

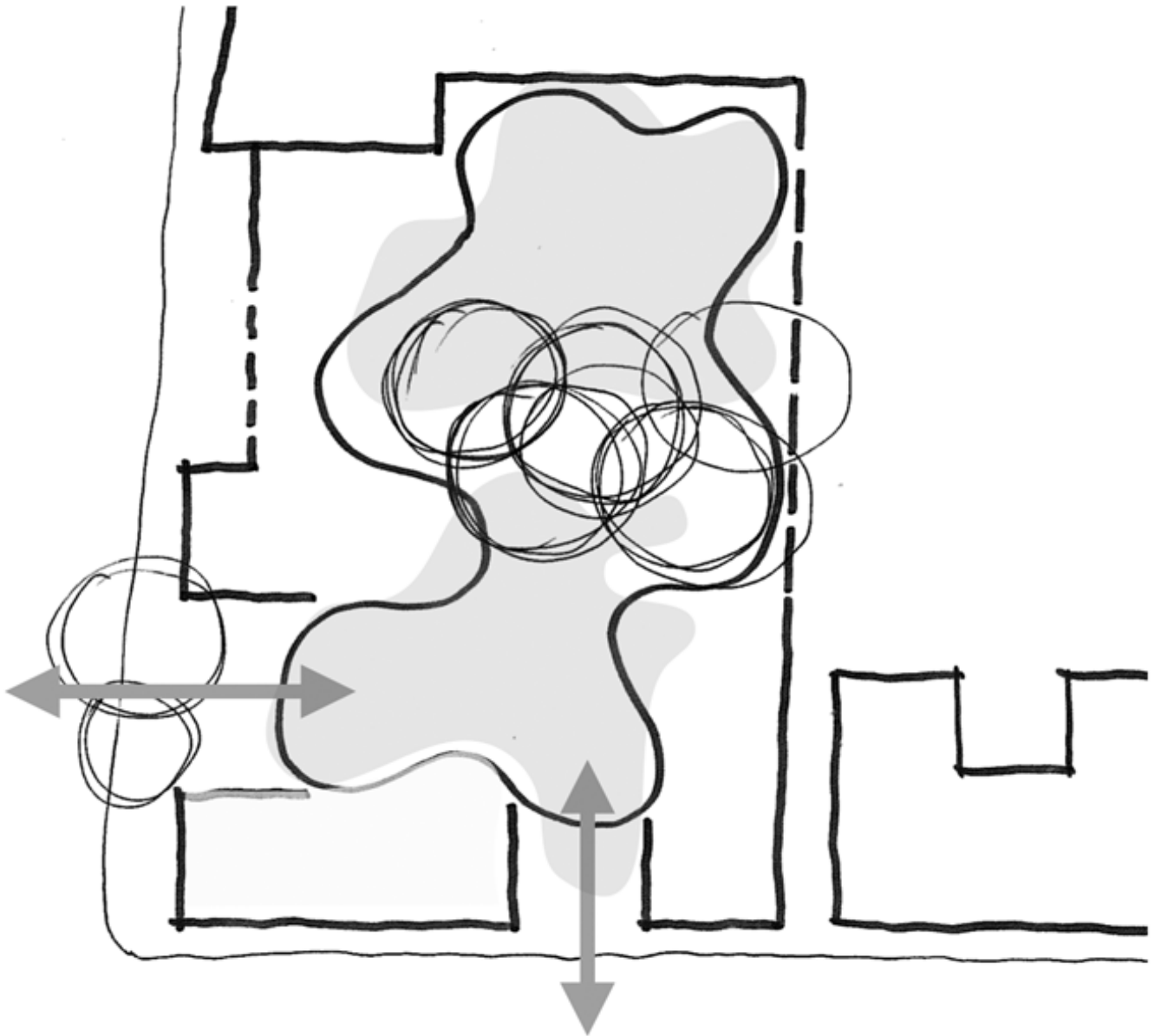
# DARLINGTON PUBLIC SCHOOL REDEVELOPMENT

## Appendix F — Clause 4.6 Variation Request – Building Height

SSD-9914

Prepared by Ethos Urban

For NSW Department of Education



# ETHOS URBAN

## Clause 4.6 Variation

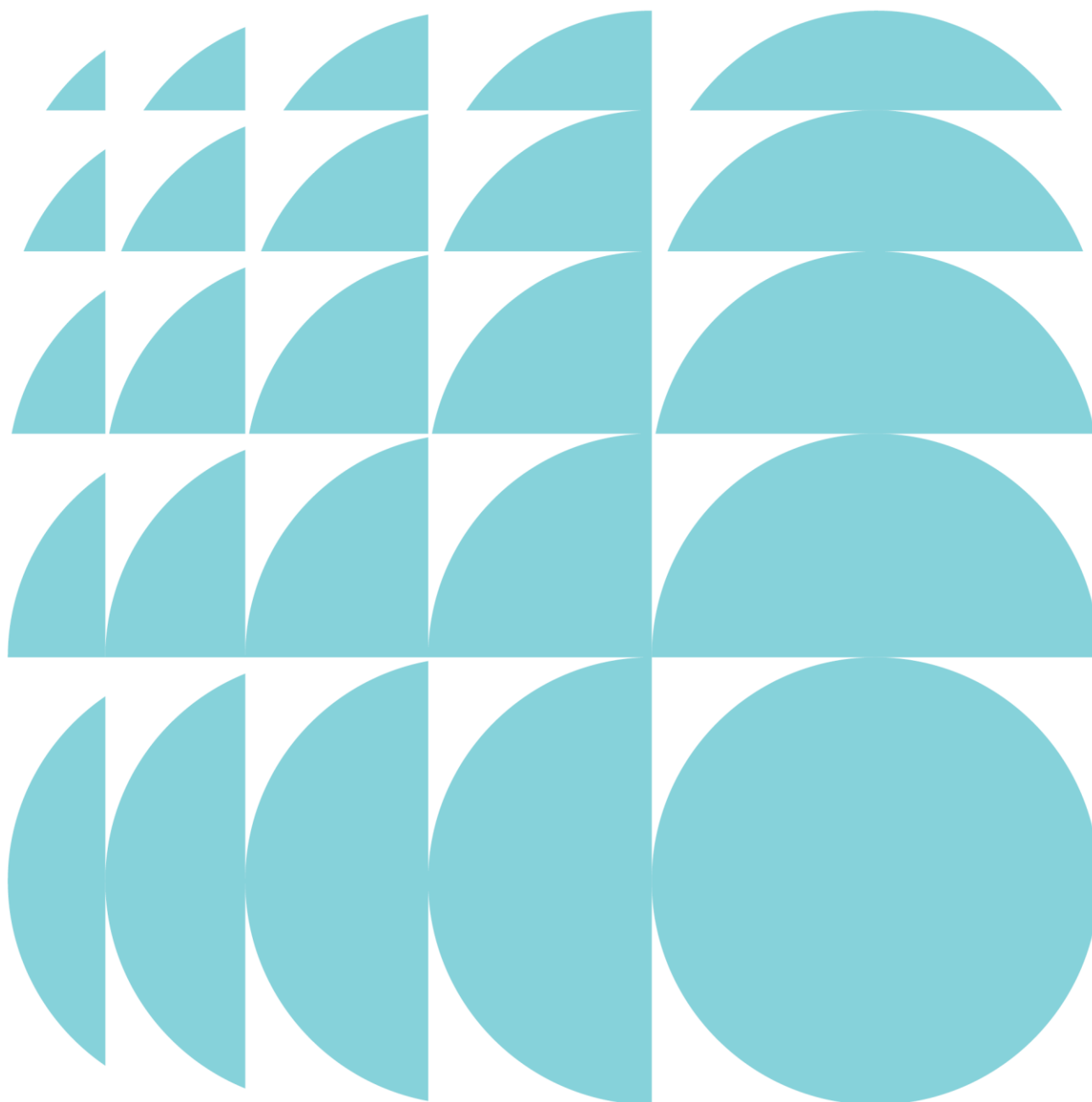
Building Height

Darlington Public School Redevelopment  
Golden Grove Street, Darlington

Submitted to Department of Planning, Industry  
and Environment

On behalf of NSW Department of Education

9 June 2020 | 2200026



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## 1.0 Introduction

This clause 4.6 variation request has been prepared by Ethos Urban on behalf of School Infrastructure NSW (SINSW). It is submitted to the Department of Planning, Industry and Environment (DPIE) in support of a State-significant development application (SSDA) for Darlington Public School Redevelopment at Golden Grove Street, Chippendale.

Secretary's Environmental Assessment Requirements (SEARs) were issued for the SSDA on 19 March 2019. This clause 4.6 variation request has been prepared in response to the following SEARs item:

### **Development Standards**

*Identify compliance with the development standards applying to the site and provide justification for any contravention of the development standards.*

Clause 4.6 of the *Sydney Local Environmental Plan 2012* (Sydney LEP) enables the consent authority to grant consent for development even though the development contravenes a development standard. The clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

We note that clause 42 of the *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* applies to this application, which states:

*Development consent may be granted for development for the purpose of a school that is State significant development even though the development would contravene a development standard imposed by this or any other environmental planning instrument under which the consent is granted.*

This clause 4.6 variation request relates to the development standard for height of buildings under clause 4.3 of the Sydney LEP and should be read in conjunction with the Environmental Impact Statement (EIS) and appended documents prepared by Ethos Urban dated 9 June 2020.

This clause 4.6 variation request demonstrates that:

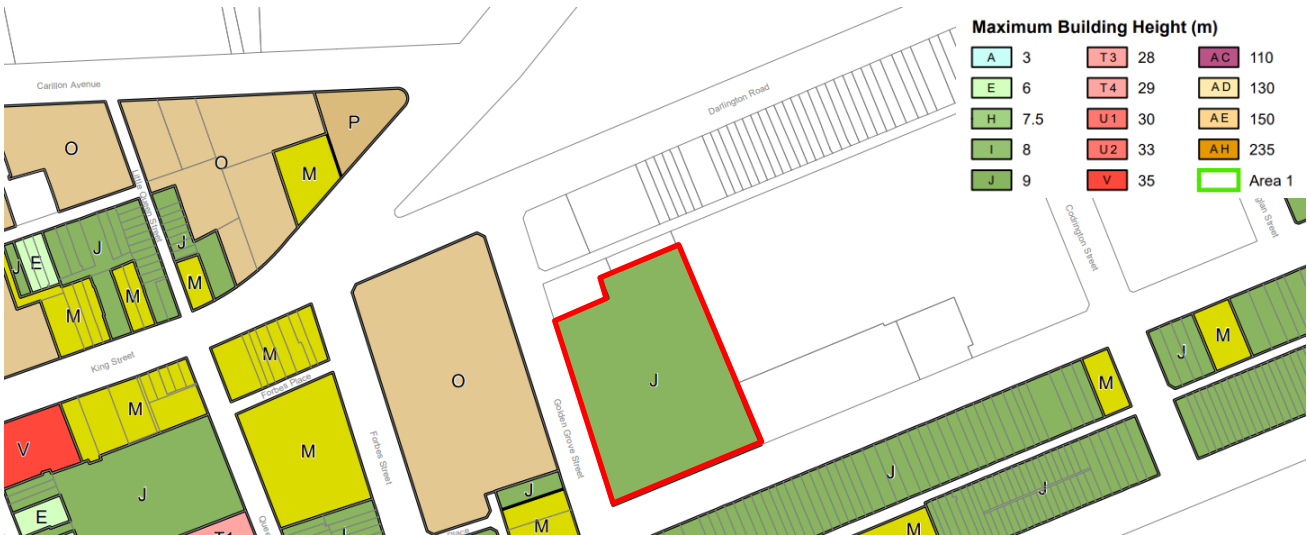
- Compliance with the building height development standard is unreasonable and unnecessary in the case since:
  - The proposal achieves the objectives of the building height development standard, notwithstanding the non-compliance.
  - Clause 42 of *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* allows State significant development for the purposes of a school to contravene a development standard in any other environmental planning instrument.
- There are sufficient environmental planning grounds to justify contravention of the building height standard including:
  - The development is of a height that is commensurate with surrounding buildings in the immediate vicinity.
  - The proposal results in acceptable and positive visual impacts.
  - Additional height is utilised to define a prominent corner in the neighbourhood and identify the school as a socially significant building.
  - A greater setback to the east can be achieved, which provides environmental and functional benefits.
  - The proposal results in acceptable overshadowing impacts.
- The proposal is in the public interest since it is consistent with the objectives of the SP2 zone and provides numerous public benefits.

Therefore, the SSDA may be approved with the variation as proposed in accordance with clause 42 of the Education SEPP and clause 4.6 of the Sydney LEP.

## 2.0 Development Standard to be Varied

### 2.1 Development Standard

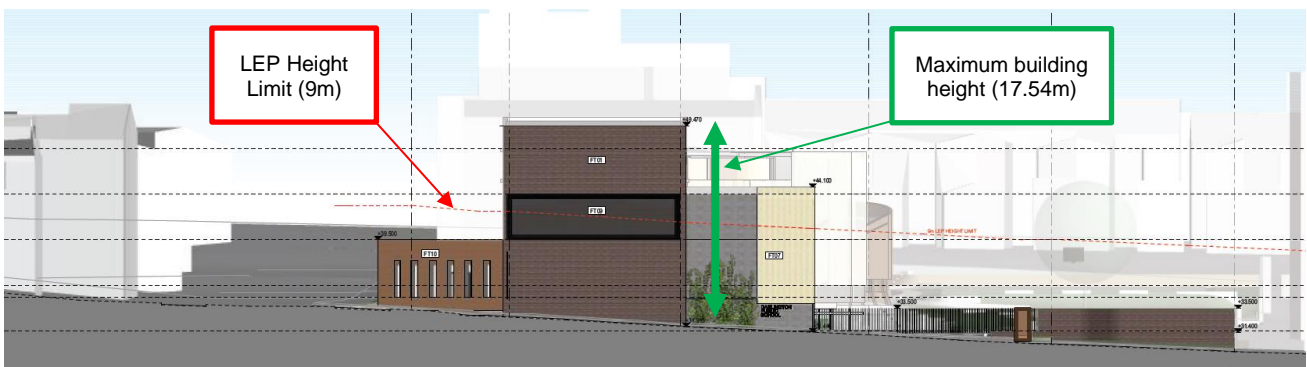
This clause 4.6 variation request seeks to justify contravention of the development standard set out in clause 4.3 of the Sydney LEP. Clause 4.3 provides that the maximum building height shown on the Height of Buildings Map (sheet 9) for the site is 9m, as shown in **Figure 1**.



**Figure 1** Extract from Height of Buildings Map  
 Source: Sydney LEP Height of Buildings Map (Sheet 9)

### 2.2 Extent of Variation

The proposed development has a maximum building height of 17.54m, which occurs at the south-eastern corner of the new school building fronting Abercrombie Street, as shown in the southern elevation drawing provided at **Figure 2**. This results in a variation to the maximum building height development standard of 8.54m, or approximately 94.9%.



**Figure 2** Southern Elevation of Proposed Development Showing Maximum Building Height and Height Limit  
 Source: FJMT

### 3.0 Justification for Contravention of the Development Standard

Clause 4.6(3) of the Sydney LEP provides that:

#### 4.6 Exceptions to development standards

- (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.*

Further, clause 4.6(4)(a) of the Sydney LEP provides that:

- (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 Secretary has been obtained.*

Assistance on the approach to justifying a contravention to a development standard is also to be taken from the applicable decisions of the NSW Land and Environment Court in:

1. *Wehbe v Pittwater Council* [2007] NSW LEC 827; and
2. *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009.

The relevant matters contained in clause 4.6 of the Sydney LEP, with respect to the height of buildings development standard, are each addressed below, including with regard to these decisions.

#### 3.1 Clause 4.6(3)(a): Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

In *Wehbe*, Preston CJ of the Land and Environment Court provided relevant assistance by identifying five traditional ways in which a variation to a development standard had been shown as unreasonable or unnecessary. However, it was not suggested that the types of ways were a closed class.

While *Wehbe* related to objections made pursuant to *State Environmental Planning Policy No. 1 – Development Standards* (SEPP 1), the analysis can be of assistance to variations made under clause 4.6 where subclause 4.6(3)(a) uses the same language as clause 6 of SEPP 1 (see *Four2Five* at [61] and [62]).

As the language used in subclause 4.6(3)(a) of the Sydney LEP is the same as the language used in clause 6 of SEPP 1, the principles contained in *Wehbe* are of assistance to this clause 4.6 variation request. The five methods outlined in *Wehbe* include:

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

- 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 (**Fourth Method**).
- 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 (**Fifth Method**).

Of particular assistance in this matter, in establishing that compliance with a development standard is unreasonable or unnecessary is the First Method.

### 3.1.1 The underlying objectives or purposes of the development standard

The objectives of the development standard contained in clause 4.3 of the Sydney LEP are:

- to ensure the height of development is appropriate to the condition of the site and its context,
- to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,
- to promote the sharing of views,
- to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,
- in respect of Green Square—
  - to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and
  - to ensure the built form contributes to the physical definition of the street network and public spaces.

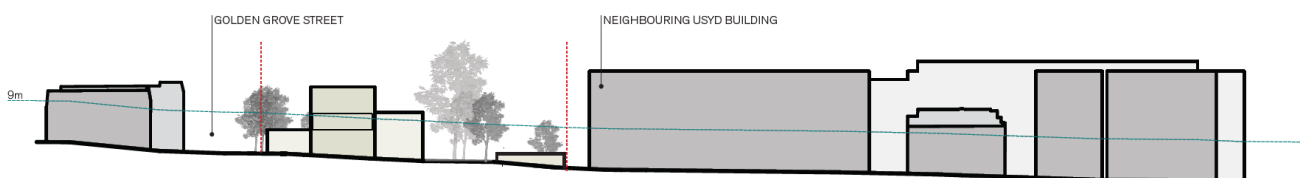
### 3.1.2 The objectives of the standard are achieved notwithstanding non-compliance with the standard

The following sections demonstrate that the objectives of the height of buildings development standard are achieved notwithstanding the proposed non-compliance.

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

The height of the proposed development responds to the immediate surrounding neighbours, which are approximately 3-storeys in height. Particular reference has been taken from the University of Sydney Business School to the east and the former IXL Garage factory building adjoining the site to the north (item I2244 of local heritage significance). The proposed design also seeks to mark the corner of Abercrombie Street and Golden Grove Street by locating the community hall at this prominent corner, which is above the 9m height limit.

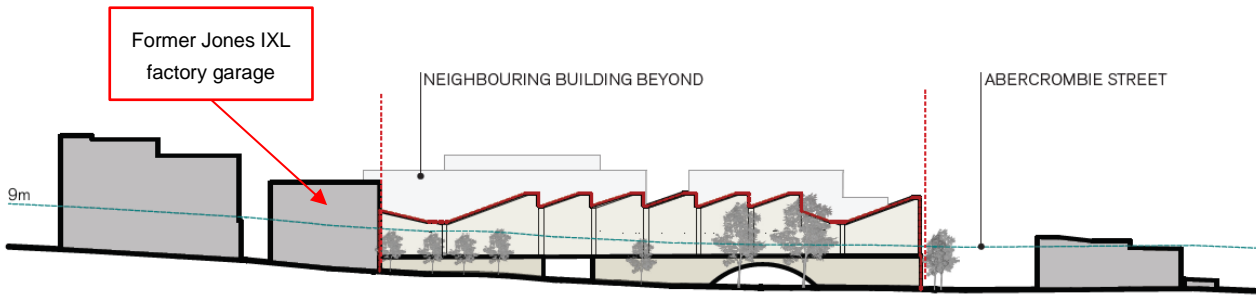
As shown in **Figure 3** and **Figure 4**, the height of the proposed development is appropriate to the condition of the site and its context. Therefore Objective (a) is achieved.



**Figure 3** Streetscape Elevation – Northern Side of Abercrombie Street

Source: FJMT





**Figure 4 Streetscape Elevation – Eastern Side of Golden Grove Street**

Source: FJMT

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

As shown in **Figure 4**, the proposed new school building is of a height that transitions appropriately from the former IXL Garage (of local heritage significance) down the slope of Golden Grove Street to the corner of Golden Grove and Abercrombie Streets.

Golden Grove Heritage Conservation Area (of local heritage significance) is located across Abercrombie Street to the south of the site, which comprises two-storey residential dwellings arranged in terrace rows. The new school building is separated from the conservation area by a four-lane street and the height of the southern end of the new school building is slightly taller than a two-storey terrace house. Therefore, the transition to this conservation area is deemed appropriate.

The proposed new building responds to its surrounding context to provide appropriate height transitions to nearby heritage items and conservation areas. Therefore Objective (b) is achieved.

**Objective (c): To promote the sharing of views**

Since the proposed development is of a low-scale that is commensurate with surrounding buildings, there will not be any significant loss of views. Further, the proposal does not interact with any desirable features in the landscape and therefore does not impact on view sharing, as demonstrated by the Visual Impact Assessment prepared by Ethos Urban and provided as Appendix EE to the EIS. Therefore Objective (c) is achieved.

**Objective (d): To ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas**

The proposed development is of a low-scale that is commensurate with the height of the many surrounding 2 and 3-storey buildings. There will be no impact on the height transitions from Central Sydney or Green Square Town Centre to adjoining areas. Therefore Objective (d) is achieved.

**Objective (e): in respect of Green Square—**

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

The proposal is not located within Green Square. Therefore, it does not impact on Objective (e) being achieved.

**3.1.3 Provisions of State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017**

Clause 42 of *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* (the Education SEPP) is reproduced below.

**42 State significant development for the purpose of schools—application of development standards in environmental planning instruments**

*Development consent may be granted for development for the purpose of a school that is State significant development even though the development would contravene a development standard imposed by this or any other environmental planning instrument under which the consent is granted.*

Since the proposed redevelopment is for the purposes of a school and is State significant development, the consent authority can grant consent for the development in accordance with clause 42 of the Education SEPP despite the development contravening the maximum building height development standard in the Sydney LEP. In light of clause 42 of the Education SEPP, development consent may be granted notwithstanding the non-compliance with the LEP building height development standard.

### 3.1.4 Conclusion on clause 4.6(3)(a)

Compliance with the building height development standard under the Sydney LEP is unreasonable and unnecessary in the circumstances of the case since:

- The objectives of the standard are achieved, notwithstanding the non-compliance.
- Clause 42 of the Education SEPP allows the consent authority to grant development consent to State significant development for the purposes of a school, even if the development contravenes a development standard set in another environmental planning instrument.

## 3.2 Clause 4.6(3)(b): Environmental planning grounds to justify contravening the development standard

Numerous environmental planning grounds exist to justify contravening the development standard in this case. These environmental planning grounds are discussed in the following sections of this report.

### 3.2.1 Ground 1: Height of Existing Surrounding Buildings

The proposed development is of a height that is commensurate with the surrounding buildings, as described in **Section 3.1.2**. The additional height above the 9m building height limit does not result in a built form that would be inconsistent with that of surrounding buildings - in fact, the building remains lower than some surrounding buildings in the immediate area.

### 3.2.2 Ground 2: Visual Impact

A Visual Impact Assessment was undertaken by Ethos Urban and is provided as Appendix EE to the EIS. The Visual Impact Assessment concluded that the visual impacts of the proposed development were generally positive and that the additional height would not result in any significant adverse or otherwise unacceptable visual impacts.

### 3.2.3 Ground 3: Defining the Street Corner

Darlington Public School has an important social connection to the surrounding local and Aboriginal community (see the Social Impact Assessment prepared by Ethos Urban provided as Appendix O to the EIS and the Aboriginal Cultural Heritage Assessment Report prepared by GML provided as Appendix N to the EIS). The intersection of Golden Grove Street and Abercrombie Street at the south-western corner of the site is prominent in the local neighbourhood. The proposed design for the new school building concentrates much of the built form to this corner, where the school/community hall is located. The additional building height beyond the 9m height limit allows for the sawtooth roof of the hall to express itself and define the street corner, creating a neighbourhood landmark and identifying the community school building that is commensurate with its standing in the local community.

### 3.2.4 Ground 4: Greater Setback to the East

By concentrating the built form along the Golden Grove Street frontage (albeit in exceedance of the height limit), the development provides a 30-50m setback from the eastern site boundary with the neighbouring University of Sydney buildings. This large setback provides a number of benefits, including:

- **Safety:** Defining the street wall and providing safe enclosure of the school grounds without the need for extensive fencing. The setback also provides privacy and separation from university uses to the east of the site.
- **Surveillance:** The proposed height of the main building, combined with the carefully framed views into and within the school, allows for surveillance of children by each other and by teachers from many locations within the school.

- **Playground Area:** A large, uninterrupted portion of the site is provided as outdoor play area for students within the setback area. The large open space allows for a comprehensive landscape design (see Appendix I of the EIS) that incorporates many different character areas and elements of Aboriginal heritage and artwork (many already existing at the school, to be retained). Good solar access is also provided to the outdoor play areas as a result of the built form massing and additional height to the west/south of the site.

### 3.2.5 Ground 5: Overshadowing

As demonstrated in **Appendix A** and the EIS, the proposal will result in acceptable overshadowing impacts despite exceeding the building height development standard. The mid-winter overshadowing impacts are summarised as follows:

- There is no additional overshadowing of St Michael's Cathedral, located across Golden Grove Street to the south-west of the site. The sawtooth design of the roof minimises shadows cast to this area of Golden Grove Street.
- There is some additional overshadowing of residential apartments across Golden Grove Street to the west between 8am and 9am. There is no additional overshadowing of these properties beyond 9am.
- From 2pm onwards there is some additional overshadowing of the residential terrace houses across Abercrombie Street to the south.
- The school playground benefits from uninterrupted sunlight between 10am and 3pm.

### 3.2.6 Conclusion on clause 4.6(3)(b)

There are sufficient environmental planning grounds to justify contravention of the building height development standard, including:

- The proposed building height is commensurate with the surrounding buildings in the immediate vicinity.
- The proposal will have an acceptable, and in many ways, positive visual impact.
- Additional height allows for greater definition of the Golden Grove Street and Abercrombie Street corner with the community hall, strengthening the social significance and connection of the school within the local community.
- The exceedance of the building height standard allows for a large setback to the eastern boundary, which has numerous environmental and social benefits.
- The proposal results in acceptable overshadowing impacts to the surrounding area.

## 3.3 Clause 4.6(4)(a)(ii): In the public interest because it is consistent with the objectives of the zone and development standard

### 3.3.1 Consistency with objectives of the development standard

The proposed development is consistent with the objectives of the building height development standard, for the reasons discussed in **Section 3.1.2** of this report.

### 3.3.2 Consistency with objectives of the zone

The proposed development is consistent with the objectives of the SP2 Educational Establishment zone, as demonstrated below.

#### **Objective (a): To provide for infrastructure and related uses**

The proposal will provide for expanded educational facilities as intended by the SP2 Educational Establishment zoning. Therefore, the proposal is consistent with Objective (a).

**Objective (b): To prevent development that is not compatible with or that may detract from the provision of infrastructure**

The proposed school redevelopment is itself new/renewed infrastructure. The proposal will not detract from the provision of any further educational infrastructure within the broader area zoned SP2 Educational Establishment. Therefore, the proposal is consistent with Objective (b).

**3.3.3 Overall public interest**

The proposed development is in the public interest since it provides the following public benefits:

- Expansion of the existing school capacity from 230 to 437 students.
- New and improved education facilities for students.
- New and expanded facilities for joint-use by the school and community.
- Will create new jobs during the construction and operation phases.
- Results in acceptable and manageable environmental impacts, as described in the EIS.

**3.3.4 Conclusion on clause 4.6(4)(a)(ii)**

The proposed development is in the public interest since it:

- Is consistent with the objectives of the SP2 zone.
- Provides numerous public benefits including expanded school capacity, new education and joint-use facilities, job creation and acceptable/manageable environmental impacts.

**3.4 Other Matters for Consideration**

Under clause 4.6(5), in deciding whether to grant concurrence, the Secretary must consider the following matters:

- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
  - (b) *the public benefit of maintaining the development standard, and*
  - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*

These matters are addressed in detail below.

**3.4.1 Clause 4.6(5)(a): Whether contravention of the development standard raises any matter of significance for State or regional environmental planning**

The variation of the building height development standard does not raise any matter of significance for State or regional planning. We do note, however, that the proposal is consistent with the most recent metropolitan plan for Sydney, A Plan for Growing Sydney in that it:

- Creates temporary job opportunities in manufacturing, construction and construction management, and on-going jobs in teaching and administration for the wider City of Sydney LGA.
- Delivers additional educational infrastructure for the catchment that will take enrolment pressure of the existing school.
- Revitalises an aged school to provide contemporary facilities to meet future educational standards, and provide increased jobs and growth.
- Delivers a sustainable, well-designed building that promotes the use of public and active transport. The redevelopment of the site will make a valued contribution to economic growth in Sydney and provide increased learning and employment opportunities.

### 3.4.2 Clause 4.6(5)(b): The public benefit of maintaining the development standard

As demonstrated above, there is no public benefit in maintaining the development standard in terms of State and regional planning objectives. As noted in the preceding sections, the additional height proposed generally reflects the height of existing buildings surrounding the site, and the proposed variation would not give rise to any adverse environmental impacts. The contravention results in the delivery of additional school capacity and other public benefits.

### 3.4.3 Clause 5.6(5)(c): Any other matters required to be taken into consideration by the Director-General before granting concurrence.

No other matters are required to be taken into consideration by the Secretary before granting concurrence.

## 4.0 Conclusion

The assessment above demonstrates that compliance with the building height development standard contained in clause 4.3 of the Sydney LEP is unreasonable and unnecessary in the circumstances of the case and that the justification is well founded. It is considered that the variation allows for the orderly and economic use of the land in an appropriate manner, whilst also allows for a better outcome in planning terms.

This clause 4.6 variation demonstrates that:

- Compliance with the building height development standard is unreasonable and unnecessary in the case since:
  - The proposal achieves the objectives of the building height development standard, notwithstanding the non-compliance.
  - Clause 42 of *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* allows State significant development for the purposes of a school to contravene a development standard in any other environmental planning instrument.
- There are sufficient environmental planning grounds to justify contravention of the building height standard including:
  - The development is of a height that is commensurate with surrounding buildings in the immediate vicinity.
  - The proposal results in acceptable and positive visual impacts.
  - Additional height is utilised to define a prominent corner in the neighbourhood and identify the school as a socially significant building.
  - Greater setback to the east can be achieved, which provides environmental and functional benefits.
  - The proposal results in acceptable overshadowing impacts.
- The proposal is in the public interest since it is consistent with the objectives of the SP2 zone and provides numerous public benefits.

Therefore, the SSDA may be approved with the variation as proposed in accordance with clause 42 of the Education SEPP and clause 4.6 of the Sydney LEP.