

## Clause 4.6 Objection to Clause 4.3 - Height of Buildings of the Bankstown Local Environmental Plan 2015 (BLEP 2015)

Revised February 2016 V4

### Introduction

This report is to be considered in conjunction with the Statement of Environmental Effects (SEE) for the application for the proposed demolition of 5 existing dwellings, removal of trees, proposed construction of two (2) three storey residential flat building comprising twenty two (22) units and six (6) two storey townhouses, fifteen (15) parking car spaces, associated landscaping and consolidation into a single lot

The report is a submission pursuant to the requirements of Clause 4.6 of the BLEP 2015 to seek approval from Council for consent to be granted to an application that contravenes a development standard.

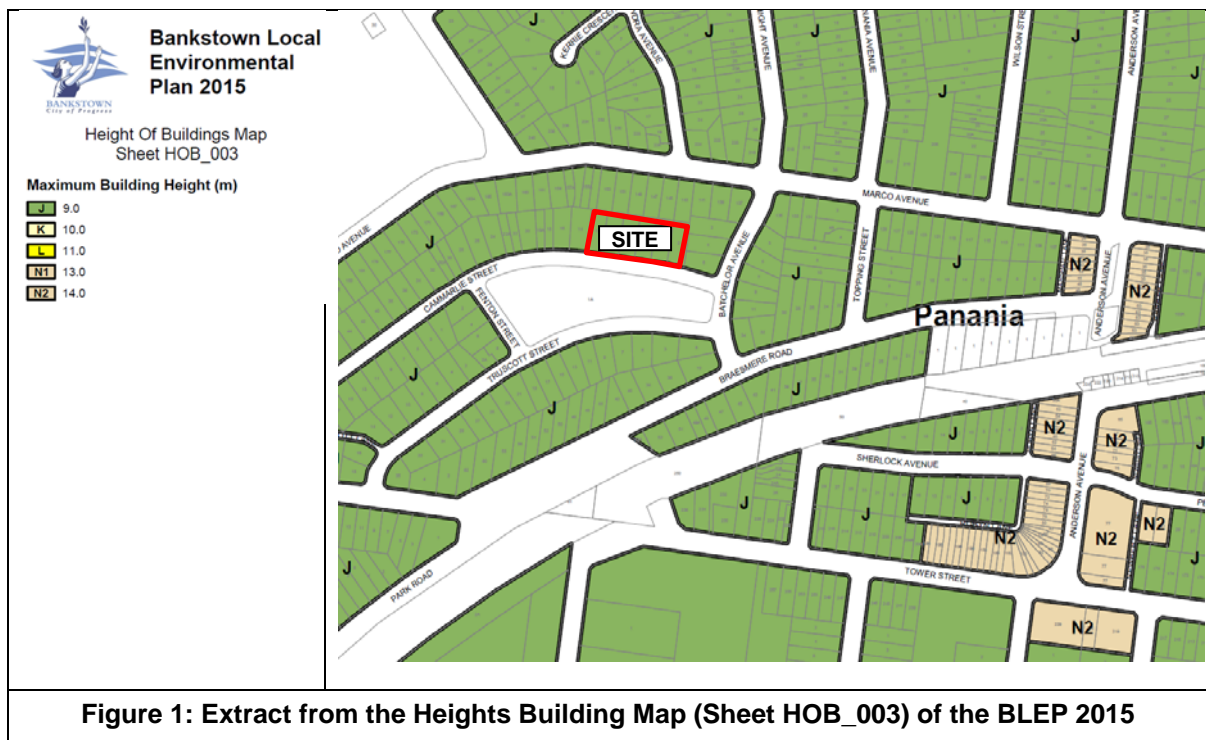
### 1. Clause 4.6 Objection

#### Development Standard

Pursuant to Clause 4.6 of the Bankstown LEP 2015 (BLEP 2015), this objection seeks to vary the building height standard stipulated in Clause 4.3 that states:

*(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 relevant portion of the Heights of Building Map (Sheet HOB\_003) of the BLEP 2015 shown on Figure 1 below shows a maximum height of 9m for the site.



Furthermore, Clause 4.3(2B) of Height of Buildings states that:

- (c) for multi dwelling housing and boarding houses:
- (i) the maximum building height for a dwelling facing a road is 9 metres and the maximum wall height is 7 metres, and
  - (ii) the maximum building height for all other dwellings at the rear of the lot is 6 metres and the maximum wall height is 3 metres.

### Proposed Variation

An extract from the architectural plans illustrated on Figure 2 below shows the street and top view of the proposed residential flat buildings. Highlighted is the extent of the non compliance and proposed variation to the building height and wall height standards.



**Figure 2:** Extracts from the Roof Plan (Sheet 7 of 12 Rev C dated 11/11/2015) and Elevations/Colour Schedule Plan (Sheet 8 of 12 Rev C dated 11/11/2015)

The table below outlines the corresponding variation on building heights in numerical values.

Building	Building Height					
	Existing Ground Level (AHD)	Proposed Height Level (AHD)	Proposed (m)	Max (m)	Variation	%
Block A - RFB	10.35	21.35	11m	9m	2m	22%
Block B - RFB	11.29	21.90	10.61m	9m	1.61m	17%
Rear (East multi dwelling)	10.85	16.641	5.791m	6m	<6m	Complies
Rear (West multi dwelling)	10.10	16.091	5.99m	6m	<6m	Complies

The table below outlines the corresponding numerical values of the proposed variations on wall heights.

Building	Wall Height					
	Existing Ground Level (AHD)	Proposed Height Level (AHD)	Height to underside of eave (m)	Max (m)	Variation (m)	%
Block A - RFB	10.35	21.10	10.75	7m	3.75	53 %
Block B - RFB	11.29	21.65	10.36	7m	3.36	48 %
Rear (East multi dwelling)	10.85	16.391	5.541	3m	2.541	84 %
Rear (West multi dwelling)	10.10	15.841	5.741	3m	2.741	91%

## 2. Justification for the exception and matters for consideration

### Compliance to Clause 4.6 BLEP 2105

The following provides the justification with regards to the objectives of 4.6 of the BLEP 2105.

(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.*

#### Comment

The proposed non-complying building height of the residential flat building consists of 22% (Block A) and 17% (Block B) is needed to accommodate lift overruns. In addition, to reduce building bulk, the main roof is fragmented into smaller skillion type roofs that invariably result in greater heights (i.e. hip roof).

In addition, the part of the proposed works that has a building height greater than 9m occupy a very small proportion of the roof and building bulk (See Figure 2). This non compliant portion is sufficiently setback from the street, side and rear property boundaries. Scale, height and built form is adequately resolved by breaking up the building mass and in articulated building facades. The building height profile provides a transitional step down from the taller mid portion of the RFB to the lower sides..

The front elevation demonstrates that the development sits comfortably within the existing streetscape and surrounding area. The minor breach is not incompatible with any existing and future development.

Similarly, the breach in maximum wall height by the proposed RFB structures of 53% and 48% in Blocks A & B, respectively, is the result of an additional 3<sup>rd</sup> storey superimposed on development standards crafted for 2 storey buildings. By and large, wall heights on the peripheral side walls comply with the maximum standard with the exception of a small and isolated portion close to the lift shafts where the wall heights are exceeded.

The non complying building and wall height on the proposed multi dwellings to the rear of the site are consequences of a two storey structure superimposed a single storey

building envelop development standard. These breaches are considered appropriate in this instance as the proposed development is akin to any seniors housing development undertaken by LAHC that is exempt from this (single storey) standard pursuant to CI 40 (5) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

Regardless, careful consideration was given in the multi dwelling design to integrate its upper level into the roof structure similar to an attic. Pursuant to the BLEP 2015 definition, an attic is not considered as a 'storey'.

Moreover, the multi dwellings are not visible from the street and viewed from the adjacent rear properties, the structure read as a single storey dwelling with attic.

The SEE has demonstrated that there is no disruption to existing views, loss of privacy, overshadowing or visual intrusion despite numerical excess in the maximum building wall and building heights. The impact to the current amenity will be insignificant.

Flexibility in the building and wall height standards is in this particular instance, justified and strict compliance is unreasonable and unnecessary as it will result in the loss of at least 6 RFB's and potentially 3 multi dwelling affordable rental housing units. It will be tantamount to under utilization of existing site potentials and public infrastructure as well as disregard to the objective of Division 5 of the ARHSEPP in the provision of new affordable rental housing.

- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances*

**Comment**

Strict compliance to the building and wall height requirements will result in the loss of 6 RFB's and potentially 3 multi dwelling affordable rental housing units. In the context of the current debate on homelessness and housing affordability for those members of society that are unable to meet their own housing needs, the proposed development in its entirety is clearly a better social outcome.

- (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.*

**Comment**

The building and wall height standards are not excluded from the clause.

- (3) Written request required that seeks to justify the contravention of the standard by demonstrating:*

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

**Comment**

Strict compliance with the 9m building height and 7m wall height for the RBF and 6m building height and 3m wall height standards in the BLEP 2015 are unreasonable and unnecessary as outlined in sub-clause (1) above.

- (b) that there are sufficient environmental planning grounds to justify contravening the development standard*

### **Comment**

Flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects specified in section 5 (a) (i) and (ii) of the Environmental Planning and Assessment Act 1979 (the Act).

Division 5 of the ARH SEPP applies to those areas where residential flat buildings are not normally permissible and non-compliances with key controls including building heights are considered justified. One aim of the SEPP is to “*facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards.*”

The design meets the SEPP65 amenity requirements demonstrating suitability of the site for the density proposed using careful planning and design strategies to reduce the environmental impact of the development.

Clause 4.6 of the BLEP 2015 allows a proponent to seek approval from Council for consent to be granted to an application that contravenes a development standard, in this case the maximum height of buildings and walls. As outlined in the SEE, the proposed development complies with all other standards of BLEP 2015 and BDCP 2014 will create a minimal impact on the locality and its surrounds.

Furthermore the objectives of Clause 4.3 Height of buildings are addressed as follows:

- (1) *The objectives of this clause are as follows:*
  - (a) *to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,*

### **Comment**

Scale, height and built form is adequately resolved by breaking up the building mass and articulated building facades. The skillion roof style effectively minimizes the height and size of the roof structure. The building height provides a transitional step down from the taller mid portion of the RFB to the sides

The use of this massing strategy together with the choice of building materials and colours, façade and fenestration treatment as well as landscaping measures all ensure that the building is proportional to the existing and future streetscape and character of the area.

The solar access and privacy are considerations that have been addressed in the SEE report and demonstrated that the additional building and wall heights will not create any unreasonable additional impact on the nearest properties or surrounding public domain.

- (b) *to maintain the prevailing suburban character and amenity of two storeys in Zone R2 Low Density Residential,*

### **Comment**

There will be an insignificant impact to the prevailing suburban character and amenity. The proposed 3 storey residential flat buildings and 2 storey multi dwellings to the rear blend into the 2 storey suburban character by the use of architectural design solutions and location across Cammarlie Park. No disruption to existing views,

loss of privacy, overshadowing or visual intrusion results in the additional storey and minimal excess in building and wall heights standards.

*(c) to provide appropriate height transitions between development, particularly at zone boundaries,*

**Comment**

The proposed 2 storey height on both ends of the residential flat building where it adjoins adjacent side boundaries, provide an effective transition from the 3 storey level.

*(d) to define focal points by way of nominating greater building heights in certain locations*

**Comment**

The additional floors, 3<sup>rd</sup> level of the RFB and 2<sup>nd</sup> level to the multi dwelling are located to the central portion of the site and are well set backed from the street frontage and adjoining side and rear properties.

The increase in building height is appropriate in the context that the site is directly across Cammarlie Reserve. The taller building will enhance CPTED properties as well as provide visual interest and focus to the park.

*(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*

**Comment**

The consistency with the objectives of Cl. 4.3 Height of buildings as outlined above satisfies the Wehbe test (i) and the absence of any environmental impacts, demonstrates that strict compliance with the building and wall height standards is both unreasonable and unnecessary in this instance.

Based on the above, there are sufficient environmental planning grounds to justify contravening the development standard.

*(4) Development consent must not be granted unless:*

*(a) the consent authority is satisfied that:*

*(i) the written request has addressed sub clause (3)*

**Comment**

Sub Clause 3 has been adequately addressed above and in the SEE (Section 3.2.2- Bankstown Development Control Plan 2014 (BDCP 2014) B1: Residential Development - Section 9: Residential Flat Buildings.

*(ii) the proposed development is in the public interest (consistent with the objectives of the standard and the zone)*

**Comment**

The objectives of Zone R2 Low Density Residential in the BLEP 2015 include the following:

- 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.
- To allow for certain non-residential development that is compatible with residential uses and does not adversely affect the living environment or amenity of the area.
- To allow for the development of low density housing that has regard to local amenity.
- To require landscape as a key characteristic in the low density residential environment.

The above objectives of the zone are met by the proposal for the following reasons:

- The proposed development provides community needs for affordable housing.
- The development sits comfortably with the existing and the future character of the street and surrounding area.
- The proposal takes advantage of local amenities including proximity to Panania station, retail, commercial and other town centre facilities and services without exceeding their capacities. The site is well placed across Cammarlie reserve and will enhance its utility and CPTED features.
- Landscaping is used throughout the site to enhance the overall development by softening the hard surfaces including the carparking bays, driveways and pedestrian pathways.

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

**Comment**

A Site Compatibility Certificate under Division 5, Part 2 of the ARHSEPP was issued on 21 May 2014 by the Acting Secretary of the Department of Planning and Environment. which states that the development of the site as described in Schedule 1 and 2 of the Certificate:

- is compatible with the surrounding land uses, having regard to the matters specified in clause 37(6)(b) of the ARH SEPP; and
- is not likely to have an adverse effect on the environment and does not cause any unacceptable environmental risks to the land.

Schedule 1 is a description of the development and Schedule 2 the concept plan that shows the 3 storey residential flat buildings to the front and the 2 storey multi dwelling structures to the rear of the site.

*(5) The Secretary must consider:*

*(a) whether contravention raises any matter of significance for State or regional environmental planning.*

**Comment**

As mentioned above, an SCC from the Acting Secretary of the Department of Planning and Environment has been obtained.

**3. Wehbe v Pittwater Council [2007] NSW LEC 827**

In his decision in *Wehbe v Pittwater Council [2007] NSW LEC 827*, Chief Justice Preston

expressed the view that there are five 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.

The five tests are considered in the table below.

<p><i>(i) The objectives of the standard are achieved notwithstanding non-compliance with the standard</i></p>	<p>The BLEP 2015 Clause 4.3 Height of Buildings and corresponding responses are as follows:</p> <p><i>(1) The objectives of this clause are as follows:</i></p> <p><i>(e) to ensure that the height of development is compatible with the character, amenity and landform of the area in which the development will be located,</i></p> <p><b>Comment</b> Scale, height and built form is adequately resolved by breaking up the building mass and articulated building facades. The skillion roof style effectively minimizes the height and size of the structure.</p> <p>The building height provides a transitional step down from the taller mid portion of the RFB to the sides</p> <p>The solar access considerations have been addressed in the SEE report and demonstrated that the additional height will not create any unreasonable additional impact on the nearest properties or surrounding public domain.</p> <p><i>(f) to maintain the prevailing suburban character and amenity of two storeys in Zone R2 Low Density Residential,</i></p> <p><b>Comment</b> There will be an insignificant impact to the prevailing suburban character and amenity The proposed 3 storey residential flat buildings blend into the 2 storey suburban character by the of use architectural design solutions and enhanced by its location right across Cammarlie Park. No disruption to existing views, loss of privacy, overshadowing or visual intrusion results in the additional storey and minimal excess in building and wall heights.</p> <p><i>(g) to provide appropriate height transitions between development, particularly at zone boundaries,</i></p> <p><b>Comment</b> The proposed 2 storey height on both ends of the residential flat building where it adjoins adjacent side boundaries, provide an effective transition from the 3 storey level.</p> <p><i>(h) to define focal points by way of nominating greater building heights in certain locations</i></p>
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	<p><b>Comment</b></p> <p>The additional floor (3<sup>rd</sup> level) is located to the middle of the site and is well set backed from the street frontage and adjoining side and rear properties.</p> <p><i>(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</i></p> <p><b>Comment</b></p> <p>The consistency with the objectives of Cl. 4.3 Height of buildings as outlined above satisfies the Wehbe test (i) and the absence of any environmental impacts, demonstrates that strict compliance with the building and wall height standards is both unreasonable and unnecessary in this instance.</p>
<i>(ii) the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary</i>	Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved as outlined in (i) above.
<i>(iii) the underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	Not applicable. The underlying object or purpose of the standard would not be defeated or thwarted if compliance was required.
<i>(iv) 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</i>	This exception to development standards request does not rely on this reason.
<i>(v) 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 would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.</i>	This exception to development standards request does not rely on this reason

#### **4. Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46**

The exception to development standards request is assessed below against the accepted test for the assessment of development standard variation established by Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46.

A Is the planning control in question a development standard?	Yes, Cl. 4.3(2) of Bankstown LEP 2015 is a development standard.
B What is the underlying object or purpose of the standard?	The underlying objectives of the standard are assessed in Section 3..
C Is compliance with the development standard unnecessary or unreasonable in the circumstances of the case?	Sections 2 & 3 demonstrates that compliance is unnecessary and unreasonable.
D. Is compliance with the development standard consistent with the aims of the Policy (to provide flexibility in the application of development standards); and, in particular, does compliance with the development standard tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act, 1979?	<p>The arguments contained in this Clause 4.6 variation support the case to allow flexibility in the application of the standard.</p> <p>The non-compliance with the development standard allows for an orderly use of the land and has been designed with consideration to the desired future character of the area.</p> <p>Additionally, the Objects of the Act are satisfied as:</p> <ul style="list-style-type: none"> <li>• The departure from the height standard in BLEP 2015 will have no negative consequences in terms of the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment; and</li> <li>• The departure from the height standard in BLEP 2015 allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.</li> </ul>
E. Is the objection well founded?	As the cl. 4.6 exception to development standards request appropriately addresses Wehbe v Pittwater Council [2007] NSW LEC 827, the proposed variation is well founded.

#### **5. Public interest and matters of State or regional significance**

##### **5.1 Is the proposal in the public interest?**

Clause 4.6 exception to development standards request and the accompanying plans and technical reports contained within the SEE demonstrate the public advantages of developing the site. In summary:

- Strict compliance to the building and wall height requirements will result in the loss of 6 residential flat units and potentially 3 multi dwelling units. In the context of the current debate on homelessness and housing affordability for those members of society that are unable to meet their own housing needs, the proposed development in its entirety is clearly a better social outcome.
- The proposed development will allow the Land and Housing Corporation to modernize its housing stock, assist it in trying to meet constantly increasing demands for public housing, and allow a site that is well located within Panania to be utilized.
- The new and modern structure will contribute to the quality of building stock in the area. Notwithstanding non compliances in building and wall heights.
- Maximum utilization of the site which is accessible and in close proximity to public infrastructure such as train stations and town centres are consistent with the government plans for metropolitan Sydney.
- The project will generate employment during the construction
- No unreasonable public disadvantages have been identified as it has been demonstrated that any environmental or other impacts associated with the development are minimal and/or can be adequately managed.

## **5.2 Matters of State or Regional Significance**

The non-compliance with CI 4.3 Height of buildings standard does not raise matters of significance for State or regional planning. The proposed development is consistent with the objectives of the ARHSEPP in providing affordable rental housing. It will likewise allow for much needed affordable housing in the Bankstown Local Government Area.

## **5.3 The public benefit of maintaining the standard**

There is no public benefit in maintaining strict compliance with the development standard in this instance. On the contrary, the general public will benefit in the increase of the supply of affordable housing in the area.

## **6. Summary justification**

This variation request is the culmination of a design process that included feedback from discussions with Council prior and after lodgment of the DA.

A summary of the matters set out in Clause 4.6 exceptions to development standards request to vary the height of building and wall standards are as follows:

### **Building and wall height standards**

- The proposed non-complying elements from the 9m building height and 7m wall height standards in the residential flat buildings was brought about by an additional floor level (3<sup>rd</sup> storey) to enable maximum use of the site. Similarly, the non-conformance in the multi dwellings from the building height of 6m and wall height of 3m is a result of an additional storey to maximize provision of affordable rental housing.
- The additional floor levels were incorporated in the approved concept plan in the Site Compatibility Certificate (SCC).

### **Urban design and streetscape**

- The portion of the proposed works in the residential flat buildings that have a building height greater than 9m occupy a small proportion of the site and building

bulk (See Figure 2). It is also sufficiently setback from the street frontage, side and rear boundaries (See Figure 2). Similarly, the wall height greater than 7m is a result of the building and roof design that aims to reduce height and minimize bulk. Located in a small portion to the centre of the site, this breach is inconspicuous and unobtrusive to surrounding development.

- The front elevation demonstrates that the development sits comfortably within the existing streetscape and surrounding area. The minor breach will not be incompatible with any future development.
- The multi dwellings are located to the rear of the site and are not visible from the street. The non compliances on building and wall heights have been demonstrated to have no impact on the adjacent properties and other dwellings within the site.

### **Height standard objectives**

The proposal satisfies the relevant objectives of the height standard (cl. 4.3(1)) as follows:

- Scale and built form is adequately resolved by breaking up the building massing and articulating building facades. The skillion roofs reduce the bulk and size of the roof structure.
- There is no disruption to existing views, loss of privacy, overshadowing or visual intrusion. There will be an insignificant impact to the current amenity.
- The 2 storey building height to both ends of the residential flat buildings that adjoin the side boundaries provide an effective transition from the 3<sup>rd</sup> storey that is already well set backed from adjoining properties being located to the middle of the site.
- There is consistency with the objectives of the standard, and the absence of any environmental impacts, would demonstrate that strict compliance with the height standard is both unreasonable and unnecessary in this instance.
- As noted in Section 3 above, the proposal is consistent with the objectives to cl. 4.3, satisfying Wehbe test (i). As such, it is unreasonable and unnecessary in this circumstance to comply with the development standard.
- The proposal will not give rise to any unreasonable or unexpected adverse amenity impacts for surrounding properties (in terms of overshadowing, views and privacy impacts), as detailed in the SEE, Section 3.2.2 - Bankstown Development Control Plan 2014 (BDCP 2014) B1:Residential Development - Section 9: Residential Flat Buildings, Section 3.3 Visual Impact, 3.4 Solar Access, 3.5 Privacy among others.

### **Impacts**

- The Traffic and Parking Assessment Report dated 10 September 2015 by Varga Traffic Planning ) (page 10) concludes that the proposed development will clearly not have any unacceptable traffic implications in terms of road network capacity.
- The proposal will not give rise to any unreasonable or unexpected adverse amenity impacts for surrounding properties (in terms of overshadowing, views/outlook and privacy impacts) as addressed in the SEE, Section 3.2.2 - Bankstown Development Control Plan 2014 (BDCP 2014) B1:Residential Development - Section 9: Residential Flat Buildings, Section 3.3 Visual Impact, 3.4 Solar Access, 3.5 Privacy among others.

### **Zone objectives**

The proposal satisfies the objectives of Zone R2 – Low Density Residential as follows:

- The objectives of the zone are met by the proposal as it provides affordable housing to people in need. The development sits comfortably with the existing and the future character of the street and surrounding area. The proposal takes advantage of the local amenity including proximity to Panania railway station and

town centre facilities and services as well as the Cammarlie reserve located right across the site.

- Landscaping is used throughout the site to enhance the overall development by softening the hard surfaces including the carparking bays, driveways and pedestrian pathways.
- The objectives of zone would be defeated and thwarted if compliance with the height standard was required as it would preclude the construction of much needed affordable housing on the site.

### **Objects of the Act**

The Objects of the Act are satisfied as follows:

- The departure from the height standard in BLEP 2015 will have no negative consequences in terms of the proper management, development and conservation of natural and artificial resources, including agricultural land, natural areas, forests, minerals, water, cities, towns and villages for the purpose of promoting the social and economic welfare of the community and a better environment.
- The departure from the height standard in BLEP 2015 allows for the orderly and economic use of the site in a manner which otherwise achieves the outcomes and objectives of the relevant planning controls.

### **Public interest**

- Strict compliance to the building and wall height requirements will result in the loss of at least 6 residential flat units and potentially 3 multi dwellings for affordable rental housing. In the context of the current debate on homelessness and housing affordability for those members of society that are unable to meet their own housing needs, the proposed development in its entirety is clearly a better social outcome.
- No unreasonable public disadvantages have been identified as it has been demonstrated that any environmental or other impacts associated with the development are minimal and/or can be adequately managed.

### **Other tests**

- The proposed variations satisfy the tests and considerations established in *Wehbe v Pittwater Council* [2007] NSW LEC 82 and *Winten Developments Pty Ltd v North Sydney Council* [2001] NSWLEC 46.

### **Conclusion**

In summary, compliance with the development standard restricting building and wall height is unreasonable and unnecessary. This is because the objectives of the development standard can still be achieved notwithstanding non-compliance. The development standard is not an end in itself but rather a means of achieving desired outcomes.

Council is therefore urged to support this Clause 4.6 objection.