

Attachment C

<p>Clause 4.6 Variation Request – Height of Buildings</p>
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Clause 4.6 Height

BUILDING ALTERATIONS AND CO-LIVING HOUSING PROPOSAL

163 BRIDGE ROAD, GLEBE

22 NOVEMBER 2022



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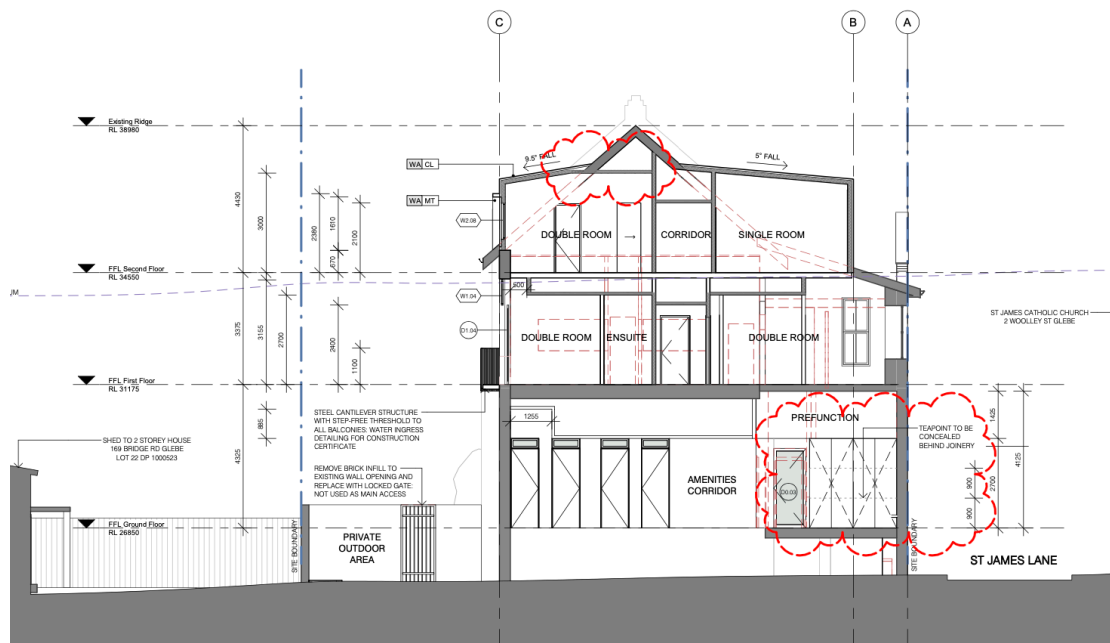
INTRODUCTION & BACKGROUND

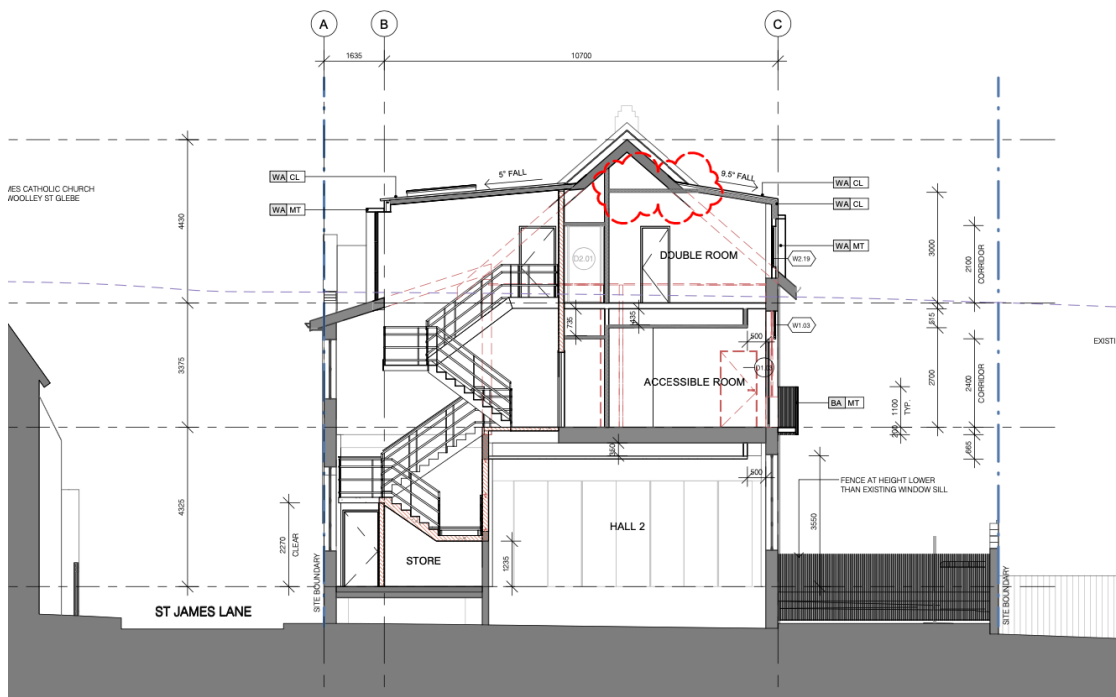
This variation statement has been prepared in accordance with Clause 4.6 of the *Sydney Local Environmental Plan 2012* to accompany a development application for alterations to an existing Church Hall building that facilitates a new co-living component.

The works are largely internal however there is a component that alters the upper most level to establish additional floor space to this part of the building. It is noted that this sits below the maximum height of the existing building on the site but contributes to a further breach to the building height development standard associated with the existing building.

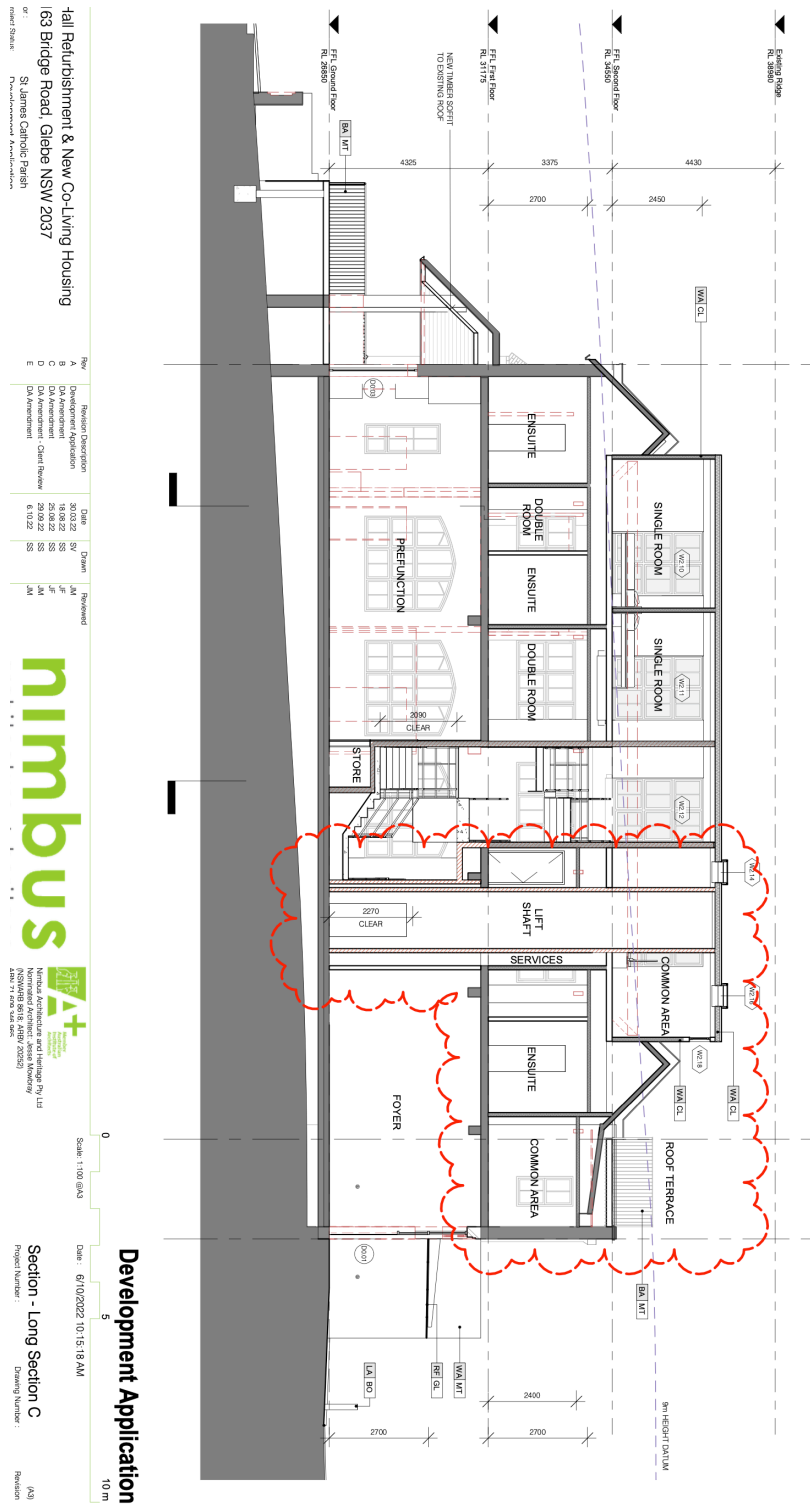
This is reflected on the image below that shows the existing building and the new works proposed relative to the 9m height limit and this clearly shows all new work sits below the existing ridge height of the building.

The red dotted line represents the portion of the building to be demolished (existing roof) and then the new dormer elements that are above the height limit- noting the existing ridge height (shown solid black) is maintained and hence the total overall height is not increased but the extent of the building over the height limit does increase as reflected on the drawing below.





An extract of Long Section C is also provided below again noting the red dotted line is the extent of the existing structure to be removed, the dark grey the existing structure to be retained, and the light grey hatched element the new work which shows the extent of the height increase to this area.



This variation statement relates to the maximum building height of 9m applicable to the site pursuant to Clause 4.3(2) of the SLEP 2012.

It is important to note at the outset that case law indicates that Clause 4.6 of the *SLEP 2012* “is as much a part of the 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.” (*SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [73]).

This statement demonstrates that compliance with the maximum building height development standard applicable to the site pursuant to Clause 4.3(2) of the SLEP 2012 is unreasonable or unnecessary and that there are sufficient environmental planning grounds to justify the proposed contravention to the development standard, as required pursuant to Clause 4.6(3). Additionally, in accordance with Clause 4.6(4),

it is demonstrated in this statement that the proposal will be in the public interest because it is consistent with the objectives of the relevant development standards, as well as the R1 General Residential zone objectives.

DEVELOPMENT STANDARD TO BE VARIED

The maximum building height control contained in Clause 4.3(2) of the *SLEP 2012* is a development standard. Clause 4.3 of the *SLEP 2012* states:

4.3 Height of buildings

- (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 outside Central Sydney,
- (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.

The Site is subject to a **9m** maximum building height on the basis that it is marked 'J1' in the *Height of Buildings Map – Sheet HOB_001* of the *SLEP 2012*, which is partly reproduced in **Figure 1** below:

Figure 1: Height of Building Map (Source: SLEP 2012 Mapping)



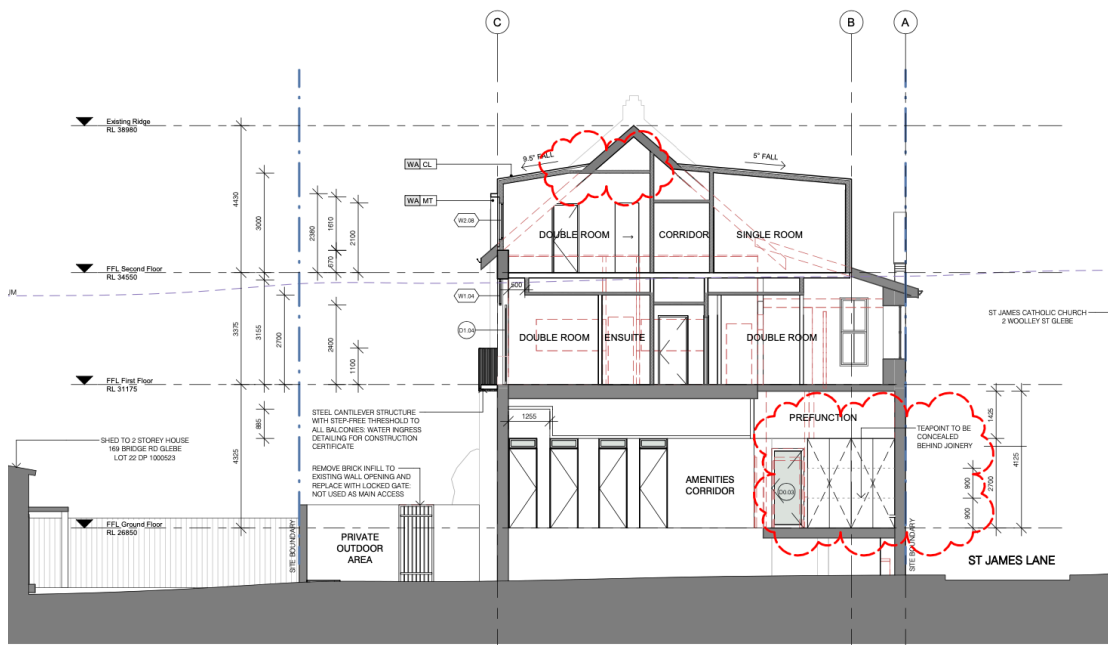
 Subject Site

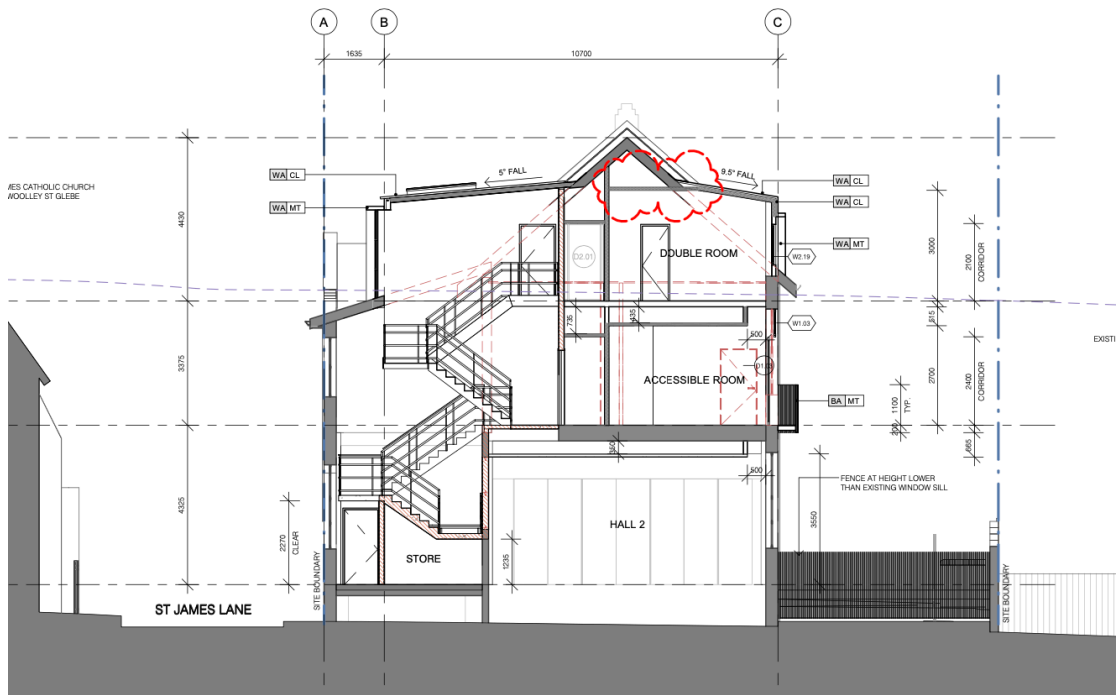
PROPOSED NUMERICAL VARIATION TO THE HEIGHT STANDARD

The existing building has a height of 13.23m and exceeds the height limit already by 4.23m.

The new work exceeds the height limit but sits below the existing ridge of the building. The extent of height that is associated with the dormers and associated elements is 12.3m-12.4m. This exceeds the height by 3.3m-3.4m, being 36.6%-37.7%.

An extract of the drawings is provided below noting that the area of breach is largely from the 'boxing out' of the existing roof form to form the rooms at the upper most level- hence the overall height breach does not increase but the extent of the built form over the height standard does increase. This is best understood in the sections running north/south which is reproduced below.







Hall Refurbishment & New Co-Living Housing
 163 Bridge Road, Glebe NSW 2037
 of: St James Catholic Parish
 Parish of St James
 Parish of St James

Rev	Revision Description	Date	Drawn	Reviewed
A	Development Application	30/03/22	SV	JM
B	DA Amendment	18/04/22	SS	JF
C	DA Amendment - Client Review	29/09/22	SS	JM
D	DA Amendment	6/10/22	SS	JM

nimbus

ZA+
 Norman Architecture and Heritage Pty Ltd
 Norman Architecture, Jesse Mackay
 44/57 St Pauls Ave, Glebe NSW 2037

Scale: 1:100 (3/4)

Date: 6/10/2022 10:15:18 AM

Development Application

Section - Long Section C

Project Number:

(A3)

Revision

JUSTIFICATION FOR VARIATION OF THE DEVELOPMENT STANDARD

Clause 4.6 of the *SLEPP2012* enables the consent authority the ability to grant development consent for development that proposes a variation to a development standard provided the matters set out in Clause 4.6 are satisfied. This Clause aims to provide an appropriate degree of flexibility in applying certain development standards to particular circumstances. 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.*

The development standard in Clause 4.3(2) of the *SLEP 2012* is not “expressly excluded” from the operation of Clause 4.6.

RELEVANT CASE LAW

This statement has been prepared with regard to the latest decisions of the NSW Land and Environment Court in relation to Clause 4.6 and the proper approach to justifying a variation of a development standard, including:

- a) *Wehbe v Pittwater Council* [2007] 156 LGERA 446; [2007] NSWLEC 827;
- b) *Four2Five Pty Ltd v Ashfield Council* [2007] 156 LGERA 446; [2015] NSWLEC 90 ;
- c) *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118;
- d) *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130; and
- e) *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112.

There are also a number of other NSW Land and Environment Court cases that are relevant, including *Micaul Holdings Pty Ltd v Randwick City Council* [2015] NSWLEC 1386 and *Moskovich v Waverley Council* [2016] NSWLEC 1015, as well as *Zhang and anor v Council of the City of Ryde* [2016] NSWLEC 1179.

Importantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ held at paragraphs [87] and [90]:

87. ...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...

...

90. In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause.

These matters are discussed in the following sections

CLAUSE 4.6(3)(A): COMPLIANCE WITH THE DEVELOPMENT STANDARD IS UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE

In *Wehbe v Pittwater* [2007] NSWLEC 827 (**'Wehbe'**), Preston CJ identified a variety of ways in which it could be established demonstrated that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. 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.”

While *Wehbe* related to objections made to State Environmental Planning Policy No. 1 – Development Standards (SEPP 1), the reasoning can be similarly applied to variations made under Clause 4.6 of the standard instrument.

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 at least 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 :

- The objectives of the standard are achieved notwithstanding non-compliance with the standard;*
- The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
- The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
- 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;*
- 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.

It is sufficient to demonstrate **only one** of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22], *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

THE OBJECTIVES OF THE STANDARD ARE ACHIEVED NOTWITHSTANDING NON-COMPLIANCE WITH THE STANDARD

This Clause 4.6 variation statement establishes that compliance with the maximum building height development standard is considered unreasonable or unnecessary in the circumstances of the proposed development because the underlying objectives of the standard are achieved despite the non-compliance with the numerical standard. The objectives of Clause 4.3 Height of Buildings pursuant to the *SLEP 2012* are responded to as follows:

4.3 Height of buildings

(1) *The objectives of this clause 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 outside Central Sydney,*
- (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.*

The existing building height is compatible with the character of the locality, for the following reasons:

- The building height, despite the additional area of the breach, is appropriate for the site given the height of the existing building on the land and the recessed nature of the additions that seeks to ‘hide’ the additional bulk and scale through the boxing out of the roof form and maintaining this below the existing ridge height of the building;
- The height breach of the development does not increase the bulk and scale of the existing building in any meaningful way as the additions are recessed and below the maximum height of the existing building and the additions visually recessive;

- The proposal has been carefully designed to respect the character of the site and locality in the context of the HCA with careful design given to the treatment of the additions.
- The height breach has no impact on view sharing.
- The site is not located in Green Square and this is not relevant.
- The minor works proposed to the site do not result in a reduction of views from either the public domain or nearby private properties;
- The proposal will not result in any additional unacceptable overshadowing impacts to adjoining properties noting that the modelling of the development and the height breach arising results in the following impacts to the adjoining residential properties:
 - The shadow diagrams show the extent of impact of the proposal including fences, and elevational shadows are updated to show the impact to the nominated nearby dwelling. The elevational shadows are to the closest dwelling which is partly impacted- noting the 2 adjoining terraces are not impacting on living area windows and only marginally impact on the POS areas of these dwellings and they all continue to achieve sufficient solar access in compliance with the DCP.
 - As it relates to the dwelling at 169 Bridge Road, which features a living area in proximity to the rear boundary the elevational shadows, shown on Drawing 500-503 show that:
 - 9am: No additional impact to windows
 - 10am: no additional impact to windows
 - 11am: Impact to the lower portion of the window with the top portion not impacted
 - 12 noon: No additional impact to windows
 - 1pm: No additional impact to windows
 - 2pm: No additional impact to windows
 - 3pm: No additional impact to windows.
 - The calculations show that greater than 1sqm retains 2 hours of solar access, being from 9am to 10am, and then 2pm to 3pm. Which complies with the DCP.
 - Accordingly the height breach associated with the development proposal does not result in unacceptable overshadowing and adjoining properties continue to retain 2 hours of solar access in mid-winter in conformance with the DCP.

- Due to the minor nature of the variation, it will not have any adverse amenity impacts. In this regard, it is noted:
 - o The variation will not lead to the unreasonable reduction in solar penetration on site or to adjoining properties nor will it lead to excessive sunlight loss or overshadowing and adjoining properties continue to achieve the required levels of solar access under Sydney DCP 2012 which demonstrates a suitable outcome.
 - o The proposed variation will not lead to view loss or interrupt on views to and from the site given the total height of the building is not increased and there are no view corridors ; and
 - o The proposed variation will not lead to a reduction in privacy afforded to surrounding properties or future residents of the proposal given the design measures proposed including the setbacks of the building and the balustrading elements proposed on the southern façade to the boarding rooms.

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.

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the departure from the control. This also satisfies Wehbe Test 1.

CLAUSE 4.6(3)(B): SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS TO JUSTIFY CONTRAVENING THE DEVELOPMENT STANDARD

Clause 4.6(3)(b) of the *SLEP 2012* requires the contravention of the development standard to be justified by demonstrating that there are sufficient environmental planning grounds to justify contravening the development standard.

The following factors demonstrate that sufficient environmental planning grounds exist to justify the proposed variation to the maximum building height standard in Clause 4.3. It is reminded at the outset that as confirmed by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at [24], the focus is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds :

- The existing building breaches the height limit and the additional height is not greater than the existing maximum building height in overall terms and the additional height proposed is visually recessive and informed by a detailed consideration of the site context within the HCA through the adoption of a 'boxing out' of the upper level roof form in a sensitive way to response to the site context and HCA- that is to say that the most site responsive approach is a boxing out of the upper level roof form rather than a further expansion of the building footprint at the lower levels of the building from a heritage perspective.
- The height breach does not result in any unacceptable overshadowing, visual privacy or view-loss which is afforded by the careful design and consideration of the surrounding context and the fact that the maximum height of the overall building is not increased.
- The proposal and the height breach facilitates a co-living housing outcome with good amenity for the upper level rooms given the expanded design that alters the roof form which the height breach enables- i.e. a better amenity is afforded to the rooms.
- The variation to the maximum building height standard enables the 'Objects' of the *EP&A Act* to be achieved, specifically:
 - (c) *to promote the orderly and economic use and development of land,*
 - (d) *to promote the delivery and maintenance of affordable housing,*
 - (f) *to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- The absence of adverse environmental, social or economic impacts

The above discussion demonstrates that there are sufficient environmental planning grounds to justify the proposed variation to the maximum building height standard.

CLAUSE 4.6(4)- PUBLIC INTEREST AND OBJECTIVES OF THE ZONE

The relevant objectives are prescribed as:

- *To provide for the housing needs of the community.*
- *To provide for a variety of housing types and densities.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To maintain the existing land use pattern of predominantly residential uses.*

The proposal is consistent with the objectives of the zone, providing for increased housing supply of affordable housing and contributes to a variety of housing types and densities.

Further the proposal maintains and enhances the use of the parish hall.

In accordance with the provisions of Clause 4.6(4) Council can be satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3). As addressed the proposed development is in the public interest as it remains consistent with the objectives of the building height control.

CLAUSE 4.6(5)

The Secretary (of Department of Planning and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 18– 003 ‘Variations to development standards’, dated 21 February 2018. This circular is a notice under clause 64(1) of the Environmental Planning and Assessment Regulation 2000.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given.

The points contained in Clause 4.6 (5) are a matter for consideration by the consent authority however the following points are made in relation to this clause:

- The contravention of the height control does not raise any matter of significance for State or regional environmental planning given the nature of the development proposal and the contextual design response and the precedent set on the adjoining site.
- There is no public benefit in maintaining the development standard as it relates to the current proposal. The departure from the control is acceptable in the circumstances given the underlying objectives of the control are achieved and it will not set an undesirable precedent for future development within the locality as any future development on another site would require consideration of the relevant merits and circumstances of the individual application.

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its unique circumstances. The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The design response aligns with the intent of the control and provides for an appropriate transition to the adjoining properties.

The proposal promotes the economic use and development of the land consistent with its zone and purpose.

CONCLUSION

Strict compliance with the prescriptive building height requirement is unreasonable and unnecessary in the context of the proposal and its circumstances.

The proposed development meets the underlying intent of the control and is a compatible form of development that does not result in unreasonable environmental amenity impacts.

The proposal will not have any adverse effect on the surrounding locality, which will be characterised by residential development of comparable height and character. The proposal promotes the economic use and development of the land consistent with its zone and purpose.

The variation is well founded and demonstrates the relevant matters set out under Clause 4.6 having regard to the provisions of Clause 4.6 and recent case law and taking into account the absence of adverse environmental, social or economic impacts, it is requested that Council and the planning panel support the development proposal.