



**Family &
Community Services**
Land & Housing Corporation

Clause 4.6

Request to vary development standards

Accompanying a Development Application for

Construction of two (2) residential flat buildings containing twenty four (24) units with basement parking for twenty three (23) vehicles, associated landscaping and consolidation into a single lot

at

**84 NEW ILLAWARRA ROAD & 313 BEXLEY ROAD
BEXLEY NORTH
Lot 38 DP 1103672 & Lot 40 DP 8315**

February 2019

Executive Summary

The Land & Housing Corporation requests that Bayside Council grant consent to the proposed development at 84 Illawarra Road and 313 Bexley Road, Bexley North despite the proposed development contravening the height and density controls of the Rockdale Local Environmental Plan (RLEP) 2011.

The request to vary development standards is considered to be reasonable in the circumstances of the case and argues why compliance with the standards is unnecessary on the grounds that:

- (a) the contraventions do not raise matters of significance for State or regional planning based on the Secretary's decision to issue a Site Compatibility Certificate for the proposed development;
- (b) there are sufficient environmental planning grounds to justify the contravention of the development standards, namely the provision of more social housing in an accessible location consistent with the Rockdale housing strategy, the State Government's Future Directions for Social Housing and the Metropolitan Strategy;
- (c) the proposed development is in the public interest because the proposed development achieves relevant objects of the *Environmental Planning & Assessment Act 1979* and is consistent with the objectives of the R2 zone and the height and FSR development standards, despite the non-compliances;
- (d) the contraventions achieve better planning outcomes for and from the development without significant environmental impact by providing more social housing, optimum utilisation of well-located land and is consistent with the evolving character of the locality;
- (e) Council's Design Review Panel considers that "*the design is a reasonable fit for the site notwithstanding its increased height and density*"; and
- (f) this variation request satisfies the tests established by the Land and Environment for the justification and assessment of variations to development standards.

1. Introduction

NSW Land & Housing Corporation proposes a 24 unit development in two buildings with a maximum height of 15.69m and a combined floor space ratio (FSR) of 0.85:1. The proposal exceeds the maximum building height of 8.5m and the maximum FSR of 0.5:1 in Clauses 4.3 & 4.4, respectively, of the Rockdale LEP 2011 (RLEP 2011).

Clause 4.6 of RLEP 2011 provides Bayside Council with flexibility in applying these standards to the proposed development, subject to a written request justifying the contraventions and demonstrating that compliance is unreasonable or unnecessary in the case of the proposed development.

This request to vary the building height and FSR development standards in Rockdale LEP 2011:

- (a) addresses the matters required to be considered by Council in exercising its discretion pursuant to Clauses 4.6(3) & (4); and
- (b) justifies the height and FSR of the proposed development and demonstrates why compliance with the development standards is unnecessary and unreasonable in this case and that there are sufficient environmental planning grounds to justify contravening the development standards, pursuant to Clause 4.6(3); and
- (c) demonstrates why Council should exercise its discretion to vary the development standards by granting consent to the proposed development despite its non-compliance with the height and FSR standards in RLEP 2011.

2. Description of the Proposal

The proposed development involves the following:

- Removal of 12 trees
- Earthworks
- Construction of two (2) residential flat buildings (**Figure 1**), comprising:
 - **Block A** (facing Bexley Road): 3- & 4-storey building comprising 14 units (11 x 1-bedroom units & 3 x 2-bedroom units) and basement parking for 12 vehicles
 - **Block B** (facing New Illawarra Road): 2- & 3-storey building, comprising 10 units (10 x 2-bedroom units) and basement parking for 11 vehicles
- Vehicle access to the site from Bexley Road and New Illawarra Road
- Landscaping
- Consolidation of two (2) lots into one (1) allotment.

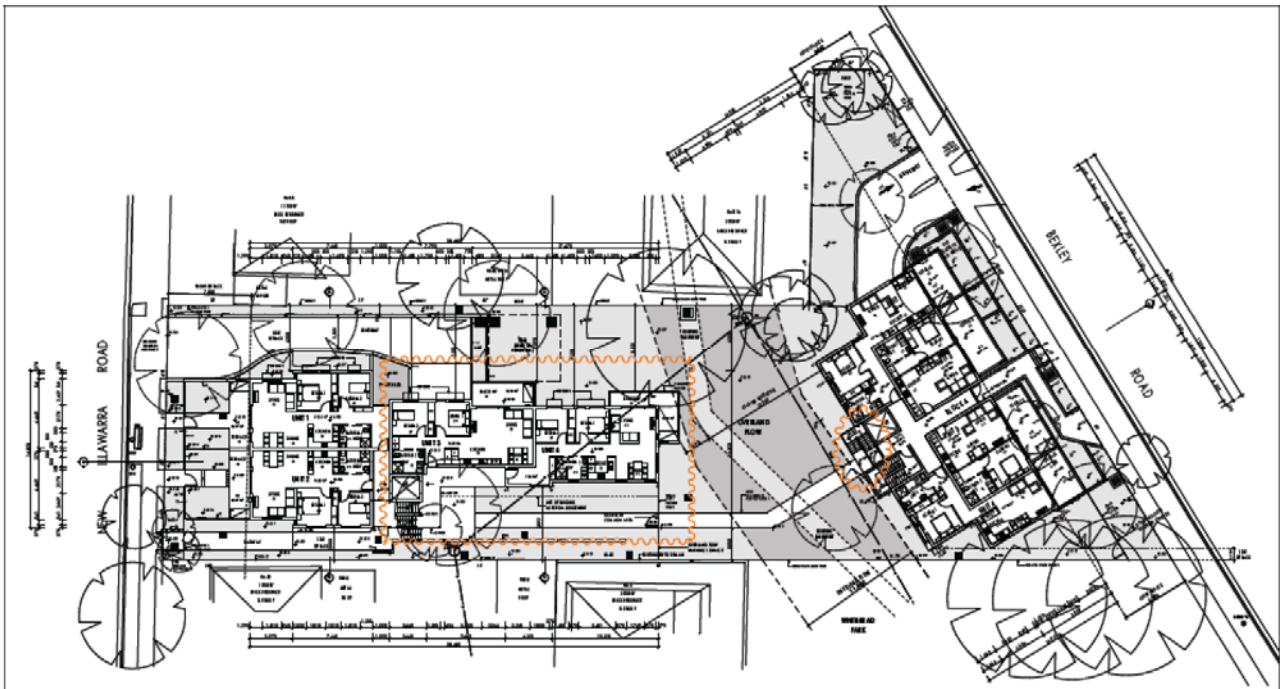


Figure 1: Block A & Block B shown in Site Plan

3. Proposed Building Height Variation

The height map referred to in Clause 4.3 of the RLEP 2011 limits the maximum height of the development on the site to **8.5m** above existing ground level. Refer to **Figure 2** below.

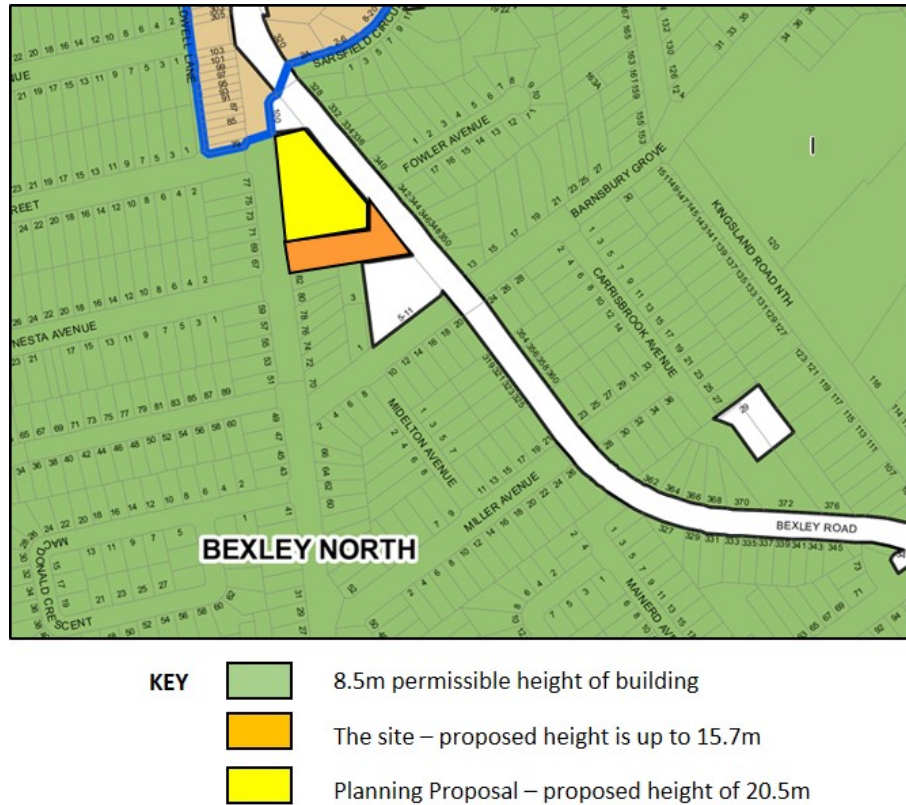


Figure 2: Height of Buildings Map from RLEP 2011 (https://www.legislation.nsw.gov.au/maps/eb2af85c-56a2-4e8d-bafb-c062a636003e/6650_COM_HOB_001_010_20131213.pdf) showing site & adjoining Planning Proposal.

The proposed variations to building height standard are not uniform across the site, as shown in the table below and in **Figures 3 to 9**.

Building	Building Height		
	Proposed (max)	Max	Variation
Block A- northern elevation	15.7m	8.5m	7.2m
Block A- southern elevation	14.8m	8.5m	6.3m
Block A- eastern elevation	13.8m	8.5m	5.3m
Block A- western elevation	15.3m	8.5m	6.8m
Block B- northern elevation	11.4m	8.5m	2.9m
Block B- southern elevation	9.8m	8.5m	1.3m
Block B- western elevation	8m	8.5m	-
Block B- eastern elevation	11.3m	8.5m	2.8m

The height variations are illustrated in **Figures 3 to 9** below.



Figure 3: Eastern (Bexley Road) elevation (**Block A**)

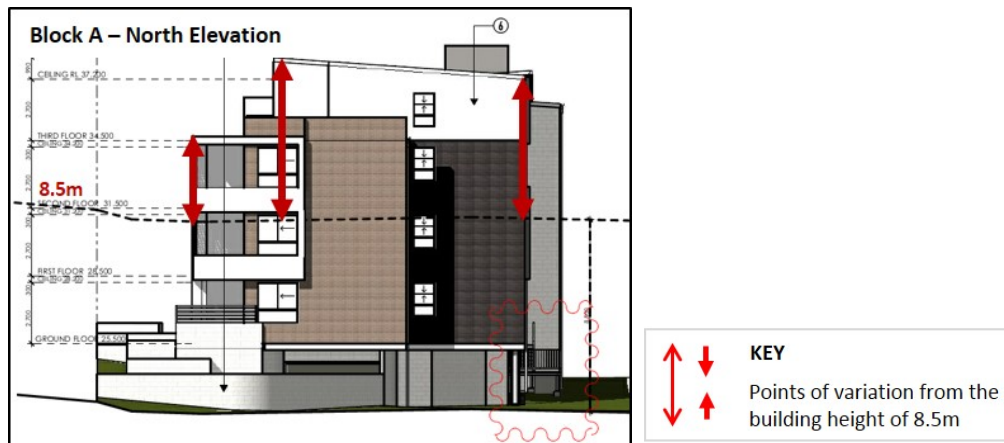


Figure 4: Northern Elevation (**Block A**)



Figure 5: Western Elevation (**Block A**)

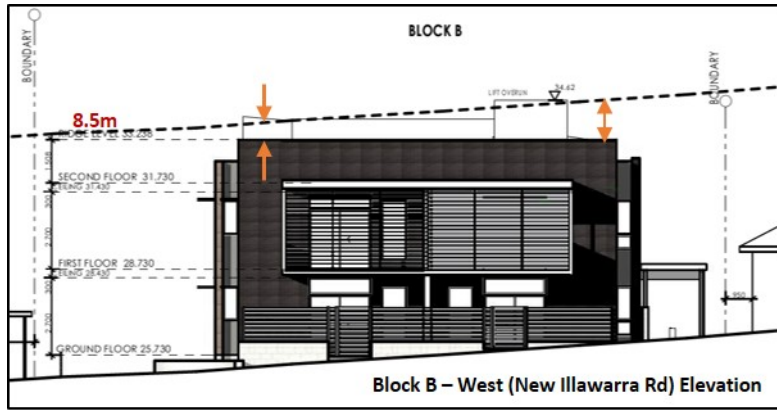


Figure 6: Western (New Illawarra Road) elevation (Block B)

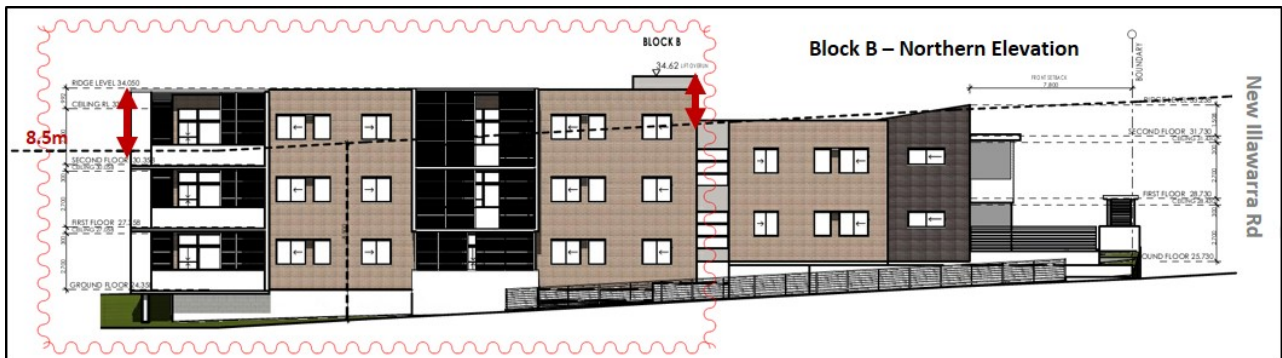


Figure 7: Northern elevation (Block B) along the site (east-west axis)

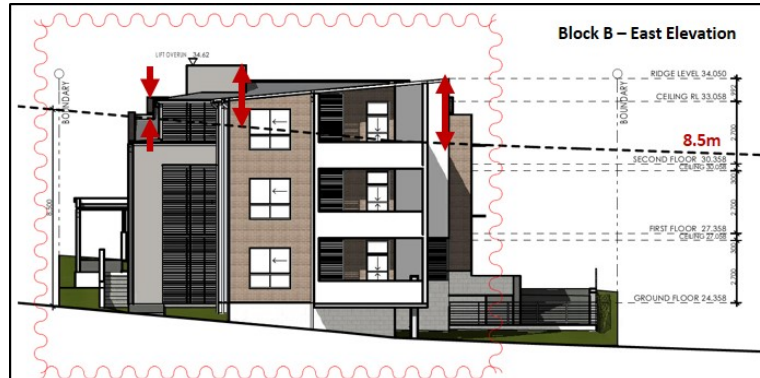


Figure 8: Eastern Elevation (Block B)

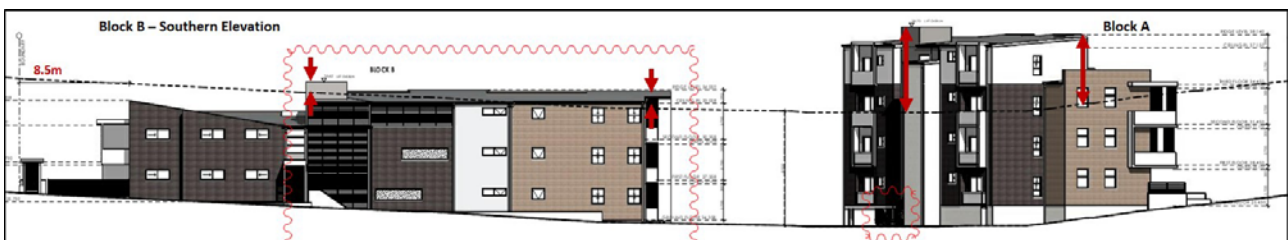


Figure 9: Southern Elevation (Block A & Block B)

4. Proposed FSR Variation

The FSR Map referred to in Clause 4.4(2) of the RLEP 2011 stipulates a maximum FSR of 0.5:1 for the site, compared to the nearby Village Centre and the Planning Proposal for the adjoining land (**Figure 10**). The FSR for the proposed development is 0.85:1.

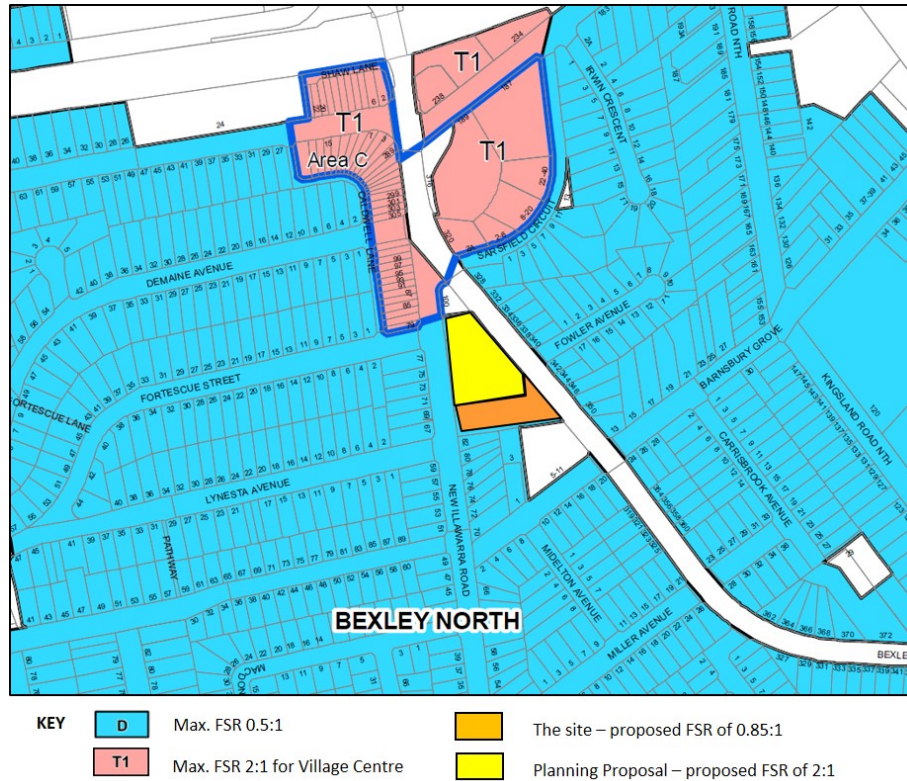


Figure 10: FSR Map taken from RLEP 2011 showing site and adjoining Planning Proposal

5. Procedural Requirements for Varying Standards

Clause 4.6 of the Rockdale LEP 2011 provides Council with flexibility in applying development standards. This variation request satisfies the requirements of Clause 4.6, as detailed in the following table:

Rockdale LEP 2011 – Clause 4.6	
(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	Compliance with the development standards is unnecessary and unreasonable in this instance as the objectives of the height and FSR development standards are achieved despite the non-compliances, as demonstrated in this report.
(b) that there are sufficient environmental planning grounds to justify contravening the development standard	The height and FSR non-compliances allow for the provision of additional housing consistent the objectives of the zone and the objects of the EP&A Act, in an appropriate location without resulting in significant or unacceptable additional amenity or streetscape impacts.

Rockdale LEP 2011 – Clause 4.6	
(4) Development consent must not be granted for development that contravenes a development standard unless:	
<p>(a) the consent authority is satisfied that:</p> <p>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</p>	<p>It is considered that the matters have been adequately addressed above and elsewhere in this request.</p>
<p>(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</p>	<p>The contravention of development standards allows for provision of additional social housing stock in suitable location to meet a local need and with no significant adverse environmental impacts, and utilisation of available physical and social infrastructure. As such, the proposed development is considered to be in the public interest.</p>
<p>(b) the concurrence of the Secretary has been obtained.</p>	<p>In accordance with Planning Circular PS 08-003 (9 May 2008), the concurrence of the Secretary can be assumed as Clause 4.6 of the Standard Instrument (Local Environmental Plans) Order 2006) has been adopted into Rockdale LEP 2011.</p> <p>Under Clause 64 of the <i>Environmental Planning and Assessment Regulation 2000</i>, the Secretary gave written notice dated 21 February 2018 (attached to the Planning Circular PS 18-003 issued on 21 February 2018) to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under Clause 4.6, subject to the conditions in the table in the notice. This case meets those conditions.</p> <p>Furthermore, and in this case, the Secretary issued a Site Compatibility Certificate (SCC) for the proposed development as a prerequisite to the lodgement of the development application. The SCC stipulates that:</p> <ol style="list-style-type: none"> 1. The height of the proposed building fronting New Illawarra Road should be limited to 2 storeys, and may transition to 3 storeys at the rear, to reflect a predominantly 2 storey streetscape and utilising the natural contours of the site. 2. The height of the proposed building fronting Bexley Road should be limited to 3 storeys, and may transition to 4 storeys with appropriate setbacks at the rear, to reflect a predominantly 3 storey streetscape and scale. 3. Final dwelling numbers and parking spaces are to be to the satisfaction of the consent authority in determining the development application. 4. The final built form will be subject to the consent authority undertaking a detailed assessment of the proposal's building design and height, and its impact on solar access and overshadowing and the amenity of surrounding residential development as part of the development application process. <p>The Site Compatibility Certificate is taken to be the Secretary's concurrence in respect of variations to the building height and FSR controls. As such, it can be discerned that the Secretary has given concurrence to varying the development standards for this project subject to the condition of the SCC.</p>

6. Justification for Variation of Building Height and FSR Development Standards

The discussion below demonstrates that it is unnecessary and unreasonable to strictly apply the development standards in the particular circumstances of this case, and that the objectives of the standards and the zone are achieved despite the variations, and as such, the development is in the public interest.

It is considered that the proposed variations of the Building Height & FSR development standards satisfy Clause 4.6(3)(a) & (b) of Rockdale LEP 2011, based on the principles and tests established by the Land & Environment Court.

Winten Developments Pty Ltd v North Sydney Council [2001] NSWLEC 46

The exception to development standard request is assessed below against the test for the assessment of development standard variations established by *Winten Developments Pty Ltd v North Sydney Council (2001) NSWLEC 46*.

A. Are the planning controls in question a development standard?

Clauses 4.3(2) and 4.4(2) of Rockdale LEP 2011 are development standards, in accordance with Section 1.4 of the *Environmental Planning & Assessment Act 1979*.

B. What is the underlying object or purpose of the standards?

The objectives of the **building height** control in Clause 4.3 of Rockdale LEP 2011 are:

- (a) *to establish the maximum limit within which buildings can be designed and floor space can be achieved;*
- (b) *to permit building heights that encourage high quality urban form;*
- (c) *to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain; and*
- (d) *to nominate heights that will provide an appropriate transition in built form and land use intensity.*

The objectives of the **FSR** development standard in Clause 4.4 of Rockdale LEP 2011 are:

- (a) *to establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic, in order to achieve the desired future character of Rockdale,*
- (b) *to minimise adverse environmental effects on the use or enjoyment of adjoining properties,*
- (c) *to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation.*

It is considered that the non compliances do not undermine the objectives.

C. Is compliance with the development standards unnecessary or unreasonable in the circumstances of the case?

It is considered that compliance with the development standards is unnecessary and unreasonable as the objectives of the standards and the zone are achieved. This is discussed in detail below, in accordance with the tests established in ***Wehbe v Pittwater Council (2007) NSW LEC 827***.

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 to establish that compliance with a development standard is **unreasonable or unnecessary**. The five ways are as follows (*emphases added*):

- (i) ***The objectives of the standards are achieved notwithstanding non-compliance with the standard***
- (ii) *that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary*
- (iii) *the underlying object of purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable*
- (iv) *the development standards have been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standards and hence compliance with the standard is unnecessary and unreasonable; and*
- (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.*

This variation request relies on the first method of establishing that compliance with the height and FSR development standards is unreasonable or unnecessary. It seeks to demonstrate that the objectives of the standards are achieved notwithstanding non-compliance with the standard.

The objectives of the Height of Buildings and Floor Space Ratio development standards are addressed separately below.

The objectives of the Height of Building development standard

- (a) ***to establish the maximum limit within which buildings can be designed and floor space can be achieved,***

Comment: The proposed development provides for a greater height than that established in Rockdale LEP 2011. Nonetheless, the development is consistent with the objectives of the height control in that it attains the objects of the Act and State housing strategies without significant impacts on adjoining land uses.

- (b) ***to permit building heights that encourage high quality urban form,***

Comment: The additional height of the proposed buildings comprises high quality urban form. The proposed buildings have been designed to be consistent with and complementary to the emerging high quality urban form in the Bexley North Village Centre and surroundings through building massing, facade articulation with balconies and screens, variation of materials, landscaping, and stepping back of upper levels from the street.

In particular, the uppermost level of the building fronting onto Bexley Road (**Block A**) is set back behind the primary street façade and side elevations of the building, and is partially obscured by a parapet so as to minimise streetscape impacts (**Figure 11**). The building appears as a 3-storey building, transitioning to 4-storeys with appropriate setbacks, consistent with the Site Compatibility Certificate.

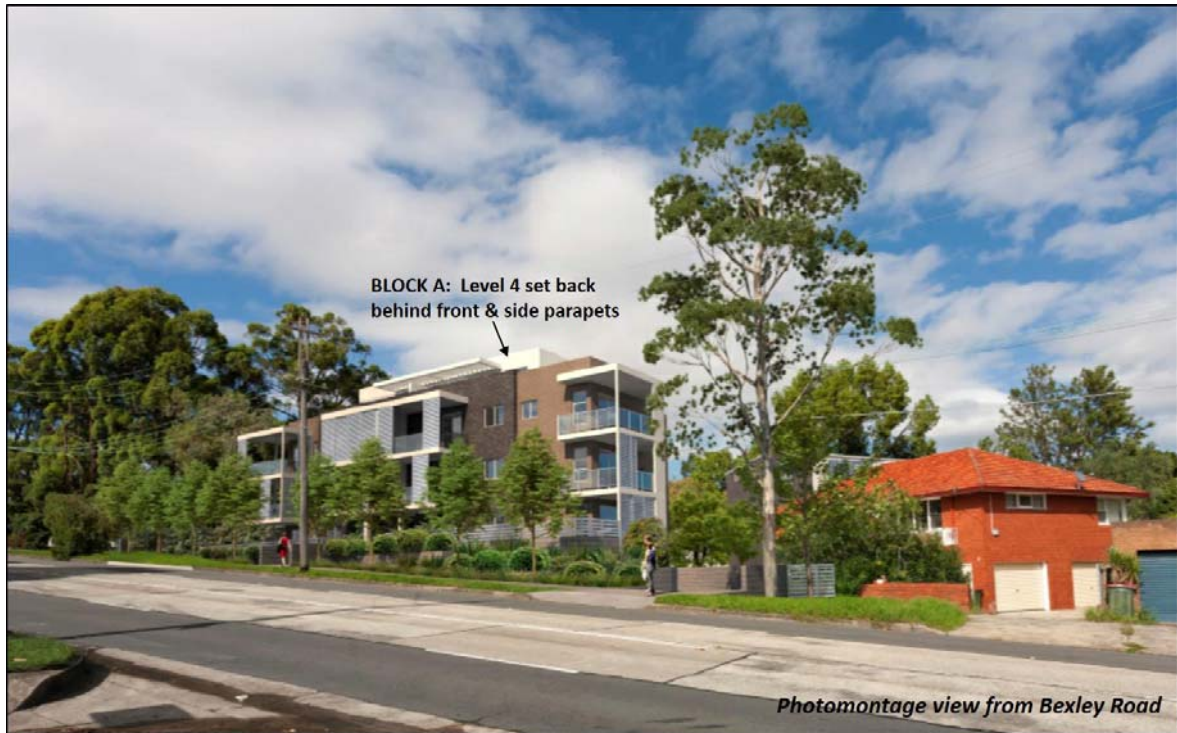


Figure 11: Recessed upper level (Block A) to the Bexley Road frontage

The proposal is also considered by Council's Design Review Panel to be *"....a reasonable fit for the area notwithstanding its increased height ..."*

The proposed building on the New Illawarra Road frontage (**Block B**) complies with the building height development standard at the street elevation. It consists of simple and square built elements and is in keeping with the low density character of the streetscape. The building is limited to 2 storeys at the street elevation and transitions to 3 storeys at the rear (**Figure 12**), consistent with the Site Compatibility Certificate.

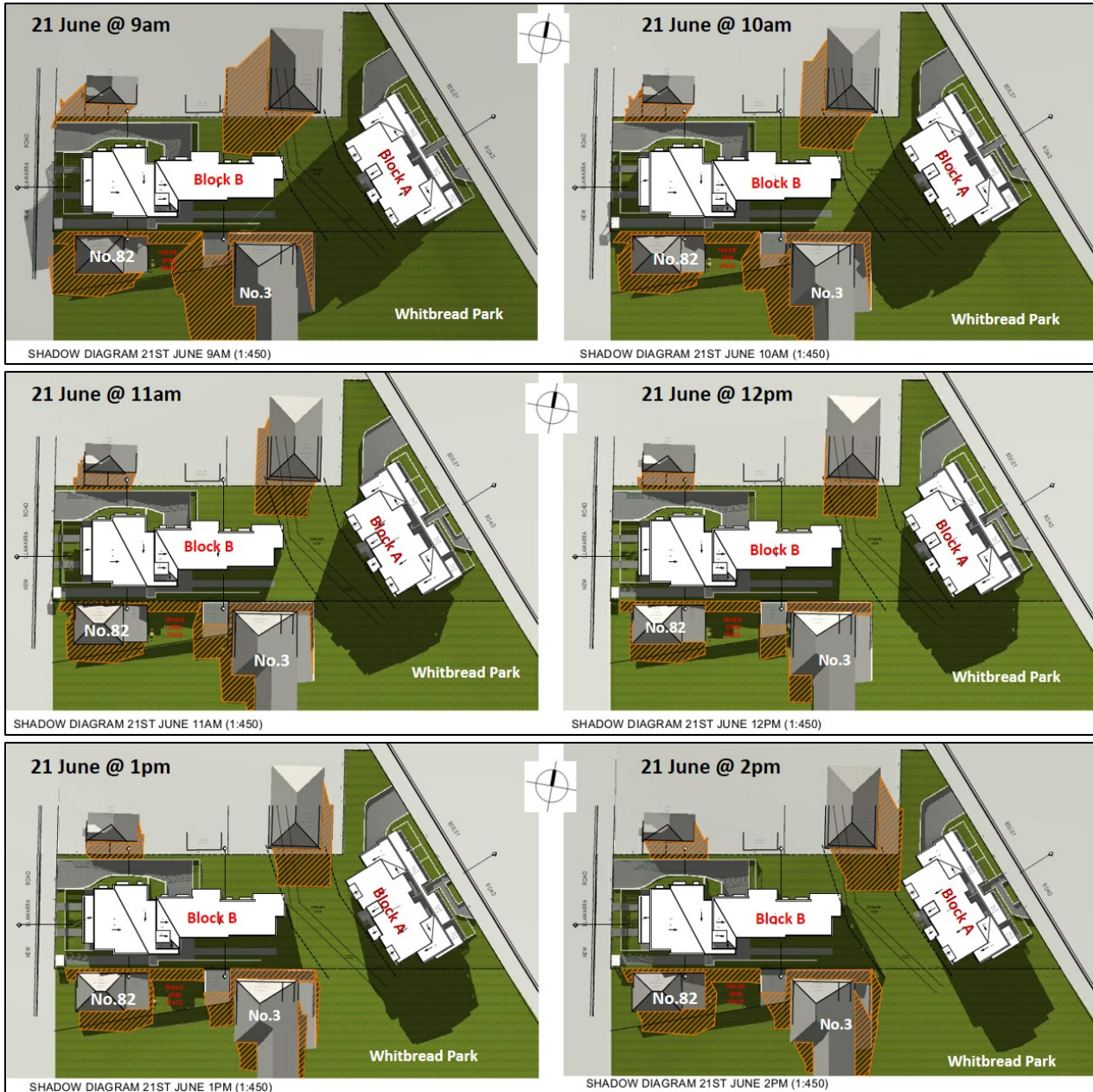


Figure 12: 2-storey elevation at the New Illawarra Road frontage, transitioning to 3 storeys at the rear

- (c) *to provide building heights that maintain satisfactory sky exposure and daylight to buildings, key areas and the public domain,*

Comment: The proposed development will result in shadow impacts on 82 New Illawarra Road and 3 Barnsbury Grove, and the public domain (streets and Whitbread Park).

The shadow diagrams below provide an indication of the additional shadows cast by those elements of the proposed buildings that exceed the building height limit (**Figure 13**).



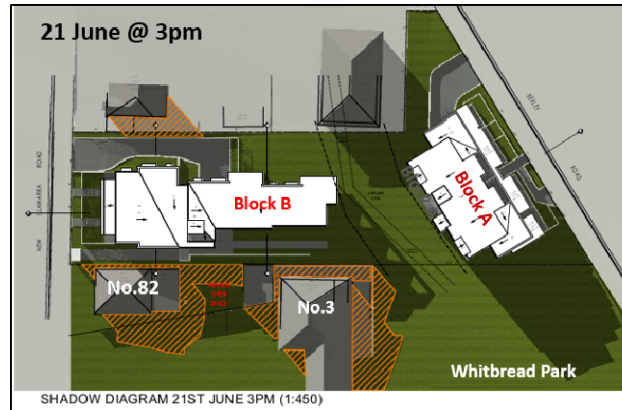


Figure 13: Midwinter shadow diagrams in plan

Elevation shadows on adjoining residences 82 New Illawarra Road and 3 Barnsbury Grove are shown in **Figure 14**.



Figure 14: Midwinter shadow diagrams in elevation

The impacts of the additional shadow impacts that are attributable to the proposed variation of the height control are discussed as follows:

Shadow impacts on 82 New Illawarra Road

The potential shadow impacts on the residence at 82 New Illawarra Road primarily affect the rear private open space. The additional shadow impacts are from the uppermost part of the second floor and lift overrun of Block B, with the building otherwise height-compliant (**Figure 15**).

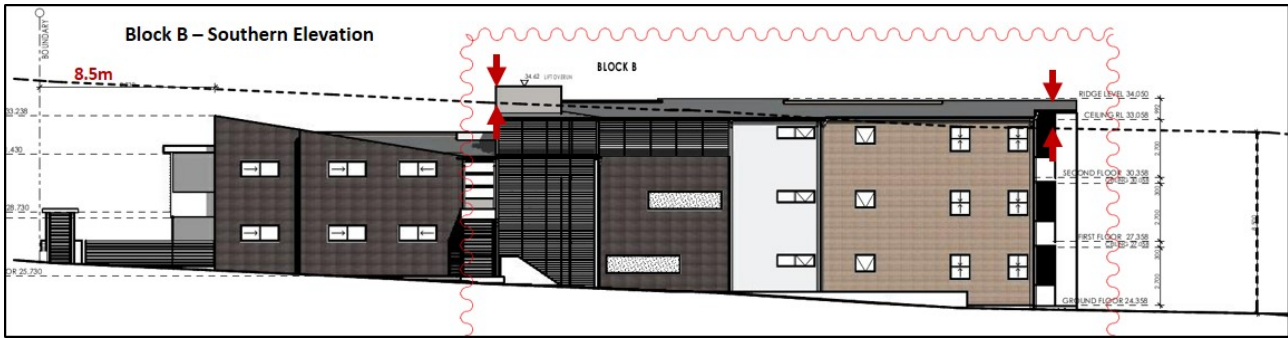


Figure 15: Height variation of Block B (southern elevation)

The additional shadow impacts are in large part attributable to the lift overrun. The shadow diagrams indicate that the shadow of the lift overrun moves across the rear yard of 82 New Illawarra Road between 11am & 2pm in midwinter. The lift overrun does not, however, add to the shadow impacts on the side windows of 82 New Illawarra Road compared to a height-compliant building.

In order to minimise the shadow impacts on 82 New Illawarra Road, the design has been modified by shifting the 3-storey part of the building (Block B) by between 850mm and 1.3m to the north, and reconfiguring the lift core and fire stair so that the lift core, being the taller element, is set further away from the southern boundary.

It is also noted that the area of greatest height variation pertains to Block A, which does not have any significant shadow impact on 82 New Illawarra Road.

Additional shadow impacts have been modelled for 21 May, and for 22 March & September (equinox) (**Figures 16 & 17**). The diagrams show that useable areas of the rear yard of 82 New Illawarra Road receive solar access between 10am and 12pm, and the rear yard of 82 New Illawarra Rd receives solar access throughout the day between 9am & 3pm during the equinox.



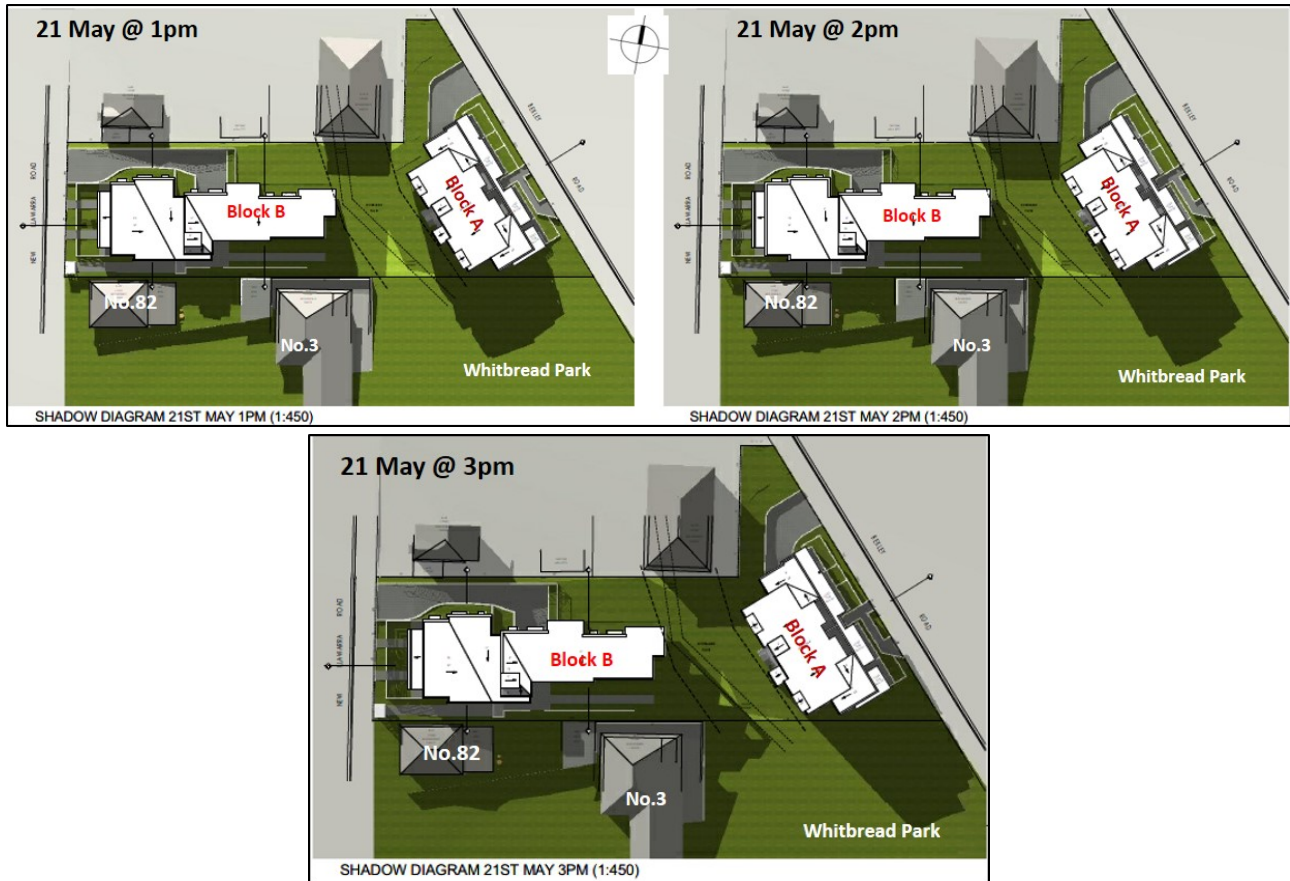


Figure 16: Solar access in May

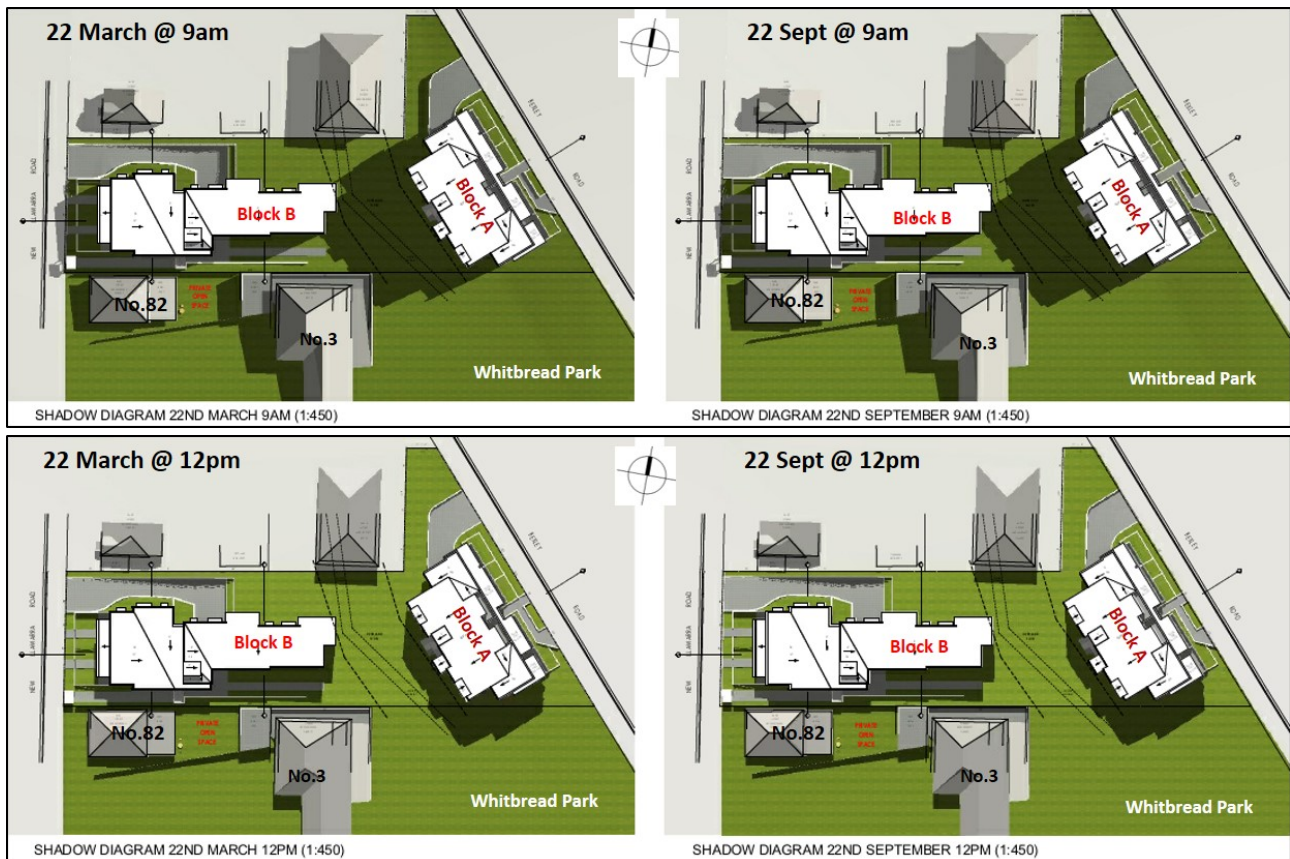




Figure 17: Solar access at March & September solstice

Shadow impacts on 3 Barnsbury Grove

The additional shadows cast by the non-height compliant parts of proposed Block A fall in most part on the driveway and rear of 3 Barnsbury Grove between 9am & 10am in midwinter, and are thus not considered to be a significant impact.

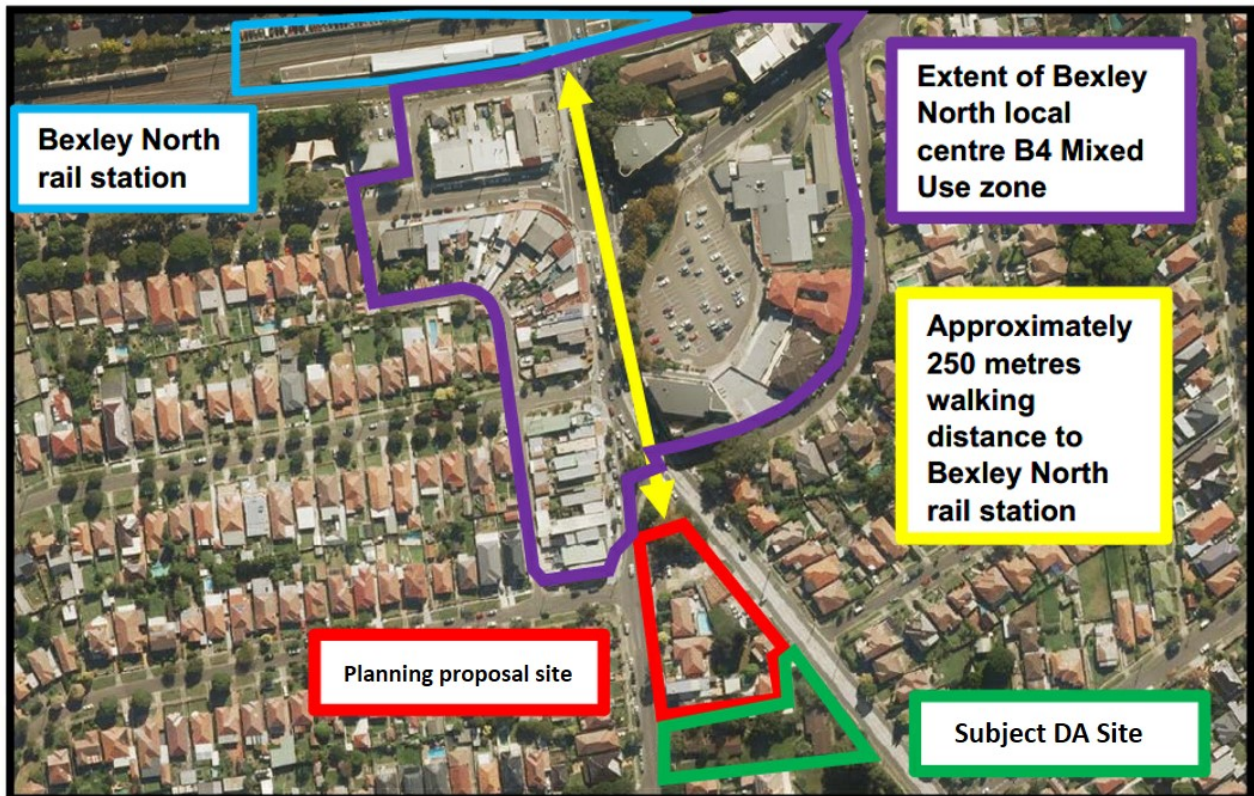
The additional shadow impacts on 3 Barnsbury Grove arising from the non-compliant parts of proposed building Block B are similar to those that would be cast by a height-compliant building. The primary private open space of this dwelling appears to be in the south western side setback of that property which will not be materially affected by the additional shadows.

Shadow impacts on Whitbread Park

The height non-compliances of Block A will give rise to additional shadow impacts on Whitbread Park. The additional shadows will fall on the northern portion of the park, however, the extent of the additional shadowing is not considered to be significant in consideration of the size of the park. Solar amenity will be maintained to the majority of area of the park despite the additional shadowing.

- (d) to nominate heights that will provide an appropriate transition in built form and land use intensity.**

Comment: The proposed height will provide an appropriate transition in built form and land use intensity between Bexley North Village Centre (to the north) and Whitbread Park (to the south) and beyond. This is particularly relevant when considered in the context of the Planning Proposal before Council for an increase in the height and FSR standards to 20.5m and 2:1, respectively, for the area north of the development site (**Figure 18**).



Source: Site Context Map (Figure 2) from Draft Planning Proposal: 88-96 New Illawarra Road & 307-311A Bexley Road, Bexley North (annotations amended)

Figure 18: Land use intensity in vicinity of the site

The proposed height variations are centrally located within the subject site or otherwise set back from the street frontages so as not to give rise to excessive building bulk. The maximum height of Block A on Bexley Road is 4 storeys, stepping down to 3 storeys in the central part of the site, and legible as a 2-storey building when viewed from New Illawarra Road. This is considered to provide for an appropriate transition in terms of the topography of the site and the relationship of the proposed development with adjoining sites.

The objectives of the Floor Space Ratio development standard

- (a) ***to establish the maximum development density and intensity of land use, accounting for the availability of infrastructure and generation of vehicular and pedestrian traffic, in order to achieve the desired future character of Rockdale,***

Comment: The proposed FSR of 0.85:1 is considered to be appropriate within the land use and accessibility context of the site and the character of Bexley North. It is noted that a maximum FSR of 2:1 applies to Bexley North Village Centre and an FSR of 2:1 is proposed in the Planning Proposal for the adjoining site of 88-96 New Illawarra Road & 307-311A Bexley Road (refer to **Figure 10** further above in this report).

The area is well serviced by regional infrastructure and educational, recreational, health, and transport services to support the proposed development. The scale of the proposed development will not significantly impact the capacity of these infrastructure services.

The proposed development will itself provide for important social infrastructure in terms of providing housing to the most vulnerable members of the community. The provision of affordable housing is one of the major planning challenges facing NSW and indeed the whole country. As at June 2017 there were over 51,000 households on the waiting list of which 1,657 are within the St George allocation zone which includes the Bexley North area. The waiting list for one and two bedroom units/houses in this zone is currently 10 years or more. It is against this background that the Land and Housing Corporation has been tasked to provide 23,000 new dwellings over the next 10 years.

The traffic report accompanying the development application indicates that the proposal will not have a discernible unacceptable impact on the road network. Furthermore, the Roads & Maritime Services has granted its concurrence to the development proposal. Should Council consider that the proposal will result in an increased demand for use of its services and facilities, Land and Housing Corporation is prepared to make a reasonable contribution under Section 7.11 of the *Environmental Planning & Assessment Act 1979*.

(b) to minimise adverse environmental effects on the use or enjoyment of adjoining properties,

Comment: The massing of the proposed buildings ensures that the additional FSR in excess of the standard does not affect the use or enjoyment of adjoining properties.

The upper level of proposed Block A fronting Bexley Road is set back 6.5m to 9m, which is within the upper level of the setback range of 3-9m provided for in Rockdale DCP. The side setback of Block A to Whitbread Park is non-compliant at the southern corner of the building, however, the breach is localised to the corners of the building, with any bulk, privacy or shadow impacts on 3 Barnsbury Grove or Whitbread Park being reasonably mitigated by the angled orientation of the building.

Any amenity impacts on the adjoining neighbours at 82 New Illawarra Road and 3 Barnsbury Grove are reasonably mitigated by the distribution of floor space within Block B, whereby the 3-storey component of the building is centrally located within the low part of the site.

(c) to maintain an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation.

Comment: Bexley Village Centre and its immediate surroundings are undergoing substantial transformation and the current visual relationships are changing. It is considered that the proposed development provides an appropriate visual relationship with the emerging character of the location.

The FSR variation allows for a development that will have an appropriate relationship with the likely future development in the adjoining site the subject of a Planning Proposal at 88-96 New Illawarra Road & 307-311A Bexley Road.

The additional FSR is provided towards the rear of Block A and centrally within the site so as not to adversely impact on the lower scale character of the neighbourhood in New Illawarra Road.

In *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 at [34], one way of demonstrating consistency with the objectives of a development standard is to show a lack of adverse amenity impacts. It is considered that the above consideration demonstrates a consistency with the height and FSR objectives and an absence of any material adverse impacts arising from the proposed variations of the development standards.

Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009

In *Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009* it was established that a variation request must demonstrate consistency with the objectives of the standard in addition to consistency with the objectives of the zone. Consistency with zone objectives is discussed in this section.

The objectives of the R2 Low Density Residential zone

The objectives of the R2 Low Density Residential zone under the Rockdale LEP 2011 are, relevantly:

- *To provide for the housing needs of the community within a low density residential environment; and*
- *To ensure that land uses are carried out in a context and setting that minimises any impact on the character and amenity of the area.*

Provide for housing needs within a low density residential environment

Block A will be legible as a 3-storey building at the Bexley Road frontage, transitioning to 4-storeys behind the parapet. This design is considered to be compatible with the Bexley Road streetscape as it transitions to higher densities towards the Village Centre to the north.

The proposed building Block B reads as a 2-storey building from New Illawarra Road and has a satisfactory relationship with the adjoining dwellings (**Figure 20**).

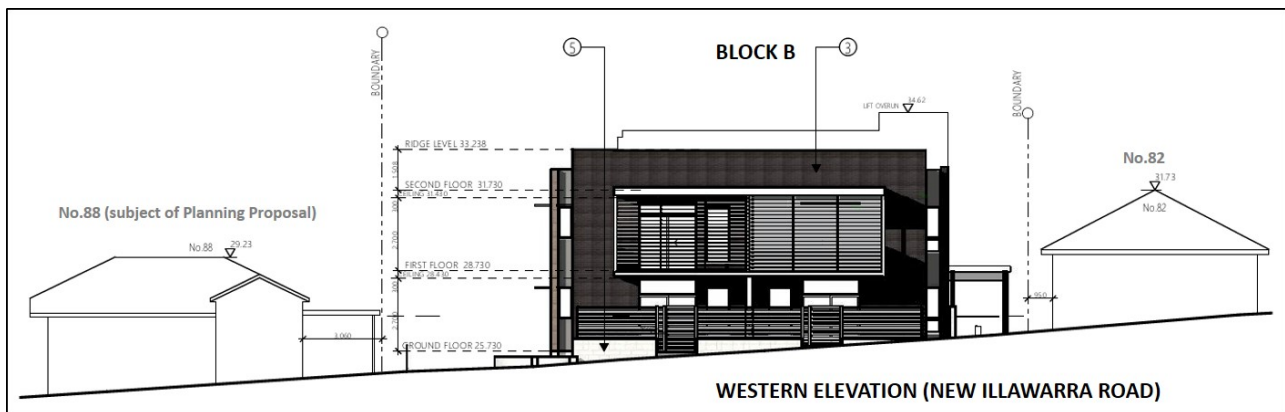


Figure 20: Low density residential streetscape on New Illawarra Road

Carried out in a context & setting that minimises any impact on the character and amenity of the area

Bexley North is undergoing a change in its residential character from low to medium density housing. This is evident along both Bexley Road and New Illawarra Road and their connecting streets, where older single lot cottages are being replaced by new double storey brick dwellings and multi dwelling housing. Within the greater Bexley North area are recently redeveloped residential lots containing residential flat buildings including:

- 8-20 Sarsfield Circuit, located approximately 140m north of the site, contains a 4-storey residential development comprising 13 units and a commercial unit, with parking on ground level;

- 22-40 Sarsfield Circuit, located approximately 170m north of the site, contains a 4-storey residential development comprising 28 units and a commercial unit, with car parking at ground level;
- 232-234 Slade Road, located approximately 290m north of the site, contains a 5-storey residential flat building with partial basement and ground floor parking;
- 238 Slade Road, located approximately 260m north of the site, contains a 5-storey building containing 22 residential units, 1 commercial premises on ground level, and basement car parking (**Figure 21**).



Figure 21: Residential flat buildings within 400m of the site

The proposed residential flat buildings on the subject site, up to 4 storeys in height, are consistent with the emerging character of the area. The siting, orientation, massing and articulation of the proposed buildings are such that the height and FSR variations are accommodated without any adverse impacts on the streetscape, character or amenity of the area. This view is supported by the Design Review Panel which "...considers that the design is a reasonable fit for the area notwithstanding its increased height and density compared to adjacent development".

Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118

In his decision in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118*, Chief Justice Preston clarified the interpretation of Clause 4.6 requests with regard to Clause 4.6 (4)(a)(i) and (ii).

A Clause 4.6 request must:

- Adequately address the matters required by subclause (3) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)), and that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b)); and
- Demonstrate that the proposed development will be in the **public interest** because it is consistent with the **objectives of the development standard** (in this case, Cl. 4.3 Height of Buildings) and land use **zone objectives** (in this case, R4 High Density Residential) (Cl 4.6 (4)(a)(ii)).

Unreasonable and unnecessary

The “unreasonable and unnecessary” test is considered to be satisfied, as discussed in this report under the heading of *Wehbe v Pittwater Council [2007] NSW LEC 827*.

Sufficient environmental planning grounds

In *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118*, the test is whether there are sufficient environmental planning grounds to justify contravening the development standard, not that the development that contravenes the development standard have a better environmental planning outcome than a development that complies with the development standard; of note:

“The focus of cl.4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental grounds. The environmental planning grounds advanced in the written request must justify contravention of the development standard, not simply promote the benefits of carrying out the development as a whole: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 248 [15].”

It is considered that there are sufficient environmental grounds to justify contravention of the building height and FSR development standards, by virtue of the following:

- The proposed variation of the height and FSR standards allows for the provision of additional public housing stock over and above that of a strictly compliant development.
- The height and FSR variations allow for optimisation of the site’s development potential as a transport-accessible site and provision of much needed affordable housing in the Bayside Local Government Area which in turn would assist in Council achieving the goals of Rockdale housing strategy and the NSW Government’s *A Plan for Growing Sydney, Future Directions for Social Housing* and the *Metropolitan Strategy*, as well as satisfy the objects of the EP&A Act.
- The proposed height and FSR variations make for efficient, economic and optimal use of the subject site, taking advantage of the local topography, dual frontages and surrounding context, increasing the provision of social housing units with minimal environmental impact. The proposed development has been designed giving regard to the natural contours of the site, with the tallest sections of each building being sited in the lower parts of the site to reduce their visual impact.

- The non-compliant height and floor space will not give rise to any material streetscape or amenity impacts compared to a compliant development, by virtue of the proposed siting, massing, setbacks, design of the building, and site characteristics. The proposed development reflects a predominantly 2 storey streetscape to New Illawarra Road and a 3 storey streetscape to Bexley Road, with the upper floors being setback from the street frontages. The proposed buildings present a high quality urban form that has been designed to be consistent with and complementary to higher density development in the Bexley North Village Centre and surroundings.
- The proposed development satisfies the objectives of the height and FSR controls and zone objectives, despite the non-compliances.

The environmental planning grounds cited above are considered to be sufficient as the benefits arising from contravention of the development standards, namely, the provision of additional social housing stock in a very accessible location with major physical and social infrastructure does not result in significant adverse environmental impacts such visual bulk, privacy and overshadowing, which have been reasonably ameliorated by the proposed site layout and building design.

7. Conclusion

Compliance with the building height and FSR development standards is considered to be unreasonable and unnecessary in the circumstances of the case, and it is considered that there are sufficient environmental planning grounds to vary the standards in this case.

The request to vary the development standards is considered to be well-founded on the grounds that the non-compliance with the building height and FSR development standards, *inter alia*:

- enables provision for additional social housing stock in a transport-accessible location;
- assists in the provision of affordable housing in Bayside Local Government Area consistent with State government policy and Council's housing strategy;
- allows for the efficient and economic development of a site that is capable of accommodating, and suitable for, the additional height and FSR proposed;
- enables a development that reflects the changing character of the locality without significant impact on the use and enjoyment of adjoining land;
- does not fetter consistency of the development with the objectives of the building height and FSR development standards, or the objectives of the zone;
- achieves relevant objects of the *Environmental Planning & Assessment Act 1979*, in particular, the provision of affordable housing, in the public interest; and
- does not raise any issues of State or regional planning significance.

This variation request addresses the matters required to be considered in Clause 4.6(3) & (4) of Rockdale LEP 2011. The Land & Housing Corporation requests that Council exercise its discretion to vary the development standards by granting consent to the proposed development despite its non-compliance with the height and FSR standards.