

# 74 Carlton Crescent, Summer Hill

Clause 4.6 variation to Height of Buildings

On behalf of  
Iglu No. 210 Pty Ltd  
August 2019



# 1 Introduction

The Development (DA) for 74 Carlton Crescent, Summer Hill (subject site) proposes a boarding house development for the exclusive purpose of student accommodation. The proposed development will result in a minor exceedance of the maximum height of building development standard applicable to the site. This Clause 4.6 variation seeks to vary the Height of Building control (Clause 4.3) in the Ashfield Local Environmental Plan 2013 (ALEP 2013) in pursuit of an enhanced planning outcome at the site.

## 2 Clause 4.6 Exceptions to Development Standards

Clause 4.6 of the ALEP 2013 aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

Clause 4.6 enables a variation to the height standard to be approved upon consideration of a written request from the applicant that justifies the contravention in accordance with Clause 4.6.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard;
- 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.

The consent authority's satisfaction as to those matters must be informed by the objectives of the clause, which are:

1. to provide flexibility in the application of the relevant control; and
2. to achieve better outcomes for and from development.

The Land and Environment Court has established questions to be addressed in variations to developments standards lodged under *State Environmental Planning Policy 1 – Development Standards (SEPP 1)* through the judgment of Justice Lloyd, in *Winten Property Group Ltd v North Sydney Council* [2001] 130 LGERA 79 at 89. The test was later rephrased by Chief Justice Preston, in the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827 (**Wehbe**).

An additional principle was established in the decision by Commissioner Pearson in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 (**Four2Five**) which was upheld by Pain J on appeal. A further recent judgement by Preston in *Initial Action Pty Ltd v*

Woollahra Municipal Council [2018] NSWLEC 118 clarified the correct approach to Clause 4.6 variation requests, including that:

*"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard."* [88]

Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

Clause 4.6 of the ALEP 2013 reads as follows:

**Clause 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 Director-General has been obtained.

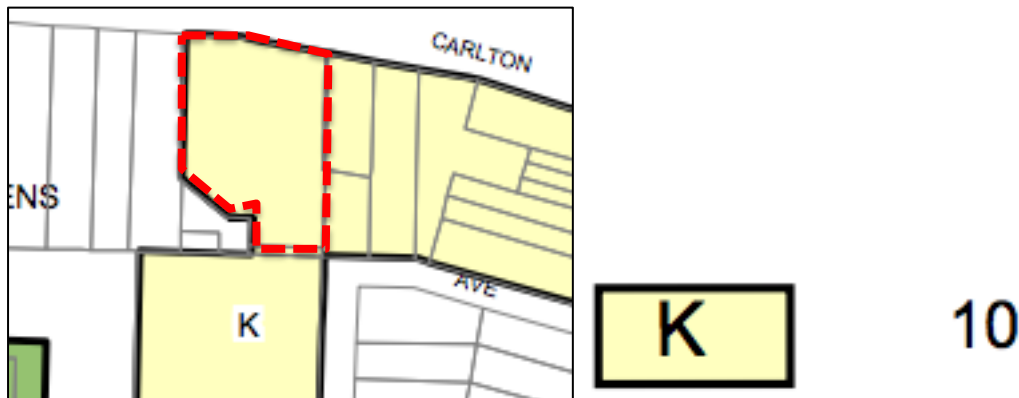
(5) In deciding whether to grant concurrence, the Director-General must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
  - (b) the public benefit of maintaining the development standard, and
  - (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.
- (emphasis added)

### 3 The Development Standard to be varied

The development standard seeking to be varied is Clause 4.3 Height of Buildings (HOB) in the ALEP 2013. As identified on the ALEP 2013 *Height of Buildings Map*, the subject site has a maximum building height limit of 10m. Clause 4.3 states:

- (1) The objectives of this clause are as follows:
  - (a) to achieve high quality built form for all buildings;
  - (b) to maintain satisfactory sky exposure and daylight to existing buildings, to the sides and rear of taller buildings and to public areas, including parks, streets and lanes,
  - (c) to provide transition in built form and land use intensity between different areas having particular regard to the transition between heritage items and other buildings,
  - (d) to maintain satisfactory solar access to existing buildings and public areas.
- (2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.



**Figure 1** Height of Buildings LEP Map

Source: ALEP 2013 modified by Mecone

### 4 Extent of Variation to the Development Standard

The proposed development will vary the HOB control as a result of the fall of the site from Carlton Crescent to the rear boundary. As a consequence, some rooms will

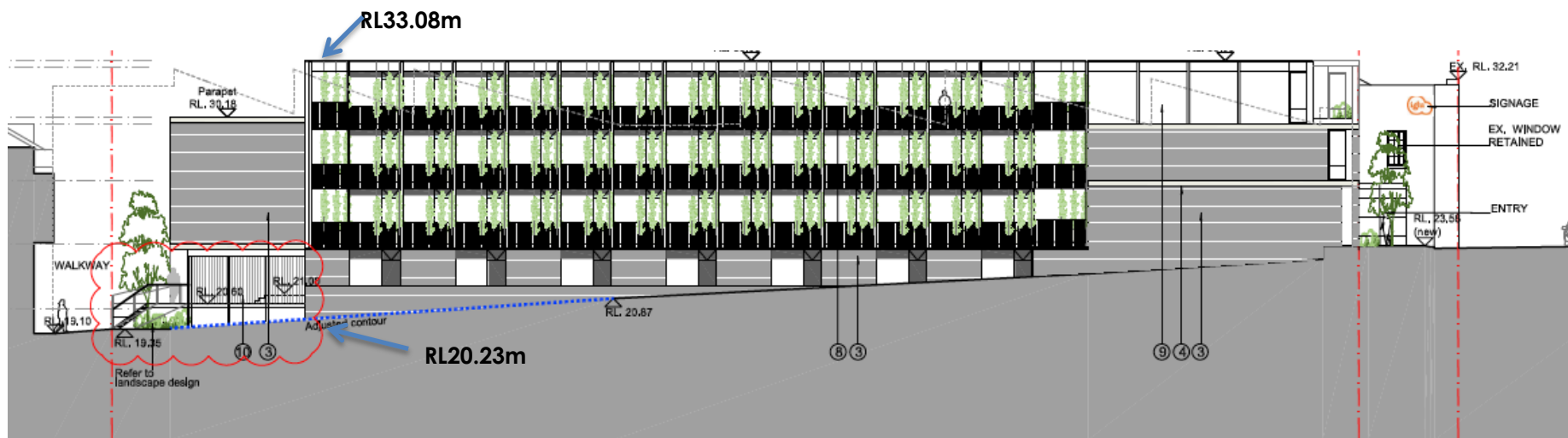
protrude above the 10m height control limit. Despite the uppermost storey of the development maintaining a consistent Relative Level (RL33.08m), aspects of the development are above the maximum HOB control.

As the subject site has been largely developed, there is difficulty in determining the ground level across the entire site. In the case of the proposed development, where an existing ground level can not be identified, ground level (existing) has been calculated in accordance with *Bettar v Council of City of Sydney* [2014] NSWLEC 1070, where it was deemed appropriate to determine the ground level (existing), by ensuring the height of the development is appropriate to the condition of the site and its context. Where ground level (existing) can not be established due to the site being largely developed, ground level is determined by identifying the ground level at the boundary and adjacent to the existing structure/s to establish the context and overall topography of the site and ensures the ground level remains relevant once the existing development is demolished.

Utilising the above methodology to calculate the ground level, the height of the building is greatest at the eastern elevation, where the ground level is calculated at RL20.23m and the highest point of the building directly above is RL33.08m, resulting in a height of building of 12.85m. The height of the building at this location will not be experienced from any public domain point as it is directly adjoined by an existing building of a similar height and scale (see **Figure 2**).

The design has carefully considered how the proposed building will be experienced from the public domain, with the site interface with Carlton Crescent (**Figure 3**), Darrell Jackson Gardens/Summer Hill Skate Park (**Figure 4**) and the rear boundary (**Figure 5**) all present as a three storey building under the 10m height control.

Portions of the fourth storey may be visible from the Darrell Jackson Gardens/Summer Hill Stake Park, however the highest point of the development has been located below and behind the ridge line of the existing Western Districts Ambulance Building, ensuring the proposed building scale is not out of context (see **Figure 6**)



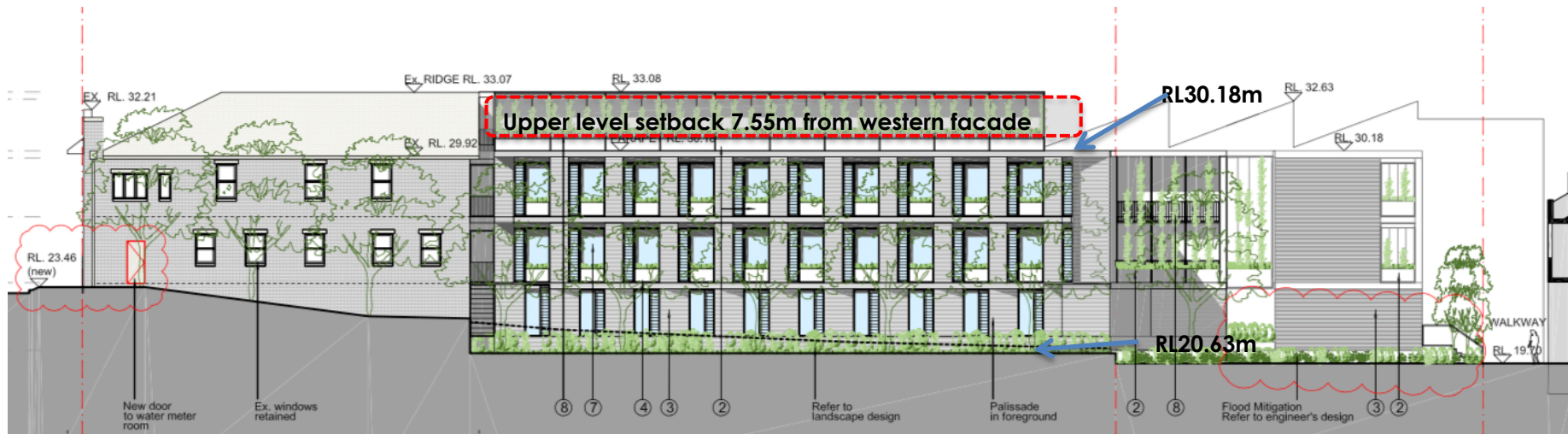
**Figure 3** Snapshot of Eastern Elevation

Source: Bates Smart



**Figure 4** Snapshot of Carlton Crescent Elevation

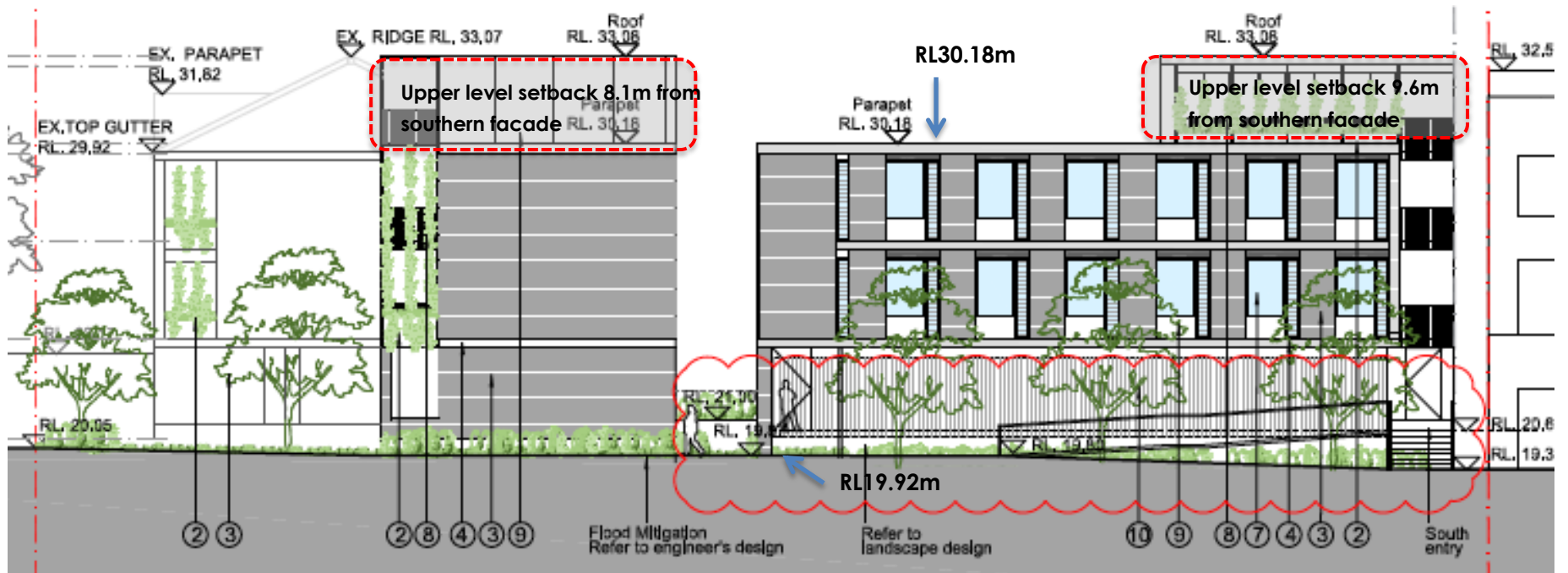
Source: Bates Smart



**Figure 5** Snapshot of Darrell Jackson Gardens/Summer Hill Skate Park elevation

Source: Bates Smart as amended by Mecone





**Figure 6** Snapshot southern elevation

Source: Bates Smart as amended by Mecone



**Figure 7** Snapshot of photomontage of view from Darrell Jackson Gardens/Summer Hill Skate Park elevation

Source: Bates Smart as amended by Mecone

## 5 Objectives of the Standard

(1) The objectives of this clause are as follows:

- (a) *to achieve high quality built form for all buildings,*
- (b) *to maintain satisfactory sky exposure and daylight to existing buildings, to the sides and rear of taller buildings and to public areas, including parks, streets and lanes,*
- (c) *to provide a transition in built form and land use intensity between different areas having particular regard to the transition between heritage items and other buildings,*
- (d) *to maintain satisfactory solar access to existing buildings and public areas.*

## 6 Objectives of the Zone

The objectives of the B2 Local Centre zone are as follows:

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*
- *To encourage employment opportunities in accessible locations.*
- *To maximise public transport patronage and encourage walking and cycling.*
- *To encourage residential accommodation as part of mixed use development.*

## 7 Assessment

Where Clause 4.6(2) permits a consent authority to grant development consent for a development even though that development would contravene a development standard, the consent authority can only grant approval if the applicant has adequately demonstrated satisfaction of the matters in Clause 4.6(3) and the pre-conditions in Clause 4.6(4) have been satisfied.

### **Clause 4.6(3)(a) - Is Compliance with the development standard unreasonable or unnecessary in the circumstances of the case**

Compliance with the Height of Building control is unreasonable and unnecessary given the following circumstances of this case:

- As detailed in *Williams v Ku-ring-gai Municipal Council* [2017] NSWLEC 1098, *Wehbe v Pittwater Council* [2007] NSWLEC 827 at [44]–[48], a number of approaches could be used to establish that compliance with a development standard is unreasonable or unnecessary. *Wehbe* Test 1, as described in *Williams*, are relevant for the subject site:
  - *Wehbe* Test 1 - the objectives of the standard are achieved notwithstanding non-compliance with the standard;

#### *Objectives of the Height of Building Control*

- *Objective (a) to achieve a high quality built form for all buildings,*
  - The proposed development has provided a high quality built form for

the subject site that integrates with the existing built form. This has been achieved through a process that considers the existing site context and the future occupants of the student accommodation building.

The scale of the building is the logical continuation of the scale established by the Western Districts Ambulance Building, which is identified as a contributory building to the local heritage conservation area. The prominence of this building is given priority by pulling the façade of the new building back and keeping the height of the proposed building at a height that is reflective of the Carlton Crescent Parapet (see **Figure 8**). The additional height of the building above 10m is not experienced from the Carlton Crescent frontage.



**Figure 8** Snapshot of photomontage of view from Carlton Crescent

*Source: Bates Smart as amended by Mecone*

The fall of the topography from Carlton Crescent frontage to the rear of the site is evident in viewing the western façade of the building from the adjoining park. This elevation of the Western District Ambulance Building was not always visible, as there were private buildings that existed in this location before it was turned into a park (see the attached Heritage Impact Statement prepared by Weir Phillips). This is evident considering the western elevation of the Western District Ambulance Building contrasts with the Carlton Crescent Façade. The proposed building has used materials and scale to compliment the existing building, by proposing consistent floor levels, repetition of windows and bricks along this side elevation.



The western elevation has been designed so that the parapet of the new building (30.18) generally correspond with the height of the eaves of the existing building (RL29.92m), whilst the top storey has been setback 7.55m from the building face and is under the ridge height of the existing Western District Ambulance Station.

The design of the building has also ensured an extensive internal courtyard for the enjoyment of the future occupants. This internal courtyard acts as an external room, for the student accommodation to look out into as well as a space for study, activities and relaxation. Furthermore, the design has incorporated extensive vertical and ground plane landscaping that will enhance the built form in the surrounding context.

The exceedance of the height limit has not compromised the proposal's ability from demonstrating a high quality built form.

- *Objective (b) to maintain satisfactory sky exposure and daylight to existing buildings, to the sides and rear of taller buildings and to public areas, including parks, streets and lanes.*
  - In *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 it was determined that a development does not have to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. In accordance with Objective (b) above, the proposed development maintains satisfactory sky exposure and daylight to existing buildings and public areas.
  - No additional shadow is cast across the adjoining park or allotments to the south as a result of the portions of the building that are not compliant with the height of building control.
  - The view from the sun diagrams prepared by Bates Smart show that the proposed development provides no overshadowing to the park as a result of the proposed development from 11am onward during midwinter. Before 11am only, a small section of the concrete skate park and tennis court is in shadow. The fact that the adjoining park maintains no overshadowing from the proposed development from 11am onwards during the winter solstice is considered "satisfactory sky exposure" in accordance with Objective (b).
  - All buildings that directly adjoin the subject site are commercial or industrial in nature. Despite this, the proposal ensures that by reducing the height of the building at the rear of the site, the design maintains satisfactory solar access to buildings located south of the subject site. The existing building to the south of the subject site is the "Supa IGA" supermarket. The height of the north facing parapet of the supermarket is RL22.72m on the Survey Plan, with the southern façade of the building being RL30.18m. The proposed development will only overshadow a small portion of the (approximately) 60m long northern elevation of the building to the south of the subject site during mid winter. The fact that the use to the south of the subject site is a

supermarket and that only a small portion of the large elevation (which has no window openings) is overshadowed from the proposal is considered satisfactory.

- *Objective (c) To provide a transition in built form and land use intensity between different areas having particular regard to the transition between heritage items and other buildings*
  - The proposed building is located in the Summer Hill Local Centre. The proposed development has given prevalence to the existing Western District Ambulance Building (which is identified as a contributory building) by pulling the façade of the proposed building back along Carlton Crescent – exposing the side elevation of the ambulance building (see **Figure 8**). The scale of the western elevation has taken the height of the building from the eaves and roof pitch of the existing ambulance building. In this way, the proposed development has respected the scale and design of the surrounding character. The development has also proposed a scale that transitions from the surrounding local centre buildings into the adjoining park, by integrating a large internal courtyard that is revealed from Carlton Crescent through clever use of openings and voids (see **Figure 9**). Furthermore the height of the building transitions from the centre of the site to the western façade wall (**Figure 10**). The use of landscaping is also integrated into the building design to soften the hard edges of the Local Centre buildings into the green parkland (**Figure 11**).



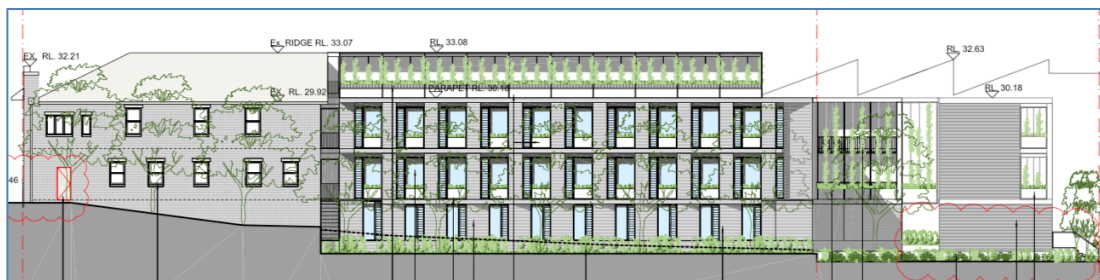
**Figure 9** Snapshot of perspective view through building into internal courtyard from Carlton Crescent

Source: Bates Smart modified by Mecone



**Figure 10** Snapshot of section demonstrating scale of building transition from Summer Hill Local Centre to adjoining park

Source: Bates Smart modified by Mecone



**Figure 11** Snapshot western elevation highlighting green elements on eastern façade

Source: Bates Smart

- Objective (d) to maintain **satisfactory** solar access to **existing** buildings and public spaces (emphasis added).
  - As previously outlined, it was demonstrated in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 that development does not have to establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development. Similar to Objective (b) above, the solar access diagrams prepared by Bates Smart determine that satisfactory solar access to existing buildings and public spaces is provided.
  - The existing adjoining buildings are commercial and industrial in nature. The subject site does not unreasonably restrict solar access to these existing buildings. The proposed development only provides minimal overshadowing to the adjoining parkland during mid winter, with no impact from the proposed building after 11am. The portions of the building that exceed the height limit to not provide any additional overshadowing to the public open space or building to the south of the subject site.

**Clause 4.6(3)(b) - Are there sufficient environmental planning grounds to justify contravening the development standard?**

As discussed above, Pain J held in *Four2Five v Ashfield Council* [2015] NSWLEC 90 that to satisfy clause 4.6(3)(b), a clause 4.6 variation must do more than demonstrate that the development meets the objectives of the development standard and the zone – it must also demonstrate that there are other environmental planning grounds that justify contravening the development standard, preferably being grounds that are specific to the site.

Pain J also held that in order for a clause 4.6 variation to be accepted, seeking to justify the contravention is insufficient - the consent authority must be satisfied that clause 4.6(3)(a) and (b) have been properly addressed. On appeal, Leeming JA in *Four2Five v Ashfield Council* [2015] NSWCA 248 acknowledged Pain J's approach, but did not necessarily endorse it, instead re-stating Pain J and saying:

*"matters of consistency with objectives of development standards remain relevant, but not exclusively so."*

Further recent findings by Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 also found that:

*"The requirement in cl 4.6(3)(b) is that there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard." [88]*

There are sufficient environmental planning grounds to justify contravening the development standard as the proposed development allows for the promotion and co-ordination of the orderly and economic use and development of the land in the following ways:

- The additional height has afforded the ability to maximise open space at the centre of the site, which provides a heightened standard of amenity for users.
- The higher building envelope has facilitated the opportunity for rooms to be single loaded off breezeways. The design has worked hard to utilise this approach to ensure the maximum number of rooms can be naturally cross ventilated; a level of amenity not normally afforded to student accommodation.
- Additional height has maximised the solar access to the individual rooms as well as maximised the solar access to the internal courtyard space. A thicker building envelope would reduce the courtyard and solar access to it.
- From an urban design standpoint, the proposed development matches the scale of the surrounding development. The floor levels have been provided to match the adjoining building, with references to the eaves of the existing building establishing the height of the eastern façade and the highest point of the development referencing the pitch of the existing roof. The development provides a consistent built form edge to the adjoining park.



#### **Clause 4.6(4)(a) Consideration of matters by Consent Authority**

The preconditions that must be satisfied in the opinion of the Consent Authority before consent can be given are detailed in Clause 4.6(4)(a). These preconditions are discussed in more detail below.

#### **Clause 4.6 (4)(a)(i) – The consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3)**

As demonstrated above, the proposed development has satisfied the matters required to be demonstrated in Clause 4.6(3) by providing a written request that demonstrates;

1. Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, by establishing that the objectives of the development standard are achieved notwithstanding the non-compliance (Wehbe Test 1).
2. The environmental planning grounds relied on are sufficient to justify the development standard.

In accordance with the findings of Commissioner Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the Consent Authority under Clause 4.6(4)(a)(i) must only be satisfied that the request addresses Clause 4.6(3). Under Clause 4.6(4)(a)(i) the Consent Authority is not to determine in their opinion whether the request satisfies the requirements of Clause 4.6(3)(a) and (b), just that the request has been made and that these items have been demonstrated.

#### **Clause 4.6(4)(a)(ii) - Is the proposed development 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?**

The proposed development is in the public interest as it is consistent with the objectives of the development standard. The objectives of the development standard are addressed below under the relevant headings:

##### *The objectives of the particular standard*

It has been demonstrated elsewhere in this report that the development achieves the objectives of Clause 4.3 Height of Buildings control within the ALEP notwithstanding the non-compliance with the standard.

##### *The objectives for development within the zone in which the development is proposed to be carried out.*

The site falls within the B2 Local Centre zone. As outlined below the proposed development is in the public interest because it is consistent with the objectives of the B2 Local Centre zone as demonstrated below;

- *To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.*

The proposed development will include student accommodation within walking distance of the Summer Hill Local Centre and Summer Hill train station.

The future occupants will be patrons of and potentially work in the local centre, strengthening the local economy. The proposed variation to the height does not compromise the achievement of this objective.

- *To encourage employment opportunities in accessible locations.*

The proposed development includes student accommodation and no other uses however, there will be full-time and part-time staff employed to manage the building, and the student residents will be within walking distance to employment opportunities in the Summer Hill Local Centre and nearby Ashfield Town Centre. Furthermore the proposal perpetuates the growth of the Inner West as an innovative and creative hub of the Greater Sydney Region. The proposal includes innovative reuse and design, which involves sustainable building and green technologies. The ambition is to not only create a facility that attracts innovative thinkers and students to the locality but will facilitate interaction and growth in innovative industries and best practice sustainable development in the Inner West. The additional height of the proposal does not compromise the achievement of this objective.

- *To maximise public transport patronage and encourage walking and cycling.*

The proposed development will be located in an accessible location which is in proximity to Summer Hill train station and a number of bus services which will maximise public transport patronage. Furthermore, the proposal incorporates bicycle parking and is surrounded by a series of footpaths which will encourage walking and cycling. The absence of car parking in the development will maximise public transport patronage and encourage walking and cycling through bicycle parking numbers above the minimum requirements.

- *To encourage residential accommodation as part of mixed-use development.*

The proposed development includes a use that is permitted with consent in the zone, which will contribute to the diversity of residential uses in the surrounding locality. Furthermore the proposed development will support the continued operation and future growth of businesses within the B2 Local Centre zone. The proposal introduces a new, permitted use into the Summer Hill Local Centre, which will contribute to the continued operation and development of the surrounding diverse uses.

Taking into consideration the above the proposed development serves the public interest, as it is consistent with the objectives of the development standard and the B2 Local Centre zone.

Furthermore, there is no significant benefit in enforcing strict compliance given the circumstances of the case. The proposed height exceedance facilitates a significantly better planning outcome with improved built form and amenity able to be realised as a result of the non-compliance. The contravention results in no significant adverse environmental impacts but rather a better planning outcome.

## 8 Any matters of significance for State or regional environmental planning

The development provides an opportunity for an appropriate planning response which aligns with the actions in place for the Inner West within the Eastern District Plan. The proposed development will add to the diversity of uses provided within Summer Hill and reinforce the role of the Local Centre. The contravention with the Height of Building Development Standard does not raise any matter of State or regional planning significance.

## 9 Conclusion to variation to height standard

This is a written request for an exception to the building height under Clause 4.6 of the ALEP 2013. It justifies the contravention to the height under Clause 4.3 of the ALEP 2013, and in particular demonstrates that the proposal provides a significantly better planning outcome, with no significant adverse environmental impacts resulting, and therefore in the circumstances of the case:

- Full compliance with the 10m building height control is unreasonable and unnecessary;
- The proposed development has been demonstrated not to have adverse environmental impacts on surrounding development and is supportable on environmental planning grounds;
- It is in the public interest in being consistent with the objectives of the standard and the objectives of the zone;
- The proposed exceedance of the height standard will result in an enhanced planning outcome at the site; and
- The proposed development can demonstrate consistency with actions outlined in the Eastern City District Plan for the Inner West.