





 DEVELOPMENT ASSESSMENT REPORT				
Application No.	REV/2022/0003			
Address	319 Trafalgar Street PETERSHAM NSW 2049			
Proposal	Application under Section 8.2 of the Environmental Planning and Assessment Act to review Determination No.MOD/2021/0236 dated 25/08/2021 to modify the existing approval for an adaptive reuse of existing warehouse to a boarding house			
Date of Lodgement	17 February 2022			
Applicant	Mr Mark Assad			
Owner	Vista Sol Pty Ltd			
Number of Submissions	Initial: 2			
Value of works	NA			
Reason for determination at Planning Panel	Delegation to the IWLPP - Review of determination with no change to the previous determination			
Main Issues	Section 4.56(a) of the <i>EPA Act 1979</i> - Substantially the same development.			
Recommendation	Refusal			
Attachment A	Reasons for refusal			
Attachment B	Plans of proposed development			
Attachment C	Conditions of consent in the event the IWLPP supports this application.			
Attachment D	Case Law extract: <i>193 Liverpool Road Pty Ltd ACN 163231810 v Inner West Council [2022] NSWLEC 1197 [18]</i>			
				
LOCALITY MAP				
Subject Site		Objectors		 N
Notified Area		Supporters		
Note: Objectors from Strata properties shown once.				

1. Executive Summary

This report is an assessment of the application submitted to Council under Section 8.2 of the *Environmental Planning and Assessment Act* to review Determination No.MOD/2021/0236 dated 25/08/2021 to modify the existing approval for an adaptive reuse of existing warehouse to a boarding house at 319 Trafalgar Street PETERSHAM NSW 2049.

The application was notified to surrounding properties and 2 submissions were received in response to the initial notification.

The main issues that have arisen from the application include:

- Substantially the same development - The original consent was for an adaptive reuse of an existing industrial building to a boarding house and retained the existing exterior wall of the building. The proposed modification involves demolition and reconstruction of the majority of the existing external walls that were to be retained. The retention of the retained external walls is an essential element of the original consent.
- Due to the original consent being for an adaptive reuse the application benefited from clause 6.9(4) of the *Marrickville LEP 2011* which excludes the operation of the FSR development standard. An application in the form of the proposed modification is no longer an adaptive reuse and would not benefit from the operation of clause 6.9(4) of the *Marrickville LEP 2011*.
- The application also fails to meet the precondition for consent to be granted under Section 2.118(2) of *State Environmental Planning Policy (Transport and Infrastructure) 2021* in that the proposal has a vehicular crossing to a classified road and is capable of providing a crossover by Ables Lane as the walls are no longer being retained as part of an adaptive reuse.

2. Proposal

The proposal seeks a review of the determination of MOD/2021/0236.

MOD/2021/0236 sought to amend the description of the development approved by the Court from:

“Partial demolition of existing building and adaptive reuse of existing building for the construction and use as a 4 storey boarding house with basement carpark.”

To:

“Demolition of existing building and construction of a new building for use as a 4 storey boarding house with basement carpark.”

The modification sought to replace the approved plans with plans that allowed complete demolition of the existing building.

The proposed modification also sought to delete condition 24, amend conditions 34 and 44.

Conditions 24 states:

“24. Methodology

Prior to any demolition or issue of a Construction Certificate (whichever is first), a methodology is to be provided to the satisfaction of the Certifier setting out how the existing building is to be retained without damage during the excavation and construction process.”

The proposed modification sought to amend condition 34 which currently reads:

“34. Concealment of Plumbing and Ductwork

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with plans detailing the method of concealment of all plumbing and ductwork including stormwater downpipes within the outer walls of the building so they are not visible.”

The proposed modification seeks to amend condition 34 to read:

“34. Concealment of Plumbing and Ductwork

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with plans detailing the method of concealment of all plumbing and ductwork within the outer walls of the building so they are not visible.”

The proposed modification sought to amend condition 44 which currently reads:

“44. Public Domain Works

Prior to the issue of an Occupation Certificate, the Principal Certifying Authority must be provided with written evidence from Council that the following works on the Road Reserve have been completed in accordance with the requirements of the approval under Section 138 of the Roads Act 1993 including:

- a) Heavy duty concrete vehicle crossing(s) at the vehicular access location(s) and removal of redundant crossings.*
- b) Stormwater Inlet Pit and stormwater drainage pipe connection to Council's stormwater system in Trafalgar Street (near intersection of Nelson Place).*
- c) The existing concrete footpath across the frontage of the site must be reconstructed.*
- d) Other works subject to the Roads Act 1993 approval.*

All works must be constructed in accordance with Council's standards and specifications and AUS-SPEC#2- "Roadworks Specifications".

The proposed modification seeks to delete condition 44(b) and instead include :

“Stormwater runoff from all roof areas in the development will be collected in a system of gutters, pits and pipeline and be discharged to the existing kerb and gutter in Trafalgar Street and Abels Lane adjoining the site.”

The applicant proposes that the subject review amends the modification application originally proposed seeking that one wall is retained on the eastern elevation and stipulates that the other external walls are to be structurally stabilised and reconstructed.

3. Site Description

The site is rectangular in shape with an area of approximately 381sqm. It is located on the southern side of Trafalgar Street, and has a primary street frontage to Trafalgar Street as well as a secondary frontage to Abels Lane to the east.

Currently the site is occupied by a two (2) storey commercial building with vehicle access from Abels Lane. The building is a warehouse typology. To the east the site is bounded by Abels

Lane and is adjacent to a vehicle repair shop. To the south the site is adjoined by three (3) single dwelling houses. To the west the site is adjoined by a single storey warehouse building.

This part of the southern side Trafalgar Street is largely characterised by single storey commercial buildings and dwelling houses. The northern side of Trafalgar Street is wholly occupied by a rail corridor and associated Sydney Trains buildings. Petersham train station is to the north-east of the site. The surrounding streets are largely characterised by single storey dwelling houses, and two (2) to three (3) storey residential flat buildings.

The site is not identified as containing a heritage item and is not located within a heritage conservation area. The site is however in the vicinity of the Petersham Commercial Precinct HCA 25.

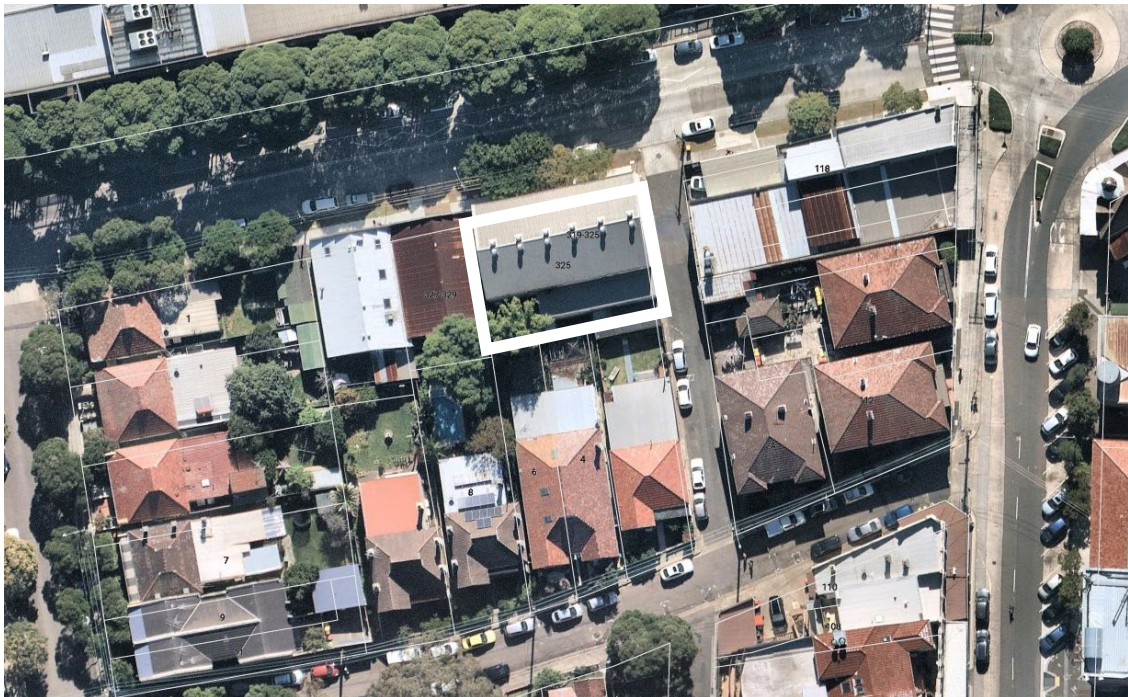


Figure 1: Aerial view showing subject site and context.



Figure 2: Site viewed from Trafalgar Street



Figure 3: Zoning Map.

4. Background

4(a) Site history

The following application outlines the relevant development history of the subject site and any relevant applications on surrounding properties.

Subject Site

Date	Proposal	Decision
19 June 2020	D/2018/570 - Partial demolition of existing building and adaptive reuse of existing building for the construction and use as a 4 storey boarding house with basement carpark.	Approved – Land and Environment Court
25/08/2021	MOD/2021/0236 - Modification of approved adaptive reuse of existing warehouse to a boarding house to allow complete demolition. Amendment to approved stormwater infrastructure	Refused under delegated Authority

4(b) Application history

The following table outlines the relevant history of the subject application.

Date	Discussion / Letter / Additional Information
7/6/2020	Emailed applicant and informed that application would not be supported.

5. Assessment

The following is a summary of the assessment of the application in accordance with Sections 4.15, 4.56 and 8.2 of the *Environmental Planning and Assessment Act 1979*.

Section 8.2 Review

The application was lodged under Section 8.2 of the *Environmental Planning and Assessment Act 1979*.

The application that is the subject of the review is a modification of consent MOD/2021/0236 that sought modification of approved adaptive reuse of existing warehouse to a boarding house to allow complete demolition. Amendment to approved stormwater infrastructure to D/2018/570 (the original proposal). MOD/2021/0236 was refused under delegated authority on 25/08/2021 for the following reasons:

1. “The application has failed to adequately demonstrate that the proposed modification is substantially the same development in relation to section 4.56(a) of the *Environmental Planning and Assessment Act 1979*.”

The application is within the time frame for consideration of a review under section 8.3(2)(a).

Having regard to section 8.3(3) of the *EPA Act 1979*, the applicant has amended the proposed modification with the review and the Statement of Environmental Effects indicates the following changes:

“The structural engineer’s report documents clearly that the existing brickwork will be difficult to be retained during construction, especially during the excavation phase of the development accommodate the basement and would present a high risk of structural collapse during construction works. Further, due to the age of the brickwork and masonry in the existing building, it has been identified as not structurally sound and is unsuitable to support the proposed new structure and provide adequate structural integrity to support a contemporary residential building. The structural engineer also identifies that due to the age and poor condition of the lime mortar in the brickwork, the proposed rendering of the exterior walls as approved in the consent is expected to result in extensive cracking and a poor external aesthetic over a short time without extensive and frequent maintenance actions.

The proposed modification seeks consent for partial demolition of the existing building. The demolition will involve removal and reconstruction of the walls along the northern and southern elevations and retention of the eastern elevation. This will require the modification of condition 24 to reflect the changes as modified.

The modification proposal also includes minor changes to Conditions 34 and 44B relating to stormwater infrastructure. It is requested that Condition 34 be amended to allow for the inclusion of stormwater drainage downpipes on the exterior of the building. It is requested that additional stormwater infrastructure requirements in Condition 44(b) be deleted and that roof and ground level stormwater be discharged into existing on-street drainage system in accordance with the current arrangements on the site.

No changes to the approved built form are proposed and the building will be reconstructed to replicate the structural elements of the existing building consistent with the approved plans. In the current approved plans, the existing walls of the structure that are to be retained would be completely rendered and none of the existing external materials and finishes would be visible. Having regard for this, the proposed part demolition and reconstruction of the built form will not result in any loss of any contributory heritage fabric and but will still maintain the visual integrity warehouse typology. It will also result in a better quality built form (utilising contemporary building materials) that will be more durable and will result in a better visual outcome over time for the site when viewed from the public realm.”

Before the consent authority can accept the amendments to the modification application with the review section 8.3(3) requires the consent authority to be satisfied that the proposal is substantially the same development as the modification that was originally proposed in the application that is the subject of the review (being the modification application). This test is articulated below in detail in the consideration of section 4.56 in relation to the original development application.

The modification that was originally sought was for complete demolition of the existing building. Considering the planning principal in *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187 the amended plans still represent demolition of the existing building and on that basis is substantially the same development as **the modification** (MOD/2021/0236) that is the subject of the review.

If the panel does not agree with the analysis of substantially the same development with **the original consent** within Section 4.56 below then it is necessary for the panel to revisit this issue and satisfy itself of the substantially the same development with **the modification** that is the subject of the review. The two substantially the same tests with this application appear to be mutually exclusive and both cannot be satisfied.

Section 4.56

Section 4.56 of the *EPA Act 1979* allows a consent authority to modify a development consent granted by it, if:

- “(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and
- (b) it has notified the application in accordance with—
 - (i) the regulations, if the regulations so require, and
 - (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
- (c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and
- (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.”

Helpfully within the recent decision in *193 Liverpool Road Pty Ltd ACN 163231810 v Inner West Council* [2022] NSWLEC 1197 [18] - [26] Espinosa C provided a summary of the applicable test and recent case law provided and this is provided in Attachment D of this report.

Having considered this, the applicant has not demonstrated that the proposed modification that is the subject of the review (as amended by the document review) is substantially the same development as the original consent.

From a quantitative perspective the change results in the retained external walls to be reduced as follows:

Elevation	Area of exterior walls retained original consent	Area of exterior walls demolished original consent	Area of exterior walls retained Modification	Area of exterior walls demolished modification
Eastern	93.1sqm	35.2sqm	67.5sqm	61.8sqm
Northern	193.9sqm	21.5sqm	0sqm	215.4sqm
Western	133.4sqm	0sqm	0sqm	133.4sqm
Southern	154.1sqm	0sqm	0sqm	154.1sqm

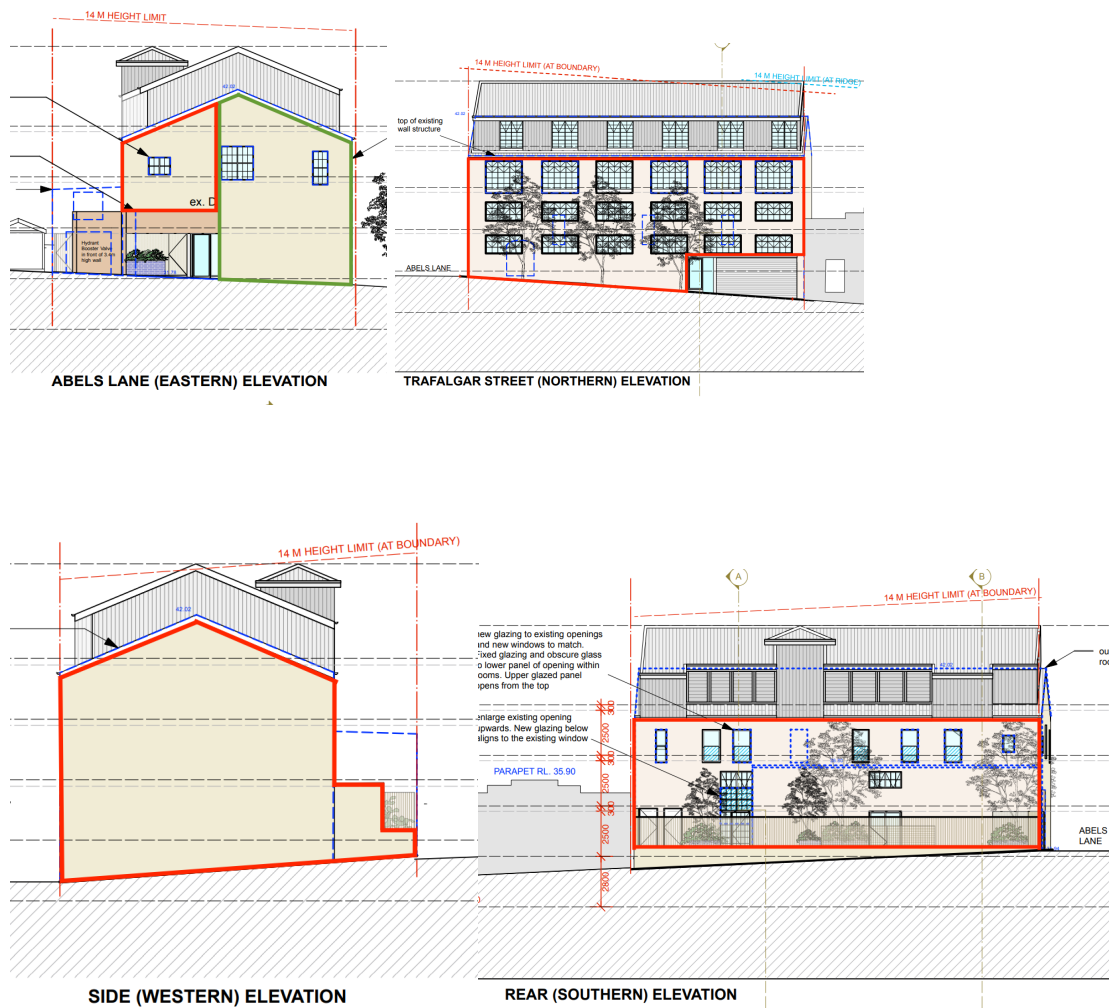
In this case the demolition is so extensive as to cause what remains to lose the characteristics and form of the existing structure with all but a portion of a single exterior wall demolished.

From a qualitative perspective the proposed modification changes the proposal from a historic building that has been adapted to a new use with the character and history associated with the previous use to demolition and construction of a new boarding house. The modification seeks to obtain the benefits from the setbacks, FSR and height exceptions but without the

environmental, character and public interest benefits discussed within *Michael Hesse v Parramatta City Council* [2003] NSWLEC 313.

The essence of the development that was originally approved in *Vista Sol Pty Ltd aff VS Unit Trust v Inner West Council* [2020] NSWLEC 1262 is an adaptive reuse (alteration and additions) of an existing commercial building to a boarding house.

The proposed modification has the effect that the proposal is no longer an adaptive reuse (having regard to *Michael Hesse v Parramatta City Council* [2003] NSWLEC 313 at [14]). The proposed modification is for demolition and construction of a new boarding house having regard to the planning principal within *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187. The current proposal demolishes and reconstructs the walls shown outlined in red that the original consent retained as part of the adaptive reuse. The only external wall that is maintained in the current application is a single wall shown in green on the eastern elevation:



It should be noted that the Engineering report provided with the current application states that:

“Given the defects observed on site, the external walls are not structurally adequate to be retained for the approved development. The differential settlement observed on site cannot be repaired. Minor ground movements during excavation/ construction will cause additional deflections to occur and in turn, further irreparable structural damage. The observed cracking in the walls will be amplified during the demolition, excavation, and construction process due to the associated vibration from the heavy machinery.

The bricks that were found to be deteriorating cannot be retained as they have lost their structural properties and will need to be demolished and replaced. This also applies to the mortar joints that have lost their structural properties. The extent of the defective mortar can be present in all the brickwork, possibly in areas that were not accessible during the site inspections. All defective mortar will need to be replaced. The current condition of the existing brickwork is poor and will continue to deteriorate. This will reduce the life span or longevity of the brickwork as a façade and will most likely need to be demolished in the near future.”

The report appears to indicate that none of the external walls can be retained despite the amended plan seeking to retain the area indicated in green.

It should be noted within the judgement for the original development approval for the site Horton C states that:

“The proposal exceeds the maximum permissible floor space ratio (FSR) as set out in cl 4.4 of the MLEP. However, for the following reasons, I am satisfied that the proposed FSR is not a barrier to the grant of consent:

- Clause 4.4 of the MLEP provides for a maximum FSR of 1.3:1. A bonus of 0.5:1 is afforded by cl 29(1)(c) of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) if the development is on land within a zone in which residential flat buildings are permitted and the land does not contain a heritage item. Residential flat buildings are permitted on the land, and the site is not a heritage item.*
- Relatedly, cl 6.9(4) of the MLEP specifies that a residential flat building on the site would not be subject to any height or FSR limits. As a consequence, the operation of cl 29 of the SEPP ARH provides a bonus on the existing maximum FSR which is, by operation of cl 6.9 of the MLEP, not limited.”*

Clause 6.9(4) applies in relation to adaptive reuse of existing industrial and warehouse buildings. The original consent provided a planning benefit to the application in terms of the assessment of floor space ratio on the basis that the application was for an adaptive reuse.

If the proposal was assessed on the basis of the plans as proposed within the modification then the application would also be subject to several other additional considerations that relate to new dwellings throughout the LEP and DCP that relate to height, number of storeys, setbacks, landscaping etc that were not applicable to an adaptive reuse application.

The proposed modification radically transforms the original consent to a different type of proposal being demolition and construction of a new boarding house.

Having formed the view that the proposed modification the subject of the review is not substantially the same as the original consent it is not necessary to address the merit contentions which fall within the consideration of the relevant matters in section 4.15(1) of the *EPA Act 1979* as required by s 4.55(3) (*Arrage* [42]-[45]). However to provide the IWLPP with discretion to determine the application as they see fit the following is provided.

5(a) Environmental Planning Instruments

The application has been assessed against the relevant Environmental Planning Instruments listed below:

- *State Environmental Planning Policy (Resilience and Hazards) 2021*
- *State Environmental Planning Policy (Affordable Rental Housing) 2009*
- *State Environmental Planning Policy (Transport and Infrastructure) 2021*

The following provides further discussion of the relevant issues:

5(a)(i) *State Environmental Planning Policy (Resilience and Hazards) 2021*

Chapter 4 Remediation of land

Section 4.1 (1) of the SEPP requires the consent authority not consent to the carrying out of any development on land unless:

*“(a) it has considered whether the land is contaminated, and
(b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
(c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.”*

The judgement in *Vista Sol Pty Ltd atf VS Unit Trust v Inner West Council* [2020] NSWLEC 1262 makes clear that remediation of land has been suitably addressed in the original consent when Horton C said:

“On the basis of the Remediation Action Plan, prepared by ADE Consulting Group reference STC-1912-17570 dated 13 May 2020, I am satisfied that the land will be remediated before the land is used for the purpose for which the development is proposed to be carried out, pursuant to cl 7(1) of the State Environmental Planning Policy No 55—Remediation of Land, and as provided for in the conditions of consent at Annexure ‘A’”

5(a)(ii) *State Environmental Planning Policy (Affordable Rental Housing) 2009*

Division 3 – Boarding Houses

The proposed modification does not substantially alter the sites compliance with the provisions of *SEPP ARH*.

5(a)(iii) *State Environmental Planning Policy (Transport and Infrastructure) 2021*

Chapter 2 Infrastructure

Impact of rail noise or vibration on non-rail development

The applicant has not demonstrated that the modified proposal will need any measures to occur to ensure that the residential accommodation within the development complies with the requirements of Section 2.99(3) of *SEPP (Transport and Infrastructure) 2021*. However, in considering that the existing walls were considered to comply with these requirements it must be assumed that reconstructed wall would also comply with these requirements.

Development with frontage to classified road

The amended proposal does not alter the driveway access to the classified road. However, Council's Development Engineers have advised that:

"The Modification is not supported.

1. As this was previously an adaptive reuse, concessions were made to retain the original fabric of the building and to maintain heritage values. In particular concessions were made in relation to keeping the existing vehicular access off a Classified Road.

As the building is now being proposed to be demolished there is no justification for not complying with Section 101 Clause 2(a) of the Infrastructure SEPP outlined below.

(2) The consent authority must not grant consent to development on land that has a frontage to a classified road unless it is satisfied that—

(a) where practicable and safe, vehicular access to the land is provided by a road other than the classified road..

Hence the plans shall be amended relocating the vehicular access off Trafalgar Street to Abels Lane."

It should be noted that these provisions are now within Section 2.118(2) of *State Environmental Planning Policy (Transport and Infrastructure) 2021* and they are a reason for refusal.

5(a)(iv) Marrickville Local Environment Plan 2011 (MLEP 2011)

The application was assessed against the following relevant clauses of *MLEP 2011*:

- Clause 1.2 - Aims of the Plan
- Clause 2.3 - Zone objectives and Land Use Table
- Clause 2.7 - Demolition
- Clause 5.10 - Heritage Conservation
- Clause 6.9 - Converting industrial or warehouse building to multi-dwelling housing, office premises or residential flat building in residential zones

(i) Clause 1.2 - Aims of the Plan

The application satisfies the clause 1.2 aims of the plan.

(ii) Clause 2.3 - Land Use Table and Zone Objectives

The site is zoned R4 under the *MLEP 2011*. The *MLEP 2013* defines the development as:

“co-living housing means a building or place that—

(a) has at least 6 private rooms, some or all of which may have private kitchen and bathroom facilities, and

(b) provides occupants with a principal place of residence for at least 3 months, and

(c) has shared facilities, such as a communal living room, bathroom, kitchen or laundry, maintained by a managing agent, who provides management services 24 hours a day,

but does not include backpackers’ accommodation, a boarding house, a group home, hotel or motel accommodation, seniors housing or a serviced apartment.”

The development is permitted with consent within the land use table. The development is consistent with the objectives of the R4 zone.

(iii) Clause 2.7 – Demolition

The application seeks consent for demolition and consent is required.

(iv) Clause 5.10 - Heritage Conservation

The site is not a heritage item and is not located within an HCA. At its South Eastern corner the site is diagonally opposite the northern boundary of the Petersham Commercial Precinct HCA 25. Councils Heritage officer advises:

“The application seeks consent as a Modification for the demolition of the existing building in its entirety, and alludes to the “reconstruction of structural elements”, suggesting that the existing building is to be built in facsimile. The application holds that this demolition and rebuild would be “substantially the same development” for the purposes of the application and now, its appeal.

In heritage terms the proposal is contrary to responsible heritage management practices and methodology, and to the basis on which adaptive re-use is facilitated in the LEP, that being that sincere adaptation offers the benefit of retention of the structures so re-used.

It cannot be considered “substantially the same development” if the fabric of the building concerned, and the integrity it offers from its evolution over its life, are lost in a transitory process that presents a make-believe structure which on close inspection, would be apparent for what it is.

If a genuine modification is required to address the difficulties of the adaptive re-use project for the property, this would be considered with Council’s intention to facilitate the building’s adaptive repair and retention a matter of record.

The adaptive re-use of the subject building must necessarily be pursued on the basis that the existing structure is retained (at least in significant part) and modified. The reconstruction of the existing building as a facsimile would not retain any of the truth of the building and the evidence that its fabric offers of its design, its construction and past uses.

While the heritage values of the building may be subject to some debate, it has clearly been worth the investment of funds to advance the project until the present circumstances.

No evidence has been presented of any strategies to retain the building through structural interventions that would address the issues cited as requiring its demolition.

Accordingly in heritage terms, the proposal is not supported.”

- (v) Clause 6.9 - Converting industrial or warehouse building to multi-dwelling housing, office premises or residential flat building in residential zones

The applicable part of the clause that relates to this application is clause 6.9(3B)

“(3B) In determining whether to grant development consent under this clause, the consent authority must consider the following—

- (a) the impact of the development on the scale and streetscape of the surrounding locality,*
- (b) the suitability of the building for adaptive reuse,*
- (c) the degree of modification of the footprint and facade of the building.”*

In relation to clause 6.9(3B)(a), the proposed modification has no impact as it does not alter that scale with the adjoining buildings and the impact on the streetscape is limited to the impacts associated with the loss of the older fabric that would be replaced.

In relation to clause 6.9(3B)(b), the proposed modification requires the demolition of almost the entirety of the existing building and as a result the building is not suitable for adaptive reuse. On that basis the proposed modification should not be granted and the applicant should seek a new development consent.

In relation to clause 6.9(3B)(c), the proposed modification substantially demolishes the facade of the building and retains only a single section of wall as shown in green above.

Having regard to the above, the application of clause 6.9(4) in relation exclusions from the floor space ratio and the height of buildings development standards would not be applicable if the modification was proposed with the level of demolition proposed.

5(b) Draft Environmental Planning Instruments

The application has been assessed against the relevant Draft Environmental Planning Instruments listed below:

Draft Environmental Planning Instruments	Compliance
Draft State Environmental Planning Policy (Environment) 2018	Yes
Draft State Environmental Planning Policy (Remediation of Land) 2018	Yes
Draft State Environmental Planning Policy (Environment) 2017	Yes

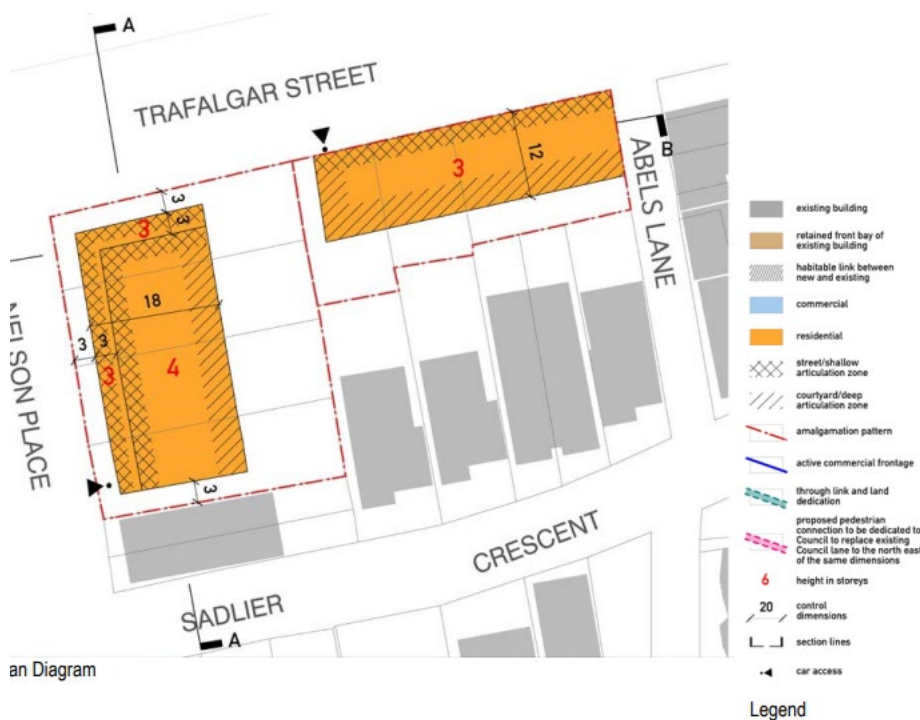
5(c) Draft Inner West Local Environmental Plan 2020 (Draft IWLEP 2020)

The Draft IWLEP 2020 was placed on public exhibition commencing on 16 March 2020 and accordingly is a matter for consideration in the assessment of the application under Section 4.15(1)(a)(ii) of the Environmental Planning and Assessment Act 1979.

The amended provisions contained in the Draft IWLEP 2020 do not substantially change from the existing controls applicable from MLEP 2011.

5(d) Development Control Plans

The proposed modification does not alter the developments compliance with provisions of Marrickville Development Control Plan 2011 (MDCP 2011) with the exception that the proposal as a new building and not as adaptive reuse would be subject to the requirements of the Masterplans within part 9.6.5.4 of the MDCP 2011. This provision is best understood by the below diagram and legend. The diagram demonstrates that the controls applicable to the site such as setbacks, landscaping, vehicular access, height in storeys are not achieved in the approved development as it relies on the benefit of an adaptive re-use, and the changes sought as part of this application diminish/delete the adaptive re-use through the demolition of the majority of the remaining fabric of the existing building.



In relation to drainage Council’s Development Engineer advises:

“2. With regard to the proposed modification of condition 44 b) to remove the requirement for direct connection to Council’s stormwater system, this will only be considered if the basement is fully tanked or if it can be clearly demonstrated by detailed geotechnical investigation that the groundwater flows are very minimal and the quality of stormwater is suitable for discharge to kerb and gutter. dry weather flows (seepage) will not be permitted to Council’s kerb and gutter.”

5(e) The Likely Impacts

The likely impacts of the proposal are increased demolition and loss of the existing building fabric.

5(f) The suitability of the site for the development

The proposed modification does not alter the sites suitability for the proposed development type. However the current proposal does not satisfy the jurisdictional requirements for a consent to be issued.

5(g) Any submissions

The application was notified in accordance with the Community Engagement Framework for a period of 14 days to surrounding properties.

2 submissions were received in response to the initial notification.

In addition to the above issues, the submissions raised the following concerns which are discussed under the respective headings below:

Issue: Number of boarding houses in the area.

Comment: Boarding houses are a use that is permitted with consent within the R4 zone and it is not within the power of the consent authority to refuse a use that is permitted with consent due to the number of similar developments in the locality.

Issue: Impacts on parking

Comment: The proposed modification does not alter the sites compliance with the car parking provisions within the MDCP 2011.

5(h) The Public Interest

The proposed modification is not in the public interest as it would allow a proposed development to avoid compliance with the floor space ratio development standard as an adaptive reuse without a 4.6 variation and then seeks consent for almost complete demolition in a subsequent modification. The modified proposal does not provide for the environmental benefit of an adaptive reuse as the walls are being demolished but one.

The application in *Vista Sol Pty Ltd aff VS Unit Trust v Inner West Council* [2020] NSWLEC 1262 was approved by the Court on the basis of an adaptive reuse (alterations and additions) with condition 24 requiring a methodology to be provided to ensure retention of the existing fabric in the absence of a detailed structural engineering report supporting the application.

The public interest is not served by the removal of this requirement. If the development is unable to proceed due to the walls being unable to be retained as posited by the application, then the appropriate action is to seek a new development consent.

6 Referrals

6(a) Internal

The application was referred to the following internal officers and issues raised in those referrals have been discussed in section 5 above.

- Building Surveyor
- Heritage Officer
- Development Engineering

6(b) External

The application was referred to the following external bodies and issues raised in those referrals have been discussed in section 5 above.

- Sydney trains

7. Section 7.11 Contributions/7.12 Levy

The proposed modification does not alter the sites development contributions.

8. Conclusion

The application fails to demonstrate that the proposed modification is substantially the same development as the consent granted by the Court in *Vista Sol Pty Ltd atf VS Unit Trust v Inner West Council* [2020] NSWLEC 1262 as is required by Section 4.56(a) of the *EPA Act 1979*.

Having read to the above, the application is recommended for refusal.

9. Recommendation

- A. That the Inner West Local Planning Panel exercising the functions of the Council as the consent authority, pursuant to s4.16 of the *Environmental Planning and Assessment Act 1979*, refuse Review Application No. REV/2022/0003 for application under Section 8.2 of the *Environmental Planning and Assessment Act* to review Determination No.MOD/2021/0236 dated 25/08/2021 to modify the existing approval for an adaptive reuse of existing warehouse to a boarding house at 319 Trafalgar Street, Petersham for the following reasons.

Attachment A – Reasons for Refusal

1. The application has failed to adequately demonstrate that the proposed modification is substantially the same development in relation to section 4.56(a) of the *Environmental Planning and Assessment Act 1979*. The original consent is for an adaptive reuse (alterations and additions) and the proposal is for demolition of all but one wall of the existing building and removes an essential element of the original development consent.
2. The proposed modification is not in the public interest as it removes the environmental benefits of the original consent.
3. The proposed modification is not an adaptive reuse having regard to clause 6.9(3A) of the *Marrickville Local Environmental Plan 2011*.
4. The proposal does not comply with Section 2.118(2) of *State Environmental Planning Policy (Transport and Infrastructure) 2021* in that the proposal has a vehicular crossing to a classified road and is capable of providing a crossover by Ables Lane.

Attachment B – Plans of proposed development

**NO. 319 TRAFALGAR STREET, PETERSHAM
SEPP AFFORDABLE RENTAL HOUSING 2009
(DIVISION 3: BOARDING HOUSE)**

LIST OF DRAWINGS

- BASEMENT PLAN S8.2 - K 100
- GROUND FLOOR PLAN S8.2 - K 101
- FIRST FLOOR PLAN S8.2 - K 102
- SECOND FLOOR PLAN S8.2 - K 103
- ATTIC FLOOR PLAN S8.2 - K 104
- ROOF PLAN S8.2 - K 105
- ELEVATIONS NORTH & EAST S8.2 - K 201
- ELEVATIONS SOUTH & WEST S8.2 - K 202

~~ELEVATION COMPANION DIAGRAM - DA-C 200~~
~~ELEVATION COMPANION DIAGRAM - DA-C 201~~

- CROSS SECTIONS S8.2 - K 301
- AREAS SCHEDULE S8.2 - K 401
- MATERIALS AND FINISHES SCHEDULE S8.2 - K 501

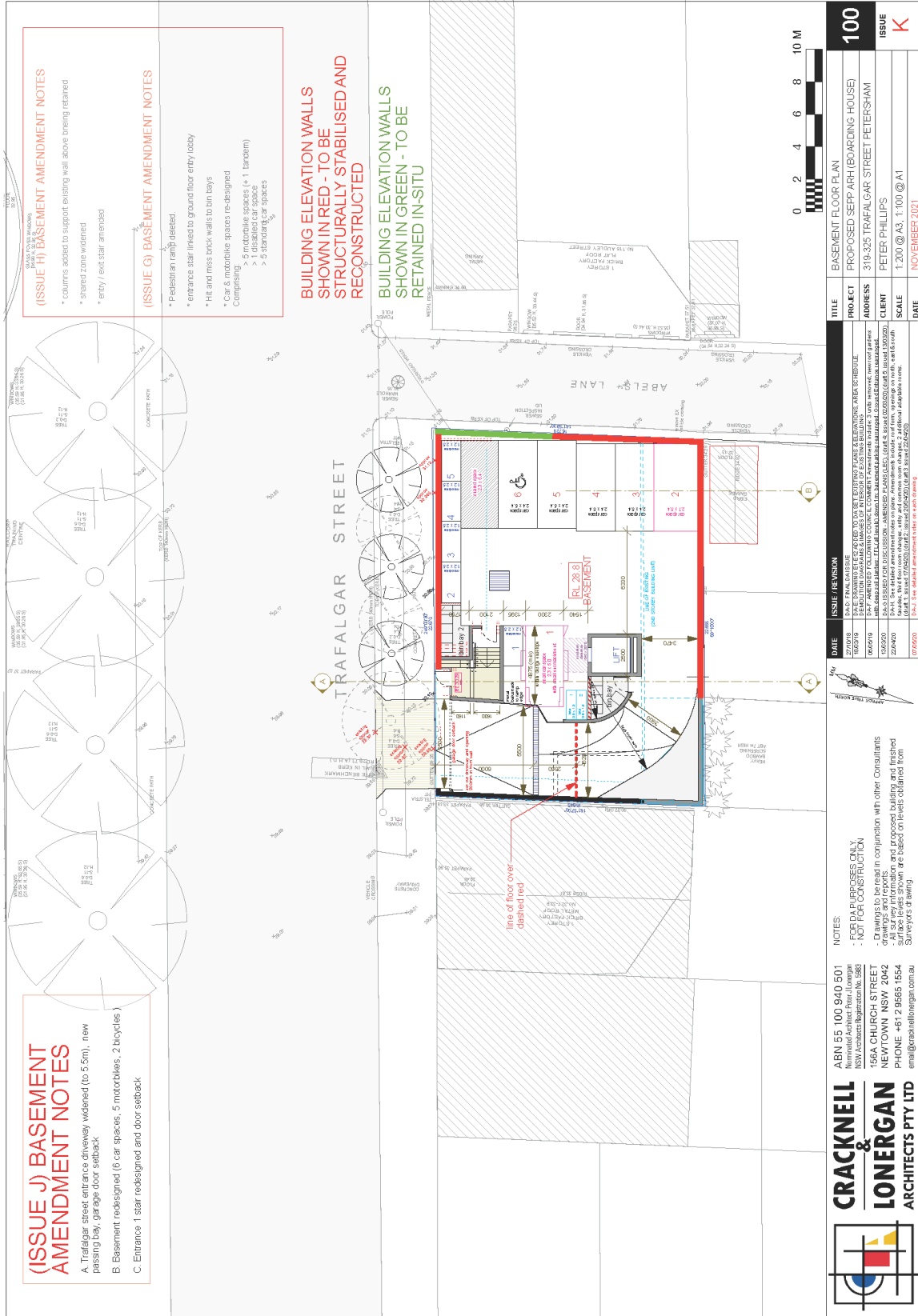
DATE	ISSUE / REVISION	TITLE	TITLE PAGE
15/04/19	DATE FORWARDED TO DA SETLE REVISIONS & ELEVATION AREA SCHEDULE	PROJECT	PROPOSED SEPP ARH (BOARDING HOUSE)
16/04/19	DATE FORWARDED TO DA SETLE REVISIONS & ELEVATION AREA SCHEDULE	ADDRESS	319-325 TRAFALGAR STREET PETERSHAM
17/04/19	DATE FORWARDED TO DA SETLE REVISIONS & ELEVATION AREA SCHEDULE	CLIENT	PETER PHILLIPS
22/04/19	DATE FORWARDED TO DA SETLE REVISIONS & ELEVATION AREA SCHEDULE	SCALE	
07/05/19	DATE FORWARDED TO DA SETLE REVISIONS & ELEVATION AREA SCHEDULE	DATE	NOVEMBER 2021



NOTES:
 - FOR DA PURPOSES ONLY
 - NOT FOR CONSTRUCTION
 - Drawings to be used in conjunction with other Consultants
 - All survey information and proposed building and finished surface levels shown are based on levels obtained from Surveyors drawing.

ABN 55 100 940 501
 Registered Architect: Howard Lonergan
 NSW Architects Registration No. 3821
 156A CHURCH STREET
 NEWTOWN NSW 2042
 PHONE +61 2 9555 1554
 email@cracknellandlonergan.com.au





(ISSUE J) BASEMENT AMENDMENT NOTES

- A. Trafalgar street entrance driveway widened (to 5.5m), new passing lay, garage door setback
- B. Basement redesigned (6 car spaces, 5 motorbikes, 2 bicycles)
- C. Entrance 1 stair redesigned and door setback

(ISSUE H) BASEMENT AMENDMENT NOTES

- * column added to support existing wall above being retained
- * street zone widened
- * entry / exit stair amended

(ISSUE G) BASEMENT AMENDMENT NOTES

- * Pedestrian ramp added
- * entrance stair linked to ground floor entry lobby
- * Hit and miss brick walls to bin bays
- * Car & motorbike spaces re-designed
- Completion:
 - > 5 motorbike spaces (+ 1 tandem)
 - > 1 disabled car space
 - > 5 standard car spaces

BUILDING ELEVATION WALLS SHOWN IN RED - TO BE STRUCTURALLY STABILISED AND RECONSTRUCTED

BUILDING ELEVATION WALLS SHOWN IN GREEN - TO BE RETAINED IN-SITU

CRACKNELL & LONERGAN ARCHITECTS PTY LTD

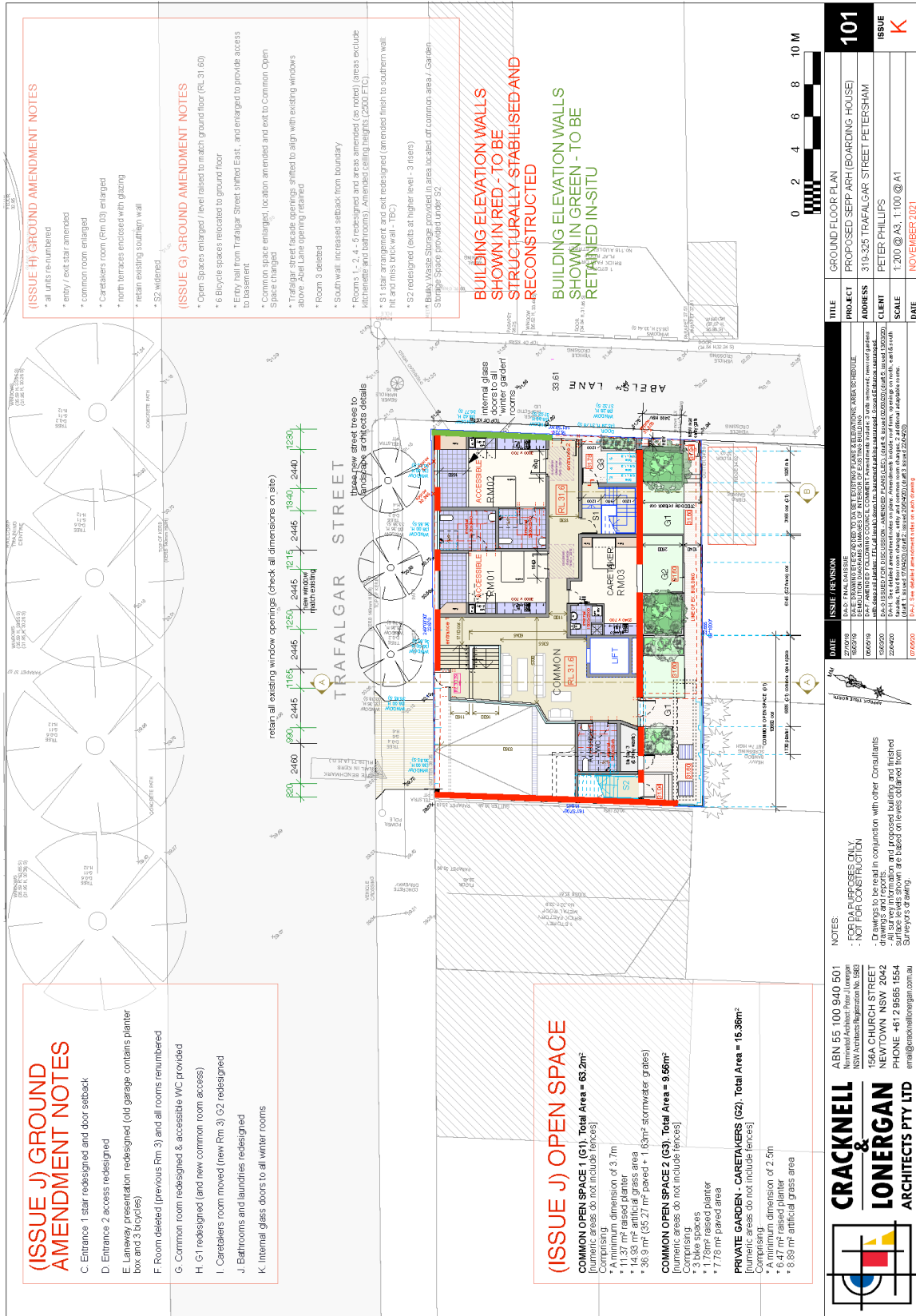
ABN 55 100 940 501
 Nominating Architect: LonerGAN
 155A Church Street
 Newtown NSW 2042
 PHONE +61 2 9565 1554
 eml@cracknellorgan.com.au

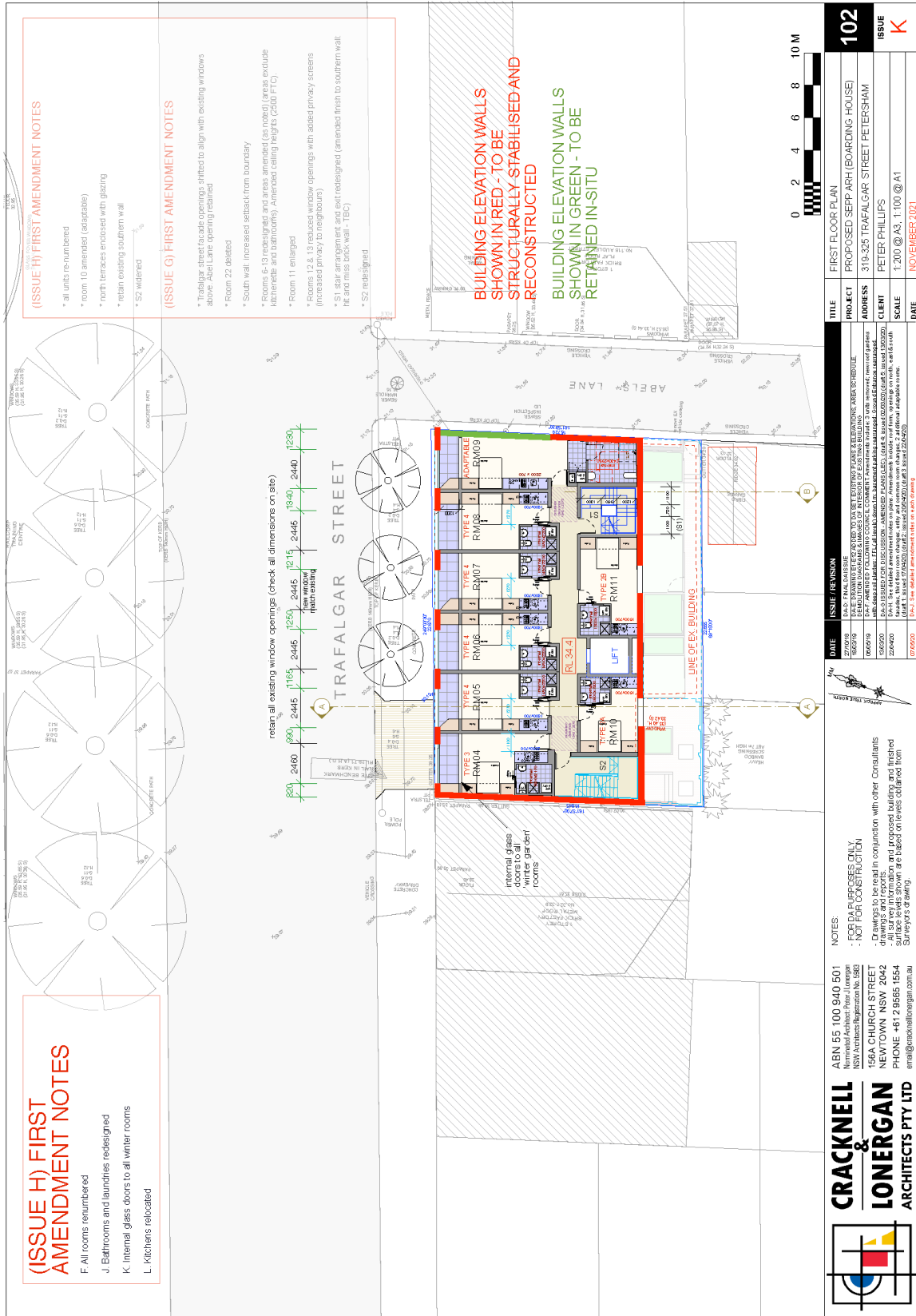
NOTES

- FOR DA PURPOSES ONLY
- NOT FOR CONSTRUCTION
- Drawings to be read in conjunction with other Consultants
- All survey information and proposed building and finished surface levels shown are based on levels obtained from Surveyor's drawing

DATE	ISSUE / REVISION
16/09/19	DATE DRAWING RELEASED TO DA SET EXISTING PLANS & ELEVATIONS, STREET & SITE
18/09/19	DATE APPROVED FOR DA BY LOCAL COUNCIL
18/09/19	DATE APPROVED FOR DA BY LOCAL COUNCIL
18/09/19	DATE APPROVED FOR DA BY LOCAL COUNCIL
22/09/20	DATE APPROVED FOR DA BY LOCAL COUNCIL
07/05/20	DATE APPROVED FOR DA BY LOCAL COUNCIL

TITLE	ISSUE / REVISION
BASEMENT FLOOR PLAN	100
PROJECT	PROPOSED SEPP ARR (BOARDING HOUSE)
ADDRESS	319-325 TRAFALGAR STREET PETERSHAM
CLIENT	PETER PHILLIPS
SCALE	1:200 @ A3, 1:100 @ A1
DATE	NOVEMBER 2021





ISSUE	REVISION	DATE
102	PROPOSED SEPP APP (BOARDING HOUSE)	
	319-325 TRAFALGAR STREET PETERSHAM	
	PETER PHILLIPS	
	1:200 @ A3, 1:100 @ A1	
	NOVEMBER 2021	

NOTES

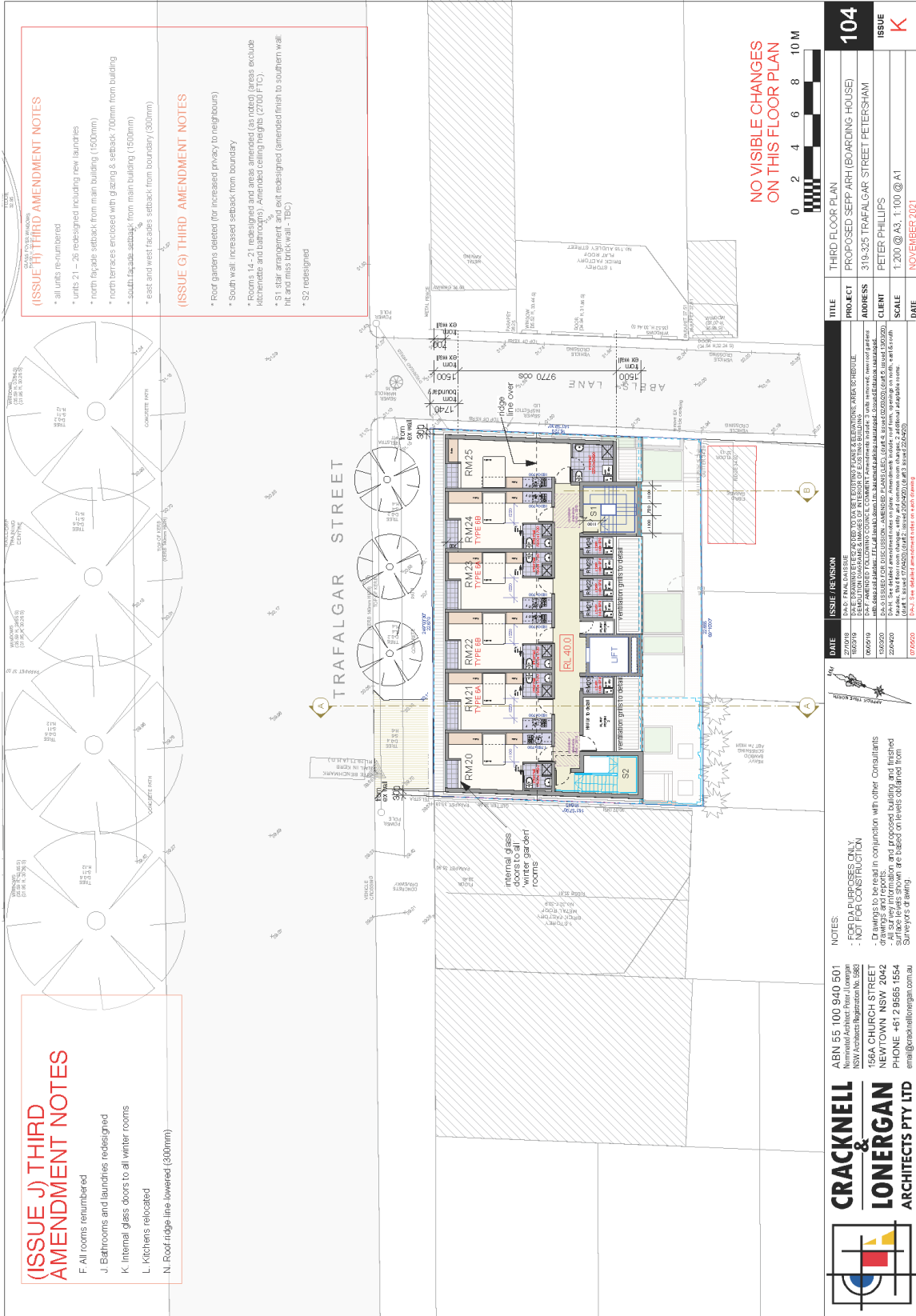
- FOR DA PURPOSES ONLY
- NOT FOR CONSTRUCTION
- Drawings to be read in conjunction with other Consultants
- All survey information and proposed building and finished surface levels shown are based on levels obtained from Surveyors & Survey

CRACKNELL & LONERGAN ARCHITECTS PTY LTD

ABN 55 100 940 501
 155A CHURCH STREET
 NEWTOWN NSW 2062
 PHONE +61 2 9565 1554
 em@cracknellandlorgan.com.au

ISSUE REVISION

ISSUE	REVISION	DATE
102	PROPOSED SEPP APP (BOARDING HOUSE)	
	319-325 TRAFALGAR STREET PETERSHAM	
	PETER PHILLIPS	
	1:200 @ A3, 1:100 @ A1	
	NOVEMBER 2021	



(ISSUE J) THIRD AMENDMENT NOTES

- F. All rooms renumbered
- J. Bathrooms and laundries redesigned
- K. Internal glass doors to all winter rooms
- L. Kitchens relocated
- N. Roof ridge line lowered (300mm)

(ISSUE H) THIRD AMENDMENT NOTES

- * all units renumbered
- * units 21 - 26 redesigned including new laundries
- * north facade setback from main building (1500mm)
- * north terraces enclosed with glazing & setback 700mm from building
- * south facade setback from main building (1500mm)
- * east and west facades setback from boundary (300mm)

(ISSUE G) THIRD AMENDMENT NOTES

- * Roof gardens deleted (for increased privacy to neighbours)
- * South wall increased setback from boundary
- * Rooms 14, 21 redesigned and areas amended (see notes) (areas exclude kitchen and bathroom). Ambient ceiling heights (2.600 PTC)
- * S1 stair arrangement and exit redesigned (demanded finish to southern wall and miss brick wall - TBC)
- * S2 redesigned

NO VISIBLE CHANGES ON THIS FLOOR PLAN



TITLE	THIRD FLOOR PLAN
PROJECT	PROPOSED SEPP APH (BOARDING HOUSE)
ADDRESS	319-325 TRAFALGAR STREET PETERSHAM
CLIENT	PETER PHILLIPS
SCALE	1:200 @ A3, 1:100 @ A1
DATE	NOVEMBER 2021

DATE	ISSUE / REVISION
16/09/19	DATE DRAWING SET FOR PERMIT TO BE SET FOR CONSTRUCTION, PERMIT TO BE OBTAINED
18/09/19	DATE DRAWING SET FOR PERMIT TO BE SET FOR CONSTRUCTION, PERMIT TO BE OBTAINED
18/09/19	DATE DRAWING SET FOR PERMIT TO BE SET FOR CONSTRUCTION, PERMIT TO BE OBTAINED
18/09/19	DATE DRAWING SET FOR PERMIT TO BE SET FOR CONSTRUCTION, PERMIT TO BE OBTAINED
22/04/20	DATE DRAWING SET FOR PERMIT TO BE SET FOR CONSTRUCTION, PERMIT TO BE OBTAINED
07/05/20	DATE DRAWING SET FOR PERMIT TO BE SET FOR CONSTRUCTION, PERMIT TO BE OBTAINED

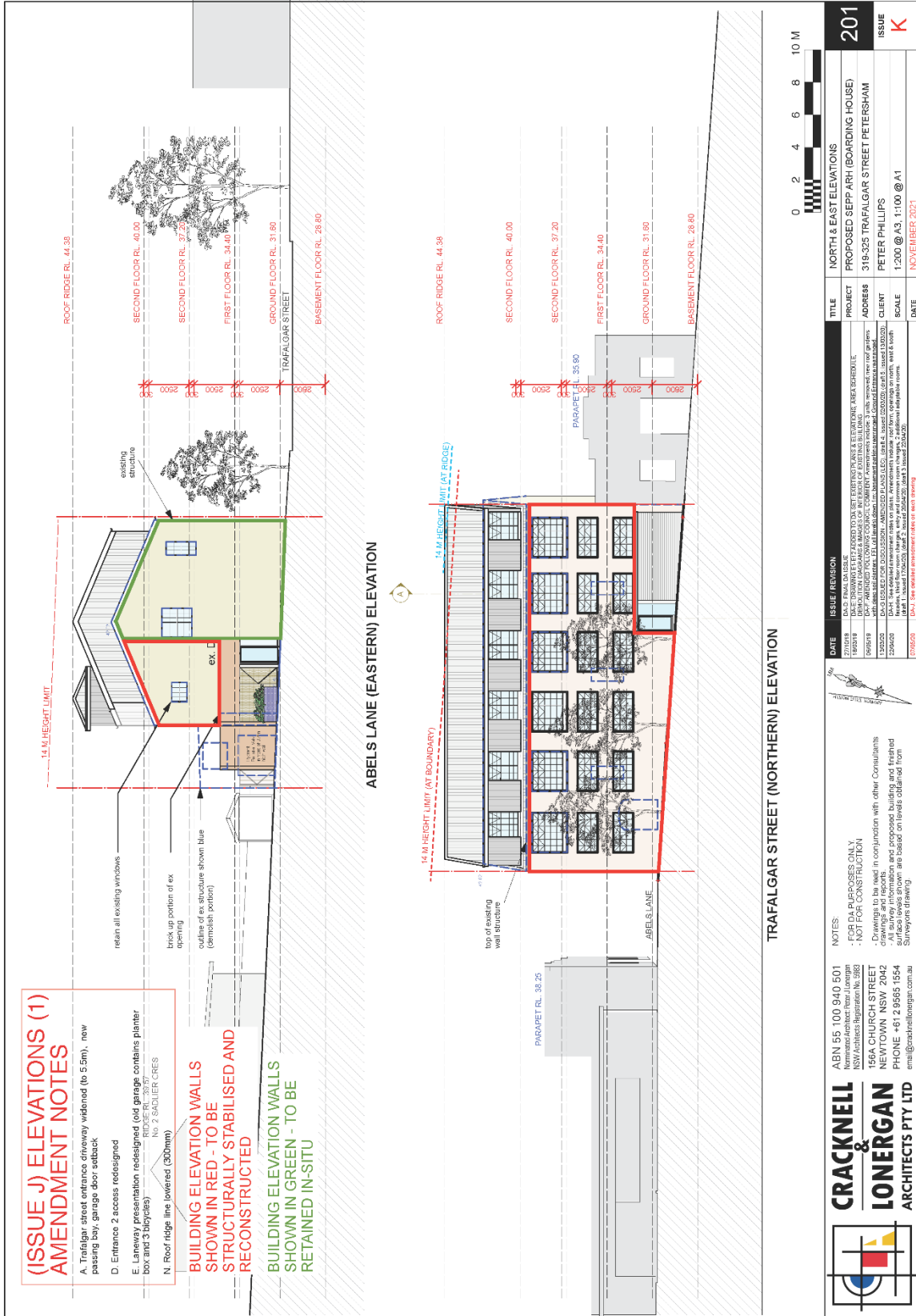
NOTES

- FOR DA PURPOSES ONLY
- NOT FOR CONSTRUCTION
- Drawings to be read in conjunction with other Consultants
- All survey information and proposed building and finished surface levels shown are based on levels obtained from Surveyors & Planning

CRACKNELL & LONERGAN ARCHITECTS PTY LTD

ABN 55 100 940 501
 158A CHURCH STREET
 NEWTOWN NSW 2062
 PHONE +61 2 9565 1654
 em@cracknellandlorgan.com.au

TITLE	THIRD FLOOR PLAN
PROJECT	PROPOSED SEPP APH (BOARDING HOUSE)
ADDRESS	319-325 TRAFALGAR STREET PETERSHAM
CLIENT	PETER PHILLIPS
SCALE	1:200 @ A3, 1:100 @ A1
DATE	NOVEMBER 2021



**(ISSUE J) ELEVATIONS (1)
AMENDMENT NOTES**

- A. Trafalgar street entrance driveway widened (to 5.5m), new parking bay, garage door setback
- D. Entrance 2 access redesigned
- E. Laneway presentation redesigned (old garage contains planter box and 3 bicycles)
- N. Roof ridge line lowered (300mm)

BUILDING ELEVATION WALLS SHOWN IN RED - TO BE STRUCTURALLY STABILISED AND RECONSTRUCTED

BUILDING ELEVATION WALLS SHOWN IN GREEN - TO BE RETAINED IN-SITU



CRACKNELL & LONERGAN
ARCHITECTS PTY LTD

ABN 55 100 940 501
Nominations Officer: Lonerган
New South Wales Registration No. 3560
156A CHURCH STREET
NEW TOWN NSW 2042
PHONE +61 2 9565 1554
email@cracknellonerган.com.au

NOTES:

- FOR DA PURPOSES ONLY
- NOT FOR CONSTRUCTION
- Drawings to be used in conjunction with other Consultants
- All survey information and proposed building and finished surface levels shown are based on levels obtained from Surveyors drawing

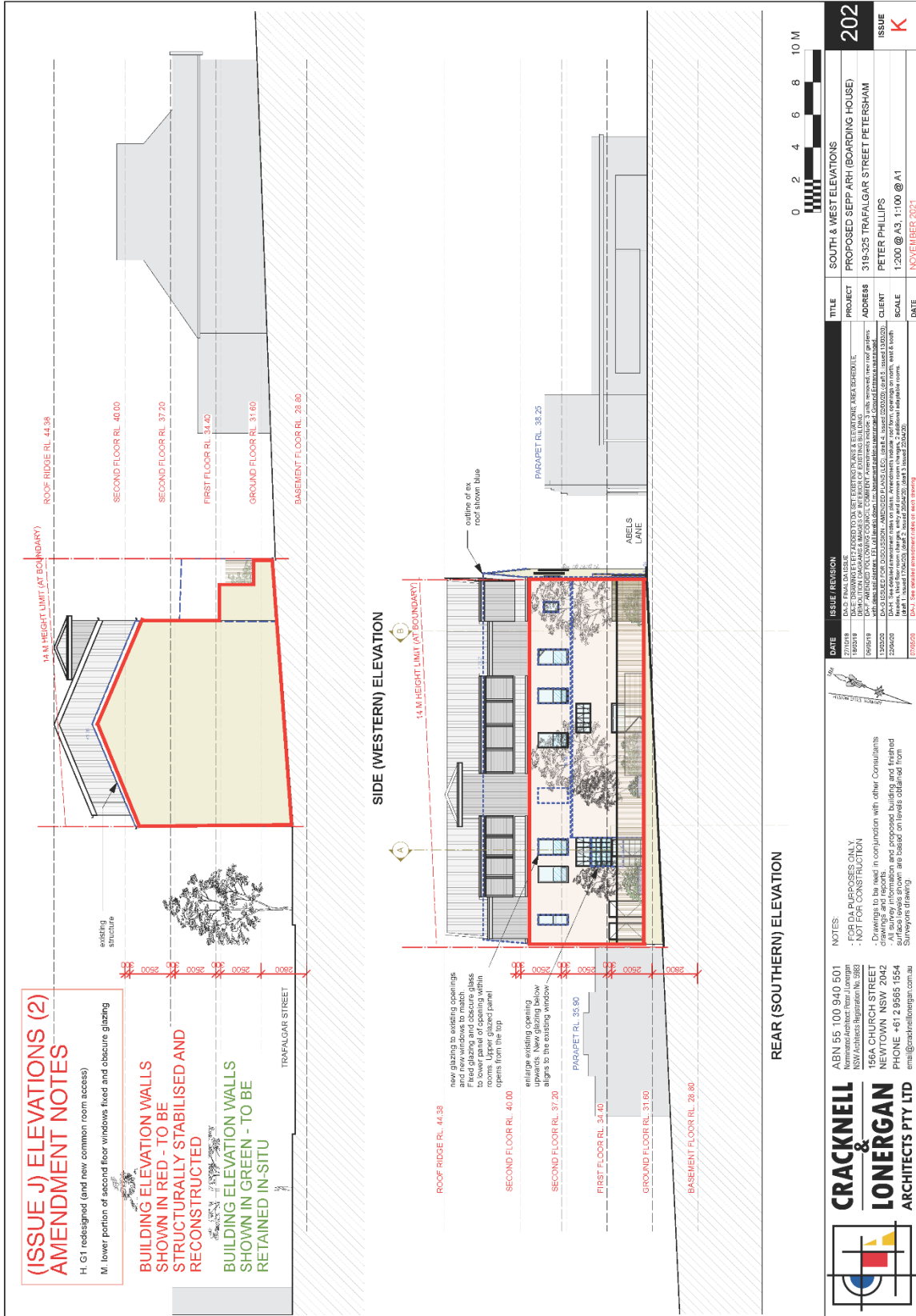


DATE	ISSUE REVISION
18/01/14	DA - DRAWING LETTERS TO DA SET FORTING PLANS & ELEVATIONS (REVISIONS)
19/01/14	DA - PARAPET TO 3.550m TO COMPACT WITH EXISTING WALLS, REMOVE NEW ROOF GABLES, AND ADD STAIRS TO BASEMENT (REVISIONS)
13/03/13	DA - PARAPET TO 3.550m TO COMPACT WITH EXISTING WALLS, REMOVE NEW ROOF GABLES, AND ADD STAIRS TO BASEMENT (REVISIONS)
12/02/13	DA - PARAPET TO 3.550m TO COMPACT WITH EXISTING WALLS, REMOVE NEW ROOF GABLES, AND ADD STAIRS TO BASEMENT (REVISIONS)
07/02/13	DA - PARAPET TO 3.550m TO COMPACT WITH EXISTING WALLS, REMOVE NEW ROOF GABLES, AND ADD STAIRS TO BASEMENT (REVISIONS)

TITLE	NORTH & EAST ELEVATIONS
PROJECT	PROPOSED SEPP ARH (BOARDING HOUSE)
ADDRESS	319-325 TRAFALGAR STREET PETERSHAM
CLIENT	PETER PHILLIPS
SCALE	1:200 @ A3, 1:100 @ A1
DATE	NOVEMBER 2021

201
ISSUE
K





DATE	ISSUE REVISION	TITLE	SOUTH & WEST ELEVATIONS
18/01/14	DATE ISSUED FOR PERMITTING AND A DEVELOPMENT APPLICATION	PROJECT	319-325 TRAFALGAR STREET PETERSHAM
18/01/14	DATE ISSUED FOR PERMITTING AND A DEVELOPMENT APPLICATION	ADDRESS	PETER PHILLIPS
13/03/15	DATE ISSUED FOR PERMITTING AND A DEVELOPMENT APPLICATION	CLIENT	1:200 @ A3, 1:100 @ A1
22/02/22	DATE ISSUED FOR PERMITTING AND A DEVELOPMENT APPLICATION	SCALE	NOVEMBER 2021
27/02/22	DATE ISSUED FOR PERMITTING AND A DEVELOPMENT APPLICATION	DATE	ISSUE K

NOTES:

- FOR DA PURPOSES ONLY
- NOT FOR CONSTRUCTION
- Drawings to be read in conjunction with other Consultants
- All survey information and proposed building and finished surface levels shown are based on levels obtained from Surveyors drawing

ABN 55 100 840 501
Nominations: Peter Loneragan
New South Wales Registration No 3580
155A CHURCH STREET
NEW TOWN NSW 2042
PHONE +61 2 9585 1554
email@cracknellloneragan.com.au

CRACKNELL & LONERGAN ARCHITECTS PTY LTD

Attachment C – Conditions of consent in the event the IWLPP supports this application.

Delete condition 24 and amend conditions 4, 34 and 44 as follows.

4. Documents related to the consent

The development must be carried out in accordance with plans and documents listed below:

Plan, Revision and Issue No.	Plan Name	Prepared by	Date Issued
100 'JK'	Basement Floor Plan	Cracknell & Lonergan	7 May 2020 November 2021
101 'JK'	Ground Floor Plan	Cracknell & Lonergan	7 May 2020 November 2021
102 'JK'	First Floor Plan	Cracknell & Lonergan	7 May 2020 November 2021
103 'JK'	Second Floor Plan	Cracknell & Lonergan	7 May 2020 November 2021
104 'JK'	Third Floor Plan	Cracknell & Lonergan	7 May 2020 November 2021
105 'JK'	Roof Plan	Cracknell & Lonergan	7 May 2020 November 2021
201 'JK'	North & East Elevations	Cracknell & Lonergan	7 May 2020 November 2021
202 'JK'	South & West Elevations	Cracknell & Lonergan	7 May 2020 November 2021
301 'JK'	Cross Section	Cracknell & Lonergan	7 May 2020 November 2021
501 'JK'	Materials and Finishes	Cracknell & Lonergan	7 May 2020 November 2021

As amended by the conditions of consent.

Amended: REV/2022/003- dated 12 July 2022

~~24. Methodology Deleted~~

~~Prior to any demolition or issue of a Construction Certificate (whichever is first), a methodology is to be provided to the satisfaction of the Certifier setting out how the existing building is to be retained without damage during the excavation and construction process.~~

Deleted: REV/2022/003- dated 12 July 2022

The proposed modification sought to amend condition 34 which currently reads:

34. Concealment of Plumbing and Ductwork

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with plans detailing the method of concealment of all plumbing and ductwork **including**

~~stormwater downpipes within the outer walls of the building so they are not visible.~~
~~within the outer walls of the building so they are not visible.~~

Amended: REV/2022/003- dated 12 July 2022

44. Public Domain Works

Prior to the issue of an Occupation Certificate, the Principal Certifying Authority must be provided with written evidence from Council that the following works on the Road Reserve have been completed in accordance with the requirements of the approval under Section 138 of the Roads Act 1993 including:

a) Heavy duty concrete vehicle crossing(s) at the vehicular access location(s) and removal of redundant crossings.

~~b) Stormwater Inlet Pit and stormwater drainage pipe connection to Council's stormwater system in Trafalgar Street (near intersection of Nelson Place).~~ Stormwater runoff from all roof areas in the development will be collected in a system of gutters, pits and pipeline and be discharged to the existing kerb and gutter in Trafalgar Street and Abels Lane adjoining the site.

c) The existing concrete footpath across the frontage of the site must be reconstructed.

d) Other works subject to the Roads Act 1993 approval.

All works must be constructed in accordance with Council's standards and specifications and AUS-SPEC#2- "Roadworks Specifications".

Amended: REV/2022/003- dated 12 July 2022

Attachment D: Case Law Extract

In the recent decision in *193 Liverpool Road Pty Ltd ACN 163231810 v Inner West Council* [2022] NSWLEC 1197 [18] - [26] Espinosa C provided a summary of the applicable test and recent case law provided as follows:

“Legal principles that apply to the substantially the same test

18. The provisions of s 4.55(2)(a) of the EPA Act extends to enable the Court to modify a consent granted by it (s 4.55(8) EPA Act) and requires that, as a jurisdictional prerequisite to the modification of a development consent, that a consent authority may modify the consent if:

“it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all)”.

19. The Respondent provides a summary of the legal principles that apply to the test of substantially the same development in s 4.55(2) of the EPA Act at par 32 of their written submissions as follows:

“a. The reference point for the test of substantially the same development is “the development for which the consent was originally granted and before that consent as originally granted was modified (if at all)” (section 4.55(2) Scrap Reality at [16]);

b. the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (Vacik Pty Ltd v Penrith City Council [1992] NSWLEC 8);

c. the term “substantially” means “essentially or materially having the same essence” (North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468 at 440 and Moto Projects (No 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]);

d. to assess whether a consent is modified will be substantially the same development requires a comparison of the before and after situations. differences of the process of implementation which have environmental implications or differences in outcomes.

e. in approaching the comparison exercise “one should not fall into the trap” of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made

under s 96(2)(a) (Vacik);

f. In relation to being satisfied as to the precondition of substantially the same development, the Court in *Moto Projects* found:

- The comparative task requires both a quantitative as well as a qualitative appreciation of the differences.
- The comparative task needs to be undertaken in a context, including the circumstances in which the original development consent was granted.
- The comparative task needs to assess the physical features that are changed, but also the environmental impacts of the changes.
- While the comparative task involves a comparison of the whole of the developments that are being compared, this should not operate to diminish a feature of the development which is important, material or essential. In these circumstances, a change to an important, material or essential feature of a development is likely to mean that the modified development is not substantially the same as the original consent.

(Moto Projects (No 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280)

20. The Applicant refers to the decision of Commissioner Clay in *Horseshoe Properties Pty Ltd v Tweed Shire Council [2021] NSWLEC 1507* (“*Horseshoe Properties*”) where Commissioner Clay helpfully provides a comprehensive summary of the various older and more recent authorities on how the “substantially the same” test is to be approached from paragraphs 27 to 43.

21. Importantly, the principles listed by the Respondent, extracted and reproduced above, need to be considered with some caution in light of the more recent decision of Preston CJ in *Arrange*, which is instructive, and a reminder that the only “test” to be applied is that in the legislature and it is important not to substitute for the legislative test, one from case law. As his Honour observed at [18]:

“The “test” the Commissioner was obliged to apply was not some dicta of Bignold J in *Moto Projects*, but rather the statutory provision of s 4.55(2)(a) of the EPA Act. Judicial decisions interpreting similar or identical legislative provisions may guide, but cannot control, the meaning of the legislative provision to be construed and applied by the court. Judicial decisions are not substitutes for the text of the legislation, although by reason of the doctrine of precedent and the hierarchical nature of the court system, particular courts may be bound to apply the decision of a particular court as to the meaning of legislation: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2008) 233 CLR 259; [2008] HCA 5 at [31]*.”

22. As identified by Clay C in *Horseshoe* at par 38 and 39, his Honour, made clear at [26] - [28]:

“26. The choice of language in the judicial decisions of “material and essential features” or a “material and essential physical element” of the development (see, for example, *Moto Projects* at [58], [59] and [64]) derives from judicial interpretations of the statutory test that the modified development be “substantially the same” development as the originally approved development.

27. This interpretation of the statutory test that the modified development be substantially the same development as the originally approved development, that the modified development be “essentially or materially” the same or “having the same essence” as the originally approved development could support an inquiry to identify the material and essential features of the originally approved and modified developments in order to undertake the comparative exercise required, but it does not demand such an inquiry.

28. That is one way, probably in most cases the most instructive way, to identify whether the modified development is substantially the same development as the originally approved development, but it is not the only way to ascertain whether the modified development is substantially (in the sense of essentially or materially) the same development as the originally approved development. For example, comparison could be made of the consequences, such as the environmental impacts, of carrying out the modified development compared to the originally approved development: see *Moto Projects* at [62] and *Tipalea Watson Pty Ltd v Ku-ring-gai Council* (2003) 129 LGERA 351; [2003] NSWLEC 253 at [17].”

(Emphasis added)

23. His Honour had observed that if the comparative task was undertaken by the identification of the essential elements then:

“24. .. the essential elements are not to be identified “from the circumstances of the grant of the development consent”; they are to be derived from the originally approved and the modified developments. It is the features or components of the originally approved and modified developments that are to be compared in order to assess whether the modified development is substantially the same as the originally approved development.”

24. At [40] Preston CJ cautioned:

“40. .. the Commissioner was not legally bound, by s 4.55(2)(a) of the EPA Act, to consider the circumstances in which the development consent was originally granted or the material or essential elements of the original development consent: neither are mandatory relevant matters, such that a failure to consider them is an error of law: see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-40.”

25. The Appellant in *Arrage* also argued that the Commissioner erred by failing to consider the provisions of the relevant environmental planning instrument. Preston CJ said at [42] – [44]:

“42. It is true that s 4.55(3) requires a consent authority to take into consideration such of the matters in s 4.15(1) of the EPA Act as are of relevance to the development the subject of the modification application and that one of those matters is the applicable environmental planning instruments, which would include in this case MLEP. But that consideration occurs “in determining an application for modification of a consent” under s 4.55. This determination cannot occur unless and until the preconditions in s 4.55(2) have been satisfied, one of which is in s 4.55(2)(a) that the consent authority has formed the positive opinion of satisfaction that “the

development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all)". The consent authority is therefore not bound by s 4.55(3) to consider the provisions of applicable environmental planning instruments at the stage of determining whether the precondition in s 4.55(2)(a) is met.

43. This is not to say that it would not be permissible for a consent authority to consider the provisions of applicable environmental planning instruments in determining whether the precondition in s 4.55(2)(a) is met, only that the consent authority is not bound in law to do so. There is a difference between a relevant matter that a repository of power is bound to consider and a permissible matter that the repository of power is entitled to consider.

44. In these circumstances, the Commissioner would not err on a question of law by not expressly considering the provisions of MLEP in determining whether he was satisfied of the precondition in s 4.55(2)(a) of the EPA Act."

(Emphasis added)

26. I have also considered the principles as summarised by Pepper J in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3) [2015] NSWLEC 75* ("Westlime") in which at [173] her Honour said:

"[173] The applicable legal principles governing the exercise of the power contained in s 96(2)(a) [now s 4.55(2)] of the EPAA may be stated as follows:

(1) first, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (*North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468 at 475 and Scrap Realty Pty Ltd v Botany Bay City Council [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]*). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (*Michael Standley at 440*);

(2) the modification power is beneficial and facultative (*Michael Standley at 440*);

(3) the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (*Scrap Realty at [16]*);

(4) the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (*Vacik Pty Ltd v Penrith City Council [1992] NSWLEC 8*);

(5) the term "substantially" means "essentially or materially having the same essence" (*Vacik endorsed in Michael Standley at 440 and Moto Projects (No 2) Pty Ltd v North Sydney Council [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]*);

(6) the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (*Scrap Realty at [19]*);

(7) the term "modify" means "to alter without radical transformation" (*Sydney City Council v Ilenace Pty Ltd [1984] 3 NSWLR 414 at 42, Michael Standley at 474, Scrap Realty at [13] and Moto Projects at [27]*);

(8) in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for

precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (Vacik);

(9) the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their “proper contexts (including the circumstances in which the development consent was granted)” (Moto Projects at [56]); and

(10) a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be “legally flawed” (Moto Projects at [52])”