

CLAUSE 4.6 EXCEPTION TO DEVELOPMENT STANDARDS CLAUSE 4.3 HEIGHT OF BUILDINGS

INDOOR SPORTS STADIUM (BASKETBALL FACILITY)

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1. INTRODUCTION

Development standards are a means to achieving an environmental planning objective and can be numerical or performance based. Some developments may achieve planning objectives despite not meeting the required development standards. The planning system provides flexibility to allow these objectives to still be met by varying development standards in exceptional cases.

This submission has been prepared with regards to development application (DA) DA/872/2020 for an indoor sports stadium (basketball facility) at 62 Hillsborough Road, Hillsborough (Lots 11 and 12 DP879281 and Lots 6, 7 and 8 DP9594) ("the site"). An initial Clause 4.6 report was submitted with the DA in June 2020. The DA assessment process, including consultation with various government agencies and review by the Regional Planning Panel, has resulted in changes to the original scheme. This Clause 4.6 report relates to the revised scheme. An important change to note between the previous and revised schemes is the replacement of fixed stadium seating around the show court with retractable seating and a reduction in seating numbers from 3,764 to 2,200. Corresponding changes to the built form mean that the proposed height has been reduced from 16.75 metres (m) to 13.7m. Notwithstanding the reduction, the proposal still requires a variation to the Maximum Building Height development standard.

This submission seeks a variation to *Clause 4.3 of the Lake Macquarie Local Environmental Plan (LEP) 2014* which prescribes a maximum building height of 8.5m and 5.5m to the site. The development footprint is contained within the portion of the site subject to the 8.5m height limit.

As detailed in this request, the proposed development is considered to meet the requirements prescribed under Clause 4.6 of the Lake Macquarie LEP 2014, as the development standard is considered unreasonable and the development displays sufficient environmental planning grounds to warrant contravention of the development standard.

Clause 4.6 states the following:

"4.6 Exceptions to development standards"

- (1) *The objectives of this clause are as follows:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - i. *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*



- ii. *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
- (b) *the concurrence of the Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
 - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. *When this Plan was made it did not include all of these zones.*

- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4*
 - (d) *clause 2.8, 6.1 or 6.2*

The use of Clause 4.6 to enable an exception to this development standard is appropriate in this instance and the consent authority should be satisfied that all requirements of the Clause have been suitably addressed via the content in this formal request.

Clause 4.6 – Exceptions to development standards, establishes the framework for varying development standards applying under a LEP. Subclause 4.6(3)(a) and 4.6(3)(b) requires that a consent authority must not grant consent to a development that contravenes a development standard unless a written request has been received from the applicant that seeks to justify the contravention of the standard by demonstrating that:

“4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

4.6(3)(b) that there is sufficient environmental planning grounds to justify contravening the development standard.”

In addition, 4.6(4)(a)(i) and (ii) requires that development consent must not be granted to a development that contravenes a development standard unless the:

- (a) *the consent authority is satisfied that:*
 - i. *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*

- ii. *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*

(b) *the concurrence of the Secretary has been obtained.*

The Environmental Planning Instrument to which these variations relate to is the *Lake Macquarie Local Environmental Plan 2014*. The development standard to which this variation relates to is *Clause 4.3 Height of Buildings*, which reads as follows:

4.3 Height of buildings

(1) *The objectives of this clause are as follows:*

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

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

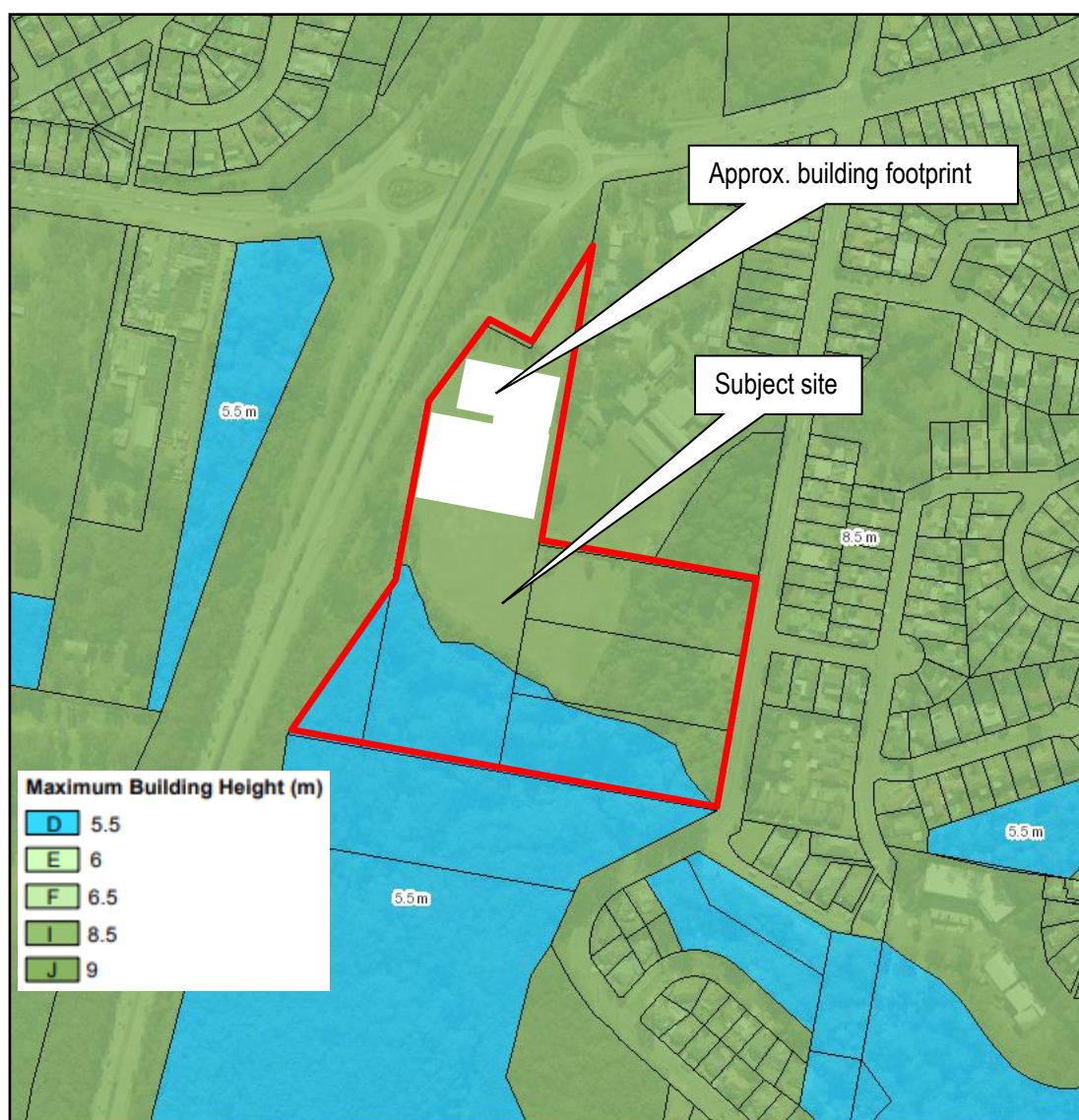


Figure 1: Height of Buildings Map – Subject site outlined in red. Source: NSW Planning Portal

A Maximum Building Height of 8.5m and 5.5m applies to the subject site, as per *Figure 1* above. The development footprint is located within the area mapped as 8.5m Maximum Building Height.



Written justification for the proposed variation to the height of buildings development standard in accordance with Clause 4.6 of the *Lake Macquarie LEP 2014* is required.

2. EXTENT OF VARIATION

As noted above, Clause 4.3 of the *Lake Macquarie Local Environmental Plan 2014* states that the subject land is subject to a maximum building height of 8.5 metres (m). Referring to the Architectural Plans incorporated in the DA package prepared by EJE Architects (Project Ref: 13017, dated September 2020) it is noted that the maximum building height is displayed as 13.7m, being a 5.2m (61%) variation to the Development Standard. Plan Ref: A-600 and Section Plans depict the height exceedance of the proposed building.

The proposal seeks to provide a high-quality, purpose-built recreation facility which displays strong adherence to industry standards and design constraints. This basketball stadium height exceedance of 5.2m is limited to the main stadium. A portion of the playing courts also exceed the height limit but by a lesser extent (up to 11m or 29% variation). It is relevant to note that height of the playing courts, along the full length of the eastern façade, is 8m, and therefore within the maximum building height limit.

The height is attributed to tiered seating BCA and ergonomic standard requirements, in conjunction with necessitating compliance with international standards for basketball court dimensions and ceiling heights. The Fédération Internationale de Basketball (FIBA) require that the minimum ceiling height for basketball stadiums from the floor to the ceiling or the lowest obstruction above the playing court shall be 7 metres. In addition to this minimum height, additional consideration is to be given to the structural truss size because of the required internal clearances of the courts – this has raised the roof further, particularly for the main stadium. In order to achieve compliance with international standards and building requirements, an increased overall building height is required in this instance.

When viewed from adjoining areas, the new buildings will not create a bulk and scale that is overbearing. The development has considered the site context in relation to the nearby streetscape, roadways and development. Firstly, the site is largely removed from view from the adjoining residential streetscape of Waratah Avenue to the east – separated by a substantial canopy of mature trees and thick undergrowth. This is in addition to the spatial separation being in excess of 150m from this road reserve. It can be expected that views from the east are highly unlikely to be impacted by development on the site.

Secondly, it is acknowledged that the development will be a prominent feature when viewed from the Hillsborough Public School because of its length primarily, and mainly when viewed from the playing fields, not buildings. The visual impact of the building when viewed from the adjoining primary school is of a linear built form controlled by a regular rhythm of vertical and horizontal panels and a roof edge that is at its lowest point (lower than the maximum building height) giving the building a more human scale to ensure it feels welcoming to its neighbours. A reduced material palette of profiled steel sheet, prefinished (Colorbond steel) and fibrous cement flat sheet along with the playful use of coloured panels, and on the south elevation, windows, result in a simple but visually pleasing aesthetic. Permanent artwork coloured and pressed into selected elements. The result is a pleasing and non-obtrusive design.” The only views which will be blocked from the public school will be to the west, and are that of the Newcastle Inner City Bypass, which are not iconic, nor intrinsic. The more favorable southerly views will be maintained. The development is more likely to provide a welcomed acoustic buffer between this busy roadway and the outdoor play areas of the school. By way of privacy, there are no opportunities for overlooking contained within the upper most portion of the building, with this area consisting of ventilation space and roof trusses. Further, overshadowing impacts are expected to be minimal. The previous, taller scheme, resulted in minor overshadowing in the southwestern portion of the school site (play fields) after 2pm only. The revised scheme is anticipated to generate even less overshadowing due to the overall reduction in height.

The western views will be improved through the use of complimentary artwork on the walls, and safety and security will be improved through the construction of 1800mm high boundary fencing with evening security through use of CCTV and lights.

Thirdly, when viewed from the Newcastle Inner City Bypass, the development will provide visual interest with an appealing, purpose built and architecturally designed sports facility. Notwithstanding, the site is largely removed from view from this roadway, with thick perimeter vegetation and existing roadway acoustic barriers providing adequate screening.

Lastly, the land immediately adjoining to the south is zoned E2 Environmental Conservation, comprises *Winding Creek*, and is highly unlikely to be developed. Therefore, any impact with respect to the visibility of the complex and loss of amenity to the land at the south of site is negligible.

An alternative design would require substantial re working and would fundamentally lack the functional outcome and/or the ability to achieve the contemporary and cohesive level of amenity that is afforded by the current design. It should be noted that no reasonable amendment to the basketball stadium and courts would provide compliance with both the building height development standards and FIBA standards. The proposed design thereby provides the most favorable architectural and practical outcome for the site and users.

As such, a degree of flexibility is considered reasonable in this instance and anticipated under the LEP where justification is made. Further discussion is provided below

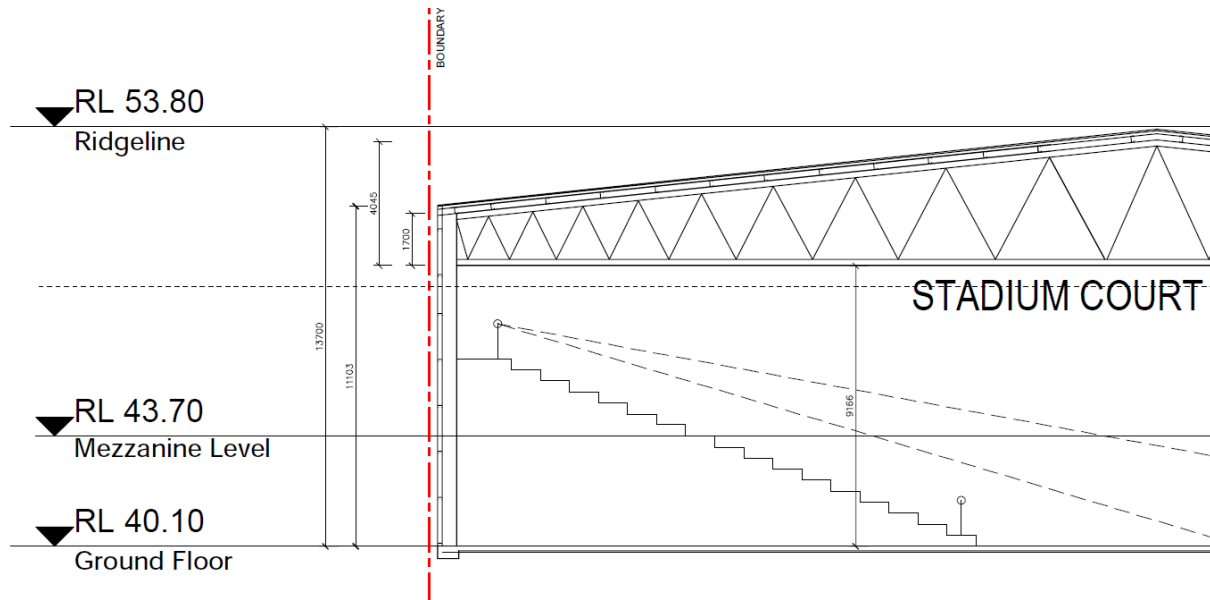


Figure 2: Extract from Section BB - height to top of stadium court shown (13.7m). Source: EJE Plan Ref: A600 Rev C.

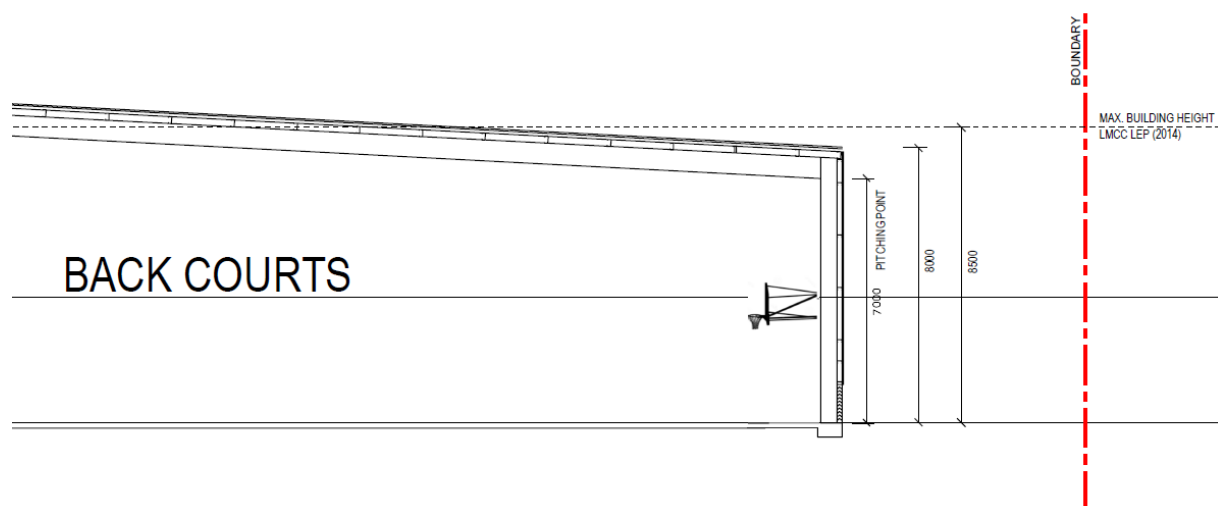


Figure 3: Extract from Section AA - height at eastern façade of back courts shown in relation to line of maximum building height. Source: EJE Plan Ref: A600 Rev C.

3. ASSESSMENT

3.1 IS COMPLIANCE WITH THE DEVELOPMENT STANDARD UNREASONABLE OR UNNECESSARY IN THE CIRCUMSTANCES OF THE CASE?

With reference to Preston CJ in *Wehbe v Pittwater Council* [2007] NSWLEC 827, the first and most commonly invoked way to establish that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, is to demonstrate that the objectives of the development standard are achieved, notwithstanding the non-compliance.

The proposed variation from the development standard is assessed against the accepted “5 Part Test” for the assessment of a development standard variation established by the NSW Land and Environment Court in *Wehbe vs Pittwater Council* (2007) LEC 827.

In the decision of *Wehbe vs Pittwater Council* (2007) LEC 827, Chief Justice Preston expressed the view that there are five (5) different ways in which an objection may be well founded, and that approval of the objection may be consistent with the aims of the policy.

It is therefore our submission that the *Wehbe* test is of relevance in the consideration of a standard to determine whether or not it is unreasonable or unnecessary. This attributes to determining whether compliance with the standard is unreasonable or unnecessary in the circumstances of the case as set out below:

First – The most commonly invoked way is to establish that compliance with the development standards is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. If the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary and unreasonable.

Second – A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary.

Third – A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable.

Fourth – A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council’s own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable.

Fifth – A fifth way is to establish that “the zoning of particular land” was “unreasonable or inappropriate” so that “a development standard appropriate for that zoning was also unreasonable or unnecessary as it applied to that land” and that “compliance with the standard in that case would also be unreasonable or unnecessary.”

The following discussion is provided in response to each of the above:

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

The objectives supporting the height of buildings control identified in Clause 4.3 are discussed below. Consistency with the objectives and the absence of any environmental planning impacts, would demonstrate that strict compliance with Clause 4.3 would be unreasonable in this instance.

The development as proposed will be in the public interest as it is consistent with the objectives of the development standard (being Clause 4.3), which are as follows:

(1) *The objectives of this clause are as follows:*

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

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



The maximum height proposed is 13.7m as measured from the existing ground level, resulting in a numerical breach of 5.2m, represented as 61%. Discussion regarding how the proposal meets the objectives of the Clause are provided below.

Strict compliance with the building height limit is not appropriate or necessary in this instance as the development responds directly to the desired outcome for the site, particularly in relation to the establishment of a new basketball facility that is compliant with the FIBA equipment, player and spectator rules. The centre provides a purpose built, architectural designed and cohesive sports complex on a vacant site that has capacity for this scale of development. In addition, the height of the basketball courts cannot be modified – doing so would negate compliance with the FIBA standards, which provide no flexibility in their application. The proposal provides a built form response that is specific to the site and proposed use, and specific industry construction standards, rather than the arbitrary application of the building height standard.

We note that the height remains compatible and appropriate in scale to building forms in the greater locality, particularly those located within a 1.5km radius of the development site. Large scale industrial and commercial precincts at Warners Bay and Charlestown, respectively, comprise buildings with heights of 15m up to 35m. These buildings are also located adjacent and nearby low-density residential uses and education facilities, similarly to the subject site. As such, the proposed works are entirely appropriate for their location in the context of surrounding development.

The design of the new building is well considered and appropriate in terms of their architectural form. Building orientation and form, roof form, materials and finishes and placement integrate the building and will present a high quality/high amenity and cohesive outcome for the site and surrounds. We submit that in view of these matters, the design provides a high-quality urban form.

The design facilitates appropriate development of the site with encroachment into the maximum permissible building height justified on the basis that the proposed built form responds to industry standards for basketball facilities. In order to comply with the height restrictions, the basketball facilities would simply not be feasible on site. The proposed built form is thereby the preferred response.

All materials selected will be durable and low maintenance so the development does not prematurely age. This will enhance the long-term appearance of the building and ensure its positive contribution as a neighbourhood element.

It is considered that this submission provides sufficient environmental planning grounds to justify contravening the development standard through adherence to the objectives of the development standard. As demonstrated, the objectives of the standard have been achieved.

3.1.2 The underlying objective or the purpose of the standard is not relevant to the development and therefore compliance is unnecessary

The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in 3.1.1 above. Therefore, this clause is not applicable.

3.1.3 The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable

It must be considered whether the underlying object or purpose of the standard would be defeated or thwarted if compliance was required and therefore compliance is unreasonable.

Restricting development forms via the development standard may be overly restrictive and could result in architectural outcomes that are unsuitable to the locality, or of lesser or poor architectural quality and that do not meet compliance with industry standards. The proposal has not disregarded the development standard, however, looks for a level of flexibility tailored to the specific and unique development type. On balance, the proposed development provides a better outcome.

Therefore, the proposal in its current form is more appropriate to its location than a development that complies with the standard.

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



This particular aspect is not applicable in this instance.

3.1.5 The zoning of the land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.

Not applicable as the zoning of the site is appropriate.

3.2 ARE THERE SUFFICIENT ENVIRONMENTAL PLANNING GROUNDS?

The assessment above and shown throughout the Statement of Environmental Effects demonstrates that the resultant environmental impacts of the proposal will be satisfactory. The proposal addresses the site constraints and relevant objectives of both the standards and the zone. The proposal will not result in any unreasonable amenity or environmental impacts as detailed in the submitted reports. The proposed variation to the development standard ranges from 0m to 5.2m. The 5.2m exceedance is limited to the main court, and at the upper most point of the roof pitch, whereby the height falls toward compliance at the eaves. Notwithstanding the variation, the proposed works represent a well-considered development that addresses international standards imposed by the type of development, continuity through architectural design and the relevant objectives of both the standards and the RE1 Public Recreation zone. The proposal will maintain high levels of amenity within the development and to the surrounding context. The proposal seeks to make a positive contribution to the greater community.

There are sufficient environmental and planning grounds to justify contravening the development standard and are as follows:

- The proposed development meets the zone objectives and the height control objectives;
- The proposed development seeks to replace the existing basketball facility in Broadmeadow. The development proposes a significant improvement to internal and external amenity experienced by current users, and provides improved facilities to new and existing users;
- The proposed development is compatible with existing buildings within the greater locality in regards to height;
- Ample visitor and user parking space is provided, ensuring the surrounding roads are not affected by overflow during events;
- The development has been situated as far north from the natural hazards affecting the site, such as bushfire and flooding, as possible;
- The development results in minimal impact on biodiversity. The works are located within the existing cleared portion of the site however a small number of trees require removal to achieve compliance with Planning for Bushfire Protection. There is no nexus between the height of building and removal of vegetation;
- The development will not result in adverse visual impacts;
- The development represents a use that is permissible. It is located within an area that is serviced by existing roads and other essential infrastructure. In this regard, the proposal represents the orderly and economic development of land.

In this case, we submit that the proposal displays sufficient environmental planning grounds to warrant variation to the development standard.



3.3 IS THE VARIATION IN THE PUBLIC INTEREST?

As detailed above, Clause 4.6 (4) (a) (ii) of the LEP requires demonstration that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard (described in Section 3.1.1 above) and the objectives for development within the zone in which the development is proposed to be carried out.

The public interest is best served by the orderly and economic use of land, for purposes permissible under the relevant planning regime and predominantly in accordance with the prevailing planning controls.

The proposed development is located within the RE1 Public Recreation zone of the Lake Macquarie LEP. The objectives of the RE1 zone are as follows:

- *To enable land to be used for public open space or recreational purposes.*
- *To provide a range of recreational settings and activities and compatible land uses.*
- *To protect and enhance the natural environment for recreational purposes.*
- *To facilitate the preservation of the environmental qualities of land.*

The proposed use enables the land to be used for recreational purposes. The development has been appropriately situated on the site to minimise impacts on the natural environment, particularly through maintaining biodiverse rich land to the south and through locating the development away from bushfire and flood prone land. The development minimises impacts on the environmental qualities of the land in this way.

The development is a permissible form of development [recreational facilities (major)], consistent with the objectives of the RE1 Public Recreation zone and is therefore considered to be in the public interest.

3.4 PUBLIC BENEFIT OF MAINTAINING THE STANDARD?

It is considered that there is no benefit to the public or the community in maintaining the development standard. The proposed development will allow for the creation of a high-quality, purpose-built recreational facility, which, as stated above, meets the desired objectives of the standard.

By maintaining the development standard, the development would not achieve its objective of providing a regional scale indoor basketball facility of the capacity required. The proposal would not be able to proceed and the region would lose the opportunity to accommodate a substantial facility that has potential to bring significant social, community, health, tourism and economic benefits.

The departure from Clause 4.3 within LEP 2014 still allows for the orderly and economic use of the site in a manner which achieves the outcomes and objectives of the relevant planning controls.

3.5 IS THE VARIATION WELL FOUNDED?

It is considered that this has been adequately addressed in Section 3.1, 3.2 and 3.3 and 3.4 of this submission. In summary, this Clause 4.6 Variation is well founded as required by Clause 4.6 of the LEP 2014 in that:

- Compliance with the development standards would be unreasonable and unnecessary in the circumstances of this specific development;
- There are sufficient environmental planning grounds to justify the departure from the standards;
- The development meets the objectives of the standard to be varied (Height of Building) and objectives of the RE1 Public Recreation zoning of the land;
- The proposed development is in the public interest and there is no public benefit in maintaining the standard;
- The breach does not raise any matter of State of Regional Significance; and
- The development submitted aligns with the development expectations for the surrounding area.

Based on the above, the proposed variation is considered well founded.

3.6 GENERAL



Clause 4.6 also states that:

- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
 - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*

Note. *When this Plan was made it did not include all of these zones.*

- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4,*
 - (d) *clause 2.8, 6.1 or 6.2.*

This variation does not relate to the subdivision of land. The variation sought is not contrary to subclause (6).

Should the exception to the development standard sought under this submission be supported by Council, the Council must retain a record of the assessment of this submission.

The development proposed is not complying development. A BASIX certificate is not required for this development. The development is not affected by clauses 5.4, 2.8, 6.1 or 6.2.



4. CONCLUSION

The proposal does not comply with the height of buildings control prescribed by Clause 4.3 of the *Lake Macquarie Local Environmental Plan 2014*. Having evaluated the likely affects arising from this non-compliance, we are satisfied that the objectives of Clause 4.6 of LEP 2014 are satisfied as the breach to the height of buildings does not create any significant adverse environmental planning impacts.

Consequently, strict compliance with this development standard is unreasonable and unnecessary in this particular instance and use of Clause 4.6 of the LEP 2014 to vary this development control is appropriate in this instance.

Based on the above, it is reasonable to conclude that strict compliance with the maximum building height is not necessary and that a better planning outcome is achieved for this development by allowing flexibility in the application.