

Clause 4.6 – Exceptions to Development Standards

Request to Vary Clause 4.3 Height of Buildings

Address: Westleigh Park, 62 Quarter Sessions Road, Westleigh

Proposal: Demolition, remediation works and construction of a parkland comprising formal sports fields, passive recreation (picnics, walking, playground), tracks and trails (bushwalking and mountain biking) and ancillary facilities (roads, carparks, buildings, share ways and stormwater run-off treatment)

Date: 17 October 2024

1. Introduction

This is a written request to seek an exception to a development standard pursuant to Clause 4.6 – Exceptions to Development Standards of the Hornsby Local Environmental Plan (HLEP) 2013. The development standard for which the variation is sought is Clause 4.3 – Height of Buildings under HLEP.

On 1 November 2023, amendments to clause 4.6 in the Standard Instrument – Principal Local Environmental Plan were published under the *Standard Instrument (Local Environmental Plans) Amendment (Exceptions to Development Standards) Order 2023*. Given the effect of the savings provision at section 27 in Part 10 of the amended *Environmental Planning and Assessment Regulation 2021*, the changes will only apply to development applications lodged after 1 November 2023. The subject Development Application (DA/975/2023) was lodged in September 2023 and therefore, the amendments to clause 4.6 do not apply to the application.

2. Description of the planning instrument, development standard and proposed variation

2.1. What is the name of the environmental planning instrument that applies to the land?

The Hornsby Local Environmental Plan (HLEP) 2013.

2.2. What is the zoning of the land?

The land is zoned:

- Part R2 Low Density Residential
- Part C3 Environmental Management
- Part RE1 Public Recreation

2.3. What are the Objectives of the zone?

The objectives of the zones are:

R2 Low Density Residential

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

C3 Environmental Management

- To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.
- To provide for a limited range of development that does not have an adverse effect on those values.
- To protect the natural environment of steep lands and floodplains within the catchment of the Hawkesbury River.
- To enable low impact agritourism and tourist and visitor accommodation that is compatible with the environmental values of the zone.

RE1 Public Recreation

- 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 protect and maintain areas of bushland that have ecological value.

2.4. What is the development standard being varied?

The development standard being varied is the Height of Buildings development standard.

2.5. Is the development standard a performance based control?

No. The Height of Buildings development standard is a numeric control.

2.6. Under what Clause is the development standard listed in the environmental planning instrument?

The development standard is listed under Clause 4.3 of HLEP 2013.

2.7. What are the objectives of the development standard?

The objectives of clause 4.3 of HLEP 2013 are as follows:

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

2.8. What is the numeric value of the development standard in the environmental planning instrument?

Clause 4.3 establishes different height controls for the different zones applying to the site. The maximum building height according to each zone are detailed at Table 1.

Zone	Control
R2 Low Density Residential	8.5m
C3 Environmental Management	10.5m
RE1 Public Recreation	No control

Table 1: Height controls applying to the site under HLEP 2013

Refer to extract of the Height of Buildings Map included at Figure 1.

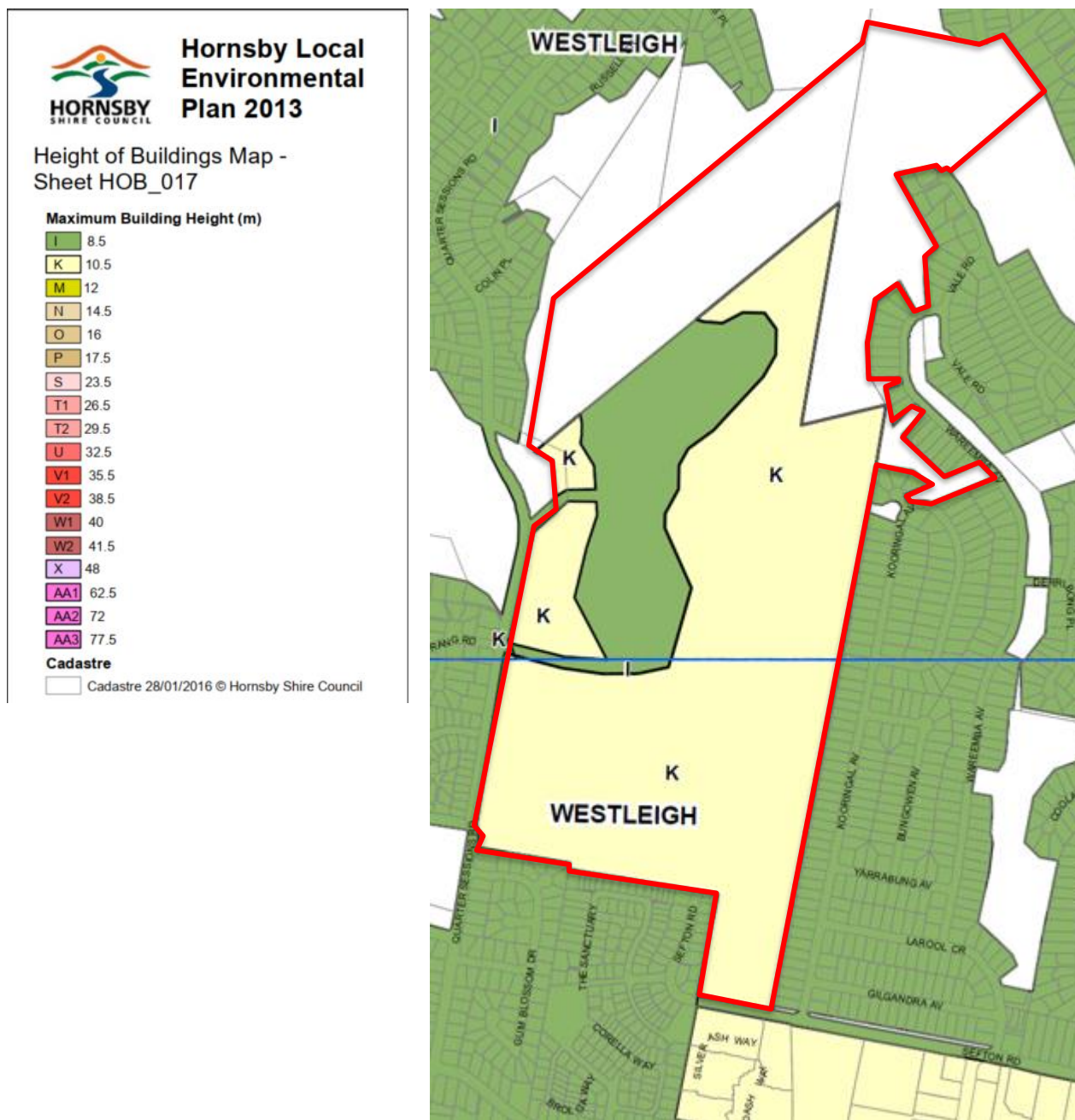


Figure 1: Extract of HLEP 2013 Height of Buildings Map - site identified with red border

2.9. What is the proposed numeric value of the development standard in the development application?

The proposed height of the development in each zone is identified at Table 2.

Zone	Control	Proposed Height
R2 Low Density Residential	8.5m	11m (10m high fencing, plus fill)
C3 Environmental Management	10.5m	33m (25m light pole, plus fill)
RE1 Public Recreation	No control	

Table 2: Height controls and proposed heights in each zone

As can be seen at Table 2, the height of the development varies depending on the structure and location within the site. Figure 2 identifies the location of the proposed structures in relation to the relevant height controls across the site.

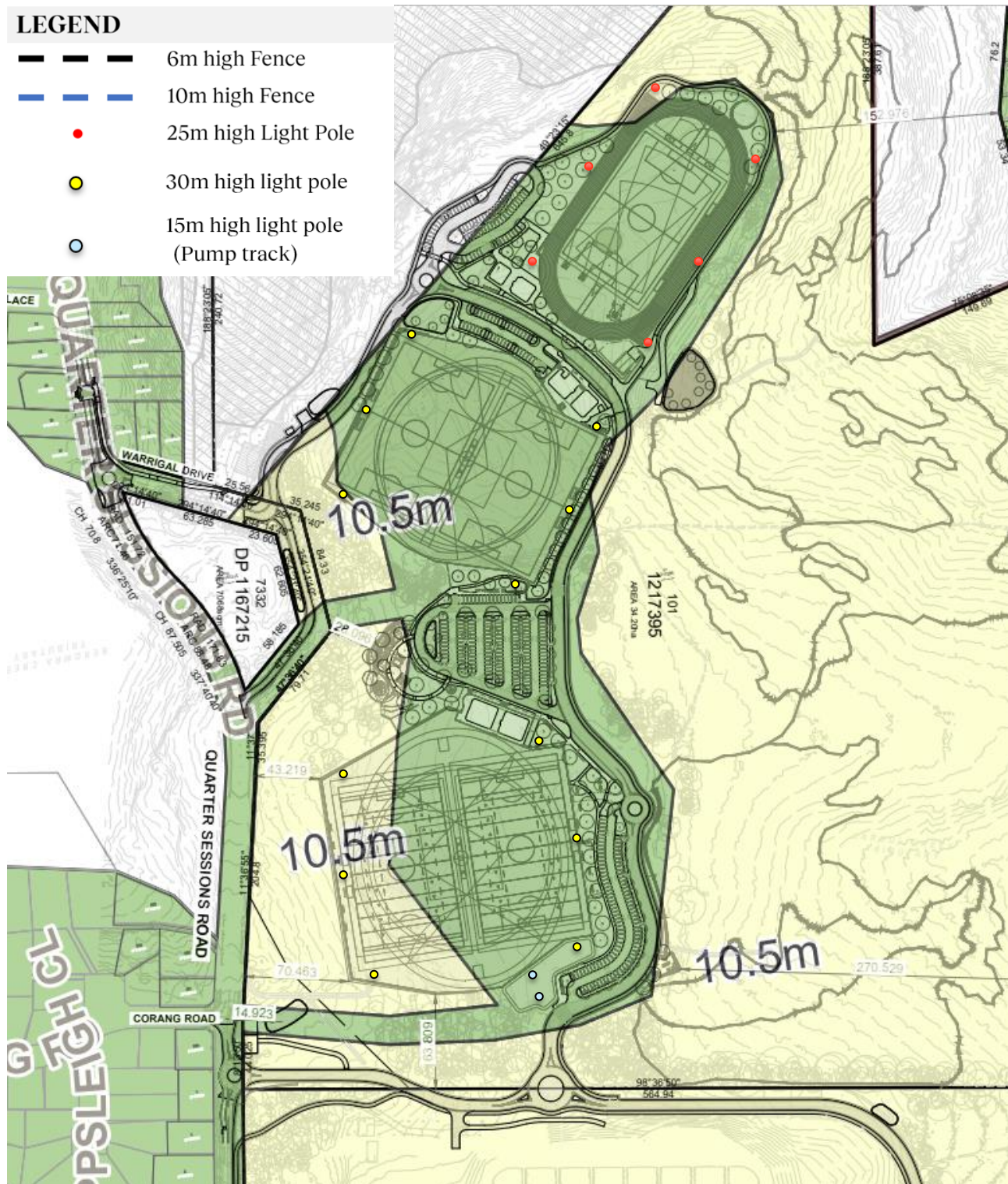


Figure 2: Location of proposed structures in relation to height controls

2.10. What is the percentage variation (between the proposal and the environmental planning instrument)?

The percentage variation to the controls differs across the site depending on the structure type and location and whether the structure is in cut or fill i.e. below or above the existing ground level. For this reason the extent of variation is addressed geographically.

Northern Sports Platform

Six (6) 25m tall sports lighting poles are proposed to be installed around the perimeter of the athletics field. The athletics field is located predominantly within the R2 zoned portion of the site with the exception of the north-western corner which is located in the C3 zone.

The tallest structure within each zone and height control are:

- The 25m high north-western most light pole is proposed to be installed in the C3 zone (or 10.5m height control). This pole is proposed on an area of the site with approximately 3-4m of fill resulting in the structure having a height above existing ground level of 29m, exceeding the 10.5m height control in this location by approximately 18.5m, which represents a variation of 176.1%.
- The 25m high eastern central light pole is proposed to be installed in the R2 zone (or 8.5m height control). This pole is proposed on an area of approximately 2-3m of fill, resulting in the structure having a height of 28m, exceeding the 8.5m height control by a maximum of 19.5m, which represents a variation of 229.4%.

Central Sports Platform

Six (6) 30m tall sports lighting poles are proposed to be installed around the perimeter of the central sporting platform. 10m high fencing is also proposed at the northern and southern ends of this platform. This platform is located predominantly within the R2 (8.5m height control) zone with the exception of the south-western corner which is located in the C3 (10.5m height control) zone.

The tallest structures within each zone and height control are:

- The 30m high central western light pole is proposed to be installed in the R2 zone (or 8.5m height control). This pole is proposed on an area of the site with approximately 2-3m fill. This structure will have a height of approximately 33m above existing ground level, exceeding the 8.5m height control by 24.5m which represents a variation of 288.2%.
- The 30m high south western light pole is proposed to be installed in the C3 zone (or 10.5m height control). This pole is proposed on an area of the site with approximately 1m of cut. This structure will have a height of approximately 29m above existing ground level, exceeding the 8.5m height control by 20.5m which represents a variation of 241.1%.
- A 10m fencing structure is proposed to be installed on the northern and southern end of the platform, in the R2 zone (or 8.5m height control). These sections of fencing are proposed in areas of 0-3 metres of cut. Assuming the worst case scenario, the fencing would have a height of approximately 10m above existing ground level, exceeding the 8.5m height control by 1.5m which represents a variation of 17.6%.

Southern Sports platform

As per the Central Sports platform, 30m tall light poles are proposed around the fields and 10m high fencing proposed at the northern and southern ends. The western third of this platform is located within the C3 (10.5m height control) zone, with the remainder within the R2 (8.5m height control) zone. Notably, the western half of this platform is in fill and the eastern half is in cut. The extent of compliance is:

- The 30m tall light poles proposed along the western side of the field stand on the top of an 8m high retaining wall, at its highest point in the southwest corner, in the C3 zone (or 10.5m height control). This results in a height above existing ground level of 38m, which exceeds the 10.5m control by 27.5m, representing a 261.9% variation.
- The 10m tall fencing at the northern and southern ends of the field straddles both the R2 (8.5m height control) and the C3 (10.5m height control) zones. The fencing at both ends stands on a maximum of 1-2 m of fill resulting in a maximum height of 12m above existing ground level. This would result in a maximum exceedance of the 10.5m control by 1.5m, representing a 14.2% variation, and an exceedance of the 8.5m height control by 3.5m, representing a variation of 41.1%.
- The southernmost 15m tall light pole associated with the pump track is proposed to be installed in the R2 zone (or 8.5m height control) an area of 0-1m of fill. This results in a maximum height above existing ground level of 16m, which exceeds the 8.5m control by 7.5m, representing a variation of 88.2%.

The extent of variation is summarised at Table 3:

Platform	Structure	Height above egl	Control	Variation
Northern	North west Light Pole	29m (25m + 4m fill)	10.5m	18.5m (176%)
Central	Central west Light Pole	33m (30m + 2-3m fill)	8.5m	24.5m (288.2%)
	10m Fencing - North	10m (0m - 1m cut)	8.5m	1.5m (17.6%)
Southern	South west Light pole	38m (30m + 8m fill)	10.5m	27.5m (261.9%)
	10m Fencing	12m (10m + 1-2m fill)	8.5m	3.5m (41.1%)

Table 3: Summary of extent of variation to height controls

3. Assessment of the Proposed Variation

3.1. Overview

Clause 4.6 Exceptions to Development Standards establishes the framework for varying development standards applying under a local environmental plan.

The Objectives of Clause 4.6 at 4.6(1) are as follows:

- to provide an appropriate degree of flexibility in applying certain development standards to particular development,*
- to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

Clause 4.6(3)(a) and 4.6(3)(b) require 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 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.*

Clause 4.6(4)(a)(i) and (ii) require that development consent must not be granted to a 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.*

Clause 4.6(4)(b) requires that the concurrence of the Secretary be obtained, and Clause 4.6(5) requires that the Secretary in deciding whether to grant concurrence must consider:

- (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning;*
- (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.*

This application has been prepared in accordance with the NSW Department of Planning, Infrastructure and Environment (DPI&E) guideline *Varying Development Standards: A Guide* (August, 2001) and has incorporated as relevant principles identified in the following judgements:

- *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46;
- *Wehbe v Pittwater Council* [2007] NSWLEC 827;
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 1009 ('Four2Five No 1');
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 ('Four2Five No 2');
- *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 248 ('Four2Five No 3');
- *Micaul Holdings Pty Limited v Randwick City Council* (2015) NSWLEC 1386;
- *Randwick City Council v Micaul Holdings Pty Ltd* (2016) NSW LEC7;
- *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118;
- *RebelMH Neutral Bay v North Sydney Council* [2019] NSWCA 130;
- *Baron Corporation v The Council of the City of Sydney* [2019] NSWLEC 61; and
- *Al Maha Pty Ltd v Huajun Investments Pty Ltd* [2018] NSWCA 245.

3.2. *Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?*

Is a development which complies with the standard unreasonable or unnecessary in the circumstances of the case?

The consideration of compliance being unreasonable or unnecessary in the circumstance is assisted by a consideration of the context of the site relative to the surrounding land use zones and the existing and potential development.

The site is former Sydney Water land that was surplus to Sydney Water requirements and purchased by Hornsby Shire Council (Council) in 2016, specifically for the purpose of the delivery of recreational facilities to meet the sporting demands of the population of Hornsby Shire local government area. The site is large and comprises significant areas of remnant native vegetation around the perimeter, with a cleared but contaminated area within the centre of the site.

The proposal seeks to deliver the recreation areas and facilities as Council intended with the purchase of the land. The surrounding bushland within the site provides large setbacks between the proposed facilities and the non-compliant elements of the development, mitigating any amenity impacts. The non-complying structures being sports netting/fencing and the sports lighting will facilitate the use of the site in accordance with its intended purpose and meet the safety and Australian Standards for such facilities.

The fencing and lighting structures are characteristic of such recreational facilities within suburban residential areas and are not out of character with the area. Furthermore, the underlying zoning of the land expressly permits such land uses on the site.

In this context, a development that strictly complies with the Height of Buildings standard is unreasonable or unnecessary in this circumstance for the following reasons:

- The proposal satisfies the objectives of the R2 Low Density Residential zone, C3 Environmental Management and RE1 Public Recreation zones and the objectives of the Height of Buildings standard as demonstrated above;
- The proposal will not result in significant adverse impact to the amenity of surrounding land uses;
- The bulk and scale of the proposed development is compatible with the existing and desired future scale and character of the locality;
- The non-compliance to the development standard facilitates the recreation and sporting facilities envisaged under the relevant planning controls for the site in a manner that delivers recreation areas and facilities which are fit for purpose and permitted in the zone;
- The variation to the height control does not give rise to unreasonable visual or light spill impacts; and
- The proposed development is generally compliant with the controls, or the intent of the controls, contained in the Hornsby Development Control Plan (DCP) 2013.

Would the underlying objective or purpose be defeated or thwarted if compliance was required?

The second objective of the R2 Low Density Residential zone is “to enable other land uses that provide facilities or services to meet the day to day needs of residents.”

The second objective of the C3 Environmental Management zone is “to provide for a limited range of development that does not have an adverse effect on those values.”

Land uses under both such zones explicitly permit “recreation areas” and “recreation facilities” and therefore contemplate such uses.

To accommodate these types of uses, high fencing and lighting is required to ensure that the space is fit for purpose for its intended use and to comply with the relevant Australian Standards.

If strict compliance were required, fences and sport lighting would have to be reduced in height to an extent that they would not be providing contemporary quality or fit for purpose lighting which is expected for such areas and facilities. It would also have the potential to compromise safety.

Has the development standard been virtually abandoned or destroyed by the Council's own actions in departing from the standard?

It cannot be said that the height of buildings development standard has been abandoned and this method is not contested to demonstrate that numerical compliance is unreasonable or unnecessary in the circumstance.

Is the zoning of the land unreasonable or inappropriate?

The land use zone is not unreasonable or inappropriate and is not contested to demonstrate that numerical compliance is unreasonable or unnecessary in the circumstance.

3.3. *Are there sufficient environmental planning grounds to justify contravening the development standard?*

It is considered that there are sufficient environmental planning grounds to justify contravening the development standard, being:

- The proposal is consistent with the objectives of the zoning of the site and the objectives of the Height of Buildings standard;
- The non-compliant structures do not result in any unacceptable impacts on the amenity of surrounding development; and
- The non-compliant structures ensure that the facilities are fit for purpose and have been accommodated without adverse environmental impact.

3.4. *Is the proposed development in the public interest because it is consistent with the objectives of the particular standard and the objectives for development in the zone?*

Objectives of the Height of Buildings standard

The proposal remains consistent with the objectives of the Height of Buildings standard outlined in Subclause 4.3(1) despite the non-compliance, as demonstrated below:

- (a) *to permit a height of buildings that is appropriate for the site constraints, development potential and infrastructure capacity of the locality.*

The Westleigh area is predominantly zoned R2 Low Density Residential with fingers of RE1 Public Recreation and C1 National Parks and Nature Reserves, comprising low density residential development amongst valleys of bushland.

The proposed development will deliver recreational areas and facilities that meet the day to day demands of the local population in terms of recreation spaces and sporting facilities. The majority of the site is heavily vegetated with remnant native vegetation ensuring significant setbacks between the sporting platforms and the surrounding residential properties.

The proposed structures are to provide protective fencing/netting at either end of the central and southern sporting platforms and sports lighting to all platforms to enable use of the sporting fields for training in the evening.

The proposed structures are lightweight and consistent with the character of similar development that exists on other recreation areas and recreation facilities, and is anticipated on land that is zoned and permits such a purpose.

The structures have been designed to minimise and avoid adverse impacts on the site and surrounds as addressed in relation to light spill in the Environmental Impact Statement. The structures will have no view impacts, overshadowing impacts or amenity impacts on neighbouring properties.

Objectives of the zone

The proposal remains consistent with the objectives of the zoning of the site, despite the non-compliance with the Height of Buildings standard as demonstrated in the assessment of the objectives below.

R2 Low Density Residential

- *To provide for the housing needs of the community within a low density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

The proposal provides recreation areas and facilities to meeting the recreation and sporting needs of the local community.

C3 Environmental Management

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*
- *To provide for a limited range of development that does not have an adverse effect on those values.*
- *To protect the natural environment of steep lands and floodplains within the catchment of the Hawkesbury River.*
- *To enable low impact agritourism and tourist and visitor accommodation that is compatible with the environmental values of the zone.*

RE1 Public Recreation

- *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 protect and maintain areas of bushland that have ecological value.*

The proposal is considered to meet the objectives of the C3 Environmental Management zone and the RE1 Public Recreation zone, in that not only will the proposal deliver a facility that is expressly permitted in the zone that is for the benefit of the wider community, but it will also assist with the protection, management and restoration of the remnant vegetation across the site. This will be facilitated through the remediation of large areas of contaminated land, a reduction in the extent of the existing unauthorised mountain bike trails within areas of environmental significance and upgrades to other trails to standards to minimise disturbance on surrounding native vegetation. It will also facilitate the regeneration and revegetation of areas of native vegetation through the implementation of a vegetation management plan.

The application is seeking development consent for the use of the land for the purpose of a recreation facility (outdoor) and recreation area. As such the fourth objective of the C3 Environmental Management zone which relates to low impact agritourism and tourist and visitor accommodation is not applicable in these circumstances.

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

The numerical non-compliance with the Height of Buildings development standard is a local matter and does not raise any matter of State or regional significance. Council can assume the Secretary's concurrence under Planning Circular PS 18-003 issued on 21 February 2018.

3.6. *Is there public benefit in maintaining the development standard?*

Generally, there is public benefit in maintaining standards. However, there is also public benefit in maintaining a degree of flexibility in specific circumstances.

In this case, no public benefit would accrue in the circumstances of requiring strict numerical compliance with the Height of Buildings development standard when it has been demonstrated that, despite the numerical non-compliance, the proposed development will achieve consistency with the zone and development standard objectives. The numerical non-compliance ensures the facilities are fit for purpose, accommodate the demand on use and ensures compliance with safety standards is achieved.

3.7. *Is the objection well founded?*

Yes, the proposal is consistent with the objectives of the R2 Low Density Residential, C3 Environmental Management and RE1 Public Recreation zones and the Height of Buildings development standard.

It is considered that the objection is well founded in this instance and that granting an exception to the development can be supported in the circumstances of the case.

4. Conclusion

The proposed variation is based on the reasons contained within this formal request for an exception to the Height of Buildings standard.

The proposal accords with the stated objectives for the zoning of the site and the Clause 4.3 Height of Buildings development standard. The proposal is consistent with adjoining residential uses in the vicinity. The overall development will have a positive outcome for the urban aesthetic of the locality. As such, it is considered that the proposal is consistent with the planning outcomes envisioned for the area.

The non-compliant structures will not contribute to any unacceptable impacts to adjoining properties and measures will be implemented to mitigate impacts on surrounding flora and fauna.

The non-compliance to the development standard facilitates the use of the site for a land use consistent with the zone objectives.

A development strictly complying with the numerical standard would not significantly improve the amenity of surrounding land uses but would result in the planned sports facilities not being fit for purpose. In the context of the locality, it would be unreasonable for strict compliance to be enforced.

The non-compliance is not considered to result in any precedents for future development within the locality or broader LGA, given the site circumstances and surrounding pattern of development.

As demonstrated in this request, it would be unreasonable for strict compliance with the Height of Buildings control to be enforced. It is concluded that the variation to the Height of Buildings development standard is well founded as compliance with the standard is both unnecessary and unreasonable in the circumstances of this case.