

## 5.0 Request to Vary a Development Standard

Clause 4.6 of the LEP 2014 allows Council to grant consent for development even though the development contravenes a development standard imposed by the LEP. The Clause aims to provide an appropriate degree of flexibility in applying certain development standards to achieve better outcomes for and from development.

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

- that the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- that the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and
- that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

The consent authority's satisfaction as to those matters must be informed by the objective of providing flexibility in the application of the relevant control to achieve better outcomes for and from the development in question.

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

These tests and considerations can also be applied to the assessment of variations under Clause 4.6 of the LEP and other standard LEP instruments. Accordingly, this Clause 4.6 variation request is set out using the relevant principles established by the Court.

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

### 5.1 Development Standard to be Varied

The development standard to be varied as part of this application is Clause 4.3 Height of Buildings' relating to maximum building heights permitted. The objective of Clause 4.3 is:

- (a) to ensure the height of buildings are appropriate for their location,
- (b) to permit building heights that encourage high quality urban form.

Under LEP 2014 multiple height limits apply to the site (see **Figure 24**). A maximum height of 8.5 metres applies to the majority of the Lake Site and all of the Triangle Site. A maximum height of 5.5 metres applies to the 100 Acre Woods Site and along the waterfront of the Lake Site.

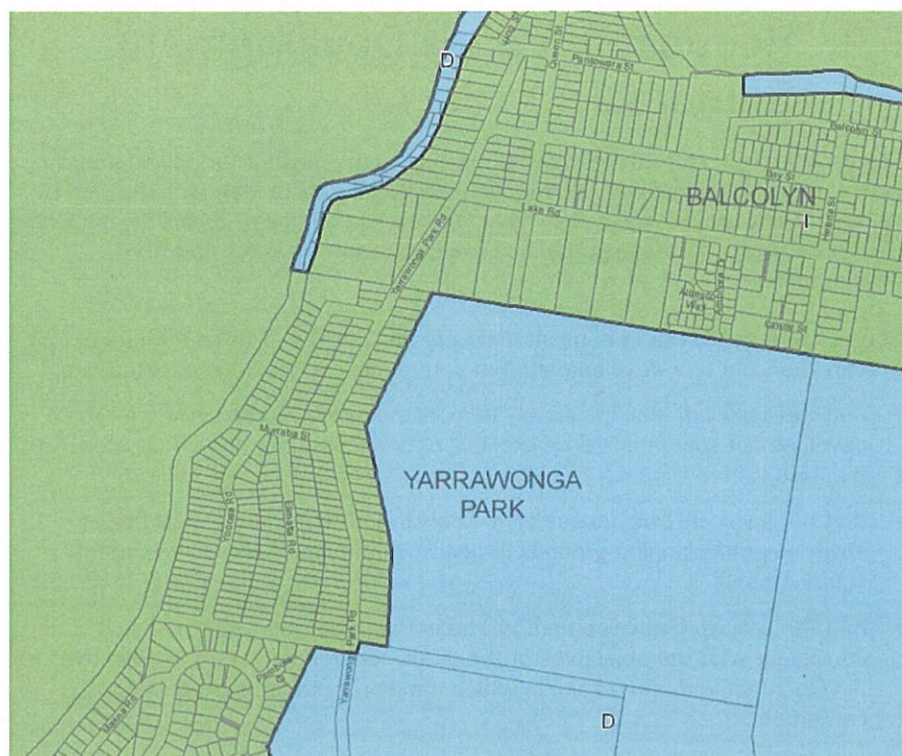


Figure 24 – LEP Height Plan

The LEP height limits reflect the typical land use / built form for each of the zones, being detached houses in R2 Low Density Residential zone and low impact uses in the E2 Environmental Conservation zone.

The proposed variation's to the maximum height development standard only occur on the Lake Site. The principle reason for the variations reflect either the specific use and nature of those buildings or the topography of the site. A summary of each of the non-complying buildings and the primary reason for the variation is set out in Table 2 below. Figure 25-28 provide Elevations of the buildings demonstrating the nature of the topography.

Table 3 – Summary of building height variations

Building	Maximum Height	Variation	Reasons
Boat House	8.51m	3.0m	Unique recreation use and Topography
Dining Hall	?m	?m	Unique use and topography
Multi-purpose Hall	9.51m	1.01m	Unique recreation use that requires specific ceiling heights.
Lodge	?m	?m	Topography
Cabins*	8.62m	0.12m	Topography
Climbing Towers	14.95m	6.45m	Unique recreation use that is for the purposes of climbing and therefore must be above the height limit

\* reflects typical cabin, noting each is slightly different depending on the existing ground level





Figure 25 – The Boat House



Figure 26 – The Lodge

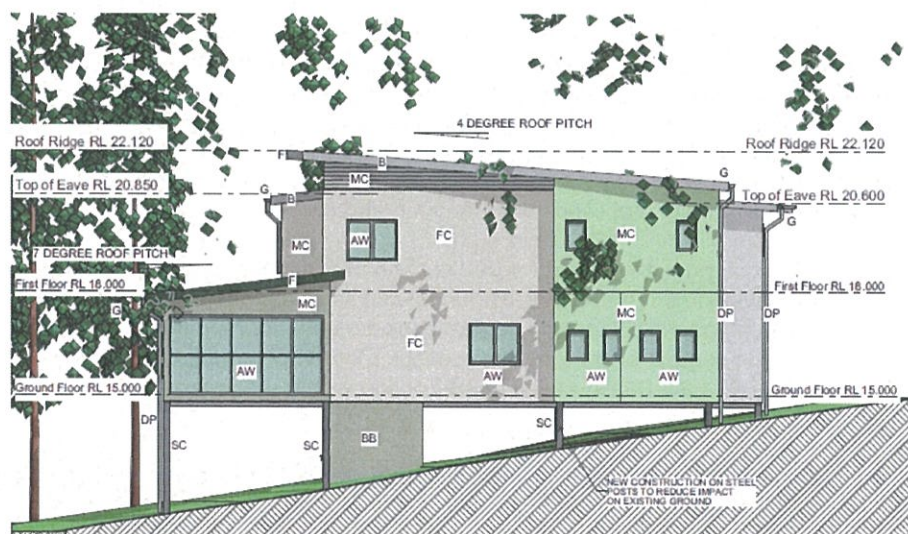


Figure 27 – Cabin



Figure 28 – Dining Hall

## 5.2 Justification for Contravention of the Development Standard

### 5.2.1 Compliance with the development standard is unreasonable or unnecessary in the circumstances of the case

Clause 4.6(3)(a) of the LEP requires the departure from the development standard to be justified by demonstrating:

*that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*

In the decision of *Wehbe v Pittwater Council* [2007] NSW LEC 827, which provides case law relating to SEPP 1 Objections, Chief Justice Preston expressed the view that there are five different ways in which a variation to a development standard might be shown as unreasonable or unnecessary. Of particular relevance in this instance is way one, that a development standard might be shown as unreasonable or unnecessary if 'the objectives of the standard are achieved notwithstanding non-compliance with the standard'.

Table 4 demonstrates that the proposed variation to the height standard will still result in a development that achieves the objectives of the height of buildings development standard. The response also considers the appropriateness of the proposal in the context of the objectives of the E2 Environmental Conservation Zone and the R2 Low Density Residential Zone in which the proposal is located.

Table 4 – Assessment against relevant LEP objectives

Objective	Proposal
<b>4.3 Height of Buildings</b>	
(a) To ensure the height of buildings are appropriate for their location;	The LEP height limits reflects the desired height for the typical development envisaged within the zone, being detached residential dwellings. The Crusaders use of the site, which predates the residential character of the area, and size of the site is unique, and accordingly the built form associated with that use does not specifically follow the typical development outcome that might otherwise occur in an R2 or E2 zone. The proposed height and siting of the non-compliant buildings has been informed by a detailed site analysis that seeks to balance the various competing considerations on the site, and as demonstrated throughout Section 4.0, the impact associated with the proposed development are appropriate in their context. Specifically we note that the variations will not result in any adverse overshadowing or visual impacts. As demonstrated in <b>Figures 23-26</b> the buildings are typically a two storeys,



Objective	Proposal
	consistent with the desired built form character, however, the dramatic slope of the site results in them exceeding the limit they would otherwise comply with if it was flat. Therefore despite varying with the height limit, the height of the proposed buildings are still appropriate for their location, noting the size of the site and its historical and unique use.
(b) To permit building heights that encourage high quality urban form	The proposed buildings variations are driven by the desire to achieve a high quality urban form. For example, the multi-purpose hall requires approximately 8.5m in order to have sufficient clearance to be able to play basketball etc, however in order to enable natural ventilation to occur for sustainability purposes, and create a higher quality architectural outcome for the building, a pitch has been introduced to the roof. The roof form therefore results in a non-compliance with the standard but an improved urban form as desired by the objective of the control. Similarly with the Dining Hall Building, the unique nature of the use drives the need to have a higher floor to ceiling to achieve better amenity for the space whilst enabling natural ventilation to occur for sustainability. Therefore despite varying the height limit, this building again will achieve a higher quality urban form than a complying one because of its unique use.
<b>Clause 2.3 E2 Environmental Conservation (applies to the Boat House)</b>	
To protect manage and restore areas of high ecological, scientific, cultural or aesthetic values.	The proposed boat house, which replaces an existing boathouse in the same location, has been designed to maintain the aesthetic values of Lake Macquarie (see Section 4.3 and <b>Appendix H</b> ).
To prevent development that could destroy, damage or otherwise have an adverse effect on those values.	In accordance with the recommendations of suitability qualified sub-consultants, the proposal adopts various strategies and measures to prevent any adverse effect on ecological, scientific, cultural or aesthetic values.
To conserve, enhance and manage corridors to facilitate species movement, dispersal and interchange of genetic material.	N/A
To encourage activities that meet conservation objectives	Boat sheds form part of the character of Lake Macquarie and is consistent with the types of activities envisaged in the E2 zone, noting that it is an explicitly listed land use.
To enhance and manage areas affected by coastal processes	N/A
<b>Clause 2.3 R2 Low Density Residential (Applies to the remainder of the Lake Site)</b>	
To provide for the housing needs of the community within a low density residential environment.	N/A
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	N/A
To encourage development that is sympathetic to the scenic aesthetic and cultural heritage qualities of the built and natural environment.	The proposal has given due consideration to the scenic aesthetic and cultural heritage qualities of the built and natural environment. Specifically, landscaping, the materiality of the buildings and the adopted colour pallet have been designed to integrate the proposal with the surrounding landscape. The height variations are minor and concealed by landscaping, therefore preventing any impact on the scenic aesthetic and cultural quality of the built and natural environment.

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

Clause 4.6(3)(b) of the LEP requires the departure from the development standard to be justified by demonstrating:

*that there are sufficient environmental planning grounds to justify contravening the development standard.*

In *Four2Five*, the Court found that the environmental planning grounds advanced by the applicant in a Clause 4.6 variation request must be particular to the circumstances of the proposed development on that site.

There are particular constraints that affect the site which inhibit the development's ability to achieve strict compliance with the building height standard. These are detailed below:

#### Unique Use

Crusaders has operated on the site for over 70 years, and pre-dates Balcolyn's establishment as a residential area. As detailed in Section 1.1.3, no major works have been undertaken on the site since the 1970's and in order to meet contemporary guests' expectations, the changing regulatory environment, and the increased size of school years / groups the site needs to be redeveloped. However, the specific types of building necessary to support the use, such as climbing towers, the boat house, dining hall and multi-purpose hall result in variations to the development standard.

Therefore the unique and historical use of the site is grounds for the variation as without them the site would not be able to operate in a manner that meets the contemporary requirements of such a use.

#### Site Constraints

The slope and topography are key features that affect the building design and the various non-compliances with the building height standard. The natural elevation of the site is 0m from the water to a maximum of 16.5 metres to the east.

The developable areas of the site have been determined by a detailed analysis of the constraints. The considerations which informed the siting of buildings include:

- the identified aboriginal heritage sites;
- areas cleared or free of significant trees and biodiversity;
- geotechnically unstable areas;
- the required bushfire asset protection zones; and
- the 36 metre foreshore building line and visual catchment from the Lake.

The proposed design therefore seeks to balance the complex environmental constraints to minimise the impacts of the development, whilst maximising its functionality and amenity. However, this has in some cases resulted in building's being sited in steep locations, which they might have otherwise not been located, or take a two storey form instead of either two one storey buildings, in order to minimise the impacts of the development. Complying with the height control would reduce the amount of open space across the site, necessitating the removal of more vegetation and potentially encroach on ecological corridors, aboriginal heritage sites, bushfire prone or visually prominent areas.

The proposed variations therefore achieve a superior planning outcome to a complying development, and is sufficient environmental planning ground to vary the standard.

### 5.2.3 Public Interest

Clause 4.6(4)(a)(ii) of the LEP requires that development consent must not be granted for development that contravenes a development standard unless the consent authority is satisfied 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.



As considered in detail in Section 5.2.1 above, despite the non-compliance with the building height standard, the proposal is considered to be in the public interest as it nevertheless satisfies the objectives of both zones and the objectives of the development standard.

### 5.3 Secretary's Concurrence

It is understood that the Secretary's concurrence under clause 4.6(5) of LEP 2014 has been delegated to Council. The following section provides a response to those matters sets out in clause 4.6(5) which must be considered by Council under its delegated authority:

***Whether contravention of the development standard raises any matter of significance for State or regional environmental planning.***

The contravention of the development standard does not raise any matter of significance for State or regional planning.

***The public benefit of maintaining the development standard.***

Maintaining the development standard would not result in any public benefit in this situation. Enforcing the building height would restrict the types of buildings the inclusion of recreational facilities that enhance amenity and the safety of patrons of the camp. Further, it is likely a reduction in the building height would necessitate an increase to the extent of the building floor plates, resulting in a greater reduction in open space and the increased removal of vegetation.

In addition to the above, the development as a whole will deliver a number of public benefits to the area, including:

- Providing a range of outdoor recreation activities of high quality design that contribute to the amenity of the camp;
- Accommodate modern buildings and facilities that will cater to the needs of the community and encourage tourism in the area;
- Promoting ecological sustainability, water sensitive urban design, and sustainable drainage systems including in the public reserve; and
- Adopts a design that responds to ecology, Aboriginal heritage and unique landscape qualities of the area.

***Any other matters required to be taken into consideration by the Director-General before granting concurrence.***

No other matters require consideration by the Director-General. The proposed variation will allow the orderly redevelopment of the site and will better service future occupants of the building.

## 6.0 Conclusion

This DA seeks approval for redevelopment and expansion of Crusaders Lake Macquarie Outdoor Recreation Centre at Yarrawonga Park Road, Balcolyn.

The proposal is the result of long-term planning to facilitate expansion and upgrade of the existing Crusaders facility which has operated on the site for over 70 years. With the last major works occurring in the 1970s, the proposal provides for the much needed modernisation of the site, which is essential to respond to the changes in education, contemporary expectations of guests, and increased regulatory environment.

The design is the outcome of a detailed site analysis to ensure that the expanded development responds to the various environmental constraints that effect the site.

This SEE demonstrates that the proposed development will not give rise to any significant adverse environmental effects which cannot be managed or mitigated.

The proposed development seeks to balance the complex environmental constraints to minimise the impacts of the development, whilst maximising its functionality and amenity. Whilst the proposal does require a variation to the building height development standard, the proposed variations achieve a superior planning outcome to a complying development, and there are sufficient environmental planning grounds to vary the standard.

In addition to the significant social benefits provided by the facility in the education and enrichment of school children, the development will provide a range of other benefits in the form of:

- the long-term management and care of 40 Ha of previously neglected bushland that was used for illegal activities;
- additional employment during the construction and operational phases of the development;
- additional visitors to the Lake Macquarie area who will spend in the local businesses.

In light of the above, and the detailed assessment of the proposal herein, we have no hesitation in recommending this DA be approved.