

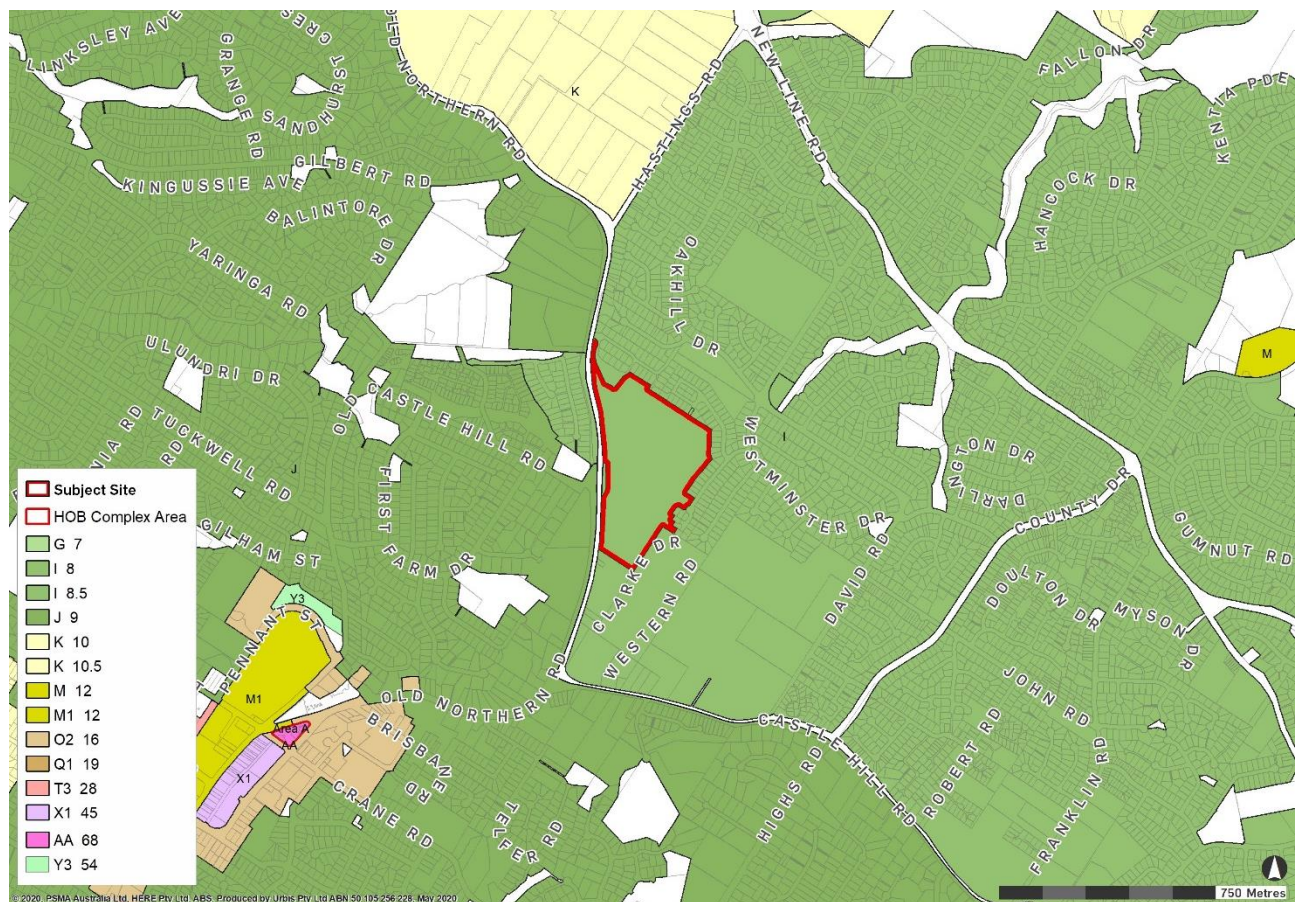
CLAUSE 4.6 VARIATION – HEIGHT OF BUILDINGS – V2W

OAKHILL COLLEGE - 423-521 OLD NORTHERN ROAD, CASTLE HILL

1. INTRODUCTION

This request seeks to vary the maximum height of building development standard prescribed for Oakhill College, 423-521 Old Northern Road, Castle Hill (Lot 1370, DP 1063007) under Clause 4.3 of *Hornsby Local Environmental Plan 2013* (HLEP). The Height of Building Map accompanying Clause 4.3 of the WLEP 2011 sets a maximum building height of 8.5 metres for the site (refer to Figure 1 below).

Figure 1 HELP Height of Building Map



Source: Urbis

2. PROPOSED VARIATION

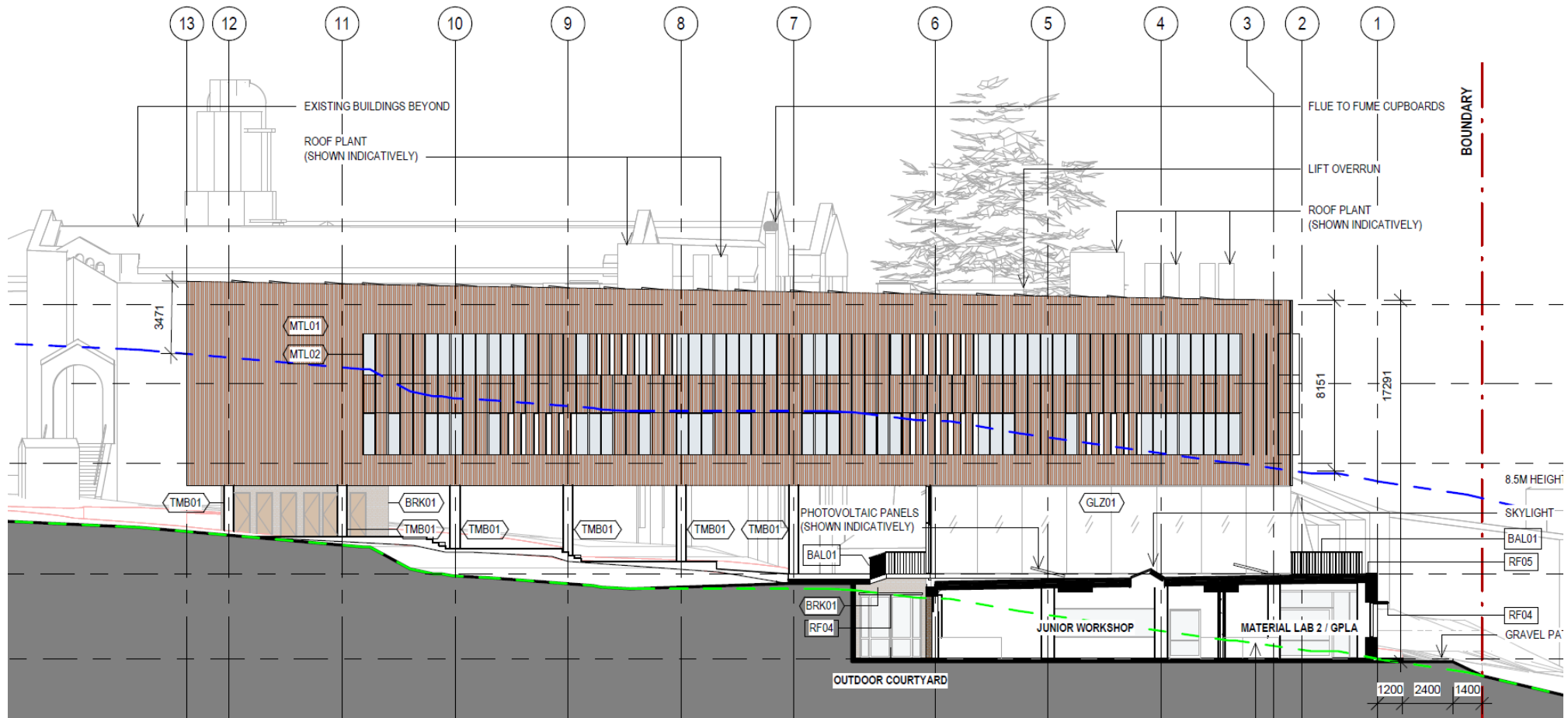
The development standard to which this request for variation relates is Clause 4.3 of the LEP – Height of Buildings. This clause operates in conjunction with the Height of Building Map which indicates that a maximum building height of 8.5 metres applies to the site. The proposal involves the construction of a new school building within an existing school site. The maximum height of the school building is approximately 17m at the northern end (see Figure 2), which is a maximum non-compliance of 8.151m. The southern end of the proposal has a non-compliance of 3.471m.

The non-compliance is appropriate for the following reasons:

- While the proposal is located within the R2 low density residential zone under the HLEP 2013, the site is currently used for the purpose of an education facility. The 8.5 metre height control that applies does not reflect the existing built form on site. The existing buildings are up to four storeys. The proposed built form is consistent with the scale of existing school buildings.
- The proposal will not result in any additional overshadowing being on the southern side of these properties. Sight lines have been mitigated through the use of glazing on the lower ground and ground floors, and horizontal metal fins placed on windows on the first and second floor. This will remove the ability for direct sight lines from the lower levels, noting the upper levels are setback a minimum of 8.6m from the northern boundary increasing the distance between the proposal and properties to the north.
- The footprint of the building is in keeping with the existing character of other school buildings. The reduced building footprint results in reduced impacts to the site, such as the need to remove vegetation, reduced landscaping and play area, and reduced likelihood of impacts on existing heritage significance.
- The proposed buildings reflect the current building standards for education and learning spaces achieving minimum ceiling heights and enough space for services.
- The site falls approximately seven metres over the footprint of the building. The sloping topography of the site is a key factor in the extent of non-compliance.
- If the maximum building height was to be enforced, it would significantly reduce the ability to provide the same quantum of learning space without increasing the building footprint.

Figure 2 below shows the point of variation to the maximum 8.5 metre height of buildings development standard measured in accordance with the HLEP 2013 definition.

Figure 2 Proposed view of development – East Elevation



Source: BVN Architecture

3. NSW LAND AND ENVIRONMENT COURT CASE LAW (TESTS)

Several key New South Wales Land and Environment Court (NSW LEC) planning principles and judgements have refined the way variations to development standards are required to be approached.

The correct approach to preparing and dealing with a request under clause 4.6 is neatly summarised by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118:

- [13] *The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is, however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard.*
- [14] *The first precondition, in cl 4.6(4)(a), is that the consent authority, or the Court on appeal exercising the functions of the consent authority, must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii). Each opinion of satisfaction of the consent authority, or the Court on appeal, as to the matters in cl 4.6(4)(a) is a jurisdictional fact of a special kind: see Woolworths Ltd v Pallas Newco Pty Ltd (2004) 61 NSWLR 707; [2004] NSWCA 442 at [25]. The formation of the opinions of satisfaction as to the matters in cl 4.6(4)(a) enlivens the power of the consent authority to grant development consent for development that contravenes the development standard: see Corporation of the City of Enfield v Development Assessment Commission (2000) 199 CLR 135; [2000] HCA 5 at [28]; Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46 at [19], [29], [44]-[45]; and Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [36].*
- [15] *The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.*

This clause 4.6 request has been prepared as per the approach set out in *Initial Action Pty Ltd v Woollahra Municipal Council*.

4. COMPLIANCE WITH DEVELOPMENT STANDARDS IS UNREASONABLE OR UNNECESSARY

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* summarised the five common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe v Pittwater Council* at [42]-[51].

These five ways are not exhaustive, and 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. These are discussed in the following sections.

4.1. COMPLIANCE WITH THE DEVELOPMENT IS UNREASONABLE OR UNNECESSARY BECAUSE THE OBJECTIVE OF THE DEVELOPMENT STANDARDS ARE ACHIEVED

Clause 4.3 of the HLEP 2013 outlines the objective for the height of buildings development standard, which reads:

“...to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.”

The proposal is consistent with the objective of this development standard for the following reasons:

- The non-compliance is appropriate for the site, noting the existing built form present within Oakhill College. For example, the De La Salle Building located immediately west of the proposal protrudes well above the height of the proposal, with an average ridge height of RL193.77 which is approximately 3m taller than the proposal. Additionally, the Performing Arts and Function Centre approved in 2015 on the site includes a final building height of 13.5m.
- The footprint of the building includes a gradient change of approximately 8.9m. As a result, the design has incorporated a stepped design to deliver the required learning space, while aiming to keep the developments footprint low.
- The non-compliance will not result in unreasonable increase in infrastructure and service capabilities. A services utility report which has been prepared and submitted with the development application concludes that no services augmentation will be required to facilitate the proposal.

4.2. THE UNDERLYING OBJECTIVE OR PURPOSE IS NOT RELEVANT TO THE DEVELOPMENT WITH THE CONSEQUENCE THAT COMPLIANCE IS UNNECESSARY

This is not relevant in the circumstances of this particular application.

4.3. THE UNDERLYING OBJECTIVE OR PURPOSE WOULD BE DEFEATED OR THWARTED IF COMPLIANCE WAS REQUIRED WITH THE CONSEQUENCE THAT COMPLIANCE IS UNREASONABLE

The proposed development provides for a partial three and four storey building, intended to facilitate improved learning spaces for Oakhill College Students. The proposal is consistent with the built form of existing school buildings within the campus, namely resulting in a lower built form than adjoining structures such as the De La Salle building which protrudes an additional 3m above the proposed finish building height.

Due to the sloping topography of the site, the proposal includes a stepped design to maximise education floor space while not increasing the development footprint. If the proposed building was reduced in height, a greater footprint would be required to facilitate additional learning spaces which would result in a loss of further car parking and landscaped grounds of the campus. Additional façade interface with the residential dwellings to the north would be a sub optimal outcome, increasing the opportunity for visual privacy impacts. Compliance in the circumstances is therefore unreasonable.

4.4. THE DEVELOPMENT STANDARD HAS BEEN VIRTUALLY ABANDONED OR DESTROYED BY THE COUNCIL'S OWN DECISIONS

This is not relevant in the circumstances of this application.

4.5. THE ZONING OF THE PARTICULAR LAND ON WHICH THE DEVELOPMENT IS PROPOSED TO BE CARRIED OUT WAS UNREASONABLE OR INAPPROPRIATE

The objectives of the R2 Low Density Residential zone primarily focus on providing housing in a low-density environment. These are not relevant to the proposal. The relevant objectives are:

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To ensure that non-residential land uses are located in a context and setting that minimises impacts on the amenity of a low density residential environment.*
- *To allow for a range of community facilities to be provided to serve the needs of residents, workers and visitors in residential neighbourhoods.*

The proposal is not residential development but does meet the educational needs of the school community. Educational establishments are envisaged in the R2 low density residential zone by virtue of being permissible with consent. The extent of the proposal which results in a non-compliance will provide for a non-residential land use in an existing school grounds context. The design has ensured that it will not result in an unreasonable increase of environmental impacts to the existing residential environment to the north.

The proposal satisfies the above objectives.

4.6. UNREASONABLE OR UNNECESSARY

Compliance with the development standard is unreasonable and unnecessary in the circumstances of the application based on the following:

- The proposal is consistent with the objectives of the development standard as provided in clause 4.3 of the HLEP 2013 and the relevant objectives of the R2 low density residential zone.
- The non-compliance does not create unreasonable environmental impacts to the surrounding sensitive land uses, such as overshadowing and privacy.
- The development will deliver improved learning and education spaces for the Oakhill College campus, improving the overall physical appearance and use of the site.
- The design responds to the topography of the site through a stepped design, while providing the required learning space to encourage collaborative learning within the building.
- Strict compliance with the height control will result in a building that does not achieve the functional or educational requirements of the school. To deliver the required learning spaces in a building with a compliant building height would require a substantially increased development footprint which results in design inefficiencies and an increased impact on the heritage fabric of the school.

Considering the above and the particular circumstances of this application, it is unreasonable and unnecessary to require compliance with the height of building standard.

5. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* states that 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].*

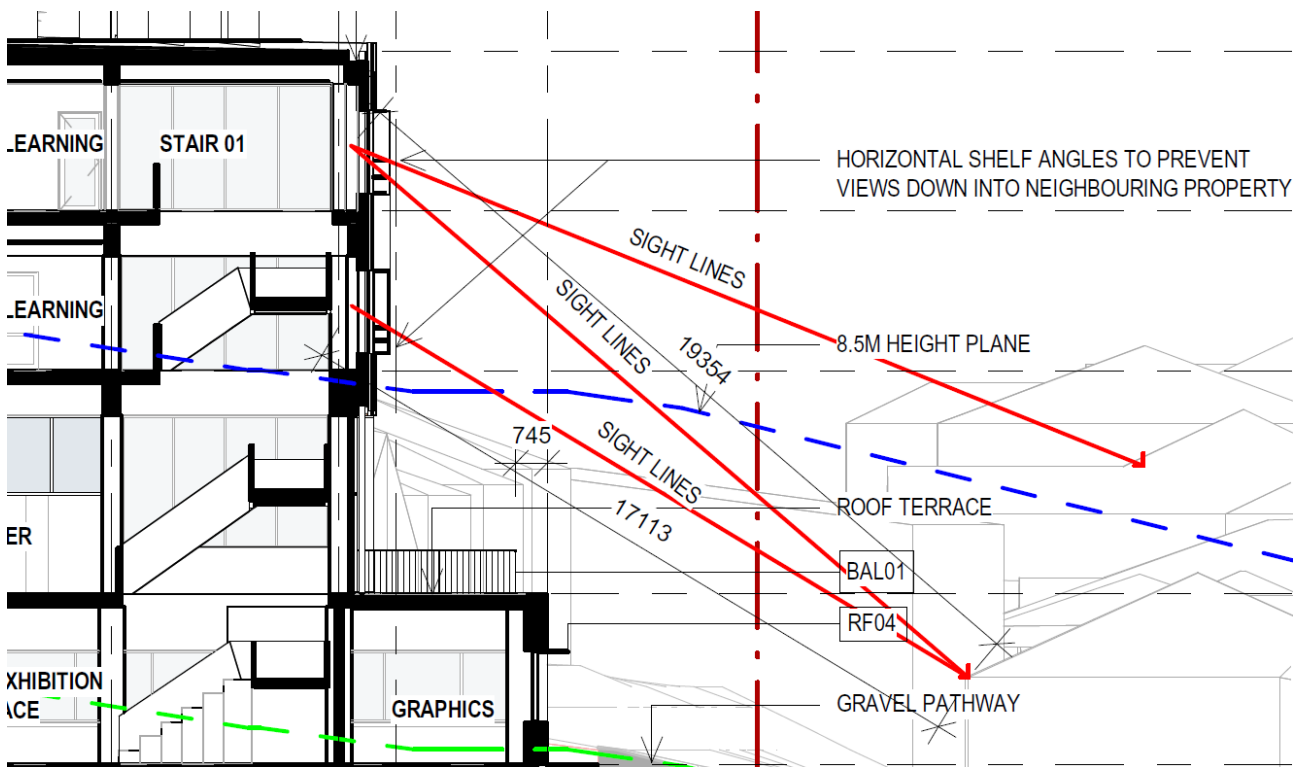
The environmental planning grounds that justify the contravention for the development standard are discussed below.

5.1. PRIVACY

The proposal has incorporated setbacks which seek to reduce the impact of the proposal on residential properties to the north. The lower ground level is setback 5m from the property boundary, with the ground level and above setback 8.6m to the outer protrusion of the built form. The stepped design increases the distance between potential view points and existing residential properties, reducing the impact of direct site lines.

An existing 1.8m high fence along the northern property boundary adjacent to the proposal will remain. This will restrict any views from the lower ground level of the proposal to properties to the north, however it is noted this is not where the non-compliance exists. For level one and level two, standard glass is proposed however external metal shading fins will be utilised not only for thermal comfort but to reduce openness of sight lines towards the north. These have been designed in both horizontal and vertical alignments to reduce the ability to look from the learning spaces down into residential properties. Rather, views are directed out horizontally from these spaces above the residential properties. Upper levels which constitute most of the non-compliance are setback a minimum of 8.6m from the northern property boundary in plan view. However, the actual distance from the upper levels to neighbouring properties is greater, at a minimum of 17.1m from the first level. This separation will ensure visual privacy is maintained to neighbouring properties.

Figure 3 Separation distances



Source: BVN

5.2. OVERSHADOWING

Shadow diagrams from 9am, 12pm and 3pm during winter solstice have been prepared by BVN Architecture Architects and are included in the architectural package lodged with this development application.

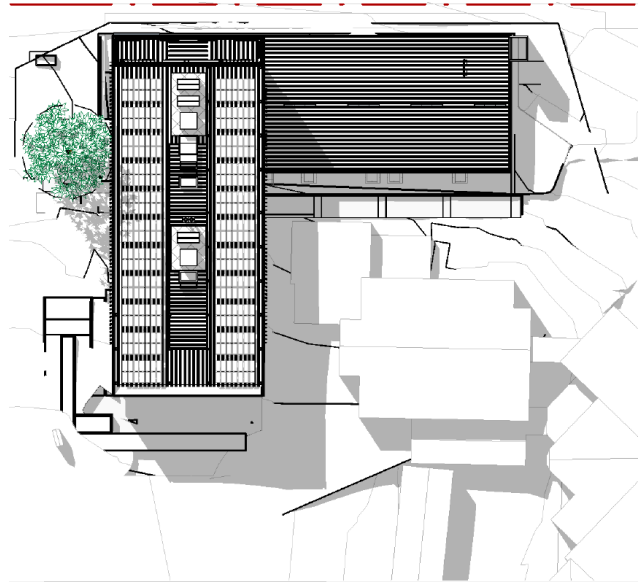
The shadow diagrams show that the proposal will not create any additional impact on the adjoining residential properties. Minor additional impacts will result in the school grounds however these do not impact on play areas or similar. The school grounds will receive sun throughout the day, notwithstanding some overshadowing caused by the building form.

Figure 4 Solar Diagrams



Picture 1 9am 21 June

Source: BVN



Picture 2 12pm 21 June

Source: BVN



Picture 3 3pm 21 June

Source: BVN

5.3. NOISE IMPACTS

The upper levels of the building will not result in additional noise impacts on adjoining or nearby sensitive receivers. As discussed in the acoustic report which supports the subject development application, work shops and areas which pose the potential for increased noise levels are located in the lower levels of the building and will be subject to strict limitations on building materials and glazing requirements. The upper levels of the proposal contain laboratories and informal learning spaces which are not anticipated to result in unreasonable noise impacts to adjoining sensitive receivers.

5.4. CONSOLIDATED BUILDING FOOTPRINT

The building footprint of the Innovation hub has been specifically designed to ensure it delivers consolidation efficiencies through design. The natural fall of the land, and existing landscaping, play spaces, car parking and heritage considerations have all further informed the layout. The proposed built form is the most suitable as it achieves the requirements of the new learning spaces and minimises environmental and amenity impacts. A summary of these considerations is included below.

5.4.1. Special Event Access

The proposal requires the removal of 62 car parking spaces from the northern most car park of the College. It is acknowledged that the access from Armidale Crescent is controlled under an existing consent which applies to the site, however, remains an important point of access for hearse vehicles and for special occasions. Additionally, this access is to be occasionally utilised throughout the year for deliveries of materials for the workshops by a small van. The design has considered this in its locating of the proposal, and through a reduced building footprint, enabled the retention of this access point.

5.4.2. Heritage

The consolidated building footprint has ensured there are no additional heritage impacts to the existing heritage significance of the site. Particularly relevant to the Innovation Hub is the De La Salle building located to the north west of the proposal. The heritage significance of this prominent building has, as confirmed in the Heritage Impact Statement included with the original DA documentation, has not been unreasonably impacted by the siting and design of the Innovation Hub. An important aspect to this is maintaining appropriate separation between new built form, which if the building footprint was to be increased by reducing the building height, may result in a worse outcome. The building footprint and height is considered appropriate from a heritage perspective.

5.4.3. Landscaping / Vegetation

The existing landscaping and outdoor recreation space for students and staff of the college is an important attribute to consider in design. If the proposal were to comply with the building height, while still delivering the required learning and teaching space, the increased footprint would require the removal of additional vegetation, notably large mature trees to the west of the building footprint. This would be an unacceptable outcome and greater impact. Consolidating the footprint enables the retention of vegetation and integrated into new landscaping for the site.

5.4.4. Efficiencies in Design

Efficiencies in design are important for a number of reasons, such as energy consumption, equitable access throughout the building, and the impact resulting from the construction such as earthworks and vegetation loss. The design has sought to maximise building efficiencies to ensure the design meets the required standards for energy consumption, particularly through heating and cooling. If the proposal were to be reduced in height, and building footprint increased, this would reduce the opportunity to achieve these efficiencies and would be considered a sub-optimal outcome.

5.5. PUBLIC BENEFIT

The principal aim of the proposal is to provide improved infrastructure to service the education needs of the community within a low-density environment. The proposed variation to the height control of the HLEP 2013 does not result in the loss of amenity to the adjoining properties from overshadowing or loss of privacy. The proposed height is therefore considered to be acceptable, particularly when balanced against the benefits of the project which are:

- Improved educational facilities for an existing education establishment.
- Encouragement of science and engineering subjects to further the education of students of the college.
- The development results in a highly attractive design which blends into the college grounds through specific use of materials, bulk and scale. Further the proposal while remains sympathetic to the existing heritage significance of the site.

- The proposal is an envisaged land use for the site consistent with the existing and future character of the area.

6. CONCLUSION

In summary, the proposal is considered appropriate and consistent with the objectives and intent of Clause 4.3 of HLEP 2013. Strict compliance with the WLEP in this case is unreasonable and unnecessary because:

- The proposal is consistent with the objectives of Clause 4.3 and the R2 low density residential zone.
- The potential for adverse privacy and overlooking impacts is considered negligible as a result of specific use of building materials and glazing, coupled with increase boundary setbacks.
- The proposal results in less environmental planning impacts, both internally and externally to the site.
- The design responds positively to the site conditions and the surrounding environment.
- The proposal does not raise significant matters of state or regional significance.

For the reasons outlined above, the clause 4.6 request is well-founded. The development standard is unnecessary and unreasonable in the circumstances, and there are sufficient environmental planning grounds that warrant contravention of the height. In the circumstances of this case, flexibility in the application of the height of building development standard should be applied.