



Clause 4.6 Variation Request – SEPP (Housing) Part 2, Division 1, In-fill Affordable Housing - Height of Building Standard

Accompanying a development application for an Affordable Housing Residential Flat Building Development



At

171 Weston Street & 2-6 Hinemoa Street, Panania NSW 2213

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1 INTRODUCTION

This is a formal request that has been prepared in accordance with Clause 4.6 of the Canterbury-Bankstown Local Environmental Plan 2023 (CBLEP 2023) to justify a variation to the maximum height of building standard under Part 2, Division 1, Clause 18 of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) in a Development Application (DA) submitted to the City of Canterbury Council (Council) for a residential flat building development comprising 100% in-fill affordable housing, which is located at 171 Weston Street & 2-6 Hinemoa Street, Panania.

This request should be read in conjunction with the documents submitted in support of the DA including the Statement of Environmental Effects prepared by Homes NSW (2024) and the architectural drawings prepared by Morson Group. These documents form part of this request.

The proposed works involve the following:

- Demolition of all existing structures, including 4 existing single storey dwelling houses and associated outbuildings,
- Removal of 13 trees across the site, including 1 street tree,
- Construction of a 4 & 5-storey residential flat building comprising 42 apartments, as follows:
 - o 22 x one-bedroom units, and
 - o 20 x two-bedroom units,
- Basement car parking for 19 vehicles (including 5 accessible spaces), 6 bicycle spaces, storage, and services,
- Provision of photovoltaic solar system on the rooftop,
- Vehicular access to the site from Hinemoa Street,
- Pedestrian access points to Weston Street and Hinemoa Street,
- Secure waste enclosure that accommodates 9 x 1100L recycling bins and 6 x 1100L waste bins, and a bulky waste storage room,
- Associated landscaping and civil works,
- Consolidation of 4 existing lots into a single title,
- Relocation of existing drainage easement,
- Provision of private and communal open space areas, and
- Landscaping and deep soil zones

Part 2, Division 1, Clause 18 of the Housing SEPP stipulates a maximum height for a development on this site of 16.9 metres, based on the In-fill Affordable Housing height bonus of 30% on top of the Canterbury-Bankstown Local Environmental Plan 2023 (CBLEP) Height of Buildings clause 4.3 which stipulates a maximum height of 13m, if the development provides 15% affordable housing.

In accordance with the Housing SEPP Clause 18(2) the proposed development provides 100% affordable housing, which equates to a maximum Height of Building (HOB) of 16.9m. The proposed development has a total height of approximately 17.44m, measured from a parapet height of RL 37.05 to existing level RL19.61. This equates to a maximum variation of 540mm (3.2%) beyond the maximum height standard (being cl.18 of the Housing SEPP). The departure from the standard is illustrated in Section 3 (Extent of variation) of this Request. Importantly, the encroaching element, comprising part of the rooftop parapet only, is located at the north-eastern extent of the site only and is setback from the boundaries shared with adjoining properties. The parapet's appearance has been thoughtfully integrated into the overall design of the building and forms part

of a consistent architectural expression. Further, the variation itself does not relate to habitable floor space – it relates to architectural intent only. The proposal's design has also been endorsed by Council's Design Review Panel (DRP).

The objectives of Clause 4.6 are to provide an appropriate level of flexibility in applying a certain development standard to particular development, and to achieve better outcomes for and from development, by allowing flexibility in particular circumstances.

This request has been prepared having regard to the Department of Planning and Environment's Guidelines to Varying Development Standards (November 2023) and various recent decision in the New South Wales (NSW) Land and Environmental Court (LEC) and the NSW Court of Appeals (Appeals Court).

By exercising the flexibility sought in this Clause 4.6 request, a better outcome is achieved by the development as follows:

- The proposed variation to the height of building control contributes to the achievement of the building's design excellence and further accentuates its verticality and architectural elegance. The building's volumes are characterised by face brickwork rectangular forms with defined face brickwork borders and infill articulated groupings. The face brickwork borders are critical to articulating the building form in this way and creating the building's aesthetic. The face brickwork borders are created by extending walls to form a parapet that extends above the roof slab level.
- The development is contextually appropriate and provides a scale and form of development that is compatible with surrounding developments and one that is predicted under the State strategic and statutory planning initiatives, as well as the underpinning strategic framework that supports the CBLEP 2023 provisions. The overall development will be compatible with the emerging higher-density character of the Panania local area.
- The maximum extent of the proposed height variation of 540mm is minor (3.2%), and the part of the building that breaches the height limit is located at the northeastern corner of the site and setback from adjoining properties such that any impacts from the additional height are internal and not likely perceptible from the adjoining properties or the public domain. The proposed variation therefore does not have any unreasonable impacts on the amenity of adjoining residential development when compared to a fully compliant building envelope.
- The proposed parapet has been incorporated into the design excellence of the building, therefore minimising the potential for any perceptible difference in height compared to a height-compliant scenario.
- Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development.

It is therefore considered appropriate in this circumstance to vary the development standard.

2 STANDARD TO BE VARIED

The standard that is proposed to be varied is the maximum height of building standard under Part 2, Division 1, Clause 18(2) of the Housing SEPP. Part 2, Division 1, Clause 18(2) of the Housing SEPP states the following:

18 Affordable housing requirements for additional building height

(1) This section applies to development that includes residential development to which this division applies if the development—

(a) includes residential flat buildings or shop top housing, and

(b) does not use the additional floor space ratio permitted under section 16.

(2) The maximum building height for a building used for residential flat buildings or shop top housing is the maximum permissible building height for the land plus an additional building height of up to 30%, based on a minimum affordable housing component calculated in accordance with subsection (3).

(3) The minimum affordable housing component, which must be at least 10%, is calculated as follows—

$$\text{affordable housing component} = \frac{\text{additional building height}}{(\text{as a percentage})} \div 2$$

The permissible building height for the land is set out in Clause 4.3 of CBLEP 2023 as 13m, as is shown in the below Height of Buildings Map extracted from the LEP:

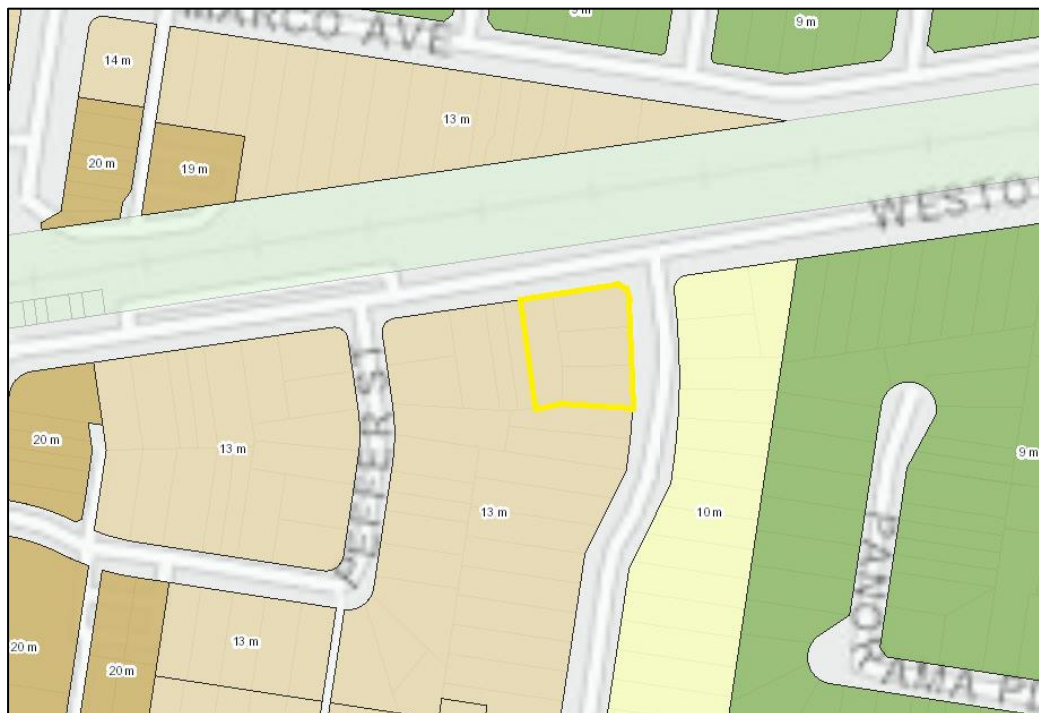


Figure 1 – Extract of Height of Buildings Map, site outlined in yellow
(Source: NSW Legislation)

The maximum Height of Buildings as per this development standard, pursuant to the CBLEP 2013, is 13m. Part 2, Division 1, Clause 18(2) development standard of the Housing SEPP permits an additional 30% height bonus on top of cl4.3 of the CBLEP 2023 (based on 100% affordable housing provision), resulting in a maximum height of building of 16.9m.

The development standard to be varied is not excluded from the operation of Clause 4.6 of the CBLEP 2023.

3 EXTENT OF VARIATION

The CBLEP 2023 defines building height as follows:

building height (or height of building) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

In accordance with the CBLEP 2012 definition for determining overall height, the proposed development has a maximum Height of Building of 17.44m (RL37.05). As stated in the introduction of this request, this equates to a maximum variation of 540mm (3.2%) beyond the height standard (being Part 2, Division 1, s.18 of the Housing SEPP). Importantly, the encroaching element, comprising the rooftop parapet, when viewed from the public domain and from adjoining properties, has been thoughtfully integrated into the overall design of the roof of the building.

Figure 2 below illustrates the extent of encroachment based on a height plane measured from ground level (existing) in accordance with the CBLEP 2023.



Figure 2 – Building height plane showing parapet protrusion
(Source: Morson Group)

4 JUSTIFICATION FOR EXCEPTION TO THE DEVELOPMENT STANDARD

Clause 4.6 of the CBLEP 2023 provides Canterbury Bankstown Council with a degree of flexibility in applying the development standard to the proposed development. This is subject to a written request by the applicant justifying any contraventions and demonstrating that compliance is unreasonable or unnecessary in the circumstance of the case. In addition, the Land and Environment Court, in *Wehbe v Pittwater Council (2007) NSW LEC 827*, *Winten Developments Pty Ltd v North Sydney Council (2001) NSW LEC 46* and *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* has articulated principles and tests regarding the justification for, and assessment of, exceptions to development standards. The proposed development has been assessed against the established principles at **Section 5**.

This request therefore:

- Addresses the matters required to be considered by Council in exercising its discretion to the numerical height development standard under the CBLEP 2023;
- Justifies the height of the proposed development and demonstrates why compliance with the development standard is unnecessary and unreasonable in this case in terms of the objectives of the standard and the zone, as well as the tests for assessment established by the Land and Environment Court; and
- Demonstrates why the City of Canterbury Bankstown Council should exercise its discretion by recommending approval for the proposed development, despite a non-compliance with the CBLEP 2023.

Clause 4.6 Exceptions to development standards of the CBLEP 2023 provides Council with a degree of flexibility in applying the height development standard to the subject development application (Clause 4.6(1)). This is provided that: the standards are not excluded from this discretion (Clause 4.6(2)); particular planning outcomes are achieved (Clause 4.6(3)); and that certain procedural requirements are met (Clauses 4.6(4)).

Each of these matters is addressed below.

4.1 Consistency with Objectives of the Clause

Clause 4.6 (1) states:

“The objectives of this clause are as follows:

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

The non-compliance with the CBLEP 2023 height of buildings development standard is driven by the goal of achieving better outcomes for and from the development. The proposed development aims to achieve the objects of the EP&A Act, as follows:

- *Promote the delivery and maintenance of affordable housing*

The delivery of affordable (social) housing to assist in combatting the national housing supply crisis. The provision of additional affordable housing will assist Canterbury Bankstown Council and Homes NSW in achieving the NSW Government’s and Council’s affordable housing targets as outlined in *Future Directions for Social Housing in NSW*, the *Greater Sydney Region Plan 2018*, the *South District Plan 2018* and the *Canterbury Bankstown Council Housing & Affordable Housing Strategies 2020*.
- *To promote the orderly and economic use and development of land*

The orderly and economic use and development of the land by redeveloping existing serviced urban land within close proximity to key transport nodes/corridors and services and facilities with higher residential densities i.e. the Panania Train Station and Panania local centre, consistent with the strategic intent of the NSW Government's *Transport Orientated Development Program*, the proposed planning reforms outlined in the *Explanation of Intended Effect: Changes to create low- and mid-rise housing*, the *Greater Sydney Region Plan 2018* and the *South District Plan 2018*.

Despite the non-compliance with the standard, the proposed development will have no unacceptable adverse impacts on the amenity of the surrounding development with respect to overshadowing, views, visual impact and privacy.

4.2 Matters for consideration

In deciding whether or not to grant consent, Council is required to satisfy itself that the request for the variation demonstrates that:

- Compliance with the development standard is unreasonable or unnecessary in the circumstances, (Clause 4.6(3)(a)); and
- There are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)).

These clauses are addressed below.

4.2.1 Clause 4.6(3)(a) – Development standard is unreasonable or unnecessary

Clause 4.6 (3)(a) states:

“(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

(a) compliance with the development standard is unreasonable or unnecessary in the circumstances,”

Compliance with the maximum height of buildings development standard is considered unreasonable and unnecessary given the following circumstances of this case:

- The proposed development achieves the objectives of the height of buildings standard and is consistent with the objectives of the zone notwithstanding non-compliance with the standard (see further discussion below in **Section 4.2.2** of this report).
- The height variation is necessary as the parapet forms an integral component of the architectural expression of the affordable housing development and is key to the developments design excellence. Strict compliance with the standard would result in a sub-optimal architectural outcome that would not result in any additional benefit to the amenity of the surrounding properties.
- There is a considerable public and social benefit arising from the provision of affordable housing. It is considered that the benefit of additional affordable housing allowed by the height variation far outweighs any minor perceived impacts associated with non-compliance with the height standard, especially in light of the current recognised housing supply crisis. The housing supply crisis in the Canterbury Bankstown LGA is well evidenced.

The City of Canterbury Bankstown Council has identified in their Housing Strategy and Affordable Housing Strategy that *“Housing stress is a significant issue in Canterbury Bankstown, as with many other parts of Greater Sydney, due to comparatively low income to Sydney’s high housing costs. Almost twenty-two thousand households experience housing stress in the city, or 18.6% compared to 11.8% in Greater Sydney. Households on moderate, low or very low incomes and key workers, who spend more than 30 per cent of their income on housing are impacted in their ability to pay for essential items like food,*

clothing, transport and utilities and are said to be experiencing housing stress.”

It also notes that in the Canterbury Bankstown LGA there is an *“estimated population of 2,344 people experiencing homelessness (ABS, 2016). It is important that housing choice, particularly for affordable housing, is provided across the city to reduce the risk of vulnerable persons falling into homelessness.”*

Furthermore, in July 2024, the NSW Communities and Justice’s publicly available figures for social housing waitlist times confirmed there were over 57,700 households on the waiting list for social housing in NSW. In the Bankstown Allocation Zone, in which the site is located, the waiting list for social housing is approximately 2,450 households with the wait time for 1-bedroom / studio apartments between 5 – 10 years, and 2-bedroom units 10 + years. It further noted that there were over 320 priority applicant households in the Bankstown Allocation Zone.

Recent statistics (February 2024) from Homelessness NSW indicate that the number of people experiencing homelessness are now more alarming than the figures above with the NSW Government stating in response: *“The analysis reveals that the top council areas that have seen increases in homelessness numbers are Inner West and Canterbury-Bankstown Council areas. These are also key areas that the NSW Government is focussed on in supporting increased access to housing.”*

- The non-compliance would not result in any unreasonable environmental or amenity impacts, for example:

Internal & external privacy, amenity & solar access:

The proposed development provides for outcomes which are consistent with the development standards which are relevant to the privacy, amenity and solar access as applicable to both the development site internally and externally.

There are no associated impacts with the proposed development’s building height standard exceedance upon the privacy and amenity within the proposed development and to neighbouring properties. This is due to the achievement of required building separation distances, setting back the top floor of the building from the side and rear façades, and the location of the parapet exceedance at the north-eastern most portion of the site.

Similarly, the proposed building height standard exceedance has not impacted upon the ability of the development or of neighbouring properties, to enjoy good solar access to living areas and private open space areas, with shadow diagrams, (Sheet DA25 of the Architectural Plans prepared by Morson Group), for the proposed development demonstrating the height exceedance has not caused unreasonable loss of solar access to adjoining properties.

Design Context:

Despite the partial building height exceedance, the proposal is considered a good contextual fit on the basis that it is an infill development which will make efficient use of existing serviced urban land and will assist in achieving the provision of additional needed housing in the locality whilst being complementary with the streetscape and consistent with the bulk and scale of nearby residential flat buildings. Furthermore, despite the building height exceedance, the development has been able to be designed to maintain a respectful relationship with the immediately adjoining development by transitioning building heights down gradually to adjoining development.

The Canterbury Bankstown Design Review Panel (DRP) has reviewed the proposed development and commends the scheme for *“achieving a positive and contextually appropriate solution to increase the availability of quality social housing in Panania.”*

Views:

The development’s partial height exceedance will not result in the loss, or disruption of any views. The site and surrounding area sits within gently undulating terrain, where no unique vistas dominate, or are required to be preserved.

Pedestrian amenity & access:

Pedestrian amenity and access will not be impacted by the proposed maximum building height standard exceedance.

Visual impact:

Careful and considered design has minimised the appearance and visual impact of the partial height exceedance of the development by:

- the stepping back of the uppermost storey from the side and rear facades of the building;
- orientation of the highest extent of the building to the northeastern portion of the site to limit amenity impacts to adjoining properties,
- through the adoption of flat roof design; and
- ensuring the proposal is considered a good contextual fit on the basis that it is an infill development which supports and reinforces the desire for higher density residential development in the locality. The proposed development is consistent with the streetscape and bulk and scale outcomes envisaged for the area.

Furthermore, as there is no development opposite the site to which the height exceedance faces, only the railway line, the streetscape of Weston Street is open in nature and therefore the focussing of the higher portion of the development toward the front of the site will not result in an overbearing visual impact on the street. The high-quality contemporary architectural design proposed, including the articulation of the front façade and the proposed landscaping will provide a visually pleasing outlook from the rail corridor.

Colours & materials:

As indicated on the Architectural Plans prepared by Morson Group, the proposed development will be finished in contemporary colours and materials complementary to existing development and consistent with the desired future character of the locality.

4.2.2 Clause 4.6(3)(b) - Sufficient environmental planning grounds exist to justify the contravention

Clause 4.6 (3)(b) states:

“(3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—

(b) there are sufficient environmental planning grounds to justify the contravention of the development standard.”

There are sufficient environmental planning grounds to justify contravening the height of buildings development standard under the CBLEP 2023. The development is consistent with:

- The objectives of *Clause 4.3 Height of buildings*;
- Objectives of the *R4 High Density Residential zone*; and
- Relevant legislation, plans and strategies

These matters are addressed below:

4.2.2.1 Objectives of Clause 4.3 Height of buildings:

(a) to establish the height of development consistent with the character, amenity and landform of the area in which the development will be located,

The proposed development is compatible with the height of existing, and desired future, development in the surrounding area.

The height of the non-compliant portion of the proposed development is 17.44m, being 4 storeys in

height. This is similar, and in some instances lower, than other residential flat buildings located near the site.

The height of the building is also compatible with the desired future development in the surrounding area, which is identified for the purposes of higher density residential developments, such as that proposed.

Following a review of the CBLEP 2023 zoning and height of buildings maps, refer to **Figure 3** below, it is clear that the desired future character for the area is for higher density development than that which currently exists. Much of the lower density housing stock in the immediate area is older, and close to reaching the end of its lifespan becoming economically unviable to maintain. Given the age of the dwellings and the demand for increased housing, these dwellings will likely be demolished and replaced with newer, modern, higher density forms of residential development. The proposed FSR and height limit will encourage this redevelopment and over time as this occurs the height difference between the proposed development on the subject site and other developments in the streetscape will be further reduced. Furthermore, only 190m to the west of the site, building height limits are further increased, with permissible heights of between 19-20m. In the context of these controls the proposed development will transition consistently in the streetscape with surrounding development.

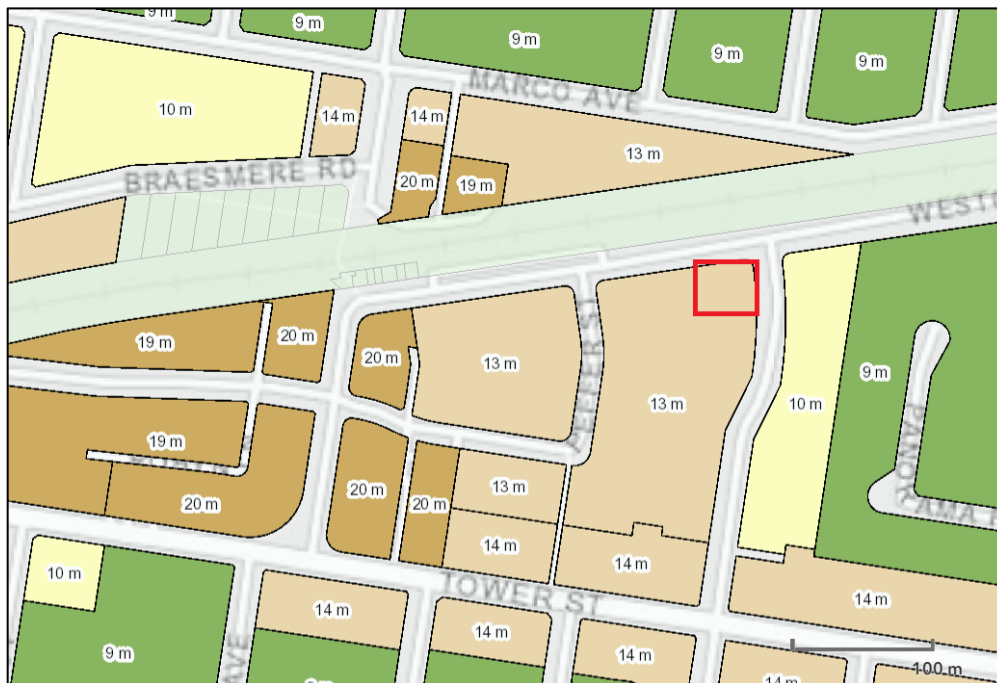


Figure 3: Extract of Height of Buildings Map (site in red)
(Source: Canterbury Bankstown LEP)

(b) to maintain the prevailing suburban character and amenity by limiting the height of development to a maximum of 2 storeys in Zone R2,

Not applicable in this instance as the Zoning of the site is R4 High Density Residential.

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

The proposed rooftop parapet has been designed so that the height breach is located centrally within the site and is away from side and rear façades. This has allowed for increased separation from adjoining properties and the front boundary, minimising the impact of the additional building height on adjoining properties and the streetscape, and allows for an appropriate transition in scale from the subject site to the adjoining properties.

(d) to minimise overshadowing to existing buildings and open space,

The Shadow diagrams within the Architectural Plans show that the adjoining dwellings will continue to receive sufficient mid-winter solar access to primary living and open space areas. Any additional shadowing as a result of the height exceedance is considered to be negligible and its likely to be contained

wholly within the site. The shadow diagrams study show that the proposed development does not have significant impacts on the neighbouring property to the south (8 Hinemoa Street).

(e) to minimise the visual impact of development on heritage items and heritage conservation areas.

The site is not within the visual catchment of the heritage item, and the development will have no impact upon heritage settings. Accordingly, this objective is not considered to be relevant to the proposal in terms of the impact of the proposed additional building height.

(f) to support building design that contributes positively to the streetscape and visual amenity of an area.

Despite a portion of the 4-storey building exceeding the maximum building height limit, the building design and development contributes positively to the streetscape and the visual amenity of the area through:

- a contemporary architectural design that is consistent with the bulk, height, scale and setbacks of other emerging modern residential flat building developments in the surrounding locality and which is consistent with the desired future character of the area.
- minimising the appearance and visual impact of the height of the 4-storey building through:
 - o the stepping back of the uppermost storey from the front and side facades of the building,
 - o utilising a recessive and consistent colour palette in the form of face brickwork,
 - o provision of horizontal articulated elements on all floors, which the rooftop parapet is a continuation of, and
 - o through the adoption of flat roof design.
- provision of a comprehensive landscaping scheme for the entire site, prepared in consideration of the streetscape and surrounding locality, incorporating both native and endemic species. The landscaping scheme will provide substantial shrub and tree planting along the front, side and rear boundaries, to improve the landscape setting and aid in assimilation of the development into the streetscape and surrounding locality. The landscaping will provide screening and a sense of separation between the subject development and neighbouring development, and in combination with the retention of existing mature trees, will enhance the appearance of both the site and streetscape, softening and buffering the visual impact of the development.
- provision of fencing that is appropriately located and designed (materials/height etc.), and common in the surrounding area.
- incorporation of open balconies and private open space areas in the frontage to actively address and activate the streetscape at a pedestrian level providing a sense of interaction with the street, common in lower density streetscapes. This will be further enhanced through the provision of multiple pedestrian entries to the site and the setting back of fencing from the front boundaries along sections of the development frontage.
- the development will not result in the loss, or disruption of any views. The site and surrounding area sit within gently undulating terrain, where no unique vistas dominate, or are required to be preserved.
- as there is no development opposite the site and only the railway line, the streetscape of Weston Street is open in nature and therefore the focussing of the higher portion of the development toward the front of the site will not result in an overbearing visual impact on the street. Furthermore, the high-quality contemporary architectural design proposed, including the articulation of the front façade and the proposed landscaping will provide a visually pleasing outlook from the rail corridor.

4.2.2.2 Objectives of the R4 High Density Residential zone

The site is identified within the *R4 Medium Density Residential* zone under the CBLEP 2023. The objectives of the R4 zone are addressed below:

1) Objectives of zone

- *To provide for the housing needs of the community within a high density residential environment.*
- *To provide a variety of housing types within a high density residential environment.*
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To allow for increased residential density in accessible locations to maximise public transport patronage and encourage walking and cycling.*
- *To promote a high standard of urban design and local amenity.*

The proposed development's non-compliant height raises no inconsistencies with the objectives of the R4 zone. For example, the development provides for the housing needs of the community in a high-density residential environment, offering a diversity of housing types, including 1 and 2 bedroom units, with 5 of the units being *adaptable* and all achieving a *Silver Level Liveability* rating. The development is proposed in direct response to the community's immediate need for social and affordable housing in the Canterbury Bankstown LGA.

The development will not hinder the ability of surrounding lands to be developed for the purposes of providing facilities or services to meet the day to day needs of residents.

At the front of the site the 4-storey building has been designed so that the top floor is stepped in from the lower storey front and side façades. This has allowed for increased separation from adjoining properties and the front boundary, minimising the impact of the building height on adjoining properties and the streetscape and allowing an appropriate transition in scale from the subject site to the adjoining properties.

The buildings, and development overall, are of a contemporary architectural design that is consistent with bulk, height, scale and setbacks of other modern emerging residential flat building developments in the surrounding locality, and which is consistent with the desired future character of the locality. The development has been carefully designed in consideration of its surrounding context and has resultantly minimised any potential for adverse impacts on the adjoining properties or the surrounding locality whilst maximising a high quality of amenity for the future occupants. Furthermore, the development has been designed to maximise sustainability through, achievement of good thermal performance, solar access, natural ventilation, energy and water efficiency, rainwater reuse and the provision of rooftop solar panels.

4.2.2.3 Relevant legislation, plans and strategies

In response to rising housing costs and a decline in housing affordability, the NSW Government amended the *Environmental Planning and Assessment Act 1979* (EP&A Act) in 1999 to make 'provision and maintenance of affordable housing' a specific objective of the EP&A Act:

- (d) to promote the delivery and maintenance of affordable housing.*

The proposed development is consistent with the Objects of the Act as it will provide affordable housing, which has been designed to be consistent with the intent of the state and local planning controls and environmental legislation. It will make best use of existing urban land and infrastructure and will support the social and economic wellbeing of the Canterbury Bankstown Local Government Area

The development provides for social housing and is therefore consistent with the NSW Government's plan *Future Directions for Social Housing in NSW*, the *Greater Sydney Region Plan 2018*, and the *South District Plan 2018*.

Furthermore, development of the subject site for the purposes of affordable (social) housing will assist Council in satisfying several of the key Evolutions of the *City of Canterbury Bankstown Connective City 2036 (Local Strategic Planning Statement)* including; *Evolution 6 Urban and Suburban Places, Housing the City, Evolution 8 Design Quality, and Evolution 9 Sustainable and Resilient Places.*

The proposed development is also considered to be consistent with the objectives of the *Canterbury Bankstown Housing Strategy 2020* and will assist Canterbury Bankstown Council in the achievement of the *Strategy's* Strategic Directions such as the efficient redevelopment of existing urban land in order to provide additional affordable (social) housing in a mix of dwelling types in an accessible location, close to frequent public transport, employment opportunities, services and community facilities. Supporting the *Strategy's* aims to focus at least 80% of new dwellings within walking distance of centres and places of high amenity. The proposed development will also assist Council to achieve its housing targets in the Canterbury Bankstown LGA by reducing the gap between the modelling yield and the net target of 25,000 dwellings by 2026 /50,000 dwellings by 2036.

The proposed development will provide housing to meet the needs of the community, assisting Homes NSW in meeting its significant, long-standing and continually growing demand for social housing in the City of Canterbury Bankstown local government and surrounding areas. For example, as noted above, in July 2024, the NSW Communities and Justice's publicly available figures for social housing waitlist times confirmed there were over 57,700 households on the waiting list for social housing in NSW. In the Bankstown Allocation Zone, in which the site is located, the waiting list for social housing is approximately 2,450 households with the wait time for 1-bedroom / studio apartment between 5 – 10 years, and 2-bedroom units 10 + years. It further noted that there were over 320 applicant households on the priority housing list.

4.3 Procedural Requirements

The procedural requirements of Clause 4.6 of CBLEP 2023 are addressed below:

Clause 4.6(2)

Clause 4.6(2) states that *"this clause does not apply to a development standard that is expressly excluded from the operation of this clause"*.

Clause 4.3 Height of buildings of the CBLEP 2023 and s18 of the Housing SEPP are not expressly excluded from the operation of Clause 4.6, and therefore, variation to the maximum height of buildings can be considered under this clause.

Clause 4.6(4)

Clause 4.6(4) states that *"The consent authority must keep a record of its assessment carried out under subclause (3)."*

5 THE LAND AND ENVIRONMENT COURT PRINCIPLES/TESTS

Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118 is discussed below and addresses the correct approach to consider Clause 4.6 requests, see **Section 5.1**.

Two landmark cases articulate the Court's view on reasonable arguments for, and assessment of, requests for exceptions to development standards. These are discussed further below at **Section 5.2** and **Section 5.3**.

5.1 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 correct interpretation of Clause 4.6 requests. A Cl 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

These matters are addressed below.

With respect to the subject site, compliance with the 16.9m height of buildings development standard is considered unnecessary in this case because the proposed development complies with the objectives of the subject development standard (noting the objectives provided under *Clause 4.3 Height of buildings of CBLEP 2023*). The objectives of the development standards are addressed at **Section 4.2** above. Refer also to the five tests under *Wehbe v Pittwater Council* at **Section 5.2** below.

The development is considered to have sufficient environmental planning grounds given the development is permissible with consent by virtue of the land zoning, enables Homes NSW to address severe housing shortages and deliver greater housing choices to those in need, and achieve design excellence in a precinct with an emerging high-density character. The development will be in the public interest because it is consistent with the objectives of the R4 zone and achieves the objectives of the subject development standard. The proposed development has been designed to minimise any conflict with the adjoining properties such as overshadowing, privacy, sunlight, and view impacts.

The case also identifies that the outcome of the breach to a development standard does not necessarily need to be a *neutral* or *better* outcome, if the relevant environmental planning grounds to assess it against do not require such.

5.2 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 applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary. The five tests are considered in the table below.

i. <i>The objectives of the standards are achieved notwithstanding non-compliance with the standard</i>	Despite relying on the additional height under s18(2) of the Housing SEPP, the proposed development complies with the objectives of <i>Clause 4.3 Height of buildings</i> under CBLEP 2023. The objectives of the standard are addressed at Section 2.2 above.
ii. <i>The underlying objectives or purposes of the standard are not relevant to the development and therefore compliance is unnecessary</i>	The underlying objectives of the standard are relevant to the development. However, as provided in this request, compliance with the standard is considered unnecessary in this case.
iii. <i>The underlying objective or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	The underlying objective or purpose of the standard would not be defeated or thwarted if compliance was required.
iv. <i>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</i>	This exception to development standards request does not rely on this reason.

v. <i>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.
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5.3 Winten Developments Pty Ltd v North Sydney Council (2001) NSWLEC 46

The exception to development standard 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) Are the planning controls in question a development standard?	Yes, s18(2) of the Housing SEPP is a development standard.
b) What is the underlying object or purpose of the standards?	The objectives of the standard are addressed at Section 2.2 above.
c) Is compliance with the development standards unnecessary or unreasonable in the circumstances of the case?	Sections 2.2 and 3 demonstrate that compliance is unnecessary and unreasonable.
d) Is compliance with the development standards consistent with the aims of the Policy (to provide flexibility in the application of development standards); and, in particular, does compliance with the development standards tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979?	As demonstrated in Section 2 , compliance with the standard would be inconsistent with the objectives of Clause 4.6 and would hinder the attainment of the objects of the Act as discussed in Sections 2, 3 and 4 of this request.
e) Is the objection well founded?	<p>The objection is well founded on the grounds that the non-compliance:</p> <ul style="list-style-type: none"> – Enables the delivery of greater housing choices to those in the community that are most in need, – Allows for the delivery of a residential flat building that achieves design excellence, – Is required to address the housing supply crisis and the long waiting list for social housing, – Has been demonstrated not to raise any issues of State or Regional planning significance, – Achieves the objects of the EP&A Act and will provide positive social impacts to the City of

	<p>Canterbury Bankstown Local Government Area, and</p> <ul style="list-style-type: none">– Enables a development that reflects the changing character of the locality without significant environmental impacts on the use and enjoyment of adjoining land uses, such as overshadowing, privacy, sunlight, and view impacts.
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6 CONCLUSION

The development proposes to vary Clause 4.3 *Height of buildings* development standard in CBLEP 2023 which sets a maximum permissible height of 16.9m. The development proposes a maximum height of 17.44m, which results in a 3.2% / 540mm variation to the development standard. The additional height allows Homes NSW to promote design excellence in an emerging high density residential precinct. Overall, the additional dwellings subject of the proposal will assist Homes NSW in meeting its significant, long-standing and continually growing demand for social housing in the City of Canterbury Bankstown local government area.

The proposed development, with a non-compliant building height, will not result in a built form that will be out of character with surrounding residential development. The additional 540mm in building height does not give rise to any significant adverse impacts upon the surrounding natural or built environment, and as particularly relevant to the increased height request, the development does not give rise to any significant adverse overshadowing impacts to adjoining neighbours. The variation will be imperceptible when viewed from adjoining properties and the public domain.

The development is otherwise generally compliant with relevant Local and State planning controls and Strategic Planning Framework.

Owing to the nature of the variation, the public benefit of an affordable housing development that exhibits design excellence that will result from the increased height, the absence of any adverse unacceptable impacts upon the surrounding natural or built environment, that the variation to Council's building height control is justified.

The proposed height is supported on environmental planning grounds and is in the public interest, as outlined in this report and as such in this instance compliance with the development standard is considered unnecessary and unreasonable.

It is therefore considered that the variation to the height of buildings development standard at 171 Weston & 2-6 Hinemoa Street, Panania, does not undermine the objectives of the development standard or the zone. Despite the non-compliance, the development will provide a high quality of design for future tenants without any discernible internal or external impacts. Council is therefore requested to exercise its flexibility under Clause 4.6 by recommending approval for the proposed development.