# Attachment D

## Clause 4.6 Variation Request – Height of Buildings

PLANNING LAB

Clause 4.6 Variation Request

Height of Buildings (Clause 4.3)

Sydney Local Environmental Plan 2012

# ADDITIONS, ALTERATIONS AND ADAPTIVE REUSE OF 'THE KIRK' (FORMER CHURCH) INCLUDING A SIX STOREY COMMERCIAL PREMISES AND LICENSED RESTAURANT

422-424 Cleveland Street, Surry Hills

360° Image of planted facade by landscape architect 360°

Prepared by Planning Lab

Issued 19 October 2023

# 1.0 Introduction

The request seeks an exception from the height of buildings development standard prescribed for the site under clause 4.3 of Sydney Local Environmental Plan 2012 (SLEP 2012). The variation is made pursuant to clause 4.6 of SLEP 2012 and has been prepared having regard to the following considerations:

- The Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011);
- The objectives of clause. 4.3 of the Sydney Local Environmental Plan 2012, being the development standard to which a variation is sought; and
- Relevant case law in the New South Wales Land and Environment Court and New South Wales Court of Appeal including *Wehbe v. Pittwater Council* [2007] NSWLEC 827.

This report should be read in conjunction with the Statement of Environmental Effects (SEE) prepared by Planning Lab, and the DA Design Report prepared by Em Be Ce Architects that accompany this application.

The proposed variation request will include the following sections:

- Description of the site and its context;
- Overview of the proposed development, as outlined in further detail within the SEE and accompanying drawings;
- Outline of the assessment framework in accordance with clause 4.6 of the SLEP 2012;
- Identification of the development standard to be varied and extent of contravention;
- Detailed justification of the proposed variation with relevant guidelines, planning principles and court judgements; and
- Summary and conclusion.

On the basis of a comprehensive site analysis and design process, as informed by extensive pre-lodgement consultation with officers of Sydney City Council and surrounding residents, it is demonstrated and justified in this report that the potential environmental, heritage and visual impacts of the proposed variation to the maximum 15m height of buildings restriction of clause 4.3 of SLEP 2012 have been minimised through the following:

- More sensitive, open form, pitched portals have been introduced above the habitable roof of the new rear commercial building, providing a more suitable transition with the form of the original Kirk church hall, and resulting in a reduced building envelope that avoids any overhang and upper floor space connection with The Kirk, and which substantially falls within the maximum roof height (RL +51.84) of the previous approved D/2020/993, with the exception a small area of lift over-run (RL +52.60);
- The mass of the proposed building has been reduced through the reduction of the street wall height of the building in comparison to the approved boarding house for the site. This results in increased solar access, privacy, daylight and an improved outlook for adjoining residential buildings. The open portals establish a strong tectonic link to the original hall, and have no mass attached to them, and hence a minimal impact on the neighbouring properties;

- The introduction of planter boxes on the east and west elevations and a ceramic textured wall and planting on the northern façade, complemented by proposed landscaping enhancements along the Cleveland Street and High Holborn Street frontages, provides a much greener outlook for adjoining neighbours; and
- A more functional and accessible Ground Level loading dock and servicing solution is provided within the new rear building.

It is considered that strict compliance with this development standard is unreasonable and unnecessary in the circumstances of this proposal, and that there are sufficient environmental planning grounds to justify contravening the development standard.

## 2.0 Site and Locality

The site is identified as Lot 1 in DP 724157 and is located at 422-424 Cleveland Street, Surry Hills (See Site aerial photo below in **Figure 1**. The site is located on the north-western side of the intersection of Cleveland Street and High Holborn Street. The site has a frontage of 15.4 metres to Cleveland Street a frontage of 36.5 metres to High Holborn Street and a site area of 579.54 square metres.

The site is located at the southern edge of Surry Hills to the south of central Sydney, with frontage to the transport arterial of Cleveland Street, which links between Moore Park to the east and Newtown to the west.

The site contains an existing former (deconsecrated) church building (also known as 'The Kirk') in the southern portion of the lot. Former outbuilding structures to the rear have been cleared. The rear portion of the lot is vacant.

The Kirk is described as a Victorian Gothic style church constructed in c. 1879. It was used as a Place of Worship as a Wesleyan Methodist Church up until c. 1970, when it was deconsecrated as a church.

Whilst the site is located within southern edge of the High Holborn Street Heritage Conservation Area, the existing Kirk Building is not listed as a local or State heritage item, but it is identified as being a contributory building.

During the 1970's and early 1980's it was leased by the church as an art exhibition space, community centre and concert venue. The site was purchased in 1986 for use as an exhibition space and venue for themed parties and concerts. The building has been unoccupied since 2010.

The immediately adjoining and adjacent development (Refer to **Figure 1** below) consists of:

- To the east of the site, across High Holborn Street, 426 Cleveland Street, is a converted 3 to 4 storey warehouse building that now serves as a mixed-use development, featuring ground floor retail spaces and apartments above. Another converted warehouse for apartments of a similar scale is located further to the north-east, known as 5 Cleveland Avenue. Further to the east along Cleveland Street, are a variety of 2 to 3 storey shop top housing and commercial buildings.
- Immediately adjoining to the north, 73 High Holborn Street, is a single-storey terrace building, with a large, pitched, blank-facing facade. Further north and north-west, the area is characterised by the rear yards and garages of period terrace houses (1-2 storeys).

- Immediately adjoining to the west, 418-420 Cleveland Street, is a two-storey terrace building with a ground floor shopfront. The surrounding development to the west predominantly consists of two storey terrace dwellings.
- Directly opposite Cleveland Street to the south is the Surry Hills Village shopping centre mixed-use redevelopment site, which is presently under construction.


***Figure 1**: Aerial Photograph of 422-424 Cleveland Street, Surry Hills and its immediately adjoining and adjacent development (Source: Adapted from City of Sydney Planning 3 November 2021)*

Given the North/South orientation of the subject site, and the predominant rear yard sections of residential properties off Cleveland Street and Goodlet Street, those properties most likely to be impacted by the proposed new rear commercial building are No. 426 Cleveland Street to the east and No. 418-420 Cleveland Street to the west.

The converted, mixed-use warehouse building to the east, No. 426 Cleveland Street has a number of residential units on different levels on its High Holborn Street frontage with living area windows and terraces directly facing the rear part of The Kirk site. An example of the outlook from one of these units is provided in the image below.

*Figure 2 – View to the west across the rear part of The Kirk site from Unit 17/ 426 Cleveland Street (Source: www.bresicwhitney.com.au)*

The rear of the adjoining two storey mixed residential terrace building to the west, Nos 418-420 414 Cleveland Street, has living areas, bedroom windows and outdoor yard areas that face the rear of the Kirk site, as identified in the image below.

*Figure 3 – View to the south of the rear yard and building of 418-420 Cleveland Street (Source: www.realestate.com.au)*

In terms of the residential properties to the north and north-west, No. 73 High Holborn Street adjoins directly to the north and the rear sections of properties off Goodlet Street adjacent to the north-west. Whilst there are no overshadowing impacts for these properties, the Em Be Ce DA Design Report still provides an analysis of the potential visual and overlooking impacts from the subject proposal. The image below provides an aerial identifier of the location of these properties:


***Figure 4 – Aerial Image of properties to the north and north-west of the subject site (Source: Em Be Ce Architects)***

## 3.0 Proposed Development

The project involves additions, alterations and adaptive reuse of the existing deconsecrated church building on the site ('The Kirk'), including demolition of rear additions, a new excavated basement level that will interconnect with the erection of a new, six level, infill building to the rear, resulting in a mixed-use development that encompasses commercial office and end of journey floor space in the new building as well as a new licensed restaurant extending across both buildings. It specifically includes the following:

- Restoration of the existing intact fabric and façade of 'The Kirk' building;
- Partial demolition works centred around the rear of the building, including the demolition of the dilapidated timber framed rear extension to The Kirk, and removal of remnants of a 19th Century brick outhouse in the north-western corner of the site;
- Excavation to create a new basement level below the Kirk Building, lift and stairwell access,

providing toilets for the new ground level licensed restaurant and connection with the basement of the new rear building.

- Renovation of The Kirk community hall (former church hall), including replacement of the temporary rear wall with a new fire-rated rear wall, replacement of the existing roof, works for a new restaurant with ground floor connection to the other restaurant areas and amenities in the new building to the rear, and a new upper mezzanine level repurposed as plant with access pathway for maintenance and connection with Level 3 of the new rear building;
- Construction of a new six (6) level building at the rear northern end of the site with full integration with the existing Kirk building, including:
    - A basement with End of Journey (EOJ) facilities, a dark kitchen, toilets, storage rooms, plant rooms and a waste holding room.
    - Ground level licensed restaurant dining and kitchen areas, with connecting level access to the Kirk Building, a main pedestrian entrance foyer, and loading dock off High Holborn Street, and access to further Level 1 dining areas.
    - Four Levels (Levels 1-4) of commercial office space with amenities and landscaped terraces.
    - A Level 3 connection with the upper-level mezzanine in the Kirk building, used for maintenance of plant purposes;
    - A Roof Level, with open pitched portals (architectural roof feature), and lift over-run.
    - Vertical internal circulation including new sets of fire stairs, a circular stairwell between the Ground and Level 1, and a lift accessible to all levels.
- Landscaping works, including the enhancement of the building forecourts on Cleveland Street and the closed High Holborn Street.
- A new proposed shared zone in the end section of High Holborn Street to facilitate improved vehicular and pedestrian access to the ground level of the new rear building.

## 4.0 Clause 4.6 Exceptions to development standards

Cl. 4.6(2) of SLEP 2012 provides that development consent may be granted for development even though the development would contravene a development standard imposed by the SLEP 2012 or any other environmental planning instrument.

However, Cl. 4.6(3) states that 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 circumstance of the case, and*

*(b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

This Clause 4.6 Variation Request has been prepared to satisfy Clause 4.6(3).

## 4.1 What is the Environmental Planning Instrument (EPI) that applies to the land?

The Environmental Planning Instrument (EPI) to which this variation relates is the Sydney Local Environmental Plan 2012.

## 4.2 What is the zoning of the land?

The site is zoned MU1 – Mixed Use pursuant to the SLEP 2012. Refer to **Figure 5**. The identified zone permits the proposed commercial premises (office premises and restaurant).

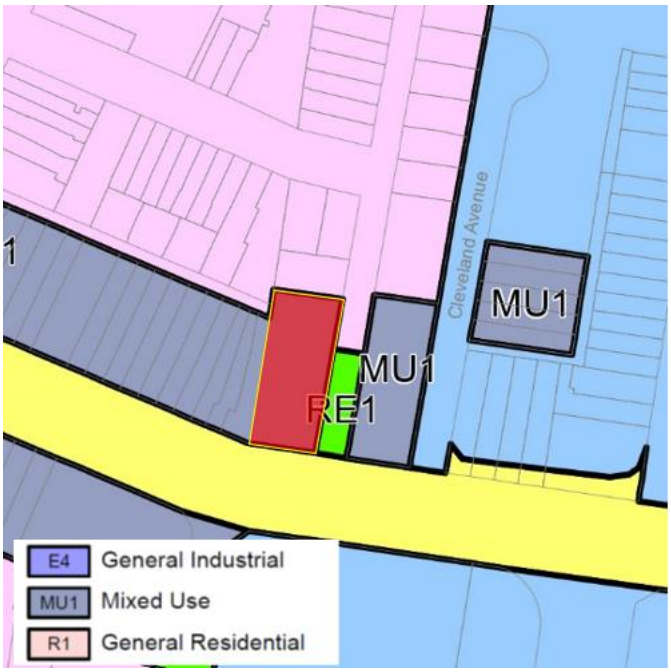



***Figure 5**: Land Zoning Map*

*(Source: Sheet LZN_016 - SLEP 2012)*

## 4.3 What is the development standard being varied?

Cl.4.3 (2) of the SLEP 2012 provides that the maximum height for a building on any land is not to exceed the height shown for the land on the Height of Building Map. The site is within area identified O on the Height of Building Map and accordingly, a maximum Height of 15m applies as shown in **Figure 6**.

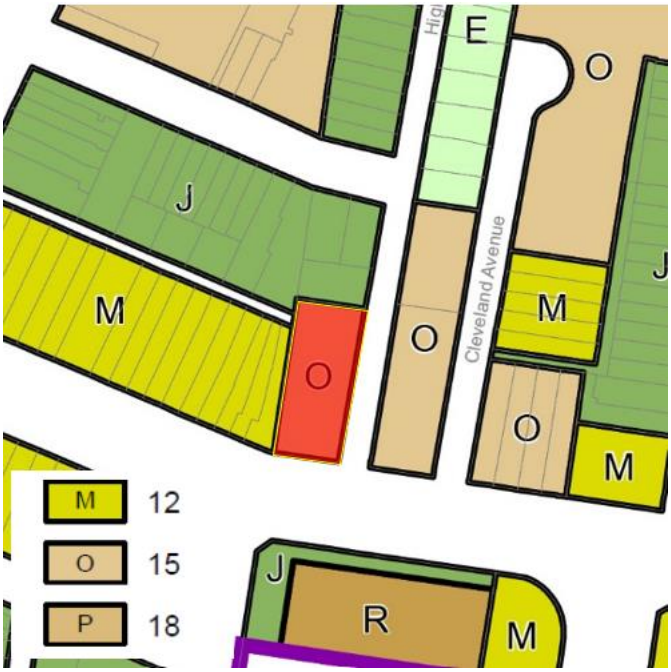



***Figure 6:*** *Height of Building Map*

*(Source: Sheet HOB_016 - SLEP 2012)*

## 4.4 Is the development standard excluded from the operation of Clause 4.6 of the EPI?

Cl. 4.6(2) states that development consent may be granted for development even though the development would contravene a development standard. However, this does not apply to a development standard that is expressly excluded under cl.4.6(6) cl. 4.6(8) of the SLEP 2012. The maximum height development standard is not identified under subclause 4.6(8) and is therefore not specifically excluded from the operation of cl 4.6 of SLEP 2011.

# 5.0 Proposed Variation to the Development Standard

The subject proposal seeks to vary the maximum 15m height of building requirement of Clause 4.3 of SLEP 2012.

The definition of building height under the LEP is:

> ***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.*

There are two main planes of measurement of this variation at locations of maximum height of the new rear building (noting the current variable ground level created by the north to south site gradient):

| | **Variation (above 15m) in Metres** | **Variation %** |
|---|---|---|
| **Architectural Roof Feature (Open Pitched Portals)** | 4.5 (19.53m – RL +55.63) | 30 |
| **Lift Over-Run Above Level 4 of the Main Building Envelope** | 1.6 (16.6m – RL +52.60) | 10.66 |

*NB. For the purpose of calculating the maximum building height, the top points of the vertical kitchen exhaust risers were not included in the above table, as they are considered to be "flues", which are excluded in the LEP building height definition.*

The extracts below from the Em Be Ce Design Report identify the comparative relationship of the range of building height variation measurements for the subject proposal, the maximum 15m LEP restriction, and the previously approved D/2020/993:

# Design Proposal

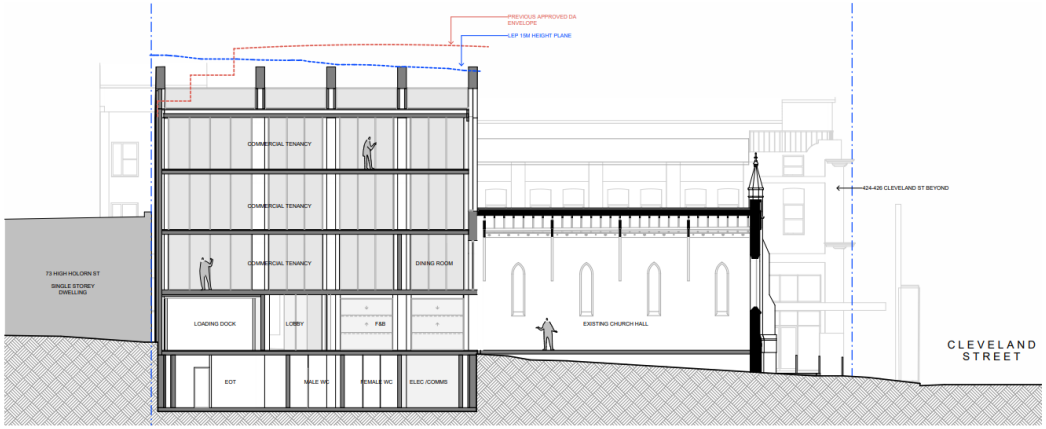
## Refining the form

### Height compliance through East and West terraces

The adjacent section illustrates the height of the building in relation to the LEP height plane and envelope of the previously approved DA.

The section is taken off-centre, through the East terraces.

This clearly illustrates the lowered street height within the LEP height plane and the previous approved DA envelope, including the lowered height to the North: The building is only 3 storeys to High Holborn Street, and to the neighbouring terrace house at 73 High Holborn St compared to the 4 storeys of the approved DA.



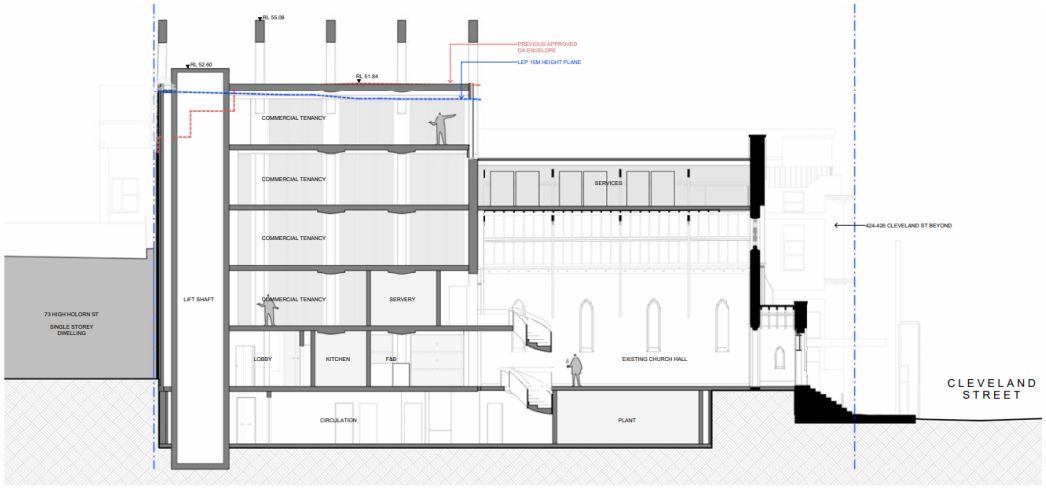

Long section through East terraces

### Height compliance through the centre of the site

The adjacent section is taken through the middle of the building where the portals project above the central roof ridge.

It matches the height of the previous approved DA height.

The lift overrun, which exceeds this, is set back from the North parapet. It is not visible from the public domain and causes no amenity impacts.




Long section through middle of site

# Design Proposal

## Minimising impact

The new built form marginally breaches the max height of the LEP where impacts are minimal and is significantly lower where impacts are greatert

The refinement of the roof to better align with the LEP height plane results in a maximum exceedance of 880mm to the South of the site, and of 440mm to the North where potential impacts are greater.

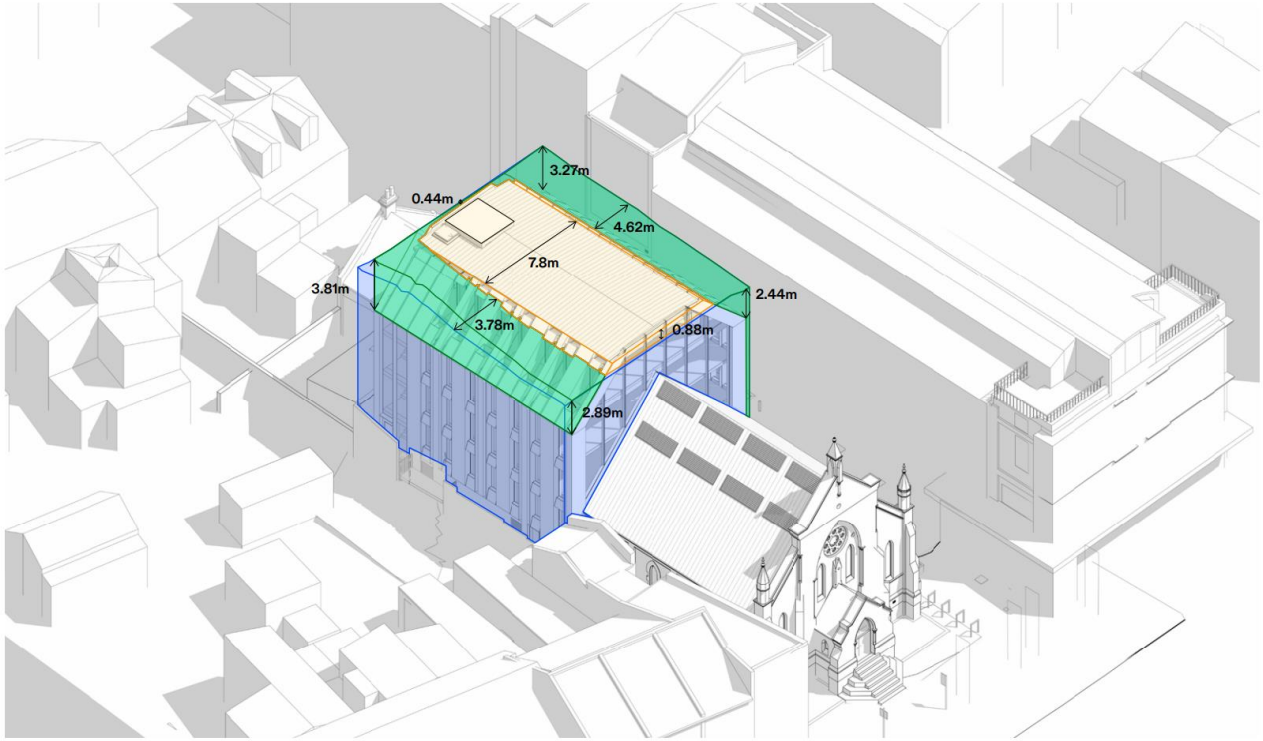
The East and West facade heights are lower than the LEP envelope by between 2.4m to 3.8m on the North.

The breaches to the LEP height are therefore minimal, as illustrated on the adjacent diagram.

The inset lift overrun extends a further 700mm past this maximum roof height as previously noted, and is set behind the parapet to minimise its visibility from the street.

There are no amenity or visual impacts as a result of these minor non compliances

The sloped form is retained for lowered building street height for improved public and local resident amenity.




Axonometric diagram of building height compared to LEP height plane

Gain (non-buit) within LEP height plane

Height breach above LEP height plane

LEP envelope

# Design Proposal

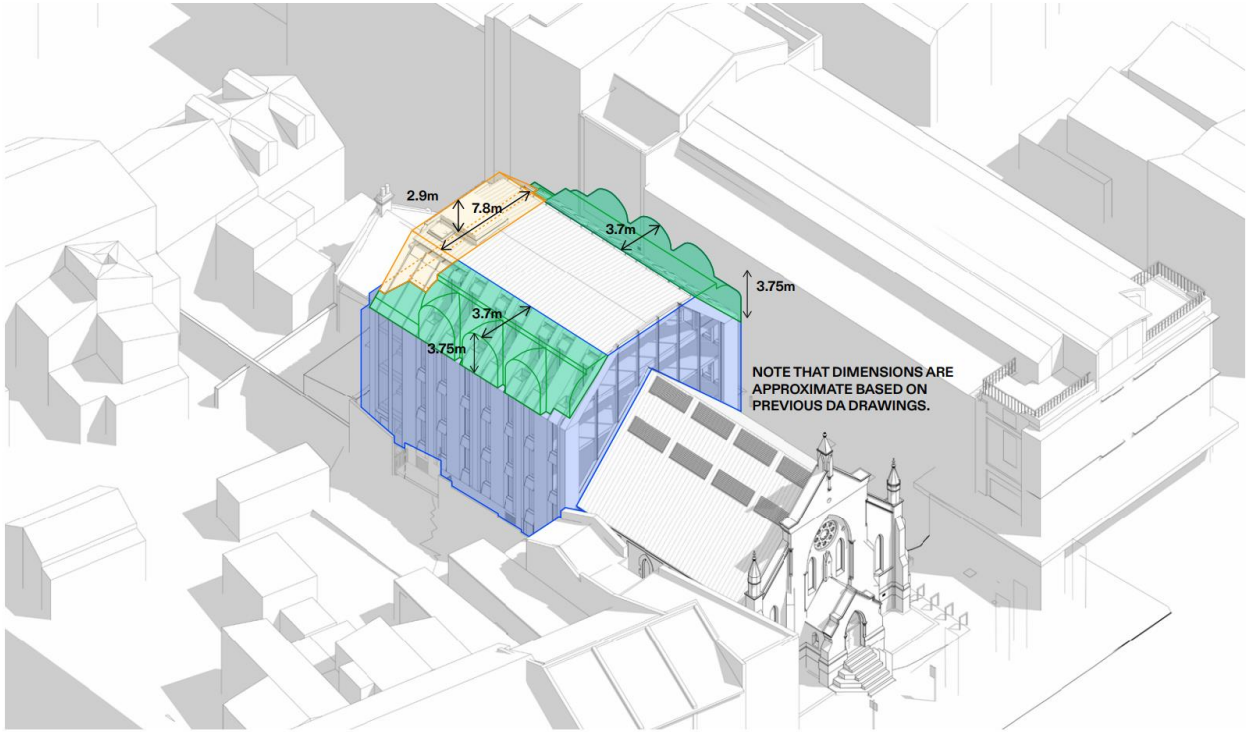
## Minimising impact

### A new roof height within the maximum height of the Approved DA

The building height remains within the maximum height of the previously approved DA, and is significantly lower where impacts are greater, except at the North in the middle of the site only.

The North-East and North-West corners remain low, sloping down on the corners where they would otherwise impact the neighbours.

The gain in mass when compared to the previous DA, and resultant increased amenity to the neighbours, is illustrated on the adjacent diagram.




Axonometric diagram of building height compared to previous DA envelope

Gain (non-buit) within approved DA envelope

Height breach outside of approved DA envelope

Previous DA envelope

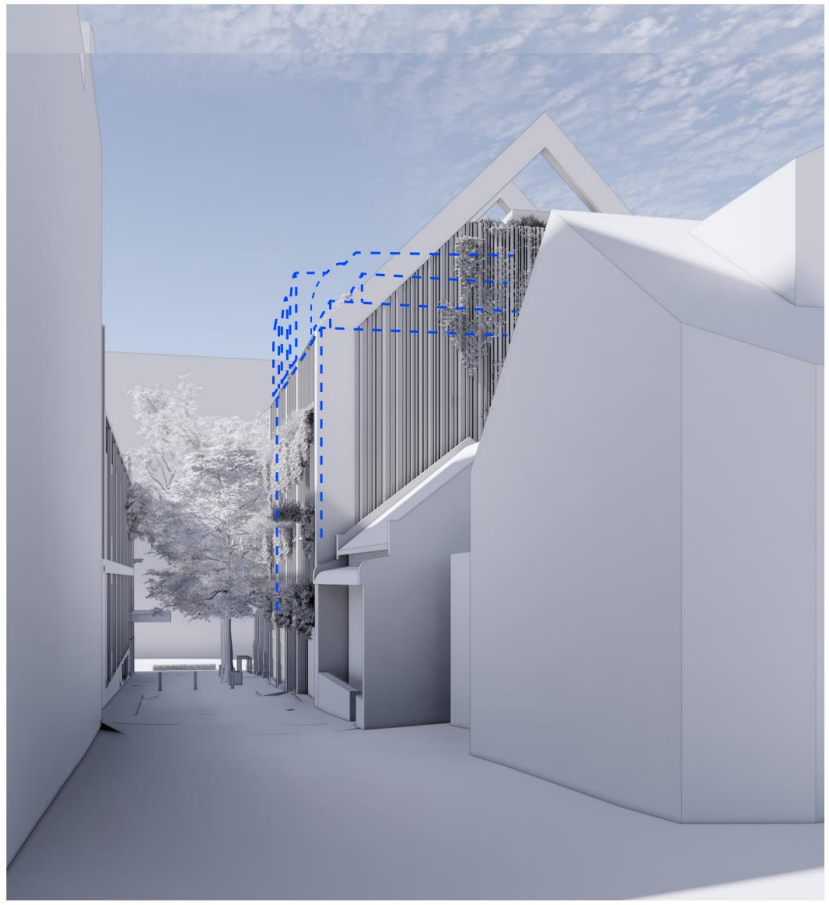
# Design Proposal

Massing derived from church form and integrated to its context

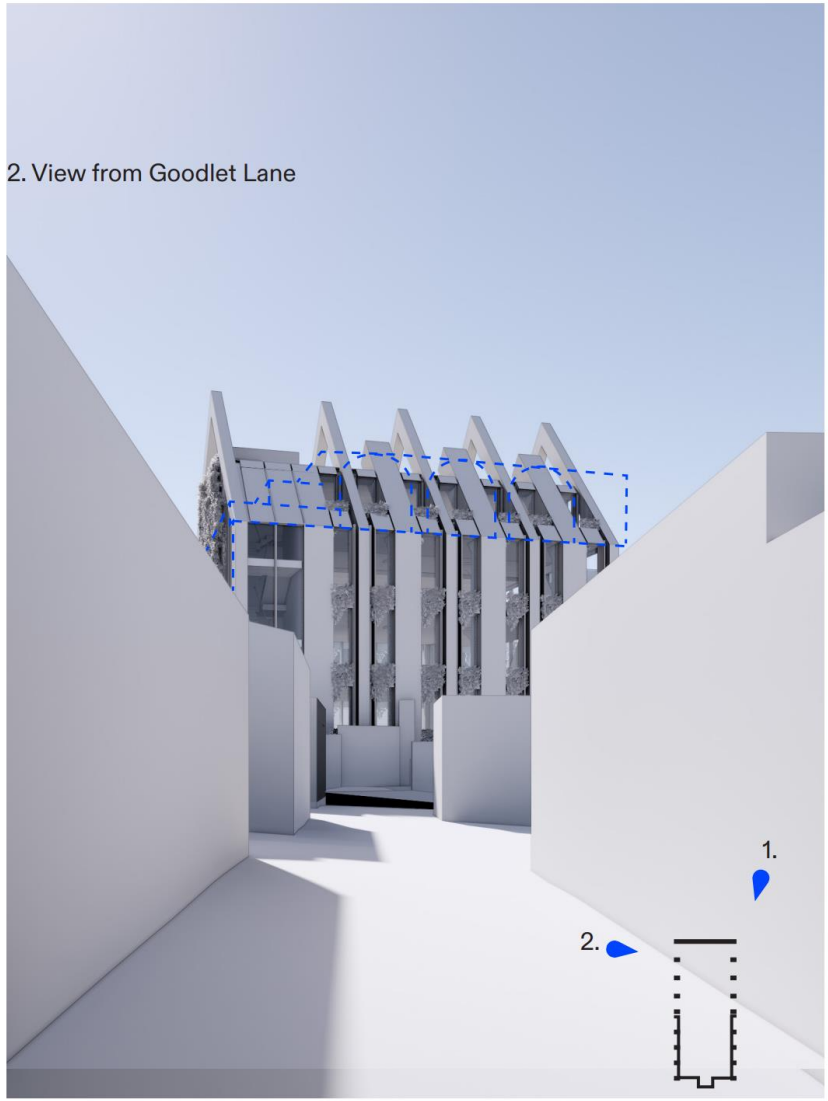
View from Cleveland St compared to DA approved building

# Street views

1. View from High Holborn Street



2. View from Goodlet Lane

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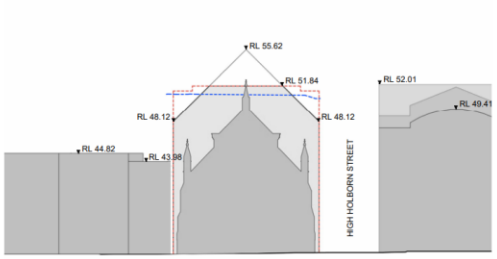
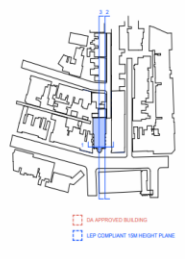
# Design Proposal

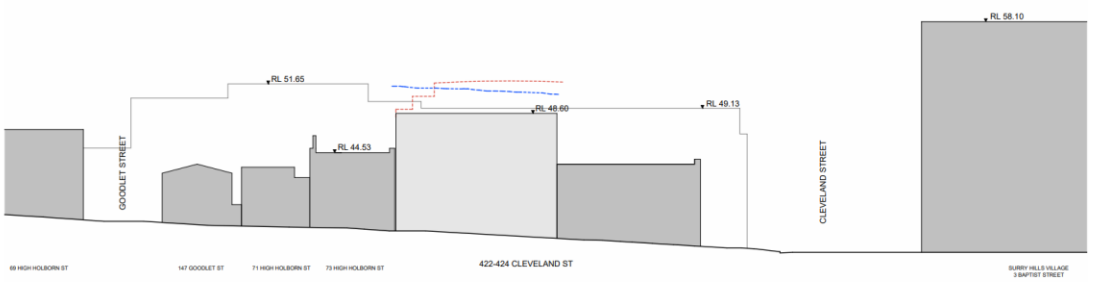
## Building form and massing

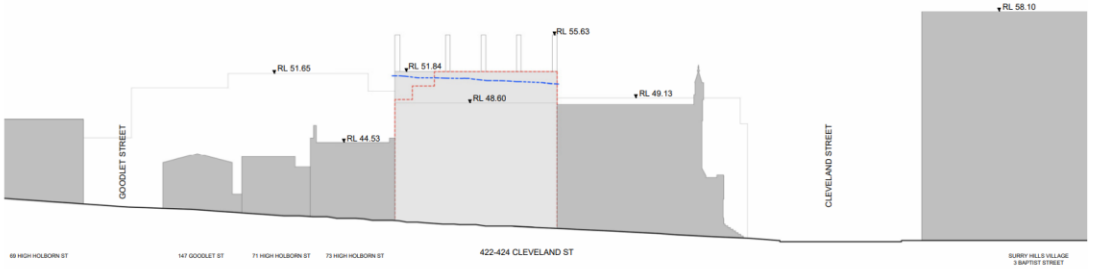
### Transition in scale and form

- The proposed form is intended to respectfully complement the existing church, without competing or detracting from it.
- The proposal is in scale with the neighbouring buildings.
- The proposed scale and form creates a better transition of the bulk and height of the existing buildings to the East and South, to the lower and pitched roof form of the terrace housing to the West and North.
- The form results in a 3-storey street wall to match the level of the terraces to the East.
- The proposal through its pitched roof provides an improved relationship to surrounding pitch roofs (church and terrace houses.)



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Client | TOGA

EM BE CE ©

## 6.0 Clause 4.6(3)(a) Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

Historically, the most commonly invoked way to establish that a development standard was unreasonable or unnecessary was the satisfaction of the first test of the five-set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827 which requires that the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

In *Wehbe* [42] – [51] and repeated in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 at[17]-[21] the Chief Judge identified 5 ways in which an applicant might establish that compliance with a development standard is unreasonable or unnecessary and that it is sufficient for only one of these ways to be established.

Although *Wehbe* concerned a SEPP 1 objection, it remains relevant to requests under cl. 4.6 as confirmed by Preston CJ in *Initial Action* at [16].

The 5 ways in *Wehbe* are:

1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's actions in granting consents departing from the standard and hence the standard is unreasonable;
5. The zoning of the land is unreasonable or inappropriate. The five ways are not exhaustive, and it may be sufficient to establish only one.

The five ways are not exhaustive, and it may be sufficient to establish only one to satisfy cl. 4.6(3)(a).

For completeness, this request addresses the five-part test described in *Wehbe*, followed by a concluding position which demonstrates that strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

### 1. the objectives of the standard are achieved notwithstanding non-compliance with the standard;

Compliance with the Height of Buildings development standard is unreasonable and unnecessary in the circumstances of the proposed development, as explained in **Table 1** (below), the objectives of the development standard are achieved, notwithstanding non-compliance with the standard.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34], the Chief Judge held, "*establishing that the development would not cause environmental harm and is consistent with the objectives of the development standards is an established means of demonstrating that compliance with the development standard is unreasonable or unnecessary".*

Demonstrating that there will be no adverse amenity impacts is, therefore, one way of showing consistency with the objectives of a development standard.

***Table 1**: Achievement of Development Standard Objectives*

| Objective | Discussion |
|---|---|
| 1(a) to ensure the height of development is appropriate to the condition of the site and its context, | Both the existing LEP and DCP height and FSR controls and the scale, bulk and height of the immediately surrounding context to the subject site clearly identify a transition of an expected built-up, 3-4+ storey, mixed commercial/residential buildings along Cleveland Street with active street frontages, grading down to a lower, 1, 2 and 3 storey scale to the residential zoned areas to the north and north-west.<br><br>The upper-level design features on the existing Kirk building already exceeds the 15 metre height of building development standard by 2.6m along its Cleveland Street frontage. This form is consistent with the variety of building scales along Cleveland Street, in particular the mixed use buildings located further to the east, which have similar heights, including: 426 Cleveland Street (3-4 storeys), 5 Cleveland Avenue (3 Storeys), and the Crown Hotel, 591 Crown Street (3-4 storeys).<br><br>The subject site therefore provides the capacity for a new, compact infill building to the rear at a height exceeding the 15m LEP and 2 storey DCP maximums.<br><br>A sympathetic design transition is created through the new rear building's open pitched portals above the habitable levels, its corresponding 3 storey building wall heights on the east and west elevations, and more sensitive and visually interesting design along its southern and northern (rear) elevations.<br><br>This results in a more consistent, proportionate and visually interesting streetscape along the site's Cleveland Street frontage, and a less impacting scale, bulk and massing at the rear. |
| 1(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas, | The subject site is located within the southern edge of the High Holborn Street Heritage Conservation Area. The existing Kirk Building is not listed as a local or State heritage item, but it is identified as being a contributory building. Several heritage items of local significance are located nearby, including the 'Terrace group including interiors' located at 32-52 High Holborn Street, the 'Former Bank of NSW including interior' at 397-399 Cleveland Street, and the 'Terrace house including interior' at 396-398 Cleveland Street, as indicated in the figure below: |

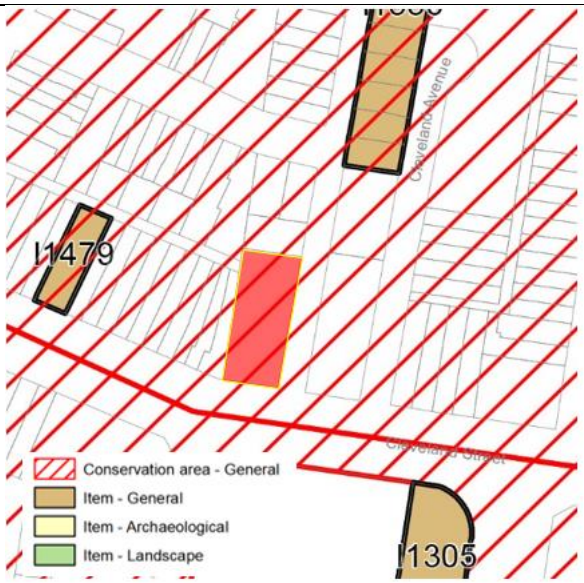



***Figure 5**: Heritage Map (Source: Sheet HER_016 - SLEP 2012)*

As outlined in point 1(a) above, an important design element of the subject proposal has been to sensitively manage the transition of height, scale and bulk of the new rear building from the more built-up scale of the site's Cleveland Street frontage, in order to complement the contributory streetscape features and setting of the existing Kirk building, and its relationship with the lower scale, residential character and amenity of adjoining residential properties to the north.

A Heritage Impact Statement has been prepared by Curio Projects to accompany this DA. Curio have provided the following comments in support of the height and form of the proposal:

*In terms of the architectural roof feature that has been designed to correspond with the line, form and pitch of The Church's roof pitch, Curio understands that it represents a non-compliance, in terms of the height restrictions. Curio, however, from a heritage perspective, strongly support the non-compliance to allow the roof feature to be approved as it has been designed, in terms of height, bulk and scale because it provides the strongest architectural link between the form and design of The Kirk and the new build.*

*The architectural roof feature, when viewed from Cleveland Street, provides a design response to the form, scale and roof pitch of The Kirk that embodies the Burra Charter principles for new infill or adjacent design that neither competes nor detracts from the existing historic building. The architectural roof feature is essential as a design elements, in that it reinforces the significance of the The Kirk, as a landmark contributory building within the heritage*

| | |
|---|---|
| | *conservation area (HCA). It also responds to the predominant pitched roof form of the surrounding houses to the rear of site. Rather than compete, the pitch and lightweight design, scale and height of the architectural roof features compliments and emphasises the key architectural characteristics of the former church (The Kirk). The new building can be clearly read as a contemporary and sympathetic addition to the church.* |
| 1(c) to promote the sharing of views, | Given the relatively limited site area and scale of the new rear commercial building, and the site's topographical setting and orientation, there will be no significant view loss from surrounding properties across the site. Views across the site are limited short distance views which are not significant, or iconic, and generally consist of views of the existing building or trees beyond. The proposed building height limit exceedance will have no significant impact on views. |
| 1(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining area, | Not applicable. |
| 1(e) in respect of Green Square—<br>(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and<br>(ii) to ensure the built form contributes to the physical definition of the street network and public spaces. | Not applicable. |

Compliance with the maximum height development standard is unreasonable or unnecessary in

the circumstances of this case because the objectives of the height standard are achieved notwithstanding the non-compliance.

2. the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

The underlying objective or purpose of the height standard is relevant. As demonstrated above, the proposal retains consistency with the objectives of Clause 4.3 of the SLEP 2012, despite non-compliance.

3. the underlying object of purpose would be defeated, thwarted or undermined if compliance was required and therefore compliance is unreasonable;

In *Linfield Developments Pty Ltd v Cumberland Council* [2019] NSWLEC 131 it was accepted (at [24]) that these grounds could extend to circumstances where the object of a purpose was **undermined**.

Clause 4.3(1)(a)-(b) of the Sydney LEP is 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,*

For reasons described above (in dealing with the first ground under Wehbe) and further detailed below (in relation to environmental planning grounds) a compliant development would:

- undermine objective 1(a) in that the compliant development would be less adapted to the condition of the site and its context that the proposed development; and
- undermine objective 1(b) in that the compliant development would have a less appropriate height transitions between new development and the existing heritage fabric on the site than the proposed development.

The underlying objectives or purpose of the standard would be undermined if compliance was required.

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;

Council has varied the height of building standard in other recent approvals of development in this part of the City of Sydney where the objectives of the standard are achieved, and Council's Local Planning Panel has previously supported a variation to the height control for the most recent development consent for this site (D/2020/993).

In another recent example, at its meeting of 20 September 2023, the COS Local Planning Panel approved of a DA involving a 5.1 metre (or 34%) variation of the SLEP 2012 maximum 15 metre height restriction for Development Application: 502-514 Elizabeth Street and 272-276 Cleveland Street, Surry Hills (in close proximity to the subject site) - D/2022/600, for a mixed-use development proposal including retail premises on the ground floor and office premises on the levels above.

A further example in the City fringe area where the COS Local Planning Panel (14 October 2020 Meeting) has approved a variation to the SLEP 2012 maximum height restriction, and similar to the subject proposal, on the basis that it is satisfied the objectives and criteria of SLEP 2012 Clause 5.6 Architectural Roof Features provisions, is their support of 11% and 15% variations respectively to the 22m and 15m height limits applying to Development Application: 135-139 McEvoy Street, Alexandria - D/2018/1581 for construction of a four to six storey mixed use commercial development.

On the basis of these approved DAs, and in the understanding gained in meetings with Council staff on the importance and integrity of the SLEP 2012 maximum height control and the need to provide solid planning and urban design rationale for any variations, it is clear that this standard has not been abandoned.

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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

The proposed zoning of the land is reasonable and appropriate. As identified in earlier sections, the subject site provides an important marker of social history and positive streetscape contribution through the retention of the existing Kirk building and provides a sensible transition between the commercial scale and land use within this section of Cleveland Street, with lower scale, residential areas adjoining to the north and north-west.

## 6.1 Clause 4.6(3)(b) Are there are sufficient environmental planning grounds to justify contravening the development standard?

This section of the Variation Request Statement focuses on the more specific assessment of the impacts of that portion of the proposed new rear building envelope and design features that exceed the maximum 15 metre SLEP 2012 building height restriction.

This section of the report should also be read in conjunction with the DA Design Report prepared by EM Be Ce Architects which provides a much more detailed and graphic analysis of the comparative environmental impacts of the height variation between the subject proposal, the previously approved D/2020/993, and the 15 metre LEP Maximum Height envelope.

As identified earlier, there are two main planes of measurement of this variation at locations of maximum height of the new rear building, which are discussed in separate sections below. (noting the current variable ground level created by the north to south site gradient):

## 1. OPEN PITCHED PORTALS (ARCHITECTURAL ROOF FEATURE)

In respect of the proposed open pitched portals, the suitability of the proposed 4.5 metre variation to the maximum 15 metre LEP height control can be addressed against the Clause 5.6 Architectural Roof Feature provision of SLEP 2012.

This clause enables architectural roof features to exceed the height limit for the site, provided certain objectives and criteria are met:

> ***5.6 Architectural roof features***
>
> *(1) The objectives of this clause are as follows—*
>
> *(a) to allow minor architectural roof features to exceed height limits,*
>
> *(b) to ensure that any architectural roof feature does not cause an adverse visual impact or adversely affect the amenity of neighbouring premises,*
>
> *(c) to ensure that architectural roof features are considered in the design of a building and form an integral part of a building's design.*
>
> *(2) Development that includes an architectural roof feature that exceeds, or causes a building to exceed, the height limits set by this Plan may be carried out, but only with development consent.*
>
> *(3) Development consent must not be granted to any such development unless the consent authority is satisfied that—*
>
> *(a) the architectural roof feature—*
>
> *(i) comprises a decorative element on the uppermost portion of a building, and*
>
> *(ii) is not an advertising structure, and*
>
> *(iii) does not include floor space area and is not reasonably capable of modification to include floor space area, and*
>
> *(iv) will cause minimal overshadowing, and*
>
> *(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature.*

The table below demonstrates how the subject proposal is consistent with the Clause 5.6 (1) objectives:

| OBJECTIVE | COMMENT |
|---|---|
| Objective (1)(a): *to allow minor architectural roof features to exceed height limits* | The geometry of the proposed, open form, pitched portals establishes a strong tectonic connection to the form of the original church |

| | |
|---|---|
| | hall. This is, together with the series of buttresses, an essential and distinguishing feature of the architecture of the building. |
| Objective (1)(b): *to ensure that any architectural roof feature does not cause an adverse visual impact or adversely affect the amenity of neighbouring premises* | Compared to the existing approved D/2020/993, the mass of the proposed building has been deleted from the top floor on the eastern and western side of the building, referred to as *"dropping of the shoulders"*. This results in increased solar access, privacy, daylight and improved outlook from adjoining residential buildings. The open portals, which establish a strong tectonic link to the original hall, have no mass attached to them and hence minimal impact on the neighbouring properties. |
| Objective (1)(c): *to ensure that architectural roof features are considered in the design of a building and form an integral part of a building's design* | The portals have been specifically designed to provide a sympathetic and respectful design response of the upper levels of the new rear commercial building and its relationship with the existing Kirk building, as well as the surrounding terrace house roofs to the north and west.<br><br>On that basis, it is considered that the proposed pitched portals form an integral part of the building's design. |

The following also demonstrates how the subject proposal satisfies the criteria of Clause 5.6(3) (a):

| **CRITERIA** | **COMMENT** |
|---|---|
| *(i) comprises a decorative element on the uppermost portion of a building* | The roof feature has been specifically designed to provide a sympathetic and respectful design response of the upper levels of the new rear commercial building and its relationship with the existing Kirk building. |
| *(ii) is not an advertising structure* | The proposed portals are not an advertising structure. |
| *(iii) does not include floor space area and is not reasonably capable of modification to include floor space area* | The proposed portals do not include any floor space, and the roof of the proposed building is within the maximum height of the approved building in D/2020/293. |

| | |
|---|---|
| *(iv) will cause minimal overshadowing* | The proposed portals will not result in any significant overshadowing, particularly given their open form and limited extent across the site. |
| *(b) any building identification signage or equipment for servicing the building (such as plant, lift motor rooms, fire stairs and the like) contained in or supported by the roof feature is fully integrated into the design of the roof feature* | The portals screen the lift over-run above the roof level, of which will generally not be perceivable from ground floor and not obvious to residents of neighbouring buildings. |

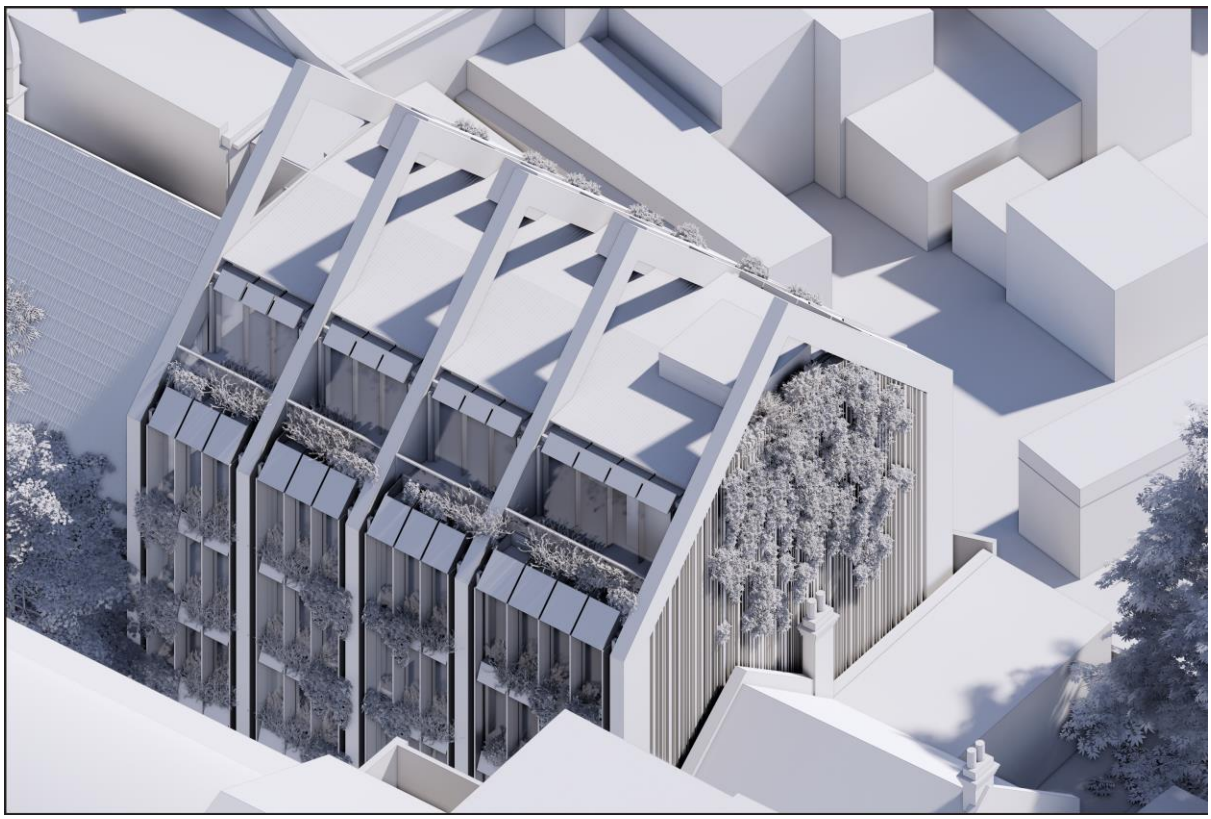


***Figure 7 – View to the south-west of the proposed rear building demonstrating how the open pitched portals are integrated into the building design and reflect the character of the pitched roof forms of The Kirk and surrounding residential buildings (Source: Em Be Ce Architects)***

The extract below from the Em Be Ce Design Report provides a broader axonometric view analysis of the pitched portals design feature:

# Design Proposal

## Architectural roof feature

### Refining the form

Height breaches have been minimised by reducing the form of the pitched roof so that is does not exceed the envelope of the existing DA, with the exception of the lift overrun to the North. The roof portals, essential to the design and maintaining the relationship with the original church, meet the DCP clause 5.6 criteria of being an architectural roof feature and are therefore exempt from the LEP height compliance.

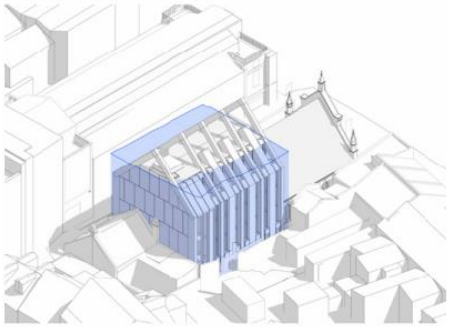
The portals geometry and form express the essential and distinguishing feature of the architecture of the building. They are integral to the design response that maintains a relationship to its immediate surroundings.

The open portals which establish a strong tectonic link to the original church, have no mass attached to them and hence no impact on the neighbours: this architectural roof feature allows for increased solar access, daylight and sky views.

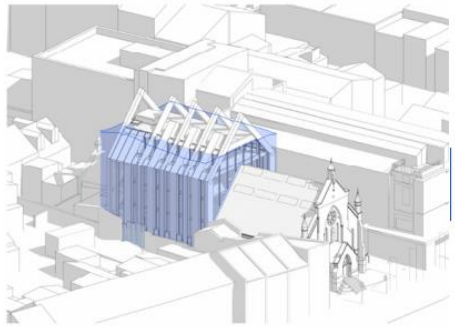
The bulk is reduced compared to the LEP height and previous approved DA, with lowered height on both East and West along the length of the building.

The portals project along the centre of the building only, ensuring a lowered street height to the North on High Holborn Street, and to the neighbouring terrace house at 73 High Holborn St.

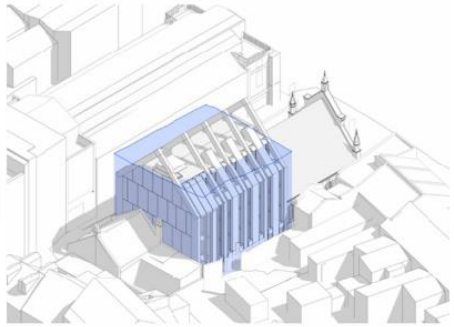
LEP height plane envelope



Axo View from South East

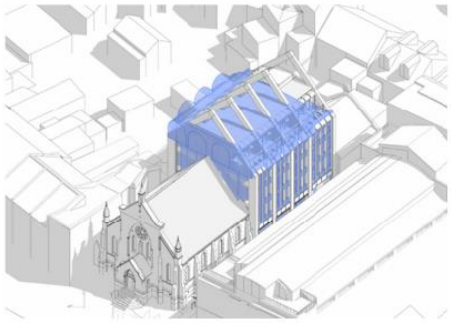


Axo View from South West

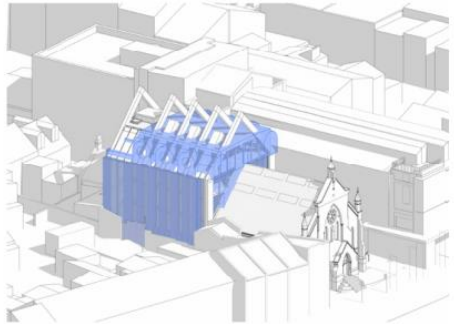


Axo View from North West

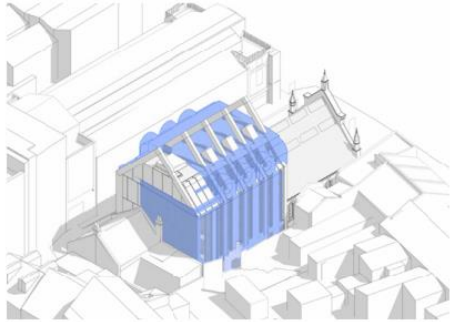
Previous approved DA envelope
(with overhang deleted per condition of consent)



Axo View from South East



Axo View from South West



Axo View from North West

## 2. MAIN BUILDING ENVELOPE

As identified earlier, the extent of that part of the envelope of the new rear commercial building that exceeds the maximum LEP 15 metre height restriction is limited to the upper portion of Level 4, and at the highest point of the lift over-run located in the mid-point of the northern elevation. At that point, the maximum building height is 16.6 metres, a margin of variation of 1.6 metres, or 10.66%.

An extract below from the Em Be Ce DA Design Report below summarises the main design strategies adopted to reduce the impacts of the proposed rear building envelope:

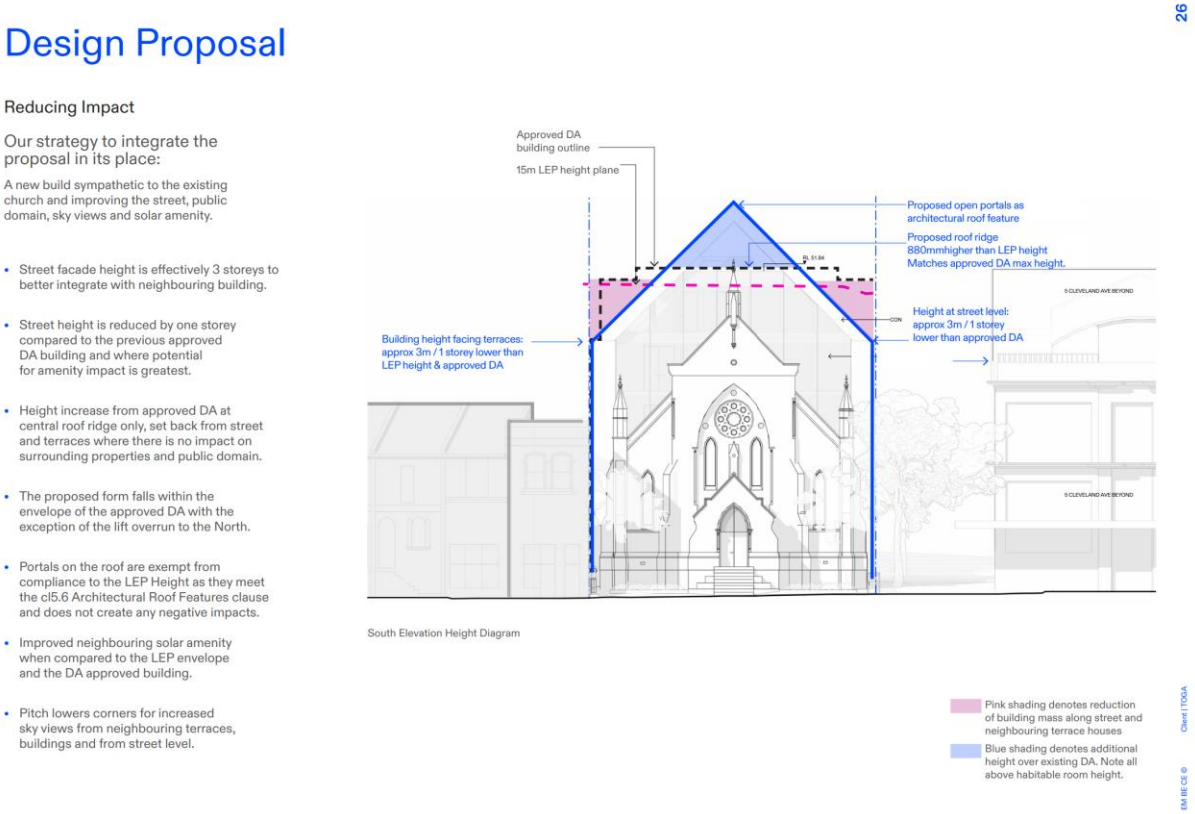



***Figure 8 – Extract of plans identifying the proposed reducing impact design strategies (Source: Em Be Ce Architects)***

An analysis of the main forms of impacts arising from the exceeded LEP height variation of the main building envelope on surrounding properties is provided below:

**Solar Impact**

The Em Be Ce DA Design Report provides a comprehensive assessment of the potential mid-winter overshadowing impacts for the two most affected properties, No. 426 Cleveland Street to the east (predominantly afternoon impacts) and No. 418-420 Cleveland Street (predominantly morning impacts) to the west, as compared to the overshadowing of a the LEP maximum 15 metre height envelope, and the approved D/2020/993.

The comparative building envelopes of these 3 scenarios are provided below:


***Figure 9 – Extract of the building envelope analysis (Source: Em Be Ce Architects)***

This Assessment of the design of the subject proposal clearly identifies the following:

It will result in a reduced amount of overshadowing for the two adjoining properties compared to the other 2 scenarios.

It will result in compliance with the solar amenity requirements of Clause 4.21 of Sydney Development Control Plan 2012:

- Neighbouring developments must achieve a minimum of 2 hours direct sunlight between 9am and 3pm on 21 June onto at least 1sqm of living room windows and a minimum 50% of the required minimum area of private open space area.
- New developments must not create any additional overshadowing onto a neighbouring dwelling where that dwelling currently receives less than 2 hours direct sunlight to habitable rooms and 50% of the private open space between 9am and 3pm on 21 June.

In respect of further testing of the solar impact of the proposed building form of 4 hours between 11am and 3pm on 21 June, there will be a reduction in the extent of overshadowing for No. 426 Cleveland Street and no additional solar impact for No. 418-420 Cleveland Street.

Potential Privacy and Overlooking Impacts

The potential loss of privacy and overlooking was one of the key concerns raised by adjoining residents and Council in the Pre-DA consultation.

The architects for the subject proposal have analysed these potential impacts in significant detail, and through major design improvements, including the reduction in building massing and wall heights, and screening design and green planting features along the proposed east, west and north elevations of the new rear commercial building, it is considered that the latest plans now significantly reduce the potential for overlooking and protection of sky views for the most affected

residential properties to the east and west, as well as to the north and north-west, when compared to the LEP maximum 15 metre height envelope, and the approved D/2020/993.

The extracts below from the Em Be Ce Design Report highlight these improved results.

# Potential privacy and overlooking impacts

## Reducing impact to the north

### Views from rear gardens

The North facade has been carefully considered from the private terraces to the north of the site, identified on the previous page. The neighbouring properties to the North have potential for overlooking from any new development to the rear of the Kirk site. It should be noted that there is no potential for overshadowing due to site orientation.

None of the adjacent properties appear to have windows directly overlooking the site but their outdoor space has the potential to be overlooked.

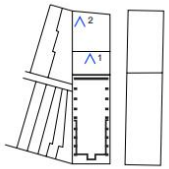
It should also be noted that the terrace house directly to the North at 73 High Holborn is not a residential use.

The view of the site from 73 High Holborn is blocked by a significant tree which will remain in situ as shown in view 02.

Our design strategy of dropping the form of the building at either corner by a storey and the architectural roof feature means that there is significantly less built form on the boundary than that anticipated by the LEP.

No windows are proposed to this facade, ameliorating overlooking issues.

The party wall will be articulated by detailed design of its elements and also through planting.




01
View from rear garden of 73 High Holborn St


02
View from rear garden of 143 Goodlet St

Section through 73 High Holborn St

# Improved privacy and sky views

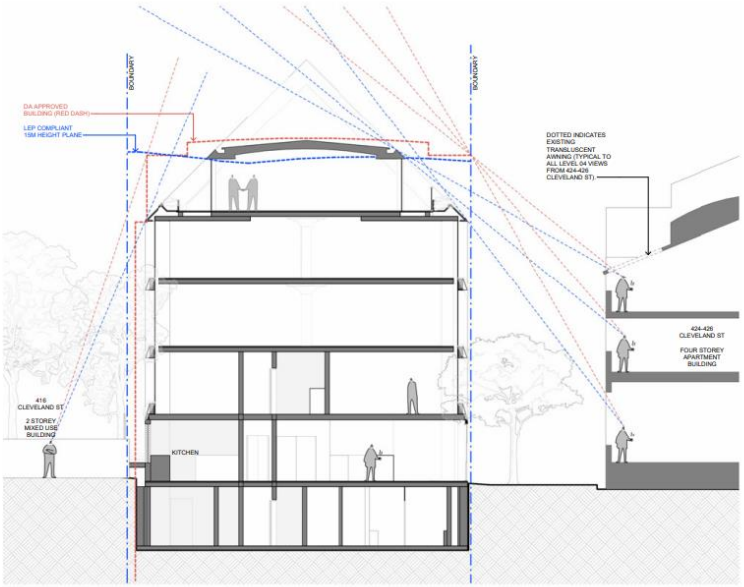
## Improved privacy to East and West

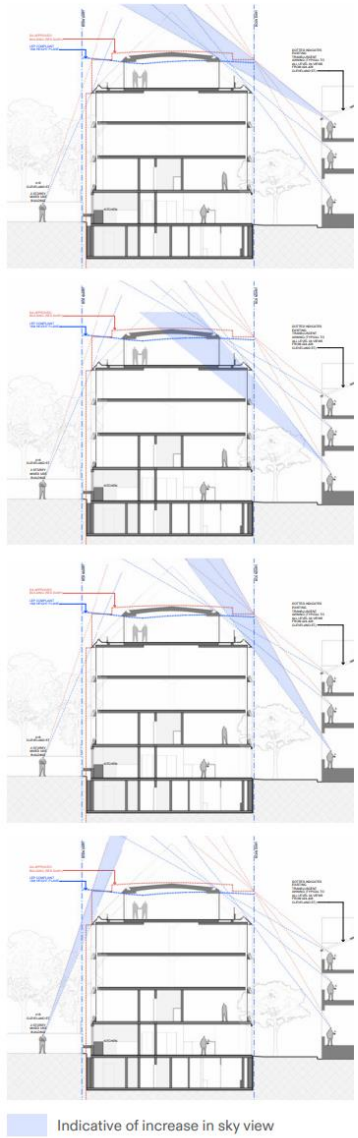
### Level 4 setback for improved neighbourhood amenity

As previously noted the upper level of the building is accommodated in a distinctive pitched roof form. This means that the top floor is set back to the East and West lowering the street wall height, opening up skyview and reducing overlooking from the upper floor.

To the East, privacy to the adjacent property is enhanced as the accessible terraces are set back from the street and screened by a row of planters. The full height glazing to the terrace is set back a further 2m from the boundary, increasing the distance from the neighbouring building to the East.

The terraces to the West are proposed to be planted, non-accessible for commercial use. They are accessible for maintenance purposes only. This ensures there is overlooking on the terraces to the West.



Indicative of increase in sky view

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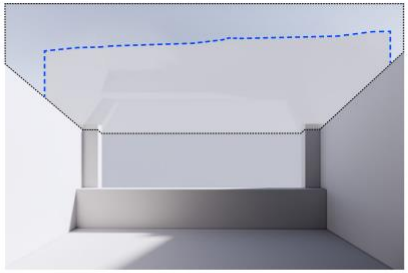
# Visual privacy and sky views

## Reducing neighbourhood impact

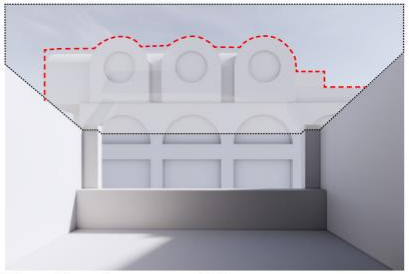
View from 424-426 Cleveland Street - Level 04

The increased setback to the upper level resulting from the pitched roof design offers improved sky view and privacy to the upper level apartments and open space. The pitched roof makes the bulk and scale impact at the North of the site no worse than the norther setback of the approved DA.

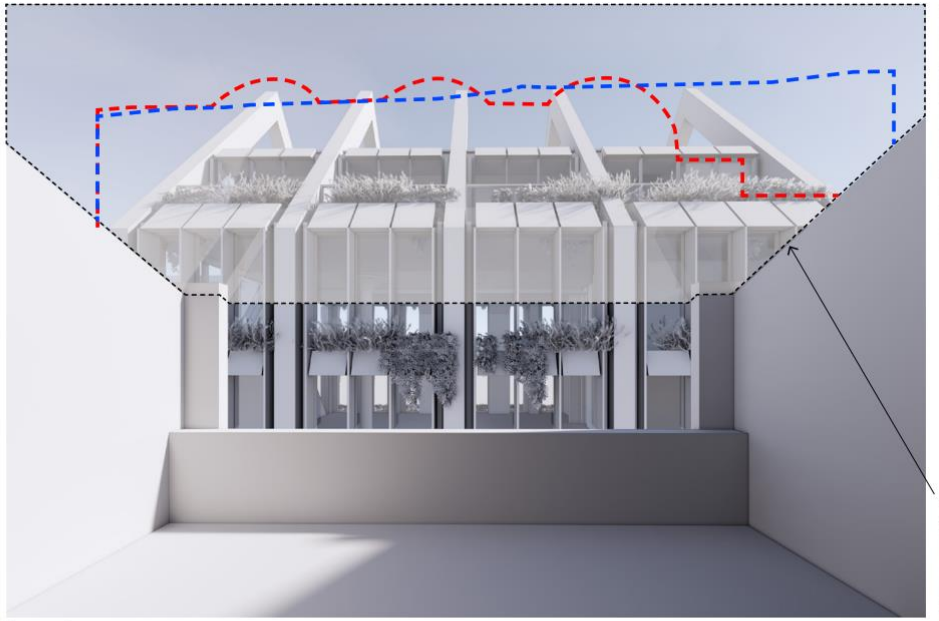
The improved sky view and privacy is further enhanced by the proposed planting and facade design at lower levels.



View with LEP compliant envelope



View with previous approved DA

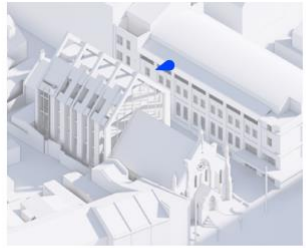


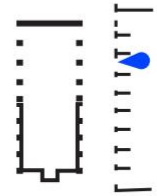
Proposed

Translucent roof above

15m LEP height plane

Outline of previously approved DA





Dotted line indicates existing translucent awning (typical to all level 04 views).

**Visual Impacts**

As identified in the 3D imagery and plans provided by the architects Em Be Ce Architects, the upper levels and entire rear building have a far superior architectural and aesthetic appearance than the bulky, overhang connection to The Kirk building that raised concerns for the City of Sydney Council in their deferred commencement approval of D/2020/993. The pitched roof form, reduced massing and greening elements incorporated into the design of the new rear building provide a more sensitive interrelationship with the Kirk building, and a scale and character more reflective of the Cleveland Street streetscape and the surrounding, lower scale character buildings of residential properties to the north, west and east.

The following extracts from the Em Be Ce Design Report demonstrate this commitment to design excellence:

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## Design Proposal

### Architecture

#### Facade

The architecture as a contemporary response to the particular character of the Kirk, is optimised to the client's brief, and refined to best suit the needs of the future occupants.

The architecture of the new building is conceived to be both contextual and aspirational.

Designed with an ambition for the highest quality, the project represents an elegant, functional, and robust proposal that speaks to the history of the area through its materiality, form and scale.

Viewed from the street, the building is discreet and supports the existing church by continuing the rhythms of its buttresses through a series of portal frames.

Inset glazing is shaded by deep vertical fins that provide both visual privacy and passive shading for sustainable design.

South elevation from Cleveland St

# Design Proposal

## Materiality

### Materials integrated with context

As the architecture is inspired by the history and context of the neighbourhood, so are the building materials and colour palette, all carefully considered to seamlessly integrate rather than detract from its surroundings .

1. The soft red colour of the solid portal frames acts are a nod to the existing brick buttresses of the adjacent church. Their vertical grid and proportion is designed to break the length of the building.

2. The high performance glass curtain wall façades help manage the heat load and glare while maximising the daylight and amenity to the building interior.

3. Vertical bronze-coloured fins contribute to shading of the glass for ESD and help manage privacy and views. The bronze colour is a nod to the detailing of the church and its main feature door.

4. The metal capping and roof mirror the new church roof.

The building through its materiality is a complementary modern expression of the existing Kirk church and broader Surry Hills precinct.


Facade Materials - 1. Coloured concrete 2. Clear Glass 3. Zinc roof and capping 4. Bronze coloured fins



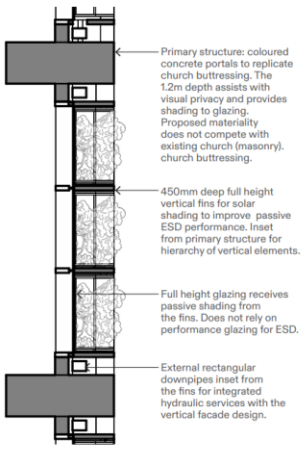


# Design Proposal

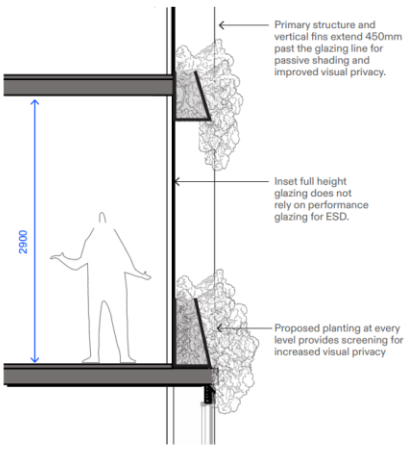
## Architecture

### Facade design

Responding to the church, improving ESD performance, minimising overlooking




01
Plan Detail




02
Section Detail

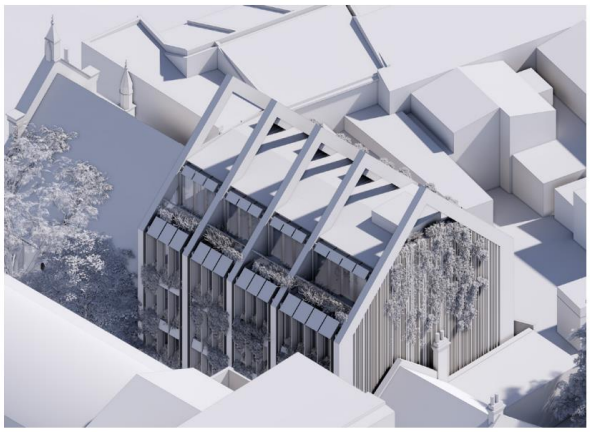
03
Detail View

# Design Proposal

Architecture

Roof

The portal beams extend beyond the roof, an architectural feature that provides an aesthetic backdrop to the existing church form while respecting the change in scale between surrounding typologies.



View of roof from the North-East

View of terraces from the East



# Design Proposal

Architecture

North Facade

The North elevation is an important visual connection to the terrace houses along High Holborn.

The pitch roof form is sympathetic with the surrounding terrace house pitch roofs. The blank wall ensures privacy to the residents and gardens to the North.

Ceramic fine grain tiling is proposed to this face, set in within the language of the portals, with overhanging planting ensuring greening across the tiles.

The low-maintenance planting is of the same type proposed to the planters along the building edges, and will be accessible for maintenance from the roof.

Examples of ceramic tiled facades below

The adjacent image is a view from the North along High Holborn St showing how the pitched roof design better integrates the proposal with the surrounding context, mediating between low rise terraces and larger scale new development. The ceramic tiles ensure a finer grain to this facade.

# Design Proposal

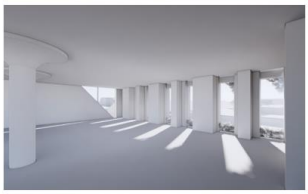
Architecture

West Facade

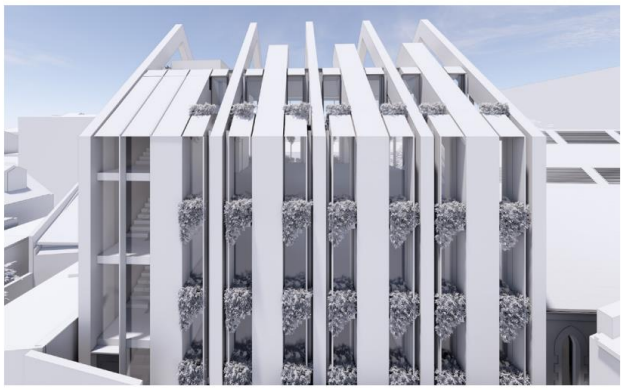
Glazing to the back of house stair in the Northernmost bay encourages active use by tenants.

The glazing between portals is interrupted on the West facade by a series of solid clad elements in a bronze finish to match the vertical fins. These kitchen exhaust risers are expressed on the facade, integrated to the vertical blade language of the building.

This innovative solution to a constrained site allows for reduced heat loads to the West-facing facade and increases visual privacy across the neighbouring terraces to the West by reducing the amount of free glazing.



View from level 3



Images of West facade

**Public Domain Impacts**

In terms of the impacts of the relatively limited height variation on the public domain and broader visual catchment of the surrounding locality, the image below provides 3D modelled views to demonstrate the more sympathetic, upper level and roof design on the new rear commercial building, and its design to the context of the character and heritage of the Cleveland Street and High Holborn Street frontages and adjoining sites.

# Design Proposal

## Landscape

### Approach

The proposed landscaping strategy creates a moment of greening in the dense site, as described in the landscape report by 360°.

The landscape architects harnessed this opportunity to maximise the landscape opportunities across the constrained site, creating soft planting moments in the otherwise dense environment. This greening strategy provides much-needed amenity for tenants and neighbouring residents in an urban environment, softening the built form while providing visual amenity for the local community.

### Public domain planting to Cleveland St

The proposed landscaping at the front of the existing church has been designed to both contribute to softening the public domain urban setting and to revitalise the main church facade facing Cleveland St. Both planting and materials have been selected to integrate with the existing building, such as reuse of existing sandstone blocks, to enhance visitor experience, while ensuring the space's connection to the ground plane and to the general public.

Soft planting is proposed along the East side of the existing church.

### Greening the building

Planter boxes on Level 1 provide screening to the commercial levels and green the urban street face.

Planting to the Level 4 terraces provide a degree of amenity with greening to the commercial tenancy, while contributing to privacy screening from the neighbours.

360° Image of planted facade by landscape architect 360°

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# An improved public domain

## Unlocking an active public domain

The building entry and new restaurant forms a vibrant and inviting frontage to High Holborn St, ensuring a safe and active public space.

Existing site photo: High Holborn St

Proposed High Holborn St public domain


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## 6.2 Clause 4.6(4)(a)(i) consent authority satisfied that this written request has adequately addressed the matters required to be demonstrated by Clause 4.6(3)

Cl. 4.6(4)(a)(i) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3).

These matters are comprehensively addressed above in this written request with reference to the five-part test described in *Wehbe* for consideration of whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. In addition, the establishment of environmental planning grounds is provided, sufficient to justify contravening the development standard.

## 6.3 Clause 4.6(4)(a)(ii) consent authority satisfied that the proposal is in the public interest because it is consistent with the zone and development standard objectives

Cl. 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied that 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.

### 6.3.1 Objective of the Development Standard

The consistency of the proposed development with the specific objectives of the height of buildings development standard is addressed above.

### 6.3.2 Objectives of the Zone

Clause 4.6(4) also requires consideration of the relevant zone objectives. The site is located within the MU1 Mixed Use zone of SLEP 2012. The objectives of the zone are:

- *To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.*
- *To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.*

- *To ensure land uses support the viability of nearby centres.*
- *To integrate suitable business, office, residential, retail and other land uses in accessible locations that maximise public transport patronage and encourage walking and cycling.*

The subject proposal is consistent with the objectives for the MU1 Mixed Use zone in that:

- The proposal encompasses a combination of land uses, including office premises, food and drink premises, which aligns with the characteristic fabric of the surrounding Surry Hills community. Despite the potential for some adverse effects, these have been effectively addressed through various design measures, and Plans of Management to ensure responsible and appropriate management of the venues in the future.
- The proposal aims to enhance the building's street presence along Cleveland and High Holborn Street by introducing active uses on the ground floor. This includes a new pedestrian entrance off High Holborn Street for the proposed restaurant that extends across both the existing Kirk building and new rear commercial building. Combined with the proposed beautification improvements to the site's forecourts along Cleveland and High Holborn Streets, these changes will activate the building's frontages and create a more vibrant, safer and welcoming atmosphere in the surrounding area.
- The proposed development has the potential to significantly increase employment opportunities and economic growth in the surrounding locality. The addition of new commercial offices and food and drink premises will not only attract more visitors to the area, but also generate more foot traffic, leading to a boost in business for the local shops and services. The site will also provide a strong commercial and retail synergy with the emerging redevelopment of the former Surry Hills Village Shopping Centre, on the opposite side of Cleveland Street to the south. This will create a more active and vibrant atmosphere, making the area a more desirable place to visit and spend time. Overall, the proposed development has the potential to greatly contribute to the activation of the area, leading to a more prosperous and thriving community.
- The location of the proposed mixed-use development provides excellent access to a multitude of public transportation options, which include rail services, light rail, bus networks, and cycleways. This advantageous accessibility is anticipated to mitigate the need for private vehicles for employees, customers and visitors traveling to the site. Therefore, it is highly feasible for them to make use of the public transportation modes available, as well as other private transportation options besides motor vehicles.

## 7.0 Conclusion

Strict compliance with the height of buildings development standard contained within clause 4.3 of the Sydney Local Environmental Plan 2012 has been found to be unreasonable and unnecessary in the circumstances of the proposed development. Further, there are sufficient environmental planning and urban design grounds to justify the proposed variation. In this regard, it is appropriate to vary the height of buildings development standard to the extent proposed.

In respect of the proposed variation of the maximum height of the main envelope of the proposed rear commercial building, the site owner has worked hard to respond to the pre-lodgement feedback from both Council officers and the surrounding residents and businesses who have sought a much improved building design outcome then the previously approved D/2020/993, with a particular focus on reducing the upper level massing and bulk of the roof design, and achieving a scale, design and function more sympathetic to the character and amenity (visual, solar, light, privacy) of both the existing Kirk building and surrounding residential buildings.

The key alternative design elements that address these concerns in the subject proposal include a much more architecturally interesting and less impacting, pitched shaped roof form for the proposed new rear commercial building, reducing the height of the building walls along the eastern and western boundaries, and a progressive setback of building mass on the upper levels. A further reduction in building bulk is created through the proposed open form pitched portals, that now better reflect the history and character of the Kirk building and its surrounding setting.