



## Clause 4.6 – Exceptions to Development Standards Request to Vary Clause 4.3 – Height of Buildings

**Address:** 41 Broadarrow Road, Narwee

**Proposal:** Demolition of existing structures and construction of a new shop top housing building containing four (4) basement levels, three (3) restaurants, one (1) commercial tenancy, and 62 apartments.

**Date:** 15 September 2020

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### 1.0 Introduction

This is a written request to seek an exception to a development standard pursuant to Clause 4.6 – Exceptions to Development Standards of Canterbury Local Environmental Plan 2012. The development standard for which the variation is sought is Clause 4.3 Height of Buildings under CLEP 2012.

### 2.0 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 Canterbury Local Environmental Plan (CLEP) 2012.

#### 2.2 *What is the zoning of the land?*

The land is zoned B2 Local Centre.

#### 2.3 *What are the Objectives of the zone?*

The objectives of the B2 Local 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; and
- To facilitate and support investment, economic growth and development for active, diverse and well-designed centres.

#### 2.4 *What is the development standard being varied?*

The development standard being varied is the height of buildings development standard at Clause 4.3 of CLEP 2012.

#### 2.5 *Is the development standard a performance based control? Give details.*

No, the height of buildings 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 CLEP 2012.

**2.7 What are the objectives of the development standard?**

The objectives of the development standard are contained in Subclause 4.3(1), and are:

- (a) to establish and maintain the desirable attributes and character of an area,
- (b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,
- (c) to support building design that contributes positively to the streetscape and visual amenity of an area,
- (d) to reinforce important road frontages in specific localities.”

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

Clause 4.3(2) establishes an 27m maximum building height for the site, as illustrated in the extract of the Height of Buildings Map included in Figure 1 below.

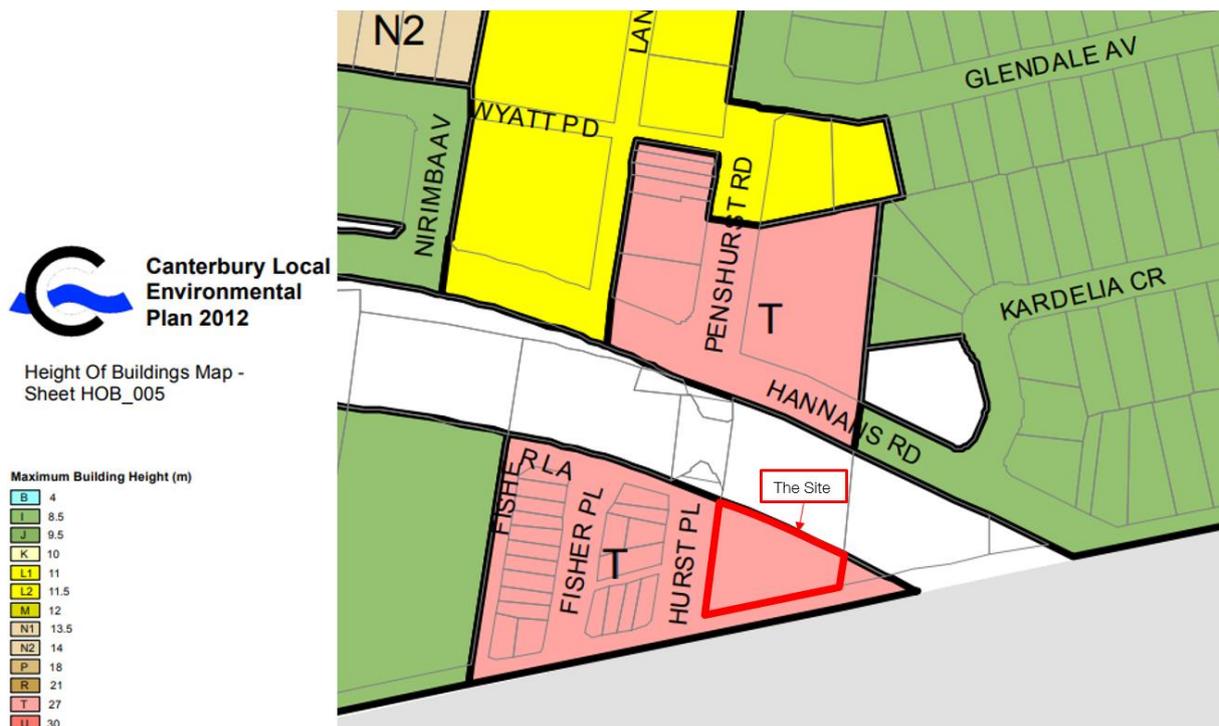


Figure 1: Extract of CLEP 2012 Height of Building Map (site outlined in red)

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

The proposed maximum building height is 27.6m.

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

The proposal exceeds the maximum height of buildings development standard of 27m by a maximum of 600mm to the western lift over run which equates to a maximum variation of 2.22%.

As shown in the height plane diagrams below in Figures 2 and 3, the protrusions above the height of buildings development standard are minor comprising small elements of lift over run, clerestory windows and a small section of the inner roof above the central court area. The substantial elements of the building, including the balustrade of the upper level communal open space are up to 1.9m below the height of Buildings development standard. The actual communal area would be an additional 1m lower. The interface to the public domain is numerically compliant

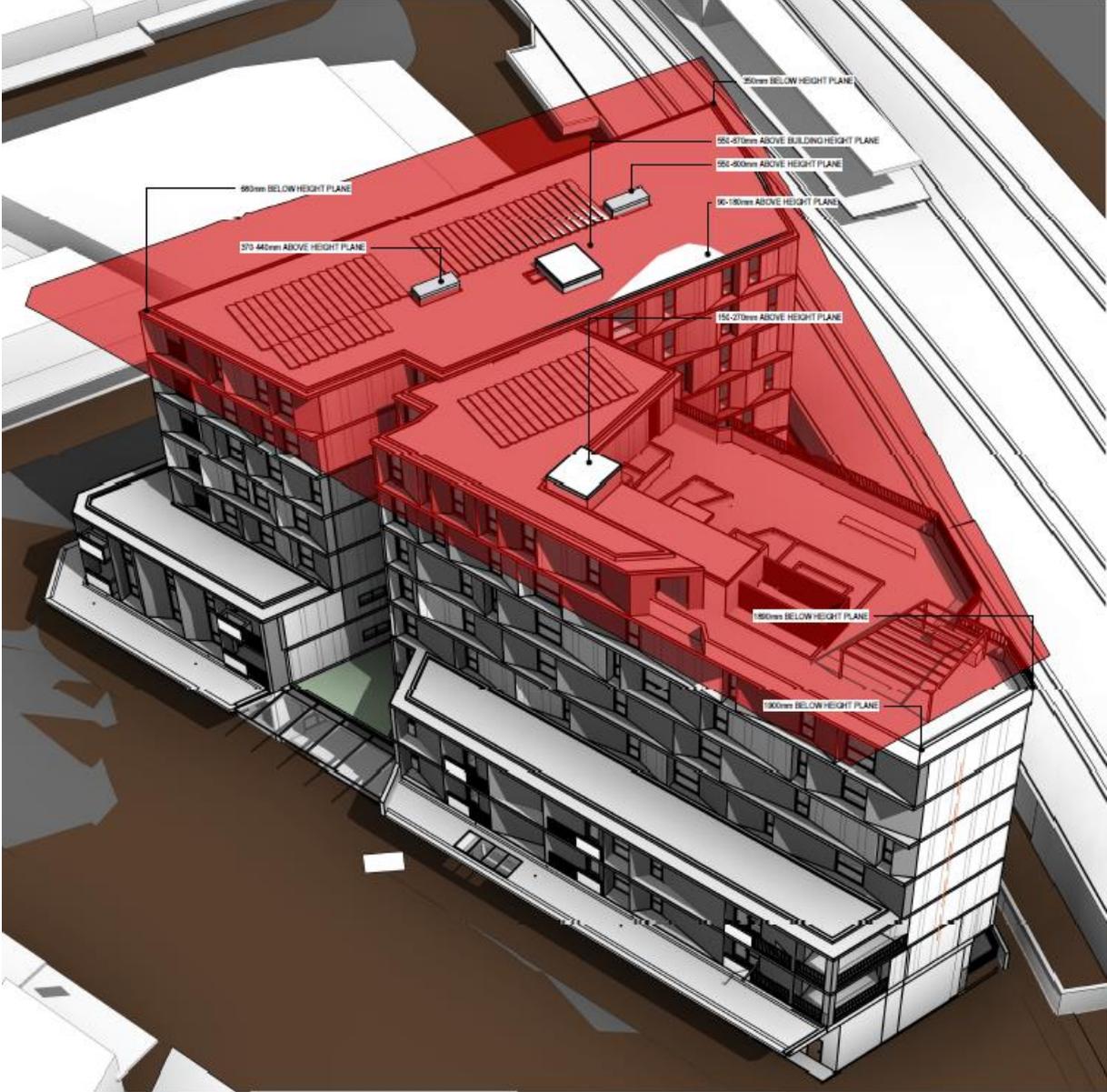


Figure 2: Building height plane diagram



Figure 3: Height plane diagram demonstrating areas of the building below the height plane.

### 3.0 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.

Objectives to Clause 4.6 at 4.6(1) are as follows:

- “(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.to provide an appropriate degree of flexibility in applying certain development standards to particular development; and*
- (c) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.”*

Clause 4.6(3)(a) and 4.6(3)(b) require 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:

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

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to 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*
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and”*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and Clause 4.6(5) requires the Secretary in deciding whether to grant concurrence must consider:

- “(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Secretary before granting concurrence.”*

This application has been prepared in accordance with the NSW Department of Planning, Infrastructure and Environment (DPI&E) guideline *Varying Development Standards: A Guide*, August 2001, and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46;*
- *Wehbe v Pittwater Council [2007] NSWLEC 827;*
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* (‘Four2Five No 1’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90* (‘Four2Five No 2’);
- *Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248* (‘Four2Five No 3’);
- *Micaul Holdings Pty Limited v Randwick City Council [2015] NSWLEC 1386;*
- *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7;*
- *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118;*
- *RebelMH Neutral Bay v North Sydney Council [2019] NSWCA 130;*
- *Baron Corporation v The Council of the City of Sydney [2019] NSWLEC 61;* and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245.*

### **3.2 Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?**

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

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

- The application seeks consent for a part eight (8) and part seven (7) storey building. This outcome is entirely consistent with the scale that is reasonably anticipated with a 27.0m height of buildings development standard;
- Council’s Development Control Plan (DCP) requires a 3.3m floor to ceiling height for ground floor tenancies. The application proposes ground floor tenancy ceiling heights of up to 4.4m which accords with the best practice guidance of the Apartment Design Guide (ADG) at Part 4C to maximise the flexibility of use of ground floor tenancies to include food premises;

- A numerically compliant height would be achieved if the lesser guideline of the DCP at Part D1.3.3 were complied with compared to the superior outcome proposed which aligns with the ADG;
- The non-compliant elements of the building do not result in any adverse environmental impacts by way of loss of solar access or loss of views; and
- Strict numerical compliance of a reduced ground floor tenancy ceiling height would be compliant with the DCP, an inferior commercial tenancy would be created.

### 3.2.2 Would the underlying objective or purpose be defeated or thwarted if compliance was required?

The underlying objective or purpose of the development standard would not be defeated or thwarted if compliance was required. The outcome would be a compromised quality of the ground floor tenancy.

### 3.2.3 Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

It cannot be said that the development standard has been abandoned or destroyed by Council's own actions, as every application must be assessed on its merits, however there are examples of development applications relying on Clause 4.6 variations having been approved in the recent past.

### 3.2.4 Is the zoning of the land unreasonable or inappropriate?

The land zoning is appropriate for the site.

### 3.3 *Are there sufficient environmental planning grounds to justify contravening the development standard?*

The proposed non-compliant elements essentially comprise lift overruns and skylights required in order to service the proposed development. These elements are non-compliant through the provision of ground floor commercial tenancy heights consistent with the ADG, but which are greater than the guidelines in the Canterbury DCP. The DCP would allow a ceiling height of 3.3m, compared to the recommended minimum of 4.0m contained in the ADG. That is the heights of the ground level have been maximised to ensure that they are suitable for a broad range of non-residential uses, rather than minimised to achieve numerical compliance.

The maximum non-compliance is 600mm. The recommended minimum ceiling height in the ADG is 700mm greater than the recommended height contained in the DCP. As a consequence provision of the inferior DCP outcome would result in the building being 100mm below the maximum height of buildings development standard.

The provision of a ground floor ceiling height aligned with the ADG, a superior quality of tenancy is created with greater flexibility in future range of land uses to ensure the greatest potential is given to the establishment of a vibrant Narwee centre.

This superior outcome in conjunction with the lack of an environmental impact supports the minor non-compliance on environmental planning grounds particularly as it cannot be said that the 27.0m building height envelope has not been over reached was evidenced by the provision of communal open space at level 8 which is below the maximum permitted height of buildings development standard.

It is also noted that the proposed solar panels, some of which exceed the maximum permitted height, provide a public benefit by reducing energy consumption associated with the proposed development.

To this end, the non-compliant elements provide for public benefits which contribute to justifying contravention of the building height standard and no undesirable precedent will be set by the minor non-compliance.

**3.4 Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?**

**3.4.1 Objectives of the Height of Building standard**

As outlined above, the proposed development is generally compliant with the maximum building height development standard, apart from the proposed lift overruns and skylights of the proposed building. Notwithstanding the proposed non-compliance, the proposal is consistent with the objectives of the building height development standard as discussed below.

*“(a) to establish and maintain the desirable attributes and character of an area,”*

Figure 3 below provides an extract from Canterbury Development Control Plan (CDCP) 2012, showing the structure plan for the Narwee Local Centre.

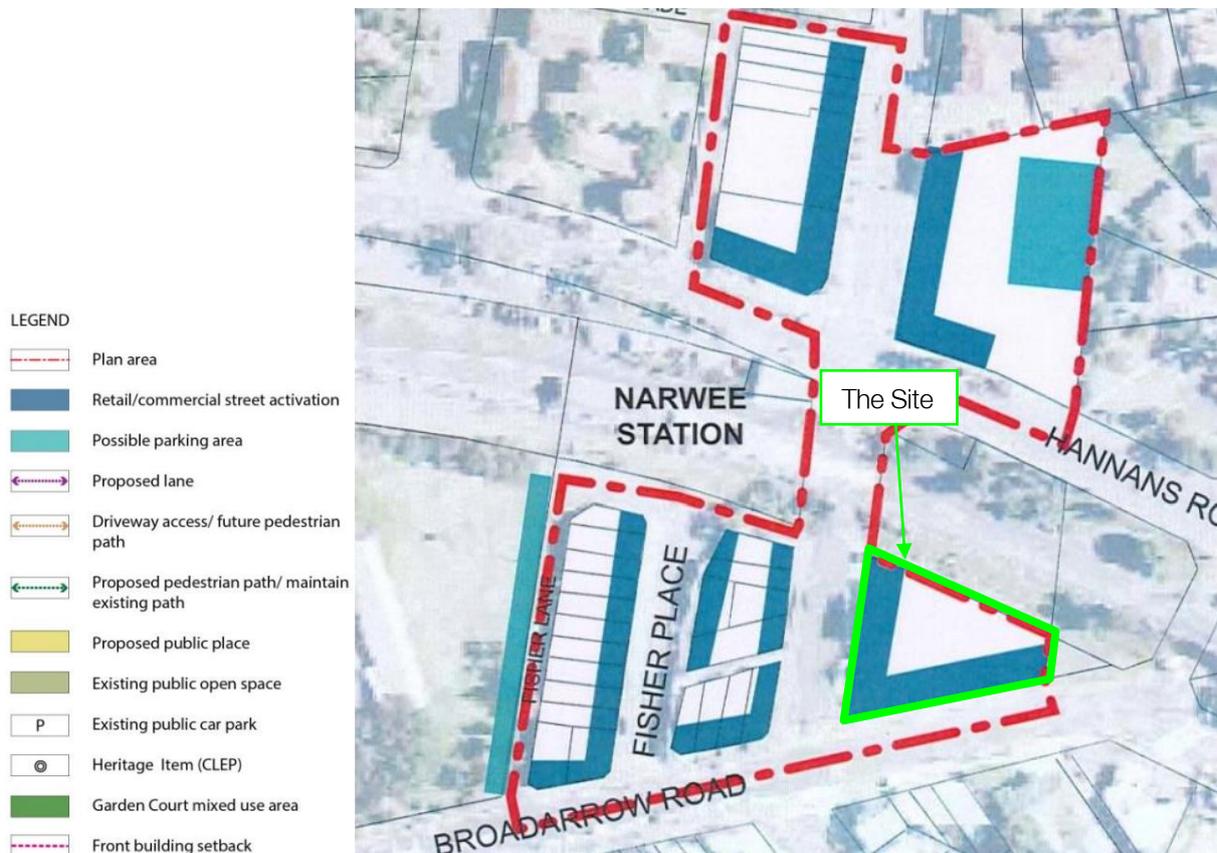


Figure 4: Extract from CDCP 2012 - Narwee Local Centre Structure Plan

Figure 4 provides an extract from the proposed Site Plan. Comparison between Figures 3 and 4 shows that the proposed siting and form of the proposed development is consistent with that envisaged by the Structure Plan.

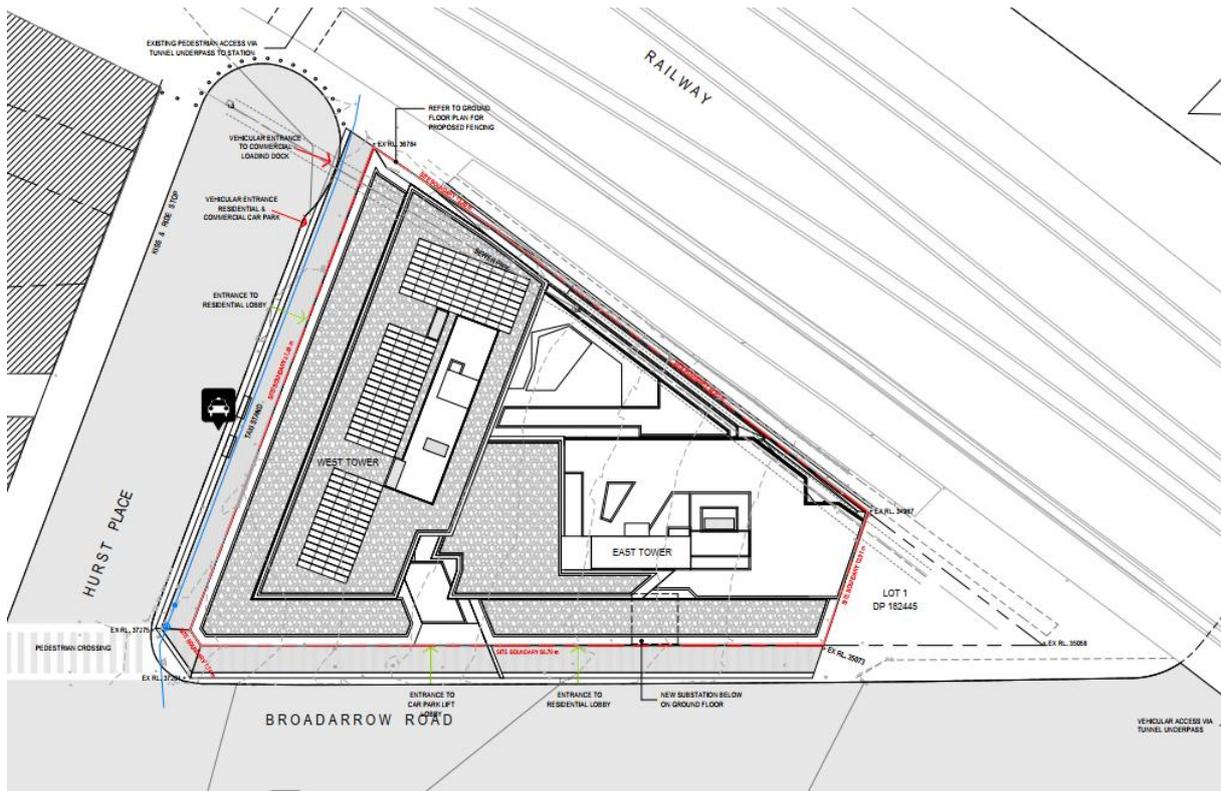


Figure 5: Extract of proposed site plan

Furthermore, in order to respond to the context and character of the locality which incorporates development of between one (1) and three (3) storeys, the proposed development incorporates a three (3) storey podium, with the upper levels setback 5m from the street frontages.

The proposed elevations incorporate articulation and modulation to minimise the perception of bulk and scale, and the proposed external colours, materials, and finishes provide a contemporary interpretation of those evident in the locality.

On this basis, the proposal is considered to be consistent with objective (a), notwithstanding the non-compliance with the standard.

*“(b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,”*

Jackson Teece has prepared detailed shadow diagrams showing the impacts of the existing and proposed developments.

The residential flat building to the south east of the site at 42 Broadarrow Road (on the opposite side of the carriageway), will be unaffected by overshadowing between 8:00am and approximately 10:30am on 21 June, which ensures compliance with the solar access requirements of the ADG. It is noted that the elements of the proposed development which exceed the maximum height of buildings development standard do not contribute to shadow impacts in relation to 42 Broadarrow Road, as shadows from these elements fall onto the roof of the proposed development itself.

There are no public open spaces in the vicinity of the site which are affected by overshadowing arising from the proposed development.

On this basis, the proposal is considered to be consistent with objective (b), notwithstanding the non-compliance with the standard.

*“(c) to support building design that contributes positively to the streetscape and visual amenity of an area,”*

The proposed development has been designed to ensure a significant positive contribution to the streetscape and visual amenity of the locality. The ground floor level of the proposed development incorporates active street frontages, comprising three (3) restaurants, one (1) commercial office and two (2) residential entry lobbies (along with other services and vehicle accessways). The ground floor level comprises extensive glazing so as to maximise transparency into the site and in order to ensure for interrelationships between the private and public domains.

The provision of a podium ensures a visual relationship, in terms of bulk and built form, with other buildings in the locality, which vary between one (1) and three (3) storeys in height.

The upper levels are setback 5m from the Hurst Place and Broadarrow Road boundaries, in order to reduce their visual prominence and maintain a scale to the street, which is compatible with the existing and likely future characters of the Narwee Local Centre.

The proposal incorporates a clear base, middle and top, through design and materiality, which provides for further visual interest and maintenance of a human scale.

The proposal will activate the Hurst Place frontage of the site, in proximity to the entrance to Narwee Railway Station, and will provide a pleasant pedestrian environment for persons walking to and from the railway station.

On this basis, the proposal is considered to be consistent with objective (c), notwithstanding the non-compliance with the standard.

*“(d) to reinforce important road frontages in specific localities.”*

The proposed development clearly reinforces the frontages of the site to Broadarrow Road and Hurst Place through the incorporation of street walls to a height of three (3) storeys, as envisaged by CDCP 2012. The architectural form and treatment of the proposed building will provide a ‘bookend’ to the eastern end of the Narwee Local Centre.

On this basis, the proposal is considered to be consistent with objective (d), notwithstanding the non-compliance with the standard.

### 3.4.2 Objectives of the zone

The objectives of the B2 Local Centre zone are addressed as follows:

Objective	Comment
<i>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.</i>	The proposal provides tenancies for three (3) new restaurants and one (1) new commercial business, which will add to the range of business and entertainment uses available in the locality.
<i>To encourage employment opportunities in accessible locations.</i>	The site is located immediately adjacent to Narwee Railway Station and within approximately 50m of a bus stop on Broadarrow Road, thereby ensuring excellent levels of accessibility for persons both living at, working at or visiting the proposed new building.
<i>To maximise public transport patronage and encourage walking and cycling.</i>	The proximity of the site to Narwee Railway Station and local bus stops will maximise public transport patronage by persons living at, working at and visiting the site.

Objective	Comment
<i>To facilitate and support investment, economic growth and development for active, diverse and well-designed centres.</i>	The proposal will encourage the activation and growth of the Narwee Centre as a consequence of the provision of three (3) new restaurants, one (1) new office, and 62 new apartments in a form commensurate with that envisaged by the applicable planning controls.

Table 1: GLEP 2012 – B2 Local Centre zone compliance assessment table

As can be seen above, the proposal is consistent with the objectives of the zone despite the non-compliance with the building height development standard.

### 3.5 **Whether contravention of the development stand raises any matter of significance for the State or regional Environmental Planning?**

The contravention is a local matter and does not raise any matter of state or regional significance.

Canterbury-Bankstown Council and associated Independent Hearing and Assessment Panel (IHAP) can assume the Secretary’s concurrence under Planning Circular PS 18-003 issued on 21 February 2018.

### 3.6 **How would strict compliance hinder the attainment of the objects specified in Section 1.3 (a), (b) and (c) of the Act?**

The objects set down in Section 1.3 (a), (b), and (c) are as follows:

Objective	Comment
(a) <i>to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State’s natural and other resources,</i>	The proposed development will promote the social and economic welfare of the locality through the provision of a new retail, commercial and residential population at the site. Furthermore, the proposal incorporates a range of design measures (i.e. provision of solar access, natural ventilation and solar panels) to ensure the conservation of resources.
(b) <i>to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,</i>	The proposal demonstrates ecologically sustainable development as it incorporates a range of design measures (i.e. provision of solar access, natural ventilation and solar panels) to ensure the conservation of resources. The proposal also assists in the realisation of urban consolidation through the provision of higher density development within the Narwee Local Centre, adjacent to Narwee Railway Station, so as to minimise urban sprawl and the use of the private motor vehicle.
(c) <i>to promote the orderly and economic use of land,</i>	The site is considered to be an acceptable location for shop-top housing development given its zoning and location within the Narwee Local Centre. The location provides excellent access to transport, services, and employment and will introduce new residents to the area which coupled with the proposed new ground floor level restaurants and commercial tenancy, will enliven the public domain and enhance the amenity of the locality. These elements are considered to demonstrate that the proposal promotes the orderly and economic use and development of land.

Table 2: EP&A Act 1979 – Section 1.3 objectives compliance assessment

### **3.7 *Is there public benefit in maintaining the development standard?***

There is public benefit in maintaining development standards. In this case, however, the non-compliance will result in significant public benefits, as discussed above, such that the non-compliance is warranted.

### **3.8 *Is the objection well founded?***

Yes, the proposal is consistent with the objectives of the zone and the height of buildings standard and the non-compliance enables the provision of building elements which provide a public benefit. On this basis this objection is considered to be well-founded.

## **4.0 Conclusion**

The proposed variation is a response to the sloping topography of the site and the requirement to provide lift overruns and skylights to provide equitable access throughout the proposed building, and to provide additional light and ventilation to upper level dwellings.

The proposed development is permissible with consent and consistent with the objectives of the B2 Local Centre zone and the building height development standard pursuant to CLEP 2012. The proposal is also generally consistent with the relevant provisions of SEPP 65, the ADG and CDCP 2012.

The proposed development, despite the non-compliance, achieves a high quality built form, which will make a positive contribution to the local streetscape and economy, along with public benefits arising from the non-compliant elements.

As the variation will not result in any adverse amenity impacts for nearby properties or the locality generally, it is considered that the variation is acceptable in the circumstances of this case.