a positive gateway building into the Airport Precinct.
 - will align with local, district and regional strategies in that it will provide a hotel development which will support the Airport and facilitate related employment generating development.
 - has a significantly smaller FSR than the previous Development Applications, the FSRs of which were supported by the Land and Environmental Court and Council.
 - is on a site with environmental site constraints (groundwater table, site contamination and Sydney Airport rail tunnel) that have required facilities that are normally excluded from FSR as they are underground to be provided above ground where they count as FSR.
 - will not create any adverse traffic impacts to the surrounding road network.
- Is therefore in the public interest.

As a result, the DA may be approved notwithstanding the variation proposed to the Floor Space Ratio Development Standard in accordance with the flexibility afforded under Clause 4.6 of the BLEP 2021.

2 Development Standard to be Varied & Extent of Variation

The development standard proposed to be varied under this written request is the FSR specified in Clause 4.4 of the LEP.

Clause 4.4(2) of the LEP states that “the maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map”.

The Floor Space Ratio Map specifies a maximum FSR of 3:1 for the site, refer to the figure below.



Figure 1. Floor Space Ratio Map (site indicated by yellow star)
Source: BLEP 2021

A proportion of the site along O'Riordan Street is to be dedicated to RMS for road widening and is approximately 2.2m wide (maximum). The FSR is to be calculated based on the site area 'after road widening' however the site area 'before road widening' has also been provided for information purposes. Refer to the table below which outlines the maximum Gross Floor Areas (GFAs) based on before and after road widening.

Table 1 – Summary of GFA before and after road widening		
	Site area	Maximum GFA based on an FSR of 3:1
Before road widening	2,095.1m ²	6,285.3m ²
After road widening	2,001.7m ²	6,005.1m ²

The development is subject to a maximum FSR control of 3:1 and the proposal seeks an FSR of 4.10:1 (or GFA of 8,200.1m²) after the road widening which will result in a non-compliance of 36.67% against the FSR control. Refer to the table below which outlines the variation with the FSR control before and after road widening.

Table 2 – Summary of variation with FSR control before and after road widening

	FSR (based on a GFA of 8,207.1 m²)	Variation
Before road widening (based on a site area of 2,095.1sqm)	3.91:1	30.46%
After road widening (based on a site area of 2,001.7sqm)	4.10:1	36.55%

3 Previously proposed variations

Two previous DAs that have been determined for the site which proposed FSRs well above the proposed FSR of 4.10:1 (after road widening). At the time of their determination Botany Bay LEP 1995 was the relevant LEP which had an FSR control of 1.5:1 for the site. The two previous DAs are detailed below. **Table 3** below provides a comparison of the proposed FSRs:

- **DA-2008/132 (Commercial/office development):** Development consent was granted for a commercial office building which had an FSR of 7.28:1. *This consent was activated by physical commencement and therefore remains in force.*

In the Design Review Panel for the DA, the Panel stipulated that such a huge increase in density [from the LEP control of 1.5:1 to 7:1] would normally be very difficult to justify however in this case is acceptable as it accords with the Council's strategic planning for the locality and approximates the density of the existing Stamford Hotel development.

- **DA-2012/230 (Hotel development):** This Development Application proposed hotel development with an FSR of 6.6:1 and was refused by the Land and Environment Court.

In the judgement, Commissioner Brown concluded that there was no significant objection to the quantum of floor space but raised concerns about the distribution of the floor space along the street frontages and landscaping setbacks (which have been addressed in the subject proposal). The Commissioner did not disagree with the general approach of all the experts that the development of the site should have the amount of floor space as it provides a good fit with the adjoining and nearby properties.

Table 3 – Summary of proposed FSRs

	DA-2008/132 (commercial/office development)	DA-2012/230 (hotel development)	Proposed
Floor Space Ratio	7.28:1	6.6:1	3.91:1 (Before road widening) 4.10:1 (After road widening)
Gross floor Area	14,572.38 m ²	13,221.22 m ²	8,200.1m ²

The proposed FSR of 4.10:1 will be sustainably lower than the approved 2008 commercial/office development which had an FSR of 7.28:1. This consent has been activated and therefore could essentially be constructed. Furthermore, whilst the 2012 hotel development was refused, Commissioner Brown concluded that there was no objection to the FSR per se (6.6:1) and that the floor space provided a good fit with adjoining and nearby properties.

4 Exceptions to Development Standards

Clause 4.6 of the LEP includes provisions that allow for exceptions to development standards in certain circumstances. The objectives of Clause 4.6 are:

- *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6 enables a variation to any development standard to be approved on consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6.

Clause 4.6 provides flexibility in the application of planning provisions by allowing a Consent Authority to support a DA for approval, even where it does not comply with certain development standards, where it can be shown that flexibility in the circumstances of the case would achieve better outcomes for the development.

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6(3) and (4) requires that the Consent Authority consider a written request from the applicant, which demonstrates that:

- Compliance with the development standard is **unreasonable or unnecessary in the circumstances** of the case, and
- There are **sufficient environmental planning grounds** to justify contravening the development standard.
- That the proposed development will be **in the public interest** because it is consistent with the objectives of the particular standard and the **objectives for development within the zone** in which the development is proposed to be carried out.

A judgement by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

"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." [88]

This Clause 4.6 variation request is set out using the relevant principles established by the Court.

The proposed non-compliance with the FSR standard has been assessed against the objectives of the zone and development standard in **Section 5.2**, respectively and in accordance with Clause 4.6(3) of the LEP in **Sections 5.1** and **5.2**.

This Clause 4.6 Variation has been prepared as a written request seeking to justify contravention of Clause 4.4 Floor Space Ratio of the LEP.

5 Clause 4.6 Justification for the Contravention of the Development Standard

The following sections of this report provide an assessment of the request to vary the development standard relating to maximum FSR, in accordance with the criteria under Clause 4.6 of the LEP.

Consideration has been given to the following matters within this assessment:

- *Varying Development Standards: A Guide*, prepared by the Department of Planning and Infrastructure dated August 2011; and Relevant planning principles and judgements issued by the Land and Environment Court.

5.1 Clause 4.6 (3)(a) Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe v Pittwater* [2007] NSW LEC 827 (**Wehbe**) a five-part test was established in which a variation to a development standard is considered to be unreasonable or unnecessary as per Clause 4.6(3A). The five tests established in *Wehbe* are (emphasis added):

1. **The objectives of the standard are achieved notwithstanding non-compliance with the standard;**
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object or purpose would be defeated or thwarted if compliance was required and therefore 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;*
5. *The zoning of the land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Satisfaction of any one of these tests is sufficient to demonstrate the compliance with the standard is unreasonable or unnecessary.

This objection is based on the **first test**, which is addressed below.

5.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The **first test** of *Wehbe* requires demonstration that the objectives of a development standard can be achieved notwithstanding non-compliance with that particular standard.

The objectives of the standards are achieved as detailed below.

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

Clause 4.4 of the LEP seeks to achieve this objective through the establishment of the maximum FSR numerical development standard. Whilst this numerical standard is one way of achieving this objective, Clause 4.6 of LEP provides an alternative avenue of achieving an FSR outcome, notwithstanding numerical non-compliance, where it can be demonstrated that compliance with the development standard is

unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

(b) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality

The site falls within the 'Mascot Business Development Precinct' under the *Botany Bay Development Control Plan 2013* (DCP). The objectives of the precinct seek to encourage and provide for business development that has an affinity or locational need to be near to Sydney Airport and to ensure that the scale, design and material of construction; and nature of the development contributes positively to the visual amenity and the gateway function of the area.

The existing character of the locality consists of a mix of buildings comprising tourist and visitor accommodation, commercial premises and mixed-use buildings of a large bulk and scale to the north and west, and transitions to buildings with smaller bulk and scale, and typically residential uses, towards the east.

The locality consists of some developments that are up to 14-storeys in height and have FSRs around 4:1, such as:

- **5-11 Ewan Street** (to the west of the site): A hotel and commercial building was approved with an FSR of 4.35:1 whilst the FSR control was 3:1.
- **256-280 Coward Street** (to the north of the site): A DA was approved for a residential flat building with an FSR of 4.41:1 whilst the site had an FSR control of 3.2:1.
- **289-293 King St** (to the north-west of the site): A 13-storey hotel and office, and separate 5-storey carpark was approved with an estimated FSR of 3.94:1.

The proposal will have a substantially lower FSR than the 2008 commercial/office consent (DA-2008/132) and the 2012 hotel development (DA-2012/230) for the site. **Figures 2 and 3** illustrate the built form approved under the 2008 commercial/office consent **Figure 4** illustrates the currently proposed building.

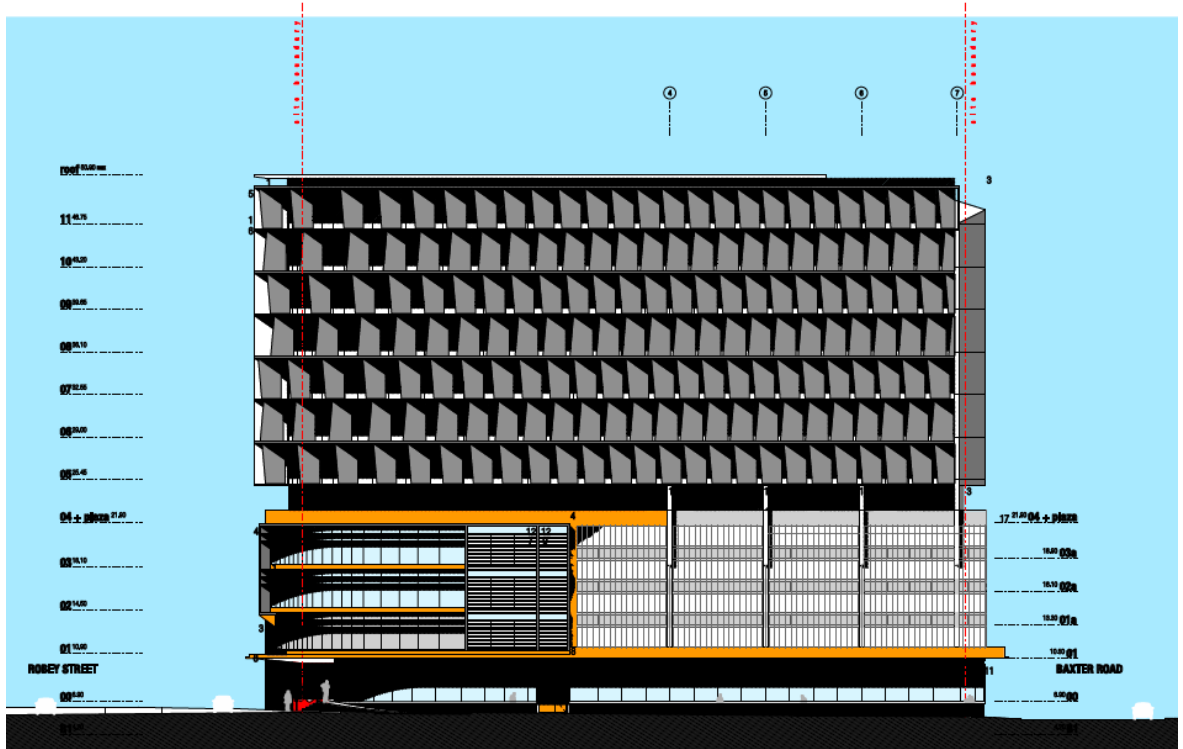


Figure 2. Approved western elevation
Source: Ancher/Mortlock/Wolley



Figure 3. Approved elevated street perspective
Source: Ancher/Mortlock/Wolley



Figure 4. Proposed photomontage from O'Riordan Street/Baxter Road Intersection.
Source: Rothelowman

While DA-2012/230 for a hotel development was refused, Commissioner Brown concluded that there was no objection to the quantum of floor space and that the floor space provides a good fit with the adjoining and nearby properties. However, the proposal substantially reduces the FSR of the previous DAs in order to provide increased setbacks and a substantially more modulated building envelope.

In the recent case, *Big Property Pty Ltd v Randwick City Council [2021]* (Big Property), Commissioner O'Neil held that the desired future character of an area is not determined solely by the development standards that control building envelopes for the area. Commissioner O'Neill held that development standards for building envelopes are frequently generic standards which do not account for existing and approved developments in the locality (amongst a number of other items).

In this regard, when determining the desired future character of the area, the existing and approved developments have been considered. The proposal will comply with the 44m height control and while it varies from the FSR control, there are other

developments in the locality that are of a similar bulk and scale and have a greater FSR as outlined above. Overall, the proposed bulk and scale is consistent with existing developments along O'Riordan Street and will create an important gateway building for the Airport Precinct. Furthermore, the design includes varying building setbacks at the ground floor, carpark podium levels and upper levels which allows for modulation of the façade to break up the building's perceived bulk and scale.

(c) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain

The site adjoins public roads to its north, south and west, and adjoins two properties to its east. The proposal minimises environmental effects on the use or enjoyment of the public domain by providing appropriate deep soil landscaped setbacks to the street frontages which allow for deep soil landscaping to improve the visual appearance of the development and soften the impact upon the streetscape. This includes a second row of mature trees that can be retained post road widening.

The two adjoining properties to the east are 108 Robey Street, Mascot which contains a 9-storey hotel 'Quest Mascot'; and 125-131 Baxter Road, Mascot which currently underutilised, accommodating very low scale, outdated development, but is subject to the same zoning and development standards as the site.

The existing adjoining hotel building at 108 Robey Street contains landscaping and services at the ground level and hotel rooms above. The hotel room windows are generally oriented to the north and the only windows along the side elevation with the subject site appear to be from lift lobby areas. The proposed boundary interface with the hotel is that of a side boundary with landscaping at the ground floor level with fire stairs on the carpark levels and hotel room windows at the upper levels. It is not considered that the proposal will create any visual or privacy concerns for the adjoining neighbour as the hotel rooms will not look into any of the adjoining hotel rooms.

For the adjoining site at 125-131 Baxter Road, a concept building envelope has been prepared (refer to SEE) which demonstrates a potential building envelope for the site that complies with built form controls. The concept building envelope demonstrates that the site can be redeveloped in isolation whilst providing suitable setbacks between the sites. The proposed car parking podium will have a nil setback along the eastern boundary whilst the hotel rooms and ancillary hotel facilities (to Level 12) will be setback between 2.4m-4.2m. The proposal will comply with the setback controls in the DCP (which are between 0-3m) and will provide a suitable setback to the site to ensure an appropriate design and amenity outcome for both sites.

There is no residential accommodation either side of the site and the site is mainly surrounded by tourist and visitor accommodation and the Botany Goods Route Train Line to the south. The proposal will not result in any overshadowing to surrounding residential sites or public open space.

The proposal minimises environmental effects on the use or enjoyment of the public domain by providing appropriate landscaped setbacks to improve the visual appearance of the development and soften the impact upon the streetscape.

The proposal is consistent with objective (c) in that it will minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.

(d) 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

The site, and surrounding land, is zoned B5 Business Development. The existing character of the location is characterised by a mix of large scale, higher density

commercial, tourist and visitor accommodation and mixed-use developments designed in response to the applicable 44m height control under the LEP. This is a marked departure from the previous development pattern of the area, which was very low in scale.

The proposed mixed-use hotel/commercial development is consistent with this emerging character. The nearest area to the site that is unlikely to undergo a substantial transformation is residential zoned land approximately 90m to the east along Robey Street. The separation distance to this land and the location of the existing intervening nine-storey hotel development (108 Robey St) provides a buffer between the proposal and that residential area.

(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 site is not in proximity to public places such as parks and community facilities however does adjoin public roads to the north, south and west, including O'Riordan Street, a classified road providing a principal route to the airport. The proposed building features increased street setbacks at ground level which allows for greater deep soil landscaping to street boundaries. This includes 2 rows of mature trees fronting O'Riordan Street such that one full row of trees would be maintained even if road widening were to occur. A green wall is proposed to the car park ramp to contribute to further greening of the streetscape, with planter boxes proposed to the top of the car park podium to soften the build form and a glazed tenancy of specialised retail floor space included to activate the ground plane.

The proposal is 44m in height which complies with the maximum building height limit and provides a skyline consistent with that of existing and proposed tourist and visitor developments adjoining to the west. The proposed building will provide a positive visual landmark to the airport and Joyce Drive (refer to the figure below) and will not adversely affect the streetscape, skyline or landscape when viewed from the adjoining public roads and is consistent with objective (e).



Figure 5. Proposed photomontage from Robey Street

In accordance with Wehbe Test 1, it is clearly demonstrated that the proposed development meets the objectives of the FSR control under Clause 4.4 notwithstanding the minor noncompliance with the numerical controls for the site. As such, strict application of the standard is unreasonable and unnecessary in the circumstances.

5.3 Clause 4.6 (3)(b) Sufficient environmental planning ground to justify contravening the development standard

Clause 4.6(3)(b) requires the applicant to demonstrate that there are sufficient environmental planning grounds to contravene the development standard.

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].

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].

In the case of the subject development, there are sufficient environmental planning grounds to justify contravening the development standard for the following reasons:

Complies with the Building Envelope Prescribed by Applicable Height and Setback Controls

- The proposal will provide an appropriate building envelope for the site, complying with the 44m building height limit in the LEP and not approaching the maximum height of the nearby Stamford Hotel at 51mAH.
- The proposal complies with the DCP setback controls. This mainly surrounded by commercial development and the Botany Goods Route Train Line to the south. The proposal will not result in any overshadowing to surrounding residential sites of public open space.
- While not strictly adhering to all quantitative setback standards in the DCP, the proposal reflects the setback patterns of the character prescribed by surrounding development in the immediate context and therefore generally complies with the setback controls and objectives in the DCP.

Reflects the Built Form Context Established by Adjoining Development

- creates an important gateway building into the Airport Precinct along O'Riordan Street. The proposal will comply with the 44m building height limit in the LEP and will not exceed the maximum height of the Stamford Hotel at 51mAH.

The development has been divided into separate modules including the ground floor plane, the car parking podium and distinct hotel tower modules which creates a highly articulated built form. The ground floor plane has generous deep soil landscaping zones along all street frontages and the eastern boundary. The ground floor retail component will activate the north-western corner with its floor to ceiling glazing and incorporate a landscaped roof top. Refer to the figure below.



Figure 5. Proposed photomontage to the corner of Robey Street and O'Riordan Street
Source: Rothelowman

The car parking podium has been suspended off the ground floor with an undercroft area for landscaping. Furthermore, the hotel gym is to incorporate glazing to the car parking podium which will provide street activation, opportunities for passive surveillance and reduce the perceived bulk and scale of the building.

- The proposal will be compatible with the existing and desired future character of the locality. It is reiterated that in the recent case, *Big Property Pty Ltd v Randwick City Council [2021]* (Big Property), Commissioner O'Neil held that the desired future character of an area is not determined solely by the development standards that control building envelopes for the area and existing and approved developments in the locality (amongst a number of other items) should be taken into consideration.

There are a number of similar developments that are up to 14-storeys in height and have FSRs of around 4:1 which include 5-11 Ewan Street, 256-280 Coward Street, and 289-293 King Street. Overall, the proposal is consistent with the desired future character and is similar to existing and approved developments within the locality.

Negligible Traffic Impact

- The proposal will not have any adverse traffic impacts on the surrounding road network. A Traffic Impact Assessment including updated traffic advice has been prepared by TPPP (refer to **Appendix 8** of the SEE and **Attachment 9** of the response to Council Request for Further Information) which provides traffic modelling results with and without the development for 2021 and 2031. The report concludes that

while unrelated background traffic growth would occur, the additional development-generated traffic is expected to have a negligible impact on the road network in the AM and PM peak.

Consistent with Relevant Strategic Planning

- The proposal will align with local, district and regional strategies. The proposal will facilitate an employment generating development which will provide job opportunities in hotel and specialised retail uses and align with the planning priorities of the Bayside Local Strategic Planning Statement (the **LSPS**). The development will contribute to employment numbers within the 'Eastern Economic Corridor' in the Greater Sydney Regional Plan and on the edge of the 'Green Square - Mascot Strategic Centre' under the Eastern City District Plan.

The site falls within the 'Mascot Business Development Precinct' under the DCP. The objectives of the precinct seek to encourage and provide for business development that has an affinity or locational need to be near to Sydney Airport and to ensure that the scale, design and material of construction and nature of the development contributes positively to the visual amenity and the gateway function of the area. The development will also provide important hotel accommodation which supports the operation of the Sydney Airport whilst it will provide a building that creates a gateway to the Airport Precinct.

Site Constraints Require Inclusion of Areas Normally Excluded from FSR

- The site is highly restricted by a number of environmental constraints which are outlined below:
 - Ground water table: The site is affected by groundwater close to the surface (at approximately 2m below ground level).
 - Site contamination: Site contamination as identified in the Preliminary Site Investigation (refer to **Appendix 3** of the SEE).
 - Sydney Airport rail tunnel: The site is adjacent to the Sydney Trains T8 Airport Line train tunnel which runs below O'Riordan Street.

These environmental constraints have restricted the potential to excavate any basement levels and therefore the placement of the entire building above ground level has contributed to its perceived bulk and scale. It is highlighted that the site is also restricted by a height of 44m under the LEP 1, the prescribed airspace and a portion of land along O'Riordan Street which is to be dedicated to RMS for future road widening purposes.

As shown below in the LEP definition of *gross floor area*, any storage, garbage, and services are only excluded from GFA calculations if they are located within a basement (Note. Vehicular car parking and access, and loading areas are excluded from GFA whether within a basement or not where they meet the requirements of the consent authority – see (g) and (h), (our emphasis)).

gross floor area means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes—
(a) the area of a mezzanine, and
(b) habitable rooms in a basement or an attic, and
(c) any shop, auditorium, cinema, and the like, in a basement or attic,
but excludes—

(d) any area for common vertical circulation, such as lifts and stairs, and

(e) any basement—

(i) storage, and

(ii) vehicular access, loading areas, **garbage and services, and**

(f) plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and

(g) car parking to meet any requirements of the consent authority (including access to that car parking), and

(h) any space used for the loading or unloading of goods (including access to it), and

(i) terraces and balconies with outer walls less than 1.4 metres high, and

(j) voids above a floor at the level of a storey or storey above.

The proposal contains storage, garbage, and services areas which ordinarily would be located within the basement and excluded from GFA calculations. However, the refuse/garbage rooms, bulky waste rooms, luggage storage rooms, linen storage and engineer's office to the ground floor, and the housekeeping and office to Level 1, have been included in the GFA and FSR calculations and contribute to the perceived bulk and scale of the development. These areas account for ~108m² of the GFA.

5.4 Clause 4.6 (4a)(ii) Public Interest

Clause 4.6(4a)(ii) requires that the consent authority consider whether 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.

Preston CJ in *Initial Action* (Para [27]) described the relevant test for this as follows:

The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).

As detailed in **Section 5.1** above, the proposed development will be consistent with the objectives of the FSR standard. The proposal's consistency with the objectives of the zone is addressed below.

5.4.1 Consistency with Zone B5 Business Development Objectives

The objective of the B5 Business Development zone is listed below:

- *To enable a mix of business and warehouse uses, and specialised retail premises that require a large floor area, in locations that are close to, and that support the viability of, centres.*

The proposal is for a mixed-use development comprising of ground floor specialised retail and hotel accommodation, along with advertising signage which are all listed as permitted uses with consent in the B5 Business Development Zone Land Use Table. The proposal is consistent with the zone objective in that it will provide specialised retail and hotel accommodation in a key location in close to Sydney Airport and will support the viability of the Airport and Mascot Precinct.

5.5 Clause 4.6(5) Secretary's Concurrence

In deciding whether to grant concurrence, subclause 4.6(5) requires that the Secretary 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.*

The proposal has been assessed against the relative criteria below:

Would non-compliance raise any matter of significance for State or regional planning?

The contravention of the FSR development standard does not raise any matter of State or regional planning significance. The proposed variation will not contravene any overarching State or regional objectives or standards.

Is there a public benefit of maintaining the development standard?

There is no public benefit associated with maintaining strict compliance with the development standard in this instance. Removing GFA from the scheme would serve no material public purpose but would diminish the supply of tourist and visitor accommodation serving the Airport and Mascot Precinct.

Are there any other matters required to be taken into consideration by the Secretary before granting concurrence?

There are no additional matters that need to be considered in exercising the assumed concurrence of the Secretary.

6 Conclusion

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying certain development standards and to achieve better outcomes for and from development in particular circumstances.

This Clause 4.6 variation is necessary to obtain the flexibility in the FSR development standard to enable the proposed mixed-use specialised retail and hotel development. The request concludes that strict compliance with the FSR standard is unnecessary and unreasonable in the circumstances of this case, and proposed variation satisfies the tests under Clause 4.6 for the following reasons:

- The objectives of the standard are achieved notwithstanding non-compliance with the numerical control (Clause 4.6(3)(a) and *Wehbe* test 1).
- There are sufficient environmental planning grounds to justify the minor contravention of the development standard. Specifically, the proposal:
 - will create an appropriate building envelope for the site which complies with the applicable height standard, will be compatible with the surrounding context and will create a positive gateway building into the Airport Precinct.
 - will align with local, district and regional strategies in that it will provide a hotel development which will support the Airport and facilitate related employment generating development (for construction and ongoing operation).
 - has a significantly smaller FSR than the previous Development Applications, the FSRs of which were supported by the Land and Environmental Court and Council.
 - is on a site with environmental site constraints (groundwater table, site contamination and Sydney Airport rail tunnel) that have required facilities that are normally excluded from FSR as they are underground to be provided above ground where they count as FSR.
 - will not create any adverse traffic impacts to the surrounding road network.
- The matters required to be demonstrated by sub-clause (3) are adequately addressed (Clause 4.6(4)(a)(ii)).
- The proposal is in the public interest (Clause 4.6(4)(a)(ii)) because it will provide hotel accommodation in close proximity to Sydney Airport and:
 - the proposed development will be consistent with objectives relating to the maximum FSR development standard; and
 - the proposal is consistent with the objectives stated in LEP Land Use Table for the B5 Business Development Zone. There would be no public benefit in maintaining strict compliance with the Development Standard.

Overall, the objectives of Clause 4.6(1) are to provide an appropriate degree of flexibility to achieve a better outcome for and from development. Strict compliance with the maximum FSR standard would prevent the proposed development proceeding and delivering the benefits and outcomes described. The proposal will have minimal impacts on the community and support economic growth, creation of new jobs and is in the public interest.

The relevant tests under Clause 4.6 are satisfied and there are sufficient environmental planning grounds to justify the contravention of the FSR development standard.