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Updated Clause 4.6 Variation Request

**427 Bronte Road
Bronte**

By way of background, this clause 4.6 variation request in support of amended plans for an appeal to the NSW Land & Environment Court against the decision of Waverley Council, to refuse a modification application as detailed below.

My original clause 4.6 variation request was submitted in support of an application under Division 8.2 of the *Environmental Planning and Assessment Act 1979* for a review of the determination in respect of development application DA-92/2020. That development application was the subject of a detailed assessment report by Council's Senior Development Assessment Planner dated 29 May 2020.

In accordance with the recommendation of that report, the development application was refused under delegated authority by Council's Development and Building Unit (DBU) for six reasons. However, all of the reasons related directly or indirectly to the fact that the proposal involved a modest increase in gross floor area (GFA), which meant that the development exceeded the maximum permitted floor space ratio (FSR) under clause 4.4A of the Waverley Local Environment Plan (LEP) 2012 and the applicant had not submitted a request for variation of the development standard pursuant to clause 4.6 of the LEP.

Despite the refusal, it is evident from reading the report of the Senior Development Assessment Planner, which was agreed and accepted by Council's DBU, that the impact of the proposed development on the character and scale of development in the locality as well as its impact on the amenity of neighbouring properties were negligible and acceptable. In the absence of a clause 4.6 request, Council had no power to approve the development. This request, the review application and the appeal are submitted in order to address that previous omission and technical problem.

Clause 4.4 of Waverley LEP 2012 relates to FSR and refers to the *Floor Space Ratio Map*. However, clause 4.4A of the LEP states, inter alia:

“ **4.4A Exceptions to floor space ratio**

Despite clause 4.4, the maximum floor space ratio for a dwelling house or dual occupancy on land in Zone R2 Low Density Residential, Zone R3 Medium Density Residential or Zone R4 High Density Residential is as follows:

- (a) *for lots with an area less than 100 square metres—1:1,*
- (b) *for lots with an area of 100 square metres to 550 square metres— $[(550 - \text{lot area}) \times 0.0011] + 0.5$:1,*
- (c) *for lots with an area greater than 550 square metres—0.5:1.”*

Gross floor area is defined by Waverley LEP 2012 as follows:

“ **gross floor area** *means the sum of the floor area of each floor of a building measured from the internal face of external walls, or from the internal face of walls separating the building from any other building, measured at a height of 1.4 metres above the floor, and includes:*

- (a) *the area of a mezzanine, and*
 - (b) *habitable rooms in a basement or an attic, and*
 - (c) *any shop, auditorium, cinema, and the like, in a basement or attic,*
- but excludes:*
- (d) *any area for common vertical circulation, such as lifts and stairs, and*
 - (e) *any basement:*
 - (i) *storage, and*

- (f) (ii) vehicular access, loading areas, garbage and services, and plant rooms, lift towers and other areas used exclusively for mechanical services or ducting, and
- (g) car parking to meet any requirements of the consent authority (including access to that car parking), and
- (h) any space used for the loading or unloading of goods (including access to it), and
- (i) terraces and balconies with outer walls less than 1.4 metres high, and
- (j) voids above a floor at the level of a storey or storey above."

It is not disputed between the parties to the Land & Environment Court proceedings that the subject building contains rooms and spaces that were not shown on the Complying Development Certificate (CDC) for the existing dwelling and have not been approved. The lawyers for each party have now agreed that the floor area of these spaces should be excluded in calculating both the existing and the proposed gross floor area. This agreement is consistent with the reasoning set out by Biscoe J which implied a lawfulness requirement in the definition of "existing dwelling" in *Wollongong City Council v Vic Vellar Nominees Pty Limited* [2010] NSWLEC 266 at [68]-[85], and in the definition "existing school" in *Bankstown City Council v Bennett* [2012] NSWLEC 38, which relies on Biscoe J's reasoning in *Vic Vellar*.

The gross floor area figures in this document are based on the survey drawing 2968/3 by Warren Eldridge – Consulting Surveyor & Real Estate Valuer dated 24/9/21 and the architectural drawings by RCO Engineering Pty Ltd Sheets A.03.1 to A.03.5 Revision F dated 28-9-21 and excludes the unauthorized spaces identified on those latter drawings by purple colour and labelled "Variation to CDC Drawings".

In accordance with the above definition, the development proposes a gross floor area of 299.7m² (see calculations in Table 1 below).

TABLE 1		
GFA Calculation	Existing (m ²)	Proposed (m ²)
Level 1	65.6	65.6
Mezzanine	2.7	36.0
Level 2	110.6	110.6
Level 3	51.3	51.3
Level 4	36.2	36.2
Total GFA	266.4	299.7

Based on the site area of 366.7m², the FSR permitted under clause 4.4A is 0.7:1 (256.7m²) whilst the existing FSR is 0.727:1 and the FSR proposed is 0.817:1. This exceeds the FSR development standard and represents a variation of 16.77%. This FSR control is a "development standard" to which variations can be granted pursuant to clause 4.6 of the LEP.

The objectives and provisions of clause 4.6 are as follows:

- " **4.6 Exceptions to development standards**
- (1) The objectives of this clause are as follows:
- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

- (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*
- (2) *Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.*
- (3) *Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:*
 - (a) *that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
 - (b) *that there are sufficient environmental planning grounds to justify contravening the development standard.*
- (4) *Development consent must not be granted for development that contravenes a development standard unless:*
 - (a) *the consent authority is satisfied that:*
 - (i) *the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and*
 - (ii) *the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and*
 - (b) *the concurrence of the Secretary has been obtained.*
- (5) *In deciding whether to grant concurrence, the Secretary must consider:*
 - (a) *whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
 - (b) *the public benefit of maintaining the development standard, and*
 - (c) *any other matters required to be taken into consideration by the Secretary before granting concurrence.*
- (6) *Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:*
 - (a) *the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or*
 - (b) *the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.*
- (7) *After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).*
- (8) *This clause does not allow development consent to be granted for development that would contravene any of the following:*
 - (a) *a development standard for complying development,*
 - (b) *a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,*
 - (c) *clause 5.4."*

The development standards in Clause 4.4A are not “expressly excluded” from the operation of Clause 4.6.

It is noted that in the Court determination in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] 236 LGERA 256 (*Initial Action*), Preston CJ notes at [87] and [90]:

“ *Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development...*

...

In any event, Clause 4.6 does not give substantive effect to the objectives of the clause in Clause 4.6(a) or (b). There is no provision that requires compliance with the objectives of the clause.

However, it is still useful to provide an assessment against the objectives of the Clause.

Objective 1(a) of Clause 4.6 is satisfied by the discretion granted to a consent authority by virtue of subclause 4.6(2) and the limitations to that discretion contained in subclauses (3) to (8). This request will address the requirements of subclauses 4.6(3) & (4) in order to demonstrate that the exception sought is consistent with the exercise of “an appropriate degree of flexibility” in applying the development standard and is therefore consistent with objective 1(a). In this regard, it is noted that the extent of the discretion afforded by subclause 4.6(2) is not numerically limited. It is also noted that the report of Council’s Senior Development Assessment Planner on DA-92/2020 queried the applicant’s figure at that time for the increase in GFA and instead relied upon his own assessment using a figure of 36.4m² additional GFA. As shown on the amended development application plans submitted separately, it is our view that the actual increase in GFA is 33.296m².

Objective 1(b) of Clause 4.6 is addressed later in this document.

There are no specific objectives for Clause 4.4A identified in the LEP. However, the objectives of Clause 4.4 are as follows, inter alia:

- “ **4.4 Floor space ratio**
- (1) *The objectives of this clause are as follows:*
- (a) *to ensure sufficient floor space can be accommodated within the Bondi Junction Centre to meet foreseeable future needs,*
 - (b) *to provide an appropriate correlation between maximum building heights and density controls,*
 - (c) *to ensure that buildings are compatible with the bulk and scale of the desired future character of the locality,*
 - (d) *to establish limitations on the overall scale of development to preserve the environmental amenity of neighbouring properties and minimise the adverse impacts on the amenity of the locality.”*

As previously noted, clause 4.4A identifies a maximum FSR of 0.7:1 for dwelling houses on this site. It is hereby requested that a contravention of this development standard be permitted pursuant to clause 4.6 so as to permit a maximum FSR of 0.817:1 in respect of the subject development. In order to address the requirements of subclause 4.6(4)(a)(ii), each of the objectives of Clause 4.4 are addressed below:

Objective (a)

The site is not within the Bondi Junction Centre and accordingly objective (a) is not relevant to this development proposal.

Objective (b)

Objective (b) relates to an intention to have density controls (expressed as FSR controls) that are realistic and achievable having regard to the maximum building heights that are permitted on a site pursuant to the LEP.

The proposal does not alter the existing building height and complies with the maximum permitted height stipulated in the LEP and all of the relevant built form controls under Council's DCP. The additional GFA, being completely internal, will not alter in any perceivable way the visual bulk and scale of the existing dwelling house.

Accordingly, notwithstanding the FSR variation, the proposed development satisfies objective (b) of that development standard.

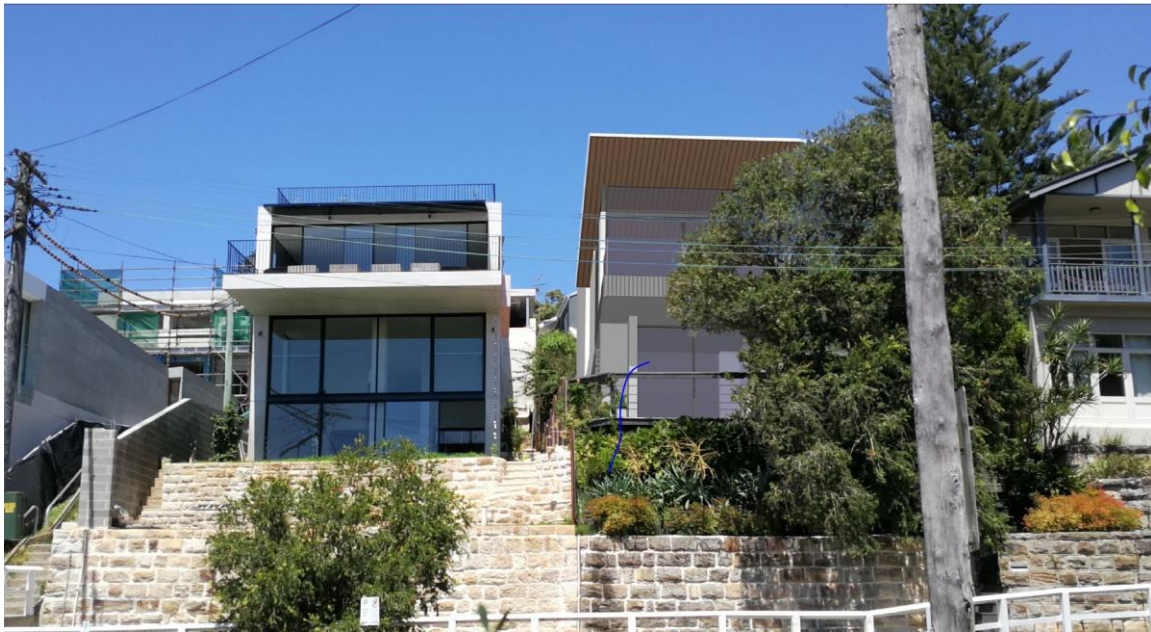
Objective (c)

The site is not located within one of the three "Special Character Areas" identified in Council's DCP for each of which the "desired future character" is explicitly stated. There is no specific "desired future character" statement for this locality. Therefore, the intent of this objective is to ensure that buildings are compatible with the bulk and scale of development within the locality.

As noted in the planning principle on "compatibility in the urban environment", there are many dictionary definitions of *compatible*. The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve. (*Project Venture Developments v Pittwater Council* [2005] NSWLEC 191)

The site is in the R2 Low Density Residential Zone and the locality is characterised by a mix of dwelling houses and residential flat buildings of varying scales and architectural styles. Due to the sloping topography of the area, developments near the subject site on the western side of Bronte Road are typically elevated above garages or high retaining walls at the street frontage.

Most of the dwellings, particularly the more recent developments including both immediate neighbours, have a similar visible bulk and scale when viewed from Bronte Road as shown in the following photographs.



Photograph 0: The existing development at 427 Bronte Road relative to impression of new development under construction at 425 Bronte Road



Photograph 1: No. 439 Bronte Road



Photograph 2: No. 445 Bronte Road

It is noted and relevant that the immediately adjoining building to the east at 429 Bronte Road involves an FSR breach of over 60%, being over 1.1:1. That development also involved height breaches and set back breaches, being largely built to the boundary.

In addition, the proposed development is also in keeping with the character of other recent developments within the broader Bronte locality as shown in the following images.

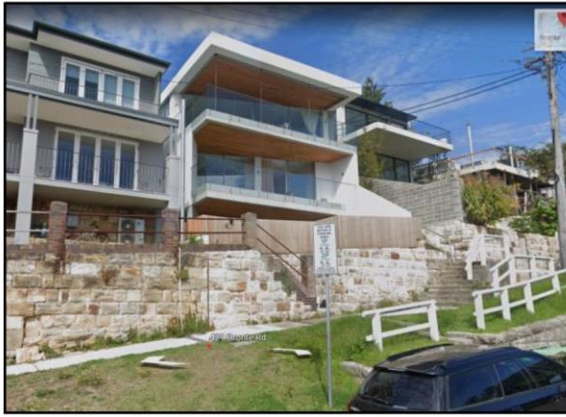


Image 1: Streetscape Image of No. 429 Bronte Road
(DA-381/2014)
(Source: Google Streetview)



Image 2: Photomontage of No. 435 Bronte Road
(DA-480/2018)
(Source: Waverley Council/Tribe Studios)



Image 3: Photomontage of Nos. 136-140 Hewlett Street
(DA-13/2009)
(Source: Walter Barda Design)

The existing building on the site is in keeping and compatible with surrounding development. Indeed, it now forms part of the existing character of the locality. In this regard, it is important to note the proposal, and specifically the additional proposed FSR, does not change the existing height, bulk, scale, streetscape appearance or built form whatsoever. As such, there is no perceptible environmental impact arising from the increased floor space.

Accordingly, the proposed dwelling is compatible with the bulk and scale of the desired future character of the locality and therefore satisfies objective (c) of clause 4.4.

Objective (d)

Notwithstanding the variation, the proposal has been designed to maintain amenity of neighbouring dwellings. No new windows are proposed, and the area of the

mezzanine has been limited to maintain existing double height voids. No additional floor space is proposed outside the existing envelope of the building.

The additional floor space does not change the height, bulk or scale of the building and results in no adverse impacts on adjoining neighbours. My opinion of the acceptability of the proposal on the amenity of neighbouring properties is, I note, an opinion shared by Council's Senior Development Assessment Planner as evidenced by the comments contained in the following Table extracted from his report dated 30 May 2020 on Development Application No.DA-92/2020:

Table 3: Waverley DCP 2012 Part C2 Low Density Residential Development Compliance Table

Development Control	Compliance	Comment
2.0 General Objectives		
<ul style="list-style-type: none"> • Appropriate scale • Does not detract from amenity of other dwellings or view corridors • ESD has been considered • Alterations & additions are sympathetic in bulk & scale to the character of the area • High design standard 	Yes	The proposal does not contravene the general objectives of this part of the DCP.
2.2 Setbacks		
2.2.1 Front and rear building lines <ul style="list-style-type: none"> • Predominant front building line • Predominant rear building line at each floor level 	N/A	No change to front and rear setbacks of the dwelling house and associated outbuildings/garages.
2.2.2 Side setbacks □ Minimum of 0.9m	No (acceptable on merit)	The infilling of the western wall of the garage varies the minimum side setback control of 0.9m. The infilling is considered minor and is unlikely to manifest in adverse amenity impacts. It is acceptable on merit.
2.3 Streetscape and visual impact		
	Yes	The mezzanine level will not be read from the street and will not affect the perceived building envelope of the development.

Development Control	Compliance	Comment
2.5 Visual and acoustic privacy		
<input type="checkbox"/> Windows to habitable rooms are not to directly face windows to habitable rooms and / or open space of neighbouring dwellings unless direct views are screened or other appropriate measures are incorporated into the design.	Yes	The proposal does not involve new window openings. The mezzanine is unlikely to result in additional privacy impacts upon adjoining properties in this regard.
2.6 Solar access		
<ul style="list-style-type: none"> Minimum of three hours of sunlight to living areas and principal open space areas on 21 June Minimum of three hours of sunlight maintained to living areas and principal open space areas of adjoining properties on 21 June 	Yes	No change to the building envelope of the development. Therefore, there will be no additional shadowing impact.
2.7 Views		
<input type="checkbox"/> Views from the public domain are to be maintained <input type="checkbox"/> Development to be designed and sited so as to enable a sharing of views with surrounding dwellings particularly from habitable rooms and decks.	Yes	No change to the building envelope of the development. Therefore, there will be no additional view impact.
2.8 Car parking		
2.8.2 Design Approach	Yes	Satisfactory.
2.8.2 Parking rates	N/A	No change.
2.8.3 Location	N/A	No change.
2.8.4 Design	Yes	The infilling of the western wall will have no material impact on the design of the garage.
2.8.5 Dimensions	N/A	No change.
2.8.6 Driveways	N/A	No change.
2.9 Landscaping and open space		
	N/A	No change to open space and landscaped area.

Accordingly, the proposed development is an appropriate scale and maintains the environmental amenity of neighbouring properties. The additional floor space will not affect the privacy, solar access and views enjoyed by neighbouring properties and will not adversely impact on the amenity of the locality. As such, despite the non-compliance with the FSR provision, the proposed development is consistent with objective (d).

Although clause 4.6 requires the decision-maker to be faithful to the language of the clause rather than any stated principles developed in the application of SEPP 1, it is helpful to consider the other tests identified in *Wehbe v Pittwater Council* as to whether the objectives of the standard are achieved.

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

“ *An objection under SEPP 1 may be well founded and be consistent with the aims set out in clause 3 of the Policy in a variety of ways. The most commonly invoked way is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.*”

The judgement goes on to state that:

“ *The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).*”

As the proposal satisfies the objectives of clause 4.4 for the reasons outlined above, Council can be satisfied that the requirements of clause 4.6(3)(a) are satisfied as compliance with the development standard has been shown to be unreasonable and unnecessary in the circumstances of this case.

The second test is whether the underlying objective or purpose is not relevant to the development. It is clear that objective (a) is not relevant. All other objectives are relevant to the proposed development.

The third test is whether the objective would be defeated or thwarted if compliance was required. This test is not relied upon in this instance.

The fourth test is whether the development standard has been virtually abandoned or destroyed by the Council's own actions in departing from the standard. In this regard, I have been instructed that there have been numerous applications for development in the R2 Low Density Residential Zone with non-compliant FSRs that have been approved by Waverley Council. I note that each DA must be assessed on its own merits and having regard to the context of the individual site. However, it is relevant to consider similar breaches to the FSR development standard that have

been approved by Council in the Bronte locality. Based on Council's Clause 4.6 Register, these include the following:

- The adjoining lot at 429 Bronte Road (DA-381/2014/B) – 60% variation;
- No. 57 Gardyne Street, Bronte (DA-724/2004/C) – 46% variation;
- Nos. 136, 138 and 140 Hewlett Street (DA-13/2009) – ranging from 28 to 50% variation;
- No. 42A Gardyne Street, Bronte (DA-50/2016) – 31% variation;
- No. 369A Bronte Road, Bronte (DA-516/2017) – 93% variation;
- No. 38-40 Henrietta Street, Bronte (DA-321/2017) – 38% variation;
- No. 10 Miramar Avenue, Bronte (DA-527/2016) – 72% variation;
- No. 11 Pembroke Street, Bronte (DA-249/2015) – 47% variation; and
- No. 12 Miramar Avenue, Bronte (DA-338/2015) – 72% variation.

It is relevant to compare under what circumstances variations to the FSR development standard were supported by Council. In this regard, I am instructed that in respect of the following additional developments the following variations and rationale were applied:

1. On 12 December 2018, Waverley Council approved DA No. 154/2018 for alterations and additions to create a single dwelling at Nos. 19 & 21 Bayview Street, Bronte, with a 30.6% FSR exceedance and a 15.3% height exceedance. The main justification was the exceedance would have no adverse environmental impact and would be consistent with the objectives of the zone and standard.
2. On 29 August 2018, Council approved DA No. 424/2017 for a new dwelling at No. 7 Gardyne Street, Bronte, with a 14.5% FSR exceedance. The main justification was the bulk, scale and height were compatible with adjoining existing development.
3. On 10 July 2018, Council approved DA No. 545/2017 for alterations and additions to a dwelling at No. 39 Hewlett Street, Bronte, with a 5% FSR exceedance. The main justification was the minor exceedance was in keeping with the context of surrounding development.
4. On 28 March 2018, Council approved DA No. 377/2017 for a new dwelling at No. 105 Hewlett Street, Bronte, with a 4% FSR exceedance and a 41.7% height exceedance. The main justification was the exceedance would have no unreasonable planning impacts.
5. On 12 January 2018, Council approved DA No. 164/2017 for alterations and additions to a semi-detached dwelling at No. 21 Dickson Street, Bronte, with a 5% FSR exceedance. Again, the main justification was that the minor exceedance would have no unreasonable planning impacts.

Accordingly, the above proposals had FSR breaches that were supported by Council staff, and approved by Council, based on circumstances and justifications that apply equally to the subject proposal i.e. being compatible with surrounding development with no significant adverse effects on the amenity of neighbours or the locality.

Whilst I rely primarily upon Test 1 of Wehbe, in my opinion a strong case could also be made to justify the variation on the basis that the FSR development standard has been virtually abandoned or destroyed by the Council's own actions in departing from that standard.

Finally, the fifth test is whether the zoning of the land is unreasonable or inappropriate. This test is not relevant in the circumstances.

For all of the above reasons, strict compliance with the standard is unreasonable or unnecessary in the circumstances of this case. The proposed development would achieve the objectives of clause 4.4. To vary the standard would achieve an appropriate degree of flexibility and achieve better outcomes for and from the proposed development.

Clause 4.6(4) also requires consideration of the relevant zone objectives. The objectives of the *R2 Low Density Residential* zone are as follows:

- *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 maximise public transport patronage and encourage walking and cycling.*

The proposal is consistent with the zone objectives in that the building will continue to provide housing to meet the needs of the community in a building type that is permissible in the zone and compatible with the other residential development forms existing in this locality.

As the proposal is a residential development, the second objective relating to “other land uses” is not applicable to this proposal.

The proposal is not antipathetic to the third zone objective as the provision of an additional bedroom / adaptable work from home space without any increased on-site car parking facilities may reduce the need for travel but is unlikely discourage public transport usage.

Sufficient Environmental Planning Grounds

Having regard to Clause 4.6(3)(b) and the need to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, it is appropriate to refer to the objects of the Environmental Planning & Assessment Act to identify matters that constitute “environmental planning grounds”.

The relevant objects of the Act are as follows, inter alia:

- (a) ...,
- (c) *to promote the orderly and economic use and development of land,*
- (d) ...,
- (g) *to promote good design and amenity of the built environment,*
- (h) ...,

In summary, the proposed development achieves the objects of the Act through:

1. maximising orderly and economic use of the existing development, by exchanging the enjoyment of the void for the utilisation of the space as bedroom or home office space;

2. promoting good overall design by enhancing flexibility of the existing development with no material adverse impact on the overall design of the development or neighbouring residents; and
3. promoting amenity by preserving the character of the locality, and amenity enjoyed by neighbouring owners.

The proposal is for a modest and orderly development of the land in order to enhance the amenity of the existing dwelling house for its residents in a manner that represents good design, being a design that is considerate of and sympathetic to the residents of its neighbouring buildings and the objects of the Act.

The additional space will undoubtedly be of benefit to residents of the dwelling house by providing additional floor space that is flexible in its potential uses. Whilst that is a private benefit, there is nothing to suggest that the “better outcomes” referred to in the objective of clause 4.6 excludes a better outcome that is a private benefit. Generally, the reason for carrying out a private development is to achieve private benefits. It should not be suggested that the generation of a private benefit and the promotion of the objects of the Act are mutually exclusive, particularly in the absence of any unreasonable impacts on the amenity of adjoining properties.

The proposed development promotes the orderly and economic use and development of the land, and good design and amenity of the built environment in a number of ways:

1. **Flexibility:** The importance of additional space and flexibility as an aspect of good design and amenity of the built environment has taken on increased significance during the recent and ongoing Covid 19 pandemic. The restrictions imposed by governments in order to protect public health and safety have encouraged, or even necessitated, many residents having to work from home. In doing so, many people found that the space available within their residence compromised their ability to work effectively without modifications to their residential environment.

In the circumstances, the availability of additional space that can, when needed, be used as a work from home space represents not only good design but also enhanced amenity, in accordance with the objects of the Act.

2. **Appropriate ceiling heights preserved:** Whilst the proposed development results in the loss of enjoyment of the existing void, it nonetheless maintains appropriate floor to ceiling heights in the existing rumpus room. The proposed additional internal floor space will result in reduced floor to ceiling height in the existing rumpus room. Whether that results in reduced amenity to the existing rumpus room is a matter of subjective opinion. Because issues such as this are so subjective it is common planning practice, in accordance with the Land and Environment Court planning principle (*Veloshin v Randwick*), to assess development by reference to the relevant controls. In this regard, the proposed development will still comply with or exceed the minimum floor-to-ceiling standards. I note that a development does not have to exhibit design excellence, or provide more than the specified standard, in order to achieve an acceptable level of amenity.

3. **Amenity of neighbours:** As discussed above it is considered that there is an absence of any unreasonable impacts, arising from the proposed non-compliance, on the character of the area or on the amenity enjoyed by neighbouring properties. In this regard, I note that Commissioner Gray in *Pritchard v Northern Beaches Council [2020] NSWLEC 1310* at paragraph 70 states, inter alia:

“ Further, the absence of any amenity impacts of the additional floor space added by the proposed development on adjoining properties could constitute an environmental planning ground, as it promotes good design and amenity in accordance with the objects of the EPA Act.”

I also note that more recently Commissioner Walsh in *Eather v Randwick City Council [2021] NSWLEC 1075* agreed and stated at paragraph 38, inter alia:

“ The fact of the particularly small departure from the actual numerical standard and lack of any material impacts consequential of the departure are sufficient environmental planning grounds to justify contravening the development standard.”

I also note that my opinion as to the acceptability of the proposal is shared by Council's Senior Development Assessment Planner as is evident from his report on the previous development application.

4. **Preservation of locality character:** Given that the FSR of the proposed building is similar to or less than that of the immediate neighbours and other recent approvals in this locality, it is considered that, together with the matters outlined above, there are sufficient and strong environmental planning grounds to justify a contravention of the development standard in the circumstances of this case.

Conclusion

Therefore, on balance, the proposal is considered to achieve a planning purpose of enhancing residential amenity and orderly use and development of land, whilst ensuring that built form is compatible with existing development and without resulting in any significant amenity impacts on neighbouring properties or the locality.

Allowing flexibility in the particular circumstances of this development will achieve “a better outcome for and from development”. On this basis, Council can be satisfied that the proposal meets objective 1(b) of clause 4.6 of the LEP.

Finally, for all of the above reasons and consistent with clause 4.6(4)(a)(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. The proposed development will:

- be consistent with character of the surrounding locality;
- achieve an enhanced level of residential amenity for residents without any significant adverse impact on neighbouring properties; and
- satisfy the relevant objectives of both clause 4.4A and the R2 zone.