



Clause 4.6 Variation Request

Botany Bay Local
Environmental Plan 2013 –
Clause 4.4 Floor Space
Ratio



23-25 Church Avenue & 16-18 John St, Mascot

Submitted to Bayside Council

On Behalf of Da Vito Ferro Apartments P/L

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TABLE OF CONTENTS

1. Executive Summary	4
2. Introduction.....	5
3. Standard to be Varied	6
4. Extent of Variation	7
5. Unreasonable or Unnecessary.....	9
5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.	9
5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;	13
5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.	13
5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or	13
5.5. The zoning of the land is unreasonable or inappropriate.	13
6. Sufficient Environmental Planning Grounds	14
7. Public Interest.....	15
8. Conclusion	16

FIGURES

Figure 2: Extract of Floor Space Ratio Map (Source: NSW legislation)	5
Figure 2: 3D massing study - 23-25 Church Ave, 16-18 John St and 27 Church Ave and 18A John St. North-easterly perspective. (Source: DA Design Report, 2 October 2019 by Squillance Architects).....	7
Figure 3: 3D massing study - 23-25 Church Ave, 16-18 John St and 27 Church Ave and 18A John St. South-western perspective. (Source: DA Design Report, 2 October 2019 by Squillance Architects)	7
Figure 4: Extract DA-458 showing shadow impacts on 222-228 Coward Street (Source: Squillance Architects).....	10

TABLES

Table 1: Achievement of Objectives of Clause number of LEP.....	9
Table 2: Consistency with zone objectives	15

1. EXECUTIVE SUMMARY

The development application seeks consent for a fourteen (14) storey mixed use development, with four (4) levels of basement car parking.

Clause 4.4 of the Botany Bay LEP 2013 prescribes that the maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown on the Floor Space Ratio Map. The Floor Space Ratio Map specifies a maximum floor space ratio of 3.2:1 for development on the site, which the development exceeds having a floor space ratio of 3.77:1.

The floor space ratio control has been varied on thirteen (13) occasions in the Mascot Town Centre, with the variations ranging from 0.23:1 – 1:1. Having regard to the number and extent of the variations, it is concluded that the development standard has been virtually abandoned and therefore compliance with the floor space ratio development standard is unreasonable and unnecessary. Furthermore, the proposal is also consistent with the objectives of the floor space ratio development standard and compliance with the development standard is unreasonable and unnecessary for this reason also.

The subject site is one of two undeveloped sites in the street block bound by Church Ave, John St, Bourke St and O'Riordan St. The proposed development references the surrounding developments to determine the new bulk, scale and the character of the area, in particular 27 Church Ave and 18A John St, which the Mascot Town Centre Precinct controls anticipates will be developed in a paired arrangement with the site.

The proposed development compliments the development on 27 Church Ave and 18A John St, creating a compatibility in bulk and scale and consistency in massing. The proposed development includes greater modulation and articulation to protect the amenity of the adjoining properties, improve internal amenity and create lively and interesting facades whilst creating a through site pedestrian link between John Street and Church Avenue.

The proposed building is compatible with the bulk and scale character of the area, as established by existing developments. Its environmental impacts are consistent with what is expected in a higher density environment. The proposal will deliver a high-quality building that positively contributes to the Mascot Town centre and the proposed variation to the FSR is acceptable. In this regard there are sufficient environmental planning grounds to justify the variation also.

2. INTRODUCTION

This is a formal request that has been prepared in accordance with clause 4.6 of the Botany Bay Local Environmental Plan 2013 to justify a variation to the Floor Space Ratio development standard prescribed in Clause 4.4 of that plan. The request relates to a development application submitted to Bayside Council that seeks consent for a 13-storey mixed use development at 23-25 Church Avenue and 16-18 John St, Mascot.

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

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this application.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

This request is structured to explicitly address the matters required to be addressed by the applicant under Clause 4.6(3) (a) and (b) for which the consent authority must be indirectly satisfied according to *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80]. This request also addresses the matters in Sections 4.6 (4) and (5) regarding which the consent authority and delegate of the Secretary must directly form their own opinion of satisfaction.

3. STANDARD TO BE VARIED

The standard that is proposed to be varied is the Floor Space Ratio (FSR) development standard which is set out in clause 4.4 (2) of the Botany Bay Local Environmental Plan 2013 (BBLEP 2013) as follows:

4.4 Floor space ratio

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.

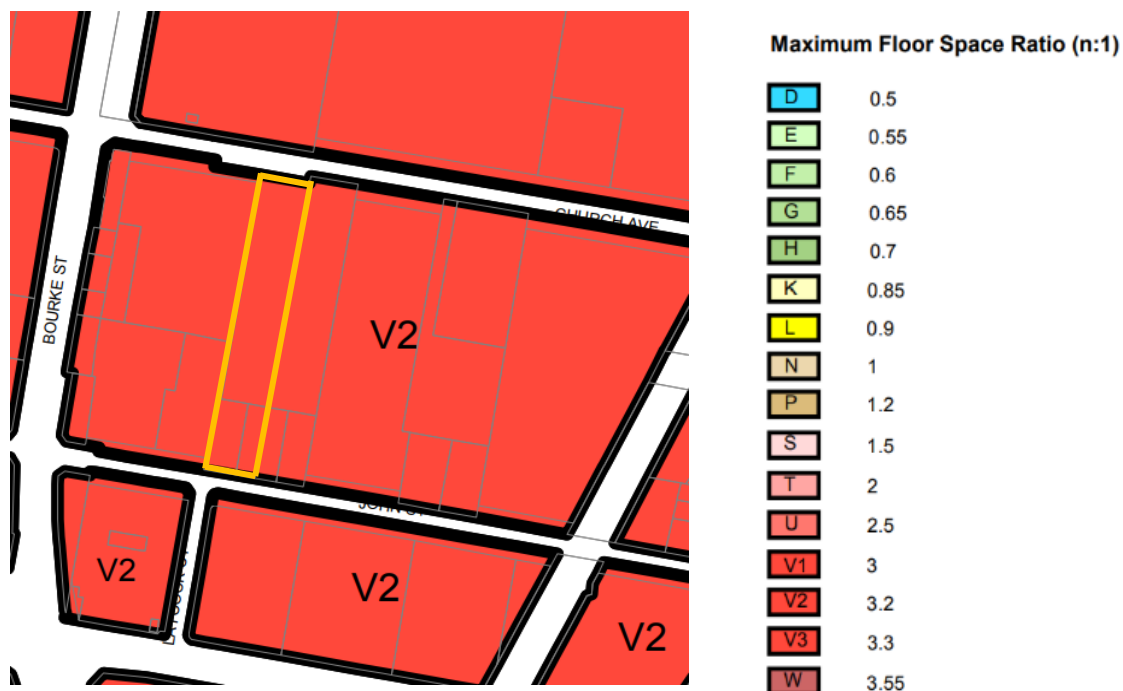


Figure 1: Extract of Floor Space Ratio Map (Source: NSW legislation)

The numeric development standard in this instance is 3.2:1.

The development standard to be varied is not excluded from the operation of clause 4.6 of the BBLEP 2013.

4. EXTENT OF VARIATION

Clause 4.4 (2) of the LEP prescribes a maximum floor space ratio of 3.2:1 for the subject site. This application seeks consent for an FSR of 3.77:1. This equates to a variation of 0.57:1 of FSR.

The FSR for each site has been calculated in accordance with Clause 4.5 - *Calculation of floor space ratio and site area* and the definition of *gross floor area* provided in the BBLEP.

It should be noted that the proposed development includes buildings with gallery corridors, that is, corridors that are open on one side and exposed to the elements.

There have been various decisions by Commissioners of the Land & Environment Court regarding whether or not to include exposed or open corridors in the calculation of gross floor area (GFA).

GFA is defined in the BBLEP as follows:

“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 ...”
(emphasis added)

In *GGD Danks Street P/L and CR Danks Street P/L v Council of the City of Sydney* [2015] NSWLEC 1521, Commissioner O'Neill formed the view that the corridor of the building in question did not form part of the gross floor area as it was contained on either side by the external walls of the units on either side of the corridor.

The Commissioner determined that the external face of the wall cannot be characterised as an internal face because an external wall has a specific function that distinguishes it, that being, weatherproofing. It was said that, the definition of gross floor area must refer to the interior surface of the wall that forms the facade or exterior of a dwelling, being the wall that weatherproofs the interior space, and cannot refer to the exterior surface of the outer wall.

In *Landmark Group Australia Pty Ltd v Sutherland Shire Council* [2016] NSWLEC 1577, the Danks case was referred to but Commissioner Morris accepted the Council's argument that the “floor” of the building in the plan was the whole of the floor enclosed by the external face of the building, that being the face that surrounds the building footprint and which, notwithstanding articulation, recessing and the like within it, is generally that which presents to the street frontage and to the side and rear boundaries.

In *Ceeroose Pty Ltd v Inner West Council* [2017] NSWLEC 1289, Commissioner Dickson took a similar approach to Commissioner Morris in the Landmark Group case.

Having regard to these decisions, gallery corridors have only been excluded from the calculation of GFA where the adjoining wall is unequivocally an external wall that forms part of the external face of the building. In application, and for abundant caution, this means that sections of the gallery corridors as shown on GFA plan have been included in the GFA calculation because they are arguably protected from the weather or not exposed to the side boundaries.



Figure 2: 3D massing study - 23-25 Church Ave, 16-18 John St and 27 Church Ave and 18A John St. North-easterly perspective. (Source: DA Design Report, 2 October 2019 by Squillance Architects)



Figure 3: 3D massing study - 23-25 Church Ave, 16-18 John St and 27 Church Ave and 18A John St. South-western perspective. (Source: DA Design Report, 2 October 2019 by Squillance Architects)

5. UNREASONABLE OR UNNECESSARY

In this section we demonstrate why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by clause 4.6(3)(a) of the LEP.

The Court has held that there at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]).

We have considered each of the ways as follows.

5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

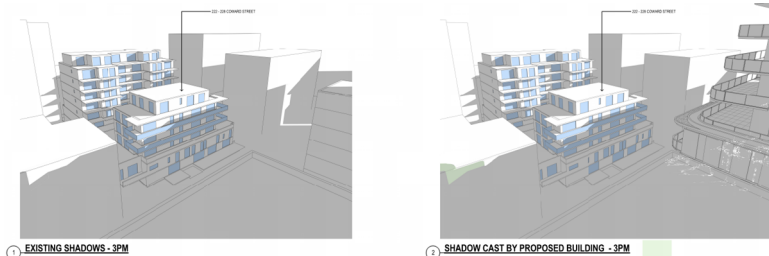
Table 1: Achievement of Objectives of Clause number of LEP.

4.4 Floor Space Ratio	
Objective	Discussion
(a) to establish standards for the maximum development density and intensity of land use	<p>Mascot town centre has been created through the renewal of industrial lands. It is characterised by high-density transit-oriented development around Mascot station. Mascot is located near to the key employment hubs of Port Botany and Sydney airport, and has easy rail access to Sydney CBD.</p> <p>The subject site is centrally located within the town centre and is a suitable location for higher density development, being:</p> <ul style="list-style-type: none"> 100 metres from the Bourke Road food and beverage strip 200 metres from Mascot Station and bus-stops and 300 metres from a local shopping centre. <p>The site is one of two undeveloped lots in this street block. It is demonstrated below that the proposed building is compatible with the density and intensity of the surrounding new developments.</p>
(b) to ensure that buildings are compatible with the bulk and scale of the existing and desired future character of the locality	<p>The proposed building is compatible with the bulk and scale of the new development in the surrounding area which establish the character of the locality.</p> <p>The subject site has a key spatial relationship with the adjoining site to the west, 27 Church Ave and 18A John St. The two sites are atypical of allotments in the Mascot town centre having relatively narrow widths of 21.3m (approx.).</p> <p>The Mascot Town Centre Precinct controls within the Botany Bay Development Control Plan 2013, anticipate that the northern portion of the sites will be developed in a paired arrangement with a nil setback at the common boundary and mirrored forms. The DCP does not identify any desired built form outcome for the southern portion of the sites.</p> <p>The development of 27 Church Ave and 18A John St (27 Church Ave) has preceded that of the subject site and establishes the desired future character and an accepted bulk and scale, for a site of that size and dimensions.</p> <p>Figure 2 illustrates the relationship of Building A to the adjoining buildings on Church Ave and demonstrates the compatibility of their bulk and scale. The follow analysis is provided on the relationship:</p>

4.4 Floor Space Ratio

Objective	Discussion
	<ul style="list-style-type: none"> ▪ The height of the top floor roof matches the adjoining building, creating a consistency in scale at Church Ave. ▪ The western portions of each building are built to the common boundary and setback from the opposing side boundary, creating a consistent massing across the sites. ▪ The varied setbacks to the eastern boundary create a stepping in the northern and eastern elevations, reducing their bulk and creating visual interest at Church Ave. ▪ A void is provided in the core of the building to maximise natural light and ventilation available to the proposed apartments. The void also allows the light well in the eastern façade of 27 Church Ave and the communal open space area at level 11 of that building, to receive sunlight. ▪ Building A occupies a similar footprint to the adjoining building but extends 5.5m (approx.) further southward. The extended footprint steps away from the subject site's western boundary to mitigate amenity impacts on the openings in the southern elevation of 27 Church Ave. The extension is in part a redistribution of mass from the central void in the building, which as described above protects sunlight access to that building. ▪ The subject site adjoins 21 Church Ave at its eastern boundary. Development on that site is lower in height (7 storeys) at Church Ave and differently massed (three rather than two towers) than the proposed development. Despite the variation, Building A proposes a suitable relationship with 21 Church St, with the side boundary setbacks separating and offsetting the buildings, preventing crowding above the podium. <p>Figure 3 illustrates the relationship of Building B to the adjoining building on 18A John St and demonstrates the general compatibility of their bulk and scale. The follow additional analysis is provided on the relationship:</p> <ul style="list-style-type: none"> ▪ The roof slab height (RL 49.51) of the building matches the adjoining building. ▪ Building B adopts a similar massing strategy to the adjoining building with setting back the upper three storeys to reduce their visual impact. ▪ The southern elevation of Building B includes greater visual articulation than the adjoining building, with varied balcony depths and staggered room projects modulating the façade.
(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,	The subject site is centrally located in the Mascot town centre. The proposed development will not impact on the character of any area that is not or will not be undergoing change.
(d) To ensure that buildings do not adversely affect the streetscape, skyline or	Building A mirrors the form and massing of the adjoining development on 27 Church Ave, creating a commonality in built form at Church Ave. The setbacks at the eastern boundary

4.4 Floor Space Ratio

Objective	Discussion
landscape when viewed from adjoining roads and other public places such as parks, and community facilities	<p>articulate the northern and eastern elevations and provide space between it and adjoining the buildings.</p> <p>Building B has an articulated form, with the upper three floors setback to create a consistency in bulk and scale with the surrounding development.</p>
(e) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain	<p>The proposed development has been designed to minimise its adverse environmental effects on the street and surrounding properties.</p> <p>The eastern boundary side setbacks create a corridor that allows sunlight to reach the northern elevation of the central and southern buildings of 19 – 21 Church Ave & 10 – 12 John St. The detailed solar analysis within the development application, identifies that 70.5% of dwellings in that property will 2 hour or more hours of sunlight in mid-winter.</p> <p>At its southern boundary the site adjoins 222-228 Coward St. The development will result in three second floor dwellings receiving less than 2hrs of sunlight, which equates to a loss of 14% of compliant apartments (Figure 4). This impact on lower floor dwellings is unavoidable. Importantly, the proposal has no impact on the ability of the upper floor apartments to achieve satisfactory solar access.</p> <div data-bbox="598 1120 1370 1375" data-label="Figure">  </div> <p>Figure 4: Extract DA-458 showing shadow impacts on 222-228 Coward Street (Source: Squillace Architects)</p> <p>Protection of solar access is more difficult in high density environments. Additionally, other buildings have been designed without adequate regard to future sunlight access (i.e. prior to the ADG). The affected apartments are vulnerable to loss because of their location on a lower floor of the building. Having regard to that context and that the development is consistent with the overshadowing design guidance in the Apartment Design Guide, in that it does not reduce solar access to the property by more than 20% the impact is acceptable.</p> <p>The apartments on level 7 of the adjoining property at 19 John St obtain views of the city skyline via a view corridor which passes across the site. The corridor extends the full length of the site and its protection would unreasonably impact on the development capacity of the site. The view loss is caused by a compliant portion of the building, and as such is an impact expected by the development controls.</p> <p>It is proposed to retain and restore the brick façade at Church Ave. The façade will serve as a reminder of the industrial past of the site, whilst creating a point of activation and visual interest within the</p>

4.4 Floor Space Ratio	
Objective	Discussion
	streetscape. Retention of the façade will not hinder pedestrian movement with clear space available for a wide footpath and circulation.
(f) to provide an appropriate correlation between the size of a site and the extent of any development on that site	It has been demonstrated at Point B, that the bulk and scale of the proposed development is consistent that of the newly constructed mixed development upon 27 Church St. The subject has a comparable site area to 27 Church Ave and adjoins that site.
(g) to facilitate development that contributes to the economic growth of Botany Bay.	The development will contribute to the economic growth of Botany Bay by creating a retail space and warehouse space from which business can operate. Future residents of the building will spend part of their disposal income in nearby businesses, thereby supporting the local economy.

As demonstrated in Table 1 above, the objectives of the Floor Space Ratio development standard are achieved notwithstanding the proposed variation.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245 and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, therefore, compliance with a development standard is demonstrated to be unreasonable or unnecessary on this way alone.

For the sake of completeness, we consider the other recognised ways as follows.

5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

On this occasion we do not believe that the underlying objective or purpose is not relevant to the development and therefore we do not rely on this reason.

5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

We do not consider the objective would be defeated or thwarted if compliance was required, even though we have demonstrated above that the objectives of the standard are also achieved by the elements that do not comply with the development standard. In this regard we do not rely on this reason.

5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or

A number of previous approvals within the Mascot Town Centre have granted variations to the floor space ratio controls. Examples of previously approved developments in the Mascot Station area that exceed the 3.2:1 FSR control are shown in the table below. The number and extent of variations is significant and demonstrates that the floor space control has been abandoned and therefore compliance is unreasonable and unnecessary. The proposed development has been designed on a first principles approach, with building envelopes developed based on the bulk and scale of surrounding development, as intended by the objectives of the control.

	Site	Approved FSR
1	39 Kent Road, Mascot	4.26:1

2	214 Coward Street, Mascot	4.24:1
3	208-210 Coward Street, Mascot	4.00:1
4	246 Coward Street, Mascot	3.88:1
5	133-141 O'Riordan Street, Mascot	3.87:1
6	8 Bourke Road & 37 Church Avenue	3.82:1
7	2-4 Haran Street, Mascot	3.79:1
8	7-9 Kent Road, Mascot	3.78:1
9	7 Bourke Street & 30-32 John Street, Mascot	3.75:1
10	19-33 Kent Road, Mascot	3.72:1
11	256 Coward Street, Mascot	3.71:1
12	230 Coward Street, Mascot (25 John Street)	3.60:1
13	671-683 Gardeners Road	3.43:1

5.5. The zoning of the land is unreasonable or inappropriate.

We do not consider the zoning of the land is unreasonable or inappropriate and therefore we do not rely on this reason.

6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In this section we demonstrate that there are sufficient environmental planning grounds to justify contravening the Floor Space Ratio development standard as required by clause 4.6(3)(b) of the LEP.

We note that in *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 2018, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard.

We also note that in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

As discussed in Section 4, the development application seeks consent for an FSR of 3.77:1. This equates to a variation of 0.57:1 or 16.6% (1,593.3m² of gross floor area).

Development approvals granted within the Mascot Town Centre have delivered a built form that is different to that facilitated by the floor space ratio control. The development references the surrounding development, particularly 27 Church Ave and 18A John St, as establishing the character of the area. The proposed development is compatible with the bulk and scale of development on that site and complements its form, delivering a consistent built form at Church Ave.

The environmental impacts of the development are consistent with what can be reasonably expected within a high-density environment. The site's orientation and the massing and setbacks of the building enable the adjoining properties to the east and west to receive a level of solar access compliant with the standards in the Apartment Design Guide. A reduction in solar access to less than 2 hours in three second floor apartments to the south is undesirable, but acceptable given the high-density context and the apartments' vulnerable location. Moreover, this occurs not as a result of the variation of the FSR development standard, but as a result of the expected development of the site as the affected apartments are located on the second floor of the building.

The development provides public benefit by providing a through site link, increasing the permeability of the street block. The link connects with John St in proximity to Laycock walk, thereby extending the network of pathways in the area and promoting walking and cycling.

As such, the proposal promotes good design and amenity of the built environment and in this regard furthers the objects of the EP&A Act.

7. PUBLIC INTEREST

In this section we explain how 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 as required of the consent authority by clause 4.6(4)(a)(ii) of the LEP.

In section 5 it was demonstrated that the objectives of the development standard are achieved notwithstanding the variation of the development standard. For the same reasons, we consider that the development as a whole is consistent with these objectives.

The table below considers whether the proposal is also consistent with the objectives of the zone.

Table 2: Consistency with zone objectives

B4 Mixed Use	
Objectives of Zone	Discussion
To provide a mixture of compatible land uses.	The proposed mixed-use development incorporates high density residential, a retail spaces, and a warehouse that is planned for future use as a providore (subject to separate DA). The uses are low intensity and their operation will not interfere with other land uses.
To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.	The proposed mixed-use development incorporates a retail and warehouse space at ground level. The proposed spaces are a short distance from the Mascot train station and bus services and as such are readily accessible by public or passive private transport.

As demonstrated in Table 2, the proposal is consistent with the objectives of the zone and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

8. CONCLUSION

This submission requests a variation, under clause 4.6 of the Botany Bay Local Environmental Plan 2013, to the Floor Space Ratio development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development because the proposal achieves the objectives of the zone notwithstanding the variation of the floor space ratio and the development standard has been virtually abandoned in the locality; and
- There are sufficient environmental planning grounds to justify the contravention.

We submit that the consent authority can be satisfied to the above and that the development achieves the objectives of the development standard and is consistent with the objectives of Zone name and is therefore in the public interest. We note that the concurrence of the Secretary can be assumed in accordance with Planning Circular PS 18-003.

On this basis, therefore, it is appropriate to exercise the flexibility provided by clause 4.6 in the circumstances of this application.