





 DEVELOPMENT ASSESSMENT REPORT				
Application No.	DA/2021/1354			
Address	21 Barr Street BALMAIN NSW 2041			
Proposal	Alterations and additions to an existing house including new first floor addition, new garage and landscaping works.			
Date of Lodgement	30 December 2021			
Applicant	Lombardo Design Studio			
Owner	Ms Cara M Varian Mr Mark R Waldron			
Number of Submissions	1			
Value of works	\$857,285.00			
Reason for determination at Planning Panel	Clause 4.6 variation exceeds 10%			
Main Issues	Landscaped Area Site Coverage Amenity impacts			
Recommendation	Approved with Conditions			
Attachment A	Recommended conditions of consent			
Attachment B	Plans of proposed development			
Attachment C	Clause 4.6 Exceptions to Development Standards Landscape Area			
Attachment D	Clause 4.6 Exceptions to Development Standards Site Coverage			
				
LOCALITY MAP				
Subject Site		Objectors		 N
Notified Area		Supporters		

1. Executive Summary

This report is an assessment of the application submitted to Council for alterations and additions to an existing house including new first floor addition, new garage and landscaping works at 21 Barr Street Balmain.

The application was notified to surrounding properties and 1 submission was received in response to the initial notification. The amended plans the subject of this report were not required to be renotified in accordance with Council's Community Engagement Framework.

The main issues that have arisen from the application include:

- Breach of Landscaped Area development standard
- Breach of Site Coverage development standard
- Amenity impacts to neighbouring property

The non-compliances are acceptable given consideration of the amended design and the submitted exception cases to the breaches of Landscaped Area and Site Cover and therefore the application is recommended for approval.

2. Proposal

The amended plans the subject of this report include alterations and additions to the existing dwelling comprising:

- Ground floor additions to the rear of the existing dwelling house including internal layout replanning.
- Erection of a new upper level comprising two bedrooms, family room, ensuites and lift.
- Demolition of existing garage and erection of a new garage in the same location.

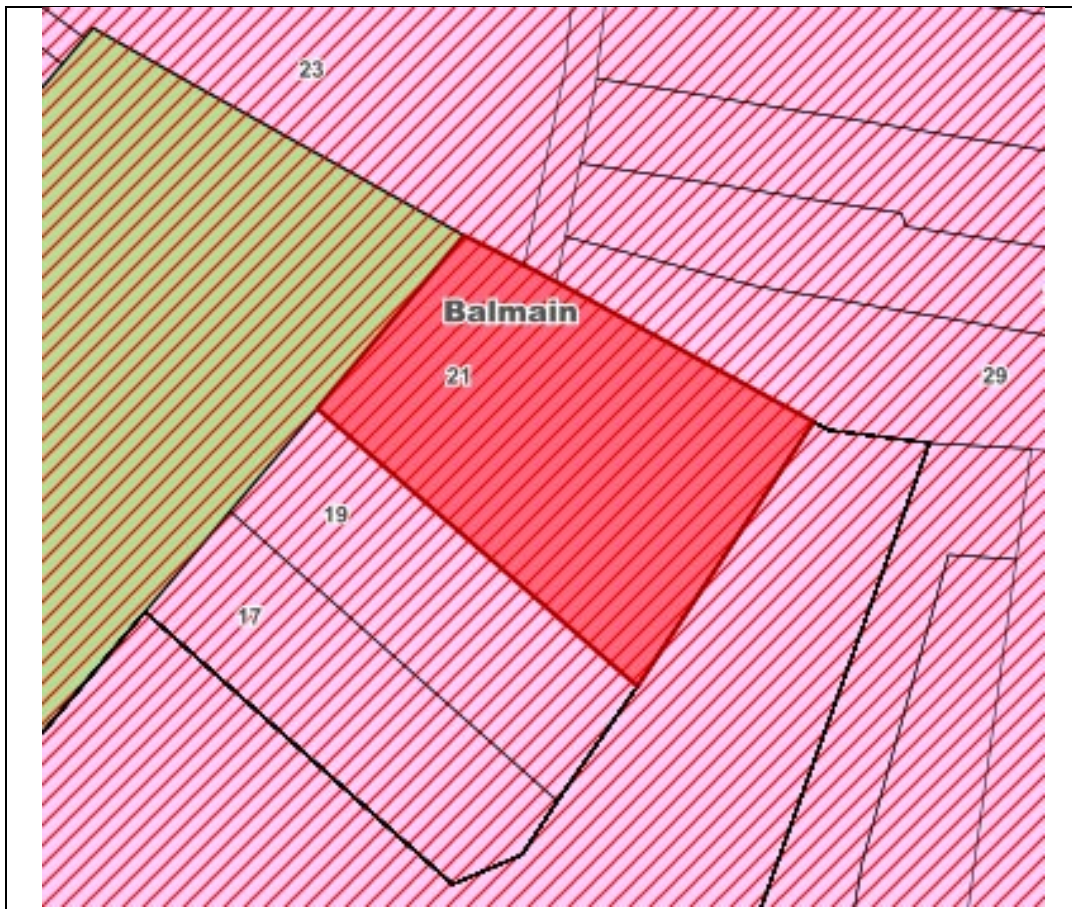
3. Site Description

The subject site is located on the eastern side of Barr Street at the northern end of the street. The site consists of one allotment and is generally rectangular with a total area of 268.9sqm and is legally described as Lot 1 in DP936558.

The site has a frontage to Barr Street of 11.405 metres.

The site supports a single storey detached dwelling house with garage. The adjoining properties support a single-storey dwelling house at 19 Barr Street, a two-storey dwelling house at 29 Jacques Street, a carpark serving a mixed-use development at 1-15 Barr Street, and residence at 23 Barr Street.

The property is located within a heritage conservation area. The subject site adjoins a Landscape Heritage Item comprising the street tree plantings in Barr Street.



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

No relevant site history.

Surrounding properties

Application	Proposal	Decision & Date
F 1/1-15 Barr Street		
D/2019/503	Change of use from commercial to a residential unit within an existing two and three storey commercial and residential building, and associated alterations and additions.	Refused 14/7/2020
29 Jacques Street		
D/2010/225	Alterations and additions to existing dwelling including ground and first floor decks	Approved 30/7/2010

4(b) Application history

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

Date	Discussion / Letter / Additional Information
23/2/2022	Council request for information (Including reduction in bulk)
25/3/2022	Additional information submitted
21/4/2022	Council request for information (shadow diagrams incorrect)
28/4/2022	Amended shadow diagrams submitted
11/5/2022	Council request for amended plans (further reduction in bulk)
6/7/2022	Amended plans and details submitted

5. Assessment

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

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 (Building Sustainability Index: BASIX) 2004*

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 4.16 (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.”*

In considering the above, there is no evidence of contamination on the site.

There is also no indication of uses listed in Table 1 of the contaminated land planning guidelines within Council’s records. The land will be suitable for the proposed use as there is no indication of contamination.

A search of Councils records does not indicate any knowledge of uses listed within Table 1 of the contaminated land planning guidelines.

5(a)(ii) State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

A BASIX Certificate was submitted with the application and will be referenced in any consent granted.

5(a)(iii) Leichhardt Local Environment Plan 2013 (LLEP 2013)

The application was assessed against the following relevant clauses of *the Leichhardt Local Environmental Plan 2013*:

- Clause 1.2 - Aims of the Plan
- Clause 2.3 - Zone objectives and Land Use Table
- Clause 2.7 - Demolition
- Clause 4.3A - Landscaped areas for residential accommodation in Zone R1
- Clause 4.4 – Floor Space Ratio
- Clause 4.4A - Exception to maximum floor space ratio for active street frontages
- Clause 4.5 - Calculation of floor space ratio and site area
- Clause 4.6 - Exceptions to development standards
- Clause 5.10 - Heritage Conservation
- Clause 5.21 - Flood Planning
- Clause 6.1 - Acid Sulfate Soils
- Clause 6.2 - Earthworks
- Clause 6.4 - Stormwater management

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

The site is zoned R1 General Residential under the *LLEP 2011*. The *LLEP 2013* defines the development as:

‘Dwelling house means a building containing only one dwelling.’

The development is permitted with consent within the land use table. The development is consistent with the objectives of the LR1 zone.

The following table provides an assessment of the application against the development standards:

Standard	Proposal	non compliance	Complies
Floor Space Ratio Maximum permissible: 0.9:1 or 242.01sqm	0.8:1 or 216.1sqm	-	Yes
Landscape Area Minimum permissible: 20% or 53.78sqm	10.67% or 28.7sqm	or 25.08sqm or 46.63%	No
Site Coverage Maximum permissible: 60% or 161.34sqm	64.34% or 173sqm	11.66sqm or 7.23%	No

Clause 4.6 Exceptions to Development Standards

As outlined in table above, the proposal results in a breach of the following development standards:

- Clause 4.3A - Landscaped areas for residential accommodation in Zone R1 and site coverage

The applicant seeks a variation to the Landscaped Areas development standard under Clause 4.3A(3)(a) of the *Leichhardt Local Environment Plan 2013* by 46.63% (25.08sqm).

Clause 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Clause 4.6 of the *Leichhardt Local Environment Plan 2013* below.

A written request has been submitted to Council in accordance with Clause 4.6(4)(a)(i) of the *Leichhardt Local Environment Plan 2013* justifying the proposed contravention of the development standard which is summarised as follows:

- Compliance with the development standard would require the removal of the permeable paving from the central courtyard and its replacement with lawn. This would compromise the amenity of the central courtyard area by removing an all-weather surface able to accommodate tables and chairs without any betterment in terms of achieving the objectives of the standard.
- The permeable paving provides for the all-weather use of the centrally located private open space area resulting in a building that promotes good design and amenity of the built environment.
- The proposed development is consistent with the objectives of the development standard and the objectives for development of the zone would be in the public interest.

The applicant's written rationale adequately demonstrates compliance with the development standard is unreasonable in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

It is considered the development is in the public interest because it is consistent with the relevant objectives of the R1 zone, in accordance with Clause 4.6(4)(a)(ii) of the *Leichhardt Local Environment Plan 2013*;

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To improve opportunities to work from home.
- To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.
- To provide landscaped areas for the use and enjoyment of existing and future residents.
- To protect and enhance the amenity of existing and future residents and the neighbourhood.

for the following reasons:

- The application proposes alterations and additions to the existing dwelling house providing for the housing needs of the community.
- The alterations and additions provide for the retention of the single dwelling house.
- The additions would provide opportunities to work from home.
- The additions as shown in the amended plans the subject of this report would be compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes including the proposed landscaped area within the site.
- The existing central rear courtyard is retained. This area is of a size and dimensions that are suitable for substantial tree planting and use of the residents. The proposed covered deck provides weather protection and facilitates the all-weather use and enjoyment of this private open space.
- The central landscaped private open space area will protect and enhance the amenity of existing and future residents and will not compromise the amenity of adjoining properties

It is considered the development is in the public interest because it is consistent with the relevant objectives of the Landscaped Area development standard, listed as follows, in accordance with Clause 4.6(4)(a)(ii) of the *Leichhardt Local Environment Plan 2013*;

- to provide landscaped areas that are suitable for substantial tree planting and for the use and enjoyment of residents,
- to maintain and encourage a landscaped corridor between adjoining properties,
- to ensure that development promotes the desired future character of the neighbourhood,
- to encourage ecologically sustainable development by maximising the retention and absorption of surface drainage water on site and by minimising obstruction to the underground flow of water,
- to control site density,
- to limit building footprints to ensure that adequate provision is made for landscaped areas and private open space.

for the following reasons:

- The existing centrally located private open space courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and use of the residents. The covered deck facilitates all-weather use of this courtyard area.
- The existing landscaped corridor between the subject site and adjoining development to the north is maintained.
- The proposal is consistent with the distinctive neighbourhood controls.
- The proposed works include the provision of rainwater tanks which will increase the retention of stormwater on the site. The provision of a single large deep soil landscaped area maximises the potential for retention and absorption of stormwater.
- The application proposes an FSR substantially less than the permitted maximum and the proposal would generally maintain the established building footprint surrounding the landscaped central private open space area.
- The existing centrally located courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use of the residents. The adjacent covered deck area provides weather protection and facilitates all-weather use of the courtyard.

The concurrence of the Planning Secretary may be assumed for matters dealt with by the Local Planning Panel.

The proposal thereby accords with the objective in Clause 4.6(1)(b) and requirements of Clause 4.6(3)(b) of the *Leichhardt Local Environment Plan 2013*. For the reasons outlined above, there are sufficient planning grounds to justify the departure from Landscaped Area development standard and it is recommended the Clause 4.6 exception be granted.

The applicant seeks a variation to the Site Coverage development standard under Clause 4.3A(3)(b) of the *Leichhardt Local Environment Plan 2013* by 46.63% (25.08sqm).

Clause 4.6 allows Council to vary development standards in certain circumstances and provides an appropriate degree of flexibility to achieve better design outcomes.

In order to demonstrate whether strict numeric compliance is unreasonable and unnecessary in this instance, the proposed exception to the development standard has been assessed against the objectives and provisions of Clause 4.6 of the *Leichhardt Local Environment Plan 2013* below.

A written request has been submitted to Council in accordance with Clause 4.6(4)(a)(i) of the *Leichhardt Local Environment Plan 2013* justifying the proposed contravention of the development standard which is summarised as follows:

- Compliance with the development standard would require the removal of a significant area of building footprint which, given the compliant FSR proposed, would significantly compromise the amenity of the development and not represent the orderly and economic use and development of this particular site.
- The proposed gross floor area has been distributed on the site in a contextually appropriate manner with the maintenance of appropriate landscaped area for the retention and establishment of landscaping consistent with the desired future character of the Valley “Balmain” Distinctive Neighbourhood. This design provides appropriately for the amenity of occupants of the development without giving rise to unreasonable impacts on surrounding development or the built environment.
- The proposed development is consistent with the objectives of the development standard and the objectives for development of the zone would be in the public interest.

The applicant’s written rationale adequately demonstrates compliance with the development standard is unreasonable in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

It is considered the development is in the public interest because it is consistent with the relevant objectives of the R1 zone, in accordance with Clause 4.6(4)(a)(ii) of the *Leichhardt Local Environment Plan 2013*;

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To improve opportunities to work from home.
- To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.
- To provide landscaped areas for the use and enjoyment of existing and future residents.
- To protect and enhance the amenity of existing and future residents and the neighbourhood.

for the following reasons:

- The application proposes alterations and additions to the existing dwelling house providing for the housing needs of the community.
- The alterations and additions provide for the retention of the single dwelling house.
- The additions would provide opportunities to work from home.
- The additions as shown in the amended plans the subject of this report would be compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes including the proposed landscaped area within the site.
- The existing central rear courtyard is retained. This area is of a size and dimensions that are suitable for substantial tree planting and use of the residents. The proposed covered deck provides weather protection and facilitates the all-weather use and enjoyment of this private open space.
- The central landscaped private open space area will protect and enhance the amenity of existing and future residents and will not compromise the amenity of adjoining properties.

It is considered the development is in the public interest because it is consistent with the objectives of the Site Coverage development standard, listed as follows, in accordance with Clause 4.6(4)(a)(ii) of the *Leichhardt Local Environment Plan 2013*;

- to provide landscaped areas that are suitable for substantial tree planting and for the use and enjoyment of residents,
- to maintain and encourage a landscaped corridor between adjoining properties,
- to ensure that development promotes the desired future character of the neighbourhood,
- to encourage ecologically sustainable development by maximising the retention and absorption of surface drainage water on site and by minimising obstruction to the underground flow of water,
- to control site density,
- to limit building footprints to ensure that adequate provision is made for landscaped areas and private open space.

for the following reasons:

- The existing centrally located private open space courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use and enjoyment of residents with the adjacent covered deck facilitating all-weather use of this courtyard.
- The existing landscaped corridor between the subject site and adjoining development to the north is maintained.
- The proposal is consistent with the distinctive neighbourhood controls.
- The proposed works include the provision of rainwater tanks which will increase the retention of stormwater on the site. The provision of a single large deep soil landscaped area maximises the potential for retention and absorption of stormwater and as the proposal involves minimal excavation, it minimises obstruction to underground water flow.
- The application proposes an FSR substantially less than the permitted maximum and the proposal would generally maintain the existing building footprint.
- The existing centrally located courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use of the residents. The adjacent covered deck area provides weather protection and facilitates all-weather use of the courtyard.

The concurrence of the Planning Secretary may be assumed for matters dealt with by the Local Planning Panel.

The proposal thereby accords with the objective in Clause 4.6(1)(b) and requirements of Clause 4.6(3)(b) of the *Leichhardt Local Environment Plan 2013*. For the reasons outlined above, there are sufficient planning grounds to justify the departure from Site Coverage development standard and it is recommended the Clause 4.6 exception be granted.

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

5(c) Inner West Local Environmental Plan 2022 (IWLEP 2022)

The *Inner West Local Environment Plan 2022* (IWLEP) was gazetted on the 12th of August 2022. As per Section 1.8A – Savings provisions, of this plan, as the subject development application was made before the commencement of this Plan, the application is to be determined as if the IWLEP 2022 had not commenced.

Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* requires consideration of any Environmental Planning Instrument (EPI), and (1)(a)(ii) also requires consideration of any EPI that has been subject to public consultation. The subject application was lodged on 30 December 2021, at this date, the IWLEP was a draft EPI, which had been publicly exhibited and was considered imminent and certain.

The development is considered acceptable having regard to the provisions of the IWLEP 2022.

5(d) Development Control Plans

The application has been assessed and the following provides a summary of the relevant provisions of Leichhardt Development Control Plan 2013.

LDCP2013	Compliance
Part A: Introductions	
Section 3 – Notification of Applications	Yes
Part B: Connections	
B1.1 Connections – Objectives	Yes
B2.1 Planning for Active Living	Yes
B3.1 Social Impact Assessment	n/a
B3.2 Events and Activities in the Public Domain (Special Events)	n/a
Part C	
C1.0 General Provisions	Yes
C1.1 Site and Context Analysis	Yes
C1.2 Demolition	Yes
C1.3 Alterations and additions	Yes
C1.4 Heritage Conservation Areas and Heritage Items	Yes – see discussion
C1.5 Corner Sites	n/a
C1.6 Subdivision	n/a
C1.7 Site Facilities	Yes
C1.8 Contamination	n/a
C1.9 Safety by Design	Yes
C1.10 Equity of Access and Mobility	Yes
C1.11 Parking	Yes
C1.12 Landscaping	Yes
C1.13 Open Space Design Within the Public Domain	n/a
C1.14 Tree Management	Yes – see discussion
C1.15 Signs and Outdoor Advertising	n/a
C1.16 Structures in or over the Public Domain: Balconies, Verandahs and Awnings	n/a

C1.17 Minor Architectural Details	n/a
C1.18 Laneways	n/a
C1.19 Rock Faces, Rocky Outcrops, Cliff Faces, Steep Slopes and Rock Walls	n/a
C1.20 Foreshore Land	n/a
C1.21 Green Roofs and Green Living Walls	n/a

Part C: Place – Section 2 Urban Character	
C2.2.2.4 The Valley Balmain Distinctive Neighbourhood	Yes
Part C: Place – Section 3 – Residential Provisions	
C3.1 Residential General Provisions	Yes
C3.2 Site Layout and Building Design	No – see discussion
C3.3 Elevation and Materials	Yes
C3.4 Dormer Windows	n/a
C3.5 Front Gardens and Dwelling Entries	Yes
C3.6 Fences	Yes
C3.7 Environmental Performance	Yes
C3.8 Private Open Space	Yes
C3.9 Solar Access	Yes
C3.10 Views	Yes
C3.11 Visual Privacy	No – see discussion
C3.12 Acoustic Privacy	No – see discussion
C3.13 Conversion of Existing Non-Residential Buildings	n/a
C3.14 Adaptable Housing	n/a
Part D: Energy	
Section 1 – Energy Management	Yes
Section 2 – Resource Recovery and Waste Management	
D2.1 General Requirements	Yes
D2.2 Demolition and Construction of All Development	Yes
D2.3 Residential Development	Yes
D2.4 Non-Residential Development	n/a
D2.5 Mixed Use Development	n/a

Part E: Water	
Section 1 – Sustainable Water and Risk Management	
E1.1 Approvals Process and Reports Required with Development Applications	Yes
E1.1.1 Water Management Statement	Yes
E1.1.2 Integrated Water Cycle Plan	n/a
E1.1.3 Stormwater Drainage Concept Plan	No – see discussion
E1.1.4 Flood Risk Management Report	n/a
E1.1.5 Foreshore Risk Management Report	n/a
E1.2 Water Management	Yes
E1.2.1 Water Conservation	Yes
E1.2.2 Managing Stormwater within the Site	Yes
E1.2.3 On-Site Detention of Stormwater	Yes
E1.2.4 Stormwater Treatment	n/a
E1.2.5 Water Disposal	Yes
E1.2.6 Building in the vicinity of a Public Drainage System	n/a
E1.2.7 Wastewater Management	Yes
E1.3 Hazard Management	n/a
E1.3.1 Flood Risk Management	n/a
E1.3.2 Foreshore Risk Management	n/a
Part F: Food	n/a
Part G: Site Specific Controls	n/a

The following provides discussion of the relevant issues:

C1.4 Heritage Conservation Areas and Heritage Items

The originally lodged plans (version. A) included an upper level addition which extended from the rear wall alignment of the existing dwelling to a point 1.6m from the existing front roof gablet. This proposal was considered unacceptable on heritage design grounds due to the significant degree of change to the original form of the dwelling in the streetscape. Amended plans were requested.

In response amended plans (version. B) were submitted which increased the setback of the upper level addition to a point 4.8m from the original front roof gablet. However, these plans did not adequately address the heritage issues previously identified and the rear upper level additions remaining substantial. Subsequently, a further reduction in the overall scale of the proposal and alteration to the detailing and palette of materials was requested.

The revised proposal includes metal screening battens over windows to the rear addition. The façade of the addition that is visible in the streetscape should be designed to contribute to the streetscape and not be screened. The adjacent residence utilises traditional external venetian blinds which are more appropriate within the HCA on the Balmain peninsular.

Further revised plans were submitted (version. C), which are the subject of this report. These drawings replanned the upper level of the addition so as to further reduce bulk and introduced an internal lift. In this regard, the current plans increase the setback of the upper level addition to a point 7.7m from the original front roof gablet. This represents a significant overall reduction in forward projection of the upper level additions compared to the original proposal by 6.1m.

The current revised proposal (version. C) has addressed the issues raised in the previous Heritage comments on the proposal. The first floor addition has been reduced in scale so that

the existing chimney is retained in its current configuration rather than incorporated into the proposed addition. The reduction in scale of the upper level also reduces the impact of the proposal on the streetscape. The palette of materials is now acceptable and the horizontal external blinds are more in keeping with the conservation area.

The current amended proposal is satisfactory on heritage grounds.

C1.14 Tree Management

There are no prescribed trees located on the site or on adjacent sites that are likely to be significantly impacted by the proposed development. Conditions are included in the recommendation requiring any minor pruning of any overhanging branches of the Jacaranda tree in 19 Bar Street to be minimised and also requiring the planting of a canopy tree within the subject site.

C3.2 Site Layout and Building Design

The proposed additions comply with the 3.6m Building Envelope control.

The proposal complies with Building Location Zone control. In this regard, the existing dwelling extends to the rear boundary, as will the proposed ground level additions. Consequently, the proposal would comply with BLZ established by the existing dwelling. At first floor level, the proposal represents the only upper level in this section of the street, as the two properties to the south of the site are single storey dwellings. The property next to the south is a non-residential building converted to mixed use which extends to the rear boundary of that site, being more than 10m to the east of the rear boundary of the subject site. In this respect the subject site is unique, as such the upper level location establishes the BLZ in this location.

The proposal results in a breach of the Side Setback controls by 1.25m to the northern side boundary and by 1.0m to the southern side boundary. In this regard, the breaches have been considered with regard to whether the proposal has been designed so as to minimise bulk and associated impacts to neighbouring properties.

The breach to the northern side boundary would not result in any overshadowing impacts to 29 Jacques Street. Only upper level bedroom windows would directly face the rear yard of that dwelling, which is considered satisfactory.

The extent of the upper level addition breaching the setback control to the southern side boundary with 19 Barr Street has been significantly reduced by the current plans which reduced the forward extent of the upper level by 7.7m to that originally proposed. The upper level of the proposal includes raked ceilings with pitching points of 2.1m to the southern side, thereby minimising the overall height of the additions and consequent bulk and overshadowing impacts to 19 Barr Street. In this respect, the north-facing openings in 19 Barr Street are currently overshadowed at the mid-winter assessment times. The significant reduction in forward extent of the addition in the current plans can be expected to significantly reduce shadow impacts to that property at other times of the year to that of the originally proposed design.

It is considered that the bulk and extent of the proposal arising from the side setback breach has been reduced such as to minimise impacts to neighbouring properties and is considered satisfactory.

C3.9 Solar Access

The subject site and adjoining southern lots are generally aligned east-west. In particular, controls C12 and C18 apply as follows:

C12 - Where the surrounding allotments are orientated east/west, main living room glazing must maintain a minimum of two hours solar access between 9am and 3pm during the winter solstice.

C18 - Where surrounding dwellings have east/west facing private open space, ensure solar access is retained for two and a half hours between 9am and 3pm to 50% of the total area (adjacent to living room) during the winter solstice.

Shadow diagrams provided for the initially amended drawings (ver. B) demonstrated that the proposal complies with control C12 as all windows in the northern elevation of 19 Barr Street are currently in shadow at the assessment times. However, the current amended plans would involve a reduction in extent of shadow impact of 2.9m in westward extent as a result of the further reduction in forward length of the upper level addition.

Shadow diagrams provided for the initially amended drawings (ver. B) demonstrated that the proposal complies with control C18 as the rear yard of 19 Barr Street is currently in full shadow at the assessment times. It is noted that the current amended plans would likely involve a reduction in assessed shadow impact at 3pm as a result of the 2.9m reduction in westward extent of the upper level addition.

C3.11 Visual Privacy & C3.12 Acoustic Privacy

The amended plans the subject of this report incorporate two additional windows in the ground floor southern side boundary wall that were not proposed in the originally lodged plans. It is noted that these two additionally proposed windows are located serving a storage room and the dining room. In this regard, it is noted that the additional window serving a storeroom is not required for such a space within the dwelling and should be deleted. Further, the proposed additional window serving the dining room is located directly opposite existing windows in the northern side wall of the submitter's dwelling thereby increasing potential for visual and acoustic impacts to that property. The proposed dining room is served by extensive north and west facing glazing and also a new window in the southern side boundary wall which is offset from windows in the northern wall of 19 Barr Street, the additional window which is directly opposite an opening in 19 Barr Street would contribute to amenity impacts to that property and is not required. Consequently, a condition is included in the recommendation requiring the deletion of the two eastern-most windows in the ground floor southern side boundary wall.

The proposed upper level windows serve an ensuite and are offset by a minimum 38° to the rear yard of 19 Barr Street. Therefore, it is unlikely that significant overlooking impacts to that yard would result.

E1.1.3 Stormwater Drainage Concept Plan

The proposal does not make provision for a stormwater drainage concept plan including on-site detention/ on-site retention as required by the DCP. Consequently, a condition should be placed on any consent requiring the provision of an amended Stormwater Drainage Plan including a design complying with the DCP and incorporating OSD/OSR.

5(e) The Likely Impacts

The assessment of the Development Application demonstrates that, subject to the recommended conditions, the proposal will have minimal impact in the locality.

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

Provided that any adverse effects on adjoining properties are minimised, this site is considered suitable to accommodate the proposed development, and this has been demonstrated in the assessment of the application.

5(g) Any submissions

The application was notified in accordance with the Community Engagement Framework for a period of 14 days to surrounding properties. One (1) submission was received in response to the initial notification. The plans the subject of this report were not required to be renotified in accordance with Council's Engagement Framework.

The following issues raised in submissions have been discussed in this report:

- Overshadowing to No.19 Barr Street.
- Bulk will adversely impact breezes and air circulation.
- The upper level windows will cause a loss of privacy to rear yard of 19 Barr Street.
- Building bulk would overwhelm and visibility of the additions should be reduced.
- The pruning of existing branches of a jacaranda tree located in the southern rear corner of No.19 Barr Street should be minimised as a result of the proposal.

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

Issue: The proposal would result in financial loss due to its impacts.

Comment: The upper level bulk of the proposed additions has been significantly reduced in the amended plans the subject of this report thereby minimising amenity impacts to the submitter's property. Notwithstanding financial matters are not a consideration of the EP and A Act 1979.

5(h) The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed.

The proposal is not contrary to the public interest.

6 Referrals

6(a) Internal

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

- Development Engineer
- Heritage Officer
- Urban Forest officer

7. Section 7.11 Contributions/7.12 Levy

Section 7.12 levies are payable for the proposal.

The carrying out of the development would result in an increased demand for public amenities and public services within the area. A contribution of \$8,572.85 would be required for the development under the *Former Leichhardt Local Government Area Section 7.12 Development Contributions Plan 2020*. A condition requiring that contribution to be paid is included in the recommendation.

8. Conclusion

The proposal generally complies with the aims, objectives and design parameters contained in *Leichhardt Local Environmental Plan 2013* Leichhardt Development Control Plan 2013.

The development will not result in any significant impacts on the amenity of the adjoining premises/properties and the streetscape and is considered to be in the public interest.

The application is considered suitable for approval subject to the imposition of appropriate conditions.

9. Recommendation

- A. The applicant has made a written requests pursuant to Clause 4.6 of the *Leichhardt Local Environmental Plan 2013*. After considering the requests, and assuming the concurrence of the Secretary has been given, the Panel is satisfied that compliance with the Landscape Area and Site Coverage standards is unnecessary in the circumstance of the case and that there are sufficient environmental grounds to support the variations. The proposed development will be in the public interest because the exceedances are not inconsistent with the objectives of the standards and of the zone in which the development is to be carried out.
- B. 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*, grant consent to Development Application No. DA/2021/1354 for alterations and additions to an existing house including new first floor addition, new garage and landscaping works at 21 Barr Street, Balmain subject to the conditions listed in Attachment A.

Attachment A – Recommended conditions of consent

CONDITIONS OF CONSENT

DOCUMENTS RELATED TO THE CONSENT

1. 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	Date Issued	Prepared by
-	Plans Title Page	2/6/2022	Lombardo Design Studio
051/C	Ground Floor Demolition Plan	2/6/2022	Lombardo Design Studio
052/C	Roof Demolition Plan	2/6/2022	Lombardo Design Studio
100/C	Site Plan	2/6/2022	Lombardo Design Studio
101/C	Ground Floor Plan	2/6/2022	Lombardo Design Studio
102/C	First Floor Plan	2/6/2022	Lombardo Design Studio
103/C	Roof Plan	2/6/2022	Lombardo Design Studio
104/C	Landscape Plan	2/6/2022	Lombardo Design Studio
201/C	Building Elevations	2/6/2022	Lombardo Design Studio
202/C	Building Elevations	2/6/2022	Lombardo Design Studio
301/C	Building Sections	2/6/2022	Lombardo Design Studio
302/C	Building Sections	2/6/2022	Lombardo Design Studio
303/C	Building Sections	2/6/2022	Lombardo Design Studio

M-01/C	Materials	2/6/2022	Lombardo Design Studio
D1/A	Stormwater Specification & Details	10/9/2021	Portes Civil & Structural Engineers
D2/A	Stormwater Site Layout Plan	10/9/2021	Portes Civil & Structural Engineers
D3/A	Stormwater Management Plan	10/9/2021	Portes Civil & Structural Engineers
D4/A	Stormwater Management Plan	10/9/2021	Portes Civil & Structural Engineers
E1/A	Sediment & Erosion Control Plan	10/9/2021	Portes Civil & Structural Engineers
A421756	BASIX Certificate	8/9/2021	Lombardo Design Studio

As amended by the conditions of consent.

DESIGN CHANGE

2. Design Change

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with amended plans demonstrating the following:

- a. That the two eastern-most windows in the ground floor southern side boundary wall serving the dining room and storage room shall be deleted.

FEES

3. Security Deposit - Custom

Prior to the commencement of demolition works or prior to the issue of a Construction Certificate, the Certifying Authority must be provided with written evidence that a security deposit and inspection fee has been paid to Council to cover the cost of making good any damage caused to any Council property or the physical environment as a consequence of carrying out the works and as surety for the proper completion of any road, footpath and drainage works required by this consent.

Security Deposit:	Min \$2,254.00
Inspection Fee:	\$241.50

Payment will be accepted in the form of cash, bank cheque, EFTPOS/credit card (to a maximum of \$10,000) or bank guarantee. Bank Guarantees must not have an expiry date.

The inspection fee is required for the Council to determine the condition of the adjacent road reserve and footpath prior to and on completion of the works being carried out.

Should any of Council's property and/or the physical environment sustain damage during the course of the demolition or construction works, or if the works put Council's assets or the environment at risk, or if any road, footpath or drainage works required by this consent are not completed satisfactorily, Council may carry out any works necessary to repair the damage, remove the risk or complete the works. Council may utilise part or all of the security deposit to restore any damages, and Council may recover, in any court of competent jurisdiction, any costs to Council for such restorations.

A request for release of the security may be made to the Council after all construction work has been completed and a final Occupation Certificate issued.

The amount nominated is only current for the financial year in which the initial consent was issued and is revised each financial year. The amount payable must be consistent with Council's Fees and Charges in force at the date of payment.

4. Section 7.12 (formerly section 94A) Development Contribution Payments

Prior to the issue of a Construction Certificate, written evidence must be provided to the Certifying Authority that a monetary contribution to the Inner West Council has been paid, towards the provision of infrastructure, required to address increased demand for local services generated by additional development within the Local Government Area (LGA). This condition is imposed in accordance with Section 7.12 of the *Environmental Planning and Assessment Act 1979* and in accordance with *Former Leichhardt Local Government Area Section 7.12 Development Contributions Plan 2020*.

Note: Copies of these contribution plans can be inspected at any of the Inner West Council Service Centres or viewed online at <https://www.innerwest.nsw.gov.au/develop/planning-controls/section-94-contributions>

Payment amount*:

\$8,572.85

*Indexing of the Section 7.12 contribution payment:

The contribution amount to be paid to the Council is to be adjusted at the time of the actual payment in accordance with the provisions of the relevant contributions plan. In this regard, you are recommended to make contact with Inner West Council *prior to arranging your payment method* to confirm the correct current payment amount (at the expected time of payment).

Payment methods:

The required contribution must be paid either *by BPAY (to a maximum of \$500,000); unendorsed bank cheque (from an Australian Bank only); EFTPOS (Debit only); credit card (Note: A 1% credit card transaction fee applies to all credit card transactions; cash (to a maximum of \$10,000))*. It should be noted that personal cheques or bank guarantees cannot be accepted for the payment of these contributions. **Prior to payment contact Council's Planning Team to review charges to current indexed quarter, please allow a minimum of 2 business days for the invoice to be issued before payment can be accepted.**

5. Long Service Levy

Prior to the issue of a Construction Certificate, written evidence must be provided to the Certifying Authority that the long service levy in accordance with Section 34 of the *Building and Construction Industry Long Service Payments Act 1986* has been paid at the prescribed rate of 0.35% of the total cost of the work to either the Long Service Payments Corporation or Council for any work costing \$25,000 or more.

GENERAL CONDITIONS

6. Boundary Alignment Levels

Alignment levels for the site at all pedestrian and vehicular access locations must match the existing back of footpath levels at the boundary.

7. Tree Protection

No trees on public property (footpaths, roads, reserves etc.) are to be removed or damaged during works unless specifically approved in this consent or marked on the approved plans for removal.

Prescribed trees protected by Council's Management Controls on the subject property and/or any vegetation on surrounding properties must not be damaged or removed during works unless specific approval has been provided under this consent.

Any public tree within five (5) metres of the development must be protected in accordance with Council's *Development Fact Sheet—Trees on Development Sites*.

No activities, storage or disposal of materials taking place beneath the canopy of any tree (including trees on neighbouring sites) protected under Council's Tree Management Controls at any time.

8. Waste Management Plan

Prior to the commencement of any works (including any demolition works), the Certifying Authority is required to be provided with a Recycling and Waste Management Plan (RWMP) in accordance with the relevant Development Control Plan.

9. Erosion and Sediment Control

Prior to the issue of a commencement of any works (including any demolition works), the Certifying Authority must be provided with an erosion and sediment control plan and specification. Sediment control devices must be installed and maintained in proper working order to prevent sediment discharge from the construction site.

10. Works Outside the Property Boundary

This development consent does not authorise works outside the property boundaries on adjoining lands.

PRIOR TO ANY DEMOLITION

11. Hoardings

The person acting on this consent must ensure the site is secured with temporary fencing prior to any works commencing.

If the work involves the erection or demolition of a building and is likely to cause pedestrian or vehicular traffic on public roads or Council controlled lands to be obstructed or rendered inconvenient, or building involves the enclosure of public property, a hoarding or fence must be erected between the work site and the public property. An awning is to be erected, sufficient to prevent any substance from, or in connection with, the work falling onto public property.

Separate approval is required from the Council under the *Roads Act 1993* to erect a hoarding or temporary fence or awning on public property.

12. Dilapidation Report

Prior to any works commencing (including demolition), the Certifying Authority and owners of identified properties, must be provided with a colour copy of a dilapidation report prepared by a suitably qualified person. The report is required to include colour photographs of all the adjoining properties to the Certifying Authority's satisfaction. In the event that the consent of the adjoining property owner cannot be obtained to undertake the report, copies of the letter/s that have been sent via registered mail and any responses received must be forwarded to the Certifying Authority before work commences.

13. Advising Neighbours Prior to Excavation

At least 7 days before excavating below the level of the base of the footings of a building on an adjoining allotment of land, give notice of intention to do so to the owner of the adjoining allotment of land and furnish particulars of the excavation to the owner of the building being erected or demolished.

14. Construction Fencing

Prior to the commencement of any works (including demolition), the site must be enclosed with suitable fencing to prohibit unauthorised access. The fencing must be erected as a barrier between the public place and any neighbouring property.

PRIOR TO CONSTRUCTION CERTIFICATE

15. Dilapidation Report – Pre-Development – Minor

Prior to the issue of a Construction Certificate or any demolition, the Certifying Authority must be provided with a dilapidation report including colour photos showing the existing condition of the footpath and roadway adjacent to the site.

16. Stormwater Drainage System – Minor Developments (OSD is required)

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with stormwater drainage design plans incorporating on site stormwater detention and/or on site retention/ re-use facilities (OSR/OSD), certified by a suitably qualified Civil Engineer that the design of the site drainage system complies with the following specific requirements:

- a. The stormwater drainage concept plan on Drawing No. D3 prepared by PORTES Civil and Structural Engineers and dated 10 September 2021, must be amended to comply with the following;
- b. Stormwater runoff from all roof areas within the property being collected in a system of gutters, pits and pipeline and be discharged, together with overflow pipelines from any rainwater tank(s), by gravity to the kerb and gutter of a public road/directly to Council's piped drainage system via the OSD/OSR tanks as necessary;
- c. Comply with Council's Stormwater Drainage Code, Australian Rainfall and Runoff (A.R.R.), Australian Standard AS3500.3-2018 'Stormwater Drainage' and Council's DCP;
- d. Charged or pump-out stormwater drainage systems are not permitted including for roof drainage;
- e. The design plans must detail the existing and proposed site drainage layout, size, class and grade of pipelines, pit types, roof gutter and downpipe sizes;
- f. The plans, including supporting calculations, must demonstrate that the post development flows for the 100 year ARI storm are restricted to the pre development flows for the 5 year ARI storm event in accordance with Section E1.2.3 (C2 and C3) of Council's DCP2013 and the maximum allowable discharge to Council's street gutter limited to 15 litres/second (100year ARI);
- g. OSD may be reduced or replaced by on site retention (OSR) for rainwater reuse in accordance with the relevant DCP that applies to the land. Where this is pursued, the proposed on-site retention (OSR) tanks must be connected to a pump system for internal reuse for laundry purposes, the flushing of all toilets and for outdoor usage such as irrigation. Surface water must not be drained to rainwater tanks where the collected water is to be used to supply water inside the dwelling, such as for toilet flushing or laundry use;
- h. Pipe and channel drainage systems including gutters must be designed to convey the one hundred (100) year Average Recurrence Interval (ARI) flows from the contributing catchment to the OSD/OSR tanks;
- i. Where a combined OSD/OSR is proposed, all roof water must be connected to the storage tank. The overflow from the OSD/OSR can be connected by gravity to the kerb and gutter of a public road.
- j. Details of the 100-year ARI overflow route in case of failure/blockage of the drainage system must be provided;
- k. Drainage pipes must be laid at a minimum grade of 1%. All pipe diameter and invert levels and finished surface ground levels must be shown on the drainage plans;
- l. The depth of the underground OSD/OSR must comply with the confined space requirements;
- m. The existing overland flow path between the rear of the dwelling and the Bar Street frontage must be retained unobstructed. The rear courtyard must be graded so that bypass flows from the site drainage system are directed to the overland flow path;

- n. A minimum 150mm step up shall be provided between all external finished surfaces and adjacent internal floor areas;
- o. The design must make provision for the natural flow of stormwater runoff from uphill/upstream properties/lands;
- p. Details of external catchments currently draining to the site must be included on the plans. Existing natural overland flows from external catchments may not be blocked or diverted, but must be captured and catered for within the proposed site drainage system. Where necessary an inter-allotment drainage system must be incorporated into the design;
- q. No nuisance or concentration of flows to other properties;
- r. The stormwater system must not be influenced by backwater effects or hydraulically controlled by the receiving system;
- s. Plans must specify that any components of the existing system to be retained must be certified during construction to be in good condition and of adequate capacity to convey the additional runoff generated by the development and be replaced or upgraded if required;
- t. An inspection opening or stormwater pit must be installed inside the property, adjacent to the boundary, for all stormwater outlets;
- u. Only a single point of discharge is permitted to the kerb and gutter, per frontage of the site;
- v. New pipelines within the footpath area that are to discharge to the kerb and gutter must be hot dipped galvanised steel hollow section with a minimum wall thickness of 4.0 mm and a maximum section height and width of 100 mm or sewer grade uPVC pipe with a maximum diameter of 100 mm;
- w. All stormwater outlets through sandstone kerbs must be carefully core drilled in accordance with Council standard drawings;
- x. All redundant pipelines within footpath area must be removed and footpath/kerb reinstated;
- y. No impact to street tree(s).

17. Changes to Levels

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with amended plans incorporating the following amendments:

- a. A 150 mm step up must be provided between the finished surface level of the external area and the finished floor level of the internal rooms.

18. Amended Architectural Plans to Reflect Access and Parking Requirements

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with plans certified by a suitably qualified Civil Engineer demonstrating that the design of the vehicular access and off-street parking facilities must comply with Australian Standard

AS/NZS2890.1-2004 Parking Facilities – Off-Street Car Parking and the following specific requirements:

- a. The floor/finished levels within the property must be adjusted to ensure that the levels at the boundary comply with the Alignment Levels issued with this consent; <OR>
- b. The garage slab or driveway must rise within the property to be 170mm above the adjacent road gutter level and higher than the street kerb and footpath across the full width of the vehicle crossing. The longitudinal profile across the width of the vehicle crossing must comply with the Ground Clearance requirements of AS/NZS 2890.1-2004;
- c. A minimum of 2200mm headroom must be provided throughout the access and parking facilities. Note that the headroom must be measured at the lowest projection from the ceiling, such as lighting fixtures, and to open garage doors;
- d. Longitudinal sections along each outer edge of the access and parking facilities, extending to the centreline of the road carriageway must be provided, demonstrating compliance with the above requirements;
- e. The garage/carport/parking space must have minimum clear internal dimensions of 6000 mm x 3000 mm (length x width). The dimensions must be exclusive of obstructions such as walls, doors and columns, except where they do not encroach inside the design envelope specified in Section 5.2 of AS/NZS 2890.1-2004;
- f. Entering of vehicle into the garage must be by reversing and exiting in a forward direction would;
- g. A plan of the proposed access and adjacent laneway, drawn at a 1:100 scale, demonstrating that vehicle manoeuvrability for entry and exit to the parking space complies with swept paths from AS/NZS 2890.1:2004. The plan must include any existing on-street parking spaces;
- h. The maximum gradients within the parking module must not exceed 1 in 20 (5%), measured parallel to the angle of parking and 1 in 16 (6.25%), measured in any other direction in accordance with the requirements of Section 2.4.6 of AS/NZS 2890.1-2004;
- i. The external form and height of the approved structures must not be altered from the approved plans; and

No changes to the external form or appearance of the development contrary to the approved plans must occur except as identified by this condition. Any changes to such must be subject to separate approval.

19. Structural Certificate for retained elements of the building

Prior to the issue of a Construction Certificate, the Certifying Authority is required to be provided with a Structural Certificate prepared by a practising structural engineer, certifying the structural adequacy of the property and its ability to withstand the proposed additional, or altered structural loads during all stages of construction. The certificate must also include all details of the methodology to be employed in construction phases to achieve the above

requirements without result in demolition of elements marked on the approved plans for retention.

20. Sydney Water – Tap In

Prior to the issue of a Construction Certificate, the Certifying Authority is required to ensure approval has been granted through Sydney Water’s online ‘Tap In’ program to determine whether the development will affect Sydney Water’s sewer and water mains, stormwater drains and/or easements, and if further requirements need to be met.

Note: Please refer to the web site <http://www.sydneywater.com.au/tapin/index.htm> for details on the process or telephone 13 20 92

DURING DEMOLITION AND CONSTRUCTION

21. Tree Protection

To protect the following tree, trunk protection must be installed prior to any works commencing in accordance with the approved *Tree Protection Plan* and/or with Council’s *Development Fact Sheet—Trees on Development Sites*:

Tree No.	Botanical/Common Name/Location
-	<i>Cupaniopsis anacardioides</i> (Tuckeroo) / street tree

22. Construction Hours – Class 1 and 10

Unless otherwise approved by Council, excavation, demolition, construction or subdivision work are only permitted between the hours of 7:00am to 5.00pm, Mondays to Saturdays (inclusive) with no works permitted on, Sundays or Public Holidays.

23. Survey Prior to Footings

Upon excavation of the footings and before the pouring of the concrete, the Certifying Authority must be provided with a certificate of survey from a registered land surveyor to verify that the structure will not encroach over the allotment boundaries.

24. Tree Protection

During excavation, demolition or construction work, damage to any overhanging branches of the tree located in the rear yard of 19 Barr Street shall be minimised.

PRIOR TO OCCUPATION CERTIFICATE**25. No Encroachments**

Prior to the issue of an Occupation Certificate, the Principal Certifier must ensure that any encroachments on to Council road or footpath resulting from the building works have been removed, including opening doors, gates and garage doors with the exception of any awnings or balconies approved by Council.

26. Protect Sandstone Kerb

Prior to the issue of an Occupation Certificate, the Principal Certifier must ensure that any stone kerb, damaged as a consequence of the work that is the subject of this development consent, has been replaced.

27. Works as Executed – Site Stormwater Drainage System

Prior to the issue of an Occupation Certificate, the Principal Certifier must be provided with Certification by a suitably qualified Civil Engineer who holds current Chartered Engineer qualifications with the Institution of Engineers Australia (CPEng) or current Registered Professional Engineer qualifications with Professionals Australia (RPEng) that:

- a. The stormwater drainage system has been constructed in accordance with the approved design and relevant Australian Standards; and
- b. Works-as-executed plans of the stormwater drainage system certified by a Registered Surveyor, to verify that the drainage system has been constructed, OSD/OSR system commissioned and stormwater quality improvement device(s) and any pump(s) installed in accordance with the approved design and relevant Australian Standards have been submitted to Council. The works-as-executed plan(s) must show the as built details in comparison to those shown on the drainage plans approved with the Construction Certificate. All relevant levels and details indicated must be marked in red on a copy of the Principal Certifier stamped Construction Certificate plans.

28. Operation and Management Plan

Prior to the issue of an Occupation Certificate, the Principal Certifier must be provided with an Operation and Management Plan has been prepared and implemented for the on-site detention and/or on-site retention/re-use facilities and stormwater quality improvement device(s) and pump(s). The Plan must set out the following at a minimum:

- a. The proposed maintenance regime, specifying that the system is to be regularly inspected and checked by qualified practitioners; and
- b. The proposed method of management of the facility, including procedures, safety protection systems, emergency response plan in the event of mechanical failure, etc.

29. Certification of Tree Planting

Prior to the issue of any Occupation Certificate, the Principal Certifier is to be provided with evidence certified by a person holding a minimum qualification of AQF3 Certificate of Horticulture or Arboriculture that:

A minimum of 1 x 45 litre size tree/palm which will attain a minimum mature height of six (6) metres, has been planted in a suitable location within the property at a minimum of 1.2 metres from any boundary and 2.3 metres from a dwelling or garage wall and allowing for future tree growth. The tree is to conform to AS2303—*Tree stock for landscape use*. Species listed on the Trees Minor Works list in the Council's Tree Management Controls, fruit trees and species recognised to have a short life span will not be accepted as suitable.

If the tree is found dead or dying before it reaches dimensions where it is protected by Council's Tree Management Controls, it must be replaced in accordance with this condition.

ON-GOING

30. Operation and Management Plan

The Operation and Management Plan for the on-site detention and/or on-site retention/re-use approved with the Occupation Certificate, must be implemented and kept in a suitable location on site at all times.

ADVISORY NOTES

Permits

Where it is proposed to occupy or carry out works on public roads or Council controlled lands, the person acting on this consent must obtain all applicable Permits from Council in accordance with Section 68 (Approvals) of the *Local Government Act 1993* and/or Section 138 of the *Roads Act 1993*. Permits are required for the following activities:

- a. Work zone (designated parking for construction vehicles). Note that a minimum of 2 months should be allowed for the processing of a Work Zone application;

- b. A concrete pump across the roadway/footpath;
- c. Mobile crane or any standing plant;
- d. Skip Bins;
- e. Scaffolding/Hoardings (fencing on public land);
- f. Public domain works including vehicle crossing, kerb & guttering, footpath, stormwater, etc.;
- g. Awning or street veranda over the footpath;
- h. Partial or full road closure; and
- i. Installation or replacement of private stormwater drain, utility service or water supply.

If required contact Council's Road Access team to ensure the correct Permit applications are made for the various activities. Applications for such Permits must be submitted and approved by Council prior to the commencement of the works associated with such activity.

Insurances

Any person acting on this consent or any contractors carrying out works on public roads or Council controlled lands is required to take out Public Liability Insurance with a minimum cover of twenty (20) million dollars in relation to the occupation of, and approved works within those lands. The Policy is to note, and provide protection for Inner West Council, as an interested party and a copy of the Policy must be submitted to Council prior to commencement of the works. The Policy must be valid for the entire period that the works are being undertaken on public property.

Prescribed Conditions

This consent is subject to the prescribed conditions of consent within clause 98-98E of the *Environmental Planning and Assessment Regulations 2021*.

Notification of commencement of works

At least 7 days before any demolition work commences:

- a. The Council must be notified of the following particulars:
 - i. the name, address, telephone contact details and licence number of the person responsible for carrying out the work; and
 - ii. the date the work is due to commence and the expected completion date; and
- b. A written notice must be placed in the letter box of each directly adjoining property identified advising of the date the work is due to commence.

Storage of Materials on public property

The placing of any materials on Council's footpath or roadway is prohibited, without the prior consent of Council.

Toilet Facilities

The following facilities must be provided on the site:

- a. Toilet facilities in accordance with WorkCover NSW requirements, at a ratio of one toilet per every 20 employees; and
- b. A garbage receptacle for food scraps and papers, with a tight fitting lid.

Facilities must be located so that they will not cause a nuisance.

Infrastructure

The developer must liaise with the Sydney Water Corporation, Ausgrid, AGL and Telstra concerning the provision of water and sewerage, electricity, natural gas and telephones respectively to the property. Any adjustment or augmentation of any public utility services including Gas, Water, Sewer, Electricity, Street lighting and Telecommunications required as a result of the development must be undertaken before occupation of the site.

Other Approvals may be needed

Approvals under other acts and regulations may be required to carry out the development. It is the responsibility of property owners to ensure that they comply with all relevant legislation. Council takes no responsibility for informing applicants of any separate approvals required.

Failure to comply with conditions

Failure to comply with the relevant provisions of *the Environmental Planning and Assessment Act 1979* and/or the conditions of this consent may result in the serving of penalty notices or legal action.

Other works

Works or activities other than those approved by this Development Consent will require the submission of a new Development Application or an application to modify the consent under Section 4.55 of the *Environmental Planning and Assessment Act 1979*.

Obtaining Relevant Certification

This development consent does not remove the need to obtain any other statutory consent or approval necessary under any other Act, such as (if necessary):

- a. Application for any activity under that Act, including any erection of a hoarding;
- b. Application for a Construction Certificate under the *Environmental Planning and Assessment Act 1979*;
- c. Application for an Occupation Certificate under the *Environmental Planning and Assessment Act 1979*;
- d. Application for a Subdivision Certificate under the *Environmental Planning and Assessment Act 1979* if land (including stratum) subdivision of the development site is proposed;
- e. Application for Strata Title Subdivision if strata title subdivision of the development is proposed;
- f. Development Application for demolition if demolition is not approved by this consent;
or
- g. Development Application for subdivision if consent for subdivision is not granted by this consent.

Disability Discrimination Access to Premises Code

The *Disability Discrimination Act 1992* (Commonwealth) and the *Anti-Discrimination Act 1977* (NSW) impose obligations on persons relating to disability discrimination. Council's determination of the application does not relieve persons who have obligations under those Acts of the necessity to comply with those Acts.

National Construction Code (Building Code of Australia)

A complete assessment of the application under the provisions of the National Construction Code (Building Code of Australia) has not been carried out. All building works approved by this consent must be carried out in accordance with the requirements of the National Construction Code.

Notification of commencement of works

Residential building work within the meaning of the *Home Building Act 1989* must not be carried out unless the PCA (not being the council) has given the Council written notice of the following information:

- a. In the case of work for which a principal contractor is required to be appointed:
 - i. The name and licence number of the principal contractor; and
 - ii. The name of the insurer by which the work is insured under Part 6 of that Act.

- b. In the case of work to be done by an owner-builder:
 - i. The name of the owner-builder; and
 - ii. If the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

Dividing Fences Act

The person acting on this consent must comply with the requirements of the *Dividing Fences Act 1991* in respect to the alterations and additions to the boundary fences.

Permits from Council under Other Acts

Where it is proposed to occupy or carry out works on public roads or Council controlled lands, the person acting on this consent must obtain all applicable Permits from Council in accordance with Section 68 (Approvals) of the *Local Government Act 1993* and/or Section 138 of the *Roads Act 1993*. Permits are required for the following activities:

- a. Work zone (designated parking for construction vehicles). Note that a minimum of 2 months should be allowed for the processing of a Work Zone application;
- b. A concrete pump across the roadway/footpath;
- c. Mobile crane or any standing plant;
- d. Skip bins;
- e. Scaffolding/Hoardings (fencing on public land);
- f. Public domain works including vehicle crossing, kerb & guttering, footpath, stormwater, etc.;
- g. Awning or street verandah over footpath;
- h. Partial or full road closure; and
- i. Installation or replacement of private stormwater drain, utility service or water supply.

Contact Council's Road Access team to ensure the correct Permit applications are made for the various activities. A lease fee is payable for all occupations.

Noise

Noise arising from the works must be controlled in accordance with the requirements of the *Protection of the Environment Operations Act 1997*.

Amenity Impacts General

The use of the premises must not give rise to an environmental health nuisance to the adjoining or nearby premises and environment. There are to be no emissions or discharges from the premises, which will give rise to a public nuisance or result in an offence under the *Protection of the Environment Operations Act 1997* and Regulations. The use of the premises

and the operation of plant and equipment must not give rise to the transmission of a vibration nuisance or damage other premises.

Construction of Vehicular Crossing

The vehicular crossing and/or footpath works are required to be constructed by your own contractor. You or your contractor must complete an application for *Construction of a Vehicular Crossing & Civil Works* form, lodge a bond for the works, pay the appropriate fees and provide evidence of adequate public liability insurance, prior to commencement of works.

Lead-based Paint

Buildings built or painted prior to the 1970's may have surfaces coated with lead-based paints. Recent evidence indicates that lead is harmful to people at levels previously thought safe. Children particularly have been found to be susceptible to lead poisoning and cases of acute child lead poisonings in Sydney have been attributed to home renovation activities involving the removal of lead based paints. Precautions should therefore be taken if painted surfaces are to be removed or sanded as part of the proposed building alterations, particularly where children or pregnant women may be exposed, and work areas should be thoroughly cleaned prior to occupation of the room or building.

Dial before you dig

Contact "Dial Prior to You Dig" prior to commencing any building activity on the site.

Useful Contacts

BASIX Information	1300 650 908 weekdays 2:00pm - 5:00pm www.basix.nsw.gov.au
Department of Fair Trading	13 32 20 www.fairtrading.nsw.gov.au Enquiries relating to Owner Builder Permits and Home Warranty Insurance.
Dial Prior to You Dig	1100 www.dialprior toyoudig.com.au
Landcom	9841 8660

			To purchase copies of Volume One of "Soils and Construction"
Long Service Corporation	Payments	131441	www.lspc.nsw.gov.au
NSW Food Authority		1300 552 406	www.foodnotify.nsw.gov.au
NSW Government			www.nsw.gov.au/fibro www.diySAFE.nsw.gov.au
			Information on asbestos and safe work practices.
NSW Office of Environment and Heritage		131 555	www.environment.nsw.gov.au
Sydney Water		13 20 92	www.sydneywater.com.au
Waste Service - Environmental Solutions	SITA	1300 651 116	www.wasteservice.nsw.gov.au
Water Efficiency Labelling and Standards (WELS)			www.waterrating.gov.au
WorkCover Authority of NSW		13 10 50	www.workcover.nsw.gov.au Enquiries relating to work safety and asbestos removal and disposal.

Attachment B – Plans of proposed development

DEVELOPMENT APPLICATION

AT 21 BARR STREET, BALMAIN
 CLIENT MARK WALDRON AND CERA VARRAN
 JOB NO. 2023

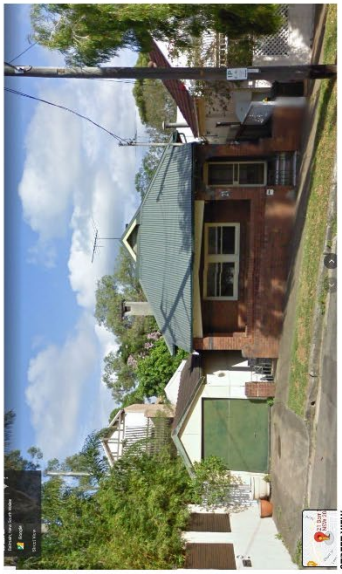
LOMBARDO DESIGN STUDIO

P: PO Box 126 Sunny Hills NSW 2010 t: 0-04-110648 e: j@lombardo.com.au

DRAWING LIST			
DRAWING NO.	DRAWING NAME	REV. NO.	REV. DATE.
001	COVER PAGE	C	02.06.2022
002	SURVEY PLAN	C	02.06.2022
051	GROUND FLOOR DEMO PLAN	C	02.06.2022
052	ROOF PLAN DEMO	C	02.06.2022
100	SITE PLAN	C	02.06.2022
101	GROUND FLOOR PLAN	C	02.06.2022
102	FIRST FLOOR PLAN	C	02.06.2022
103	ROOF PLAN	C	02.06.2022
104	LANDSCAPING PLAN	C	02.06.2022
201	BUILDING ELEVATIONS	C	02.06.2022
202	BUILDING ELEVATIONS	C	02.06.2022
301	BUILDING SECTIONS	C	02.06.2022
302	BUILDING SECTIONS	C	02.06.2022
303	BUILDING SECTIONS	C	02.06.2022
901	FSR CALCULATIONS	C	02.06.2022
902	TRAFFIC MANAGEMENT PLAN	C	02.06.2022
903	3D VIEWS	C	02.06.2022
904	3D VIEWS	C	02.06.2022



1 SITE PLAN, SITE ANALYSIS
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STREET VIEW

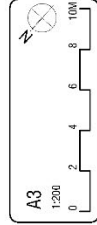


SATELLITE VIEW - NOT TO SCALE

NOTES:
1. All dimensions are in metres unless otherwise stated.
2. The proposed development is shown in grey.
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10. The proposed development is shown in grey.

REVISION	DATE
A	14 MAR 2022
B	15 MAR 2022
C	02 APR 2022

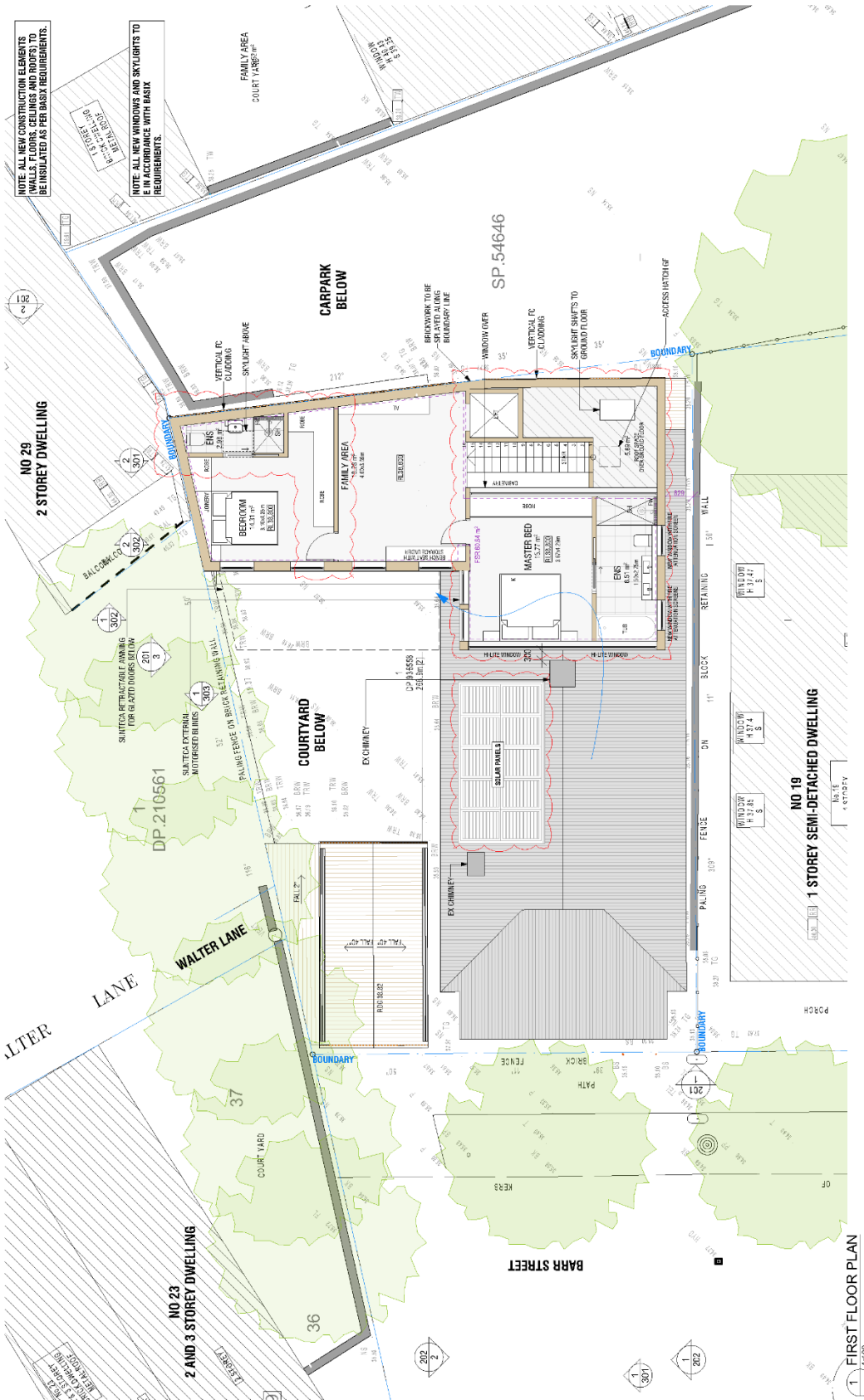
EXISTING VALLEY
STREETS
PROPOSED WORKS
PROPOSED WORKS



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1:200

DEVELOPMENT APPLICATION
21 Bards Street, Berrimah NSW 2861 AI
WALUKUN AND CAHA VASARI CLIENT
2020 JWS P.O.
ST/CL BDPN

100



1 FIRST FLOOR PLAN
1:100

NOTES:
1. ALL NEW CONSTRUCTION ELEMENTS (WALLS, FLOORS, CEILINGS AND ROOFS) TO BE INSULATED AS PER BASIX REQUIREMENTS.
2. NOTE ALL NEW WINDOWS AND SKYLIGHTS TO BE IN ACCORDANCE WITH BASIX REQUIREMENTS.
3. SUITCASE REFRIGERATOR FINING (FOR GLAZING DIVIDERS BELOW)
4. SUITCASE EXTERNAL MOTORIZED BI-RING
5. PAINTING FENCE ON BRICK RETAINING WALL
6. BRICKWORK TO BE SPRAYED ALONG BOUNDARY LINE
7. WINDOW OVER
8. VERTICAL TO CLADDING
9. SKYLIGHT ABOVE
10. SKYLIGHT ABOVE
11. ACCESS HATCH FOR
12. RETAINING WALL
13. FENCE
14. PALING
15. PATH
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100. BRICK

NO.	DESCRIPTION	DATE
1	PRELIMINARY DESIGN	14.03.2023
2	DESIGN DEVELOPMENT	16.03.2023
3	FINAL DESIGN	07.04.2023

EXISTING WALLS
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PROPOSED WORKS

PROPOSED WORKS

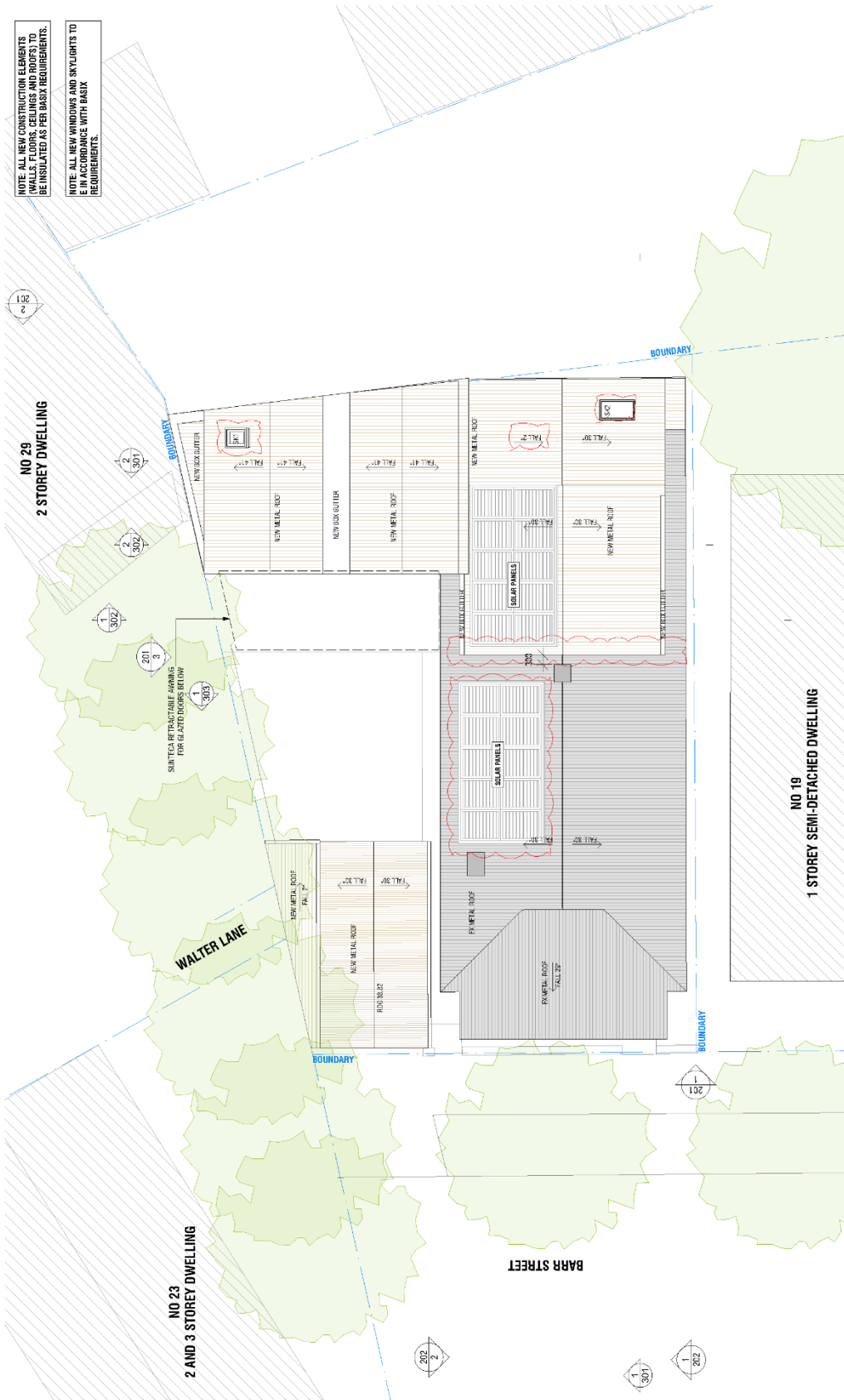
PROPOSED WORKS

PROPOSED WORKS

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1:100
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DEVELOPMENT APPLICATION
21 Barr Street, Parramatta NSW 2151 AT
WARRICK AND CARA WARRICK CLIENT
2020 403 000
FIRST FLOOR PLAN 1:100

102



1 ROOF PLAN
1:100

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NO.	REVISION/DETAIL	DATE
A	DESIGN DEVELOPMENT	14.03.2023
B	DESIGN DEVELOPMENT	16.03.2023
C	DESIGN DEVELOPMENT	07.04.2023

EXISTING WALLS
EXISTING ROOFS
PROPOSED WORKS

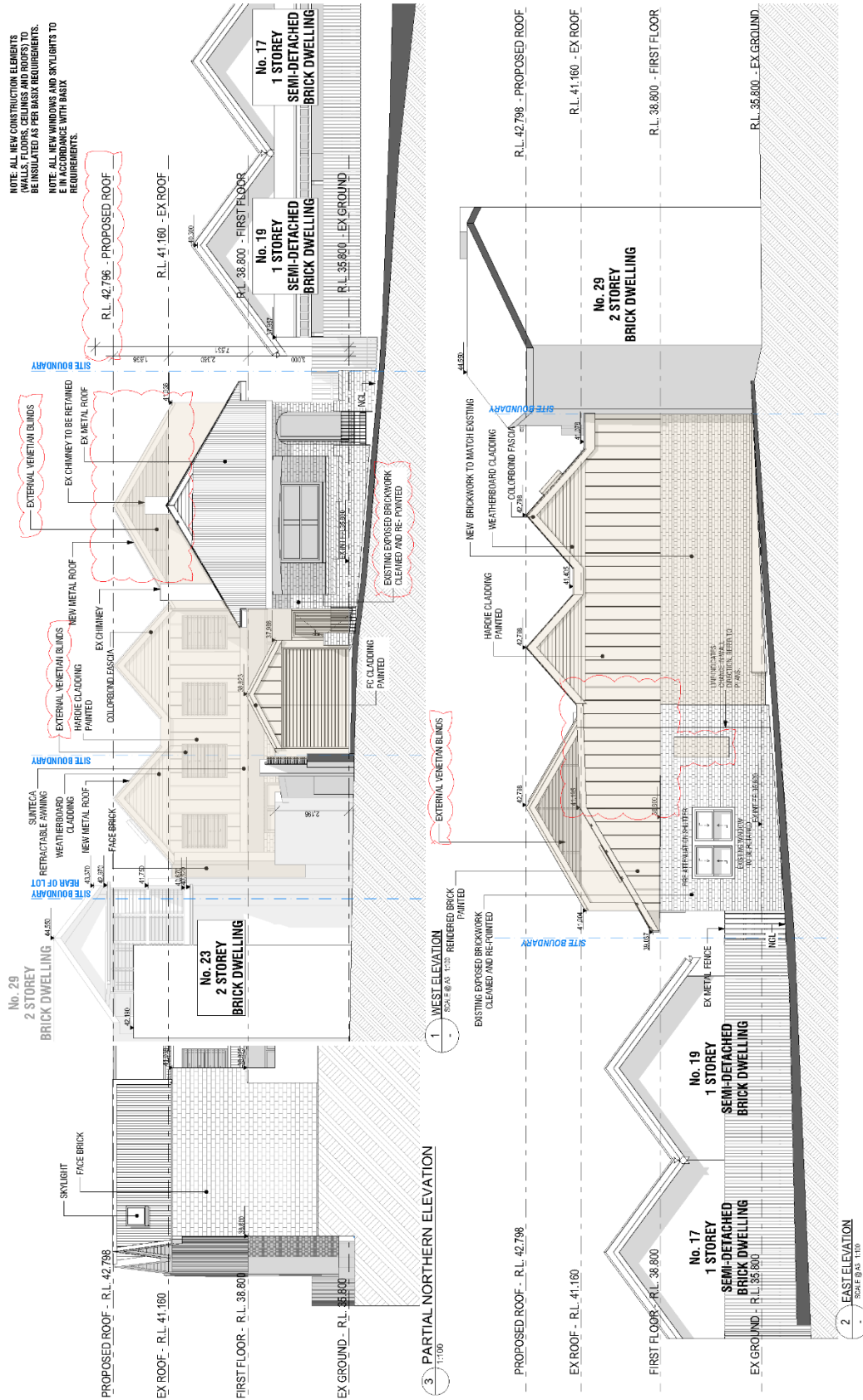
EXISTING WALLS
EXISTING ROOFS
PROPOSED WORKS

A3
1:100

LOMBARDO DESIGN STUDIO
11/111 New St, Surry Hills NSW 2019
t: 02 9234 7664 e: info@lombardodesign.com.au

DEVELOPMENT APPLICATION
21 Barr Street, Surry Hills NSW 2011 AT
WALTON AND CARR VARIATION SHEET
2200 403 001
ROOF SH-11 (RCP)

103



201

DEVELOPMENT APPLICATION
 21 BARR STREET, PENRITH NSW 2041 AT
 WALDEAN AND CARA WALDEAN CLIENT
 2020 403 3000
 11/11/2020
 BUILDING ELEVATION (S.A.) (SHEET)

LOMBARDO DESIGN STUDIO
 11/11/2020
 1. 044 714644 2. 044 714644 3. 044 714644

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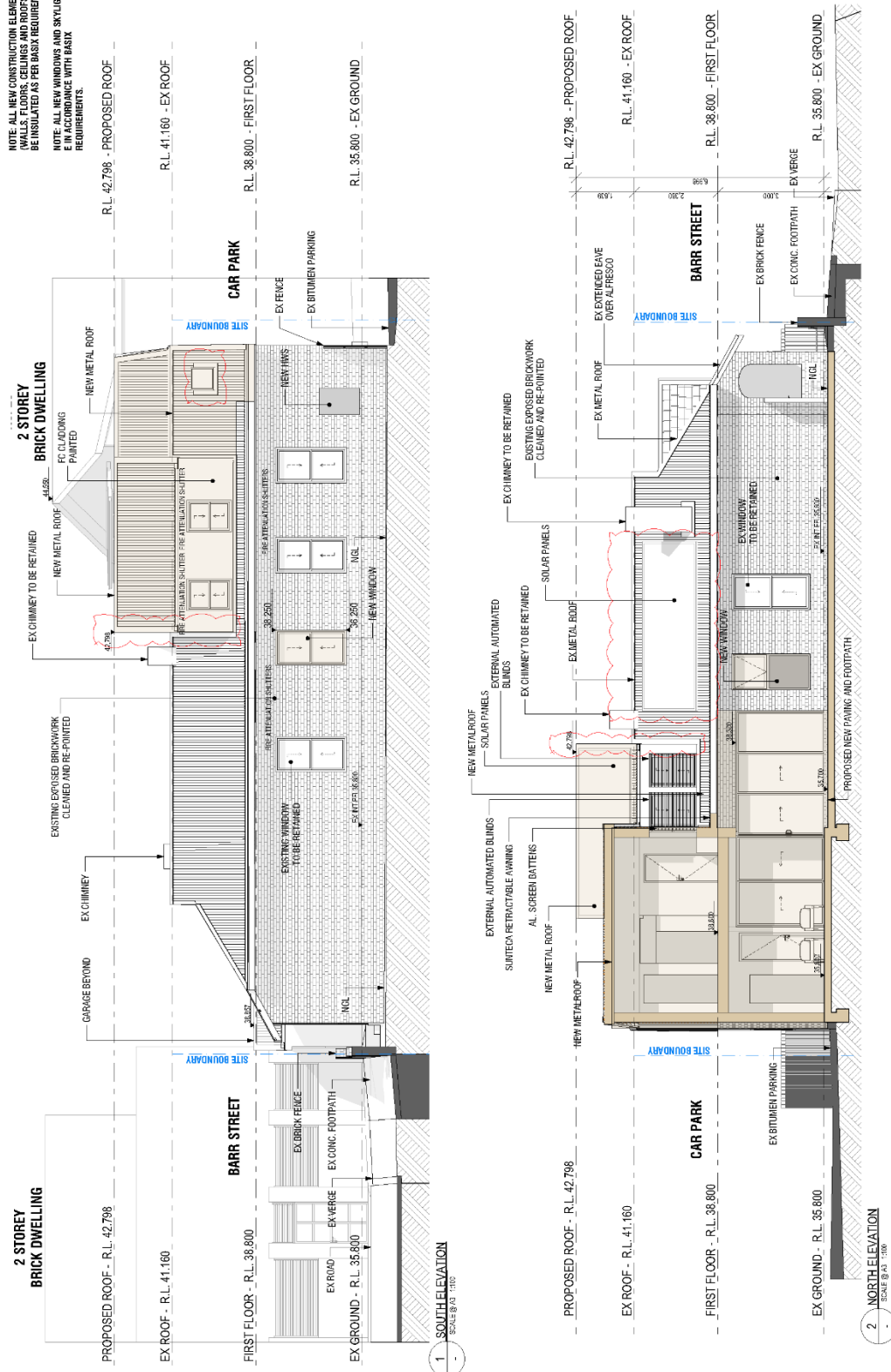
EXISTING WORKS
 EXISTING WORKS

EXISTING MATERIALS
 EXISTING MATERIALS
PROPOSED WORKS
 PROPOSED WORKS

NO.	DESCRIPTION	DATE
A	PRELIMINARY PERMIT	14.03.2020
B	DEVELOPMENT APPLICATION	16.03.2020
C	DEVELOPMENT APPLICATION	07.08.2020

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NOTE: ALL NEW CONSTRUCTION ELEMENTS (WALLS & FLOORS, CEILINGS AND ROOFS) TO BE INSULATED AS PER BASIX REQUIREMENTS.
NOTE: ALL NEW WINDOWS AND SKYLIGHTS TO BE IN ACCORDANCE WITH BASIX REQUIREMENTS.



202

DEVELOPMENT APPLICATION
21 Barr Street, Parramatta NSW 2151 AT
WALDEN AND CARA CARROLL CLIENT
2022 403 300
888 006 1111 (TOLL FREE)
D.M.A. ARCH

LOWBARDO DESIGN STUDIO
10/10 New Year Drive, Parramatta NSW 2151
1. 004 716 644
2. 02 9610 0000

A3
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0 1 2 3 4 5M

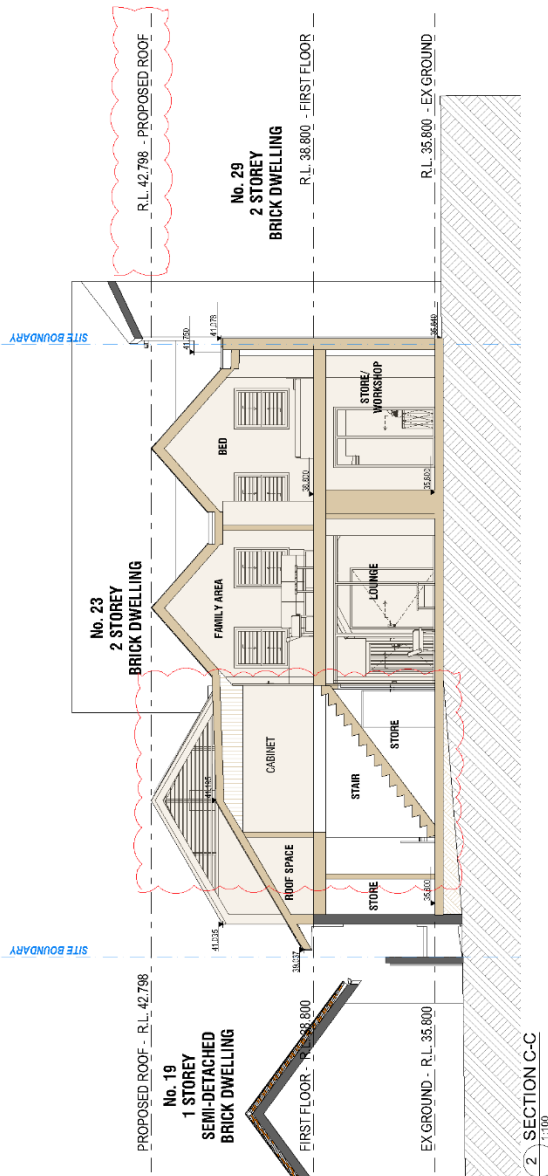
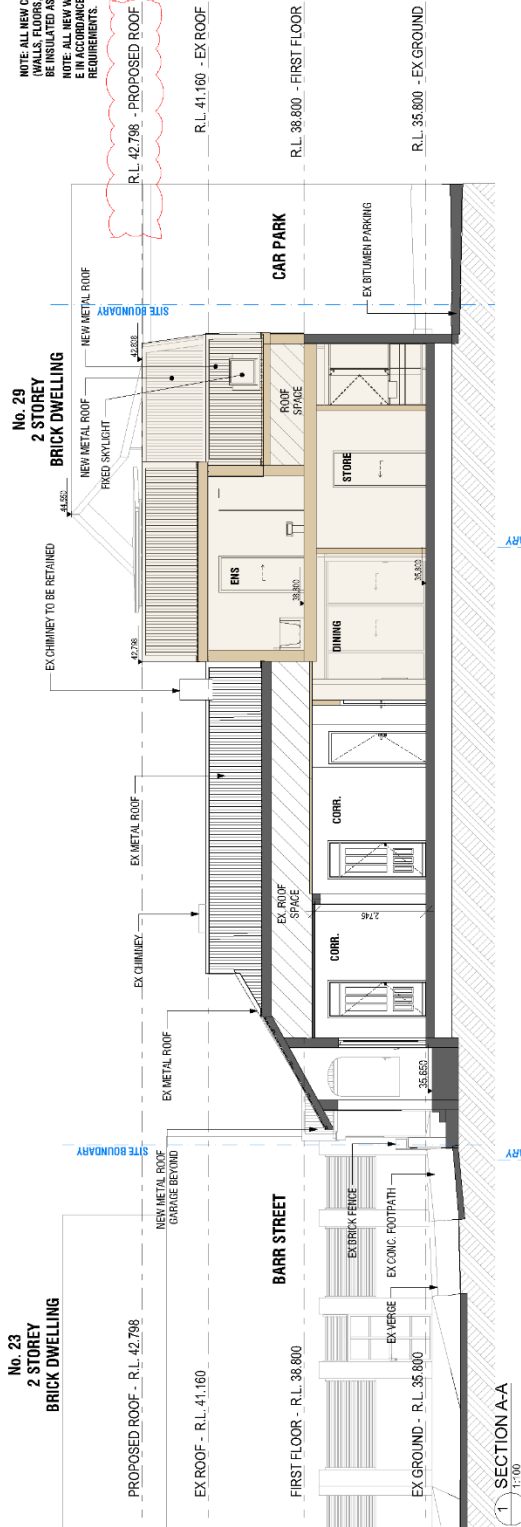
PROPOSED WORKS
EXISTING

USE MATERIALLY
DIFFERENT
PROPOSED WORKS
PROPOSED WORKS

N.I.	APPROVED MATERIAL	DATE
A	FINISH (INTERNAL WALLS, CEILING)	14.03.2022
B	FINISH (EXTERNAL WALLS, CARPORT)	16.03.2022
C	FINISH (EXTERNAL WALLS, CARPORT)	07.08.2022

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NOTE: ALL NEW WINDOWS AND SKYLIGHTS TO BE IN ACCORDANCE WITH BASIX REQUIREMENTS.



1:100
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N.I.	APPROVED DETAIL	DATE
A	FINAL (FINAL PLAN, COLL.)	14.02.2023
B	FINAL (FINAL PLAN, COLL.)	16.03.2023
C	FINAL (FINAL PLAN, COLL.)	07.08.2023

EXISTING WALLS
OPEN SPACES
PROPOSED WORKS

PROPOSED WORKS
EXISTING WORKS

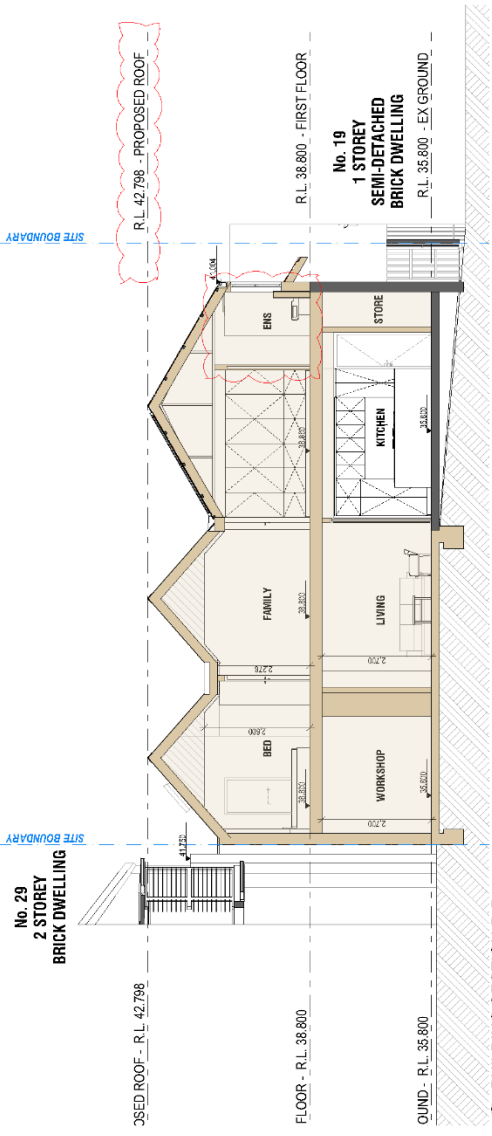
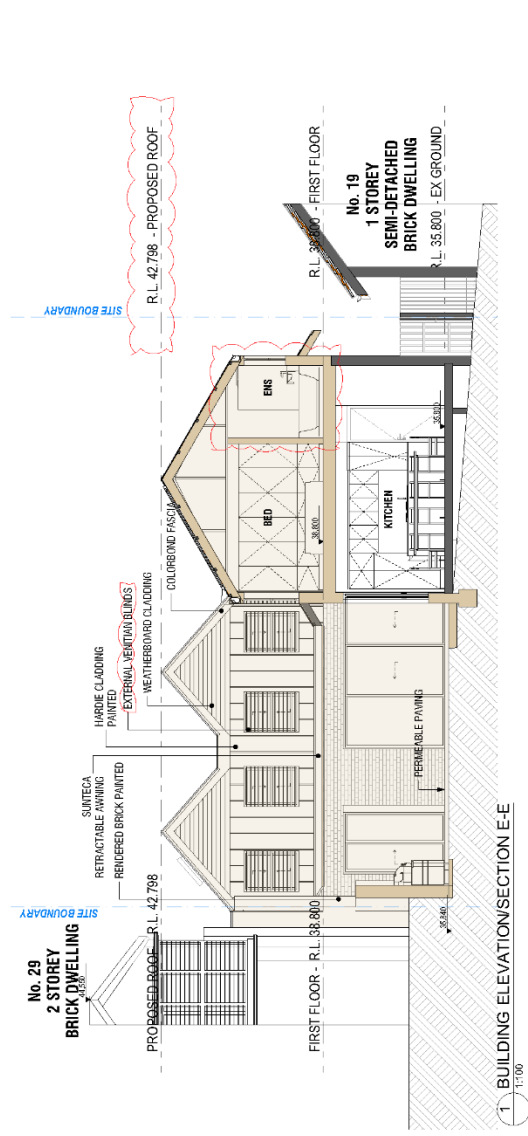
A3
1:100
0 1 2 3 4 5M

LOMBARDO DESIGN STUDIO
11/111 New St, Surry Hills NSW 2019
P: 02 9234 7844 E: info@lombardodesign.com.au

DEVELOPMENT APPLICATION
21 Barr Street, Parramatta NSW 2124 AT
WARRICK AND CARA WARRICK SELECT
2022 A33/202
SHIRAZEE SEC 34.1.1 (B)C1

301

NOTE: ALL NEW CONSTRUCTION ELEMENTS (WALLS, FLOORS, CEILINGS AND ROOFS) TO BE INSULATED AS PER BASIX REQUIREMENTS.
NOTE: ALL NEW WINDOWS AND SKYLIGHTS TO BE IN ACCORDANCE WITH BASIX REQUIREMENTS.



1 BUILDING ELEVATION SECTION E-E
1:100

2 BUILDING SECTION D-D
1:100

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NO.	REVISION/DETAIL	DATE
A	FINAL DESIGN	14.03.2023
B	DESIGN DEVELOPMENT	16.03.2023
C	DESIGN DEVELOPMENT	07.04.2023

EXISTING WALLS
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A3
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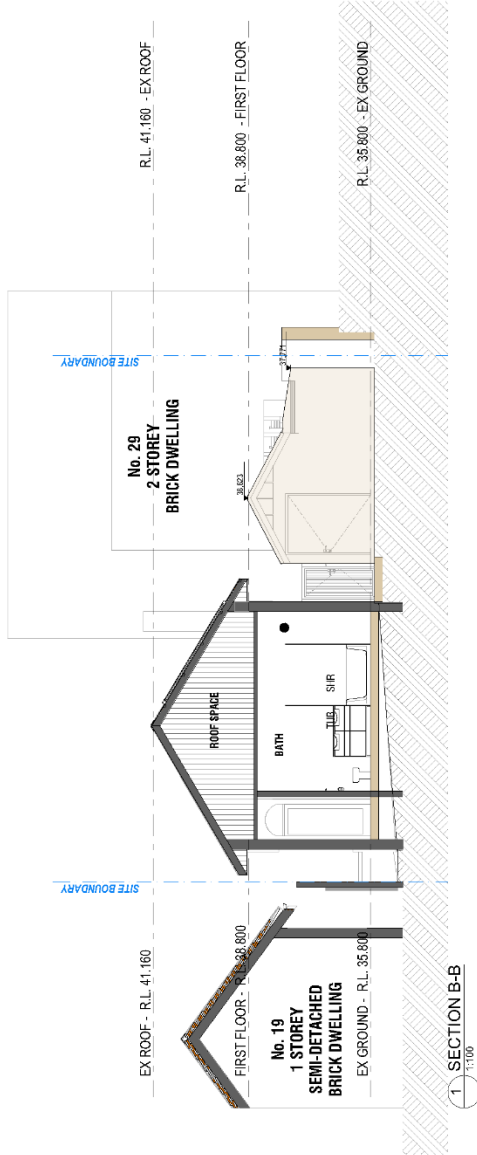
LOMBARDO DESIGN STUDIO
11/111 New St, Surry Hills NSW 2019
T: 02 9550 7828 E: info@lombardodesign.com.au

DEVELOPMENT APPLICATION
21 BARR STREET, SURRY HILLS NSW 2019 AT
WARRICK AND CARA WARRICK CLIENT
2023 A33.03
L1: 02/24/2023
BIMBONES SEC 54.1.1 (B3)

302

NOTE: ALL NEW CONSTRUCTION ELEMENTS (WALLS, FLOORS, CEILINGS AND ROOFS) TO BE INSULATED AS PER BASIX REQUIREMENTS.

NOTE: ALL NEW WINDOWS AND SKYLIGHTS TO BE IN ACCORDANCE WITH BASIX REQUIREMENTS.



1:100
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NO.	DATE	DESCRIPTION
A	16.03.2023	PRELIMINARY DESIGN
B	16.03.2023	PRELIMINARY DESIGN
C	07.08.2023	PRELIMINARY DESIGN

EXISTING WALLS
OPEN SPACES
PROPOSED WORKS
PROPOSED WORKS

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A3
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0 1 2 3 4 5M

LOMBARDO DESIGN STUDIO
11/111 New St, Sydney NSW 2011
T: 02 9251 1111 E: info@lombardodesign.com.au

DEVELOPMENT APPLICATION
21/341 Street, Parramatta NSW 2124 AT
WARDEN AND CARRAMBAH SELECT
2022 A33 A33
BIMBERG SEC 24.1.1 (B3)

303

Attachment C - Clause 4.6 Exception to Development Standards – Landscaped Area

Attachment 1

30th June 2022

Updated clause 4.6 variation - Landscaped areas for residential accommodation in Zone R1 (clause 4.3A(3)(a)(ii) LLEP 2013 – Landscaped area)

**Alterations and additions to an existing dwelling
21 Barr Street, Balmain**

1.0 Introduction

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

This clause 4.6 variation request has been prepared on the basis of the following plans prepared by Lombardo Design Studio:

DRAWING LIST			
DRAWING NO.	DRAWING NAME	REV. NO.	REV. DATE.
001	COVER PAGE	C	02.06.2022
002	SURVEY PLAN	C	02.06.2022
051	GROUND FLOOR DEMO PLAN	C	02.06.2022
052	ROOF PLAN DEMO	C	02.06.2022
100	SITE PLAN	C	02.06.2022
101	GROUND FLOOR PLAN	C	02.06.2022
102	FIRST FLOOR PLAN	C	02.06.2022
103	ROOF PLAN	C	02.06.2022
104	LANDSCAPING PLAN	C	02.06.2022
201	BUILDING ELEVATIONS	C	02.06.2022
202	BUILDING ELEVATIONS	C	02.06.2022
301	BUILDING SECTIONS	C	02.06.2022
302	BUILDING SECTIONS	C	02.06.2022
303	BUILDING SECTIONS	C	02.06.2022
901	FSR CALCULATIONS	C	02.06.2022
902	TRAFFIC MANAGEMENT PLAN	C	02.06.2022
903	3D VIEWS	C	02.06.2022
904	3D VIEWS	C	02.06.2022

2.0 Leichhardt Local Environmental Plan 2013 (LLEP)

2.1 Clause 4.3A(3)(a)(ii) – Landscaped area

Pursuant to Clause 4.3A(3)(a)(ii) of LLEP development consent must not be granted to development to which this clause applies unless the development includes landscaped area that comprises at least 20% of the site area.

The stated objectives of this standard are as follows:

- (a) *to provide landscaped areas that are suitable for substantial tree planting and for the use and enjoyment of residents,*
- (b) *to maintain and encourage a landscaped corridor between adjoining properties,*
- (c) *to ensure that development promotes the desired future character of the neighbourhood,*
- (d) *to encourage ecologically sustainable development by maximising the retention and absorption of surface drainage water on site and by minimising obstruction to the underground flow of water,*
- (e) *to control site density,*
- (f) *to limit building footprints to ensure that adequate provision is made for landscaped areas and private open space.*

landscaped area means a part of a site used for growing plants, grasses and trees, but does not include any building, structure or hard paved area.

The development has a landscaped area, as defined, of 42.93m² representing 15.9% of the site area and therefore non-compliant with the standard by 10.85m² or 20.1%. We note that although not in accordance with the landscaped area definition that an additional 28.19m² of site area is permeable paving which provides for the absorption of surface drainage water on-site.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of LLEP provides:

- (1) *The objectives of this clause are:*
 - (a) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*
 - (b) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of LLEP provides:

- (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.*

This clause applies to the clause 4.3A(3)(a)(ii) LLEP landscaped area development standard.

Clause 4.6(3) of LLEP provides:

- (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.*

The proposed development does not comply with the landscape area provision at 4.3A(3)(a)(ii) of LLEP which specifies a minimum landscaped area however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of LLEP provides:

- (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 Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 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 development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b). The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 20-2020 issued on 5th 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.

Clause 4.6(5) of LLEP provides:

- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Clause 4.6(6) relates to subdivision and is not relevant to the development.

Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3A(3)(a)(ii) of LLEP from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. *The first and 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: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*

20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3A(3)(a)(ii) of LLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:
 - (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3A(3)(a)(ii) and the objectives for development in the zone?
4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?

5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for the development that contravenes clause 4.3A(3)(a)(ii) of LLEP?

4.0 Request for variation

4.1 Is clause 4.3A(3)(a)(ii) of LLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3A(3)(a)(ii) LLEP prescribes a minimum landscaped area provision that relates to certain development. Accordingly, clause 4.3A(3)(a)(ii) LLEP is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the landscape area standard

The objectives of Clause 4.3A(3)(a)(ii) of LLEP with an explanation of how each of those objectives is achieved is set out below:

- (a) *to provide landscaped areas that are suitable for substantial tree planting and for the use and enjoyment of residents,*

Response: The existing centrally located private open space courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use and enjoyment of residents. The adjacent covered deck provides weather protection and facilitates the all-weather use and enjoyment of the central courtyard private open space area. This objective is satisfied notwithstanding the numerical non-compliance.

- (b) *to maintain and encourage a landscaped corridor between adjoining properties,*

Response: The existing landscaped corridor between the subject site and adjoining development to the north is maintained. This objective is satisfied notwithstanding the numerical non-compliance.

(c) to ensure that development promotes the desired future character of the neighbourhood,

Response: The subject site is located within The Valley "Balmain" Distinctive Neighbourhood as depicted within Part C of Leichhardt Development Control Plan 2013. The controls that reflect the desired future character of the neighbourhood in relation to landscaping are as follows:

C2 Preserve the established streetscape with regard to setbacks, street trees and general lack of driveway crossings.

Response: The existing street tree is retained and protected.

C11 Preserve and promote the establishment of trees in front gardens as these contribute significantly to streetscape amenity.

Response: There is no ability to establish tree plantings in the front garden of the existing property however the existing street tree is retained and protected.

C12 Preserve and integrate natural rocky outcrops into the landscaping of the area, particularly where visible from public places. Cutting into rockface for any purposes including driveway crossings are to be avoided.

Response: The proposal does not disturb any natural rocky outcrops or rockfaces.

C21 Where structures are proposed to be built on top of exposed rock face, they are to be rendered masonry and are to be coloured to complement the sandstone.

Response: The proposal does not disturb any natural rocky outcrops or rockfaces.

Having given consideration to the relevant objectives and controls within The Valley "Balmain" Distinctive Neighbourhood I am satisfied that this objective is satisfied notwithstanding the numerical non-compliance.

(d) to encourage ecologically sustainable development by maximising the retention and absorption of surface drainage water on site and by minimising obstruction to the underground flow of water,

Response: The proposed works include the provision of rainwater tanks which will increase the retention of stormwater on the site. The provision of a single well dimension deep soil landscaped area maximises the retention and absorption of surface drainage water on site. Further, as the proposal requires minimal excavation the proposal minimises obstruction to the underground flow of water.

We note that although not in accordance with the landscaped area definition that an additional 28.19m² of site area is permeable paving which provides for the absorption of surface drainage water on-site.

This objective is satisfied notwithstanding the numerical non-compliance.

(e) to control site density,

Response: The application proposes a Gross Floor Area (GFA)/ FSR well below the maximum prescribed for development on land with proposed works generally maintain the established building footprint surrounding a centrally located private open space courtyard area.

This objective is satisfied notwithstanding the numerical non-compliance.

(f) to limit building footprints to ensure that adequate provision is made for landscaped areas and private open space.

Response: The existing centrally located private open space courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use and enjoyment of residents. The adjacent covered deck provides weather protection and facilitates the all-weather use and enjoyment of the central courtyard private open space area. This objective is satisfied notwithstanding the numerical non-compliance.

This objective is satisfied notwithstanding the numerical non-compliance.

Consistency with zone objectives

The subject site is zoned R1 General Residential pursuant to the provisions of LLEP. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community.*

Response: The application proposes legitimate alterations and additions to the existing dwelling house which provides for the housing needs of the community. This objective is achieved notwithstanding the landscaped area variation sought.

- *To provide for a variety of housing types and densities.*

Response: The application proposes legitimate alterations and additions to the existing dwelling house providing for the retention of a low density housing form within the zone. This objective is achieved notwithstanding the landscaped area variation sought.

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

Response: N/A

- *To improve opportunities to work from home.*

Response: The additional floor space will improve opportunities to work from home. This objective is achieved notwithstanding the landscaped area variation sought.

- *To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.*

Response: The resultant building form is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes and works with the maintenance of an appropriately sized and dimensioned area of landscaping not compromising the developments consistency with this objective. This objective is achieved notwithstanding the landscaped area variation sought.

- *To provide landscaped areas for the use and enjoyment of existing and future residents.*

Response: The existing centrally located private open space courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use and enjoyment of residents. The adjacent covered deck provides weather protection and facilitates the all-weather use and enjoyment of the central courtyard private open space area. This objective is achieved notwithstanding the landscaped area variation sought.

- *To ensure that subdivision creates lots of regular shapes that are complementary to, and compatible with, the character, style, orientation and pattern of the surrounding area.*

Response: Not applicable as no subdivision is proposed.

- *To protect and enhance the amenity of existing and future residents and the neighbourhood.*

Response: The maintenance of an appropriately sized and dimensioned landscape private open space area will protect and enhance the amenity of existing and future residents and will not compromise the amenity of adjoining properties. This objective is achieved notwithstanding the landscaped area variation sought.

The proposed development achieves the stated objectives of the zone. As the development achieves the objectives of the landscaped area standard it follows that the development is also consistent with those objectives. It follows that the development is in the public interest because it is consistent with the objectives of the landscaped area standard and the objectives of the R1 General Residential zone.

4.2B Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] & [87] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*

24. *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].

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.

Sufficient environmental planning grounds

Sufficient environmental planning grounds exist to justify the variation to the landscaped area/site coverage standard. Those grounds are as follows:

Ground 1

Objective 1.3(c) of the EP& Act is:

“to promote the orderly and economic use and development of land,”

Compliance with the development standard would require the removal of the permeable paving from the central courtyard and its replacement with lawn. This would compromise the amenity of the central courtyard area by removing an all-weather surface able to accommodate tables and chairs without any betterment in terms of achieving the objectives of the standard.

Such outcome would not represent the orderly development of the land and would be inconsistent with (and would tend to hinder the achievement of) objective 1.3(c).

Ground 2

Objective 1.3(g) of the EP&A Act is:

“to promote good design and amenity of the built environment,”

As outlined above, the permeable paving provides for the all-weather use of the centrally located private open space area. Such outcome is consistent with objective 1.3(g) of the EP&A Act as it results in a building that promotes good design and amenity of the built environment.

For the above reasons there are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3A(3)(a)(ii) and the objectives of the R1 General Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

"The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it 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. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."

As demonstrated in this request, the proposed development 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.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Secretary's concurrence

By Planning Circular dated 5th May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a landscaped area variation in this instance.

Boston Blyth Fleming Pty Limited



Greg Boston
B Urb & Reg Plan (UNE) MPIA
Director

Attachment D – Clause 4.6 Exception to Development Standards – Site Coverage

Attachment 2

**Updated clause 4.6 variation - Landscape areas for residential accommodation in Zone R1 (clause 4.3A(3)(b) LLEP 2013 – Site coverage)
Alterations and additions to an existing dwelling
21 Barr Street, Balmain**

1.0 Introduction

This clause 4.6 variation request has been prepared on the basis of the following plans prepared by Lombardo Design Studio:

DRAWING LIST			
DRAWING NO.	DRAWING NAME	REV. NO.	REV. DATE.
001	COVER PAGE	C	02.06.2022
002	SURVEY PLAN	C	02.06.2022
051	GROUND FLOOR DEMO PLAN	C	02.06.2022
052	ROOF PLAN DEMO	C	02.06.2022
100	SITE PLAN	C	02.06.2022
101	GROUND FLOOR PLAN	C	02.06.2022
102	FIRST FLOOR PLAN	C	02.06.2022
103	ROOF PLAN	C	02.06.2022
104	LANDSCAPING PLAN	C	02.06.2022
201	BUILDING ELEVATIONS	C	02.06.2022
202	BUILDING ELEVATIONS	C	02.06.2022
301	BUILDING SECTIONS	C	02.06.2022
302	BUILDING SECTIONS	C	02.06.2022
303	BUILDING SECTIONS	C	02.06.2022
901	FSR CALCULATIONS	C	02.06.2022
902	TRAFFIC MANAGEMENT PLAN	C	02.06.2022
903	3D VIEWS	C	02.06.2022
904	3D VIEWS	C	02.06.2022

This clause 4.6 variation has been prepared having regard to the Land and Environment Court judgements in the matters of *Wehbe v Pittwater Council* [2007] NSWLEC 827 (*Wehbe*) at [42] – [48], *Four2Five Pty Ltd v Ashfield Council* [2015] NSWCA 248, *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

2.0 Leichhardt Local Environmental Plan 2013 (LLEP)

2.1 Clause 4.3A(3)(b) – Site coverage

Pursuant to Clause 4.3A(3)(b) of Leichhardt Local Environmental Plan 2013 (LLEP) development consent must not be granted to development to which this clause applies unless the site coverage does not exceed 60% of the site area.

The stated objectives of this standard are as follows:

- (a) *to provide landscaped areas that are suitable for substantial tree planting and for the use and enjoyment of residents,*
- (b) *to maintain and encourage a landscaped corridor between adjoining properties,*
- (c) *to ensure that development promotes the desired future character of the neighbourhood,*
- (d) *to encourage ecologically sustainable development by maximising the retention and absorption of surface drainage water on site and by minimising obstruction to the underground flow of water,*
- (e) *to control site density,*
- (f) *to limit building footprints to ensure that adequate provision is made for landscaped areas and private open space.*

Site coverage means the proportion of a site area covered by buildings. However, the following are not included for the purpose of calculating site coverage—

- (a) *any basement,*
- (b) *any part of an awning that is outside the outer walls of a building and that adjoins the street frontage or other site boundary,*
- (c) *any eaves,*
- (d) *unenclosed balconies, decks, pergolas and the like.*

The development results in a total site coverage, as defined, of 144.1m² representing 71.3% of the site area and therefore non-compliant with the standard by 30.47m² or 18.8%.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of LLEP provides:

- (1) *The objectives of this clause are:*
 - (c) *to provide an appropriate degree of flexibility in applying certain development standards to particular development, and*

- (d) *to achieve better outcomes for and from development by allowing flexibility in particular circumstances.*

The decision of Chief Justice Preston in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (“Initial Action”) provides guidance in respect of the operation of clause 4.6 subject to the clarification by the NSW Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [1], [4] & [51] where the Court confirmed that properly construed, a consent authority has to be satisfied that an applicant’s written request has in fact demonstrated the matters required to be demonstrated by cl 4.6(3).

Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner.

At [90] of *Initial Action* the Court held that:

“In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.”

The legal consequence of the decision in *Initial Action* is that clause 4.6(1) is not an operational provision and that the remaining clauses of clause 4.6 constitute the operational provisions.

Clause 4.6(2) of LLEP provides:

- (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.*

This clause applies to the clause 4.3A(3)(b) LLEP site coverage development standard.

Clause 4.6(3) of LLEP provides:

- (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.*

The proposed development does not comply with the site coverage provision at 4.3A(3)(b) of LLEP which specifies a maximum site coverage however strict compliance is considered to be unreasonable or unnecessary in the circumstances of this case and there are considered to be sufficient environmental planning grounds to justify contravening the development standard.

The relevant arguments are set out later in this written request.

Clause 4.6(4) of LLEP provides:

- (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 Director-General has been obtained.*

In *Initial Action* the Court found that clause 4.6(4) required the satisfaction of two preconditions ([14] & [28]). The first precondition is found in clause 4.6(4)(a). That precondition requires the formation of two positive opinions of satisfaction by the consent authority. The first positive opinion of satisfaction (cl 4.6(4)(a)(i)) is that the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3)(a)(i) (*Initial Action* at [25]).

The second positive opinion of satisfaction (cl 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 development standard and the objectives for development of the zone in which the development is proposed to be carried out (*Initial Action* at [27]). The second precondition is found in clause 4.6(4)(b).

The second precondition requires the consent authority to be satisfied that that the concurrence of the Secretary (of the Department of Planning and the Environment) has been obtained (*Initial Action* at [28]).

Under cl 64 of the *Environmental Planning and Assessment Regulation 2000*, the Secretary has given written notice dated 5th May 2020, attached to the Planning Circular PS 20-2020 issued on 5th 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.

Clause 4.6(5) of LLEP provides:

- (5) *In deciding whether to grant concurrence, the Director-General 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 Director-General before granting concurrence.*

Clause 4.6(6) relates to subdivision and is not relevant to the development.

Clause 4.6(7) is administrative and requires the consent authority to keep a record of its assessment of the clause 4.6 variation. Clause 4.6(8) is only relevant so as to note that it does not exclude clause 4.3A(3)(b) of LLEP from the operation of clause 4.6.

3.0 Relevant Case Law

In *Initial Action* the Court summarised the legal requirements of clause 4.6 and confirmed the continuing relevance of previous case law at [13] to [29]. In particular the Court confirmed that the five common ways of establishing that compliance with a development standard might be unreasonable and unnecessary as identified in *Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827* continue to apply as follows:

17. *The first and 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: Wehbe v Pittwater Council at [42] and [43].*
18. *A second way is to establish that the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary: Wehbe v Pittwater Council at [45].*
19. *A third way is to establish that the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable: Wehbe v Pittwater Council at [46].*
20. *A fourth way is to establish that the development standard has been virtually abandoned or destroyed by the Council's own decisions in granting development consents that depart from the standard and hence compliance with the standard is unnecessary and unreasonable: Wehbe v Pittwater Council at [47].*
21. *A fifth way is to establish that the zoning of the particular land on which the development is proposed to be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstances of the case would also be unreasonable or unnecessary: Wehbe v Pittwater Council at [48]. However, this fifth way of establishing that compliance with the development standard is unreasonable or unnecessary is limited, as explained in Wehbe v Pittwater Council at [49]-[51]. The power under cl 4.6 to dispense with compliance with the development standard is not a general planning power to determine the appropriateness of the development standard for the zoning or to effect general planning changes as an alternative to the strategic planning powers in Part 3 of the EPA Act.*
22. *These five ways are not exhaustive of the ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary; they are merely the most commonly invoked ways. An applicant does not need to establish all of the ways. It may be sufficient to establish only one way, although if more ways are applicable, an applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way.*

The relevant steps identified in *Initial Action* (and the case law referred to in *Initial Action*) can be summarised as follows:

1. Is clause 4.3A(3)(b) of LLEP a development standard?
2. Is the consent authority satisfied that this written request adequately addresses the matters required by clause 4.6(3) by demonstrating that:

- (a) compliance is unreasonable or unnecessary; and
 - (b) there are sufficient environmental planning grounds to justify contravening the development standard
3. Is the consent authority satisfied that the proposed development will be in the public interest because it is consistent with the objectives of clause 4.3A(3)(b) and the objectives for development in the zone?
 4. Has the concurrence of the Secretary of the Department of Planning and Environment been obtained?
 5. Where the consent authority is the Court, has the Court considered the matters in clause 4.6(5) when exercising the power to grant development consent for development that contravenes clause 4.3A(3)(b) of LLEP?

4.0 Request for variation

4.1 Is clause 4.3A(3)(b) of LLEP a development standard?

The definition of “development standard” at clause 1.4 of the EP&A Act includes:

- (c) *the character, location, siting, bulk, scale, shape, size, height, density, design or external appearance of a building or work,*

Clause 4.3A(3)(b) LLEP prescribes a maximum site coverage provision that relates to certain development. Accordingly, clause 4.3A(3)(b) LLEP is a development standard.

4.2A Clause 4.6(3)(a) – Whether compliance with the development standard is unreasonable or unnecessary

The common approach for an applicant to demonstrate that compliance with a development standard is unreasonable or unnecessary are set out in *Wehbe v Pittwater Council* [2007] NSWLEC 827.

The first option, which has been adopted in this case, is to establish that compliance with the development standard is unreasonable and unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

Consistency with objectives of the site coverage standard

The objectives of Clause 4.3A(3)(b) of LLEP with an explanation of how each of those objectives is achieved is set out below:

- (a) *to provide landscaped areas that are suitable for substantial tree planting and for the use and enjoyment of residents,*

Response: The existing centrally located private open space courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use and enjoyment of residents. The adjacent covered deck provides weather protection and facilitates the all-weather use and enjoyment of the central courtyard private open space area. This objective is satisfied notwithstanding the numerical non-compliance.

(b) to maintain and encourage a landscaped corridor between adjoining properties,

Response: The existing landscaped corridor between the subject site and adjoining development to the north is maintained. This objective is satisfied notwithstanding the numerical non-compliance.

(c) to ensure that development promotes the desired future character of the neighbourhood,

Response: The subject site is located within The Valley "Balmain" Distinctive Neighbourhood as depicted within Part C of Leichhardt Development Control Plan 2013. The controls that reflect the desired future character of the neighbourhood in relation to landscaping are as follows:

C2 Preserve the established streetscape with regard to setbacks, street trees and general lack of driveway crossings.

Response: The existing street tree is retained and protected.

C11 Preserve and promote the establishment of trees in front gardens as these contribute significantly to streetscape amenity.

Response: There is no ability to establish tree plantings in the front garden of the existing property however the existing street tree is retained and protected.

C12 Preserve and integrate natural rocky outcrops into the landscaping of the area, particularly where visible from public places. Cutting into rockface for any purposes including driveway crossings are to be avoided.

Response: The proposal does not disturb any natural rocky outcrops or rockfaces.

C21 Where structures are proposed to be built on top of exposed rock face, they are to be rendered masonry and are to be coloured to complement the sandstone.

Response: The proposal does not disturb any natural rocky outcrops or rockfaces.

Having given consideration to the relevant objectives and controls within The Valley "Balmain" Distinctive Neighbourhood I am satisfied that this objective is satisfied notwithstanding the numerical non-compliance.

(d) to encourage ecologically sustainable development by maximising the retention and absorption of surface drainage water on site and by minimising obstruction to the underground flow of water,

Response: The proposed works include the provision of rainwater tanks which will increase the retention of stormwater on the site. The provision of a single well dimension deep soil landscaped area maximises the retention and absorption of surface drainage water on site. Finally, as the proposal requires minimal excavation the proposal minimises obstruction to the underground flow of water.

This objective is satisfied notwithstanding the numerical non-compliance.

(e) to control site density,

Response: The application proposes a Gross Floor Area (GFA)/ FSR well below the maximum prescribed for development on land with proposed works generally maintain the established building footprint surrounding a centrally located private open space courtyard area.

This objective is satisfied notwithstanding the numerical non-compliance.

(f) to limit building footprints to ensure that adequate provision is made for landscaped areas and private open space.

Response: The existing centrally located private open space courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use and enjoyment of residents. The adjacent covered deck provides weather protection and facilitates the all-weather use and enjoyment of the central courtyard private open space area. This objective is satisfied notwithstanding the numerical non-compliance.

This objective is satisfied notwithstanding the numerical non-compliance.

Consistency with zone objectives

The subject site is zoned R1 General Residential pursuant to the provisions of LLEP. The stated objectives of the zone are as follows:

- *To provide for the housing needs of the community.*

Response: The application proposes legitimate alterations and additions to the existing dwelling house which provides for the housing needs of the community. This objective is achieved notwithstanding the landscaped area/ site coverage variation sought.

- *To provide for a variety of housing types and densities.*

Response: The application proposes legitimate alterations and additions to the existing dwelling house providing for the retention of a low density housing form within the zone. This objective is achieved notwithstanding the landscaped area/ site coverage variation sought.

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

Response: N/A

- *To improve opportunities to work from home.*

Response: The additional floor space will improve opportunities to work from home. This objective is achieved notwithstanding the landscaped area/ site coverage variation sought.

- *To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.*

Response: The resultant building form is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes and works with the maintenance of an appropriately sized and dimensioned area of landscaping not compromising the developments consistency with this objective. This objective is achieved notwithstanding the landscaped area/ site coverage variation sought.

- *To provide landscaped areas for the use and enjoyment of existing and future residents.*

Response: The existing centrally located private open space courtyard area is retained with the size and dimension of this space suitable for substantial tree planting and for the use and enjoyment of residents. The adjacent covered deck provides weather protection and facilitates the all-weather use and enjoyment of the central courtyard private open space area. This objective is achieved notwithstanding the landscaped area/ site coverage variation sought.

- *To ensure that subdivision creates lots of regular shapes that are complementary to, and compatible with, the character, style, orientation and pattern of the surrounding area.*

Response: Not applicable as no subdivision is proposed.

- *To protect and enhance the amenity of existing and future residents and the neighbourhood.*

Response: The maintenance of an appropriately sized and dimensioned landscape private open space area will protect and enhance the amenity of existing and future residents and will not compromise the amenity of adjoining properties. This objective is achieved notwithstanding the landscaped area/ site coverage variation sought.

The proposed development achieves the stated objectives of the zone.

As the development achieves the objectives of the landscaped area/ site coverage standard it follows that the development is also consistent with those objectives. It follows that the development is in the public interest because it is consistent with the objectives of the landscaped area/ site coverage standard and the objectives of the R1 General Residential zone.

4.2B Clause 4.6(4)(b) – Are there sufficient environmental planning grounds to justify contravening the development standard?

In Initial Action the Court found at [23]-[24] & [87] that:

23. *As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.*
24. *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].

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.*

Sufficient environmental planning grounds

Sufficient environmental planning grounds exist to justify the variation to the landscaped area/ site coverage standard. Those grounds are as follows:

Ground 1

Objective 1.3(c) of the EP& Act is:

"to promote the orderly and economic use and development of land,"

Compliance with the development standard would require the removal of the 30.47m² of building footprint which, given the compliant nature of the FSR proposed, would significantly compromise the amenity of the development and not represent the orderly and economic use and development of this particular site.

Such outcome would be inconsistent with (and would tend to hinder the achievement of) objective 1.3(c).

Ground 2

Objective 1.3(g) of the EP&A Act is:

"to promote good design and amenity of the built environment,"

A compliant quantum of floor space has been distributed on this particular site in a contextually appropriate manner with the maintenance of appropriate landscaped area for the retention and establishment of landscaping consistent with the desired future character of the locality of The Valley "Balmain" Distinctive Neighbourhood.

This represents good contextually appropriate design which provides appropriately for the amenity of occupants of the development without giving rise to unreasonable impacts on surrounding development or the built environment. Such outcome is consistent with objective 1.3(g) of the EP&A Act as it results in a building that promotes good design and amenity of the built environment.

For the above reasons there are sufficient environmental planning grounds to justify contravening the development standard.

4.3 Clause 4.6(a)(iii) – Is the proposed development in the public interest because it is consistent with the objectives of clause 4.3A(3)(b) and the objectives of the R1 General Residential zone

The consent authority needs to be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

Preston CJ in Initial Action (Para 27) described the relevant test for this as follows:

“The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it 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. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii).”

As demonstrated in this request, the proposed development 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.

Accordingly, the consent authority can be satisfied that the proposed development will be in the public interest if the standard is varied because it is consistent with the objectives of the standard and the objectives of the zone.

4.4 Secretary’s concurrence

By Planning Circular dated 5th May 2020, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence to clause 4.6 request except in the circumstances set out below:

- Lot size standards for rural dwellings;
- Variations exceeding 10%; and
- Variations to non-numerical development standards.

The circular also provides that concurrence can be assumed when an LPP is the consent authority where a variation exceeds 10% or is to a non-numerical standard, because of the greater scrutiny that the LPP process and determinations are subject to, compared with decisions made under delegation by Council staff.

Concurrence of the Secretary can therefore be assumed in this case.

5.0 Conclusion

Pursuant to clause 4.6(4)(a), the consent authority is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) being:

- (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.*

As such, I have formed the considered opinion that there is no statutory or environmental planning impediment to the granting of a landscaped area/ site coverage variation in this instance.

Boston Blyth Fleming Pty Limited



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Director