



## CLAUSE 4.6 - FSR

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Alterations and additions to an approved residential flat building

142, 142A & 142B Bellevue Road,  
BELLEVUE HILL

Prepared for: Bellevue Road Holdings Pty Ltd

REF. M190240

Date: 21 December 2021





# Clause 4.6 Variation Statement – Floor Space Ratio (Clause 4.4)

## 1. Floor Space Ratio Standard

Clause 4.4 of WLEP 2014 relates to the maximum floor space ratio (FSR) for the site and refers to the *Floor Space Ratio Map*. The relevant map [sheet FSR\_003] indicates that the maximum FSR permitted at the subject site is 0.65:1 (**Figure 1**).

The floor space ratio of buildings on a site is the ratio of the gross floor area (GFA) of all buildings within the site to the site area. Gross floor area is defined to mean:

*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*
  - (ii) vehicular access, loading areas, garbage and services, and*
- (f) 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.*



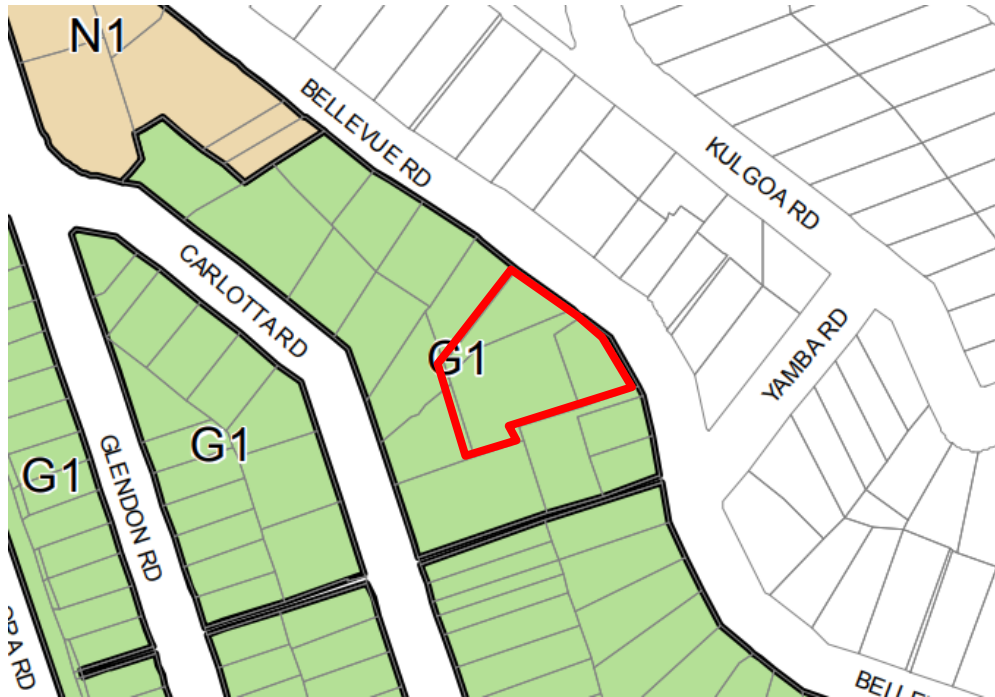


Figure 1 Extract from the Floor Space Ratio Map [G1=0.65:1]

## 2. Proposed variation to height of buildings development standard.

The maximum permitted GFA for the site is 1,698.2m<sup>2</sup>. The approved residential flat building has a GFA of 1,671m<sup>2</sup> and FSR of 0.64:1. The architectural plans indicate that the proposed alterations and additions will have a maximum gross floor area (GFA) of 2,764m<sup>2</sup> and FSR of 1.058:1. This results in an exceedance of 1,065.8m<sup>2</sup> or 62.7%.

The proposed development has a GFA and FSR as follows:

Table 1 GFA and FSR			
Site Area	2612.7m <sup>2</sup>		
	Control	Approved	Proposed
<b>Gross Floor Area</b>			
Lower Ground Floor (Basement 03)	-	-	373m <sup>2</sup>
Ground Floor (Basement 02)		120m <sup>2</sup>	384m <sup>2</sup>
L1 (Basement 01)		200m <sup>2</sup>	384m <sup>2</sup>
L2		517m <sup>2</sup>	707m <sup>2</sup>
L3		608m <sup>2</sup>	694m <sup>2</sup>
L4		226m <sup>2</sup>	222m <sup>2</sup>
Total	1698.2m <sup>2</sup>	1,671m <sup>2</sup>	2,764m <sup>2</sup>
<b>FSR</b>	0.65:1	0.64:1	1.058:1

The maximum FSR under Clause 4.4 is a “development standard” to which exceptions can be granted pursuant to Clause 4.6 of the LEP.

## 3. Clause 4.6 to WLEP 2014

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 Planning Secretary has been obtained.*
  - (5) *In deciding whether to grant concurrence, the Planning 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 Planning 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.*
- Note**—When this Plan was made it did not include all of these zones.
- (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 4.4 are not “expressly excluded” from the operation of Clause 4.6.

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 submission will address the requirements of Subclauses 4.6(3) & (4) in order to demonstrate to the consent authority 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, the extent of the discretion afforded by Subclause 4.6(2) is not numerically limited, in contrast with the development standards referred to in, Subclause 4.6(6).

It is hereby requested that a variation to this development standard be granted pursuant to Clause 4.6 so as to permit a maximum GFA of 2,764m<sup>2</sup> and FSR of 1.058:1 which equates to a numerical variation of 1,065.8m<sup>2</sup> or 62.7%. The maximum FSR under Clause 4.4 is a “development standard” to which exceptions can be granted pursuant to Clause 4.6 of the LEP.

#### **4. Compliance is unreasonable or unnecessary in the circumstances of the case (Clause 4.6(3)(a))**

Of relevance to Clause 4.6(3)(a), 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).”*

Preston CJ in the judgement then expressed the view that there are 5 different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy, as follows (with emphasis placed on number 1 for the purposes of this Clause 4.6 variation [our underline]):

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;
3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;
4. The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;

5. *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 that would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

Relevantly, in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 16), Preston CJ makes reference to Wehbe and states:

*“...Although that was said in the context of an objection under State Environmental Planning Policy No 1 – Development Standards to compliance with a development standard, the discussion is equally applicable to a written request under cl 4.6 demonstrating that compliance with a development standard is unreasonable or unnecessary.”*

Clause 4.6(3)(a) requires that the written request to vary a development standard demonstrate that compliance with the development standard is unnecessary or unreasonable in the circumstances of the case. Requiring strict compliance with the standard is unreasonable or unnecessary because:

- the development is consistent with the standard and zone objectives, even with the proposed variation (refer to Section 7 below);
- there are no additional significant adverse impacts arising from the proposed non-compliance; and
- important planning goals are achieved by the approval of the variation.



On this basis, the requirements of Clause 4.6(3)(a) are satisfied.

## **5. Sufficient environmental planning grounds (Clause 4.6(3)(b))**

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. Specifically, Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (paragraph 24) states:

*The environmental planning grounds relied on in the written request under cl 4.6 must be “sufficient”. There are two respects in which the written request needs to be “sufficient”. First, the environmental planning grounds advanced in the written request must be sufficient “to justify contravening the development standard”. 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 planning grounds. The environmental planning grounds advanced in the written request must justify the 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] NSWCA 248 at [15]. Second, the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [31].*

The assessment of this numerical non-compliance is also guided by the decisions of the NSW LEC in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 and *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248 whereby Justice Pain ratified the original decision of Commissioner Pearson. The following planning grounds are submitted to justify contravening the maximum FSR:

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1. The proposed variation of 1,065.8m<sup>2</sup> or 62.7% is located predominately at the lower levels within the established building envelope approved under DA344/2019. Specifically, the proposal involves the provision of 8 additional units within the footprint of the lower levels, being the lower ground, ground and first floor. This represents an increase of 821m<sup>2</sup> when compared to the original approval and accounts of 77% of the proposed variation. That is, the majority of the additional floorplate is below street level due to the sloping topography and will not be readily discernible when viewed from the public domain and adjoining properties.
  2. The provision of this additional floor area is a result of the improved efficiencies of the parking layout and building services and has been purposefully designed to ensure no discernible increase in building bulk is created when viewed from the neighbouring properties. Importantly, the 821m<sup>2</sup> increase is located within the approved footprint and no additional excavation is proposed to provide for the additional GFA. In fact, the proposed development reduces the extent of excavation despite the increase in density.

The balance of the additional GFA (272sqm or 25%) can be attributed to the infill of the space above the vehicular and pedestrian entrances and greater floor area within the approved envelope. The deletion of the ramps and provision of a double car lift coupled with the infill of articulation elements will ensure the additional GFA will not be sited any closer to or impart any significant additional bulk and scale to adjoining properties or the public domain. Specifically, the additional density does not bring with it a form of development that encroaches further than the approved setbacks (compliant with the WDCP and ADG) nor does it result in a loss of amenity for future occupants given its compliance with the ADG amenity requirements.

3. The proposed variation will not compromise the amenity of future occupants or create changes to the visible built form and character of the site. In fact, despite the increase in density, the proposed development will increase with quantum of deep soil landscaped area and provide a compliant level of useable communal open space with the deletion of the swimming pool. This will enhance the amenity and landscaped setting of the proposed building despite the variation.
4. The proposed variation will not result in any discernible increase to bulk and scale or change to the character of the approved residential flat building when viewed from the neighbouring properties or public domain. It follows that the location of this floor area will not result in any further amenity impacts to future occupants or neighbouring properties beyond the approved built form in terms of solar access, views or privacy as discussed in this variation.
5. The proposed variation to the GFA will still maintain the architectural language of the approved development, especially when viewed from Bellevue Road. Importantly, the additional GFA will not result in any discernible change or obvious non-compliance with regards to the built form (as viewed by the casual observer) given they are compliant with DCP setbacks and building height development standard. That is, the additional GFA does not bring with it a built form that is excessive when viewed from neighbouring properties or the public domain, nor does it appear out of context with surrounding development that steps down the site within a landscaped setting.



6. When considering streetscape character, the proposed additions have been designed to complement the contemporary character established by the approved residential flat buildings on the site and surrounding. The proposed increase in GFA retains the façade undulations, balcony articulation, fenestration and roof design that were integral to the approved building and ensures that, despite the variation, the proposed development will not be visually jarring from the public domain. A comparison between the approved development and proposed alterations and additions is provided below which demonstrates the negligible impact the increase in GFA will have when viewed from the public domain (Figures 2 and 3). Importantly, when considering the provision of vegetation within the front setback the extent of any variation will be predominantly obscured.





**Figure 2** Perspective of approved development





**Figure 3** Perspective of proposed development

7. The FSR breach in part, can be accounted for by a result of the topography where the site drops considerably from the front to rear boundary by approximately 15m. This is a site specific condition that can accommodate the additional density proposed. That is, the variation to the GFA will occur within the approved envelope and will not encroach closer to any boundary than the approved development. Importantly, the additional FSR will not bring with it a scale that is out of context with surrounding development or the approved development for that matter.



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8. Further to the above, the proposed FSR variation does not bring with it a form of development on the site that is noticeably larger than anticipated by the controls or inconsistent with the character for the locality generally. As identified, the additional GFA is not concentrated to a specific portion of the site and has been integrated throughout the approved stepped built form and modular design fronting Bellevue Road. Furthermore, the built form is generally obscured from the public domain given the topography of the site and stepped nature of the proposal and therefore mitigates any visual or physical impacts created by the variation to the FSR development standard.
  9. The proposed alterations and additions have been carefully considered and supported by the neighbouring developments, DCP controls and built form of the approved residential flat buildings. The proposed development maintains the bulk of the approved building in terms of setbacks and separation. The approved building is setback appropriately from the front, side and rear boundaries and the proposed development will not encroach any closer to the boundaries and therefore will not have any further adverse impact to the amenity of the adjoining properties or the streetscape character.
  10. The provision of additional GFA will have no bearing onto the provision of landscaped area on the subject site. In fact, as the density of the site increases so does the area of communal open space and landscaped area. The additional GFA will retain the landscaped character fronting the public domain and within the side and rear setbacks.
  11. It is considered that there is an absence of any significant material impacts of the proposed FSR variation on the amenity of the environmental values of the locality, the amenity of future building occupants and on area character. Specifically, the extent of non-compliance with the FSR development standard:
    - a. The proposal creates no significant overshadowing when compared to a compliant FSR. That is, when compared to the approved residential flat building the proposed alterations and additions will not result in any discernible increase in overshadowing. Importantly, the proposal will continue to ensure compliance with Council's solar access requirements for adjoining properties. Therefore, when considering the overshadowing against the backdrop of applicable planning controls, the extent of overshadowing created by the additional FSR is insignificant or nil;
    - b. The FSR breach does not result in any significant additional privacy impacts. The proposal has been designed to ensure all primary living areas are orientated to the front and rear boundaries as originally approved and provides predominantly blank facades to the northern and southern (side) boundaries. Where openings are proposed, these are setback 3-6m in accordance with the ADG design criteria and have integrated privacy screens and planter boxes to ensure visual and aural privacy is retained both within and exterior to the development. When considered against the backdrop of the applicable planning controls, the extent of privacy impacts created by the additional FSR is considered to be insignificant or nil; and
    - c. The FSR breach does not create any significant additional view loss. Per the original approval, the proposed non-compliance does not alter the height or encroach further into the front, rear and side setbacks than the approved development. No significant views are currently enjoyed across the



subject site and the variation to the FSR will not result in any further material loss of views or outlook when compared to a development with a compliant FSR. As such, when considering the extent of view sharing against the backdrop of the applicable planning controls, the extent of view loss caused by the non-compliant element would be insignificant or nil.

12. The social benefits of providing additional housing stock within a highly sought after location (specifically, 8 additional apartments) should be given weight in the consideration of the variation request. The additional distribution of floor space which will cater for the needs of the community is designed to ensure that the visual and amenity impact is minimal and provides a form and scale consistent with the original approval. It would be a loss to the community (and contrary to the public interest) to deny the variation and require the removal of apartments within a well located and well-designed development.
13. The non-compliance facilitates an arrangement of floor space on the site in a manner that is effective in providing high levels of amenity to occupants of the development without impacting the amenity of neighbouring properties. Insistence on compliance with the FSR standard would result in the removal of 8 units which is a disproportionate response to the impacts created by the proposal.
14. The proposed development meets the objectives of the development standard and meets the objectives of the R3 Medium Density Residential zone (as further detailed in Section 7 below);
15. The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:
  - a. The proposal promotes the orderly and economic use and development of land through the redevelopment of an underutilised site for residential uses (1.3(c));
  - b. The proposed development promotes good design and amenity of the built environment through a well-considered design which is responsive to its setting and context (1.3(g)).
16. The variation to the FSR development standard will give better effect to the aims of *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* (SEPP 65). In particular:
  - a. The proposed variation will provide more sustainable housing in social and environmental terms and better achieve urban planning policies (clause 2(3)(a)(i));
  - b. Approval of the proposed variation will allow for a variation of scale across the locality which is commonly accepted urban design approach instead of buildings with consistent height; and
  - c. Approval of the proposed variation will support a variety of housing types by providing a well-located and compact development that will be a better choice for families (clause 2(3)(g)).

The above environmental planning grounds are not general propositions and are unique circumstances to the proposed development, particularly the levels of the topography across the site and building envelope established under DA344/2019. Insistence on compliance with the FSR standard would result in the removal of 8 apartments which is

disproportionate given the limited impact of the non-compliance. The additional FSR does not significantly impact the amenity of the neighbouring properties (when compared to the approved development) and has been designed in such a way to ensure the additional GFA is not visually jarring from the public domain.

It is noted that in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, Preston CJ clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

86. *The second way is in an error because it finds no basis in cl 4.6. 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. This test is also inconsistent with objective (d) of the height development standard in cl 4.3(1) of minimising the impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion. Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary, contrary to what the Commissioner held, that the non-compliant development have no view loss or less view loss than a compliant development.*
87. *The second matter was in cl 4.6(3)(b). I find that the Commissioner applied the wrong test in considering this matter by requiring that the development, which contravened the height development standard, result in a "better environmental planning outcome for the site" relative to a development that complies with the height development standard (in [141] and [142] of the judgment). Clause 4.6 does not directly or indirectly establish this test. The requirement in cl 4.6(3)(b) is that 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.*

As outlined above, it is considered that in many respects, the proposal will provide for a better planning outcome than a strictly compliant development. At the very least, there are sufficient environmental planning grounds to justify contravening the development standard.

## **6. The applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), (Clause 4.6(4)(a)(i))**

Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* details how Clause 4.6(4)(a) needs to be addressed (paragraphs 15 and 26 are rephrased below):

The first opinion of satisfaction, in clause 4.6(4)(a)(i), is that a written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by clause 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (clause 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (clause 4.6(3)(b)). This written request has addressed Clause 4.6(3)(a) in Section 5 above (and furthermore in terms of meeting the objectives of the development standard, this is addressed in Section 7 below). Clause 4.6(3)(b) is addressed in Section 5 above.

The second opinion of satisfaction, in clause 4.6(4)(a)(ii), is that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the



objectives for development for the zone in which the development is proposed to be carried out. The second opinion of satisfaction under cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under clause 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in clause 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in clause 4.6(4)(a)(ii). The matters in Clause 4.6(4)(a)(ii) are addressed in Section 7 below.

## **7. The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii))**

### **Floor Space Ratio Objectives**

The objectives and relevant provisions of clause 4.4 of WLEP 2014 are as follows, inter alia:

*(a) for development in Zone R3 Medium Density Residential—*

*(i) to ensure the bulk and scale of new development is compatible with the desired future character of the area, and*

*(ii) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain, and*

*(iii) to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space,*

*(b) for buildings in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, and Zone B4 Mixed Use—to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.*

In order to address the requirements of Subclause 4.6(4)(a)(ii), the objectives of Clause 4.4 are addressed in turn below. It is noted that Objective (b) does not relate to the proposed development and is therefore not addressed.

### **Objective (a)(i) to ensure the bulk and scale of new development is compatible with the desired future character of the area, and**

The desired future character of the locality is not defined under WLEP 2014 and is subjective. Historically, Council has relied upon the provisions of WDCP 2015 to set the desired future character objectives of the locality however this was overturned by Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115.

The desired future character of the neighbourhood must be set by the existing, recently approved and proposed buildings within the neighbourhood. Therefore, the built form of the approved development under DA344/2019, whilst compliant with the FSR development standard, must be considered to form part of the desired future character of the locality. In this instance, the FSR variation does not increase the height or result in a built form that encroaches closer to the front, side or rear boundaries and is contained predominantly within the approved envelope through improved efficiencies and design. If the built form approved under DA344/2019 was considered to be compatible with the desired future character of the locality, it must follow that a form that is not significantly altered must also be compatible with the desired future character of the locality.

That is, the proposed development will appear as an FSR compliant building with the variation achieved through design efficiencies that do not significantly alter the approved form as viewed from the street with the additional area located towards the rear of the buildings and steps down the topography. In addition, as previously noted, it is our view that “compatible” does not promote “sameness” in built form but rather requires that development fits comfortably with its urban context. Of relevance to this assessment are the comments of Roseth SC in *Project Venture Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 191:



*“22 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.”*

The subject site is zoned R3 – Medium Density Residential and is situated opposite a R2 – Low Density Residential zone within a locality characterised by varied building typologies and heights. That is, the existing size and scale of development in the immediate locality is not definitive nor is the locality characterised by strict compliance with the planning controls. For example No. 142C Bellevue Road adjoining to the north was approved with height and FSR variations which sets a different context to that of development that strictly complies with the relevant development standards.

The proposed development is considered to be, at the very last compatible, with other developments surrounding the site, including the recently approved residential flat building to the north at No. 142C Bellevue Road, residential flat building to the south at No. 138A Bellevue Road and residential flat buildings to the rear on Carlotta Road. Additionally, given the topography of the site and the surrounding locality (which falls 15m from east to west), the proposal is consistent with the residential dwellings located on the eastern side of Bellevue Road.

Further to the above, the proposed FSR variation facilitates the achievement of the objectives of the R3 Medium Density Residential Zone through increasing population density within close proximity to the Double Bay employment and commercial hub. Importantly, the subject site contains an approval for a residential flat building (DA344/2019) which establishes the density and character of the site as envisaged by the R3 zone, with the proposed development simply providing greater effect to the objectives.

In accordance with the above, the proposed FSR variation does not result in a building which is incompatible with the emerging character of the immediate locality and is representative of the varying typologies of the surrounding developments. The proposed alterations and additions will retain the high quality built form of the original approval which provides a coherent streetscape appearance with building elements that complement the topography of the site and reflect the emerging contemporary character of the locality. As identified, the FSR variation is suitably obscured from the public domain given the floor area is distributed predominantly within the building footprint and envelope of the approved development. That is, the proposed development has reduced visual bulk and scale through maintaining the architectural elements of the approved residential flat building including façade undulation, balcony articulation, glazing and a contemporary roof form. This existing or approved character must be acknowledged and it is considered the proposal responds to the existing and future character of the locality.

Furthermore, it is also noted that the proposal provides setbacks which are compatible with the WDCP, character of the locality and original approval. This ensures that despite the FSR variation, the proposal is compatible with the existing and desired building pattern in the locality. Importantly and as discussed, the proposed alterations and additions do not bring with it a form which is considerably different from the approved development. The burden of insisting on strict compliance would result in the removal of 8 apartments, which would be an unreasonable and unnecessary outcome given the scale of the proposal is compatible with the character of the locality. Additionally, the proposal does not result in any adverse impacts to the amenity of the neighbouring properties as is discussed in objective (ii) below.

The proposal is therefore consistent with objective (i), despite the FSR breach.

**Objective (a)(ii) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain, and**

The proposal has minimised adverse environmental impacts on the adjoining properties and the public domain.

In terms of privacy, the FSR variation does not result in any adverse additional privacy impacts when compared to the approved built form either externally or within the development. The areas of non-compliance have been designed with private open spaces and living areas orientated to the front and rear boundary as to mitigate overlooking to the adjoining





properties. Where additional floor area is located opposing the northern and southern (side) boundaries, these have been designed with predominantly blank facades with setbacks of 3.5m to 4.5m as originally approved. Where an opening is proposed to a living area, this is setback 6m in accordance with the ADG design criteria and is suitably separated to ensure no adverse visual privacy impact will result. Where balcony spaces have been modified opposing side and rear boundaries or within the development, these include a combination of privacy measures including privacy screens, planter boxes (per the approved design), fin walls and the like to mitigate overlooking concerns. As such, the additional privacy impacts as a result of the non-compliance when compared to the approved development are insignificant.

With regards to overshadowing, the proposed FSR variation will not result in any adverse overshadowing as opposed to the originally approved development (DA344/2019). The shadow diagrams submitted with the architectural plans confirm that the living areas and private open spaces of the neighbouring properties will not be further impacted by the proposed development. That is, the additional FSR is located within the approved built form and will not cast any significant additional shadows to the southern neighbours. Furthermore, the proposed will ensure compliance with the solar access requirements of WDCP 2015. As such, the additional overshadowing impact as a result of the non-compliance when compared to the approved development are insignificant.

In terms of views, the areas of non-compliance will not have any adverse view loss compared to the approved development. Per the above, the additional FSR is located within the approved building envelope or have been designed to retain setbacks in accordance with the WDCP. Furthermore, the proposal retains compliance with the building height development standard. As such, loss of views created by the non-compliance is considered to be reasonable within the Medium Density Zone and permissible building envelope.

The examination of the FSR variation demonstrates that there will be no adverse impact to adjoining properties in relation to, overshadowing, views or privacy.

Therefore objective (ii) is achieved.

**Objective (a)(iii) to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space,**

As detailed throughout this submission, the additional FSR is provided within the approved building footprint and envelope to ensure that deep soil planting and private open spaces are not reduced by the proposal. In fact, as the density of the site increases, so does the area available to deep soil landscaped area to ensure the proposed building continues to sit within a landscaped setting.

The proposed development will seek to modify the quantum of landscaped area throughout the site to provide a total deep soil area of 381m<sup>2</sup> (15%) with a minimum dimension of 6m in accordance with the ADG. This represents an increase of 90m<sup>2</sup> over the approved development through the removal of the hard paved surfaces associated with the swimming pool. The proposal also provide for a total of 988m<sup>2</sup> (37.8%) deep soil area outside of the ADG requirements. This also significantly exceeds the Part B3.7 of WDCP 2015 requirement of 50% outside the buildable area (855sqm).

Where the proposed alterations have impacted the provision of podium landscaping, this has been redistributed throughout the site in order to ensure the proposal will maintain consistency with the approval. In accordance with the Landscape Plan submitted with this application, the proposal will include the provision of 29 mature trees which contain a height of 6m or greater, in conjunction with various shrubs, grass and trees. This will, as approved, suitably reflect the desired landscaped character of the locality and ensure site permeability is maximised.

Accordingly, objective (iii) is satisfied.

**Objectives of the Zone**

Clause 4.6(4)(a)(ii) requires that the consent authority be satisfied that the development is in the public interest because it is consistent with relevant zone objectives. The objectives of Zone R3 are as follows:



- *To provide for the housing needs of the community within a medium density residential environment.*

The proposal will enhance the function of an approved residential flat building through alterations and additions which will result in the provision of 8 additional apartments. The proposal will provide better opportunities to meet the housing needs of the community within a building form appropriate to a medium density residential environment.

- *To provide a variety of housing types within a medium density residential environment.*

The proposal offers a variety of dwelling types by providing for a number of different sized apartments within the approved residential flat building, therefore contributing to a variety of apartment sizes in the wider area.

- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*

Not applicable to the proposed development.

- *To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.*

The proposal does not impact on the height of the approved building, with the FSR variation located within the approved building envelope, footprint and below the maximum permitted height. As demonstrated in Section 7 above, the proposal is consistent with the desired future character of the Bellevue Hill North Precinct principally as it has minimal impacts on the streetscape and public or private views when compared to the approved building envelope.

The proposed development, including those parts of the building that breach the maximum FSR development standard, are not antipathetic to the objectives for the zone and for that reason the proposed variation is acceptable.

## **8. The concurrence of the Secretary has been obtained (Clause 4.6(4)(b))**

The second precondition in cl 4.6(4) that must be satisfied before the consent authority can exercise the power to grant development consent for development that contravenes the development standard is that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (cl 4.6(4)(b)). Under cl 64 of the Environmental Planning and Assessment Regulation 2000, the Secretary has given written notice, attached to the Planning Circular PS 20-002 issued on 5 May 2020, to each consent authority, that it may assume the Secretary's concurrence for exceptions to development standards in respect of applications made under cl 4.6, subject to the conditions in the table in the notice.

## **9. Whether contravention of the development standard raises any matter of significance for State or Regional environmental planning (Clause 4.6(5)(a))**

Contravention of the maximum FSR development standard proposed by this application does not raise any matter of significance for State or regional environmental planning.

## **10. The public benefit of maintaining the development standard (Clause 4.6(5)(b))**

As detailed in this submission there are no unreasonable impacts that will result from the proposed variation to the maximum FSR development standard. As such there is no public benefit in maintaining strict compliance with the development standard. Whilst the proposed FSR exceeds the maximum permitted on the site by 0.408:1, the breach will not alter the approved bulk and scale of the residential flat building and is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest.



## 11. Conclusion

This written request has been prepared in relation to the proposed variation to the FSR development standard contained in WLEP 2014. Despite the FSR variation, the proposed alterations and additions are compatible with the character of Bellevue Road as originally approved and as anticipated by the planning controls under the ADG, WLEP and WDCP.

Having regard to all of the above, it is our opinion that compliance with the FSR development standard is unreasonable and unnecessary in the circumstances of this case as the development meets the objectives of that standard and the zone objectives. The proposal has also demonstrated sufficient environmental planning grounds to support the breach.

Therefore, insistence upon strict compliance with that standard would be unreasonable. On this basis, the requirements of Clause 4.6(3) are satisfied and the variation supported.