

**7-9 CHORLEY AVENUE, CHELTENHAM
DWELLING ALTERATIONS AND ADDITIONS**

**VARIATION OF A DEVELOPMENT STANDARD REGARDING THE MAXIMUM
BUILDING HEIGHT CONTROL AS DETAILED IN CLAUSE 4.3 OF THE HORNSBY
ENVIRONMENTAL PLAN 2013**

For: Alterations and Additions to an Existing Dwelling
At: 7-9 Chorley Avenue, Cheltenham
Owner: Mr & Mrs Fawkes
Applicant: Mr & Mrs Fawkes

1.0 Introduction

This written request is made pursuant to the provisions of Clause 4.6 of Hornsby Local Environmental Plan 2013. In this regard, it is requested Council support a variation with respect to compliance with the building height development standard as described in Clause 4.3 of the Hornsby Local Environmental Plan 2013 (HLEP 2013).

2.0 Background

Clause 4.3 of HLEP sets out the maximum height of a building as follows:

- (1) *The objectives of this clause are as follows—*
 - (a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*
- (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.*

The Height of Buildings Map specifies a maximum building height of 8.5m.

The proposed alterations and additions to the existing dwelling house provides for a maximum building height of 10m, which is consistent with the height of the existing dwelling on site. This is a non-compliance of 1.5m or a variation of 17.6%.

The extent of non-compliance is depicted in the following section and height plane analysis prepared by David White Architects Pty Ltd.

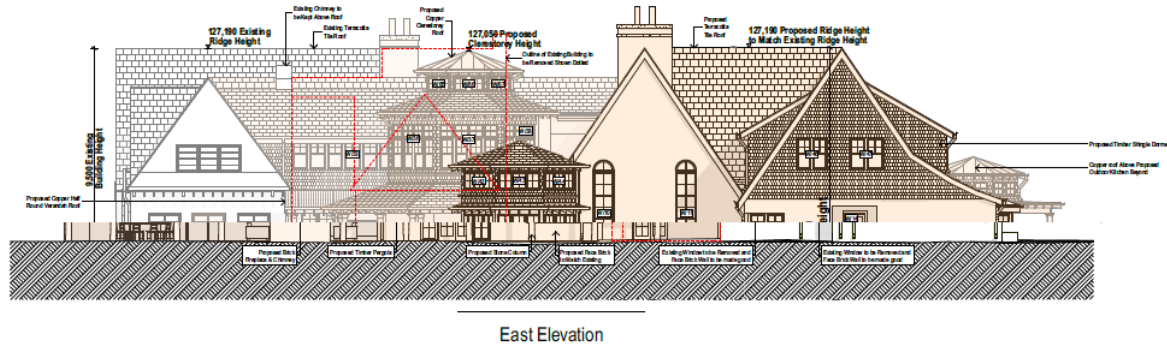


Fig 1: Extract of elevations depicting maximum height of 10m (consistent with height of existing ridge)

The Dictionary to HLEP operates via clause 1.4 of HLEP. The Dictionary defines “building height” as:

building height (or *height of building*) means—

- (a) *in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or*
- (b) *in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,*

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

The proposal is considered acceptable and as discussed further within this request, there are sufficient environmental planning grounds to justify contravening the development standard.

The controls of Clause 4.3 are considered to be a development standard as defined in the Environmental Planning and Assessment Act, 1979.

Is Clause 4.3 of the LEP a development standard?

- (a) The definition of “development standard” in clause 1.4 of the EP&A Act means standards fixed in respect of an aspect of the development and includes:

“(c) the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work.”

- (b) Clause 4.3 relates to the maximum height of a building. Accordingly, Clause 4.3 is a development standard.

3.0 Purpose of Clause 4.6

The Hornsby Local Environmental Plan 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LEP is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the Standard Instrument should be assessed. These cases are taken into consideration in this request for variation.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 118 have been relied on in this request for a variation to the development standard.

4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in ***RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51]** where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”.

If objective (b) was the source of the Commissioner's test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test."

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of the LEP provides:

- (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.*

Clause 4.3 (the Maximum Building Height Control) is not excluded from the operation of clause 4.6 by clause 4.6(8) or any other clause of the LEP.

Clause 4.6(3) of the LEP provides:

- (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.*

The proposed development does not comply with the maximum building height development standard pursuant to Clause 4.3 of HLEP which specifies a maximum building height of 8.5m in this area of Hornsby Council.

The proposed additions and alterations to the existing historic dwelling provide an addition to the rear of the existing built form which will result in a maximum height of up to 10m in height, resulting in a non-compliance of 1.5m or 17.6% to the control. It is noted that the new works do not exceed the height of the existing dwelling which is contributory to the Heritage Conservation Area.

The proposal provides for additions to an existing dwelling house, with the existing historic dwelling currently exceeding the current height controls of the HLEP. The additions do not extend above the height of the existing buildings.

The subject site is not heritage listed, however it is located within the Beecroft Cheltenham Heritage Conservation Area. The existing historic dwelling on site is two storey face brick structure described as Inter-War Old English Style. The existing features steep tiled roofs that 'spring' from the first floor level with large gable and tall chimneys. A Statement of Heritage Impact has been prepared by GBA Heritage which identifies that the existing dwelling on site has many features of the Inter-War Old English Style which is a period acknowledged in the Beecroft Cheltenham Heritage Conservation Area. These features include a steep and/or 'catslide' roofs which are identified as having a high contribution value to the HCA.

The proposal which incorporates a high pitched roof consistent with the pitch of the existing main roof form on the existing historic dwelling, provides for a successful integration of the addition to the dwelling and within the heritage conservation area. In fact, the non-compliance with the building height control ensures that the proposed built form is compatible with the existing historic dwelling and the surrounding HCA.

The non-compliance with the height controls is a result of providing a roof pitch that complements the style and character of the dwelling proposed. A complying roof form results in a built form that is not appropriately balanced and destroys the architectural character.



View A

Proposed Montage

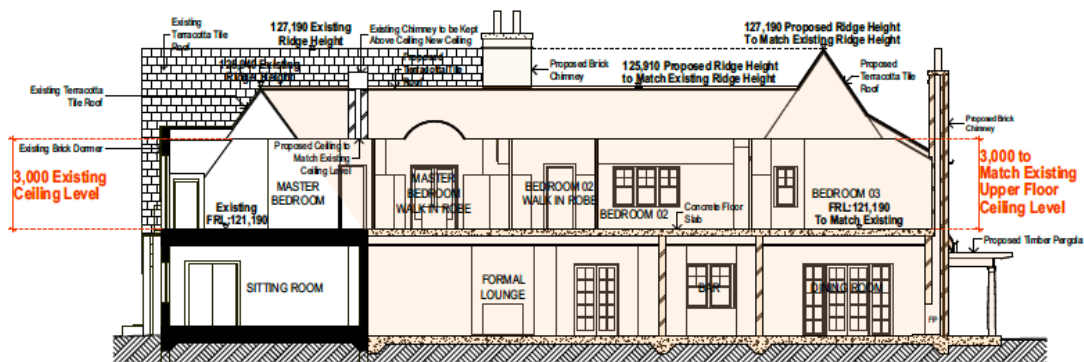
The overriding architectural objective is to conserve the heritage significance of the conservation areas and the proposed additions, in particular the roof pitch and non-complying height achieves this. In particular, objective 1(b) of Clause 5.10 (Heritage Conservation) of the Hornsby LEP provides:

(1) Objectives - The objectives of this clause are as follows—

- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,

The higher roof form is integral to the design and to ensure its contribution to the existing dwelling and the Heritage Conservation Area. The existing dwelling which is contributory to the Heritage Conservation Area has been in existence for almost 100 years, well before the current Local Environmental Plan and Development Control Plans. The existing dwelling is a contributory building and is celebrated in the locality for its design. The proposed additions therefore, including the roof form, have been designed to be consistent with the heritage aspects.

The design of the additions are driven by the characteristics of the existing historic dwelling and respecting the existing roof pitch which is an integral aspect of the dwelling. The proposed roof form has not been designed to increase floor to ceiling heights with the existing upper level floor and ceiling levels replicated in the additions.



Section Depicting Ceiling/Floor Heights of Existing and Proposed Elements

Strict compliance with the numerical standard, would require an altered roof form which would detract from the character of the existing historic dwelling and provide for an unsympathetic outcome. The proposal ensures a consistent architectural expression with the resultant ridge height being complimentary to the existing historic dwelling, noting that the proposal does not exceed the existing ridge height. The dwelling in its original form was a substantial house for a well known person of society. A well-integrated addition requires a roof form that is consistent with the existing historic dwelling.

Strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard. The relevant arguments are set out later in this written request.

Clause 4.6(4) of HLEP is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation:

Clause 4.6(6) relates to subdivision and is not relevant to the development. Clause 4.6(8) is only relevant so as to note that it does not exclude Clause 4.3 of the LEP from the operation of clause 4.6.

The specific objectives of Clause 4.6 are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The development will achieve a better outcome in this instance as the proposal provides for additions/alterations that complement the form and character of the existing historic dwelling and the surrounding Heritage Conservation Area. The non-compliance is a result of providing a roof form consistent with the existing roof form, which is consistent with the stated Objectives of the R2 Low Density Residential Zone, which are noted as:

- To provide for the housing needs of the community within a low density residential environment.*
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

5.0 The Nature and Extent of the Variation

- 5.1 This request seeks a variation to the maximum building height standard contained in Clause 4.3 of HLEP.
- 5.2 Clause 4.3 of HLEP specifies a maximum building height of 8.5m in this area of Hornsby.
- 5.3 The proposal provides for additions to the existing dwelling house which is contributory to the Heritage Conservation Area. The works proposed do not extend above the height of the existing building. The non-compliance is a direct result of providing additions that are complimentary and includes a roof pitch to match the existing which is integral to the architectural character of the existing historic dwelling.

6.0 Relevant Caselaw

6.1 In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular, the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. *The first and most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46]*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*

22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

6.2 The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is Clause 4.3 of HLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be consistent with the objectives of Clause 4.3 and the objectives for development for in the R2 zone?

7.0. Request for Variation

7.1 Is compliance with Clause 4.3 unreasonable or unnecessary?

- (a) This request relies upon the 1st way identified by Preston CJ in *Wehbe*.
- (b) The first way in *Wehbe* is to establish that the objectives of the standard are achieved.
- (c) Each objective of the maximum 8.5m building height standard, as outlined under Clause 4.3, and reasoning why compliance is unreasonable or unnecessary, is set out below:
 - (a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

The non-compliance with the height controls is a result of providing a roof pitch that complements the style and character of the dwelling proposed. A complying roof form results in a built form that is not appropriately balanced and destroys the architectural character. The overriding architectural objective is to conserve the heritage significance of the conservation areas and proposed roof pitch which is designed to be consistent with the roof pitch of the existing historic dwelling that achieves this. The additions need to be consistent with the heritage aspects of the existing dwelling which is contributory to the heritage conservation area. The design of the additions is driven by the characteristics of the existing dwelling.

The proposed height is appropriate for the site given the characteristics of the existing historic dwelling which includes the existing roof pitch and ridge heights that are inherent in its architectural character.

7.3 Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”.
The focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds. The environmental planning grounds advanced in the written request must justify the contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority*

to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31].

There are sufficient environmental planning grounds to justify contravening the development standard.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposed development will maintain the general bulk and scale of the existing surrounding development and maintains architectural consistency with the existing development on site. The non-compliance is the result of providing a roof form to match the existing roof form which is contributory to the Heritage Conservation Area. Providing for a roof form to comply with the building height development standard would result in an inferior design which is unbalanced and destroys the character of the existing historic dwelling. It is noted that the height is not driven by a need for an increased ceiling height. Rather, the additions are designed replicate the floor and ceiling levels of the existing upper level. Therefore, the roof design and resultant building height as proposed promotes the orderly & economic use of the land (cl 1.3(c)).
- The additions provide for a roof form that is consistent with the existing roof form of the dwelling and will promote good design (cl 1.3(g)).
- The existing dwelling is celebrated for its architectural character, including the roof pitch and ridge height which is inherent to the character. It is noted that the additions/alterations do not exceed the height of the existing historic building. Therefore, the proposal and resultant building height promotes the management of the built heritage (cl1.3(f)).
- The existing building exceeds the maximum height control, however the new additions do not exceed the existing height and strict compliance is therefore unreasonable.
- The overriding architectural objective is to conserve the heritage significance of the conservation areas and this proposal provides for a roof form that achieves this.

Further, the proposed works do not have any detrimental impact on the adjoining properties for the following reasons:

- The proposal, and in particular, the area of non-compliance, does not result in any additional overshadowing to the adjoining properties. Shadow diagrams have been prepared which depicts both the existing and proposed shadows. The diagrams indicate that proposal continues to ensure at least 3 hours of solar access to private open space of the adjoining properties.
- The area of non-compliance does not result in any loss of privacy to the adjoining properties. The area of non-compliance relates only to the roof form. The first floor level provide for only bedrooms, a study and bathrooms. Windows on the side elevations are provided with sufficient setbacks to the boundaries to ensure spatial separation and protection of privacy.
- The proposed roof form does not result in unreasonable bulk or scale when viewed from the adjoining property. The area of non-compliance is provided with sufficient setbacks to the side boundaries which provides for ample separation from the adjoining built form.

The above environmental planning grounds are not general propositions. They are unique circumstances to the proposed development, particularly the existing historic building on site which exceeds the height of building development standard and the overriding architectural objectives to converse the significance of the conservation areas. A complying roof form results in a built form that is not appropriately balanced and destroys the architectural character of the historic building.

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

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

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. The non-compliance is a result providing for a roof form that is consistent with the roof form of the existing dwelling, which is contributory to the Heritage Conservation Area. A complying roof form results in a built form that is not appropriately balanced and destroys the architectural character. The area of non-compliance does not result in any detrimental impact and provides a better outcome by providing for a roof form to match the existing historic dwelling and conserving the heritage significance of the conservation areas. The existing dwelling which is contributory to the Heritage Conservation Area has been in existence for almost 100 years. The existing building is celebrated in the locality for its architectural design. The proposed additions incorporate ridge heights which are needed to ensure appropriate integration and respect for the existing historic characteristics. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

7.4 Is the proposed development consistent with the objectives of Clause 4.3 and the objectives of the R2 Low Density Residential Zone?

- (a) Section 4.2 of this written request suggests the 1st test in Wehbe is made good by the development.
- (b) Each of the objectives of the R2 Low Density Residential Zone and the reasons why the proposed development is consistent with each objective is set out below.

I have had regard for the principles established by Preston CJ in *Nessdee Pty Limited v Orange City Council [2017] NSWLEC 158* where it was found at paragraph 18 that the first objective of the zone established the range of principal values to be considered in the zone.

Preston CJ also found that “*The second objective is declaratory: the limited range of development that is permitted without or with consent in the Land Use Table is taken to be development that does not have an adverse effect on the values, including the aesthetic values, of the area. That is to say, the limited range of development specified is not inherently incompatible with the objectives of the zone*”.

In response to *Nessdee*, I have provided the following review of the zone objectives:

It is considered that notwithstanding the variation of to the building height, the resultant building as proposed will be consistent with the individual Objectives of the R2 Low Density Residential Zone for the following reasons:

- ***To provide for the housing needs of the community within a low density residential environment.***

The proposal provides for an addition to the existing dwelling which is contributory to the Heritage Conservation Area. The additions do not exceed the height of the existing historic dwelling on site and provides for the housing needs of the community whilst retaining a low density residential environment. As detailed previously, the proposal, and in particular the area of non-compliance, does not result in any loss of amenity to the adjoining properties.

The non-compliance is a result of providing for a roof form that is consistent with the roof form of the existing dwelling which is contributory to the Heritage Conservation Area. A complying roof form results in a built form that is not appropriately balanced and destroys the architectural character.

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

This objective is not relative to the proposal.

Accordingly, it is considered that the site may be further developed with a variation to the prescribed maximum building height control, whilst maintaining consistency with the zone objectives.

8.0 Conclusion

This development proposes a departure from the maximum building height development standard, with the proposed additions providing for a maximum building height 10m.

The non-compliance is a result providing for a roof form that is consistent with the roof form of the existing historic dwelling. A complying roof form results in a built form that is not appropriately balanced and destroys the architectural character.

The extent of the variation to the building height control does not result in any significant impact on the amenity, views and outlook for the neighbouring properties.

This written request to vary to the maximum building height standard specified in Clause 4.3 of the Hornsby LEP 2013 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality.

Strict compliance with the maximum building height control would be unreasonable and unnecessary in the circumstances of this case.

Natalie Nolan
Town Planner