

# GYDE

## Clause 4.6 Variation Request

Clause 4.3(2) of the North Sydney Local  
Environmental Plan 2013

Neutral Bay Public School – 175- 177 Ben Boyd Road, Neutral  
Bay

Submitted to North Sydney Council

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<b>Report Version:</b>	Final - Amended post lodgement

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## 1. EXECUTIVE SUMMARY

This request has been prepared to justify a variation to Clause 4.3(2) height of buildings in the North Sydney Local Environmental Plan 2013 (NSLEP) that is proposed in a Crown development application (DA) for the upgrades to Neutral Bay Public School located at 175- 177 Ben Boyd Road, Neutral Bay. The upgrades for which development consent is sought under the Crown DA are summarised as follows:

- Removal of three general learning area (GLA) temporary learning spaces (i.e. demountables);
- Demolition of Building G (amenities) and Building I (special programs room and amenities);
- Upgrade and refurbishment of Building A to nine GLAs;
- Upgrade and refurbishment of Building B from 7 GLAs to 3 GLAs, out of school hours care and special programs;
- Consolidation of allotments;
- Construction of Building L, a new three (3) storey building fronting Bydown Street, containing a library, amenities, canteen, staff facilities, amenities and seven GLAs; and
- Associated on-site preparation and landscaping works.

Buildings C, J and K are retained/unchanged.

Clause 4.3(2) of the NSLEP prescribes a maximum building height for the site of 8.5 metres.

The proposal involves the following variations:

### **Building A**

The existing height variation for Building A is captured as a part of this written request on the basis that internal alterations are proposed to the existing building. The existing building is taller than the maximum 8.5 metre height standard that applies to the site. There will be no increase in the envelope/height of the existing building. The proposed variation for the amended structures is as follows:

- Between 1.712 metres and 2.204 metres – two amended walls separating general learning spaces and program rooms.

### **Building B**

The existing height variation for Building B is captured as a part of this written request on the basis that internal alterations are proposed to the existing building. The existing building is taller than the maximum 8.5 metre height standard that applies to the site. There will be no increase in the envelope/height of the existing building. The proposed variation for the amended structures is as follows:

- Maximum 1.225 metres - upper portion of amended windows for general learning spaces.

### **Building L**

Building L comprises the proposed new three storey building and involves the following variations:

- Between 2.845 metres or RL96.58 at the mid-way of the western elevation (northern end) at the roof parapet and 5.655 metres or RL97.82 at the mid-way of the eastern elevation (southern end) at the roof parapet.

As set out in detail in this written request, the requirement to comply with the development standard is unreasonable and unnecessary in the circumstances of this case because the proposal satisfies the objectives of the height of buildings development standard. The objectives in clause 4.3(1) of the NSLEP 2013 are:

- *To promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- *To promote the retention and, if appropriate, sharing of existing views,*
- *To maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
- *To maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- *To ensure compatibility between development, particularly at zone boundaries,*
- *To encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area,*

There are sufficient environmental planning grounds to justify the variation including:

- The current significant shortfall of play space (4.49m<sup>2</sup>) is well below the recommendation of 10m<sup>2</sup> per student. The variation from the height development standard enables the freeing up of the ground plane to provide approximately 7m<sup>2</sup> of play space per student (2.51m<sup>2</sup> increase per student). The absence of the height variation would mean the new learning spaces would occupy additional play space at ground level and result in a poor planning, design, and community outcome.
- The contravention of the standard enables the provision of additional learning spaces which achieve contemporary requirements.
- The proposed mass and scale of proposed Building L are driven by the need to upgrade the out-dated learning facilities on the site to achieve compliance with the Educational Facilities Standards and Guidelines (EFSG) requirements and hub layouts and respond to the drivers set out in the Treasury approved Business Case for the project dated 31 January 2020. The key projects drivers are noted in points 1 and 2 above.
- The extent of the variation of Building L has been reduced since the original submission by 0.641 metres. This reduction has resulted from removal of the COLA, internal spatial replanning, redesign of the external stairs and replanning of the servicing including lift shaft;
- The proposed height of Building L is commensurate to that of existing Buildings A, B and J; and
- The internal alterations and additions to Buildings A and B do not result in any environmental impacts as the non-compliances with the building height standard relate to existing non-compliances, yet have been considered in this request for the avoidance of doubt.

The variation is in the public interest because the development satisfies the relevant objectives of the SP2 Infrastructure and R2 Low Density Residential zones that apply to the land, as well as the objectives of the height of buildings standard pursuant to the NSLEP.

This request has been prepared under Clause 4.6 of the NSLEP and demonstrates that compliance with the height of buildings development standard would be unreasonable and unnecessary in the circumstances of the case, and there are sufficient environmental planning grounds to justify the contravention. Any further reduction would compromise compliance with the ESFG or would necessitate the floor area/massing to be distributed in a more extensive area across the ground floor plane, resulting in an unreasonable reduction in play space across the site. Further, the proposal is consistent with the objectives of the zone for the site and the development standard itself and is, therefore, in the public interest. This request also addresses the requirement for the concurrence of the Secretary. On balance, the proposed variations, particularly to Building L, are considered to be appropriate for the site, its context, and an appropriate response with regard to all relevant matters for consideration under Clause 4.6 of the NSLEP.

## 2. INTRODUCTION

This is a formal request prepared in accordance with Clause 4.6 of the NSLEP to justify a variation to the height of buildings development standard proposed in a Crown DA submitted to North Sydney Council (Council) for the upgrades to Neutral Bay Public School, located at 175- 177 Ben Boyd Road, Neutral Bay. The development is shown in the Architectural Drawings prepared by Design Inc and Survey Plan prepared by Project Surveyors that form part of the Crown DA package submitted to Council. This request is made by the Crown DA applicant, SINSW, as part of the Department of Education, under Clause 4.6(3) of the NSLEP.

The objectives of Clause 4.6 are to provide an appropriate degree of flexibility in applying development standards to achieve better outcomes for, and from, development.

As the following request demonstrates, a better planning outcome would be achieved by exercising the flexibility afforded by Clause 4.6 in the particular circumstances of this Crown DA.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (August 2011) and various relevant decisions in the New South Wales Land and Environment Court and New South Wales Court of Appeal (Court).

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard (see *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245) at [23] and *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at [76]-[80] and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31]:

1. That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case [Clause 4.6(3)(a)];
2. That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard [Clause 4.6(3)(b)];
3. 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 [Clause 4.6(4)]

This request also addresses the requirement for the concurrence of the Secretary as required by Clause 4.6(4)(b).

### 3. STANDARD TO BE VARIED

The standard proposed to be varied is the height of buildings development standard which is set out in Clause 4.3(2) of the NSLEP as follows:

(2) The height of a building on any land is not to extend the maximum height shown for the land on the Height of Buildings Map.

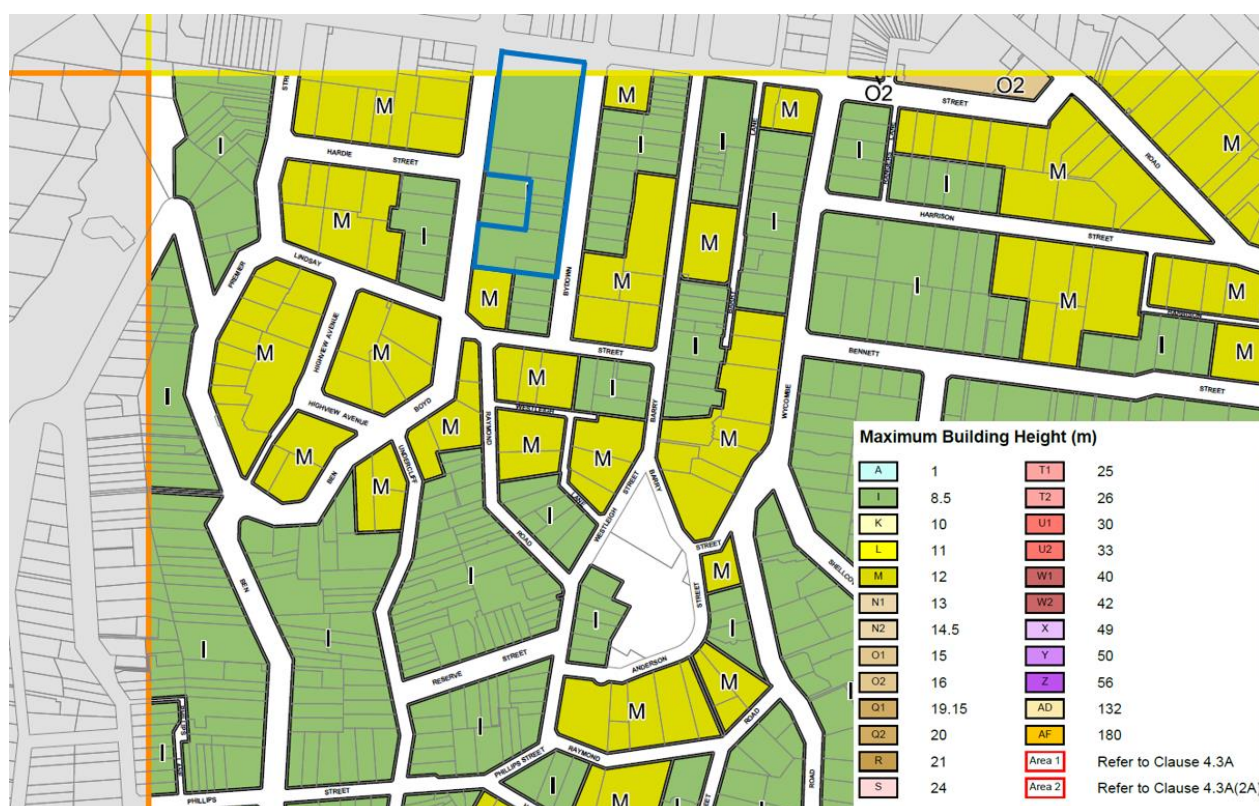


Figure 1: Height of buildings map, site with an 8.5 metre height limited outlined in blue (Source: NSLEP 2013)

The numerical value of the development standard proposed to be varied is 8.5 metres.

The height of buildings development standard is not excluded from the operation of Clause 4.6 of the NSLEP.



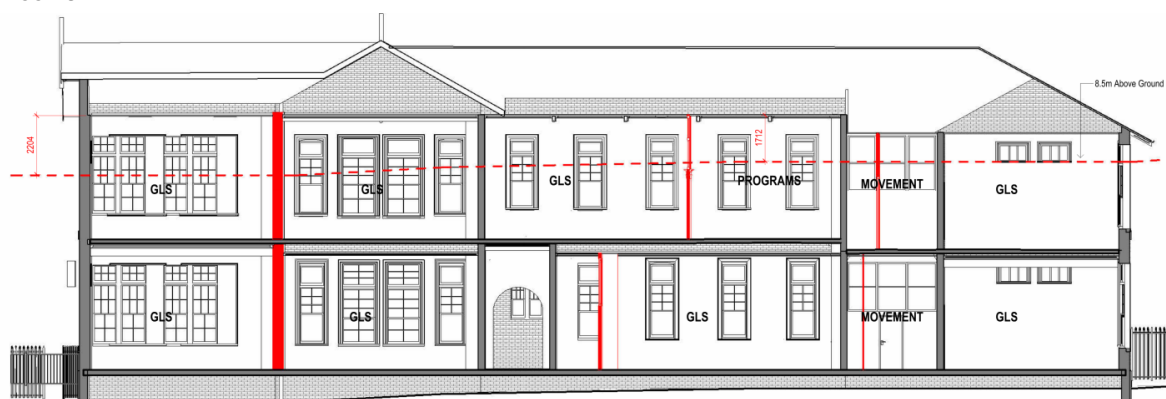
## 4. EXTENT OF VARIATION

Clause 4.3(2) of the NSLEP prescribes a maximum building height for the site of 8.5 metres. The upgrades involve variations to the height of buildings development standard as set out below.

### Building A

The height variation for Building A is captured as a part of this written request on the basis that internal alterations are proposed to the existing building. The existing building is taller than the maximum 8.5 metre height standard that applies to the site. There will be no increase in the envelope/height of the existing building. The proposed variation for the amended structures is as follows:

- Between 1.712 metres and 2.204 metres – two amended walls separating general learning spaces and program rooms.



1 Section 47

Figure 2: Extract of Building A section, 8.5 metre height line shown by the dotted red line (Source: DesignInc)

A variation to the height of buildings standard is sought purely on a technical compliance basis, with no change to the envelope/height of the building.

### Building B

The height variation for Building B is captured as a part of this written request on the basis that internal alterations are proposed to the existing building. The existing building is taller than the maximum 8.5 metre height standard that applies to the site. There will be no increase in the envelope/height of the existing building. The proposed variation for the amended structures is as follows:

- Maximum 1.225 metres - upper portion of amended windows for general learning spaces.

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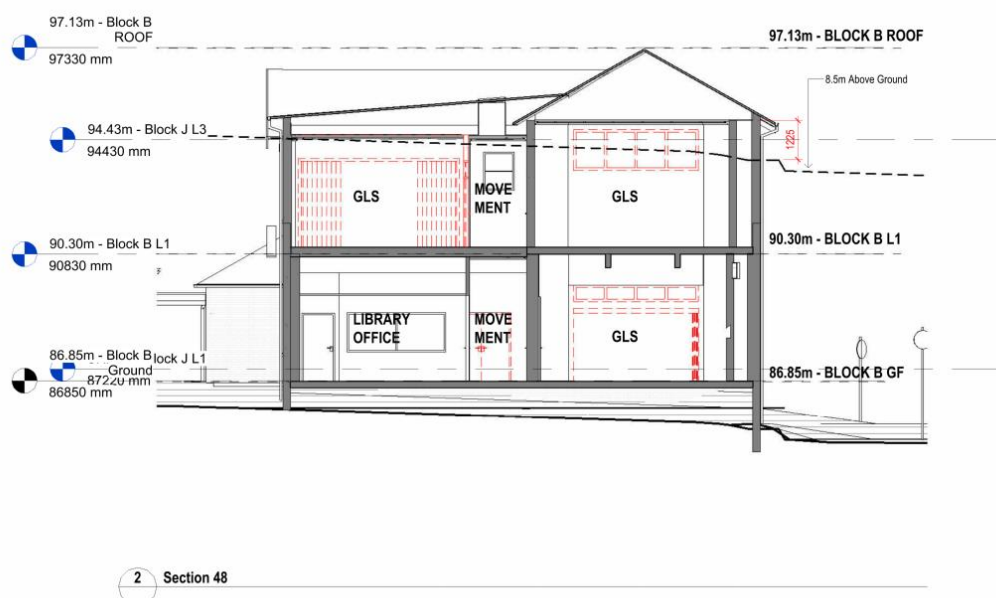


Figure 3: Extract of Building B section (Source: DesignInc)

A variation to the height of buildings standard is sought purely on a technical compliance basis, with no change to the envelope/height of the building.

### Building L

Building L comprises the proposed new three storey building and involves the following variations:

- 2.845 metres or RL96.58 at the mid-way of the western elevation (northern end) at the roof parapet
- 3.561 metres or RL96.58 at the mid-way of western elevation (southern end) at the roof parapet
- 3.626 metres or RL97.82 at the north elevation Building L at the roof parapet
- 4.138 metres or RL97.82 at the mid-way of the eastern elevation (northern end) at the roof parapet
- 4.811 metres or RL97.82 at the south elevation of Building L at the roof parapet
- 5.655 metres or RL97.82 at the mid-way of the eastern elevation (southern end) at the roof parapet

The following sections and height plane diagram illustrate the proposed contravention of the height of buildings development standard for Building L.

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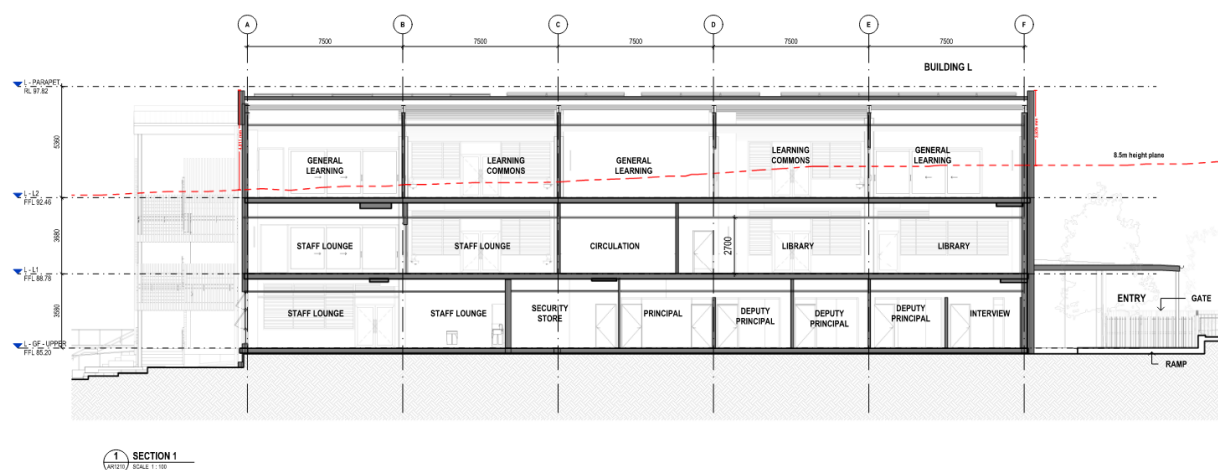


Figure 4: Extract of Building L Section 1, 8.5 metre height line shown by the red dotted line, north-south (Source: DesignInc)

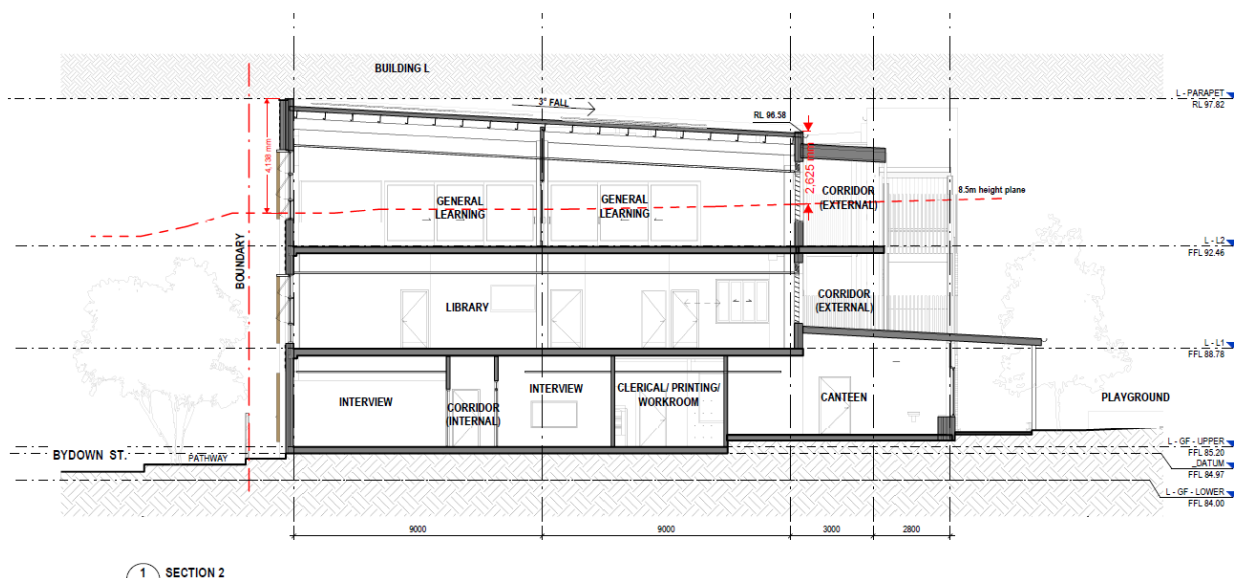
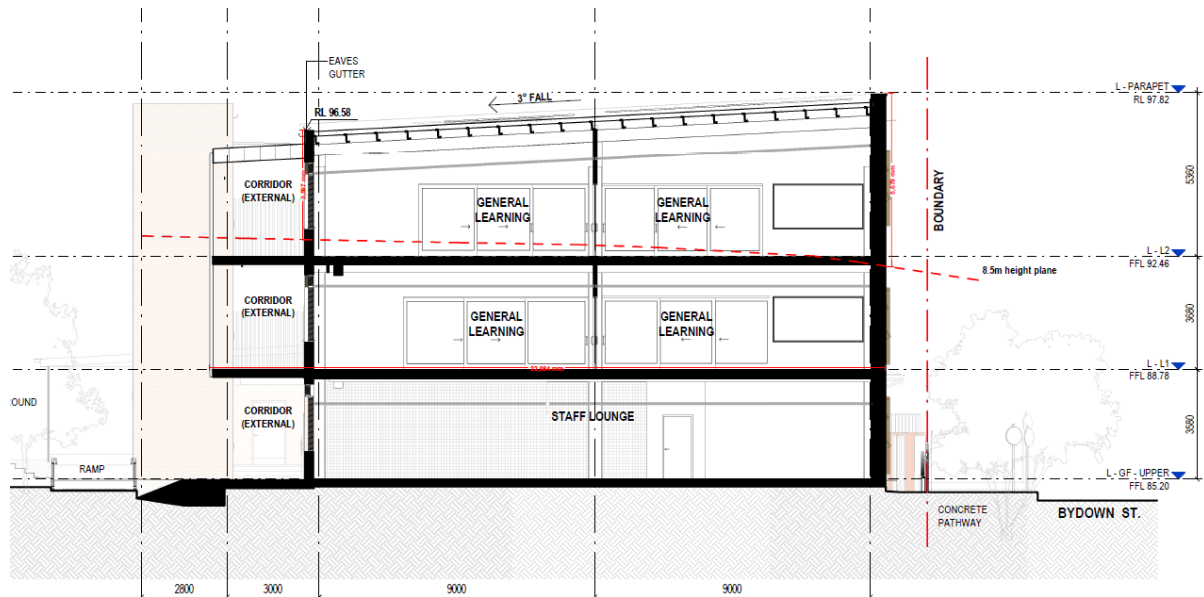


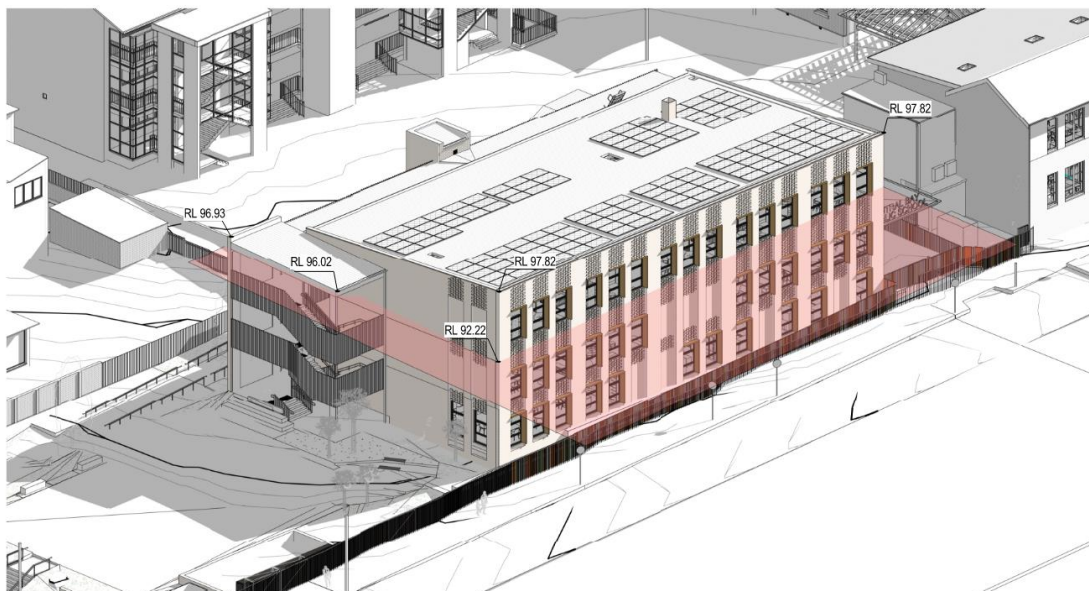
Figure 5: Extract of Building L Section 2, 8.5 metre height line shown by the red dotted line, east-west (Source: DesignInc)

## Clause 4.6 Variation Request – Height of Buildings



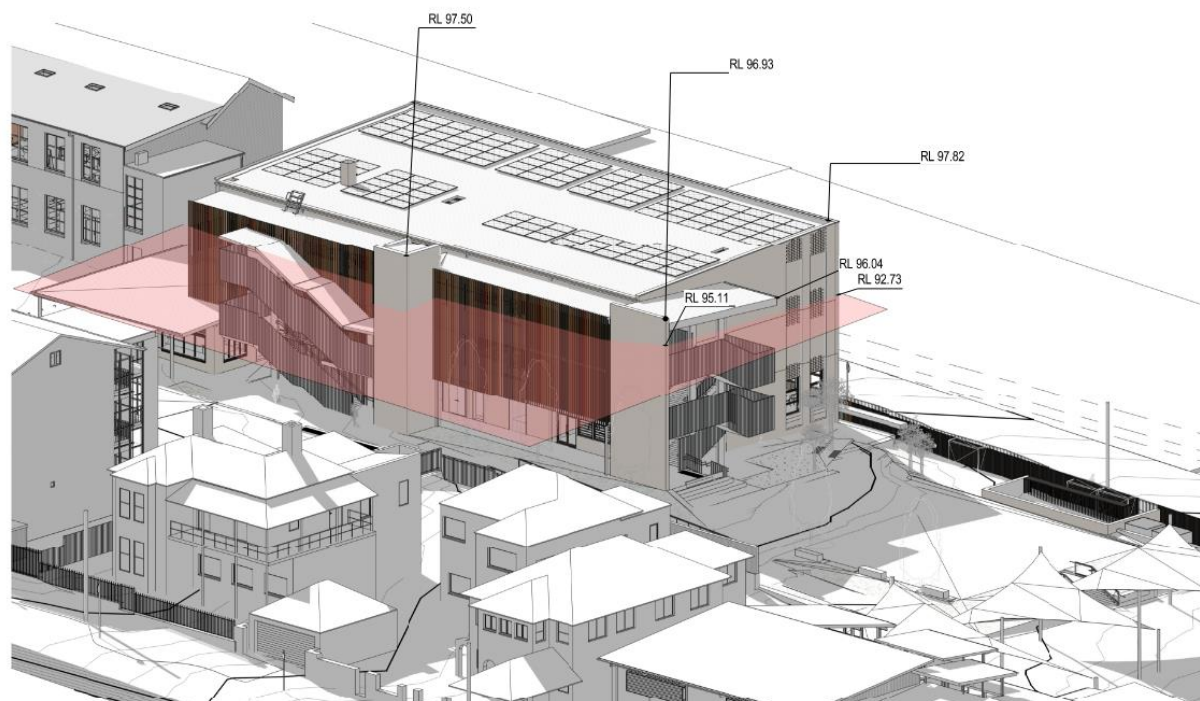
2 SECTION 3  
SCALE 1:100

Figure 6: Extract of Building L section through COLA, east-west (Source: DesignInc)



1 3D HEIGHT PLANE

Figure 7: Extract of height plane diagram looking north-west (Source: DesignInc)



## 2 3D HEIGHT PLANE2

Figure 8: Extract of height plane diagram looking north-east (Source: DesignInc)

The maximum proposed variation is 5.655 metres or 66.52% variation of the development standard.

Refer to the Architectural Drawings prepared by Design Inc for further detail.

## 5. UNREASONABLE OR UNNECESSARY

In this section it is demonstrated why compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as required by Clause 4.6(3)(a) of the NSLEP.

The Court has held that there are at least five different ways, and possibly more, through which an applicant might establish that compliance with a development standard is unreasonable or unnecessary (see *Wehbe v Pittwater Council* [2007] NSWLEC 827).

It is sufficient to demonstrate only one of these ways to satisfy clause 4.6(3)(a) (*Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118 at [22] and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [28]) and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31].

In this case, it is demonstrated below that Test 1 has been satisfied.

### 5.1. The objectives of the development standard are achieved notwithstanding non-compliance with the standard.

The objectives of the height of buildings development standard in Clause 4.3(1) the NSLEP are:

- *To promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,*
- *To promote the retention and, if appropriate, sharing of existing views,*
- *To maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,*
- *To maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,*
- *To ensure compatibility between development, particularly at zone boundaries,*
- *To encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area,*

These are discussed below.

#### **(a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient.**

The design of the building follows the natural fall of the land from north to south, to minimise the need for cut and fill and hence reduce the proposed height of the building and associated variation. The location of Building L has considered how the upgraded play space should be designed and function, and introduces a *Discrimination Disability Act* compliant north-south connection through the mid-line of the site. The indicative Building L excavation and fill is detailed in the below table and illustrated in the Bulk Earthwork Plan prepared by Enstruct for the Crown DA.



Table 1: Summary of excavation and fill for Building L

LOCATION	EXISTING LEVEL	FINISHED FLOOR LEVEL
On-site detention tank	RL82.13	RL81.62
South-east of the new building	RL84.21	RL84.87
Mid-west of the new building	RL84.71	RL84.87
North-mid of the new building	RL84.48	RL84.87

Building L is levelled to achieve DDA and EFSG compliance, and the design of the outdoor play space comprises various zones having regard to the existing land levels and transition from the main school campus at the north, to Kindyland in the south. The upgrades therefore conform to the natural gradient as much as is feasible considering the functional requirements of the building and the accessibility requirements across the ground floor plane. The extent of the variation as discussed in further detail below is the result of providing upgraded facilities in accordance with the EFSG and, the need to free up the ground plane to increase provision and improve the quality of the outdoor play space for students.

Therefore, objective (a) is achieved having regard to proposed Building L.

The alterations and additions to Buildings A and B are internal and hence no further consideration of (a) is required in respect to those works as there is no change in the relationship of those buildings to landform.

**(b) to promote the retention and, if appropriate, sharing of existing views.**

The site and surrounding locality are not subject to any view corridors or vistas under the NSDCP 2013. Therefore, objective (b) is not applicable.

**(c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development.**

**Existing surrounding dwellings**

*Building L*

Part 3 of the NSDCP 2013 states:

- *P1 Developments should be designed and sited such that solar access at the winter solstice (21st June) provides a minimum of 3 hours between the hours of 9.00am and 3.00pm to:*
  - (a) any solar panels;
  - (b) the windows of main internal living areas;
  - (c) principal private open space areas; and
  - (d) any communal open space areas.

*located on any adjoining residential properties.*

*Note: Main internal living areas excludes bedrooms, studies, laundries, storage areas.*

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- *P2 Despite P1 above, living rooms and private open spaces for at least 70% of any adjacent dwellings within a residential flat building or shoptop housing should receive a minimum of 2 hours of solar access between the hours of 9.00am and 3.00pm at the winter solstice (21st June).*
- *P3 The use, location and placement of photovoltaic solar panels take into account the potential permissible building form on adjoining properties.*

The shadow plans prepared by DesignInc confirm in accordance with the above NSDCP 2013 control that the three residential properties to the west of the site, 169- 173 Ben Boyd Road, and the properties on the eastern side of Bydown Street, achieve a minimum three hours of solar access to their principal private open space and living rooms during mid-winter. Based on aerial imagery and (limited) online available data, reasonable assumptions as to the location of the living rooms windows of the three Ben Boyd Road properties have been made to enable a solar assessment to be undertaken, refer to Figure 9.

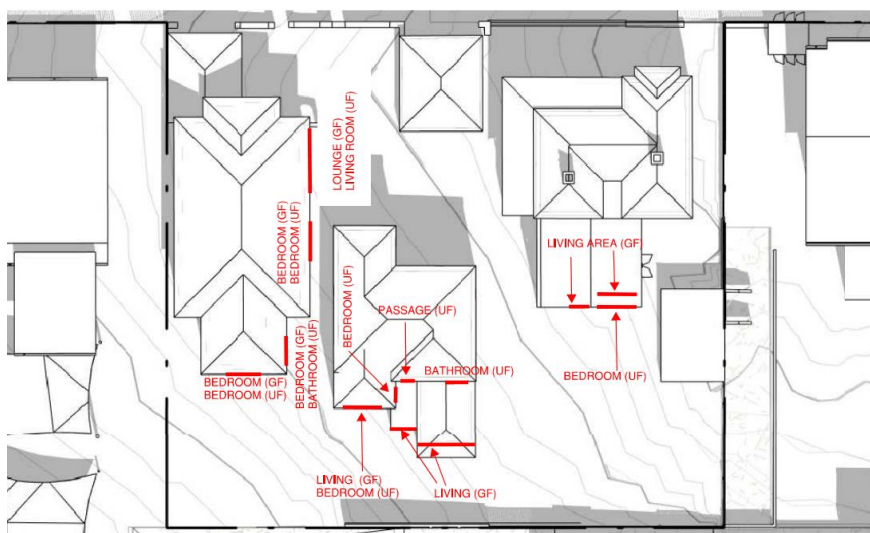


Figure 9: Location of living rooms of three Ben Boyd Road properties (Source: John Staff)

The following table summarises the solar access achieved at hourly intervals to the private open space and living rooms of affected neighbouring properties. This is based on drawings ADA 3501, 3503 and 3505 prepared by DesignInc.



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Table 2: Summary of solar access to 169- 173 Ben Boyd Road, POS and living rooms

TIME (MID-WINTER)	REAR POS			INTERNAL LIVING AREAS		
	169 BBR	171 BBR	173 BBR	169 BBR	171 BBR	173 BBR
9.00am	X	X	X (only a very small portion receives SA)	X (partial overshadowing from Building L, small amount SA received)	X (partial overshadowing from Building L, small amount SA received)	✓
9:30am	✓	✓ (small amount, but some)	✓	✓ (no impact Building L)	✓ (no impact Building L)	✓ (no impact Building L)
10.00am	✓	✓	✓	✓ (no impact Building L)	✓	✓ (no impact Building L)
10:30am	✓	✓	✓	✓ (no impact Building L)	✓	✓ (no impact Building L)
11.00am	✓	✓	✓	✓ (no impact Building L)	✓	✓ (no impact Building L)
11:30am	✓	✓	✓	✓ (no impact Building L)	✓	✓ (no impact Building L)
12.00pm	✓	✓	✓	✓	✓	✓ (no impact Building L)
12:30pm	✓	✓	✓	✓	✓	✓ (no impact Building L)
1.00pm	✓	✓	✓	✓	✓	X (no impact Building L)
1:30pm	✓ (small amount received, but shadow impact from self-shadowing)	✓ (small amount received, but shadow impact from self-shadowing)	✓	✓	✓	X (no impact Building L)
2.00pm	X (no impact from Building L)	✓ (small amount received, but shadow	X (no impact from Building L)	✓	X (no impact Building L)	X (no impact Building L)

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TIME (MID-WINTER)	REAR POS			INTERNAL LIVING AREAS		
	169 BBR	171 BBR	173 BBR	169 BBR	171 BBR	173 BBR
		impact from self-shadowing)				
2:30pm	X (no impact from Building L)	X (no impact from Building L)	X (no impact from Building L)	✓	X (no impact Building L)	X (no impact Building L)
3.00pm	X (no impact from Building L)	X (no impact from Building L)	X (no impact from Building L)	✓	X (no impact Building L)	X (no impact Building L)

DesignInc in their updated shadow analysis has quantified the solar loss to POS as a result of the proposal. The amendments to Building L, from that originally submitted, has in fact improved the overall solar loss in metres squared. The below table summarises this and is to be read in conjunction with drawings ADA 3501, 3503 and 3505 prepared by DesignInc.

Table 3: Solar loss and gain from original proposal to current (amended) proposal

TIME	PREVIOUS SOLAR LOSS	CURRENT SOLAR LOSS	SOLAR GAIN COMPARED TO ORIGINAL DESIGN
9.00am	313.10sqm to POS 3 BBR properties	307.02sqm to POS 3 BBR properties	6.08m <sup>2</sup>
9.30am	179.02sqm to POS 3 BBR properties	154.64sqm to POS 3 BBR properties	24.38m <sup>2</sup>
10.00am	37.30sqm to POS BBR properties	29.94sqm to POS 3 BBR properties	7.36m <sup>2</sup>
10.30am	None	1.76sqm to POS 3 BBR properties	N/A
11.00am	None	None	N/A
11.30am	None	None	N/A
12.00pm	The proposed shadow cast falls onto the footpaths and road of Bydown Street. This is considered negligible having regard to Council's solar access control.		
12.30pm			
1.00pm			
1.30pm			
2.00pm			
2.30pm	1,095.01sqm to footpaths of	1,026.59sqm to Bydown St	68.42m <sup>2</sup>

TIME	PREVIOUS SOLAR LOSS	CURRENT SOLAR LOSS	SOLAR GAIN COMPARED TO ORIGINAL DESIGN
	Bydown Street, Bydown Street and front yard POS of 9, 11, 13 and 17 Bydown Street	footpaths, Bydown Street and front yard POS of 11 and 13 Bydown Street and potentially front windows 17 Bydown Street	
3.00pm	1,398.02sqm to Bydown Street footpaths, Bydown Street and 9, 11, 13, 17 Bydown Street	1,253.26sqm to Bydown Street footpaths, Bydown Street, 9, 11, 13 and 17 Bydown Street	144.76m <sup>2</sup>

The impact is acceptable as a minimum 3 hours of solar access is maintained to these properties in accordance with the NSDCP 2013.

#### *Buildings A and B*

As the proposed works to Buildings A and B are contained within the existing envelope, there are no solar access or overshadowing impacts associated with the works in this Crown DA.

#### **Streets**

The proposed upgrades to Buildings A and B do not impact solar access to Ben Boyd Road or Yeo Street. The non-compliant portions of Building L cast a shadow as follows:

- 12.00pm mid-winter – shadow onto a small portion of the western footpath of Bydown Street, which is not considered to be of any material consequence as there will be no impact to the amenity or function of this part of the public domain;
- 1.00pm mid-winter – shadow onto a small portion of the western portion of Bydown Street itself and a small area of the western footpath, which is not considered to be of any material consequence as there will be no impact to the amenity or function of this part of the public domain;
- 2.00pm mid-winter – shadow onto the eastern portion of Bydown Street itself and, a small slither of the eastern and western footpaths, which is not considered to be of any material consequence as there will be no impact to the amenity or function of this part of the public domain; and
- 3.00pm mid-winter – shadow onto a small section of Bydown Street itself, the eastern footpath and very small area of the western footpath. The impact in this regard is considered to be acceptable as there will be no impact on the amenity or function of this part of the public domain.

#### **Public reserves**

No public reserves are affected by the proposal.

#### **Shadow diagrams**

Refer to the shadow analysis under objective (c) above and the shadow plans prepared by DesignInc.

Based on the above discussion, objective (c) is achieved.

**(d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings.**

The proposal, in the context of the height variation, maintains privacy for existing residents and promotes privacy for potential future residents of surrounding residential buildings/dwellings. DesignInc has prepared a privacy analysis/separation plan in the Architectural Plans, extracted below.

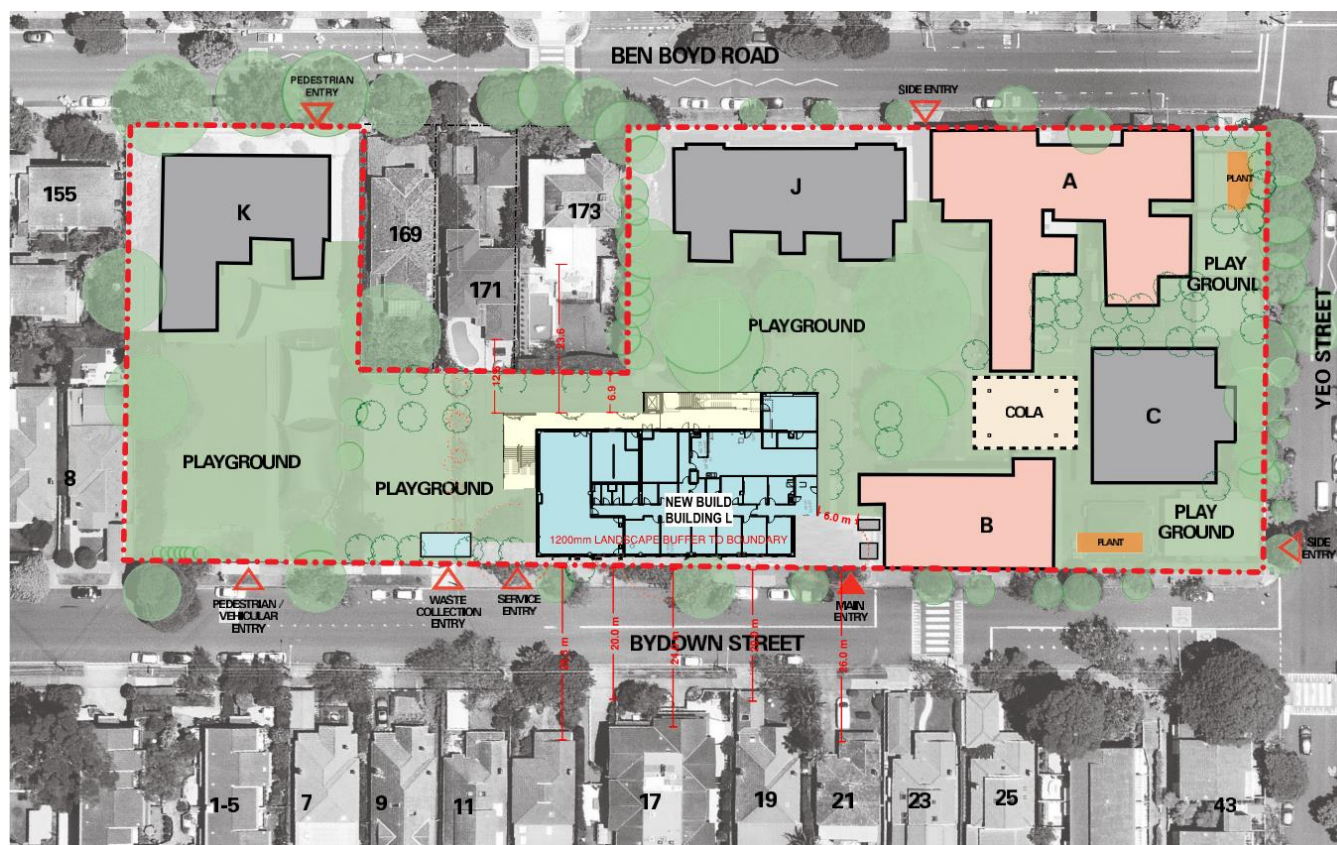


Figure 10: Extract of separation distance analysis (Source: DesignInc)

The development incorporates several design measures that mitigate any potential for a reduction in privacy to surrounding properties. A key focus of the design development process has been duly considering potential impacts onto 169- 173 Ben Boyd Road and its relationship to Building L. The separation distances, proposed materials of the circulation zone for the new building and existing/proposed landscape buffers all successfully mitigate privacy. Proposed privacy measures include:

- A minimum 6.9 metre separation from the eastern boundary of 173 Ben Boyd Road to the treated circulation zone of the new building. The treated circulation zone includes coloured battens to screen the western elevation of the new building;

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- A minimum 12.6 metre separation from the eastern elevation of the dwelling at 171 Ben Boyd Road;
- A minimum 23.6 metre separation from the eastern elevation of the dwelling at 173 Ben Boyd Road;
- The treatment of the circulation zone on the western elevation of the new building with battens (with their colour subject of further consultation with the school and Indigenous community), providing visual screening to minimise opportunities for overlooking;
- The separation distance from the eastern elevation of the new building to the residential properties on Bydown Street ranges from a minimum of 20 metres to 26.3 metres. Given the orientation of those dwellings (with the primary open space orientated to the east, away from the school site), these separation distances are sufficient to mitigate any overlooking in this regard; and
- The ground floor of the new building is treated with a 1.2 metre landscape buffer, comprising hedge screening the ground floor mass of the new building.



NOTE: SCREEN AND BALUSTRADE COLOURS SUBJECT TO REVIEW WITH SCHOOL AND INDIGENOUS CONSULTANT

Figure 11: Extract of Building L western elevation render (Source: DesignInc)

The alterations and additions to Buildings A and B are internal and hence do not give rise to any privacy impacts.

Therefore, objective (d) is achieved.

**(e) to ensure compatibility between development, particularly at zone boundaries.**

Majority of the site is zoned SP2 Infrastructure with 16 Bydown Street zoned R2 Low Density Residential. The R2 commences from the eastern boundary of the site and moves eastward, see overleaf.



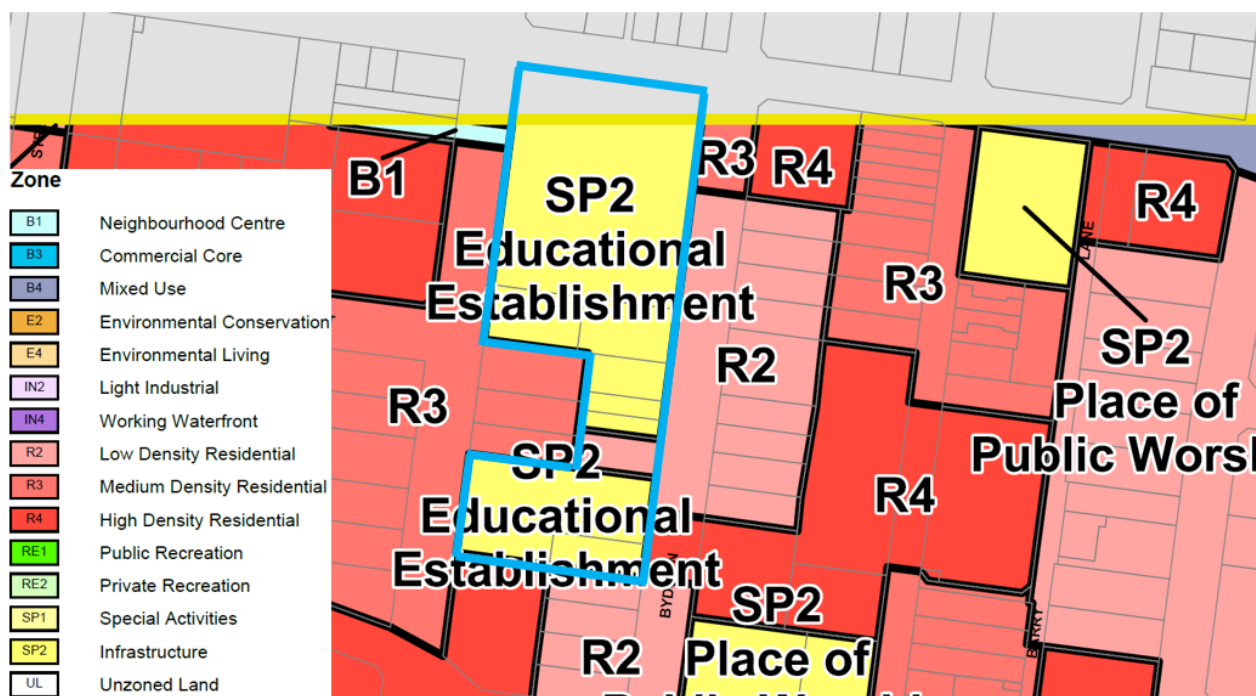


Figure 12: Extract of zoning map (Source: NSW Legislation)

The proposed Building L is compatible with surrounding development with the following design measures adopted to achieve this:

- The choice of materiality, taking cues from the heritage buildings on the site and the different treatment of the eastern and western façade which appropriately respond to the context of the site;
- The introduction of a 1.2 metre landscape hedge setback, taking on board Council's feedback and ensuring a balanced outcome have regard to SINSW requirements and site planning;
- The eastern elevation of the new building is separated a minimum distance of 20 metres across Bydown Street, providing a generous separation distance that assists in the transition in development outcomes from the SP2 zone applying to the school site and the R2 zoned dwellings on the eastern side of Bydown Street; and
- Sufficient separation distance and treatment of the western façade of Building L ensuring the upgrades are compatible with the nature and scale of 169- 173 Ben Boyd Road, which by virtue of their location are bounded by the school lots. The proposed treatment of the western façade of Building L breaks up the mass and scale through the use of battens. These are intended to be colourful and will be subject of further consultation with the school and Indigenous community. The existing landscaping also aids screening the built form.

Compatible does not mean "consistent" and hence having regard to the development and height variation, the proposal is compatible with other nearby/adjoining development and objective (e) is achieved.

**(f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area.**

The site is located in the Neutral Bay Planning Area identified in Section 7 of the North Sydney Development Control Plan 2013 (NSDCP). In particular, the site is located in the Forsyth Neighbourhood. This is the relevant character statement for the site/area, see below figure.

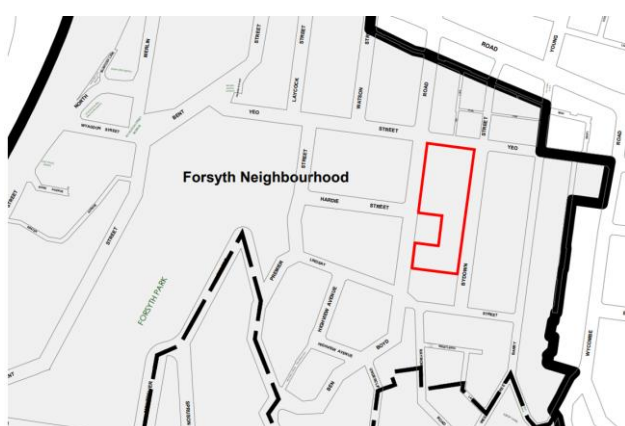


Figure 13: Extract of Neutral Bay Planning Area, approximate site boundaries outlined in red (Source: NSDCP 2013)

The NSDCP identifies the significant elements of the Forsyth neighbourhood, as it does for all neighbourhoods. Hence, in the context of the proposed contravention to the height of buildings development standard, the proposal promotes the character of the area as:

- The additional mass has enabled the ground plane to be freed up to provide much needed open play space for students at 6.9m<sup>2</sup> per student from the existing 4.2m<sup>2</sup> per student;
- Building L is consistent with the general height of built form at the school site, notably Buildings A, B and J and this has been confirmed by City Plan Heritage in the Heritage Impact Statements accompanying the subject Crown DA;
- The school will continue to operate without adverse effect on the surrounding neighbourhood, noting there is no increase in staff or student numbers, hence no additional traffic impacts;
- An appropriate stormwater plan will be in place to capture runoff and sediment and erosion will be managed during construction;
- Refer above in this Request for discussion regarding overshadowing and solar access;
- The roof design seeks to minimise the extent of the height variation; and
- Bulk and scale of the building has been minimised where feasible without compromising compliance with EFSG requirements and hub layouts.

The new building will inevitably introduce additional mass and built form on the eastern portion of the school site. The local views from the residential properties on Bydown Street will hence change, though the scale is commensurate with that of existing Building B. There will be some loss of the sky and tree line on the school site, but arguably an improved outlook with provision of a high quality built form. The view from Ben Boyd Road is mostly unchanged given the existing structures and vegetation which screen the proposed built form of Building L.

Therefore, the proposal delivers an appropriate scale new building which responds to the character of the site and area, and balances environmental constraints and impacts onto surrounding residential properties to the west and east.

The works proposed to Buildings A and B are within the existing/already established height structure. These are key contributors to the mass and scale of development on the site and surrounding neighbourhood. The works are in accordance with the character of the area.

Objective (f) is achieved.

**(g) to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone E4 Environmental Living.**

16 Bydown Street is zoned R2 Low Density Residential pursuant to the NSLEP 2013, noting this is a zoning anomaly. SINSW acquired the site in 2021 and hence the lot forms part of the development proposal. All school lots (excluding the Kindyland) are proposed for consolidation as part of this Crown DA. Hence, objective (g) as it relates to the school development is achieved.

As demonstrated, the objectives of the height of buildings development standard (in Clause 4.3(1) of the NSLEP) are achieved notwithstanding the proposed contravention.

In accordance with the decision in *Wehbe v Pittwater Council* [2007] NSWLEC 827, *Initial Action Pty Limited v Woollahra Municipal Council* [2018] NSWLEC 118, *Al Maha Pty Ltd v Huajun Investments Pty Ltd* (2018) 233 LGERA 170; [2018] NSWCA 245, *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 and *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 at [31], therefore, compliance with the height development standard is demonstrated to be unreasonable or unnecessary and the requirements of clause 4.6(3)(a) have been met on this way alone.

For the sake of completeness, the other recognised ways are considered as follows.

- 5.2. The underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;

The underlying objective or purpose is relevant to the development and therefore is not relied upon.

- 5.3. The objective would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

The objective would not be defeated or thwarted if compliance was required. This reason is not relied upon.

- 5.4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence the standard is unreasonable and unnecessary; or

The development standard has not been virtually abandoned or destroyed by Council's own actions in granting consents departing from the standard. This reason is not relied upon; however, it is noted that there are other buildings on the existing school site (namely 154 Ben Boyd Road, 604 Watson Street and Buildings A and B on the school site) that exceed the HOB standard.



5.5. The zoning of the land is unreasonable or inappropriate.

This reason is not relied on.

## 6. SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS

In *Initial Action Pty Ltd v Woollahra Council* [2018] NSWLEC 118, Preston CJ observed that in order for there to be 'sufficient' environmental planning grounds to justify a written request under Clause 4.6 to contravene a development standard, the focus must be on the aspect or element of the development that contravenes the development standard, not on the development as a whole.

In *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, Pain J observed that it is within the discretion of the consent authority to consider whether the environmental planning grounds relied on are particular to the circumstances of the proposed development on the particular site.

The relevant environmental grounds and the statutory planning objectives achieved are as follows:

- The current significant shortfall of play space (4.49m<sup>2</sup>) is well below the recommendation of 10m<sup>2</sup> per student. The variation from the height development standard enables the freeing up of the ground plane to provide approximately 7m<sup>2</sup> of play space per student (2.51m<sup>2</sup> increase per student). The absence of the height variation would mean the new learning spaces would occupy additional play space at ground level and result in a poor planning, design, and community outcome. This achieves the following key objectives in the Act and NSLEP noted below in *italics*.
- The proposed mass and scale of proposed Building L are driven by the need to upgrade the out-dated learning facilities on the site to achieve compliance with the EFSG requirements and hub layouts and respond to the drivers set out in the Treasury approved Business Case for the project dated 31 January 2020. This achieves the following key objectives in the Act and NSLEP as follows:
  - in the Act – the objective in 1.3(a) to '*promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources*'; and
  - in the NSLEP – the aim in clause 1.2(aa) to '*protect and promote the use and development of land for arts and cultural activity, including music and other performance arts*'.
- The contravention of the standard enables the provision of additional learning spaces which achieve contemporary requirements. This achieves the following key objectives in the Act and NSLEP:
  - in the Act – the objective in 1.3(c) to '*promote the orderly and economic use and development of land*'; and
  - in the NSLEP – the aim in clause 1.2(a) to '*promote development that is appropriate to its context and enhances the amenity of North Sydney community and environment*'.
- The extent of the variation of Building L has been reduced since the original submission by 0.641 metres. This reduction has resulted from removal of the COLA at the southern end of Building L and associated overhang on level 2, internal spatial replanning, redesign of the external stairs and replanning of the servicing including lift shaft. This has allowed a reduction in the overall mass of the building. This achieves the following key objectives in the Act and NSLEP:
  - in the Act – the objective in 1.3(g) to '*promote good design and amenity of the built environment*'; and
  - in the NSLEP – the aim in clause 1.2(b)(i) to '*ensure that new development is compatible with the desired future character of an area in terms of bulk, scale and appearance*'.
- The shadow analysis prepared by DesignInc confirms the residential properties at 169- 173 Ben Boyd Road (west of the site) and the eastern side of Bydown Street continue to receive a sufficient level of solar access between

9.00am and 3.00pm mid-winter, notwithstanding the proposed height variation for Building L. This achieves the following key objectives in the Act and NSLEP:

- in the Act – the objective in 1.3(g) quoted above; and
  - in the NSLEP – the aim in clause 1.2(b)(i) quoted above and 1.2(d)(ii) to *'ensure that non-residential development does not adversely affect the amenity of residential properties and public places, in terms of visual and acoustic privacy, solar access and view sharing'*.
  - The upgrades afford a high level of privacy through separation distances, materiality which responds to the heritage context of the site/area, landscape hedge buffer at the ground floor eastern elevation of Building L, existing trees in the mid-west of the site and varied treatment of the eastern and western facades of Building L. This achieves the following key objectives in the Act and NSLEP:
    - in the Act – the objective in 1.3(g) quoted above; and
    - in the NSLEP – the aim in clause 1.2(d)(i) and 1.2(d)(ii) quoted above
  - The proposal has been amended to remove the previously proposed COLA structure in the original DA submission. This achieves the following key objectives in the Act and NSLEP:
    - in the Act – the objective in 1.3(c) quoted above, 1.3(f) to *'promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage)* and 1.3(g) quoted above;
    - in the NSLEP – the aim in clause 1.2(d)(i) and 1.2(d)(ii) quoted above.
  - There are no view corridors affecting the site or nearby in the locality. This achieves the following key objectives in the Act and NSLEP:
    - in the Act – the objective in 1.3(g) quoted above; and
    - in the NSLEP – the aim in clause 1.2(d)(ii) quoted above.
  - The internal alterations and additions to Buildings A and B do not result in any environmental impacts as there is no change to the existing envelopes/height of those buildings. However, they have been considered in this request for the avoidance of doubt/for completeness. This achieves the following key objectives in the Act and NSLEP:
    - in the Act – the objective in 1.3(c) and 1.3(f) quoted above; and
    - in the NSLEP – the aim in clause 1.2(a), b(ii) and d(i) quoted above.
- and;
- The contravention does not detract from the development's achievement of the objective of the height development standard and the objectives of the zone (discussed further below).

For completeness we note that the size of the variation (66.52%) is not in itself a material consideration as to whether the variation should be allowed. There is no constraint on the degree to which a consent authority may depart from a numerical standard under clause 4.6: *GM Architects Pty Ltd v Strathfield Council* [2016] NSWLEC 1216 at [85].

Some examples that illustrate the wide range of commonplace numerical variation to development standards under clause 4.6 (as it appears in the Standard Instrument) are as follows:

- In *Baker Kavanagh Architects v Sydney City Council* [2014] NSWLEC 1003 the Land and Environment Court granted a development consent for a three storey shop top housing development in Woolloomooloo. In this decision, the Court, approved a floor space ratio variation of 187 per cent.

- In *Abrams v Council of the City of Sydney* [2019] NSWLEC 1583 the Court granted development consent for a four-storey mixed use development containing 11 residential apartments and a ground floor commercial tenancy with a floor space ratio exceedance of 75 per cent (2.63:1 compared to the permitted 1.5:1).
- In *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 the Court granted development consent to a six-storey shop top housing development with a floor space ratio exceedance of 42 per cent (3.54:1 compared to the permitted 2.5:1).
- In *Artazan Property Group Pty Ltd v Inner West Council* [2019] NSWLEC 1555 the Court granted development consent for a three storey building containing a hardware and building supplies use with a floor space ratio exceedance of 27 per cent (1.27:1 compared to the permitted 1.0:1).
- In *Stellar Hurstville Pty Ltd v Georges River Council* [2019] NSWLEC 1143 the Land and Environment Court granted development consent for 12-storey residential tower, on the basis of a clause 4.6 request, with a floor space ratio exceedance of 8.3 per cent.
- In *88 Bay Street Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1369 the Land and Environment Court granted development consent for a new dwelling house, swimming pool and landscaping at 6 Bayview Hill Road, Rose Bay with a height exceedance of 49 per cent (14.16m compared to the permitted 9.5m).

In short, Clause 4.6 is a performance-based control, so it is possible (and not uncommon) for large variations to be approved with sufficient justification.

## 7. PUBLIC INTEREST

In this section it is explained how 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. This is required by Clause 4.6(4)(a)(ii) of the NSLEP.

### 7.1. HOB Development Standards

In Section 5 it was demonstrated that the proposed development achieves the objectives of the development standard notwithstanding the contravention of the development standard.

### 7.2. Objectives of the School Site Zones

Table 4 and 5 demonstrates the proposal is consistent with the objectives of the zones.

*Table 4: Consistency with SP2 zone objectives.*

Objectives of the SP2 Infrastructure (Educational Establishment) Zone	Discussion
To provide for infrastructure and related uses.	Notwithstanding the contravention, the proposed upgrades improve the school learning facilities, consistent with this objective.
To prevent development that is not compatible with or that may detract from the provision of infrastructure.	Notwithstanding the contravention, the development is compatible with the provision of upgraded educational infrastructure needed at the site. In fact, the provision of additional/upgraded school facilities in the built form (and height) in which they are currently proposed ensures the infrastructure outcome is a balanced one, that achieves operational design compliance, without impacting the surrounds. Strict compliance with the height standard would result in a development outcome on the site that does not align with the required provision of infrastructure as set out in the EFSG and the Business Case for the project and the learning needs of the catchment.

*Table 5: Consistency with the R2 zone objectives*

Objectives of the R2 Low Density Residential Zone	Discussion
To provide for the housing needs of the community within a low density residential environment.	As discussed in this Request, 16 Bydown Street is zoned R2 Low Density Residential. Regardless, the proposal is for school development and does not limit provision of housing on other sites. The subject development facilitates the orderly redevelopment of 16 Bydown Street as part of the school site.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	Notwithstanding the contravention, the upgrades provide improved educational infrastructure for the school catchment which meets day-to-day needs of students and the school community.
To encourage development of sites for low density housing, including dual occupancies, if such development does not compromise the amenity of the	As per the response to objective (a), the zoning of 16 Bydown Street is an anomaly and the proposal facilitates the orderly redevelopment of the lot as part of the school site.

Objectives of the R2 Low Density Residential Zone	Discussion
surrounding area or the natural or cultural heritage of the area.	
To ensure that a high level of residential amenity is achieved and maintained.	As demonstrated in Section 5 of this Request, the proposal maintains a high level of residential amenity on surrounding sites.

As demonstrated in the above tables, the proposal is consistent with the objectives of the zone and in Section 5 it was demonstrated that the proposal is consistent with the objectives of the development standard. According to Clause 4.6(4)(a)(ii), therefore, the proposal is in the public interest.

## 8. STATE OR REGIONAL ENVIRONMENTAL PLANNING

This section considers whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, the public benefit of maintaining the development standard, and any other matters required to be taken into consideration by the Secretary before granting concurrence required by Clause 4.6(5).

There is no identified outcome which would be prejudicial to planning matters of State or regional significance that would result as a consequence of contravening the development standard as proposed by this application.

As demonstrated, the proposal is consistent with the objectives of the zone and the objectives of the development standard and in our opinion, there are no additional matters which would indicate there is any public benefit of maintaining the development standard in the circumstances of this application.

Finally, we are not aware of any other matters required to be taken into consideration by the Secretary before granting concurrence.

The Secretary (of Department of Planning, Industry and Environment) can be assumed to have concurred to the variation. This is because of Department of Planning Circular PS 20–002 ‘Variations to development standards’, dated 5 May 2020. This circular is a notice under Section 55(1) of the *Environmental Planning and Assessment Regulation* 2021.

A consent granted by a consent authority that has assumed concurrence is as valid and effective as if concurrence had been given. The circular provides for assumed concurrence.

The Secretary can be assumed to have given concurrence to the variation, provided that the determination is not made by a delegate of the Council. (It should be noted that a panel and the Land and Environment Court are not delegates of the Council).

## 9. CONCLUSION

This submission requests a variation, under Clause 4.6 of the NSLEP, to the height of buildings development standard and demonstrates that:

- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this case;
- The development achieves the objectives of the development standard and is consistent with the objectives of the SP2 and R2 zones; and
- There are sufficient environmental planning grounds to justify the contravention.

In the case of Building A and B, there is no unreasonable outcome given there is no change to the existing envelopes and established heights of the existing buildings.

In the case of Building L, the EFSG requirements and educational needs of the catchment, as set out in the Business Case dated January 2020, have driven the proposed built form, and been appropriately balanced with the site analysis and understanding of environmental impacts. Strict compliance with the height standard would result in a lower building. However, the floor area would need to be accommodated elsewhere on-site, impacting play space, resulting in an inferior outcome to that proposed in the subject Crown DA. As demonstrated in this Request, the impacts to the surrounds are acceptable or mitigated through design measures. The consent authority can be satisfied that the development achieves the objectives of the development standard and is consistent with the objectives of SP2 and R2 zones notwithstanding non-compliance with the height of buildings development standard and is therefore in the public interest

The concurrence of the Secretary can be assumed in accordance with Planning Circular PS 20-002.

On this basis, therefore, it is appropriate to exercise the flexibility provided by Clause 4.6 in the circumstances of this application.