

Clause 4.6 Variation Request

MAXIMUM BUILDING HEIGHT

ESQ STAGE 4 AND 5

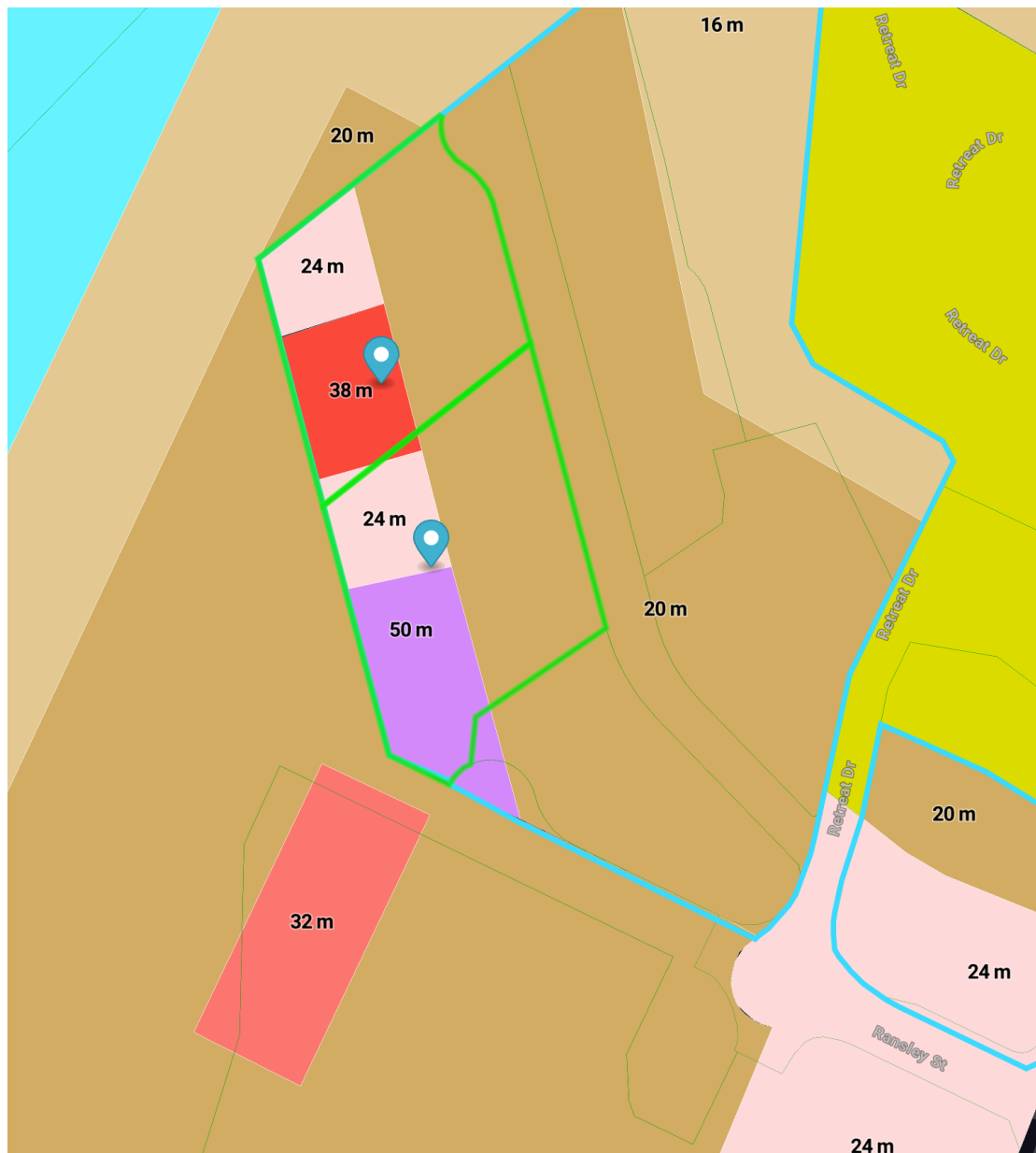
5 DECEMBER 2023



CLAUSE 4.6 VARIATION

Background to Building Height

Clause 4.3 of the Penrith LEP 2010 stipulates a maximum building height across the site that varies from 20m-50m, as reflected on the building height map below.

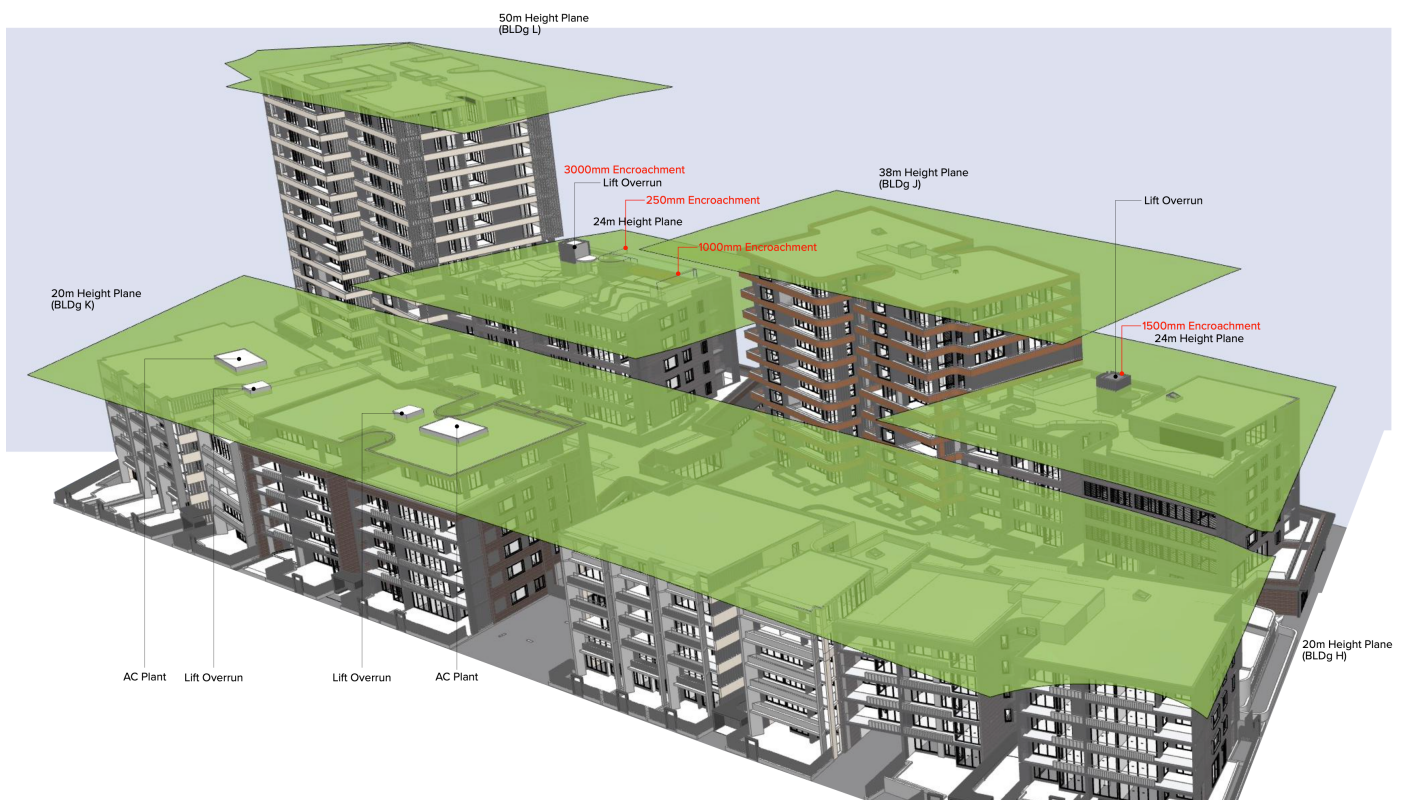




The Variation and Design Response

As shown on the elevation extracts below the proposed development is compliant with the maximum building height, with the exception of part of the lift over-run and the AC plant areas associated with some of the buildings as well as acoustic screens. This relates to Building K, J and L which is addressed in the table below in relation to the extent of breach of the various elements of the building. The development exhibits the following building height breaches to the height standard that is reflected on the 3D height plane.

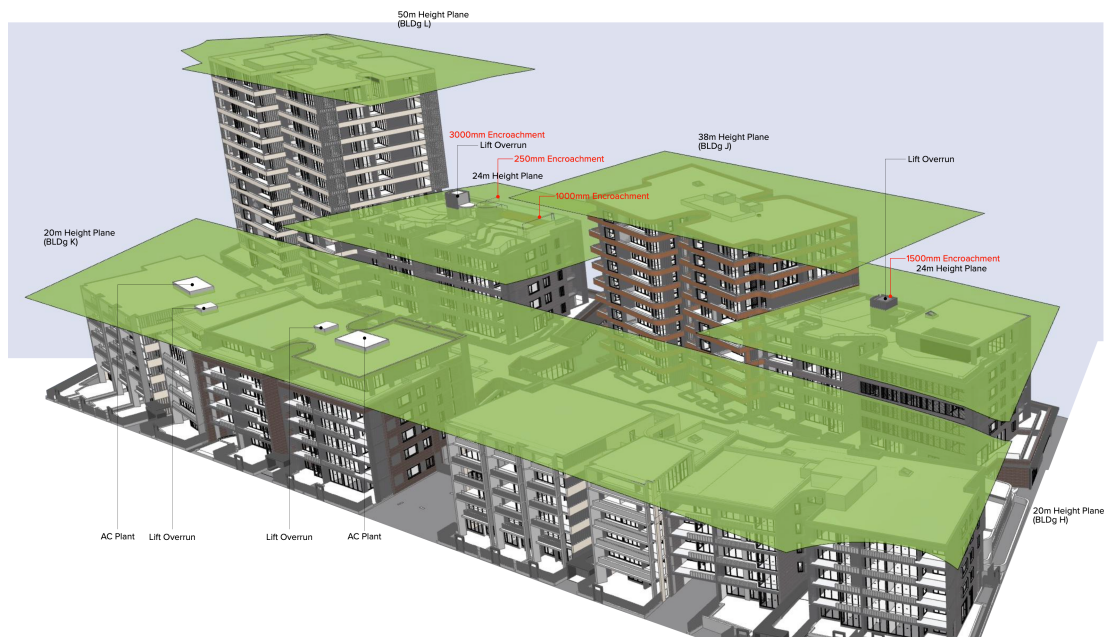
Maximum Height Exceedance	Departure
Building L : Lift overrun: 3m	12.5% to 24m standard
Building L: Acoustic Screen: 0.25m-1m	4.2% to 24m standard
Building K: A/C Plant: 573mm	2.8% to 20m standard
Building K: Lift Over-run: 563mm	2.8% to 20m standard
Building J: Lift Over-run: 1500mm	6.25% to 24m standard
Building J: Skylight to J501: 300mm	1.25% to 24m standard





As noted in the table above the variations are very minor- and a function of providing suitable integration of AC plant areas and the provision of a necessary lift over-run to the building and an acoustic screen to part of the rooftop COS. There is also a skylight over Unit J501 to provide solar access to that unit to improve amenity.

The areas of the breach are also very minor- noting the image below shows the areas of breach protruding above the green height limit. Of key importance is that the breaches are recessed to the building and a very small part of the total surface area of the roof and will be visually imperceptible from the public domain given the recessed location of the elements that exceed the height standard.



The design of the building ensures that the habitable floor space is contained below the maximum building height line which indicates that the variation is not simply a means of achieving additional development yield on the site, but a site specific design response to provide a suitable lift with necessary over-run to Building K, J and L plus an integrated AC/plant area to contain necessary plant rather than exposing AC condensers and the like. The acoustic screen to Building L is to the rooftop COS to address acoustic impacts and is made of glass and will not be perceptible. Finally the skylight to J501 is provided to maximise amenity to that dwelling.

These elements are not visible from the street level as they are hidden well behind the main building line and will have no impact on the bulk and scale of the development.

Relevant Case Law

There are a number of recent Land and Environment Court cases including *Four 2 Five v Ashfield* and *Micaul Holdings Pty Ltd v Randwick City Council* and *Moskovich v Waverley Council*, as well as *Zhang v Council of the City of Ryde*. In addition a judgement in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* confirmed that it is not necessary for a non-compliant scheme to be a better or neutral outcome and that an absence of impact is a way of demonstrating consistency with the objectives of a development standard. Therefore this must be considered when evaluating the merit of the building height departure.

Further a decision in *Al Maha Pty Ltd v Huajun Investments Pty Ltd [2018] NSWCA 245* has adopted further consideration of this matter, requiring that a consent authority must be satisfied that:

- The written request addresses the relevant matters at Clause 4.6 (3) and demonstrates compliance is unreasonable or unnecessary and that there are sufficient environmental planning grounds; and
- The consent authority must consider that there are planning grounds to warrant the departure in their own mind and there is an obligation to give reasons in arriving at a decision.

Accordingly, the key tests or requirements arising from the above judgements is that:

- The consent authority be satisfied the proposed development will be in the public interest because it is “consistent with” the objectives of the development standard and zone is not a requirement to “achieve” those objectives. It is a requirement that the development be compatible with the objectives, rather than having to ‘achieve’ the objectives.
- Establishing that ‘compliance with the standard is unreasonable or unnecessary in the circumstances of the case’ does not always require the applicant to show that the relevant objectives of the standard are achieved by the proposal (Wehbe “test” 1). Other methods are available as per the previous 5 tests applying to SEPP 1, set out in *Wehbe v Pittwater*.
- There are planning grounds to warrant the departure, and these planning grounds are clearly articulated as reasons in arriving at a decision.
- The proposal is required to be in ‘the public interest’.

In relation to the current proposal the keys are:

- Demonstrating that the development remains consistent with the objectives of the maximum building height control and on that basis that compliance is unreasonable or unnecessary;
- Demonstrating consistency with the SP3 zoning;
- Establishing compliance is unreasonable and unnecessary;
- Demonstrating there are sufficient environmental planning grounds to justify varying the standard; and
- Satisfying the relevant provisions of Clause 4.6.

Consideration of Clause 4.6

Clause 4.6 of the Penrith Local Environmental Plan 2010 provides that development consent may be granted for development even though the development would contravene a development standard. This is provided that the relevant provisions of the clause are addressed, in particular subclause 3-5 which provide:

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(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.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(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

(b) the concurrence of the Director-General has been obtained.

(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.

Clause 4.6(3) Compliance Unreasonable or Unnecessary

In accordance with the provisions of this clause it is considered that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case as the underlying objectives of the control are achieved.

The objectives of the building height development standard are stated as:

The objectives of this clause are as follows:

- a) *to ensure that buildings are compatible with the height, bulk and scale of the existing and desired future character of the locality,*
- b) *to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development and to public areas, including parks, streets and lanes,*
- c) *to minimise the adverse impact of development on heritage items, heritage conservation areas and areas of scenic or visual importance,*
- d) *to nominate heights that will provide a high quality urban form for all buildings and a transition in built form and land use intensity.*

The current development proposal is consistent with the building height with the exception of a necessary lift over-run to Building K, J and L plus an integrated AC/plant area to Building K rather than exposing AC condensers and the like. The acoustic screen to Building L is to the rooftop COS to address acoustic impacts and is made of glass and will not be perceptible. Finally the skylight to J501 is provided to maximise amenity to that dwelling.

Despite these minor breaches the proposal remains consistent with the objectives based on the following:

- Objective a)
The building height, bulk and scale are compatible with the desired future character of the locality reflected by the fact the building is compliant with the height limit set out in the LEP with the exception of the lift over-run to Building L, K and J and then the acoustic screen to Building L and the A/C plant elements to Building K and small skylight to Building J. The height in storeys and habitable areas are below the height limit and therefore the departure has no impact on the bulk and scale of the development and the proposal fully aligns with the desired future character of the locality having regard to permitted heights and the provisions of the PDGP 2014 relating to the Panthers Precinct.
- The proposed height variation continues to respect the form and scale of surrounding buildings within the Panthers Precinct and desired future character.
- Therefore the proposal satisfies objective a) notwithstanding the breach.

Objective b)

- The additional height proposed is in a location recessed from the perimeter of the building itself such that it is not visible from the public domain or 'in the round' from other key view lines such as Mulgoa Road and Ransley Street/Panther Place. The location and distribution of the additional height to the non-habitable elements has no discernible additional impact in terms of visual privacy and overshadowing when having regard to the lot orientation and location of the exceedance which is recessed from the perimeter of the building.
- In addition the use of the acoustic screen, which marginally breaches the height, is in place to mitigate acoustic privacy from the COS.
- The height and form of the development will establish a new context for the Panthers Precinct that to some extent alters the character and scale of the streetscape. The character and identity of the Panthers Precinct is tied closely to the quality of architecture and its relationship to surrounding buildings. This relationship is being retained and enhanced and the height departure has no bearing on the satisfaction of the underlying objectives of the control.
- The proposed variation in height does not result in unreasonable shadow impacts to the important public domain and areas of open space given the recessed location of the minor breach. The built form locations have been carefully considered to ensure daylight access is not compromised to surrounding buildings.

Therefore the proposal satisfies objective b) notwithstanding the breach.

Objective c)

- The site is not in a heritage conservation area of any proximity to heritage items so the height breach has no impact on this aspect of the objective.
- In relation to scenic and visual importance the site is not identified on the landscape or scenic quality mapping. However there are view corridors towards the Blue Mountains westwards. The additional height proposed is in a location recessed from the perimeter of the building itself such that it is not visible from the public domain or 'in the round' from other key view lines such as Mulgoa Road and Ransley Street/Panther Place. Therefore the proposal satisfies objective c) despite the breach.

Objective d)

- The development, including the minor height breach, provides for a high quality urban form for the development reflected in the support of the scheme by Councils Urban Design Review Panel and the proposal has considered the visual and scenic view corridors which is largely down Ransley Street and is unaffected by the proposal. The non-compliance to the lift over-run/acoustic screens and AC plant areas have no impact

on view corridors or the continued achievement of a high quality urban form on the site owing to its location and the recessed nature of these elements of the building from the perimeter of the building.

- The proposal is also consistent with the desired transition in built form as the proposal adopts a series of building heights and forms designed to align with the desired future character for the Precinct given the 24m, 38m and 50m height limits designed to provide a diversity of heights and suitable transitions to adjoining properties. The minor breach has no impact on this outcome given the recessed location of the breach and the non-habitable nature of the breach.
- Therefore the proposal satisfies the objectives of the control.

As outlined above the proposal remains consistent with the underlying objectives of the control and as such compliance is considered unnecessary or unreasonable in the circumstances.

Sufficient Environmental Planning Grounds & Design Response

The below points demonstrate suitable environmental planning grounds exist to justify contravening the height development standard and further demonstrates that the height departure does not give rise to any environmental impacts, and therefore the proposal is an appropriate design response for the subject site:

- At the outset the variation is minor, to the extent that the non-compliance will be largely imperceptible as viewed from the public domain or surrounding properties.
- The proposal retains habitable floor space below the height limit- meaning the elements above the height limit are ancillary elements necessary for the building to function- i.e. the lift over-run and then the acoustic screen that is clear glass.
- The maximum height of all parts of the building is compliant, other than the lift over-run to Building K, J and L plus an integrated AC/plant area to Building K rather than exposing AC condensers and the like. The acoustic screen to Building L is to the rooftop COS to address acoustic impacts and is made of glass and will not be perceptible but achieves a positive outcome in terms of mitigating acoustic impacts. Finally the skylight to J501 is provided to maximise amenity to that dwelling.
- The extent of the minor non-compliance could be reduced by the removal of these areas; however this would result in reduced accessibility if the lift and required over-run was provided and lessen the presentation of the building in terms of exposing the AC/plant without a structure around it. In addition the acoustic impacts of the COS would be increased absent the screens and amenity and solar access to J501 would be reduced without the skylight.

- As noted above the glass acoustic screen to Building J could also be removed however this would result in adverse acoustic impacts- and therefore the provision of a clear glass screen is a preferred outcome facilitated by the minor height breach.
- The height breach and design response enables a suitable design outcome on the site and is consistent with the following Objects of the Environmental Planning and Assessment Act 1979:

*(c) to promote the orderly and economic use and development of land,
(g) to promote good design and amenity of the built environment,
(h) to promote the proper construction and maintenance of buildings,
including the protection of the health and safety of their occupants,*

Therefore, the current proposal is a preferred outcome from an environmental planning perspective and demonstrates that there is merit in varying the height control to achieve a better design response on the site which demonstrates sufficient environmental planning grounds to support the departure.

Clause 4.6(4)

In accordance with the provisions of Clause 4.6(4)(a)(i) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3) for the reasons set out previously.

In relation to the provisions of Clause 4.5(4)(a)(ii) the consent authority can be satisfied that the development, including the numerical building height departure, is in the public interest given that:

- The proposed development remains consistent with the objectives of the building height control as set out above
- The proposal is consistent with the SP3 zone objectives as follows
 - *To provide for a variety of tourist-oriented development and related uses.*

The development will establish uses across the site that assist in strengthening the Panthers Precinct as a destination for residential and leisure.

The proposal will provide additional retail and community employment opportunities at a location that is highly accessible by walking, cycling and public transport. Proposed uses will expand the existing tourist-orientated development within the Precinct. On that basis the proposal contributes towards the provision of tourist-oriented development through the provision of the retail spaces at the ground floor at the interface with the lake.

- *To provide for diverse tourist and visitor accommodation and activities that are compatible with the promotion of tourism in Penrith.*

The development will establish uses across the site that assist in strengthening the Panthers Precinct as a destination for tourist oriented development through expanded commercial/retail offerings noting the breach to the height standard does not detract from satisfaction of this objective.

The proposal will provide additional retail and community employment opportunities at a location that is highly accessible by walking, cycling and public transport. Proposed uses will complement and support existing tourist-orientated development within the Precinct and are compatible with the promotion of tourism in Penrith.

- *To create an appropriate scale that maintains important views to and from the Nepean River as well as to the Blue Mountains escarpment, while also improving important connections to the Penrith City Centre and the Nepean River.*

The proposed development will be of an appropriate scale that will ensure important views to and from the Nepean River and Blue Mountains escarpment are retained and enhanced as nominated in the Panthers Chapter of the PDCP noting the height exceedance has no impact on these matters.

The proposal will also improve connections to the Penrith City Centre and Nepean River with increased permeability throughout the site. The finer ground plane and pedestrian linkages will improve accessibility and encourage walking.

On the basis of the above points the development is clearly in the public interest because it is consistent with the objectives of the building height standard, and the objectives of the SP3 zone.

Clause 4.6(5)

As addressed, it is understood the concurrence of the Director-General may be assumed in this circumstance, however the following points are made in relation to this clause:

- a) The contravention of the building height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal;
- b) There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the building height control is acceptable in the circumstances given the underlying objectives are achieved and it will not set an undesirable precedent for future development within the locality based on the observed building forms in the locality.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its particular circumstances, specifically in relation to flooding impacts.

The proposal will not have any adverse effect on the surrounding locality, which is envisioned to be characterised by residential development of comparable height and form.

The proposal promotes the economic use and development of the land consistent with its zone and purpose. Council is requested to invoke its powers under Clause 4.6 to permit the variation proposed.

The objection is well founded and considering the absence of adverse environmental, social or economic impacts, it is requested that Council support the development proposal.