

Attachment D

Clause 4.6 Variation Request – Building Height



AMENDED CLAUSE 4.6 VARIATION STATEMENT (HOB)

MAXIMUM BUILDING HEIGHT – CLAUSE 4.3 OF SYDNEY LEP 2012

1 Toxteth Road, Glebe

Prepared for: Antoniadis Architects Pty Ltd

Ref. M200070

DATE: 13 January 2021



Clause 4.6 Variation Statement – Height of Buildings (Clause 4.3)

1. INTRODUCTION

This Variation Statement has been prepared in accordance with Clause 4.6 of Sydney Local Environmental Planning Plan 2012 to accompany Development Application No. 2020/926. The application seeks consent for a change of use to a dwelling, including alterations and additions and associated landscaping to the heritage contributory building at No. 1 Toxteth Road, Glebe ('the site').

2. PROPOSED VARIATION

Clause 4.3 of SLEP 2012 prescribes the maximum building height for the site and refers to the *Height of Buildings Map*. The relevant map [sheet HOB_001] as illustrated in Figure 1 indicates that the maximum building height permitted at the subject site is 6m.



Figure 1 Prescribed Height of Building; 6m (Source; SLEP 2012)

Building height is defined as:

“building height (or height of building) means:

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

As indicated in Figure 2 below, the existing street façade at Toxteth Road, which is to be retained as part of the proposed development, currently exceeds the maximum building height by 4m to ridge height and 5m to chimney height, although the chimney is excluded from the calculation of building height. Similarly, due to the site slope, when viewed from the east and north, the existing building is well above the 6m building height limit.



Figure 2 Proposed and existing extent of non-compliance (6m height limit indicated by the green line) – south elevation.

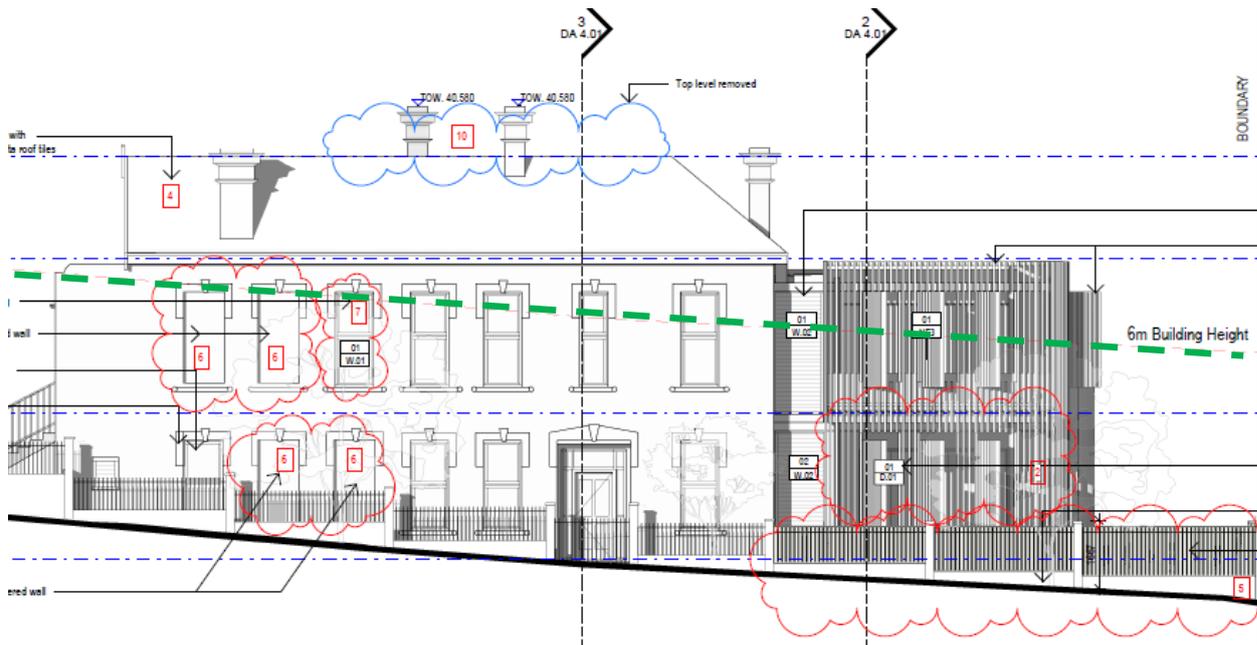


Figure 3 Proposed and existing extent of non-compliance (6m height limit indicated by the green line) – east elevation.

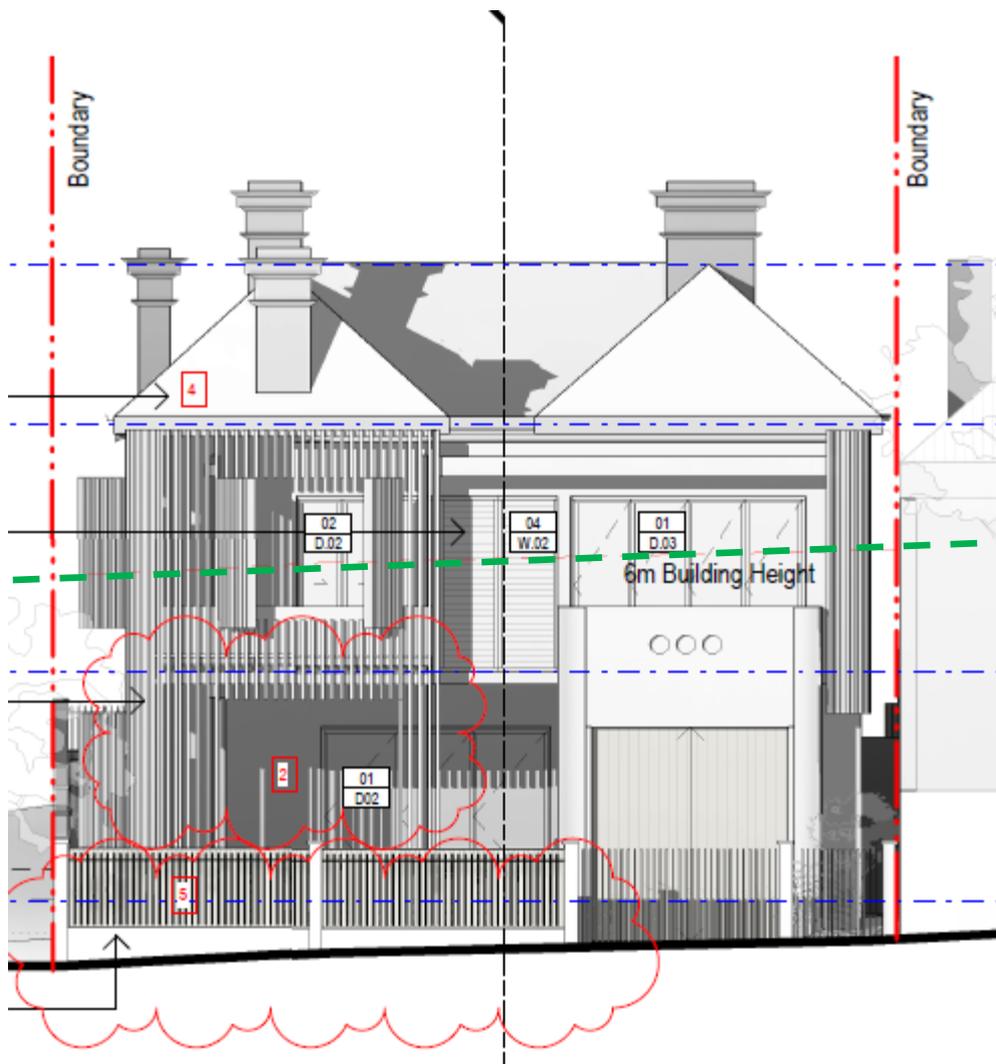


Figure 4 Proposed and existing extent of non-compliance (6m height limit indicated by the green line) – north elevation.

As amended, the proposed new exceedance occurs at the 2 storey rear addition only.

The proposed new addition to the rear of the site exceeds the building height limit by a maximum of 1.95m, however, it is less than the maximum existing building height. The existing building exceeds the 6m height limit by a maximum of 4m, to create a building height of 10m, representing a 66.6% variation of the standard. Therefore, the amended proposed development does not propose an increase to the building height found on site.

The maximum building height under Clause 4.3 is a “development standard” to which exceptions can be granted pursuant to Clause 4.6 of the LEP

3. OBJECTIVES AND PROVISIONS OF CLAUSE 4.6

The objectives and provisions of Clause 4.6 are as follows:

4.6 Exceptions to development standards

(1) The objectives of this clause 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.
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
- (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 Planning Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Planning Secretary 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 Planning Secretary before granting concurrence.
- (6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if—
 - (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
 - (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

Note— When this plan was made it did not include land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Rural Small Holdings, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living.

- (7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).
- (8) This clause does not allow development consent to be granted for development that would contravene any of the following—
 - (a) a development standard for complying development,
 - (b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,
 - (c) clause 5.4,
 - (ca) clause 4.3 (Height of buildings), but only in relation to land shown as being in Area 1 or Area 2 on the Height of Buildings Map,

- (cab) clause 4.5A (Balconies on certain residential flat buildings),
- (cb) clause 5.3A (Development below ground level in Zone RE1),
- (cc) clause 6.10 (Heritage floor space),
- (cd) clause 6.11 (Utilisation of certain additional floor space requires allocation of heritage floor space),
- (cda) clause 6.11A (Temporary alternative heritage arrangements in relation to allocation of heritage floor space),
- (ce) clause 6.17 (Sun access planes),
- (cf) clause 6.18 (Exceptions to sun access planes),
- (cg) clause 6.19(1)(d)–(h) and (j), unless the additional overshadowing is caused by playground equipment, a shade structure, an awning, a sculpture or artwork, or a community notice or public information sign,
- (cga) clause 6.26 (AMP Circular Quay precinct),
- (cgb) clause 6.29 (58–60 Martin Place, Sydney),
- (cgc) clause 6.33 (230–238 Sussex Street, Sydney),
- (cgd) clause 6.35 (45 Murray Street, Pyrmont), but only if the development is an alteration or addition to an existing building,
- (cge) clause 6.36 (12–20 Rosebery Avenue, 22–40 Rosebery Avenue and 108 Dalmeny Avenue, Rosebery),
- (cgf) clause 6.37 (296–298 Botany Road and 284 Wyndham Street, Alexandria),
- (cgg) clause 6.41 (7–15 Randle Street, Surry Hills),
- (cgh) clause 6.42 (102–106 Dunning Avenue, Rosebery),
- (cgi) clause 6.40 (2–32 Junction Street, Forest Lodge),
- (cgj) clause 6.43 (Danks Street South Precinct),
- (cgk) clause 6.52 (1–11 Oxford Street, Paddington),
- (ch) Division 1 of Part 7 (Car parking ancillary to other development).

It is noted that Clause 4.3(2) is not “expressly excluded” from the operation of Clause 4.6.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of Subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard, and is therefore consistent with objective 1(a). In this regard, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

4. THAT COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE (CLAUSE 4.6(3)(a))

In *Wehbe V Pittwater Council* (2007) NSW LEC 827 Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. This list is not exhaustive. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.”

The judgement goes on to state that:

“The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the

proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served)."

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;
5. The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to *Wehbe* and states:

"...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary."

Compliance with the maximum building height development standard is considered to be unreasonable and unnecessary as the objectives of that standard are achieved for the reasons set out in Section 7 of this statement. For the same reasons, the objection is considered to be well-founded as per the first method underlined above.

Notably, under Clause 4.6(4)(a)(ii) a consent authority must now be satisfied that the contravention of a development standard 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. Clause 4.6(4)(a)(ii) is addressed in Section 6 below.

5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS (CLAUSE 4.6(3)(b))

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, the following planning grounds are submitted to justify contravening the maximum building height:

1. The non-compliance is largely existing, being a maximum breach of 4m to the current building height. The proposal will return to the building to its former glory as a single detached dwelling and will immaterially increase the existing height of building found on site.
2. The objectives outlined in Clause 4.3 regarding Height of Building ensure height of buildings are appropriate to the site and its context, whilst further ensuring appropriate height transitions between new development and buildings within a heritage conservation area. Maintaining the building height is considered acceptable as it will contribute to the heritage conservation area, whilst preserving the dominant built form as viewed from the surrounding street frontages and neighbouring buildings.

In addition, the proposed new rear addition aligns with the built form of properties to the west and will therefore sit comfortable amongst the group of buildings, noting also that the buildings to the west extend higher than the proposed rear wing addition.

3. The proposed variation to the height of building will not result in a detrimental change to the character of the area. The primary alterations and additions are located to the rear of the property where the existing rear wing is currently in a state of dilapidation and unsympathetic to the building and public domain. The proposal will provide a contemporary addition to the building which respects the heritage conservation area and subject contributory building. Furthermore, the proposed additions will be compatible with the existing and approved building heights at Nos. 3 and 5 Toxteth Road when viewed from Avenue Lane to the rear.
4. The proposed development will continue to reflect the character of the streetscape and will not appear visually jarring to the casual observer. When viewed from the rear (northern) boundary, the existing building height will be maintained and added to in a manner that creates consistent alignment with the properties to the west.
5. The 6m building height limit is regularly exceeded in the locality. A large proportion of single detached dwelling houses and developments which have been constructed within the latter half of the twentieth century are well above the prescribed 6m limit. The majority of buildings were constructed prior to the City of Sydney implementing the 6m height control, highlighting that the development standard does not reflect the character of the area.
6. It is considered that there is an absence of any significant impacts of the proposed non-compliance on the amenity of the environmental values of the locality, the amenity of future building occupants and on area character. Specifically, the extent of non-compliance with the height of building development standard will:
 - a. Not create any material overshadowing to the neighbouring property at No. 3 Toxteth Road to the south-west or of the public domain;
 - b. Not result in any additional privacy impacts.
 - c. Not impede any views across the site. The additional height of building will not result in any additional view loss when compared to the existing scheme as views are not afforded across or from the site. Therefore, the extent of view loss caused by the non-compliant element is nil.
7. The proposed development meets the objectives of the development standard and meets the objectives of the R1 General Residential zone (as further detailed in Section 7 below);

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the significance of the heritage contributory item within the Toxteth Heritage Conservation Area. The proposal will provide a high quality design and outcome specific to the site and its context, significantly improving the amenity and liveability of the building.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118*, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. The second way is in an error because it finds no basis in cl 4.6. Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby

properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.

87. The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard.

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

6. CLAUSE 4.6(4)(a)

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 4 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in 7a below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

7. 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 (CLAUSE 4.6(4)(a)(ii))

7a. Objectives of Development Standard

The objectives of Clause 4.3 are as follows:

- (a) to ensure the height of development is appropriate to the condition of the site and its context,*
- (b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,*

(c) to promote the sharing of views,

(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,

(e) in respect of Green Square—

(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and

(ii) to ensure the built form contributes to the physical definition of the street network and public spaces...'

In order to address the requirements of Subclause 4.6(4)(a)(ii), the relevant objectives of Clause 4.3 are addressed in turn below.

Objective (a): “to ensure the height of development is appropriate to the condition of the site and its context”

The subject sites exhibits a contributory building within the heritage conservation area. The existing building on site is already in breach of the 6m height of building control prescribed on site. The building was constructed in 1891 and formed part of the Toxteth estate. Buildings in the immediate area are recognised as heritage items or heritage contributory items to the Toxteth Heritage Conservation Area. All buildings within the Toxteth estate are noted for building heights which are above the 6m prescribed height of building control. Strict compliance with the development standard would not result in an improved level of attainment with the height control or this particular objective.

Provided below is a view of the building from Allen Street, indicating its considerable size.



Figure 5 Allen Street view



As indicated in the submitted plans and previously outlined, the proposed rear addition will align with the rear portion of the development to the west at No. 3 Toxteth Road, which extends in a similar manner for the properties further to the west, as shown in Figure 6 (green line indicating the rear building alignment at the upper level).



Figure 6 Aerial view

Therefore objective (a) is achieved.

Objective (b): “to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas”

The immediate locality is characterised by both the R1 General Residential zoning and Toxteth Heritage Conservation Area. The residential development in the locality is diverse, comprising detached dwellings, terrace housing and residential flat buildings. A majority of the surrounding development was constructed between the late nineteenth century and late twentieth century, before the City of Sydney’s 6m height of building control was implemented. Development to the west, forming the Toxteth Estate are all of similar building heights to the subject site.

Viewed from the rear along Avenue Lane, the proposed rear addition will be visually subordinate to the existing building heights. The addition of a rear wing will form a continuity of transition between the subject site and adjoining heritage contributory dwellings to the west. The proposal will provide a contemporary update to the rear wing which is complimentary to the heritage dwelling and wider conservation area.

Provided below is a photograph of the northern side of the subject site and buildings to the west, noting building height that is well above the 6m limit.





Therefore objective (b) is achieved.

Objective (c): “to promote the sharing of views”

No views are afforded from or through the site. Whilst views down Allen Street extend down the hill, no views of the harbour, Sydney city or land and water interface are offered. The minor height non-compliance does not intrude views from

Therefore objective (c) is achieved.

Objective (d) “to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas”

Not applicable

Objective (e) “in respect of Green Square—

- (i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and
- (ii) to ensure the built form contributes to the physical definition of the street network and public spaces...”

Not applicable.

7b. Objectives of the Zone

Clause 4.6(4)(a)(ii) also requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R1 are as follows:

- **To provide for the housing needs of the community.**

The proposal will enhance the liveability and useability of the existing dwelling through alterations and additions. The proposal will provide better opportunities to meet the housing needs of the community within a building which will provide a considerably higher level of amenity, liveability and functionality within the residential environment whilst maintaining the heritage character of the locality.

- **To provide for a variety of housing types and densities**

The improved amenity of the property will provide occupants enhanced liveability, whilst contributing the diversity of housing types and densities in the zone. As of the 2016 census, single detached dwellings made up only 4.9% of dwelling types within Glebe (ABS; 2016).

- **To enable other land uses that provide facilities or services to meet the day to day needs of residents.**

The proposed development is not antipathetic to this objective.

- **To maintain the existing land use pattern of predominantly residential uses**

The development will maintain the existing land use pattern of the predominantly residential area. The building façade will be enhanced, highlighting the historical elements whilst providing a rear extension which is sympathetic to the lined streetscape and building typology of the locality.

The proposed development is consistent with the objectives of Zone R1 in that it will provide for a variety of housing types within the community and maintain the land use pattern of the area. The height variation is not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

8. THE CONCURRENCE OF THE SECRETARY HAS BEEN OBTAINED (CLAUSE 4.6(4)(b))

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice dated 21 February 2018, attached to the Planning Circular PS 18-003 issued on 21 February 2018, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

9. WHETHER CONTRAVENTION OF THE DEVELOPMENT STANDARD RAISES ANY MATTER OF SIGNIFICANCE FOR STATE OR REGIONAL ENVIRONMENTAL PLANNING (CLAUSE 4.6(5)(a))

Contravention of the maximum height development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

10. THE PUBLIC BENEFIT OF MAINTAINING THE DEVELOPMENT STANDARD (CLAUSE 4.6(5)(b))

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum building height. As such there is no public benefit in maintaining strict compliance with the development standard.



Whilst the proposed building height exceeds the maximum permitted for the site, it is consistent with the objectives of the development standard and the objectives for development of the zone. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.

11. CONCLUSION

Having regard to all of the above, it is our opinion that compliance with the maximum height development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.



