



Clause 4.6 – Exceptions to Development Standards – Height of Buildings

Address: 801 - 807 New Canterbury Road, Dulwich Hill – Proposed Mixed Use Development

1. Introduction

This is an application to vary a development standard under Clause 4.6 – Exceptions to Development Standards, of the Marrickville Local Environmental Plan 2011 (MLEP 2011). The development standard for which the variation is sought is Clause 4.3 Height of Buildings under the MLEP 2011.

The variation relates to an amended DA for a proposed mixed use development located at 801-807 New Canterbury Road, Dulwich Hill. The development contains 80 dwellings and 600m² of retail space and is five (5) storeys in height.

The site fronts New Canterbury Road to the south and its northern (rear) boundary is also the boundary between the B2 Local Centre and the R1 General residential zones.

This application has been prepared in accordance with the NSW Department of Planning and Infrastructure (DP&I) guideline “Varying development standards: A Guide, August 2011”.

It is noted that Clause 4.6 also requires the concurrence of the Director-General to be obtained prior to the granting of consent for development that contravenes a development standard, unless concurrence from the Director-General to vary the development standard has been delegated to the Council.

2. Description of the planning instrument, development standard and proposed variation

2.1 What is the name of the environmental planning instrument that applies to the land?

The Marrickville Local Environmental Plan 2011 (MLEP2011).

2.2 What is the zoning of the land?

The zoning of the land is B2 Local Centre zone.

2.3 What are the Objectives of the zone?

The objectives of the B2 Local Centre zone are:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.

- To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.
- To constrain parking and reduce car use

2.4 What is the development standard being varied?

The development standard being varied is the building height development standard.

2.5 Is the development standard a performance based control?

No. The building height development standard is a numerical control.

2.6 Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under clause 4.3 of the MLEP2011.

2.7 What are the objectives of the development standard?

The objectives of clause 4.3 are as follows:

- “(a) to establish the maximum height of buildings*
- (b) to ensure building height is consistent with the desired future character of an area,*
- (c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,*
- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity”.*

2.8 What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3 of the MLEP 2011 establishes a 14m height control for the site as illustrated on the extract of the Height of Buildings Map included in Figure 1 and described below:

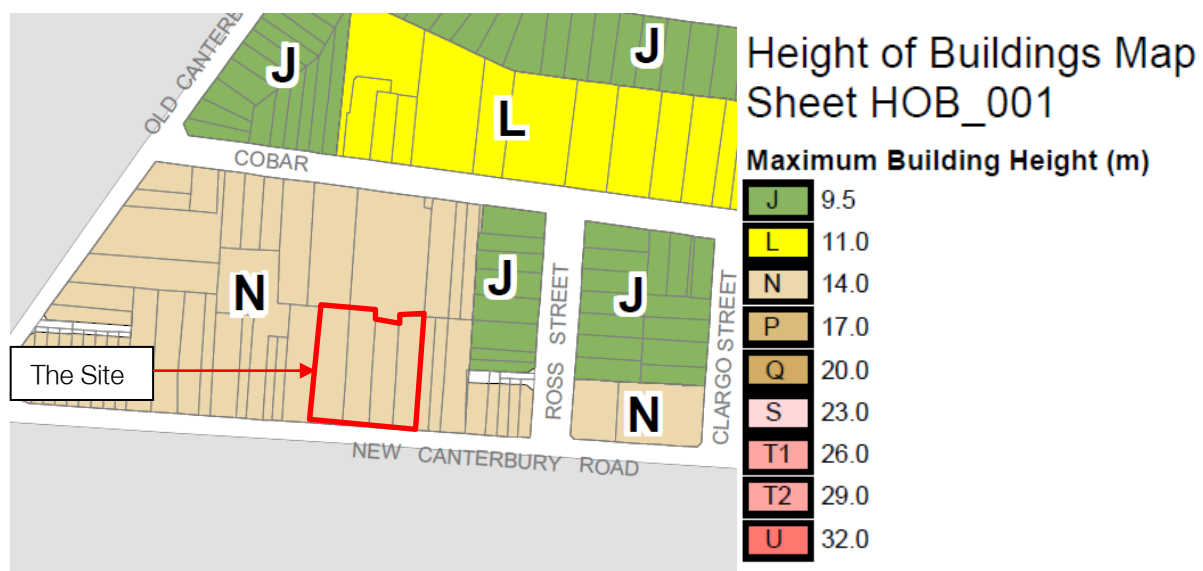


Figure 1: Extract from Height of Building Map – MLEP 2011

2.9 What is the proposed numeric value of the development standard in the development application?

The proposal involves two (2) buildings, a southern element (Building B) and a northern element (Building A).

Both buildings are five (5) storeys in scale. Building A has a height of 17.04m to the top of the lift and is 16.12m to the top of roof parapet.

Building B has a height of 17.65m to the top of the skylight and is 16.47m to the top of roof parapet.

The heights are calculated from the existing ground level below those points as extrapolated from the survey plan.

Figure 2 below is an extract from Section AA drawing of the proposal which illustrates the level of non-compliance. In Figure 2, the horizontal dotted blue line represents the 14m height control across the site.

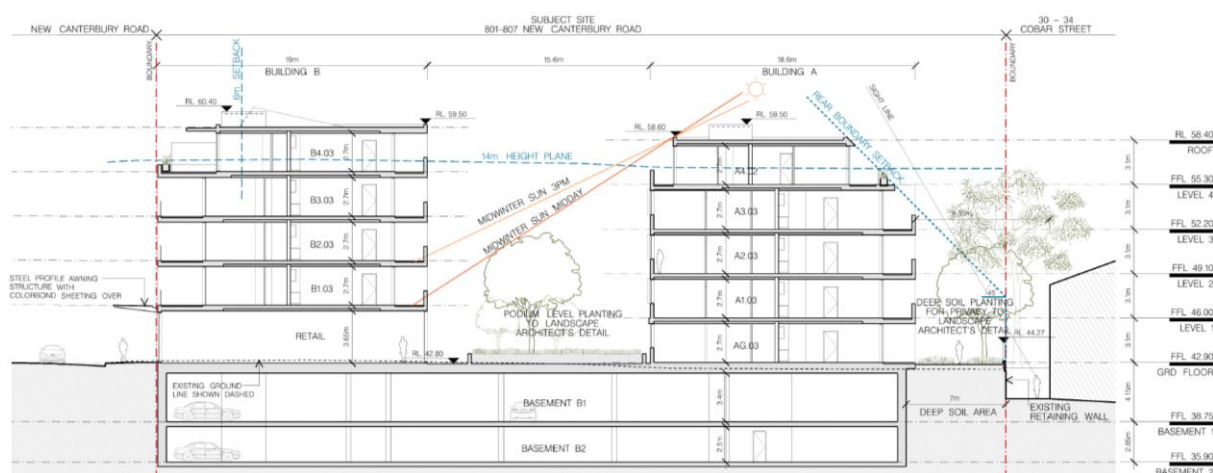


Figure 2: Non-compliance with 14m height limit

2.10 What is the percentage variation (between the proposal and the environmental planning instrument)?

The percentage of the variation to the top of the skylight for Building B (being the largest variation to the building height control) is 26% (i.e. 3.65m).

The percentage of the variation to the top of the roof parapet of Building B is 17.6% (i.e. 2.47m).

The percentage of the variation to the top of the lift overrun for Building A is 21.7% (i.e. 3.04m).

The percentage of the variation to the top of the roof parapet of Building A is 15.1% (i.e. 2.12m).

3. Assessment of the Proposed Variation

3.1 Overview

Clause 4.6 Exceptions to development standards establishes the framework for varying development standards applying under a local environmental plan.

Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

In addition, the 4.6(4)(i) requires that development consent must not be granted for a development that contravenes a development standard unless the:

(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..

An assessment of the building height variation is provided below in accordance the requirements of Clause 4.6. In addition, this variation has also been prepared in accordance with the Guidelines, which identifies matters to be addressed in an application to vary a development standard. The matters identified in the Guideline are consistent with the SEPP 1 objection principles identified in the decision of Justice Lloyd in *Winten v North Sydney Council* outlined below:

1. Is the planning control in question a development standard;
2. What is the underlying object or purpose of the standard;
3. Is compliance with the development standard consistent with the aims of the Policy, and in particular does compliance with the development standard tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the EP&A Act 1979;
4. Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case;
5. Is a development which complies with the development standard unreasonable or unnecessary; and
6. Is the objection well founded.

In accordance with the Guideline, the assessment also addresses the 'five part test' established by the NSW Land and Environment Court. The five part test was established in the decision of Justice Preston in *Wehbe V Pittwater [2007] NSW LEC 827* to determine whether compliance with a development standard is unreasonable or unnecessary based on the following:

1. Would the proposal, despite numerical non-compliance, be consistent with the relevant environmental or planning objectives;
2. Is the underlying objective or purpose of the standard not relevant to the development thereby making compliance with any such development standard is unnecessary;
3. Would the underlying objective or purpose be defeated or thwarted were compliance required, making compliance with any such development standard unreasonable;
4. Has Council by its own actions, abandoned or destroyed the development standard, by granting consent that depart from the standard, making compliance with the development standard by others both unnecessary and unreasonable; or
5. Is the "zoning of particular land" unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable and unnecessary as it applied to that land. Consequently, compliance with that development standard is unnecessary and unreasonable.

3.2 How is strict compliance with the development standard unreasonable or unnecessary in this particular case?

In the circumstances of this case, the provision of strict numerical compliance would be unreasonable due to the following:

1. The proposal remains consistent with the objectives of the B2 Local Centre zone, despite the non-compliance with the height control as demonstrated in the assessment of the objectives below:

(a) To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.

The proposal will incorporate three (3) new retail tenancies (600m² in total floor space) at ground level which will activate the street frontage at the site and which will provide opportunities for new business to establish themselves and to better service the needs of the local and wider community.

The retail floor space has been designed so that it is flexible in its layout, will address the street and also a landscaped open space within the centre of the site. The retail space can be tailored to suit a wide variety of retail and commercial businesses.

(b) To encourage appropriate employment opportunities in accessible locations.

The proposal will provide additional retail, office, business and community employment opportunities at a location that is highly accessible by walking, cycling and public transport.

It is considered that the development will display design excellence and through its construction and operation is likely to assist in rejuvenating and drawing new commercial activity to the western end of the New Canterbury Road commercial locality.

The proposed non-compliance with the building height control in no way discourages the delivery of new retail floor space within the zone, rather it is likely to encourage additional interest in employment opportunities in the locality.

The site is accessible and the proposal seeks to establish commercial floor space within a contemporary building that will increase employment opportunities. Non-compliance with the building height control in this instance is not inconsistent with objective (b).

(c) To maximise public transport patronage and encourage walking and cycling.

The site is highly accessible by public transport and benefits from a high level of pedestrian and cyclist traffic. This has been enhanced with the provision of the light rail within walking distance of the site, in addition to the heavy rail line.

The site is within 700m of the Hurlstone Park railway station (i.e. within walking distance) and is also within walking distance of the recently completed light rail extension at Dulwich Grove (800m) and Arlington (800m). It is noted that at the time that the MLEP 2011 controls were contemplated and came into operation, the light rail extension had not been confirmed or commenced.

The site is also located close to established bus routes.

The scale and intensity of development as proposed within a business centre that has good accessibility to public transport is likely to encourage greater patronage of the public transport.

The provision of a mixed use development of the scale and intensity of the proposed development is consistent with State and local government strategic aims of locating medium density residential development and commercial development in proximity to public transport infrastructure.

- (d) *To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.*

The proposal seeks to provide housing attached to retail uses. The scale and intensity of the mixed use development is commensurate with the overarching strategic aims of the locality, its geographical position and its recognised position as a local business centre within the business and employment generating centre hierarchy of the Marrickville LGA.

- (e) *To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.*

The proposal includes retail floor space, divided into three (3) tenancies of approximately 200m² each, with each tenancy addressing the street frontage. The spaces are of appropriate size and will be provided with appropriate services that are suitable for them to operate as new vibrant retail businesses, which will enable the activation of the street in this location.

The retail floor space has been designed so that it is flexible in its layout, includes front and rear glazing lines so that it will address both the street and also a landscaped open space within the centre of the site. The retail space has been designed so that it can be tailored to suit a wide variety of retail and commercial businesses.

- (f) *To constrain parking and reduce car use*

The proposal seeks to provide off-street car parking which satisfies Council's requirement to service the development. The proposal also includes seven (7) spaces above the Council requirement, although these spaces do not add to the height or bulk and scale of the development as they are entirely below ground level. In this respect, Council would be able to condition any development consent accordingly.

The site is within walking distance to several forms of public transport including heavy rail, light rail and bus routes.

2. *The proposal remains consistent with the objectives of the building height standard outlined in subclause 4.3(1) despite the non-compliance demonstrated below:*

- (a) *to establish the maximum height of buildings*

The control will continue to prescribe maximum building heights and the proposal will not alter that. Council is able to continue to consider variations based on merit and in accordance with the provisions of Clause 4.6.

- (b) *to ensure building height is consistent with the desired future character of an area,*

The scale of the development is consistent with the scale of recently approved developments within the vicinity of the site, which have been completed or are under construction. This includes developments along New Canterbury Road as described below in Table 1.

Address	Distance from Proposal	Approved / Built Height	Height Control	LGA	Approved / Built FSR
799 New Canterbury Road	Immediately adjacent proposal to east	To roof parapet 13 metres and to lift overrun / level 5 roof top	14m	Marrickville	2.2:1

Address	Distance from Proposal	Approved / Built Height	Height Control	LGA	Approved / Built FSR
terraces 16 m					
610 – 618 New Canterbury Road	350 m east of site	Part 5 and 6 levels	18m to roof and 19.5m to loft overrun / roof top structures	Canterbury	No FSR control under Canterbury LEP but inferred at 2.8:1 to 3:1

Table 1: Comparison with development within the vicinity

The block bound by New Canterbury Road to the south, Cobar Street to the north and Old Canterbury Road to the west has a building height of 14m.

Additionally, the entire southern part on New Canterbury Road, opposite the site has a maximum building height control of 18m and is not subject to a FSR control, providing for development of a greater scale and density than that which is proposed. Recent approvals have been granted based on these parameters and those developments are underway (refer to Table 1).

Notwithstanding that the southern portion of New Canterbury Road is within the City of Canterbury LGA, the development activity and built form and land use outcomes along that section of the road will have a significant and demonstrable influence on shaping the urban character of the locality overall and in particular this western precinct of New Canterbury Road.

The urban context for development on the northern side of New Canterbury Road cannot be viewed or considered in isolation from the built form that exists, and which is emerging, on the southern side of the road. In this respect, the proposed height and density is commensurate or less than the height and density being approved for development opposite the site.

The proposal will act as an appropriate transition in scale and density between the B2 zoned land to the south of the site and the R1 zoned land to the north of the site, which also has a 14m height standard.

The proposed density, although numerically greater than the development standard, is nonetheless consistent with Council's strategic vision and desired future character for the West Dulwich Hill locality in that it will assist in delivering a vibrant and rejuvenated mixed use precinct with new retail and commercial opportunities and increased residential dwellings with good amenity and access to public transport.

(c) to ensure buildings and public areas continue to receive satisfactory exposure to the sky and sunlight,

The building is of a design so that the variation in height will not compromise the opportunity for view sharing from nearby or surrounding properties, visual privacy for adjacent properties or the exposure to sky and sunlight for adjacent properties.

The proposal will not result in overshadowing of development to the south.

The non-compliant element of the building does not affect the sky exposure levels or access to daylight for adjacent properties of the public realm in a significant manner.

The mixed use building completed recently at the adjacent site to the east includes side setbacks which do not comply with the relevant controls. Openings to that building that may be affected by the proposal would be in part opposite the eastern blank wall of proposed Building A. The openings in that position appear to be mainly west facing bedrooms setback approximately 4.0m (or less) from the common side

boundary and also openings serving common circulation areas at ground level and do appear to be primary internal living areas.

Notwithstanding, shadow cast by the proposed development does not reach the western wall of the adjacent building until approximately 12.30pm in the day in mid-winter.

Higher components of the proposed development are stepped back from the front and rear setbacks and are unlikely to result in adverse visual massing and bulk and scale impacts above the impacts that could be reasonably expected from a compliant development.

Additionally, the amended DA includes side setbacks which respond to the mixed use development to the east of the site. Specifically, the amended DA has been modelled to include side and rear setbacks for Building A (at its eastern end) which result in solar access outcomes for the eastern adjacent property that are consistent with a compliant development (in terms of height and setback controls).

The solar access modeling demonstrates that a reduction in height of the remaining proportion of proposed Building A to a compliant level is unlikely to reduce the number of living room windows in the western wall of the building at 793-799 New Canterbury Road that would be affected by shadow in a significant manner.

Specifically, it is the compliant height of the amended Building A that is predominantly creating the shadow to western side living room openings of 793-799 New Canterbury Road in the afternoon in mid-winter.

Given the minimal setback of the western facing openings at No. 793-799 New Canterbury Road, it is reasonable to expect that most forms of redevelopment at the subject site will result in additional overshadowing of the side windows and open space of 793-799 New Canterbury Road.

(d) to nominate heights that will provide an appropriate transition in built form and land use intensity

The roof parapet of Building B is 2.47m higher than the 14m control.

The roof parapet of the Building A is 2.12m higher than the 14m.

The lift overruns and skylights are higher but will not set the overall scale or determine the visual massing of the development and will not be visually dominant as they are set back from the edges of the respective buildings and are relatively small in area.

It is also considered that the height of the roof of the fifth level for each building will not necessarily set the scale of the development when viewed from the public realm at the front of the site or the private realm at the rear given the upper level of each building is recessed from the respective front and rear boundaries.

In this respect, the scale of the development will read as more a four (4) storey development, in the order of 14m high, with some variation depending on where one views the buildings from.

This height is considered appropriate and commensurate with the existing and emerging scale of buildings in the locality.

Specifically, the area is zoned B2 and adjacent to an R1 zone in which medium density residential structures of a similar height are permitted and have been built (i.e. 14m).

The entire southern part on New Canterbury Road, opposite the site has a maximum building height control of 18m and is not subject to a FSR control, providing for development of a greater height than that which is proposed.

The recently completed adjacent mixed used building has a height of 13m to roof parapet and 16m to level 5 roof terrace structures and lift overrun.

From an urban design and built form context, there is a large area which extends from Cobar Street in the north to beyond the first row of allotments on the southern side of New Canterbury Road in which the controls set the height of buildings from 14m to 18m.

The proposed development is positioned in the middle of this area and consequently the proposal represents a built form solution that responds to higher forms of development to the south (18m) and the 14m (or four storey) development to the north. The proposed height will provide an appropriate transition between the built forms of the locality and is consistent with the land use intensity of the site.

Importantly, the higher components of the proposed development, those greater than 14m, are stepped back from the front and rear setbacks and are unlikely to result in adverse visual massing and bulk and scale impacts above the impacts that could be reasonably expected from a compliant development. Additionally, the proposed setting back of the higher elements will minimise overshadowing and privacy impacts.

Given the circumstances of the case, the provision of a strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard, and is compatible with adjoining development.

3.3 How would strict compliance hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Act?

The objects set down in Section 5(a)(i) and (ii) are as follows:

"to encourage:

- (i) the proper management, development and conservation of natural and artificial resources, including agricultural land, natural area, forest, mineral, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.*
- (ii) the promotion and co-ordination of the orderly and economic use and development of land..."*

Compliance with the standard would not hinder the attainment of the objects of section 5(a)(i) and (ii) of the Act, which are to encourage development that promotes the social and economic welfare of the community and a better environment, and to promote and coordinate orderly and economic use and development of land.

Strict compliance with the development standard would not result in discernible benefits to the amenity of adjoining sites or the public. Further, the proposal satisfies the zone and development standard. The development as proposed is consistent with the provisions of orderly and economic development. Strict compliance with the standard is not required in order to achieve compliance with the objectives.

3.4 Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

A development that strictly complies with the 14m height standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The level of non-compliance with the building height control is consistent with the degree of variations contemplated and accepted by Council with respect to development in similar situations and in that respect will not set a precedent.

- The additional height, (above the height allowed under the control) is positioned on the site in a manner that is unlikely to result in significant adverse impacts upon adjacent properties or the public realm by way of overshadowing, visual massing and privacy impacts.
- The height of the proposed development better responds to the existing urban context than would a compliant development. Specifically, the proposal will result in a development which provides an appropriate scale transition between the higher forms of development that are permissible on the southern side of New Canterbury Road and the scale of development permissible to the north of the site in Cobar Street.
- The top level of both proposed buildings is recessed from the front and rear boundaries and removing the non-compliance would not significantly alter the perceived scale of the proposed development when viewed from the public domain or surrounding development;
- The height of Building A is arranged on the site in a manner that minimises the overshadowing of living room windows to adjacent residential dwellings. In particular the amended DA has been modelled to include side and rear setbacks which result in solar access outcomes towards the eastern adjacent property that are consistent with a compliant development (in terms of height and setback controls);
- The top floor of Building A is responsive to the residential land uses and the scale of residential buildings to the north of the site. Specifically:
 - The top floor of Building A as amended has been setback in compliance with Council's rear setback control and the building separation controls.
 - The top floor of Building A will not be visible from the private open space and lower levels of the residential flat buildings at 30-34 Cobar Street and 36 Cobar Street. Only the leading northern edge of the bevelled roof of the top floor of Building A will be visible from the south facing openings on the top floor (second floor) of 30-34 Cobar Street and 36 Cobar Street and this will only be the case when residents are actually standing immediately adjacent to the south facing windows. The top floor of Building A will not be visible from seated positions or from positions standing back from the south facing windows on the second floor of residential flat buildings at 30-34 Cobar Street and 36 Cobar Street.
 - Consequently the top floor of Building A will not result in adverse visual massing to the adjacent residential flat buildings to the north of the site.
 - The top floor of Building A will not result in any solar access impacts to the residential flat buildings in Cobar Street and will not result in adverse visual privacy impacts upon the residential building to the north.
- The development is a large and prominent site which can deliver excellent northern orientation and amenity, with 90% of apartments orientated in whole or part away from New Canterbury Road towards extensive landscaped gardens to create a vibrant and well designed in fill development proximate to rail, commercial businesses, schools and recreational facilities;
- There is minimal difference in the impacts between a building that strictly complies with maximum building height control including:
 - Visual and acoustic privacy impacts: The arrangement of the fifth storey of both buildings, the arrangement and orientation of openings and balconies, and the positioning of proposed screening devices is such that the additional height will not generate any significant privacy impacts.
 - Visual impacts: Due to the setback arrangements, there is a nominal difference in visual impacts between the proposed buildings and a complying development.
 - Overshadowing impacts: The difference in shadow impacts on adjacent sites of a compliant building compared to the proposed building are minimal.

Shadow from the development does not affect the existing residential buildings in Cobar Street and will not significantly affect any existing or future residential development on the southern side of New Canterbury Road.

With respect to the adjacent mixed use building at 799 New Canterbury Road to the east, shadow cast by the proposed development (i.e. Building A) does not reach the western wall of

that development until approximately 12.30pm in the day in mid-winter. The amended DA has been designed to include side and rear setbacks which result in solar access outcomes towards the eastern adjacent property that are consistent with a compliant development (in terms of height and setback controls).

Submitted shadow analysis demonstrates that a reduction in height of the remaining proportion of proposed Building A to a compliant level is unlikely to reduce the number of living room windows in the western wall of the building at 793-799 New Canterbury Road that would be affected by shadow in a significant manner.

Additionally, the proposed east-west orientation is the most desirable design solution for mixed used development for the deep blocks within the B2 zoned area along this section of New Canterbury Road and is likely to be replicated in future redevelopment in order to maximise residential amenity and retail activity.

Given the circumstances of the case, the provision of a strict numerical compliance would be unreasonable on the basis that the proposed development achieves compliance with the objectives of the standard, and is compatible with adjoining development.

3.5 Are there sufficient environmental planning grounds to justify contravening the development standard?

Yes. In the circumstances of the case, there are sufficient planning grounds to justify contravening the development standard being:

- The height of the proposed development is consistent with the zone objectives and the objectives of the Building Height standard as described in Section 3.2 above.
- It is considered that there are strong planning grounds to justify contravening the current height standard in this instance. Considerable urban design analysis has been undertaken in the design development stage of the proposed mixed use development. The plans, as amended, represent the end of an exhaustive design analysis process which has accounted for the existing site constraints (physical and economical), the existing and the evolving character of the locality and the transition of land uses and built forms from the north of the site to the south of the site.

The design development of the proposal involved a level of urban context analysis that was not necessarily undertaken by Council in establishing the height and FSR controls for the site.

Specifically, it is understood that the west Dulwich Hill area did not undergo a detailed urban design, economic and strategic analysis when the provisions of the new LEP were formulated. Instead a transferring of the previous controls, with some relatively minor amendments, was undertaken in formulating the MLEP 2011 with respect to the west Dulwich Hill area.

Indeed submissions were made to Council regarding properties at the western end of New Canterbury Road as part of the exhibition process for the then Draft LEP 2010. The submissions called for increases in the FSR and height limits of properties in the B2 Local Centre in west Dulwich Hill.

Council strategic planners, within a report to Council regarding the Draft LEP, acknowledged at that time that the proposal for an increase in height and FSR had merit and stated that the proposal was:

“supported in general terms, particularly as lots along this section of New Canterbury Road are deep and are located on the northern side of the road, so increased heights can be managed so as not to adversely affect neighbouring or nearby properties through overlooking or overshadowing.”

It was however recommended that any increase in height or FSR should be informed by a masterplanning process and so the ‘uplift’ in FSR and height was effectively deferred at that time.

Since the adoption of MLEP 2011, public transport access for the locality has improved through the construction and operation of the light rail network which is within walking distance of the site.

Approvals have been granted for taller buildings to be constructed on the southern side of New Canterbury Road and several mixed use developments have been approved for the northern side of New Canterbury Road.

The strategic planning justification for higher density and increased height limits for the B2 zone has therefore increased since Council recognised the merits of such increases in 2010.

It is considered that on a strategic planning level, the proposed development represents a well-considered urban design response. The development will result in a building height, density and general built form (i.e. buildings located with long axis running in an east west manner – with maximum exposure to the north) that is a more appropriate urban design response to the prevailing and emerging urban context. The development will result in the more orderly and appropriate use of the B2 zoned properties along the western end of New Canterbury Road in Dulwich Hill than would be the case with absolute compliance with the current height and FSR controls.

- The visual catchment of New Canterbury Road contains a number of new buildings which have been approved that will present a similar or greater bulk and height and which will set the character to a large degree. Importantly, built form controls allowing higher development have been established for the B2 zoned properties opposite the site, on the southern side of New Canterbury Road.
- The proposal will provide a transition in scale between taller buildings (and future taller buildings) on the southern side of New Canterbury Road and the four (4) storey RFBs to the north of the site.
- Consequently, the non-compliance with the standard does not result in a scale of building that is out of character with the surrounding development and emerging character.
- The proposal will achieve a good urban design outcome and will improve the streetscape through contemporary architecture styling, appropriate articulation and use of interesting and varying materials and finishes.
- Within this context, the site is capable of accommodating the height proposed and the development is of scale commensurate with the evolving character and the prevailing urban conditions and capacity of the locality.
- Council would not be setting a precedent by varying the Building Height standard as proposed. It is understood that Council has varied the height controls to similar degrees on similar developments, including in relation to the recently completed adjoining project to the east at 799 New Canterbury Road which achieves 13 and 16 m – refer Table 1. We also understand that variations have been supported in some instances based upon an apparent disconnect between the Height of Building and the FSR controls in the LEP and the ‘roof-top level massing’ control in the DCP which seeks to prevent the top-most 3m of a building from containing any floor space for the purpose of dwellings – a circumstance which is applicable to the subject proposal.
- The non-compliance with the standard does not contribute to adverse environmental impacts in terms of overshadowing, visual impacts or view loss.
- The development will result in significant public benefit through:
 - the positive urban design outcomes and revitalisation of a significant site at the western end of New Canterbury Road,
 - the increase in accessible, flexible and well-appointed retail floor space;
 - the provision of 80 residential units which achieve a high amenity, considerably above the minimum standards called for in the RFDC and Marrickville DCP;
 - the provision of a mixed use building of high architectural merit which achieves design excellence and will deliver a level of aesthetic interest to the western end of New Canterbury Road which is currently lacking; and
 - the inclusion of a VPA which will provide Council with the opportunity to deliver significant public infrastructure, in addition to the amount that would otherwise be provided for a development of this scale through the implementation of Council’s S94 Contributions plan.
- The development is a large and important site which can deliver excellent northern orientation and amenity, with 90% of apartments orientated in whole or part away from New Canterbury Road towards

extensive landscaped gardens to create a vibrant and well designed in fill development proximate to rail, commercial businesses, schools and recreational facilities.

- The development as proposed is consistent with the provisions of orderly and economic development.

3.6 Is the variation well founded?

Yes. For reasons outlined in the preceding sections of this submission, the variation to the height control is well founded as compliance with the standard is unreasonable as the development does not contravene the objects specified within 5(a)(i) and (ii) of the Act and B2 Local Centre zone.

A development that strictly complies with the standard is unnecessary in this circumstance as no appreciable benefits would result by restricting the entire building to each of the variable height limits.

3.7 Clause 4.6(5)

Clause 4.6(5) states:

- (5) In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

The requested variation to the Building Height standard does not raise any matter of significance for State or regional environmental planning. The consideration of the variation is a purely local matter relating to the distribution and accommodation of permitted building volume on the site in a manner that more skilfully integrates the building into the streetscape.

There is no discernible public benefit in maintaining a strict application of the numerical Building Height limit in this instance. Despite the variation to the Building Height development standard, the proposal generally complies with the SEPP 65 design principles, setback controls and amenity controls applicable to the development.

The variation to the Building Height control delivers a public benefit in facilitating a mixed use development of design excellence which responds to the existing and emerging urban context of the locality while providing additional housing stock and retail floor space within an area identified for medium density residential development and increased commercial development.

The proposal will result in dwellings with high amenity, above the minimum standards outlined in Council's DCP and the RFDC. The proposal will result in a significant improvement to the streetscape of the locality through the provision of a building of high architectural quality. Additionally, the proposed VPA will result in significant public benefit through the provision of significant additional public infrastructure and / or affordable housing.

4. Conclusion

Development standards are a means of implementing planning purposes for a development or area.

The building height is considered appropriate to the context and circumstances of the site, and does not result in a scale of development that is out of character with the surrounding development.

Contextually, the proposal will provide a development of a scale and form that appropriately transitions from 18m high development to the south and 14m high development to the north. On an urban design

basis, the outcome will be entirely appropriate to the locality. Development along this ridge line occupied by New Canterbury Road in this precinct is consistent with a five (5) to six (6) storey built form.

The components of the proposal that are higher than the 14m control are suitably set back from the street frontage and the rear boundary and a development strictly complying with the numerical standard would not discernibly alter the scale of the building or improve the amenity of surrounding development or the public domain.

The proposal does not represent an overdevelopment of the site and the height and proposed intensity (density) is consistent with the strategic vision for the locality, its evolving urban context and a detailed analysis of the site constraints.

Change within the locality is likely to be invigorated and accelerated by the recent increase in available and accessible public transport, which was not necessarily implicit at the time that the MLEP 2011 built form controls were adopted.

Significantly, Council strategic planning officers have previously recognised that there is merit in development of greater height and density (compared to the current height and FSR controls) on the deep sited properties within the B2 zoned land at the western end of New Canterbury Road in Dulwich Hill (such as the subject site).

The urban form and density of development to the south of the site will be greater (as allowed under the relevant planning controls applicable to that land) than development along the northern side of New Canterbury Road. The proposal does not seek to replicate the development permissible on the southern side of the road, but instead will provide a development that is responsive and appropriate to the urban form on both side of the road and which will transition to the R1 land to the north.

The proposal will not result in significant adverse impacts upon the adjacent residential developments to the north (in the R1 zone in Cobar Street) and the upper floor of the rear building (Building A) has been well setback so that visual massing, solar access and visual privacy impacts have been mitigated.

The proposal will result in considerable public benefit through the provision of new retail floor space, 80 new residential dwellings of high amenity and a mixed use building displaying design excellence and providing visual interest and a significant improvement to the streetscape. The inclusion of a VPA will also result in additional public infrastructure for the locality.

The site is within a locality which has appropriate service capacity to readily accommodate development of the density and scale proposed.

The development is a large and prominent site at the western end of Dulwich Hill which can deliver excellent northern orientation and amenity, with 90% of apartments orientated in whole or part away from New Canterbury Road towards extensive landscaped gardens to create a vibrant and well designed in fill development proximate to rail, commercial businesses, schools and recreational facilities.

This submission satisfies the provisions of 4.6(3)(a), 4.6(3)(b) and 4.6(4)(a)(i) of the SLEP as it has been demonstrated that compliance with the height development standard is both unnecessary and unreasonable in the circumstances of this case and there is sufficient planning grounds to justify contravening the standard.