



125-131 Baxter Road, Mascot

Clause 4.6 Variation Request

Clause 4.4 Floor Space Ratio

Bayside Local Environmental Plan 2021

PREPARED FOR

Boston Atlas Hotels Pty Ltd

November 2023

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Mecone acknowledges the Traditional Custodians of the land on where this project is undertaken and across the Mecone offices that this report is prepared, paying respect to the Elders past and present. We recognise the ongoing connection of Aboriginal and Torres Strait Islander peoples to land, waters, and culture.

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* This document is for discussion purposes only unless signed and dated by the persons identified. This document has been reviewed by the Project Director.

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1 Introduction

This Clause 4.6 Variation Request has been prepared by Mecone on behalf of Boston Atlas Hotels Pty Ltd (the Proponent) in support of a Development Application (**DA**) for proposed hotel and food and drink premises at 125-131 Baxter Road, Mascot (**the site**).

This Variation Request seeks a variation to the maximum floor space ratio (**FSR**) development standard under Clause 4.4 of the *Bayside Local Environmental Plan 2013* (**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:

- Strict application of the standard is unreasonable and unnecessary as the stated objectives of the standard are achieved notwithstanding non-compliance with the standard (*Wehbe* test 1).
- The following are **sufficient environmental planning grounds** to justify the contravention of the development standard:
 - The proposed FSR represents the outcome of a building envelope that has been developed in response to the bulk and scale of the surrounding developments, particularly with respect to the adjoining three existing and approved hotel buildings to the north, west and east.
 - The proposed FSR reflects the prevailing built form and land use context of the E3 Productivity Support zoned land in the Mascot locality as well as the specific gross floor area (GFA) characteristics of the proposed hotel use.
 - The proposed FSR is compatible with the character of the Mascot precinct which has been undergoing a transformation from low density mixed industrial uses to multistorey airport related tourist accommodation and commercial office developments. A reduced building envelope with a compliant FSR would undermine, rather than reinforce the consistency with the emerging character and planning context.
 - The proposed FSR as a result of a context responsive envelope will not create any adverse privacy, overshadowing, visual, traffic or noise impacts on the surrounding development.

Accordingly, the consent authority can be satisfied that compliance with the FSR development standard is unreasonable and unnecessary since the objectives of the standard are achieved notwithstanding the non-compliance.



2 Development Standard to be Varied

The development standard sought to be varied under this written request is Clause 4.4 Floor Space Ratio 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.

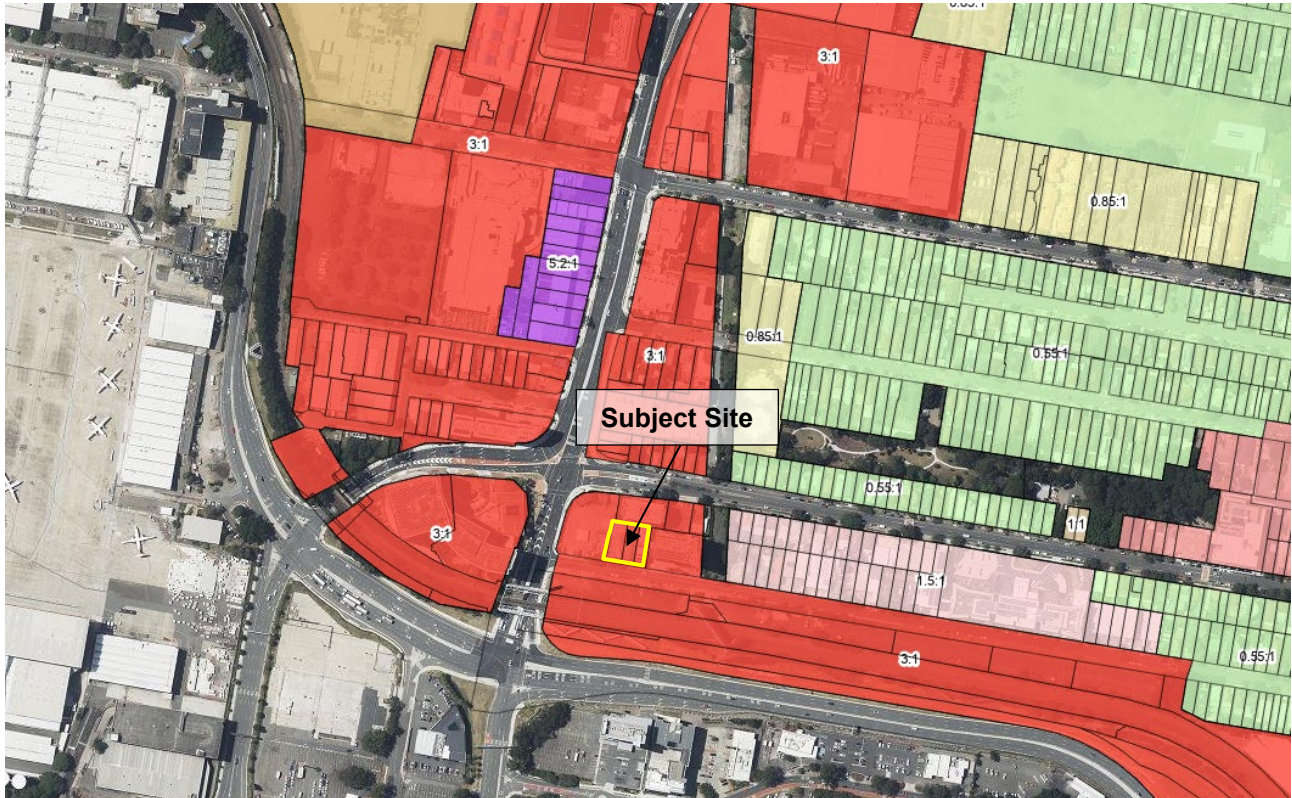


FIGURE 1 FLOOR SPACE RATIO MAP

Source: NSW Legislation 2023

The subject site area is 1,102m² and therefore the maximum Gross Floor Area (GFA) based on an FSR of 3:1 is 3,306m².

The development is subject to a maximum FSR control of 3:1 and the proposal seeks an FSR of 3.78:1 (or GFA of 4,163.1m²) which will result in a non-compliance of 26% against the FSR standard.



3 Clause 4.6 Exceptions to development standard

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:

- (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.*

In determining whether to grant consent for development that contravenes a development standard, Clause 4.6 (3) requires that the consent authority to consider a written request from the applicant, demonstrating that:

- (a) *compliance with the development standard is **unreasonable or unnecessary in the circumstances,** and*
- (b) *there are **sufficient environmental planning grounds** to justify the contravention of the development standard.*

The proposed non-compliance with the FSR standard has been assessed against the objectives of the development standard in **Section 3.3.1**, and in accordance with Clause 4.6(3) of the LEP in **Sections 3.1** and **3.2**.

Recent changes to Clause 4.6 commenced on 1 November 2023. Variation requests are still required to demonstrate that:

- compliance with the development standard is unreasonable or unnecessary; and
- there are sufficient environmental planning grounds to vary the standard.

However, the following is no longer required:

- Demonstration of public interest (i.e. consistent with the objectives of the standard and the zone)
- the Secretary's concurrence.

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

In *Wehbe v Pittwater Council* [2007] NSW LEC 827 (Wehbe), the Court established five potential ways in which a variation to a development standard can be demonstrated to be unreasonable or unnecessary in accordance with Clause 4.6(3)(a). The first test is:

1. ***The objectives of the standard are achieved notwithstanding non-compliance with the standard (first test).***

3.1.1 First test: 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 FSR development standard are achieved as detailed below.

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

While the 3:1 FSR standard applies to the majority of E3 Productivity Support zoned land in Mascot, the FSR standard is imposed to accommodate a wide range of land uses, encompassing commercial, tourist accommodation and industrial uses with variable building forms. The proposed built form with an FSR of 3.78:1 represents the result of an extensive design process involving consideration of the setback provisions and the potential visual and amenity impacts on the surrounding developments. The proposed FSR is adjusted in this instance to reflect the proposed built form and land use context of the immediate locality, which predominantly comprises hotel development of similar scale. The proposed FSR is a result of accommodating the floor space characteristics of the proposed hotel and food and drink premises uses.

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



The proposal is consistent with the bulk and scale of the surrounding developments. In the immediate context, a 12-storey hotel development adjoining the western boundary of the site (210 O’Riordan Street) was approved with an FSR of 4.1:1 (DA-2021/450) on 15 September 2022. The adjoining hotel development to the north and east also present a similar scale with similar building setbacks, comprising 9 and 12 storeys respectively. To the north-east at 102-106 Robey Street, a 12-storey hotel development with an FSR of 3.9:1 is currently under assessment (DA-2022/423). The proposed FSR results from the establishment of a building envelope designed with a direct response to the three adjacent hotel buildings to the north, west and east.

As demonstrated in **Section 6.2.2** of the SEE, the proposal provides appropriate setbacks to the neighbouring properties, whilst providing an articulated response to the streetscape on Baxter Road. Despite the numerical departure to certain setback requirements in the *Bayside Development Control Plan 2022* (the DCP), the proposal has been designed to minimise the potential visual amenity impacts by providing adequate separation to the adjoining buildings whilst facilitating adequate solar access to the hotel rooms within the site and the surrounding hotel buildings. The proposed hotel development with appropriate setbacks will present a positive visual relationship between the proposal and the surrounding hotel developments.

Figures 2-5 below illustrate the proposed building envelope in the context of the immediate context.



FIGURE 2 VIEW EAST ALONG BAXTER ROAD
Source: Rothe Lowman 2023



FIGURE 3 VIEW WEST ALONG BAXTER ROAD
Source: Rothe Lowman 2023



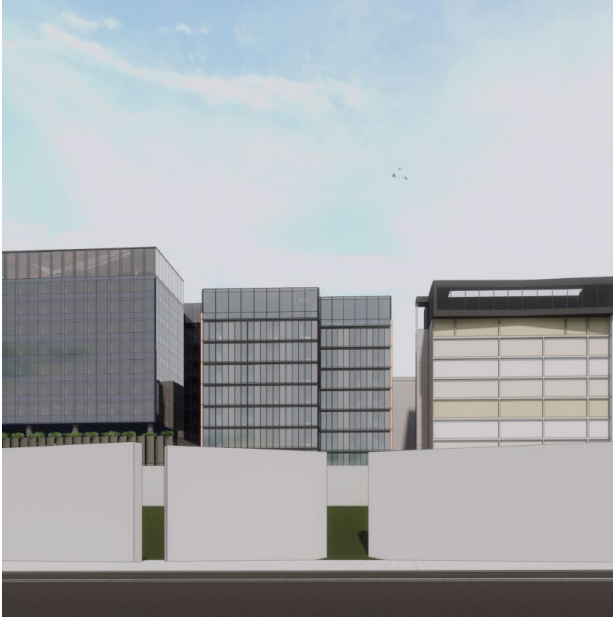


FIGURE 4 VIEW NORTH ACROSS JOYCE DRIVE
 Source: Rothe Lowman 2023



**FIGURE 5 VIEW EAST ALONG ROBEY STREET
 (PROPOSED HOTEL DEVELOPMENT AT 102-106
 ROBEY STREET)**
 Source: Rothe Lowman 2023

In the wider context, the existing character of the Mascot 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 north-west): A hotel and commercial building was approved with an FSR of 4.35:1 whilst the FSR control was 3:1;
- 215-235 O’Riordan Street and 1-3 Ewan Street (to the north-west): A Planning Proposal (PP-2021-6388) was approved to increase the maximum FSR from 3:1 to 5.2:1;
- 289-293 King Street (to the north-west): A 13 storey hotel ‘Travelodge Hotel’ and office, separate 5 storey carpark was approved with an estimated FSR of 3.94:1; and
- 256-280 Coward Street (to the north): 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.

Figure 6 illustrates the aforementioned developments in the surrounding area.



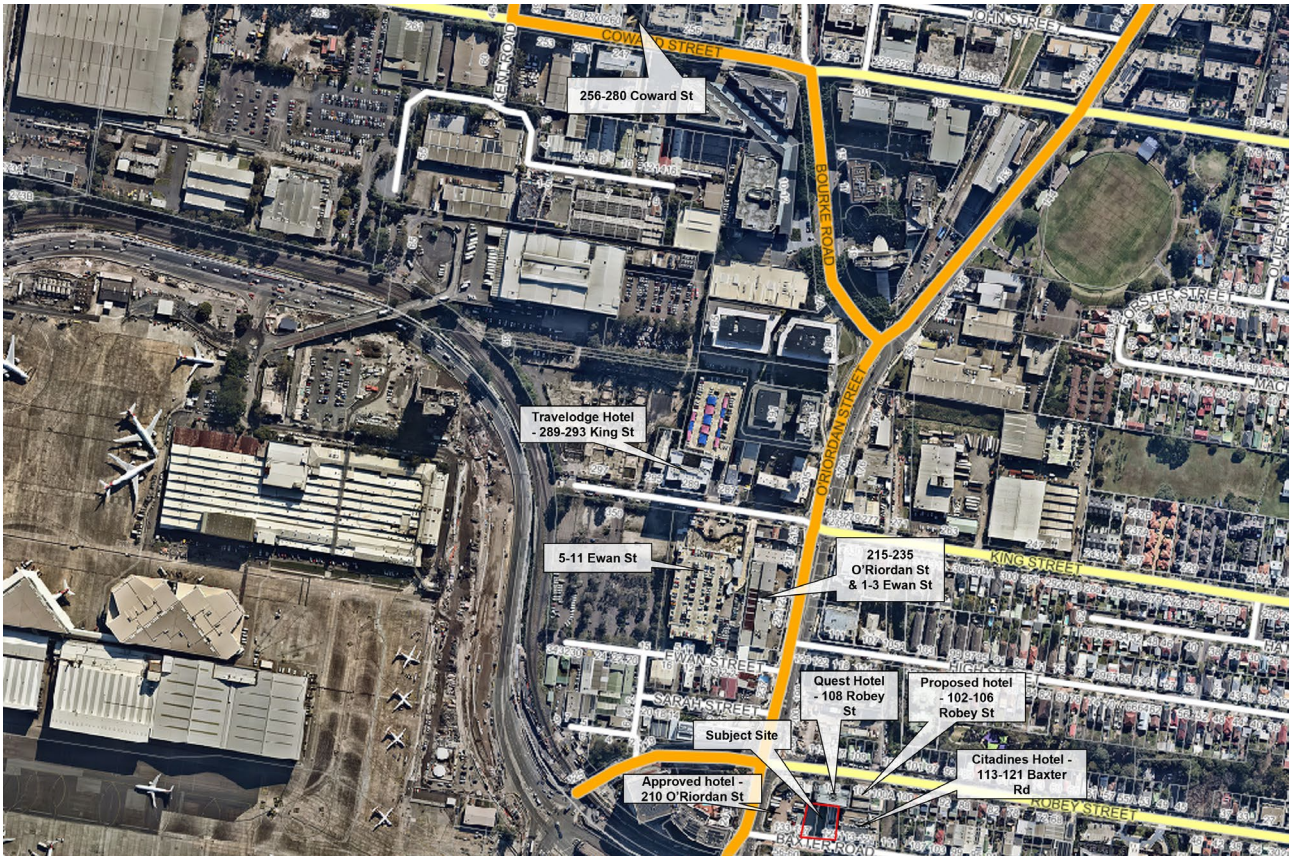


FIGURE 6 SURROUNDING DEVELOPMENTS

Source: Mecone 2023

In *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 immediate locality that are of a similar bulk and scale and have a greater FSR as outlined above.

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

To its south, the site is bound by Baxter Road and the Botany Goods Route Train Line.

The adjoining property to the east is 113-121 Baxter Road, Mascot which accommodates a 12-storey hotel ‘Citadines Connect Sydney Airport’, and contains landscaping and services at ground level, and hotel rooms above. The hotel room windows are generally orientated to the north, south and east with the only windows on its side elevation with the subject site appearing to be from lift lobby areas.

108 Robey Street, Mascot to the north of the site contains the ‘Quest Apartments’ hotel building with landscaping and services at ground level and hotel rooms above. All north facing serviced apartments have been designed to include full height breeze block angled screening to the north directing views east and west to maintain privacy. A 3m setback is maintained from Level 1 up the full height of the building to ensure light penetration into the Quest Apartment rooms.

To the west of the site at 210 O’Riordan Street, Mascot, a 12-storey hotel development was approved. The hotel is treated with glazing to its eastern façade, however apart from the lift lobby areas, this is a material treatment only and no hotel rooms face east to the subject site. The 3m setback, while tapering toward the



rear of the site, maintains an appropriate building separation in the streetscape. Appropriate building setback will still be maintained due to the location of the driveway of the neighbouring building on its eastern boundary.

All neighbouring properties are subject to the same zoning and development standards as the site.

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.

Additionally, as demonstrated in **Sections 6.6, 6.7 and 6.12** of the Statement of Environmental Effects (**SEE**), the proposal also will not result in any adverse parking, traffic, noise or other environmental impacts.

(d) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation,

The site forms part of a precinct that has been undergoing a transformation from low density mixed industrial uses to multilevel airport related tourist accommodation and commercial office development. The proposed development sits amongst three very similar development, adopting a built form and expression that has been designed in direct response to these developments. A reduction in FSR would not achieve any positive planning purpose. Specifically, a reduced height or increased setback would undermine, rather than reinforce the consistency with the emerging character and planning context.

The proposed hotel and food and drinks premises 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 80m to the north and the east of the site. The existing Quest Apartments to the north and Citadines Apartments to the east separate the site from that residential area with the same form as is proposed, such that the proposed FSR will have no bearing upon the built form transition to lower scale residential areas.

(e) to ensure 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 but does adjoin a public road, Baxter Road, to the south. The proposed building features increased street setbacks at ground level which allow for greater deep soil landscaping to street boundaries.

The glazed food and drinks premises has been pushed out toward the street to activate the ground plane and is linked to the hotel lobby area. This is proposed to soften the streetscape given the frontage required to adequately service the car park and loading area. The varied setback to the front assists in both grounding the building in the streetscape and transitioning from the setback on the approved neighbouring hotel development at 210 O'Riordan Street (west), to the existing Citadines Connect development at 113-121 Baxter Road (east). The proposed 3m western setback provides adequate separation between the proposal and the adjoining approved hotel development when viewed from Baxter Road.

The proposal is 37.9m 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 all sides. When viewed from the Airport collectively in the context of the existing and proposed adjacent buildings, the proposed building will provide a quality, contextual infill development to the urban edge of the Airport-Mascot District. It will not adversely affect the streetscape, skyline or landscape when viewed from the adjoining public roads.

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

3.2 Clause 4.6(3)(b) Sufficient environmental planning grounds 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.



There are sufficient environmental planning grounds to justify the proposed variation to the maximum 3:1 FSR development standard under Clause 4.4 because:

- The proposed FSR results from the provision of an appropriate building envelope that is compliant with the 44m building height limit and sits below the Obstacle Limitation Surface (OLS) of 50-51m AHD.
- While not strictly adhering to all quantitative setback standards in the DCP, the proposed building envelope and the resulting FSR reflect the setback patterns of the character prescribed by surrounding development in the immediate context and therefore is generally consistent with the setback controls and objectives in the DCP.
- The proposed additional FSR will not have any adverse traffic impacts on the surrounding road network. Specifically, the Traffic Impact Assessment (**Appendix 4**) prepared by The Transport Planning Partnership indicates that the additional traffic generated by the proposal is expected to have a minimal impact on the road network in both morning and evening peak hours. The proposal also provides adequate carparking to service the proposed hotel and food and drink premises. Hence the proposal with the additional floor space is not anticipated to result in any adverse parking impacts.
- As demonstrated in the Acoustic Report (**Appendix 7**), the proposal with additional floor space will not result in any unacceptable impacts on the acoustic amenity of the surrounding residential receivers. The increase in number of vehicles associated with the proposed floor space will also be barely perceptible to the surrounding residential receivers.
- The proposed additional floor space resulting from the building envelope will not create any overshadowing to surrounding residential receivers or public open space. There is no residential accommodation in the immediately vicinity of the site and the site is surrounded by hotel development of similar scale to the north, west and east and the Botany Goods Route Train Line to the south.
- The proposed FSR variation is consistent with the strategic directions for the locality as it optimises the quantum of employment floor space that can be delivered from the site whilst maintaining compliance with the building height standard and consistency with the key development controls under the DCP.
- The proposed building envelope and resulting FSR is consistent with the emerging character and land use context of the surrounding area which is predominantly characterised by employment-generating developments such as tourist and visitor accommodation and commercial uses that support the operation of Sydney Airport. Restricting the FSR to 3:1 with a reduced height and increased setbacks would undermine the consistency of the proposal with the surrounding land use and planning context.
- A strict compliance with the FSR standard would not result in any positive planning outcomes as the proposed building setbacks already provide an appropriate level of visual amenity to the surrounding hotel developments. Curtailing the floor space to strict compliance with the 3:1 FSR standard would therefore restrict the proposal from achieving the full development potential of the site and would undermine the optimal delivery of employment floor space, inhibiting the economic growth of the Mascot locality.



4 Conclusion

This Clause 4.6 Variation Request is for a variation to the maximum FSR development standard under Clause 4.4 of the LEP. The request justifies the contravention of the development standard in the terms required under Clause 4.6 of the LEP.

As demonstrated throughout this Variation Request, the variation sought to Clause 4.4 is well-founded in this instance and the granting of a Clause 4.6 variation to this development standard is appropriate because:

- Compliance with the development standard is unreasonable and unnecessary as explained in **Section 3.1**;
- There are sufficient environmental planning grounds to justify the contravention of the development standard as demonstrated in **Section 3.2**;
- The underlying objective of the standard is achieved notwithstanding the non-compliance with the standard, as demonstrated in **Section 3.1.1**;
- The proposed variation is considered acceptable as it provides a built form that is sympathetic to the bulk and scale of the surrounding developments in both the immediate and wider contexts;
- The proposed variation will not result in any unreasonable environmental effects; and
- The proposal represents an optimal development outcome when compared to scenarios for achieving strict compliance.

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 amenity and environmental impacts. Rather, the proposal will provide an employment-generating development which supports the economic growth of the Mascot locality and the wider Eastern City District.

Accordingly, the proposed minor variation to the minimum non-residential floor space development standard is well-justified and warrants approval.

