
CLAUSE 4.6 VARIATION – BUILDING HEIGHT

ADDRESS: 1586-1606 Canterbury Road, Punchbowl

1. Introduction

This amended Clause 4.6 Variation Request is to accompany a development application seeking consent for the demolition of existing structures, site remediation and construction of an industrial warehouse development with associated showrooms, landscaping, car parking and signage at No. 1586-1606 Canterbury Road, Punchbowl.

This variation request relates to the proposed breach of the maximum building height requirement under Clause 4.3 of Canterbury LEP (CLEP) 2012 which in relation to the subject site prescribes a maximum height of 18m. It is noted that whilst the proposal seeks a departure from the maximum height limit, the non-compliance is attributed to site flooding and the need to raise the building levels on the site, whilst creating useable internal spaces for future businesses to occupy, including specialised retail premises, as encouraged by the B5 zone objectives.

When viewed from Canterbury Road and Moxon Road, the proposed variation will be imperceptible to the casual observer and will not materially contribute to the perceived height and bulk of the building. The variation is at its highest point adjacent to the stormwater canal (southern end of the site), where this is good separation to adjoining properties created by the channel.

The remaining sections of this variation request detail the development standard, the extent of the proposed departure and provide a detailed assessment with regard to the statutory tests contained within Clause 4.6 of CLEP 2012, as well as having regard to relevant caselaw which assists in the application of Clause 4.6.

This variation request concludes that the application of the development standard is unreasonable and unnecessary in the circumstances and details that there are sufficient environmental planning grounds advanced to support the application of flexibility in the circumstances. In addition, this variation request demonstrates that the proposal is in the public interest because it is consistent with the objectives of the standard and the zone within which the site is located.

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

Canterbury Local Environmental Plan 2012.

3. What is the zoning of the land and what are the objectives of the zone?

B5 – Business Development Zone – Objectives

- *To enable a mix of business and warehouse uses, and specialised retail premises that require a large floor area, in locations that are close to, and that support the viability of, centres.*
- *To provide for residential use in conjunction with mixed use development to create an attractive streetscape supported by buildings with a high standard of design.*

- To support urban renewal that encourages an increased use of public transport, walking and cycling.
- To encourage employment opportunities on Canterbury Road and in accessible locations.

4. Identify the Development Standard to which this Clause 4.6 Variation applies?

Clause 4.3 Height of Buildings of Canterbury LEP 2012.

5. Is the standard expressly excluded from operation of Clause 4.6

Clause 4.3 is not identified as being expressly excluded from operation of 4.6 as it is not identified at Clause 4.6(6) or (8) of the LEP.

6. What are the objectives of the development standard?

- 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.

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

Clause 4.3 of the LEP requires a maximum building height of 18m.

8. How do the existing and proposed numeric values relate to the development standard? What is the percentage variation (between the proposal and the environmental planning instrument)?

The submitted section drawings detail that the proposed development and the extent of site filling that is required to establish floor levels that are above the 1 in 100 year flood levels. The proposed buildings have been designed to respond to the flooding constraints of the site and required minimum finished levels, as reflected in the submitted Flood Report.

Provided below are extracts from the sections submitted with the Architectural drawing set, which indicate the extent of height non-compliance. The 18m height line as measured from the existing ground level is shown blue, whilst the outline of the approved apartment development on the subject site is shown red.

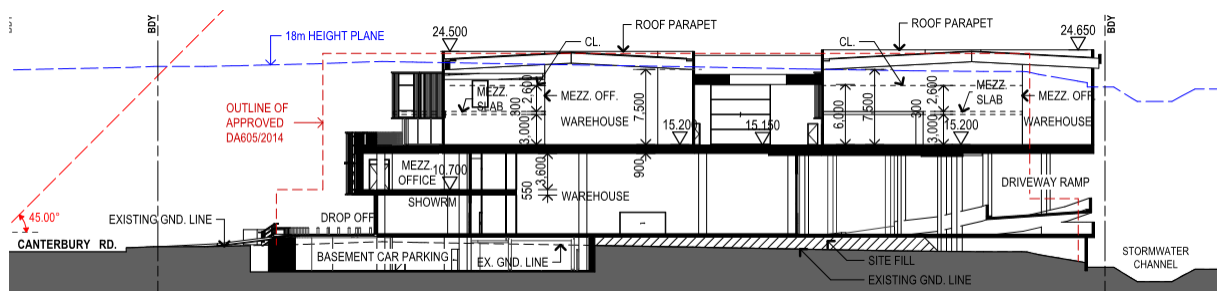


Figure 1: Section A - height non-compliance



Provided at Figure 6 over page is a plan view of the points that the building projects above the 18m height limit.



Figure 5: Height blanket diagram

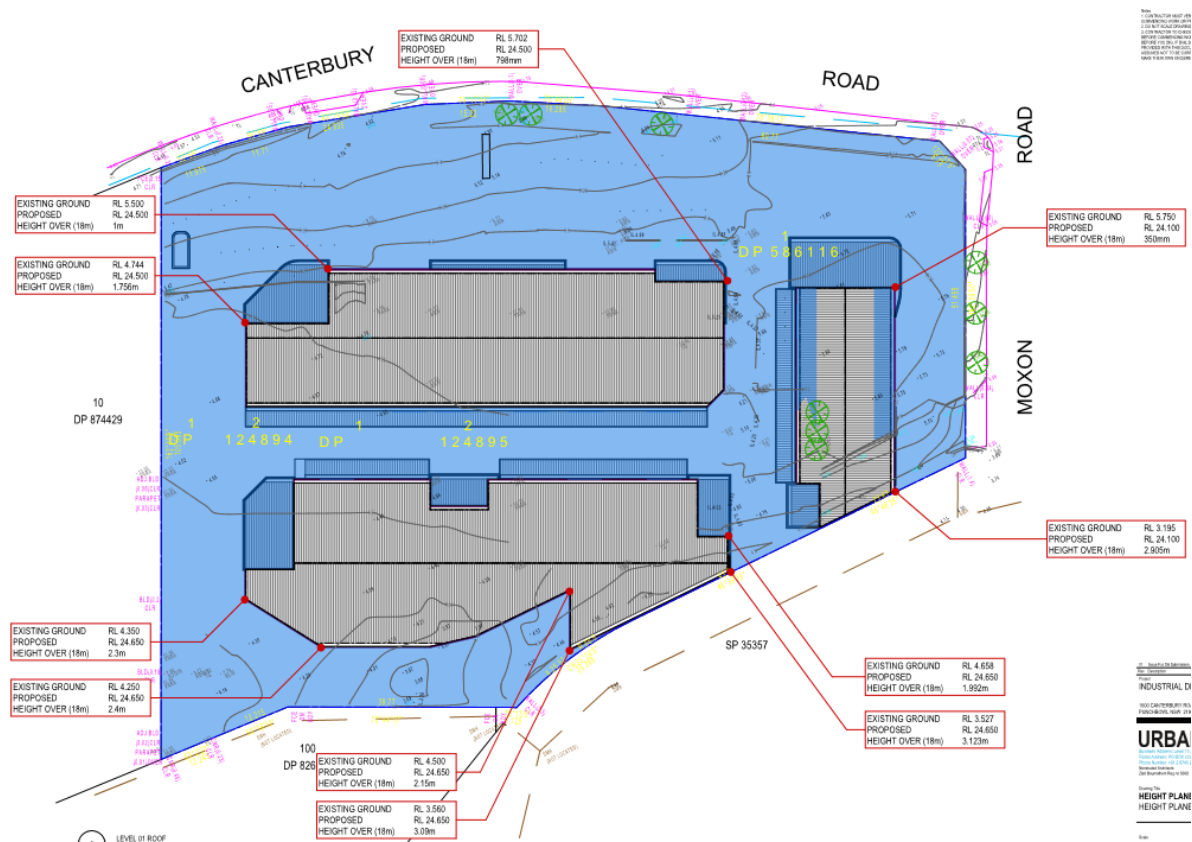


Figure 6: Extent of projection above the height limit at various points

As indicated on DA-1411 (extract provided at Figure 6), the height variation ranges from 0.35m adjacent to Moxon Road, 0.798m to 1.0m adjacent to Canterbury Road, 1.756m to 2.4m adjacent to the western site boundary, and 1.992m to 3.123m adjacent to the stormwater channel to the south.

The maximum extent of variation is therefore 3.123m to create a maximum building height of 21.123m, which represents a variation 17.35% of the development standard.

9. How is compliance with the development standard unreasonable or unnecessary in the circumstances of this particular case?

The NSW Land and Environment Court in *Four2Five Pty LTD v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827. The court provided five tests as follows that can be used as prompts to answer the above question.

Note: These five tests are not exhaustive of the ways in which a variation request might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. It is not necessary to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, it can demonstrate that compliance is unreasonable or unnecessary in more than one way.

Test 1: It is considered that, the proposal satisfies the first test in *Wehbe v Pittwater Council* [2007] NSWLEC 827 as the objectives of the standard are achieved notwithstanding the non-compliance with the standard. Refer to discussion below relating to compliance with the objectives of the development standard.

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

In considering whether there are sufficient environmental planning grounds to support the proposed height non-compliance, the following principles are relied on.

In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ further clarified the correct approach in the consideration of clause 4.6 requests. Preston CJ confirms that the clause does not require that a development that contravenes a development standard must have a neutral or better environmental planning outcome than one that does not.

The decision of Acting Commissioner Philip Clay in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 supports the notion that there is no such numerical limitation on the size of a variation to a development standard such as building height or FSR exists under the Standard Instrument clause 4.6 wording.

Additionally, it is noted that 'cl 4.6 is as much a part of [an LEP] as the clauses with development standards. Planning is not other than orderly simply because there is reliance on cl 4.6 for an appropriate planning outcome' (at [73]).

Finally, the tests in cl4.6(4)(a)(i) and cl4.6(4)(a)(ii) requires that the consent authority must be directly satisfied (or satisfied in fact) about the matter. In respect of Clause cl4.6(4)(a)(ii) the development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out.

In relation to overshadowing impacts, copied below are shadow diagrams which confirm that the proposed overshadowing is in part less, and in part marginally more, than a

- e. The variation will assist with the development achieving important planning goals of rejuvenation and activation of the Canterbury Road corridor. To require strict compliance would mean that the development would need to be reduced in height, which would in turn undermine the commercial viability of the project and range of potential businesses types that could occupy the site. This would be a sub-optimal planning outcome given that the variation also results in improved solar access to the approved development at No. 1608-1612, as outlined above.



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compliant design on the site (based on a building height of 18m and nil southern boundary setback). The sun-eye view diagrams following clearly indicate a significant net improvement to solar access (particularly from 9am to 10:30am, mid-winter) to the approved east facing units on No. 1608-1612 Canterbury Road when compared to the solar access that would be available as a result of the approved apartment development on the subject site.

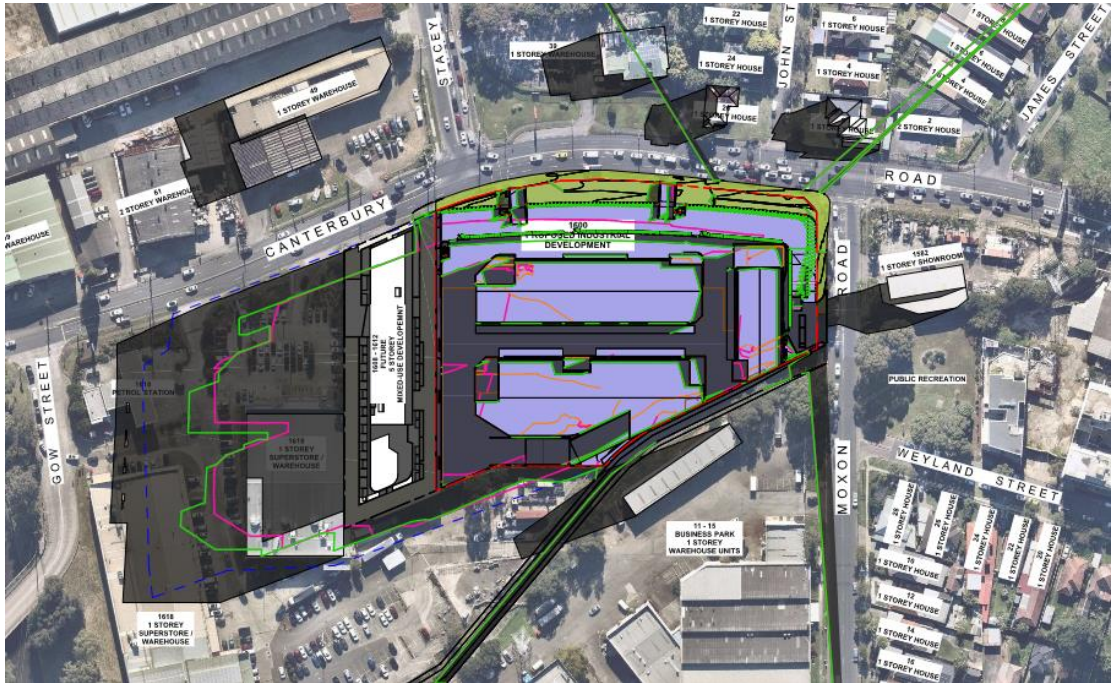


Figure 8: 8am shadow – mid-winter

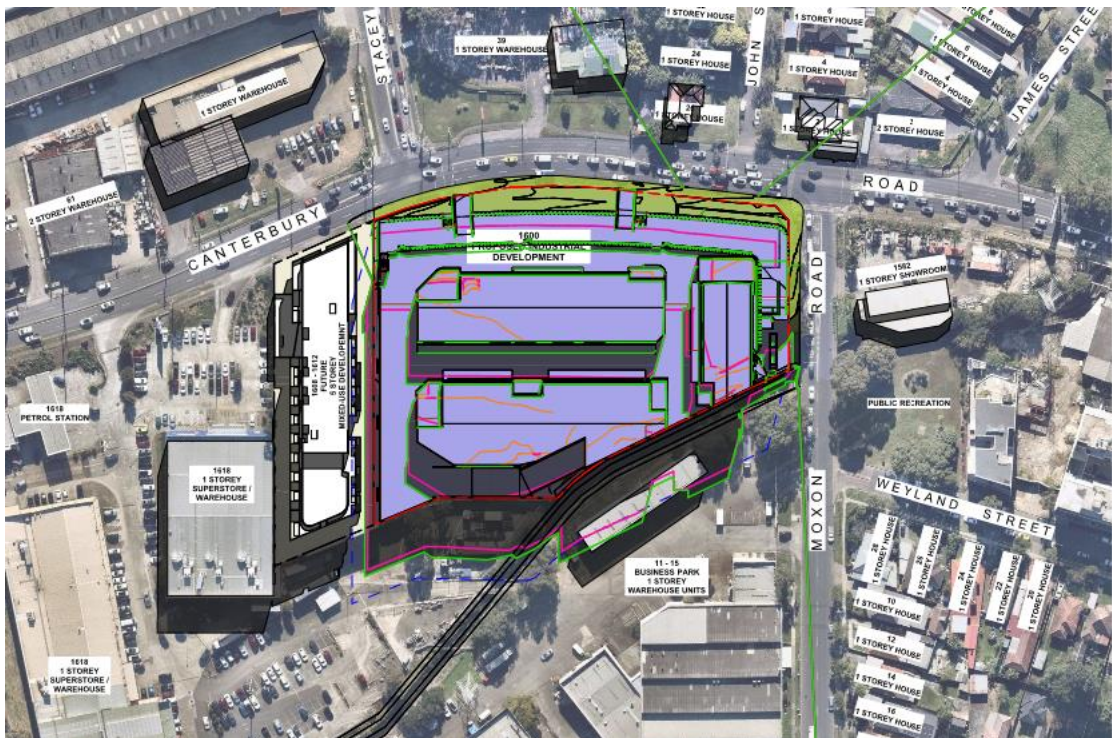


Figure 9: Midday shadow – mid-winter

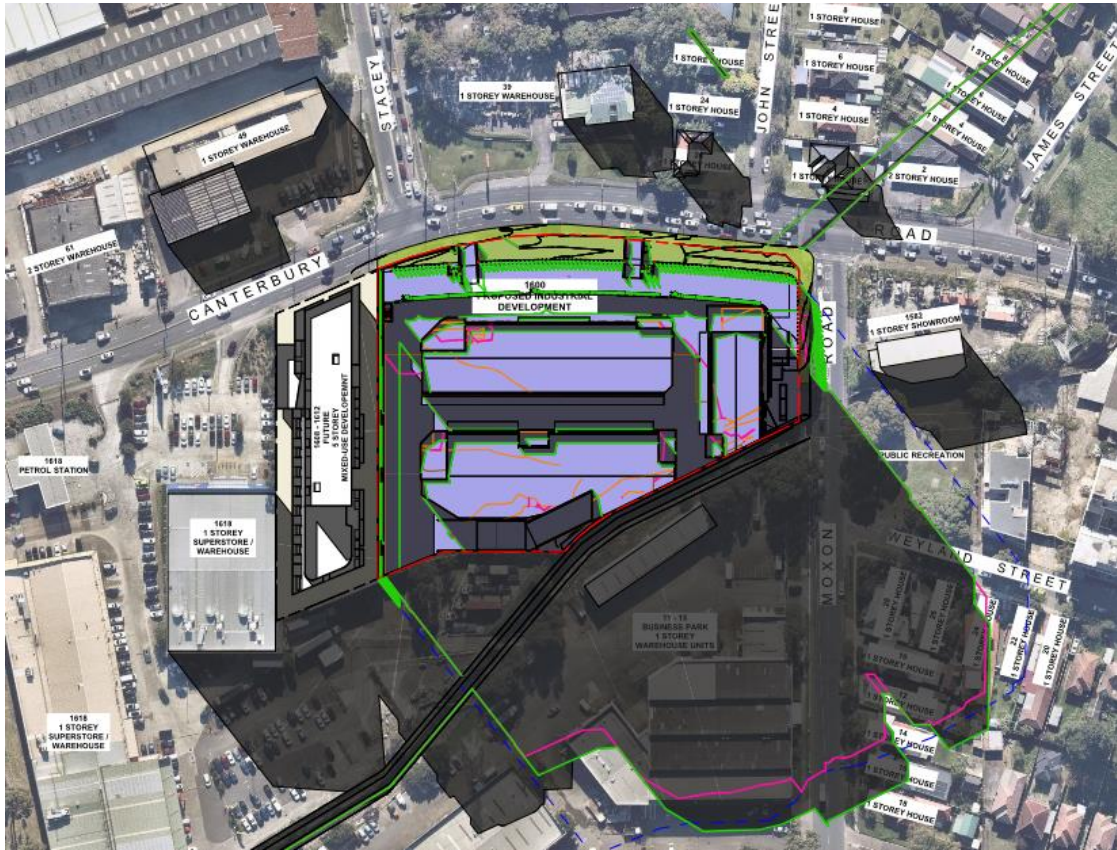


Figure 10: 4pm shadow – mid-winter



Figure 11: 9am midday – approved v proposed solar access to No. 1608-1612 Canterbury Road



Figure 12: 9:30am – approved v proposed solar access to No. 1608-1612 Canterbury Road



Figure 13: 10am – approved v proposed solar access to No. 1608-1612 Canterbury Road



Figure 14: 10:30am – approved v proposed solar access to No. 1608-1612 Canterbury Road



Figure 15: 11am – approved v proposed solar access to No. 1608-1612 Canterbury Road



Figure 16: 11:30am – approved v proposed solar access to No. 1608-1612 Canterbury Road

Furthermore, the proposal is in the public interest because is it consistent with the objectives of the development standard and the objectives of the zone in which the development is proposed to be carried out.

Provided below is an assessment of the proposal with respect to the objectives of the Building Height Development Standard (Table 1) and the *B5 – Business Development* zone (Table 2).

Table 1: Compliance with the objectives of the Building Height Requirement	
Objective	Response
a. <i>to establish and maintain the desirable attributes and character of an area,</i>	When taken from the floor levels required to cater for site flooding, the proposal will have a visually compliant building height and will therefore appear to be consistent with the desired built form for the site and intended character of development in the B5 zone. The proposal is set further from Canterbury Coad in comparison to the approved building on the site and will allow for clear lines of sight to the tenancies and proposed showrooms. A key objective of the B5 zone describes the desired character of the area , which is <i>to enable a mix of business and warehouse uses, and specialised retail premises that require a large floor area, in locations that are close to, and that support the viability of, centres.</i> The development will be clearly consistent with this zone objective as the tenancies proposed are of a scale and internal dimension that will cater for a wide variety of businesses, including specialised retail premises. The proposed height variation facilitates a development outcome on the site that will be consistent with the desired character of the area.
b. <i>to minimise overshadowing and ensure there is a desired level of solar access and public open space,</i>	As demonstrated previously in this variation request, the proposed variation results in improved solar access to the approved apartment building on No. 1608-1612 Canterbury Road and the residential dwellings further to the south-east will be immaterially impacted at 3pm in mid-winter. There will be no alteration to access to public open space as a result of the height variation.
c. <i>to support building design that contributes positively to the streetscape and visual amenity of an area,</i>	The proposal will be visually consistent with the expected scale and density of development on the site. It will have a contemporary appearance with high quality building finishes, articulated and visually interesting form, and an overall appearance that is different to the traditional approach for similar development to have a 'boxy' form. In addition, the development includes a robust landscape scheme that will further enhance the sites appearance and streetscape contribution. The proposal will set a high standard for similar future development to follow on nearby sites.
d. <i>to reinforce important road frontages in specific localities.</i>	For the reasons outlined above, the proposal will enhance the Canterbury Road corridor and will support new businesses on the site, which will contribute to the desired activation of the street and broader locality. The proposed tenancies directly front Canterbury Road and the proposed

Table 1: Compliance with the objectives of the Building Height Requirement	
Objective	Response
	showrooms will be directly visible from the street, which will be enhanced through the proposed business identification signage.

In addition to the above, the proposal is consistent with the **objectives of the B5 – Business Development zone**, as detailed below.

Table 2: Compliance with the objectives of the B5 – Business Development Zone	
Objective	Response
To enable a mix of business and warehouse uses, and specialised retail premises that require a large floor area, in locations that are close to, and that support the viability of, centres.	The height exceedance will facilitate the provision of warehouse and specialised retail uses on site with large floor areas and generous ceiling heights.
To provide for residential use in conjunction with mixed use development to create an attractive streetscape supported by buildings with a high standard of design.	Not applicable.
To support urban renewal that encourages an increased use of public transport, walking and cycling.	The site is presently underutilised and the proposal will seek to create new tenancies within an attractive building and landscape design. It will allow for renewal of the site and the site is well connected to bus services that operate on Canterbury Road. 36 Bicycle parking spaces are provided on-site to encourage cycling by employees and visitors.
To encourage employment opportunities on Canterbury Road and in accessible locations.	As above, the development includes a range of business tenancies that will contribute to employment opportunities once occupied.

11. The concurrence of the Secretary has been obtained

Clause 4.6(4)(b) requires that a development consent cannot be granted to a development that contravenes a development standard unless the concurrence of the Secretary of the Department of Planning, Industry and the Environment (DPIE) has been obtained. As outlined in the DPIE's Planning Circular PS 20-002 dated 5 May 2020, the consent authority may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table attached to the Circular. The conditions are not applicable to the building height development standard and the Secretary's concurrence can therefore be assumed.

12. Matters of significance for State or Regional Environmental Planning.

The proposed variation to the building height development standard is minor and does not raise any matters of significance for State or regional environmental planning.

13. The public benefit of maintaining compliance with the Development Standard

This variation request demonstrates that the proposed variation is consistent with the relevant zone and standard objectives, and that insistence on strict compliance would be unreasonable unnecessary in the circumstances. As also demonstrated in this variation request, there are no unreasonable impacts that will result from the contravention to the

maximum building height standard and to the contrary, the proposed variation will accommodate site flooding constraints and required finished levels.

On this basis, there is no public benefit in maintaining strict compliance with the development standard. The proposal's consistency with the relevant zone objectives and development standard objectives deems that the subject application is in the public interests.

14. Conclusion

In light of the above, the proposed height exceedance is demonstrated to satisfy the statutory tests of Clause 4.6 of CLEP 2012. The proposed development departs from the height limit which is a result of need to raise finished level to cater for site flooding.

As demonstrated, the proposal will result in a net improvement to solar access to the approved east facing units on No. 1608-1612 Canterbury Road.

The proposal represents an appropriate built form outcome that is in the public interest as it is consistent with the objectives of the development standard and the B5 zone.

In satisfaction of the statutory tests of Clause 4.6 of CLEP 2012, it is requested that Council and the Planning Panel support the variation as proposed.