

APPLICATION FOR VARIATION TO A DEVELOPMENT STANDARD

New multi-purpose hall at Nepean Creative and Performing Arts High
School



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1 INTRODUCTION

An application is made to vary the maximum building height development standard in relation to a development application (DA) for a new multi-purpose hall at the Nepean Creative and Performing Arts (CAPA) High School at 115-119 Great Western Highway, Emu Plains, NSW.

This application is made having regard to:

- The provisions of Clause 4.6 *Penrith Local Environmental Plan 2010* (PLEP 2010);
- *Varying development standards: A Guide* (August 2011) prepared by the Department of Planning and Infrastructure (DPIE); and
- Key principles established by the NSW Land and Environment Court.

1.1 Key matters

- The subject site is zoned R2 Low Density Residential under PLEP 2010. Under the R2 Low Density Residential zone educational facilities are not nominated as a “permitted with consent” use. However, *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* applies to the site and under Clause 35(1) development for the purpose of a school may be carried out by any person with development consent on land in a prescribed zone. For the purpose of Clause 35(1) the R2 Low Density Residential zone is a prescribed zone. Hence the proposed development is a permissible use on the site.
- The maximum building height shown for the subject site on the *Height of Buildings Map* in PLEP 2010 is 8.5 metres.
- The maximum height of the proposed multi-purpose hall will be 10.27 metres measured from the existing ground level to the highest point of the sloping roof. **Figure 1** is a location plan of the proposed multi-purpose hall showing its context with existing school buildings and surrounding development. **Figure 2** is an extracted elevation plan with building height and existing ground levels.
- The existing ground level at the site of the proposed development is approximately 25.3 to 25.6 metres AHD. Council flood planning controls require a finished floor level of 26.5 metres AHD – 0.9 to 1.2 metres above the existing ground level.
- As articulated in the Statement of Environmental Effects for the proposed development three options for the location of the proposed development were considered during the planning phase. Whilst possible the key disadvantages of the alternative location sites were:
 - New building will not enhance the sense of arrival if its not in close proximity to the existing school Hall and Nepean Arts Centre.
 - Distance away from the arrival point and carparking will require a detailed way finding strategy for visitors to navigate through the campus.
 - If located directly adjacent to sports oval to the north it will be disconnected from the events precinct with inherent risk of damage to the facility.
 - If positioned adjacent to the general learning and teaching facilities, it will impact on future master planning options for future school growth / potential for additional school buildings to cater for growing school population.

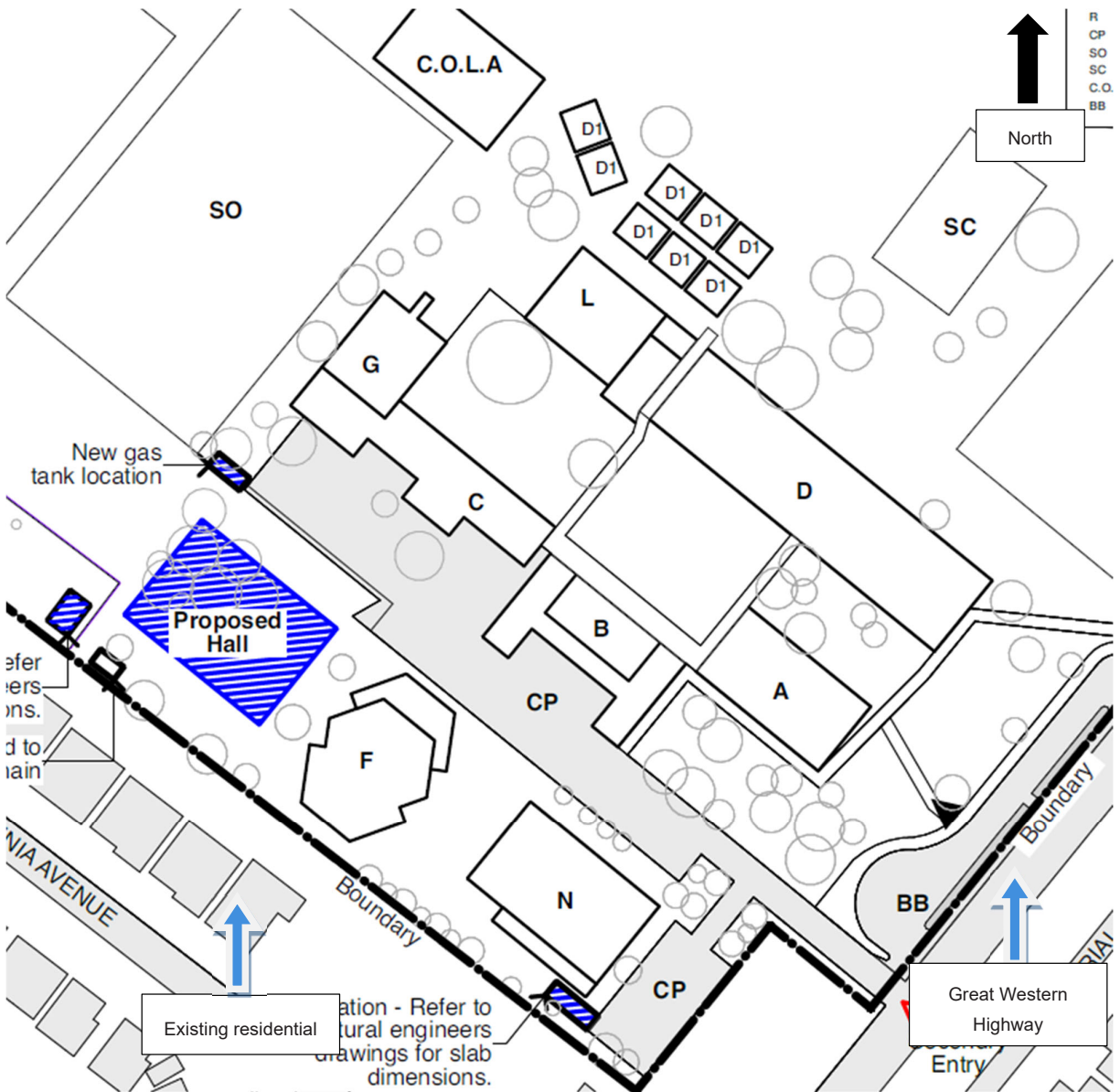


Figure 1 Location plan – Multi-purpose hall at Nepean CAPA High School

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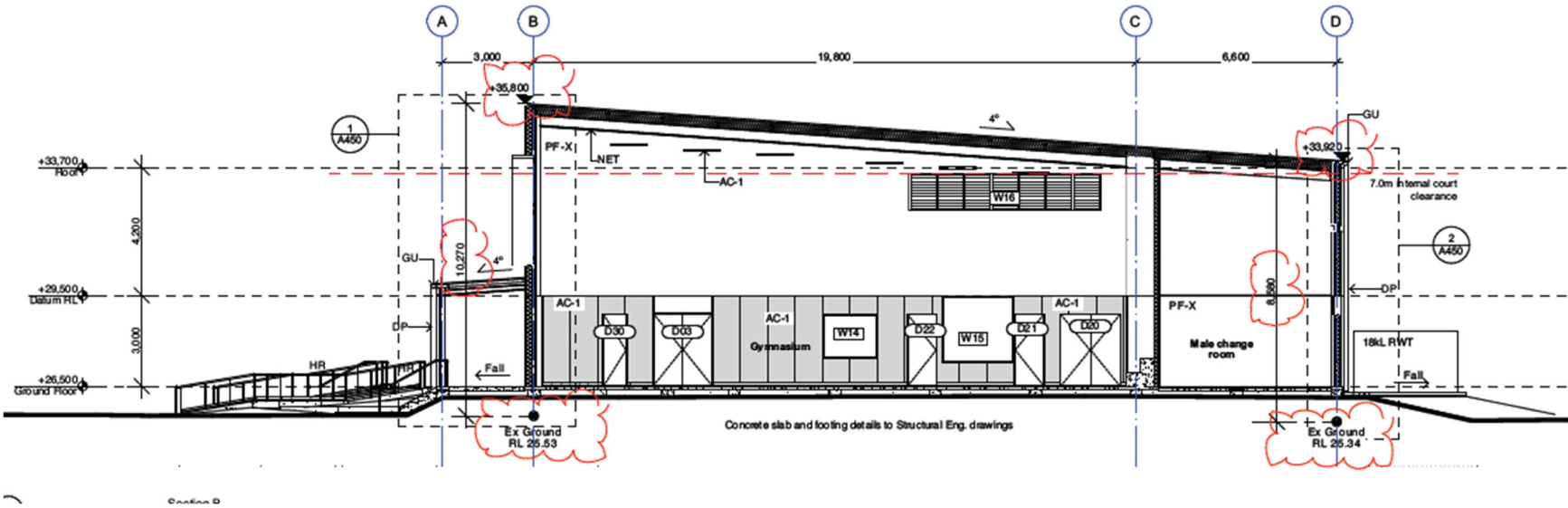


Figure 2 Proposed building height and existing ground levels.

2 CLAUSE 4.6 EXCEPTIONS TO DEVELOPMENT STANDARDS

The maximum height control is a “development standard” to which exceptions can be granted pursuant to clause 4.6 of the PLEP 2010.

The objectives and provisions of clause 4.6 are as follows:

Clause 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.*

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- (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.*
- (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,*
- (ca) clause 6.2 or 6.3,*
- (cb) clause 7.11.*

The development standard in clause 4.3 of PLEP 2010 is not “expressly excluded” from the operation of clause 4.6 of PLEP 2010. This submission will address the requirements of subclauses 4.6(3) & (4) of PLEP 2010 in order to demonstrate that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard and is therefore consistent with objective 1(a) of Clause 4.6. In this regard it is noted that the extent of the discretion afforded by subclause 4.6(2) is not numerically limited as compared with the development standards referred to in subclause 4.6(6) for example.

The balance of this request will be divided into the following sections, each dealing with the nominated aspect of clause 4.6:

- Consistency with the development standard objectives and the zone objectives (clause 4.6(4)(a)(ii));
- Sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)); and
- Compliance is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)).

Where necessary the information addresses key principles established by the NSW Land and Environment Court.

3 JUSTIFICATION FOR EXCEPTION TO THE BUILDING HEIGHT STANDARD

3.1 Consistency with the development standard objectives and the zone objectives (clause 4.6(4)(a)(ii))

The objectives and provisions of clause 4.3 are as follows:

Clause 4.3 Height of buildings

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

(a) *to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,*

(b) *to minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas.*

(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 Height of Buildings Map nominates a maximum height of 8.5m for the site. It is hereby requested that an exception to this development standard be granted pursuant to clause 4.6 to permit a breach to a maximum of 10.27m in height.

In order to address the requirements of subclause 4.6(4)(a)(ii), each of the relevant objectives of clause 4.3 of PLEP 2010 are addressed in turn below.

Objective (a) - To ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,

Response – **Figure 2** is an extracted elevation plan showing the south-east elevation and highlighting the component of the roofline which exceeds the building height control. The area of the building that exceeds the building height standard is located at the northern extent of the building and faces towards existing school buildings. The southern extent of the proposed building is approximately 16 metres from the common property boundary between the school and existing residential lots to the south.

The proposed design is an appropriate response to the constraints of the site. The hall is designed as a multi-purpose space to meet school needs and NSW Department of Education Educational Facilities Standards and Guidelines (EFSG) standards. It will facilitate indoor sports with large storage requirements to house sporting and performing arts equipment. The proposed multi-purpose hall will be compatible with the architecture of the existing hall and strengthen the school's current relationships with the wider community and school groups.

The proposed multi-purpose hall is approximately 16 metres from the common property boundary between the school and existing residential lots to the south. Between the proposed hall and the common property boundary are a number of mature trees which provide significant visual screening from the school for residents to the south. Trees along the common property boundary will be retained. A 1.8 metre colourbond fence runs along the common property boundary.

From a streetscape perspective the proposed development will not be visible from the Great Western Highway or surrounding residential streets.

Objective (a) refers to being “compatible” with adjoining development and the streetscape. It is considered that “compatible” does not promote “sameness” in built form, but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191 as stated on the following page.

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“22 There are many dictionary definitions of compatible. The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.”

The proposed height encroachments are distanced from the adjacent residential dwellings to the south and the Great Western Highway. Existing tree screening between the proposed building and the adjacent residential dwellings will remain. It is noted that the future character of the land subject of the proposed development will remain as a high school. The overall massing of the proposed building is sympathetic with existing school buildings.

Accordingly, it is considered that the scale of the building is suitably mitigated by its sloping roof design and through its integration with the surrounding school building landscape. It provides compatibility with existing development on the school site, is consistent with the future character of the site and existing tree screening will remain. The height breach is considered appropriate and supportable in design and scale and satisfies Objective (a).

Objective (b) - to minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas.

Response – The proposed building will be located approximately 16 metres from the common property boundary between the school and existing residential lots to the south. Shadow diagrams for the proposed development, refer to Appendix B of the Statement of Environmental Effects (RPS, PR147922-1) show only a marginal increase in overshadowing on adjoining properties at 9AM on 21 June. No overshadowing occurs after approximately 11AM onwards.

Visually the proposed development will result in minimal impact to adjoining properties. The 16 metre separation between existing development and the proposed is considered appropriate and tree screening along the common boundary will remain. The proposed building will sit comfortably in the setting and be integrated into the high school character of the site.

The addition of the non-compliant height will not increase the shadowing caused by a compliant scheme due to its location within the high school site and its generous setback to the common property boundary. The additional height proposed will not increase the potential for overlooking due to its setback and intended use. Location of the windows and doors of the proposed multi-purpose hall and the existing fence and established vegetation on the site near the fence will ensure privacy of the surrounding residential dwellings is maintained.

The proposed development is therefore consistent with the objectives for maximum height, despite the numeric non-compliance.

Zone Objectives

Clause 4.6 (4) also requires consideration of the relevant zone objectives. The site is zoned R2 Low Density Residential under PLEP 2010. Under the R2 Low Density Residential zone educational facilities are not nominated as a permitted with consent use. However, *State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017* applies to the site and under Clause 35(1) development for the purpose of a school may be carried out by any person with development consent on land in a prescribed zone. For the purpose of Clause 35(1) the R2 Low Density Residential zone is a prescribed zone. Hence the proposed development is a permissible use on the site. The objectives of the R2 Low Density Residential zone and consideration of the proposed development against the objectives are provided below.

- To provide for the housing needs of the community within a low-density residential environment.

The proposal is located within the confines of an existing school site. Whilst the proposal does not provide housing it does provide educational facilities needed by the community. The proposed development is consistent with this objective.

- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

The proposal will enable Nepean CAPA to provide multi-purpose facilities. . Day to day needs of residents attending the school will be met. The proposed development is consistent with this objective.

- To promote the desired future character by ensuring that development reflects features or qualities of traditional detached dwelling houses that are surrounded by private gardens.

The proposed development will form part of the existing environment of Nepean CAPA High School. Considerable separation between the proposed building and existing residential development, mostly detached dwellings, will not impact upon the desired future character of the area. The proposed development is consistent with this objective.

- To enhance the essential character and identity of established residential areas.

The proposal will not interfere with the ability to enhance the essential character and identity of the surrounding residential areas. The proposed development is consistent with this objective.

- To ensure a high level of residential amenity is achieved and maintained.

The proposal will not interfere with the residential amenity of the surrounding area. The proposed development is not inconsistent with this objective.

- To provide temporary overnight accommodation for the working population and businesses in the area.

The proposed development does not provide temporary overnight accommodation but is not inconsistent with this objective.

The proposed development is therefore consistent with the objectives of the zone, despite the numeric non-compliance to building height and as such is considered to be in the public interest.

3.2 Sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b))

There are sufficient environmental planning grounds to justify the variation of the height control and the variation in height will achieve a better outcome for and from development, particularly given that:

- The multi- purpose hall is designed to meet the school needs and NSW Department of Education EFSG standards. It will facilitate indoor sports with large storage requirements to house sporting and performing arts equipment and consequently requires additional height for these essential purposes.
- The existing ground level at the site of the proposed development is approximately 25.3 to 25.6 metres AHD. Council flood planning controls require a finished floor level of 26.5 metres AHD which is 0.9 to 1.2 metres above the existing ground level. Based upon this situation the building upon the finished floor level can be no greater than 7.3 - 7.6 metres above the finished floor level to comply with the building height control. The height variation occurs in part due to the planning control level.
- The proposed development provides a modest building mass and articulated built form. Strict compliance with the building height standard would result in a multi- purpose hall that does not meet the NSW Department of Education EFSG standards.
- The maximum height encroachment occurs to the northern end of the building.
- The proposed height variation will not be visually dominant from the street frontage of the Great Western Highway or adjoining properties to the south. This is due to the sloped roofline.
- The additional building height will not result in any overshadowing or loss of privacy to adjoining properties.

3.3 Compliance is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a))

In *Wehbe V Pittwater Council (2007) NSW LEC 827* Preston CJ sets out ways of establishing that compliance with a development standard is unreasonable or unnecessary. It states, inter alia:

“An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the

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development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard."

However, in *Four2Five v Ashfield Council [2015] NSWLEC 90*, the Land and Environment Court said that whether something was 'unreasonable or unnecessary' is now addressed specifically in clause 4.6(4)(a)(ii), with separate attention required to the question of whether compliance is unreasonable or unnecessary. Accordingly, while the objectives of the standard are achieved despite non-compliance with the standard, this request goes further. It seeks to demonstrate that requiring strict adherence to the standard would be 'unreasonable or unnecessary' for reasons that are additional to mere consistency with the development standard.

Preston CJ in the judgement then expressed the view that there are 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, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation):

1. *The objectives of the standard are achieved notwithstanding non-compliance with the standard*
2. *The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*
3. *The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*
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;*
5. *The zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Additionally, in an analogous context, in *Botany Bay City Council v Saab Corp [2011] NSWCA 308*, the Court of Appeal said that a requirement may be unreasonable when 'the severity of the burden placed on the applicant is disproportionate to the consequences attributable to the proposed development' (at paragraph 15).

Having regard to the above, it is considered that compliance with the maximum building height development standard is unreasonable or unnecessary in the circumstances of this case for the reasons set out below:

- The development achieves the objectives of the zone.
- The development achieves the objectives of the height of buildings development standard, notwithstanding the numerical non-compliance.
- Strict compliance with the height control will inevitably result in the following consequences:
 - It will result in a result in a multi-purpose that does not meet the NSW Department of Education EFSG standards.
 - It will result in a larger and lower building that would have increased bulk and be less compatible with the existing school hall, which if required to be reduced would then compromise the ability of the development to meet the day to day needs to the local residents.

Each of these consequences carries a social, economic, and environmental cost and would lead to a suboptimal environmental planning outcome (in comparison with the proposed development).

Given that compliance with the zone and development standard objectives is achieved, insistence on strict compliance with the building height standard is unreasonable and unnecessary in the circumstances of the case. The proposal is consistent with the relevant zone objectives and will result in a better planning and environmental outcome for the site. The additional height allows for a building footprint and multi-purpose hall that will meet NSW Department of Education standards.

The proposal is therefore justified on environmental planning grounds. For the reasons above, the proposed building height variation is consistent with the requirements of Clause 4.6(3) of the LEP.

4 CONCLUSION

The proposed design is an appropriate response to the constraints of the site. The proposed multi-purpose hall is designed as a space to meet school needs and NSW Department of Education Educational Facilities Standards and Guidelines (EFSG) standards. It will facilitate indoor sports with large storage requirements to house sporting and performing arts equipment. The multi-purpose hall will be compatible with the architecture of the existing hall and strengthen the school's current relationships with the wider community and school groups.

From a streetscape perspective the proposed development will not be visually dominant from the Great Western Highway or surrounding residential streets.

The development is consistent with the objectives of the building height development standard and the objectives for development within the R2 Low Density Residential on which the development is proposed to be carried out.

The proposal will provide direct employment opportunities during construction and indirect employment through the companies it will service and also through supply contracts for equipment and maintenance.

The contravention of the building height development standard in the proposal does not cause any matter of significance for State or regional environmental planning. Beyond the non-compliance with the height standard, the proposal complies with the relevant development standards of the LEP and the relevant controls of the DCP.

The contravention to the standard is considered to be in the public interest and there would be no public benefit in not supporting the variation request given the benefits to the school and community that the design affords.

Accordingly, for the reasons stated above, we respectfully suggest that compliance with the maximum height is unreasonable and unnecessary and request that the consent authority permit the variation to the maximum building height development standard.