





INNER WEST

DEVELOPMENT ASSESSMENT PANEL REPORT

Application No.	DA/2024/0465
Address	10 Mckell Street BIRCHGROVE
Proposal	Alterations and additions to an existing semi-detached dwelling, including partial demolition of existing structures, construction of ground, first and second floor addition
Date of Lodgement	11 June 2024
Applicant	The Trustee for Varley Family Trust
Owner	Mr Patrick Brownrigg Mrs Jennifer E Brownrigg
Number of Submissions	Nil
Cost of works	\$488,840.00
Reason for determination at Planning Panel	Variations to development standards as multi dwelling housing development exceeds Officer delegations
Main Issues	N/A
Recommendation	Approved with Conditions
Attachment A	Recommended conditions of consent
Attachment B	Plans of proposed development
Attachment C	Section 4.6 Exception to Development Standards FSR
Attachment D	Section 4.6 Exception to Development Standards Landscape



LOCALITY MAP

Subject Site		Objectors		↑ N
Notified Area		Supporters		

Note: Due to scale of map, not all objectors could be shown.

1. Executive Summary

This report is an assessment of the application submitted to Council for alterations and additions to an existing semi-detached dwelling, including partial demolition of existing structures, construction of ground, first and second floor addition at 10 Mckell Street Birchgrove.

The application was notified to surrounding properties and no submissions were received in response to notification.

The main issues that have arisen from the application include:

- Variation to prescribed development standards

Clause 4.6 exceptions were submitted to Council to vary the Landscaped Area, Site Coverage and Floor Space Ratio development standards of the *Inner West Environmental Plan 2022*. The non-compliances are acceptable given that the proposal generally complies with the aims and objectives of the *Inner West Local Environmental Plan 2022 (IWLEP 2022)* and the Leichhardt Development Control Plan 2013 (LDCP 2013). The proposal is considered acceptable and recommended for approval

2. Proposal

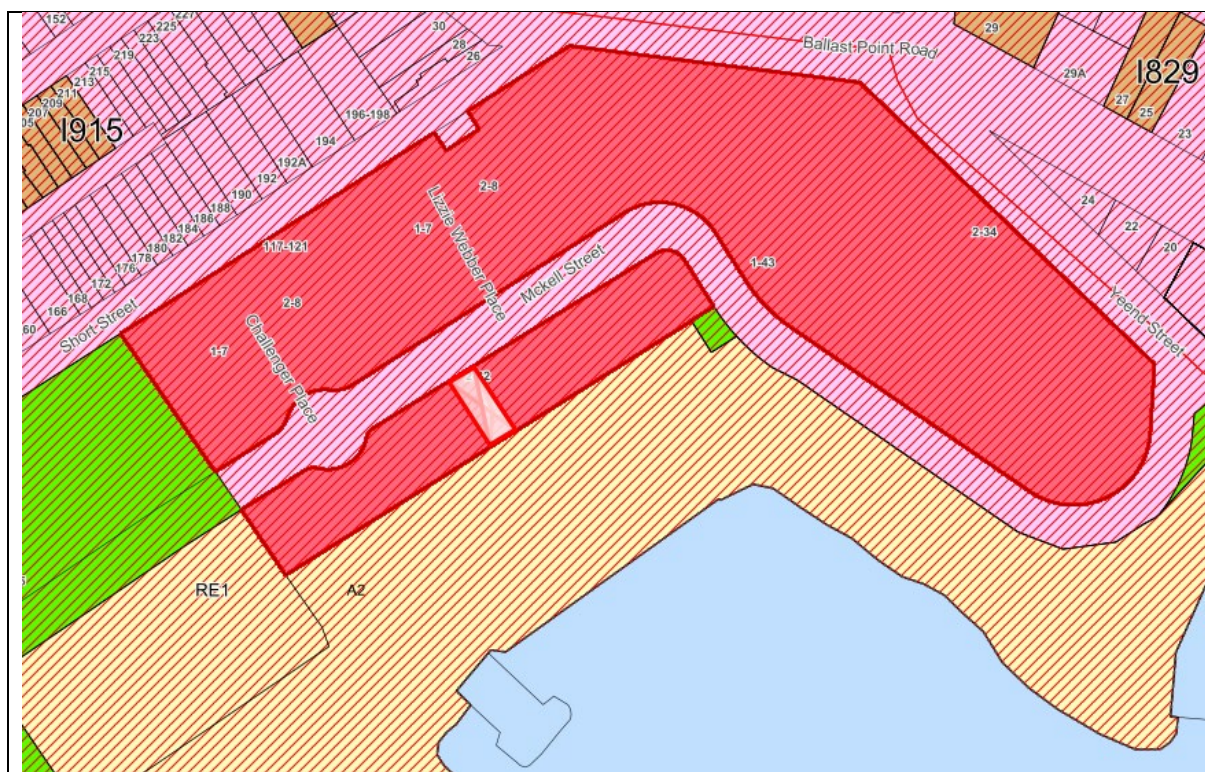
The proposal seeks to carry out alterations and additions to the semi-detached-dwelling as follows:

- Partial demolition of the dwelling, including:
 - Rear portion of the dwelling on the ground floor - demolition of the rear portion of the dwelling with exception of the existing carport, front entry hall, stair, internal wall currently separating the existing laundry and W/C, front patio and alfresco, and external wall for the existing living room.
 - Portion of the roof on the first floor – demolition of the partial first floor with exception of the existing bedrooms, sun room, stairs, and the balcony to the front façade.
 - Portion of the dwelling on the second/attic floor –with exception of the existing bedroom and stairs.
- Ground floor rear alterations and additions located behind the front portion of the dwelling to be mostly retained to provide for:
 - New desk area directly behind the existing front entry area;
 - New wine fridge within the existing garage;
 - Enlarged WC adjacent to the stairs,
 - New Pantry area adjacent to the existing open plan kitchen;
 - New mechanical lift access to existing first and second/attic floor adjacent to the existing stair access; and
 - Enlargement of the existing open plan kitchen, dining and living area with a new fireplace.
- First floor rear alteration and additions to provide for:
 - Enlargement of the existing bathroom behind the bedroom facing the front of the dwelling;
 - New laundry, robe and the enlargement of the bedroom towards the rear of the site and adjacent to the proposed sun room;
 - Conversion of the existing bedroom located behind the stair access to a new sun room with access to the proposed roof top terrace;

- New wall openings eastern elevation wall to provide access to the roof top terrace;
- New roof top terrace towards the north-eastern boundary with a 500mm planter box adjacent to the roof terrace side wall with a 500mm height privacy screen; and
- New balcony to the south-eastern elevation servicing the new bedroom and sun room.
- Second floor alterations and additions to provide for:
 - Conversion of the existing bedroom space to a enusite;
 - New bedroom with robe towards the rear of the dwelling; and
 - New balcony to the south-eastern elevation servicing the new bedroom.
- one (1) x skylight to the front roof plane, and one (1) x skylight to the rear roof plane of the existing roof form of the dwelling;
- two (2) x skylights to the roof plane of the new extension of the Second floor; and
- four (4) solar panels to the exiting and new roof plane of the dwelling.

3. Site Description

The site contains a multi-dwelling residential redevelopment. The whole site was privatised and sold off under the Strata Scheme, 1-43 McKell Street, Birchgrove. The site has an area of 17,230sqm. It occupies the area bound by McKell Street, Yeend Street, Ballast Point Road and Short Street and includes Challenger Place and Lizzie Webber Place.



The specific strata-titled lot (Lot 116 in SP 62555) that is the subject of this application is approximately 273sqm in area and has a frontage of approximately 10 metres to McKell Street. It currently accommodates a three-storey townhouse, with similar townhouses located in the row.

The site is not a heritage item under the *IWLEP 2022*, however it is located within a Heritage Conservation Area. The site is identified as a flood control lot and is zoned R1 General Residential under the Inner West Local Environmental Plan 2022.

4. Background

Site History

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

Subject Site

Application	Proposal	Decision & Date
D/2003/301	Ground, first and second floor alterations and additions to an existing townhouse including a rear deck at first and second floor level.	Approved 30/10/2003
M/2004/205	Modification to development consent D/2003/301 which approved part demolition, additions and alterations to two existing townhouses. Modification includes changes to external openings on ground, first and second floor levels, internal alterations, and change to roof pitch.	Approved 10/12/2004

Surrounding Properties – No. 12 McKell Street

Application	Proposal	Decision & Date
D/2003/300	Ground, first and second floor alterations and additions to an existing townhouse including a rear deck at first and second floor level.	Approved 30/10/2003
DA/2022/0794	Alterations and additions to existing three storey attached dwelling	Approved 14/03/2023

Surrounding Properties – No. 8 McKell Street

Application	Proposal	Decision & Date
D/2003/299	Ground, first and second floor alterations and additions to an existing townhouse including a rear deck at first and second floor level.	Approved 30/10/2003
M/2004/206	Modification of development consent D/2003/299 which gave consent for ground, first and second floor alterations and additions to an existing townhouse including a rear deck at first and second floor level. Modifications include internal re-configuration, alterations to window openings & addition of a skylight above the stairwell.	Approved 02/12/200

Application History

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

Date	Discussion / Letter / Additional Information
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23/09/2024

Request for Further Information correspondence was sent to the applicant requiring amended plans and further information addressing streetscape / heritage and amenity concerns as follows:

1. Heritage Considerations

- The existing palette of materials is to be continued, including the use of manor red and light grey roofing, pale bagged brickwork and live green joinery.
- The brickwork to the side elevation is to match the existing pale coloured bagged brickwork to the side elevation.
- The window hoods to the side elevation are to match the existing detail of the current window hoods to the rear.
- A reduction in the number and scale of the skylights on the front roof plane. Additional small square windows could be provided, continuing the existing façade detail to the upper level. The windows removed from the rear elevation could be reused.
- The terrace balustrade is to match the extended garage to the adjacent townhouse and not include horizontal metal slats.
- The colour of the balustrade to the rear is to be equivalent to Colourbond Pale Eucalypt instead of Basalt.
- No change is to be made to the colour palette of the McKell Street elevations. The doors should be repainted in the existing colour.

2. Visual Privacy

- The first-floor rooftop terrace, located directly adjacent to the eastern strata boundary, is required to incorporate a planter box with a minimum width of 900mm to mitigate potential privacy impacts on No. 8 McKell Street; and
- The two new window openings on the ground floor, associated with the existing Lounge room, are to be deleted.

3. Class 2 Acid Sulphate Soil Management

- Demonstrate the proposal (the lift overrun, and the excavation work) does not impact or disturb the watertable; and
- Provide Council with acid sulphate management plan, which demonstrates the appropriate methods when dealing with acid sulphate soil.

4. Sump Pump on neighbouring property is to be relocated within the property boundary

5. Flood Affected Lot and appropriate flood management

6. Stormwater management

7. Updated architectural plans

8. Amended Shadow Diagrams

9. Revised BASIX

17/10/2024	<p>Amended plans and supporting documentation were received. Amendments carried out included:</p> <ul style="list-style-type: none">• The materials and finishes schedule (all proposed walls, frames, balustrade, and roof) to match with the existing;• The large skylight over the stairwell on the front roof plane deleted;• The terrace balustrade has been amended, the privacy screening to the front elevation deleted;• The proposal has been amended to comprise a 500mm wide planter box along the eastern boundary, but the privacy screen will be retained to satisfy with the relevant National Construction Code and Australian Standard safety requirements;• Proposal includes a non-operable highlight window similar to the existing highlight windows in-lieu of a full height window directly adjacent to the boundary;• Sump Pump over neighbouring property amended to remove works that were encroaching;• Revised Architectural Plans depict Council's stormwater assets. <p>The amended plans were accompanied by:</p> <ul style="list-style-type: none">• Flood Certification obtained, and statement from Engineers relating to Flood Risk Mangement.• A lift specification to confirm there is no excavation for the lift overrun, and the proposal will not impact or disturb the watertable;• Updated shadow diagrams; and• Updated BASIX certificate accompanied the amended plans. <p>Renotification was not required in accordance with Council's Community Engagement Strategy as the amended proposal is considered to have the same or a lesser impact as the original application and were submitted at the request of Council to address submissions or relevant controls and deemed to have no measurable adverse effect on adjoining properties. The amended plans and supporting documentation are the subject of this report.</p>
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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 (EP & A Act 1979)*.

A. Environmental Planning Instruments

The application has been assessed and the following provides a summary of the relevant Environmental Planning Instruments.

State Environmental Planning Policies (SEPPs)

SEPP (Resilience and Hazards) 2021

Chapter 2 Coastal Management

The *Resilience and Hazards SEPP* aims to ensure that future coastal development is appropriate and sensitive to its coastal location and category. The site is categorised as a coastal use area pursuant to Sections 2.10 and 2.11 of the *Resilience and Hazards SEPP* as identified on the maps to the *Resilience and Hazards SEPP*.

However, these specific provisions do not apply to land located within the Foreshores and Waterways Area within the meaning of *State Environmental Planning Policy (Biodiversity and Conservation) 2021*, Chapter 6

In general terms, it is considered that the carrying out of the proposed development is generally consistent with the objectives of the Plan and would not be likely to cause increased risk of coastal hazards on the land or other land.

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.”*

The site has a long history of residential use. Council's Environmental Health Officer has recommended that a standard condition be applied requiring any new information regarding contamination on site be notified to the Principal Certifying Authority and Council – any consent granted will include a condition to this effect.

The proposal, as conditioned, raises no issues that will be contrary to the provisions and objectives of Chapters 2 and 4 of *SEPP (Resilience and Hazards) 2021*.

SEPP (Sustainable Buildings) 2022

The applicant has included a BASIX Certificate as part of the lodgment of the application (lodged within 3 months of the date of the lodgment of this application) in compliance with the *EP & A Regulation 2021*.

SEPP (Biodiversity and Conservation) 2021

Chapter 2 Vegetation in Non-rural Areas

The *Biodiversity and Conservation SEPP* requires consideration for the protection and/or removal of vegetation and gives effect to the local tree preservation provisions of Pat C1.14 - *Tree Management* of the LDCP 2013.

The application does not seek the removal of prescribed trees from within the subject site. However, the construction works will potentially impact on two (2) - *Syagrus romanzoffianum* (Cocos Palm), and one (1) - *Plumeria sp* (Frangipani) located in the rear yard of the site. To ensure the tree to the rear of the dwelling would not be impacted during construction, a standard tree protection condition is recommended to be imposed as part of any consent granted.

Overall, the proposal is considered acceptable with regard to the *Biodiversity and Conservation SEPP* and C1.14 *Tree Management* of the LDCP 2013 subject to the imposition of conditions, which have been included in the recommendation of this report.

Chapter 6 Water Catchments

Section 6.6 under Part 6.2 of the *Biodiversity and Conservation SEPP* provides matters for consideration which apply to the proposal. The subject site is located within the designated hydrological catchment of the Sydney Harbour Catchment and is subject to the provisions contained within Chapter 6 of the above *Biodiversity Conservation SEPP*.

It is considered that the proposal is consistent with the relevant general development controls under Part 6.2 of the *Biodiversity Conservation SEPP* and would not have an adverse effect in terms of water quality and quantity, aquatic ecology, flooding, or recreation and public access.

An assessment has been made of the matters set out under Part 6.28 of the *Biodiversity and Conservation SEPP* given that the site is located in a Foreshores and waterways Area under the SEPP. It is considered that the carrying out of the proposed development is generally consistent with the relevant matters for consideration and would not have an adverse effect on environmental heritage, the visual environment, the natural environment or any open space and recreation facilities.

Inner West Local Environmental Plan 2022 (IWLEP 2022)

The application was assessed against the following relevant sections of the *Inner West Local Environmental Plan 2022 (IWLEP 2022)*.

Part 1 – Preliminary

Section	Proposed	Compliance
Section 1.2 Aims of Plan	<p>The development, as proposed and as conditioned, will result in acceptable streetscape / heritage, pattern of development and on-site and off-site amenity outcomes, and hence, will meet the relevant Aims of Plan as follows:</p> <ul style="list-style-type: none"> • The proposal conserves and maintains the natural, built and cultural heritage of Inner West; • The proposal encourages diversity in housing to meet the needs of, and enhance amenity for, Inner West residents; 	Yes, as conditioned

Section	Proposed	Compliance
	<ul style="list-style-type: none"> The proposal prevents adverse social, economic and environmental impacts on the local character of Inner West; and The proposal prevents adverse social, economic and environmental impacts, including cumulative impacts. 	

Part 2 – Permitted or Prohibited Development

Section	Proposed	Compliance
Section 2.3 Zone objectives and Land Use Table	<p>The application proposes alterations and additions to an existing dwelling as part of a multi dwelling housing development. Multi dwelling houses are permissible with consent in the R1 General Residential zone, and hence, the proposal is permissible with consent.</p> <p>The objectives of the R1 General Residential zone of relevance are as follows:</p> <ul style="list-style-type: none"> To provide for the housing needs of the community; To provide for a variety of housing types and densities; To provide residential development that maintains the character of built and natural features in the surrounding area. <p>The development, as proposed and as conditioned, is consistent with the relevant zone objectives prescribed above, including providing residential development that maintains the character of built and natural features in the surrounding area.</p>	Yes, as conditioned
Section 2.7 Demolition Requires Development Consent	<p>The proposal satisfies the section as follows:</p> <ul style="list-style-type: none"> Demolition works are proposed, which are permissible with consent; and Standard conditions are recommended to manage impacts which may arise during demolition. 	Yes, subject to conditions

Part 4 – Principal Development Standards

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

Note: The calculations below are relative to the development site, which is 273sqm. This is the individual strata lot upon which the affected townhouse is located, but does not include the overall allotment, which is approximately 17,230sqm.

Section	Proposed		Compliance
Section 4.3C (3)(a) Landscaped Area	Minimum	20% (site area > 235sqm)	Yes
	Proposed	23.92% or 65.31sqm	
	Variation	N/A	
Section 4.3C (3)(b) Site Coverage	Maximum	60%	Yes
	Proposed	44.38% or 121.77sqm	
	Variation	N/A	
Section 4.4 Floor Space Ratio	Maximum	0.9:1 or 245.7sqm	Yes
	Proposed	0.66:1 or 179.31sqm	
	Variation	N/A	

Section	Proposed	Compliance
Section 4.5 Calculation of Floor Space Ratio and Site Area	The Site Area and Floor Space Ratio for the proposal has been calculated in accordance with the section.	Yes
Section 4.6 Exceptions to Development Standards	<p>As outlined in the table above, the proposal complies with the applicable site coverage, landscaped area, and FSR development standard if calculated for the individual strata lot upon which the subject dwelling is situated. However, the <i>IWLEP 2022</i> does not distinguish strata lots as development allotments for this purpose.</p> <p>Council’s records indicate that the overall “parent” parcel had a compliant Floor Space Ratio of approximately 0.696:1 when it was originally approved. However, over time, many applications and building works have increased this Floor Space Ratio to a point where it exceeds the LEP development standard.</p> <p>Although it is not known by exactly how much the overall strata development exceeds the standards by, given its multi-unit nature and fragmented ownership, Council and the proponent agree that the development will require a Clause 4.6 request to contravene the applicable development standards of the LEP.</p> <p>A written request has been submitted by the applicant in accordance with Clause 4.6(3) seeking to justify the contravention of the standards in the context of the strata lot and is as discussed below.</p>	See discussion below

Section 4.6 – Exceptions to Development Standards

Section 4.3C(3)(a) – Landscaped areas for residential accommodation in Zone R1 and Section 4.3C(3)(b) – Site Coverage for residential accommodation in Zone R1

As stated above, whilst the proposal (calculated for the individual strata lot) achieves compliance with the site coverage development standard of 60%, and 15% landscape area, the subject property forms part of a larger housing estate, and as there are no records of the existing overall site coverage for the site as a whole, to err on the side of caution, it is assumed that there is a breach with this development standard.

A written request has been submitted to Council in accordance with Section 4.6(3) of the *IWLEP 2022* justifying the proposed contravention of the development standard. 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 Section 4.6 of the *IWLEP 2022* below.

Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe* at [42] – [51], Preston CJ summarises the common ways in which compliance with the development standard may be demonstrated as unreasonable or unnecessary. This is repeated in *Initial Action* at [16]. In the Applicant’s written request, the first method described in *Initial Action* at [17] is used, which is that the objectives of the landscaped and Site Coverage standard are achieved notwithstanding the numeric non-compliance.

The **first objective of Section 4.3C (3)(a)** is “*to provide landscaped areas for substantial tree planting and for the use and enjoyment of residents*”. The written request states the rear yard will preserve the existing trees along the rear boundary and includes sufficient landscaped area to support substantial tree plantings. Accordingly, the breach is consistent with the first objective.

The **second objective of Section 4.3C (3)(a)** is “*to maintain and encourage a landscaped corridor between adjoining properties*”. The written request states the proposal seeks to match the rear alignments with the recently approved DA for the adjoining dwelling at 12 McKell Street (DA/2022/0794) and will have a similar landscaped rear yard. No 8 also includes a rear yard. These sites back onto the public reserve of Mort Bay and benefit from being within a landscaped setting with canopy trees. Accordingly, the breach is consistent with the second objective.

The **third objective of Section 4.3C (3)(a)** is “*to ensure that development promotes the desired character of the neighbourhood*”. The written request states the landscape character will be preserved with compliant levels of site coverage and landscaped area achieved when measured with regard to the individual lot. The proposal will adopt the existing architectural style therefore complies with the objective of desired character of the neighbourhood. Accordingly, the breach is consistent with the third objective.

The **fourth objective of Section 4.3C (3)(a)** is “*to encourage ecologically sustainable development*”. The written request states the landscaped area proposed is suitable for retention and absorption of surface drainage water on site. Accordingly, the breach is consistent with the fourth objective.

The **fifth objective of Section 4.3C (3)(a)** is “*to control site density*”. The written request states when assessed against the individual lot, the proposal is consistent with the FSR, Site Coverage and Landscaped Area controls which reflects an appropriate density. Accordingly, the breach is consistent with the fifth objective.

The **sixth objective of Section 4.3C (3)(a)** is “*to provide for landscaped areas and private open space*”. The written request states the proposal will provide adequate private open space (POS) within a landscaped setting. It is agreed that there is sufficient area retained on site for use of residents. Accordingly, the breach is consistent with the sixth objective.

As the proposal achieves the objectives of the Landscaped Area and Site Coverage standard, compliance is considered unreasonable and unnecessary in this instance.

Whether there are sufficient environmental planning grounds to justify contravening the development standard

Pursuant to Section 4.6(3)(b), the Applicant provides the following environmental planning grounds to justify contravening the Landscaped Area and Site Coverage development standard:

Environmental Planning Ground 1 – *This clause 4.6 is provided out of an abundance of caution due to the lack of feasibility to measure the existing landscape area and site coverage of the Estate as a whole.* This environmental planning ground is accepted because if the sites were assessed individually the proposal would comply with Site Coverage and Landscaped area controls.

Environmental Planning Ground 2 – *The proposal would comply with site coverage and landscaped area controls, but also would not detract from the desired future character of the area.* This environmental planning ground is accepted because the proposed design matches with the adjoining properties No.12 and 8 McKell Street. But also, the proposal will utilise the existing material, colour and schedule for the new additions and alterations, therefore, the proposed development would not detract from the desired future character of the area and the multi-dwelling estate as a whole.

Environmental Planning Ground 3 – *The proposal would not result significant adverse amenity impacts.* This environmental planning ground is accepted as the proposal adopts the same rear alignment of No.12 and No.8 McKell Street and would not result in unreasonable amenity to the neighbouring properties. – also see assessment under Parts C3.2, C3.9, and C3.11 of the LDCP 2013 for further details.

Cumulatively, grounds 1-3 are considered sufficient to justify contravening the development standard. Notwithstanding, if the application was assessed individually the proposal would have compliant landscaped area and site coverage which would not require a Clause 4.6 exception to be accompanied with the application.

Whether the proposed development meets the objectives of the development standard, and of the zone

As previously noted, the objectives of the R1 zone under the *IWLEP 2022* are:

- To provide for the housing needs of the community
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide residential development that maintains the character of built and natural features in the surrounding area.

Council accepts the Applicant's submissions in the written request that the relevant objectives of the R1 zone are met. The variation will improve occupant amenity and provide a dwelling which will continue to support local housing needs without impacting upon the built or natural features of the surrounding area. As indicated above, Council is also satisfied that the development meets the objectives of the Landscaped Area and Site Coverage standards. As the proposal is consistent with both the objectives of the zone and the standards, it is considered in the public interest.

For the reasons outlined above, it is recommended that the section 4.6 exception be granted.

Section 4.4 - Floor Space Ratio (FSR) Development Standard

As stated above, whilst the proposal (calculated for the individual strata lot) achieves compliance with the FSR development standard of 0.9:1, the subject property forms part of a larger housing estate, and as there are no records of the existing overall FSR for the site as a whole, to err on the side of caution, it is assumed that there is a breach with this development standard.

A written request has been submitted to Council in accordance with Section 4.6(3) of the *IWLEP 2022* justifying the proposed contravention of the development standard. 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 Section 4.6 of the *IWLEP 2022* below.

Whether compliance with the development standard is unreasonable or unnecessary

In *Wehbe* at [42] – [51], Preston CJ summarises the common ways in which compliance with the development standard may be demonstrated as unreasonable or unnecessary. This is repeated in *Initial Action* at [16]. In the Applicant's written request, the first method described in *Initial Action* at [17] is used, which is that the objectives of the landscaped and Site Coverage standard are achieved notwithstanding the numeric non-compliance.

The **first objective of Section 4.4** is *“to establish a maximum floor space ratio to enable appropriate development density”*. The written request states the application of a maximum FSR to this specific strata development is not feasible without firstly establishing the existing level of floor space across all dwellings within the estate. The dwelling is consistent with adjoining development and accordingly, the breach is consistent with the first objective.

The **second objective of Section 4.4** is *“to ensure development density reflects its locality”*. The written request states the proposal seeks to match the rear alignment with the recently approved DA for the adjoining dwelling at No.12 McKell Street (DA/2022/0794) to reflect the scale of development within the immediate locality. But also, the proposed works are located to the rear of the site which would not significantly alter the streetscape scale. Accordingly, the breach is consistent with the second objective.

The **third objective of Section 4.4** is *“to provide an appropriate transition between development of different densities”*. The written request states the proposal will have comparable density to surrounding buildings within the whole estate along McKell Street, and the proposal does not result in a net-increase in population, as number of bedrooms remain unchanged for the dwelling, hence the density of the dwelling remains the same as existing. Accordingly, the breach is consistent with the third objective.

The **fourth objective of Section 4.4** is *“to minimise adverse impacts on local amenity”*. The written request states the proposal does not give rise to any unreasonable amenity impacts with regard to solar access, view loss or privacy. Privacy mitigation measures have been included to the balcony areas. No view corridors towards Mort Bay enjoyed from neighbouring dwellings will be impacted. The rear addition seeks to align with the adjoining dwelling at 12 McKell Street which will allow that site to retain views across the rear garden of the subject site. Accordingly, the breach is consistent with the fourth objective.

The **fifth objective of Section 4.4** is *“to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain”*. The written request states the existing trees on site will be preserved. The site benefits from adjoining Mort Bay reserve which includes a plethora of canopy trees. Accordingly, the breach is consistent with the third objective.

As the proposal achieves the objectives of the FSR standard, compliance is considered unreasonable and unnecessary in this instance.

Whether there are sufficient environmental planning grounds to justify contravening the development standard

Pursuant to Section 4.6(3)(b), the Applicant advances six environmental planning grounds to justify contravening the FSR development standard. Each will be dealt with in turn:

Environmental Planning Ground 1 – If the FSR control was applied to the individual lot, the proposal would have an approximate permissible GFA of 245.7sqm, as the lot size is approximately 273sqm. The proposal development would have compliant FSR control. This environmental planning ground is accepted.

Environmental Planning Ground 2 - The proposal has been designed has been so that the bulk, form, and scale is compatible with the adjoining dwellings. The proposal would also result in compliance with open space and landscaping with the relevant DCP and LEP control. This environmental planning ground is accepted because the proposal is considered consistent and comparable with streetscape and desired future characteristic of properties along McKell Street, see Part 5.10 for further heritage consideration and assessment.

Environmental Planning Ground 3 - The proposal would not result any unreasonable amenity impacts regard to overshadowing, privacy and view loss. This environmental planning ground is accepted because the proposed development presents with a similar design and rear alignment to the adjoining properties (No.12 and No.8 McKell Street) – also see assessments under Parts C3.2, C3.9, and C3.11 of the LDCP 2013 for further details.

Environmental Planning Ground 4 – Council has applied the FSR development standard flexibly in this locality and have approved variations provided that the undersize lot provisions within the DCP can be met. This environmental planning ground is accepted because the proposal seeks a similar rear alignment and design to the adjoining properties. notwithstanding, if the proposal was assessed individually the proposal would result in compliance with FSR control as stated above.

Cumulatively, the grounds are considered sufficient to justify contravening the development standard.

Whether the proposed development meets the objectives of the development standard, and of the zone

The objectives of the R1 zone have been identified previously in this report.

Council accepts the Applicant's submissions in the written request that the relevant objectives of the R1 zone are met. The proposal will improve occupant amenity and provide a dwelling which will continue to support local housing needs without impacting upon the built or natural features of the surrounding area. As indicated above, Council is also satisfied that the development meets the objectives of the FSR standard. As the proposal is consistent with both the objectives of the zone and the standard, it is considered in the public interest.

For the reasons outlined above, it is recommended the section 4.6 exception be granted.

Part 5 – Miscellaneous Provisions

Section	Compliance	Compliance
Section 5.10 Heritage Conservation	<p>The subject property at No.10 McKell Street, Birchgrove, is a contributory dwelling located within The Town of Waterview Heritage Conservation Area (C31 under Schedule 5 of the <i>IWLEP 2022</i>). The site itself is not heritage listed, and there is no environmental heritage in the vicinity that will be adversely affected by the proposal.</p> <p>The key and relevant objectives of Section 5.10 of <i>IWLEP 2022</i> are to conserve the environmental heritage of the Inner West, including the heritage significance of conservation areas and their associated fabric, settings and views.</p> <p>An assessment of the revised proposal against the relevant streetscape and heritage controls of this part of the LEP and those contained in the LDCP 2013 (see assessment later in this report) has been carried out, and it is considered that the alterations and additions, as proposed and as conditioned, will satisfactorily conserve the heritage significance of the existing dwelling on the site, and will not detract from the dwelling, adjoining dwellings, the streetscape or the Heritage Conservation Area. Given the above, the proposal will satisfy the provisions and objectives of Section 5.10 of the <i>IWLEP 2022</i>. See LDCP 2013 assessment, including under <i>Alterations and Additions</i> and <i>Heritage Conservation and Heritage Items</i>, later in this report for further details.</p>	Yes
Section 5.21 Flood Planning	<p>Although the site is located in a flood planning area, the flood certificate confirms the dwelling No.10 McKell Street is not subject to flooding during a 1 in 100-year storm, and therefore, no flood controls measures and conditions are required.</p> <p>The development is considered to be compatible with the flood function and behaviour on the land now and under future projections. The design of the proposal and its scale will not affect the flood affectation of the subject site or adjoining properties and is considered to appropriately manage flood risk to life and the environment.</p>	Yes

Part 6 – Additional Local Provisions

Section	Proposed	Compliance
Section 6.1 Acid Sulfate Soils	The site is identified as containing Class 5 and 2 Acid Sulfate Soils. The proposal does not involve significant excavation works or the disturbance of soil over 1 tonne and will not lower the watertable on Class 2 land. Given then above, Council’s Environmental Health Officer has confirmed that no further assessment of Acid Sulfate Soils is required, and the proposal can proceed.	Yes
Section 6.2 Earthworks	The proposed earthworks are unlikely to have a detrimental impact on environmental functions and processes, existing drainage patterns, or soil stability.	Yes
Section 6.3 Stormwater Management	The development maximises the use of permeable surfaces, and subject to standard site drainage and stormwater control conditions, which will be recommended as part of any consent granted, would not result in any significant runoff to adjoining properties or the environment.	Yes, subject to conditions
Section 6.5	The site is not subject to a Foreshore Building Line on the LEPs Foreshore building Line Map.	NA

Section	Proposed	Compliance
Limited Development on Foreshore Area		
6.6 Development on the Foreshore Must Ensure Access	The proposal does not adversely impact on existing public foreshore access adjacent to the site.	Yes

B. Development Control Plans

The proposal has been assessed against the following relevant Development Control Plans.

Leichhardt Development Control Plan 2013 (LDCP 2013)

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

LDCP 2013	Compliance
Part B: Connections	
B1.1 Connections – Objectives	Yes
Part C	
C1.0 General Provisions	Yes
C1.1 Site and Context Analysis	Yes
C1.2 Demolition	Yes
C1.3 Alterations and Additions	Yes – see discussion
C1.4 Heritage Conservation Areas and Heritage Items	Yes – see discussion
C1.7 Site Facilities	Yes
C1.11 Parking	Yes - minimum of one (1) space for three (3) + bedrooms, and 1 space provided
C1.8 Contamination	Yes
C1.12 Landscaping	Yes
C1.14 Tree Management	Yes
Part C: Place – Section 2 Urban Character	
C2.2.2.6 Birchgrove 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
C3.5 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	No – see discussion
C3.11 Visual Privacy	No – see discussion
Part D: Energy	
Section 1 – Energy Management	Yes
Section 2 – Resource Recovery and Waste Management	
D2.1 General Requirements	Yes, subject to standard condition
D2.2 Demolition and Construction of All Development	Yes, subject to standard condition
D2.3 Residential Development	Yes, subject to standard condition
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
E1.1.3 Stormwater Drainage Concept Plan	Yes
E1.1.4 Flood Risk Management Report	Yes
E1.2 Water Management	Yes
E1.2.1 Water Conservation	Yes
E1.2.2 Managing Stormwater within the Site	Yes, subject to recommended conditions
E1.2.6 Building in the vicinity of a Public Drainage System	Yes, subject to recommended conditions
E1.2.7 Wastewater Management	Yes
E1.3.1 Flood Risk Management	Yes, subject to recommended conditions

The following provides discussion of the relevant issues:

C1.3 Alterations and Additions, C1.4 Heritage Conservation and Heritage Items, C.2.2.2.6: Birchgrove Distinctive Neighbourhood, and Appendix B Building Typologies

The subject property at No.10 McKell Street, Birchgrove, is a contributory dwelling located within The Town of Waterview Heritage Conservation Area (C31 in Schedule 5 of the *IWLEP 2022*). The site itself is not heritage listed, and there is no environmental heritage in the vicinity that will be adversely affected by the proposal.

The proposal generally consists of alterations and additions to an existing dwelling, including partial demolition of existing structures, construction of a ground, first and second floor addition.

The proposed alterations and additions to the existing dwelling meet the objectives and requirements of these parts of the DCP as it is considered the proposed development:

- The proposal is of an appropriate siting, form, size, scale, materials and finishes and design and appearance that will complement the existing residence and will not detract from the streetscape, foreshore, or Heritage Conservation Area and will meet desired future character and Building Typology Statement controls.
- Is compatible with neighbourhood character, including prevailing site layout.
- Protects existing residential amenity, including the retention of adequate private open space and ensuring adequate sunlight, natural ventilation and privacy to surrounding dwellings.

C3.2 Site Layout and Building Design

This part of the DCP contains Building Location Zone (BLZ) and Side Setback controls which aim to control, inter-alia, bulk and scale and overshadowing impacts, as well as ensure that the pattern of development in the street is not adversely affected. The proposal complies with both the rear BLZ and side setback controls summarised in the following:

Building Envelope

The proposed additions are appropriately sited at the rear and will not breach the building envelope of the existing dwelling.

Building Location Zone

The existing ground floor, first floor, and second floor rear building alignments are indicated in green, and the proposed ground floor, first floor, and second floor building additions are indicated in blue. In addition, for neighbouring properties context (No.8, and No.12 McKell Street, Birchgrove) the existing and approved ground floor, first floor, and second floor rear alignments are the same and it is represented in red.



Figure 1: Existing and proposed rear and first floor additions BLZ compared to adjoining properties.

To determine the average rear first floor setback of the subject site, the average rear setbacks of the immediate adjoining dwellings are used as per Figure C128: Building Location Zone shown below.

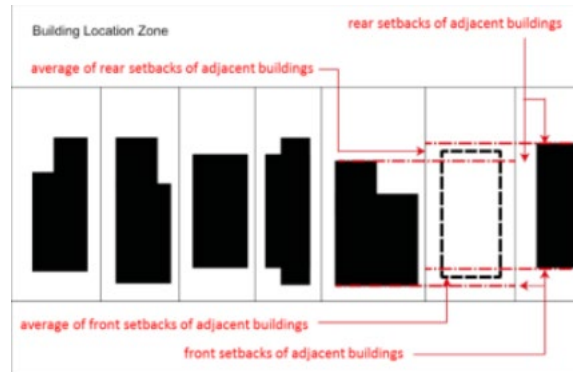


Figure C128: Building Location Zone

Given the above, the proposed ground, first floor, and second floor rear BLZs (i.e. building lines) comply with the BLZs established by immediate adjoining dwellings at Nos. 8 and 12 McKell Street.

Side Setbacks

The following compliance table assesses the proposal against the Side Boundary Setbacks Graph prescribed in Part C3.2 of the LDCP 2013:

Elevation	Wall height (m)	Required setback (m)	Proposed setback (m)	Complies
North-East/East (GF)	2.7 – 2.8	0	0	Yes
South-West/West (GF)	2.4 – 2.7	0	0	Yes
North-East/East (FF)	4.9 – 5.4	1.21 – 1.5	0 – 3.5	Yes and No
South-West/West (FF)	5.3	1.44	0	No
North-East/East (SF)	7.7 – 7.8	2.8	3.5	Yes
South-West/West (SF)	7.6 – 7.8	2.77 – 2.8	0	No

As noted in the table above, the proposed partial first floor and second floor level additions will not comply with the Side Boundary Setback Graph to the north-eastern/eastern and south-western/western strata boundaries as prescribed in this Part.

In accordance with this part of the DCP, where a proposal seeks a variation to the Side Boundary Setbacks Graph, various tests need to be met. These tests are assessed below:

- The development is consistent with relevant Building Typology Statements as outlined within Appendix B – Building Typologies of the Leichhardt DCP 2013 and complies with streetscape and desired future character controls.

Comment: As discussed previously, the proposal will be compatible with the existing and adjoining dwellings and the streetscape and comply with the Building Typology Statements and desired future character controls of the LDCP 2013.

- The pattern of development is not adversely compromised.

Comment: The proposed rear additions are sited at the rear, and within the existing rear setback, where it is considered additions are generally permitted to be carried out in accordance with relevant streetscape and heritage controls, and will have wall heights and setbacks that will be compatible with the existing and immediate nearby three storey development. This test is therefore deemed to be met.

- The bulk and scale of the development has been minimised and is acceptable.

Comment: The ground, first and second floor additions are considered to be acceptable with respect to height, bulk, and scale impacts when viewed from adjoining properties and their POS have been successfully designed and mitigated in accordance with this test for the following reasons:

- The height, bulk, and scale are considered consistent and compatible with the existing or approved neighbouring dwellings at No. 8 and No. 12 McKell Street. Therefore, the proposed rear addition does not raise concerns regarding visual bulk and scale;
- The proposal’s compliance with the BLZs or rear building setbacks is established by adjoining buildings; and
- The additions will be located immediately adjacent to adjoining built forms.

- The proposal is acceptable with respect to applicable amenity controls e.g. solar access, privacy and access to views.

Comment: Acceptable. The proposal, as amended, is considered to be satisfactory with respect to applicable solar access controls as well as the privacy controls of the DCP and will not result in any undue loss of views implications.

- Reasonable access is retained for necessary maintenance of adjoining properties.

Comment: Therefore, and with respect to the above, the proposal, is considered to satisfy the above tests, and as such, the proposed side wall heights and setbacks are supported in this instance.

C3.3 Elevation and Materials

It is considered that the proposed building elevations and materials used are consistent with the objectives and controls outlined under this part of LDCP 2013 as the proposal adopts the same architectural language and detailing matches the surrounding existing buildings and results in a uniform architectural expression when viewed from the street and foreshore.

C3.9 Solar Access

The following Solar Access controls of Part C3.9 of the LDCP 2013 apply with regard to neighbouring properties:

Adjoining Living Room Glazing

- *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.*
- *C15 Where surrounding dwellings currently receive less than the required amount of solar access to the main living room between 9am and 3pm during the winter solstice, no further reduction of solar access is permitted.*

Adjoining Private Open Space

- *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.*
- *C19 Where surrounding dwellings currently receive less than the required amount of solar access to their private open space between 9am and 3pm during the winter solstice, no further reduction of solar access is permitted.*

The shadow diagrams confirm that the proposal will overshadow the POS of dwelling at No.12 McKell Street located to the south-west between 9am to 12pm in mid-winter, while any additional overshadowing impacts between 12:00noon to 3:00pm would be to towards / over Mort Bay Park. Given that the adjoining POS at No. 12 McKell Street does not currently receive the requisite 2.5 hours to 50% of its area between 9am and 3pm in mid-winter, the additional overshadowing between 9am and 12pm in mid-winter will be contrary to Control C19 above.

In accordance with the provisions of this part of the DCP, where a proposal breaches the Solar Access controls, a reasonableness assessment is required to be carried out, which is provided below.

- The reasonableness of the development overall, in terms of compliance with other standards and controls concerned with the control of building bulk and having regard to the general form of surrounding development

Comment: The additions have been designed to be located towards the rear of the site to ensure the relevant streetscape and heritage provisions are satisfied. Furthermore, the proposed development complies with applicable controls pertaining to bulk and scale, and is a satisfactory response to the BLZ controls, provides side wall heights and setbacks that will be compatible with adjoining buildings, and provides a compliant area of private open space. Therefore, this test is deemed to be met.

- Site orientation

Comment: The neighbouring property affected is east/west with a south/south-east facing POS, and as such, is vulnerable to overshadowing from any addition to the rear of the subject site. However, as previously noted, the additions have been appropriately sited to reduce streetscape impacts and minimise amenity impacts on adjoining properties i.e. by proposing additions with similar building lines as its neighbours and siting the additions adjacent to adjoining built forms, and by proposing wall heights and overall heights that are compatible / not out of character with the existing dwelling and adjoining buildings. Given the above, and the orientation of the subject site and the adjoining property, and the established design pattern; it is difficult for overshadowing impacts to the rear POS of this adjoining site in mid-winter to be completely avoided.

- The relative levels at which the dwellings are constructed

Comment: Satisfactory – the proposed additions are constructed at grade and propose floor-to-ceiling heights that respect the floor-to-ceiling heights of the existing residence.

- The degree of skill employed in the design to minimise impact

Comment: As previously noted, the additions have been appropriately sited to reduce streetscape impacts and minimise amenity impacts on No.12 McKell Street. As such, the proposal has been designed to minimise the overshadowing impacts to immediate adjoining properties. Further, despite the additional overshadowing impacts, the adjoining POS at No. 12 McKell Street will still retain access to sunlight between 9am and 11am in mid-winter.

- Whether reasonably available alternative design solutions would produce a superior result

Comment: For reasons discussed above (i.e. site orientation and site constraints, the siting of the additions and height, bulk and scale and compatibility in its context), the proposal has been designed to minimise the impacts.

In the light of above, the overshadowing impacts to the adjoining properties are considered to be reasonable and the tests under this part of the DCP are deemed to have been satisfied.

C3.11 Visual Privacy

Various Visual Privacy controls of Part C3.11 of the LDCP 2013 apply to the proposal.

Assessment of the proposal against the above controls has been carried out and the following Visual Privacy assessment is made:

- While the balconies and rooftop terraces at first and second floor level do not fully comply with Controls C4 and C9 of this section of the Development Control Plan (DCP), the site context along McKell Street and within the estate must be considered. In this regard, the density of development within the strata scheme / estate, combined with the large number of dwellings with large balconies and / or rooftop terraces, including immediately adjoining the site, results in increased sightlines and a degree of mutual overlooking between neighbours' POS;
- The proposed rooftop terrace includes a 500mm-wide planter box and an additional 500mm-high privacy screen on top of the north-eastern eastern side wall. These features will effectively mitigate potential overlooking into the private open space (POS) and side passageway of No. 8 McKell Street; and
- The location of balconies and terraces at first and second floor level will be immediately adjacent to adjoining terraces and balconies and associated screening at No. 12 McKell Street.

In light of the above considerations, including the immediate site context and historical development in the area, the proposal is not expected to result in unreasonable visual privacy impacts on adjoining neighbours.

In the light of above, the proposal, is considered to be satisfactory with respect to the provisions and objectives of Part C3.11 of the LDCP 2013.

Sydney Harbour Foreshores and Waterways Areas Development Control Plan 2005 (SHDP 2005)

The subject site is located in a Foreshore and Waterways Area, and therefore, the Sydney Harbour Foreshores and Waterways Area Development Control Plan (SHDCP) 2005 applies to the proposal.

As discussed elsewhere in this report, the appearance of the proposal will be compatible with the existing and adjoining dwellings on the site when viewed from the foreshore.

In consideration of the above, the proposal is compatible with the surrounding built form and is considered to appropriately transition between the overall height of adjoining buildings when viewed from the adjacent waterway. As such, the proposal is considered to be consistent with the 'Design Guidelines of Land-Based Developments' under Part 5 of the SHDCP 2005 and the application is recommended for approval.

C. The Likely Impacts

- These matters have been considered as part of the assessment of the development application. It is considered that the proposed development will not have significant adverse environmental, social or economic impacts upon the locality.

D. The Suitability of the Site for the Development

The proposal is of a nature in keeping with the overall function of the site. The premises are in a residential surrounding and amongst similar uses to that proposed.

E. Submissions

The application was notified in accordance with Council's Community Engagement Strategy between 18 June 2024 to 02 July 2024.

No submissions were received

F. 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.

This has been achieved in this instance.

6. Section 7.11 / 7.12 Contributions

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 \$4,888 would be required for the development under the Inner West Local Infrastructure Contributions Plan 2023.

A condition requiring that contribution to be paid is included in the recommendation.

7. Referrals

The following internal referrals were made, and their comments have been considered as part of the above assessment:

- Heritage Specialist;
- Development Engineer;
- Urban Forest;
- Environmental Health; and
- Building Certification.

8. Conclusion

The proposal generally complies with the aims, objectives and design parameters contained in *Inner West Local Environmental Plan 2022* and *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. In relation to the proposal by the development in Development Application No. DA/2024/0465 to contravene the Landscape Area, Site Coverage and FSR development standards in Clauses 4.3C(3)(a), (b) and 4.4 of *Inner West Local Environmental Plan 2022* the Panel is satisfied that the Applicant has demonstrated that:
- (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and
 - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.
- 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/2024/0465 for alterations and additions to an existing semi-detached dwelling, including partial demolition of existing structures, construction of ground, first and second floor addition at 10 Mckell Street, BIRCHGROVE subject to the conditions listed in Attachment A.

Attachment A – Recommended conditions of consent

CONDITIONS OF CONSENT

GENERAL CONDITIONS

		Condition		
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/Received	Prepared by
	DA03 Rev.A	Site - Waste - Sediment Plan	17/10/2024	Progressive Plans
	DA04 Rev.B	Existing Ground Floor Plan	17/10/2024	Progressive Plans
	DA05 Rev.B	Proposed Ground Floor Plan	17/10/2024	Progressive Plans
	DA06 Rev.B	Existing First Floor Plan	17/10/2024	Progressive Plans
	DA07 Rev.B	Proposed First Floor Plan	17/10/2024	Progressive Plans
	DA08 Rev.B	Existing Second Floor Plan	17/10/2024	Progressive Plans
	DA09 Rev.B	Proposed Second Floor Plan	17/10/2024	Progressive Plans
	DA10 Rev.B	Existing Roof Plan	17/10/2024	Progressive Plans
	DA11 Rev.B	Proposed Roof/Concept Stormwater Plan	17/10/2024	Progressive Plans
	DA12 Rev.B	Elevations - North & South	17/10/2024	Progressive Plans
	DA13 Rev.B	Elevations - East & West	17/10/2024	Progressive Plans
DA14 Rev.B	Section - A & B	17/10/2024	Progressive Plans	

	DA15 Rev.B	Finishes Board	17/10/2024	Progressive Plans
	A1743616	BASIX Certificate	15/04/2024	
	23S264 - FMR - Issue 1	Flood Risk Management Plan	04/10/2024	Heinz Consulting Engineering
	AU-NL-031 Rev.01	Dimensions & Applicable Loads in Nibav Lift	24/07/2024	NIBAV Lifts Pvt Ltd
	23S264 -H03 Rev.D	Stormwater Plans	27/09/2024	Heinz Consulting Engineering
	As amended by the conditions of consent.			
	Reason: To ensure development is carried out in accordance with the approved documents.			
2.	Works Outside the Property Boundary			
	This development consent does not authorise works outside the property boundaries on adjoining lands.			
	Reason: To ensure works are in accordance with the consent.			
3.	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.			
	Reason: To protect pedestrian safety.			
4.	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 <i>Environmental Planning and Assessment Act 1979</i> .			
	Reason: To ensure compliance with legislative requirements.			
5.	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.			
	Reason: To ensure compliance with legislative requirements.			

6.	<p style="text-align: center;">Notification of commencement of works</p> <p>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:</p> <ul style="list-style-type: none"> a. In the case of work for which a principal contractor is required to be appointed: <ul style="list-style-type: none"> 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: <ul style="list-style-type: none"> 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. <p>Reason: To ensure compliance with legislative requirements.</p>
7.	<p style="text-align: center;">Dividing Fences Act</p> <p>The person acting on this consent must comply with the requirements of the <i>Dividing Fences Act 1991</i> in respect to the alterations and additions to the boundary fences.</p> <p>Reason: To ensure compliance with legislative requirements.</p>
8.	<p style="text-align: center;">Lead-based Paint</p> <p>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.</p> <p>Reason: To protect human health.</p>
9.	<p style="text-align: center;">Dial before you dig</p> <p>Contact "Dial Prior to You Dig" prior to commencing any building activity on the site.</p> <p>Reason: To protect assets and infrastructure.</p>
10.	<p style="text-align: center;">Asbestos Removal</p> <p>Hazardous and industrial waste arising from the use must be removed and / or transported in accordance with the requirements of the NSW Environment Protection Authority (EPA) and the New South Wales WorkCover Authority.</p> <p>Reason: To ensure compliance with the relevant environmental legislation.</p>

11.	<p style="text-align: center;">Bin Storage - Residential</p> <p>All bins are to be stored within the property. Bins are to be returned to the property within 12 hours of having been emptied.</p> <p>Reason: To ensure resource recovery is promoted and residential amenity is protected.</p>
12.	<p style="text-align: center;">Boundary Alignment Levels</p> <p>Alignment levels for the site at all pedestrian and vehicular access locations must match the existing back of footpath levels at the boundary unless levels are otherwise approved by Council via a S138 approval.</p> <p>Reason: To allow for pedestrian and vehicular access.</p>
13.	<p style="text-align: center;">Permits</p> <p>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:</p> <ul style="list-style-type: none"> • 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; • A concrete pump across the roadway/footpath; • Mobile crane or any standing plant; • Skip Bins; • Scaffolding/Hoardings (fencing on public land); • Public domain works including vehicle crossing, kerb & guttering, footpath, stormwater, etc.; • Awning or street veranda over the footpath; • Partial or full road closure; and • Installation or replacement of private stormwater drain, utility service or water supply. <p>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.</p> <p>Reason: To ensure works are carried out in accordance with the relevant legislation.</p>
14.	<p style="text-align: center;">Insurances</p> <p>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.</p> <p>Reason: To ensure Council assets are protected.</p>

BUILDING WORK

BEFORE ISSUE OF A CONSTRUCTION CERTIFICATE

Condition	
15.	<p>Long Service Levy</p> <p>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 0.25% of the total cost of the work to either the Long Service Payments Corporation or Council for any work costing \$250,000 or more.</p> <p>Reason: To ensure the long service levy is paid.</p>
16.	<p>Structural Certificate for retained elements of the building</p> <p>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.</p> <p>Reason: To ensure the structural adequacy of the works.</p>
17.	<p>Sydney Water – Tap In</p> <p>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.</p> <p>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.</p> <p>Reason: To ensure relevant utility and service provides requirements are provided to the certifier.</p>
18.	<p>Section 7.12 Development Contribution Payments</p> <p>In accordance with section 7.12 of the <i>Environmental Planning and Assessment Act 1979</i> and the Inner West Local Infrastructure Contribution Plan 2023 (the Plan), a monetary contribution of \$4,888 shall be paid to Council for the purposes of the provision, extension or augmentation of local infrastructure identified in the Plan.</p> <p>At the time of payment, the monetary contribution payable will be adjusted for inflation in accordance with indexation provisions in the Plan in the following manner:</p> <p>$C_{\text{payment}} = C_{\text{consent}} \times (CPI_{\text{payment}} \div CPI_{\text{consent}})$</p> <p>Where:</p>

	<ul style="list-style-type: none"> • Cpayment = is the contribution at time of payment • Cconsent = is the contribution at the time of consent, as shown above • CPIconsent = is the Consumer Price Index (All Groups Index) for Sydney at the date the contribution amount above was calculated being 139.8 for the Novemeber 2024. • CPIpayment = is the Consumer Price Index (All Groups Index) for Sydney published by the Australian Bureau of Statistics that applies at the time of payment <p>Note: The contribution payable will not be less than the contribution specified in this condition.</p> <p>The monetary contributions must be paid to Council (i) if the development is for subdivision – prior to the issue of the subdivision certificate, or (ii) if the development is for building work – prior to the issue of the first construction certificate, or (iii) if the development involves both subdivision and building work – prior to issue of the subdivision certificate or first construction certificate, whichever occurs first, or (iv) if the development does not require a construction certificate or subdivision certificate – prior to the works commencing.</p> <p>It is the professional responsibility of the principal certifying authority to ensure that the monetary contributions have been paid to Council in accordance with the above timeframes.</p> <p>Council's Plan may be viewed at www.innerwest.nsw.gov.au or during normal business hours at any of Council's customer service centres.</p> <p>Please contact any of Council's customer service centres on 9392 5000 or council@innerwest.nsw.gov.au to request an invoice confirming the indexed contribution amount payable. Please allow a minimum of 2 business days for the invoice to be issued.</p> <p>Once the invoice is obtained, payment can be made via (i) BPAY (preferred), (ii) credit card / debit card (AMEX, Mastercard and Visa only; log on to www.innerwest.nsw.gov.au/invoice; please note that a fee of 0.75 per cent applies to credit cards), (iii) in person (at any of Council's customer service centres), or (iv) by mail (make cheque payable to 'Inner West Council' with a copy of your remittance to PO Box 14 Petersham NSW 2049).</p> <p>The invoice will be valid for 3 months. If the contribution is not paid by this time, please contact Council's customer service centres to obtain an updated invoice. The contribution amount will be adjusted to reflect the latest value of the Consumer Price Index (All Groups Index) for Sydney.</p> <p>Reason: To ensure payment of the required development contribution.</p>
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<p>19.</p>	<p>Council Stormwater Pipe - Physical Location</p> <p>Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with evidence that Council's stormwater drainage line adjacent to the building works has been physically located and inspected by Closed Circuit Television (CCTV) with a video copy provided to Council prior to the issue of the Construction Certificate, to determine the condition of the pipe before commencement of works. The actual location and depth of the pipe must be used in the design of the footings of the proposed building.</p> <p>The stormwater line shall again be inspected on completion of the works and a video copy provided to Council prior to occupation of the site.</p> <p>Reason: To ensure that the adequate provision of stormwater drainage is provided.</p>				
<p>20.</p>	<p>Works Adjacent to Council's Stormwater Pipeline</p> <p>Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with plans prepared by a suitably experienced Civil Engineer who holds current Chartered Engineer qualifications with the Institution of Engineers Australia (CEng) or current Registered Professional Engineer qualifications with Professionals Australia (RPEng) that demonstrate any footings or excavation to be located or undertaken adjacent to Councils stormwater pipeline address the following requirements:</p> <ol style="list-style-type: none"> a. All footings and excavation must be located outside of the easement boundaries; b. All footings and excavation must be located a minimum of 500mm from the outside of the pipeline; c. All footings adjacent to Council's stormwater pipe must be taken to a depth 500mm below a line of influence measured at 450 from a point 1m from the invert of the stormwater pipe in the direction of the footing unless the footings are to be placed on competent bedrock; and d. If permanent excavation is proposed beneath the obvert of the pipeline, suitable means to protect the excavation and proposed retaining structures from seepage or other water flow from the pipeline and surrounding subsoil must be provided. <p>Nothing in this condition prevents a Construction Certificate from being issued for demolition and site investigation purposes contemplated by this condition.</p> <p>Reason: To ensure that stormwater infrastructure is protected as a result of the development.</p>				
<p>21.</p>	<p>Security Deposit - Custom</p> <p>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.</p> <table border="1" data-bbox="435 1547 1197 1626"> <tr> <td>Security Deposit:</td> <td>\$6,238.00</td> </tr> <tr> <td>Inspection Fee:</td> <td>\$389.00</td> </tr> </table>	Security Deposit:	\$6,238.00	Inspection Fee:	\$389.00
Security Deposit:	\$6,238.00				
Inspection Fee:	\$389.00				

	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>Reason: To ensure required security deposits are paid.</p>
<p>22.</p>	<p>Dilapidation Report – Pre-Development – Minor</p> <p>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.</p> <p>Reason: To ensure Council assets are protected.</p>
<p>23.</p>	<p>Stormwater Drainage System – Minor Developments (OSD is not required)</p> <p>Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with stormwater drainage design plans certified by a suitably qualified Civil Engineer that the design of the site drainage system complies with the following specific requirements:</p> <ul style="list-style-type: none"> a. The design must generally be in accordance with the Stormwater Drainage Concept plan on Drawing Nos H01-B, H02-C and H03-D prepared by Heinz Consulting. b. Stormwater runoff from all roof and paved areas within the property must be collected in a system of gutters, pits and pipelines and be discharged together overflow pipelines from any rainwater tank(s) by gravity to the kerb and gutter or to a Council drainage system. Minor roof and paved areas at the rear of the property that cannot reasonably be drained by gravity to the street may drained to an on-site dispersal system such as an absorption system or otherwise, subject to the roof areas being drained via a suitably

	<p>sized rainwater tank, no nuisance or concentration of flows to other properties and the feasibility and design of the on-site dispersal system being certified by a suitably qualified and experienced practising Civil and/or Geotechnical Engineer.</p> <ul style="list-style-type: none"> 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 other than to drain downpipes to the rainwater tanks. e. No nuisance or concentration of flows to other properties. f. 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. g. No impact to street tree(s). <p>Reason: To ensure that the adequate provision of stormwater drainage is provided.</p>
<p>24.</p>	<p>Party Walls</p> <p>Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with a Structural Certificate from a practising structural engineer which verifies that the structural integrity of the existing "Party Walls" are adequate to accept the additional loads imposed thereon by the proposal. A copy of the Structural Certificate must be provided to all owners of the party wall/s.</p> <p>Reason: To ensure the structural adequacy of the works AND/OR to ensure works do not rely on the party wall for vertical or lateral support.</p>

BEFORE BUILDING WORK COMMENCES

	Condition									
<p>25.</p>	<p>Tree Protection Zone</p> <p>To protect the following trees, no work may commence until their Protection Zone is protected as shown on the approved Site-Waste-Sediment Plan by Progressive Plans, dated 8.05.2024. The fence/s (including existing boundary fencing) must be maintained intact until the completion of all demolition/building work on site.</p> <table border="1" data-bbox="432 1491 1023 1626"> <thead> <tr> <th>Tree No.</th> <th>Botanical/Common Name</th> <th>Location</th> </tr> </thead> <tbody> <tr> <td>1</td> <td><i>Syagrus romanzoffianum</i> (Cocos Palm)</td> <td>Rear yard</td> </tr> <tr> <td>2</td> <td><i>Syagrus romanzoffianum</i> (Cocos Palm)</td> <td>Rear yard</td> </tr> </tbody> </table>	Tree No.	Botanical/Common Name	Location	1	<i>Syagrus romanzoffianum</i> (Cocos Palm)	Rear yard	2	<i>Syagrus romanzoffianum</i> (Cocos Palm)	Rear yard
Tree No.	Botanical/Common Name	Location								
1	<i>Syagrus romanzoffianum</i> (Cocos Palm)	Rear yard								
2	<i>Syagrus romanzoffianum</i> (Cocos Palm)	Rear yard								

	3	<i>Plumeria sp</i> (Frangipani)	Rear yard
Reason: To protect and retain trees.			
26.	<p>Waste Management Plan</p> <p>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.</p> <p>Reason: To ensure resource recovery is promoted and local amenity is maintained.</p>		
27.	<p>Erosion and Sediment Control</p> <p>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.</p> <p>Reason: To ensure resource recovery is promoted and local amenity is maintained.</p>		
28.	<p>Standard Street Tree Protection</p> <p>Prior to the commencement of any work, the Certifying Authority must be provided with details of the methods of protection of all street trees adjacent to the site during demolition and construction.</p> <p>Reason: To protect and retain trees.</p>		
29.	<p>Dilapidation Report</p> <p>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 identified property (No.12 McKell Street, Birchgrove) 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.</p> <p>Reason: To establish and document the structural condition of adjoining properties and public land for comparison as site work progresses and is completed and ensure neighbours and council are provided with the dilapidation report.</p>		
30.	<p>Construction Fencing</p> <p>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.</p> <p>Reason: To protect the built environment from construction works.</p>		

31.	<p>Hoardings</p> <p>The person acting on this consent must ensure the site is secured with temporary fencing prior to any works commencing.</p> <p>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.</p> <p>Separate approval is required from the Council under the Roads Act 1993 to erect a hoarding or temporary fence or awning on public property.</p> <p>Reason: To ensure the site is secure and that the required permits are obtained if enclosing public land.</p>
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DURING BUILDING WORK

	Condition
32.	<p>Contamination – New Evidence</p> <p>Any new information revealed during demolition, remediation or construction works that have the potential to alter previous conclusions about site contamination must be immediately notified to the Council and the Certifying Authority.</p> <p>Reason: To protect the amenity of the neighbourhood from contamination.</p>
33.	<p>Advising Neighbours Prior to Excavation</p> <p>At least 7 days before excavating below the level of the base of the footings of a building on an adjoining allotment of land, reasonable notice must be provided to the owner of the adjoining allotment of land including particulars of the excavation.</p> <p>Reason: To ensure surrounding properties are adequately notified of the proposed works.</p>
34.	<p>Construction Hours – Class 1 and 10</p> <p>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.</p> <p>Reason: To protect the amenity of the neighbourhood.</p>
35.	<p>Construction Hours – Class 2-9</p> <p>Unless otherwise approved by Council, excavation, demolition, construction or subdivision work must only be permitted during the following hours:</p> <p>7:00am to 6.00pm, Mondays to Fridays, inclusive (with demolition works finishing at 5pm); 8:00am to 1:00pm on Saturdays with no demolition works occurring during this time; and at no time on Sundays or public holidays.</p>

	<p>Works may be undertaken outside these hours where they do not create any nuisance to neighbouring properties in terms of dust, noise, vibration etc. and do not entail the use of power tools, hammers etc. This may include but is not limited to painting.</p> <p>In the case that a standing plant or special out of hours permit is obtained from Council for works in association with this development, the works which are the subject of the permit may be carried out outside these hours.</p> <p>This condition does not apply in the event of a direction from police or other relevant authority for safety reasons, to prevent risk to life or environmental harm.</p> <p>Activities generating noise levels greater than 75dB(A) such as rock breaking, rock hammering, sheet piling and pile driving must be limited to 8:00am to 12:00pm, Monday to Saturday; and 2:00pm to 5:00pm Monday to Friday.</p> <p>The person acting on this consent must not undertake such activities for more than three continuous hours and must provide a minimum of one 2 hour respite period between any two periods of such works. "Continuous" means any period during which there is less than an uninterrupted 60 minute respite period between temporarily halting and recommencing any of that intrusively noisy work.</p> <p>Reason: To protect the amenity of the neighbourhood.</p>
<p>36.</p>	<p>Survey Prior to Footings</p> <p>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.</p> <p>Reason: To ensure works are in accordance with the consent.</p>

BEFORE ISSUE OF AN OCCUPATION CERTIFICATE

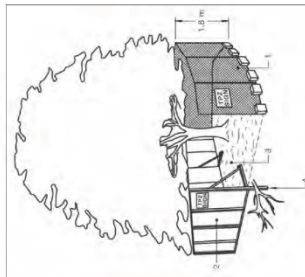
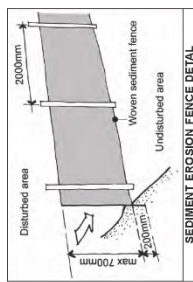
Condition	
<p>37.</p>	<p>Dilapidation Report – Post-Development</p> <p>Prior to the issue of an Occupation Certificate, the Principal Certifier must be provided with a second Dilapidation Report addressing the public infrastructure identified in approved predevelopment dilapidation report, including a photographic survey, structural condition and CCTV inspections which was compiled after the completion of works. As the report details public infrastructure, a copy is to be furnished to Council at the same time.</p> <p>Reason: To ensure Council assets are protected.</p>

DEMOLITION WORK

BEFORE DEMOLITION WORK COMMENCES

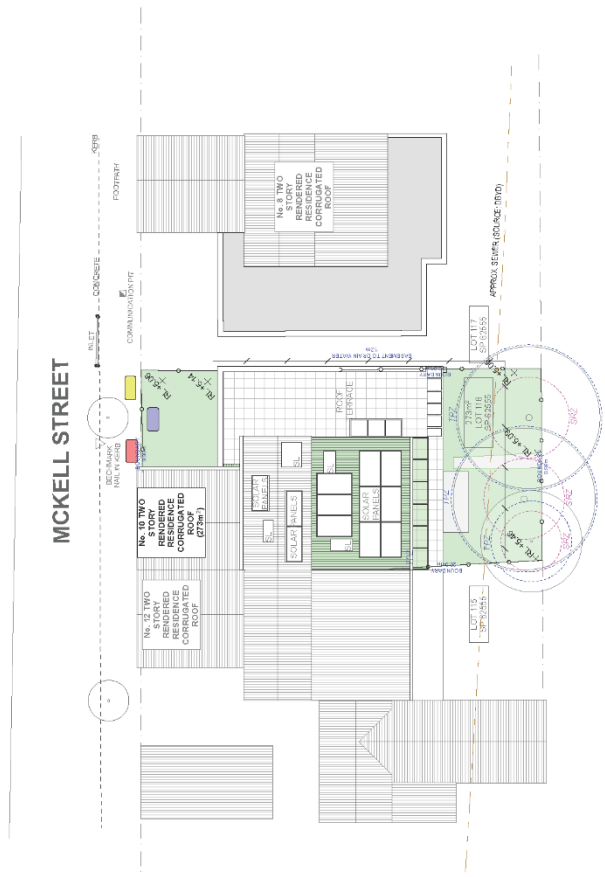
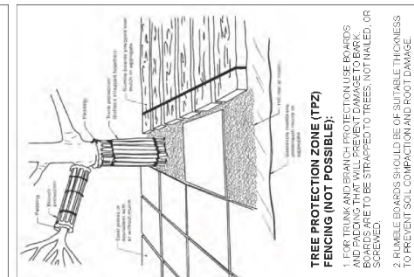
Condition	
38.	<p>Hoardings</p> <p>The person acting on this consent must ensure the site is secured with temporary fencing prior to any works commencing.</p> <p>If the work involves the erection or demolition of a building and is likely to cause pedestrian or vehicular traffic on public roads or Council 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.</p> <p>Separate approval is required from the Council under the Roads Act 1993 to erect a hoarding or temporary fence or awning on public property.</p> <p>Reason: To ensure the site is secure and that the required permits are obtained if enclosing public land.</p>

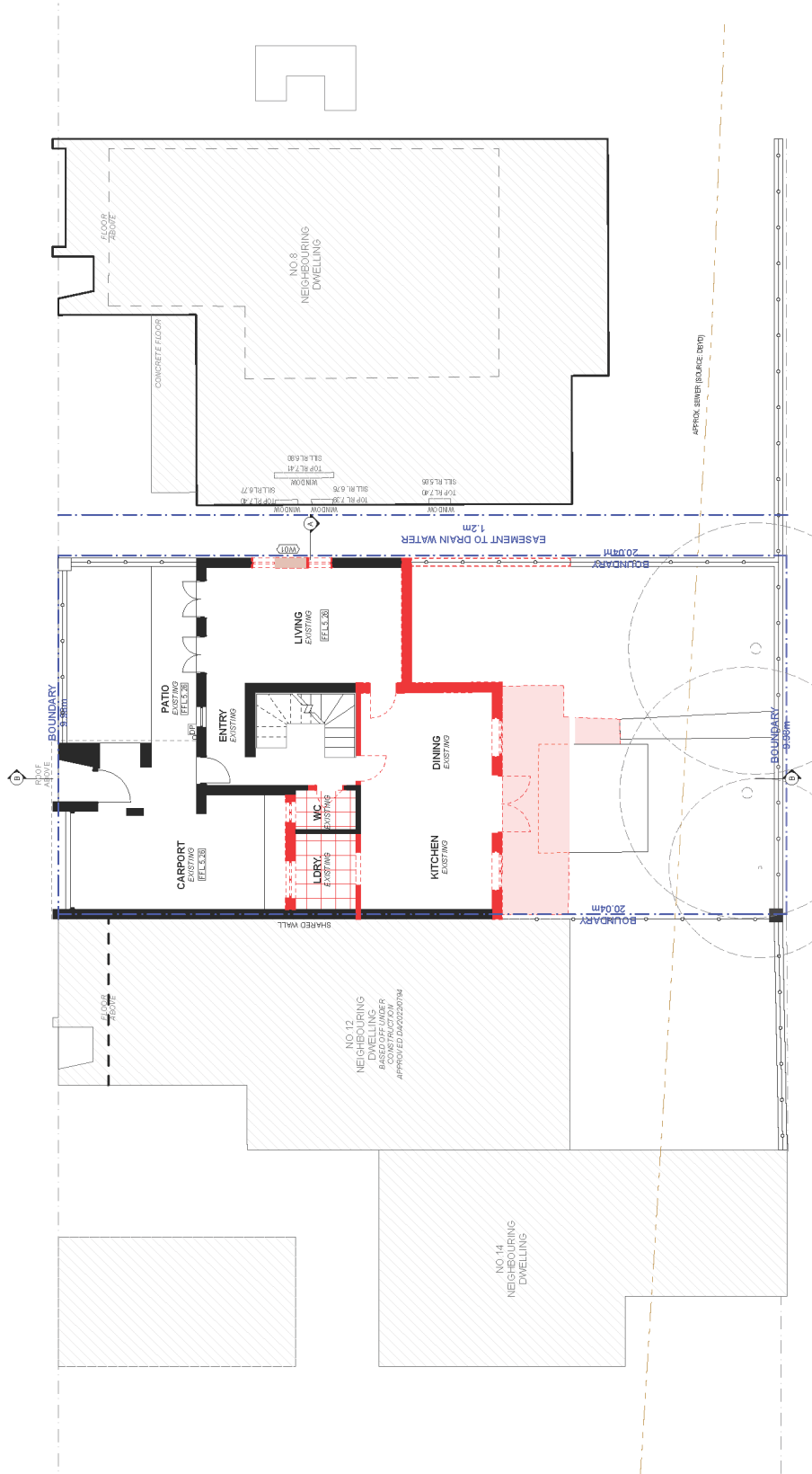
Attachment B – Plans of proposed development



TREE PROTECTION ZONE (TPZ) FENCING (WHEN POSSIBLE):

1. CAN BE MADE OF ANY TYPE OF FENCE, BUT MUST BE 150mm HIGH AND 100mm WIDE. IT MUST BE BUILT ON A CONCRETE FOUNDATION. THE TPZ (AT THE DISCRETION OF THE PROJECT ARCHITECT) MAY BE EXCAVATED, CONSOLIDATED, GRADE CHANGES, ANY KIND IS PERMITTED WITHIN THE TPZ.
2. ALTERNATIVE TO WOOD OR WOVEN PALING FENCE BUILDING MATERIALS MAY ALSO BE USED.
3. FENCING IS PERMITTED WITHIN THE TPZ.
4. BRACING IS PERMITTED WITHIN THE TPZ.
5. INSTALLATION OF SUPPORTS TO AVOID DAMAGING ROOTS.





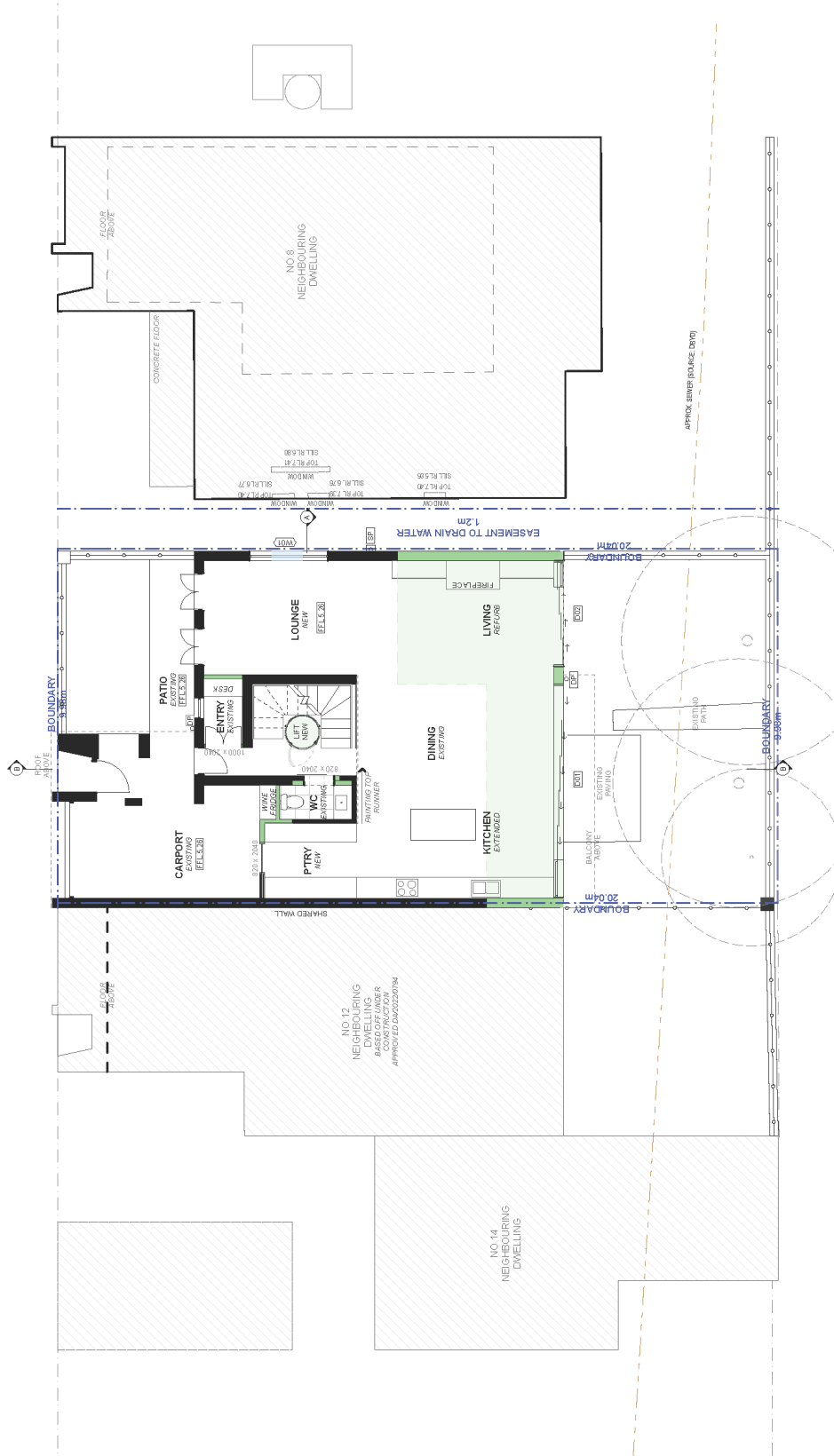
1 EXISTING GROUND FLOOR PLAN 1:100

NOTE: ALL DEMOLITION WORK TO BE CARRIED OUT IN ACCORDANCE WITH AS2801:2001.

REV.	NOTES	DATE	INITIAL	DATE	LEGEND	ABBREVIATIONS	NORTH POINT	Clients	DRAWING TITLE	
A	DATE	15/03/24	DAK/BET	15/03/24	EXISTING	CPD: CLIPBOARD		PATRICK & JENNIFER BROWNRIGG SITE ADDRESS: 10 MCKELL STREET BIRCHGROVE, NSW, 2041	EXISTING GROUND FLOOR PLAN	
B	DATE	03/03/24	DAK/BET	03/03/24	DEMOLISHED	DP: DOWN PIPE			SCALE:	DATE:
C	DATE	06/03/24	DAK/BET	06/03/24	PROPOSED	DPB: DOWN PIPE SPLITTER			1:100 @A3	8/11/2024
D	DATE	20/03/24	DAK/BET	20/03/24	FEI	FFL: FINISHED FLOOR LEVEL			PROJECT NO:	1067
E	DATE	18/12/24	DAK/BET	18/12/24	FEI	FW: FLOOR WASTE SYSTEM			DRAWING NO:	DA04
						RL: REDUCED LEVEL				
						SA: SMOKE ALARM				

progressive plans
 4/155 SPUR ROAD
 16 DONALD GREEN LANE
 AVALON, NSW, 2107
 HELLO@PROGRESSIVEPLANS.COM.AU
 WWW.PROGRESSIVEPLANS.COM.AU

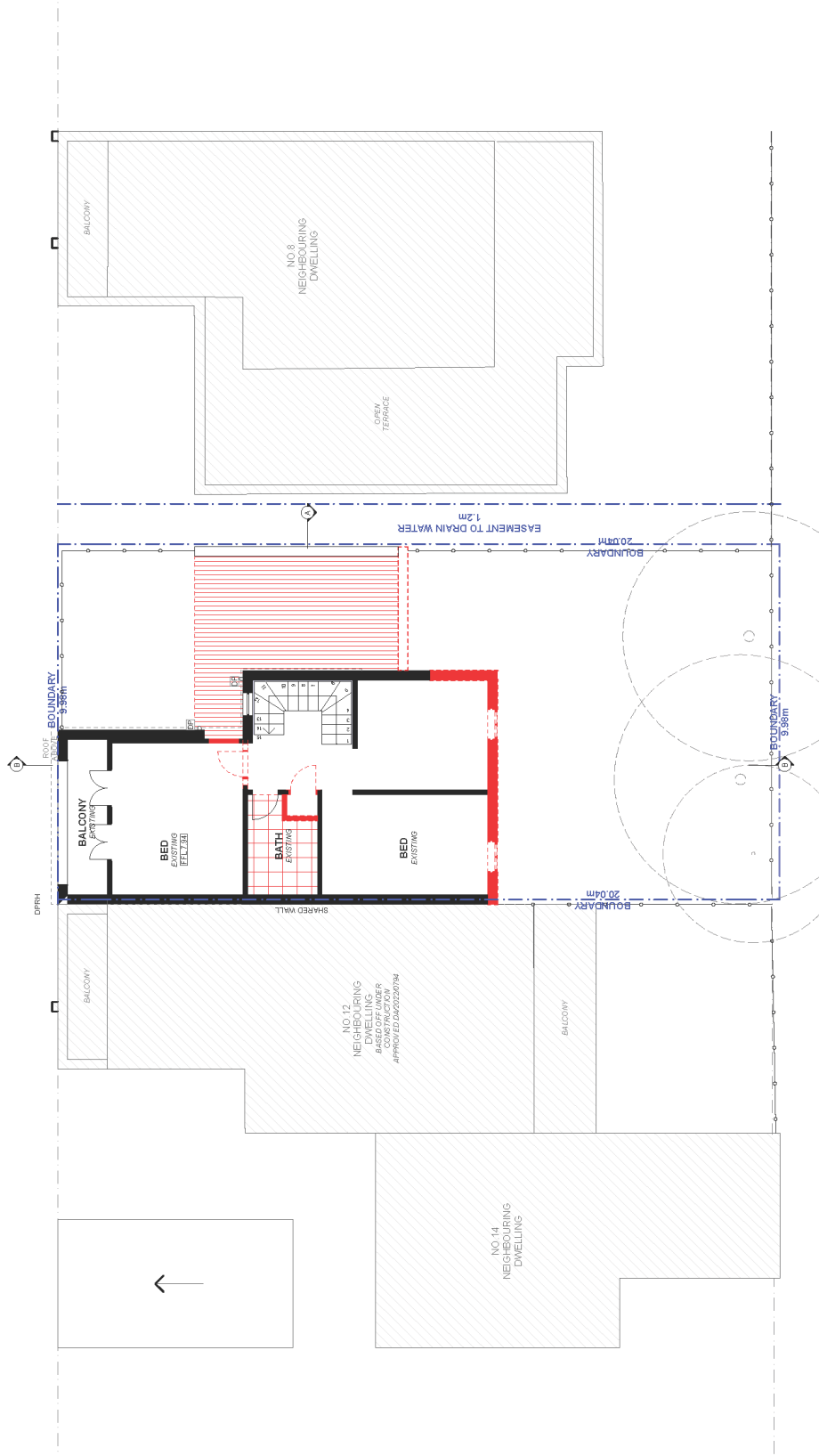
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 Version: 1, Version Date: 23/11/2024



1 PROPOSED GROUND FLOOR PLAN 1:100

<p>progressive plans 4/155 SHELTON ST 16 DONALD GREEN LANE AVALON, NSW, 2107 HELLO@PROGRESSIVEPLANS.COM.AU WWW.PROGRESSIVEPLANS.COM.AU</p>		<p>NOTES</p> <p>1. THE CLIENT SHALL RETAIN RESPONSIBILITY FOR OBTAINING ALL NECESSARY APPROVALS AND VERIFY ALL BEFORE ANY COMMENCEMENT OF WORK.</p> <p>2. DRAWINGS SHALL NOT BE USED FOR CONSTRUCTION WITHOUT THE WRITTEN APPROVAL OF THE ARCHITECT.</p> <p>3. THE DRAWING OFFICE FOR CONSTRUCTION SHALL BE ADVISED BY THE ARCHITECT OF ANY CHANGES TO THE WORK ASSET BEFORE COMMENCEMENT.</p>		<p>REV. NOTES. INITIAL DATE LEGEND</p> <table border="1"> <tr> <td>A</td> <td>DATE</td> <td>15/08/24</td> <td>EXISTING</td> </tr> <tr> <td>B</td> <td>DATE</td> <td>03/03/24</td> <td>DEMOLISHED</td> </tr> <tr> <td>C</td> <td>ADDITIONAL CHANGES</td> <td>06/06/24</td> <td>PROPOSED</td> </tr> <tr> <td>D</td> <td>DATE</td> <td>20/08/24</td> <td>FEINCE</td> </tr> <tr> <td>E</td> <td>DATE</td> <td>18/11/24</td> <td></td> </tr> </table>	A	DATE	15/08/24	EXISTING	B	DATE	03/03/24	DEMOLISHED	C	ADDITIONAL CHANGES	06/06/24	PROPOSED	D	DATE	20/08/24	FEINCE	E	DATE	18/11/24		<p>ABBREVIATIONS</p> <p>CPD: CLIPBOARD DP: DOWN PIPE DP8: DOWN PIPE SPITTER FFL: FINISHED FLOOR LEVEL FW: FLOOR WASTE SYSTEM RL: REDUCED LEVEL SA: SMOKE ALARM</p>	<p>NORTH POINT</p>	<p>CLIENTS</p> <p>PATRICK & JENNIFER BROWNRIGG SITE ADDRESS: 10 MCKELL STREET BIRCHGROVE, NSW, 2041</p>	<p>DRAWING TITLE: PROPOSED GROUND FLOOR PLAN</p> <table border="1"> <tr> <td>SCALE:</td> <td>DATE:</td> </tr> <tr> <td>1:100 @A3</td> <td>18/11/2024</td> </tr> <tr> <td>PROJECT NO:</td> <td>DRAWING NO:</td> </tr> <tr> <td>1067</td> <td>DA05</td> </tr> </table>	SCALE:	DATE:	1:100 @A3	18/11/2024	PROJECT NO:	DRAWING NO:	1067	DA05
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 Version: 1, Version Date: 25/11/2024




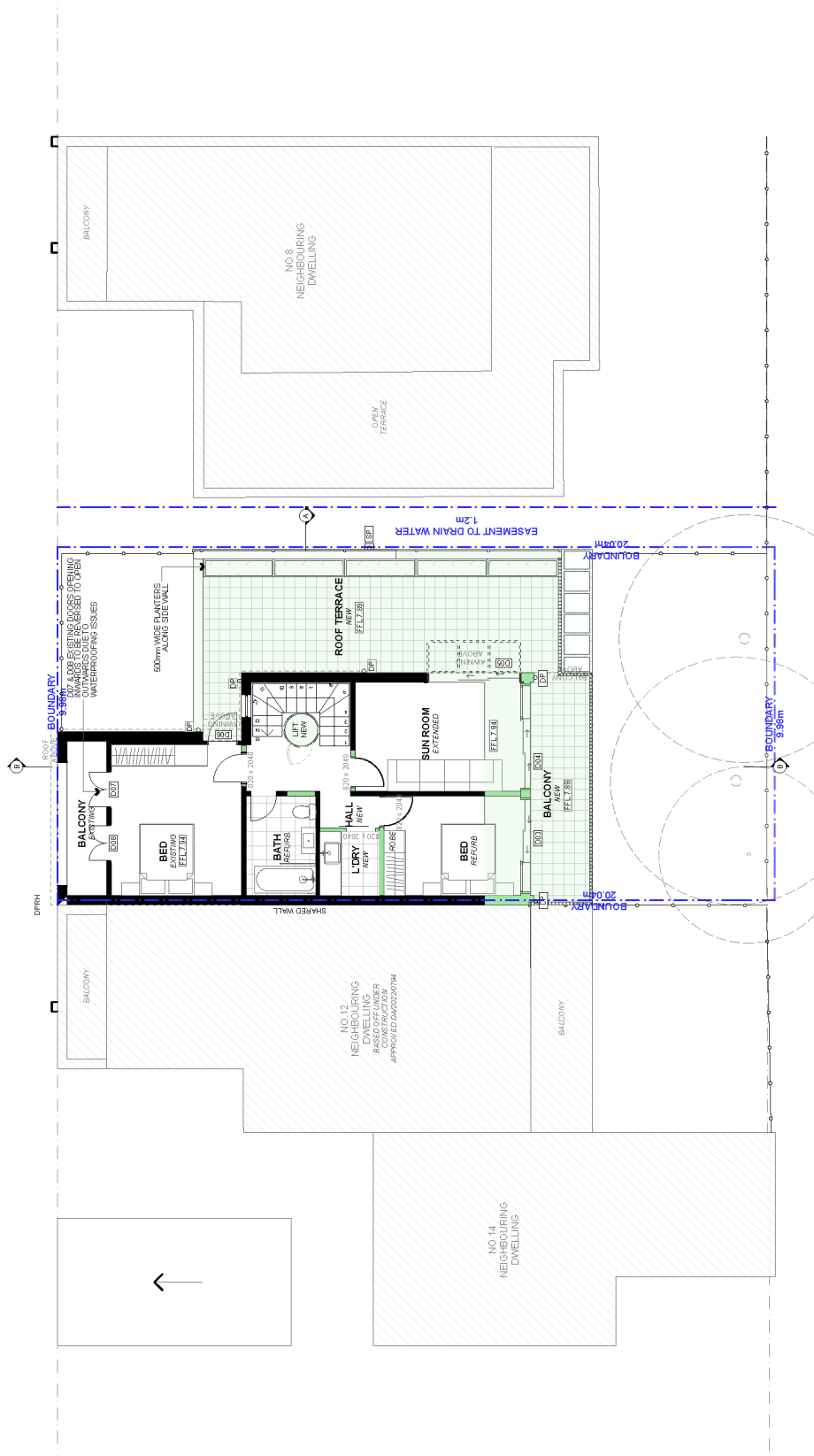
NOTE: ALL DEMOLITION WORK TO BE CARRIED OUT IN ACCORDANCE WITH AS2601:2001

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EXISTING FIRST FLOOR PLAN

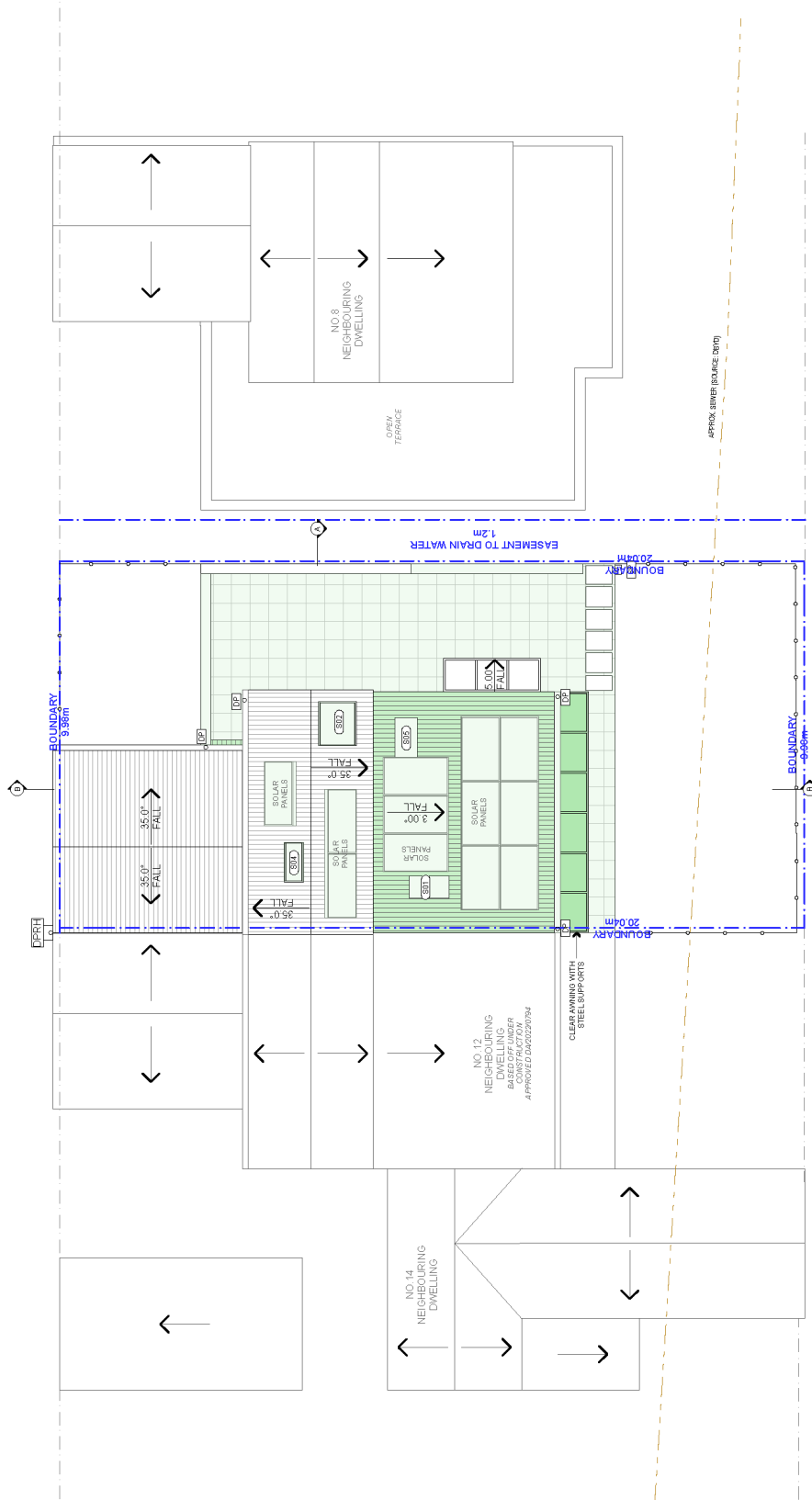
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 <p>progressive plans 4/155 SPUR ROAD 16 DONWING GREEN LANE AVALON, NSW, 2107 HELLO@PROGRESSIVEPLANS.COM.AU WWW.PROGRESSIVEPLANS.COM.AU</p>		<p>NOTES</p> <p>1. THE CLIENT SHALL VERIFY ALL DIMENSIONS AND VERIFY CALLS BEFORE ANY WORK COMMENCES ON THE DRAWING OFFICE.</p> <p>2. DRAWINGS SHALL NOT BE USED FOR CONSTRUCTION WITHOUT THE APPROVAL OF THE DRAWING OFFICE FOR CONSTRUCTION.</p> <p>3. THE WORK MUST BE VERIFIED BY A COMPETENT ENGINEER BEFORE WORK COMMENCES.</p>	<p>REV</p> <table border="1"> <tr> <th>REV</th> <th>NOTES</th> <th>DATE</th> </tr> <tr> <td>A</td> <td>DRAWING</td> <td>15/08/24</td> </tr> <tr> <td>B</td> <td>DATE SET</td> <td>03/02/24</td> </tr> <tr> <td>C</td> <td>ADDITIONAL WORK</td> <td>06/02/24</td> </tr> <tr> <td>D</td> <td>DATE SET</td> <td>20/02/24</td> </tr> <tr> <td>E</td> <td>DATE SET</td> <td>18/12/24</td> </tr> </table>	REV	NOTES	DATE	A	DRAWING	15/08/24	B	DATE SET	03/02/24	C	ADDITIONAL WORK	06/02/24	D	DATE SET	20/02/24	E	DATE SET	18/12/24	<p>LEGEND</p> <table border="1"> <tr> <th>LEGEND</th> <th>DATE</th> </tr> <tr> <td>EXISTING</td> <td>15/08/24</td> </tr> <tr> <td>DEMOLISHED</td> <td>03/02/24</td> </tr> <tr> <td>PROPOSED</td> <td>20/02/24</td> </tr> <tr> <td>FENCE</td> <td>18/12/24</td> </tr> </table>	LEGEND	DATE	EXISTING	15/08/24	DEMOLISHED	03/02/24	PROPOSED	20/02/24	FENCE	18/12/24	<p>ABBREVIATIONS</p> <p>CPD: CLIPBOARD DP: DOWN PIPE DPS: DOWN PIPE SPLITTER FFL: FINISHED FLOOR LEVEL FW: FLOOR WASTE SYSTEM RL: REDUCED LEVEL SA: SMOKE ALARM</p>	<p>CUSTOMERS</p> <p>PATRICK & JENNIFER BROWNRIGG SITE ADDRESS: 10 MCKELL STREET BIRCHGROVE, NSW, 2041</p>	<p>DRAWING TITLE:</p> <p>EXISTING FIRST FLOOR PLAN</p> <p>SCALE: 1:100 @A3</p> <p>DATE: 18/12/2024</p> <p>PROJECT NO: 1067</p> <p>DRAWING NO: DA06</p>
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1 PROPOSED FIRST FLOOR PLAN 1:100

 <p>progressive plans 4/155 SANDS 16 DONALD GREEN LANE AVALON, NSW, 2107 HELLO@PROGRESSIVEPLANS.COM.AU WWW.PROGRESSIVEPLANS.COM.AU</p>		<p>Document Set ID: 39655414 Version: 1, Version Date: 25/11/2024</p>																																
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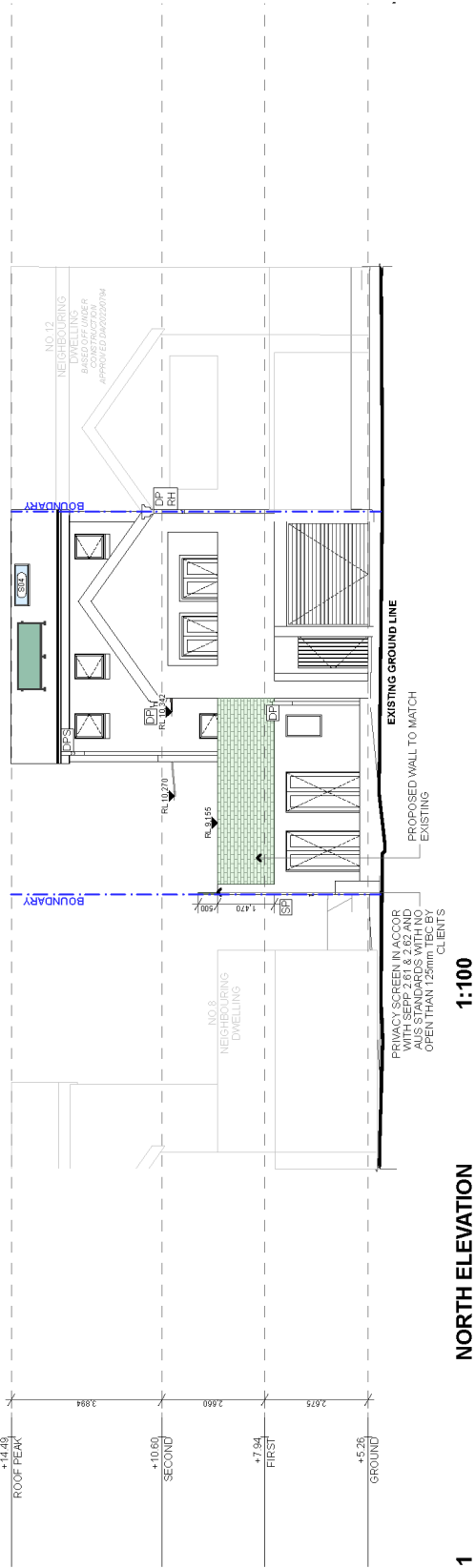


NOTE: PROPOSED DOWNPIPES TO DRAIN INTO EXISTING STORMWATER LINES

1 PROPOSED ROOF / CONCEPT STORMWATER PLAN 1:100

<p>progressive plans 6/155 SPUR ROAD MOWBRAY GREEN LANE AVALON, NSW, 2107 HELLO@PROGRESSIVEPLANS.COM.AU WWW.PROGRESSIVEPLANS.COM.AU</p>		<p>NOTES</p> <p>1. THE CLIENT SHALL VERIFY ALL DIMENSIONS AND VERIFY ALL BEFORE ANY WORK COMMENCES. THE DRAWING OFFICE SHALL NOT BE LIABLE FOR CONSTRUCTION OF THE WORK UNLESS THE WORK HAS BEEN VERIFIED BY THE ARCHITECTURAL ENGINEER BEFORE WORK COMMENCES.</p>	<table border="1"> <thead> <tr> <th>REV.</th> <th>NOTES</th> <th>INITIAL</th> <th>DATE</th> <th>LEGEND</th> </tr> </thead> <tbody> <tr> <td>A</td> <td>DRAWN</td> <td>SP</td> <td>15/08/24</td> <td>EXISTING</td> </tr> <tr> <td>B</td> <td>DATE SET</td> <td>SP</td> <td>03/04/24</td> <td>DEMOLISHED</td> </tr> <tr> <td>C</td> <td>ADDITIONAL CROPPING</td> <td>UM</td> <td>06/05/24</td> <td>PROPOSED</td> </tr> <tr> <td>D</td> <td>DATE SET</td> <td>UM</td> <td>20/05/24</td> <td>FENCE</td> </tr> <tr> <td>E</td> <td>DATE SET</td> <td>UM</td> <td>18/12/24</td> <td></td> </tr> </tbody> </table>	REV.	NOTES	INITIAL	DATE	LEGEND	A	DRAWN	SP	15/08/24	EXISTING	B	DATE SET	SP	03/04/24	DEMOLISHED	C	ADDITIONAL CROPPING	UM	06/05/24	PROPOSED	D	DATE SET	UM	20/05/24	FENCE	E	DATE SET	UM	18/12/24		<p>ABBREVIATIONS</p> <p>CPD: CURBOARD DP: DOWNPIPE DPS: DOWN PIPE SPLITTER FFL: FINISHED FLOOR LEVEL FW: FLOOR WASTE SYSTEM RL: REDUCED LEVEL SA: SMOKE ALARM</p>	<p>NORTH POINT</p>	<p>CLIENTS</p> <p>PATRICK & JENNIFER BROWNRIGG SITE ADDRESS: 10 MCKELL STREET BIRCHGROVE, NSW, 2041</p>	<p>DRAWING TITLE:</p> <p>PROPOSED ROOF / CONCEPT STORMWATER PLAN</p> <p>SCALE: 1:100 @A3</p> <p>DATE: 18/12/2024</p> <p>PROJECT NO: 1067</p> <p>DRAWING NO: DA11</p>
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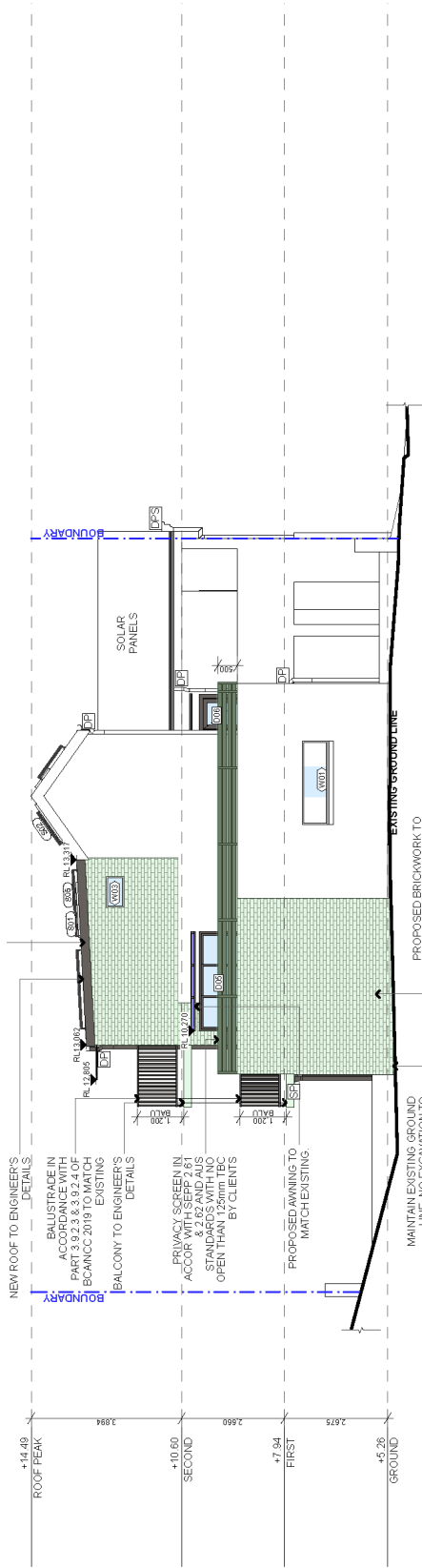
1 NORTH ELEVATION 1:100



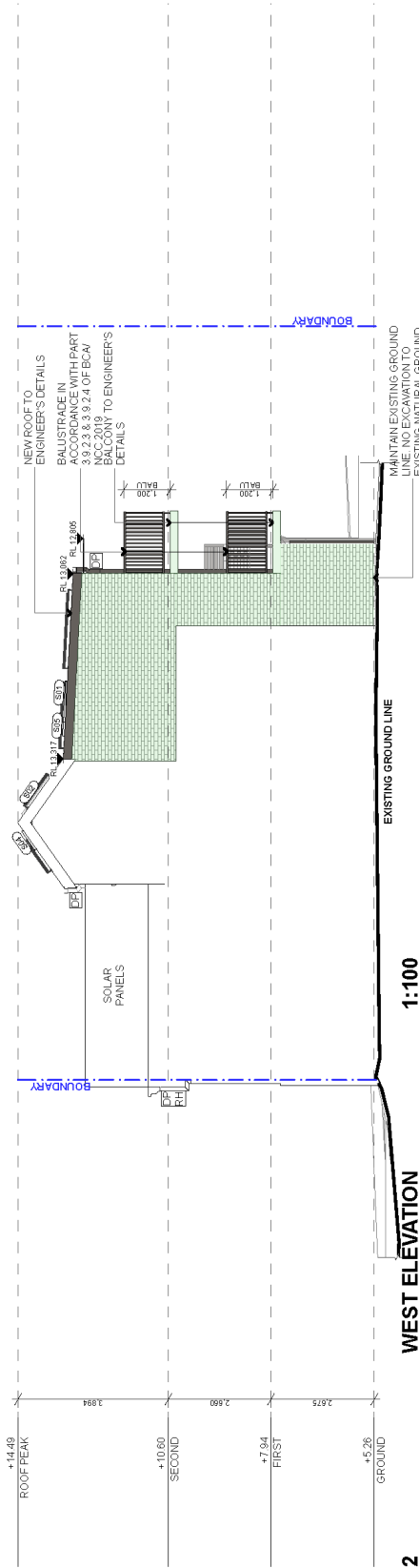
2 SOUTH ELEVATION 1:100

		<p>NOTES</p> <p>1. THE CLIENT SHALL VERIFY ALL DIMENSIONS AND VERIFY ALL BEFORE ANY COMMENCEMENT OF WORK.</p> <p>2. DRAWINGS SHALL NOT BE USED FOR THE STARTING OFF FOR CONSTRUCTION UNLESS THE WORK HAS BEEN VERIFIED BY THE ARCHITECT OR ENGINEER BEFORE WORK COMMENCES.</p>		<p>REV. INITIAL DATE</p> <p>A. DAB/ST 15/03/24</p> <p>B. DAB/ST 15/03/24</p> <p>C. DAB/ST 15/03/24</p> <p>D. DAB/ST 15/03/24</p> <p>E. DAB/ST 15/03/24</p>	<p>LEGEND</p> <p>EXISTING</p> <p>DEMOLISHED</p> <p>PROPOSED FLOOR</p> <p>PROPOSED GLAZING</p>	<p>ABBREVIATIONS</p> <p>CPD - CURBOARD</p> <p>SP - DOWNPIPE</p> <p>DPE - DOWN PIPE SPITTER</p> <p>FFL - FINISHED FLOOR LEVEL</p> <p>HWS - HOT WATER SYSTEM</p> <p>RL - REDUCED LEVEL</p>	<p>CLIENTS</p> <p>PATRICK & JENNIFER BROWN/IRIG</p> <p>SITE ADDRESS: 10 MCKELL STREET BIRCHGROVE, NSW, 2041</p>	<p>DRAWING TITLE: ELEVATIONS - NORTH & SOUTH</p> <p>SCALE: 1:100 @A3</p> <p>DATE: 15/03/2024</p> <p>PROJECT NO: 1067</p> <p>DRAWING NO: DA12</p>
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Version: 1, Version Date: 23/11/2024



1 EAST ELEVATION 1:100



2 WEST ELEVATION 1:100

progressive plans

14/01/2024
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NOTES

1. ALL WORK SHALL BE IN ACCORDANCE WITH THE NATIONAL BUILDING REGULATIONS AND VERIFIED BY A REGISTERED ARCHITECT OR ENGINEER.

2. DIMENSIONS AND VERIFICATION SHALL BE FOR ANY DIMENSIONS AND VERIFICATION OF THE EXISTING OFFICE.

3. DIMENSIONS SHALL NOT BE USED FOR THE EXISTING OFFICE FOR CONSTRUCTION.

4. THE DRAWING OFFICER FOR CONSTRUCTION SHALL BE THE ARCHITECT OR ENGINEER.

5. THE WORK SHALL BE VERIFIED BY A REGISTERED ARCHITECT OR ENGINEER BEFORE WORK COMMENCES.

REV.

REV.	INITIAL	DATE	LEGEND	NOTES
A	DA	15/02/24	EXISTING	DA 1/18/24
B	DA	15/02/24	DEMOLISHED	DA 1/18/24
C	DA	15/02/24	PROPOSED FLOOR	DA 1/18/24
D	DA	15/02/24	PROPOSED WINDOW FRAMES	DA 1/18/24
E	DA	15/02/24	PROPOSED GLAZING	DA 1/18/24

ABBREVIATIONS

CPD CURBOARD
DP DOWNPIPE
DPS DOWNPIPE SPACER
DPE DOWN PIPE SPLITTER
FFL FINISHED FLOOR LEVEL
HWS HOT WATER SYSTEM
RL REDUCED LEVEL

LEGEND

PROPOSED COLORBOND ROOF - MORTAR GROWN ON SIMLAR
PROPOSED WINDOW FRAMES - BRICK OF SIMLAR
PROPOSED FLOOR - BRICK OF SIMLAR
PROPOSED GLAZING

CUSTOMERS

PATRICK & JENNIFER BROWNRIGG

SITE ADDRESS:
10 MCKELL STREET
BIRCHGROVE, NSW, 2041

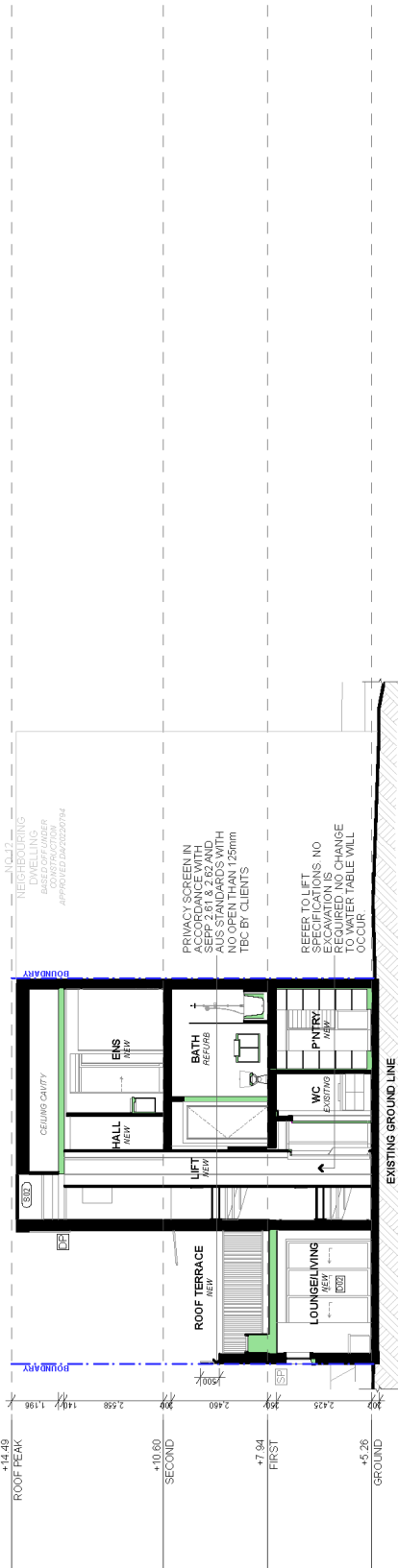
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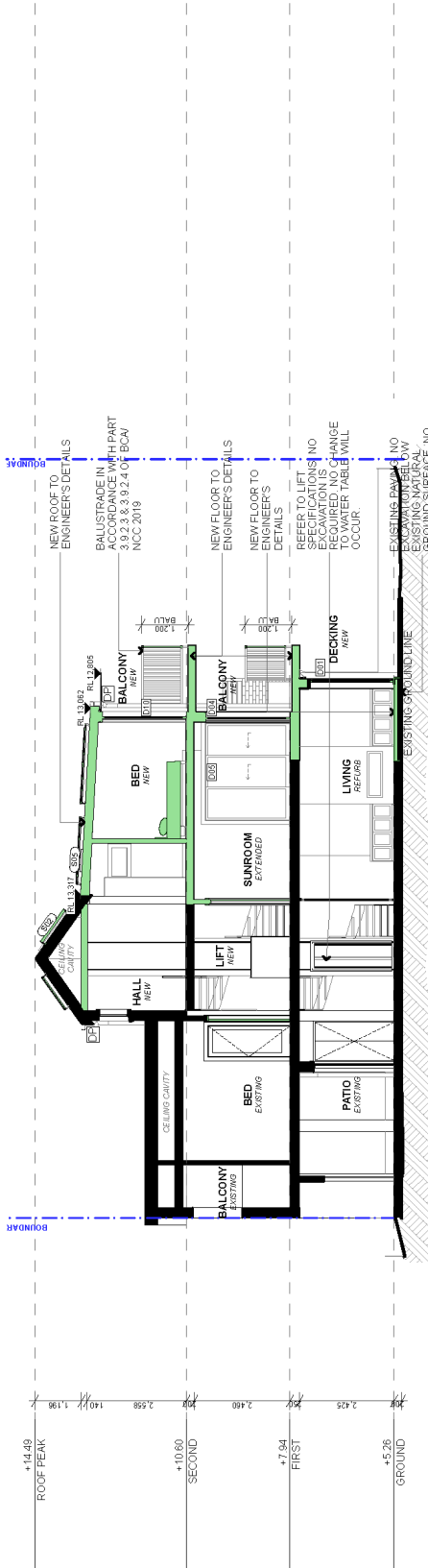
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18/11/2024

PROJECT NO.:
1067

DRAWING NO.:
DA13



SECTION A 1:100



SECTION B 1:100

<p>progressive plans 6/65 WILSON ROAD MURRUMBidge, NSW 2107 AVALON, NSW 2107 HELLO@PROGRESSIVEPLANS.COM.AU WWW.PROGRESSIVEPLANS.COM.AU</p>	<p>NOTES</p> <p>1. THIS DRAWING IS THE PROPERTY OF PROGRESSIVE PLANS. IT IS TO BE USED ONLY FOR THE PROJECT AND SITE SPECIFICALLY IDENTIFIED IN THE DRAWING. ANY REUSE OR MODIFICATION OF THIS DRAWING WITHOUT THE WRITTEN PERMISSION OF PROGRESSIVE PLANS IS STRICTLY PROHIBITED.</p> <p>2. THE DRAWING IS THE PROPERTY OF PROGRESSIVE PLANS. IT IS TO BE USED ONLY FOR THE PROJECT AND SITE SPECIFICALLY IDENTIFIED IN THE DRAWING. ANY REUSE OR MODIFICATION OF THIS DRAWING WITHOUT THE WRITTEN PERMISSION OF PROGRESSIVE PLANS IS STRICTLY PROHIBITED.</p>	<table border="1"> <thead> <tr> <th>REV.</th> <th>NOTES</th> <th>DATE</th> <th>LEGEND</th> </tr> </thead> <tbody> <tr> <td>A</td> <td>DATE SET</td> <td>05/02/24</td> <td>EXISTING</td> </tr> <tr> <td>B</td> <td>DATE SET</td> <td>05/02/24</td> <td>DEMOLISHED</td> </tr> <tr> <td>C</td> <td>ADDITIONAL WORK</td> <td>06/02/24</td> <td>PROPOSED</td> </tr> <tr> <td>D</td> <td>DATE SET</td> <td>06/02/24</td> <td></td> </tr> <tr> <td>E</td> <td>DATE SET</td> <td>18/12/24</td> <td></td> </tr> </tbody> </table>	REV.	NOTES	DATE	LEGEND	A	DATE SET	05/02/24	EXISTING	B	DATE SET	05/02/24	DEMOLISHED	C	ADDITIONAL WORK	06/02/24	PROPOSED	D	DATE SET	06/02/24		E	DATE SET	18/12/24		<p>ABBREVIATIONS</p> <p>CPD CURBOARD DP DOWNPIPE DPE DOWN PIPE SPITTER FFL FINISHED FLOOR LEVEL HWS HOT WATER SYSTEM RL REDUCED LEVEL</p>	<p>DRAWING TITLE: SECTIONS - A & B</p> <p>SCALE: 1:100 @/A3</p> <p>DATE: 09/12/2024</p> <p>PROJECT NO.: 1067</p> <p>DRAWING NO.: DA14</p>
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<p>Clients: PATRICK & JENNIFER BROWN RIGG</p> <p>Site Address: 10 MCKELL STREET BIRCHGROVE, NSW, 2041</p>																												

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Attachment C – Section 4.6 Exception to Development Standards

Suite 1, 9 Narabang Way Belrose NSW 2085 | Phone: (02) 9986 2535 | Fax: (02) 9986 3050 | www.bbfplanners.com.au

**RE: CLAUSE 4.6 REQUEST TO VARY THE FLOOR SPACE RATIO
10 MCKELL STREET, BIRCHGROVE****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.

2.0 Inner West Local Environmental Plan 2022 (“IWLEP”)**2.1 Clause 4.4 – Floor Space Ratio**

Pursuant to Clause 4.4(2b(c)) of Inner West Local Environmental Plan 2022 (IWLEP) the floor space ratio control applicable to the site is 0.9:1. The objectives of this control are as follows:

- (a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,*
- (b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,*
- (c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,*
- (d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,*
- (e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.*

The subject site sits within a larger strata development that was constructed in the 1980s. The overall site area is measured at approximately 17,140m² and from Council records the estate when first constructed had an FSR of 0.696:1. Many dwellings within the estate have undergone renovations since they were first constructed that would have increased the floor area across the estate into non-compliance. There is no feasible way to measure the gross floor area of the estate as a whole.

Notwithstanding, the proposed development will increase the gross floor area by 63.89m².

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of IWLEP provides:

(1) *The objectives of this clause are:*

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 IWLEP 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.*



Clause 4.6 FSR

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 4.4 FSR Development Standard.

Clause 4.6(3) of IWLEP 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 FSR provision at 4.4 of IWLEP which specifies a maximum FSR 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 IWLEP 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 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 2021*, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 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 IWLEP 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.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire*



Council (1999) 103 LGERA 94 at 100; Wehbe v Pittwater Council at [41] (Initial Action at [29]).

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 4.4 of IWLEP 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 4.4 of IWLEP 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 4.4 and the objectives for development for 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 4.4 of IWLEP?

4.0 Request for variation

4.1 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 Floor Space Ratio standard

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

- a) *to establish a maximum floor space ratio to enable appropriate development density,*

Response: Applying a maximum floor space ratio to this specific strata development is not feasible without firstly establishing the existing level of floor space across all dwelling within the estate. The dwelling density is not being altered with the additional floor space to 10 McKell Street.

Consistent with the conclusions reached by Senior Commissioner Roseth in the matter of *Project Venture Developments v Pittwater Council* (2005) NSW LEC 191 I have formed the considered opinion that most observers would not find the proposed development by virtue of its form, massing or scale (as reflected by FSR), offensive, jarring or unsympathetic in a streetscape context nor having regard to the built form characteristics of development within the site's visual catchment.

- b) *to ensure development density reflects its locality,*

Response: The proposal seeks to match the rear alignments with the recently approved DA for the adjoining dwelling at 12 McKell Street (DA/2022/0794) to reflect the scale of development within the immediate locality. The works are largely confined to the rear which will preserve the streetscape scale.

The proposal meets this objective.

- c) *to provide an appropriate transition between development of different densities,*

Response: The development is consistent with the scale of developments along Mckell Street.

- d) *to minimise adverse impacts on local amenity,*

Response: The works do not give rise to any unreasonable amenity impacts with regard to solar access, view loss or privacy. Privacy attenuation measures have been included to the balcony areas. No view corridors towards Mort Bay enjoyed from neighbouring dwellings will be impacted. The rear addition seeks to align with the adjoining dwelling at 12 Mckell Street which will allow that site to retain views across the rear garden on the subject site.

- e) *to increase the tree canopy and to protect the use and enjoyment of private properties and the public domain.*

Response: The existing trees on site will be preserved. The site benefits from adjoining Mort Bay reserve which includes a plethora of canopy trees.

Consistency with zone objectives

The subject site is zoned R1 General Residential pursuant to IWLEP 2022. The stated objectives of the zone are as follows:

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

Response: The development relates to alterations and additions to an existing dwelling.

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

Response: The development will maintain the existing land use of the site

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

Response: N/A

- *To provide residential development that maintains the character of built and natural features in the surrounding area.*

Response: The site is within a heritage conservation area despite the estate being a relatively recent development. The works have been largely confined to the rear to preserve the existing streetscape presentation and the character of the street.

The proposed works are permissible and consistent with the stated objectives of the zone.

The non-compliant component of the development, as it relates to FSR, demonstrates consistency with objectives of the R1 General Residential zone and the FSR standard objectives. Adopting the first option in *Wehbe* strict compliance with the FSR standard has been demonstrated to be unreasonable and unnecessary.

4.2 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] 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].

Sufficient environmental planning grounds exist to justify the FSR variation. Specifically, the environmental planning grounds consist of the following:

- If the FSR control was applied to the individual lot it would have a permissible GFA of 245.7m². The lot site is 273m². The proposal provides for 184.25m² of GFA which would equate to an FSR of 0.67:1 which would be well under the 0.9:1 control.
- The works have been designed to maintain a predominately 2 storey form to the street to ensure consistency with established development. Significant side setbacks to the ground and first floor provides relief from any visual impact with the proposed wall heights also being compliant. Total open space and landscaping are also compliant with the DCP control. Compliance with the numerical controls within the LEP and DCP is reflective of the considered design approach to limit any potential bulk and scale and visual impact concerns despite the FSR variation.
- The development does not raise any unreasonable amenity impacts with regard to overshadowing, privacy and view loss. As outlined in the statement of environmental effects view loss assessment, views will be maintained from the immediately adjoining properties. The developments across the road to the rear will be unaffected as they sit well above the subject site and will still access views over the proposed dwelling.
- We note that Council has applied the FSR development standard flexibility in this locality and have approved variations provided that the undersized lot provisions within the DCP can be met.

I have formed the considered opinion that sufficient environmental planning grounds exist to justify the variation including the compatibility of the height, bulk and scale of the development, as reflected by floor space, with the built form characteristics established by adjoining development and development generally within the site's visual catchment.

The developments compliance with the objectives of the FSR standard and the general paucity of adverse environmental impact also giving weight to the acceptability of the variation sought.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

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.

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 4.4 and the objectives of the R2 Low Density 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 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.

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 21st February 2018, 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 determination s 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

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- (a) that the contextually responsive development is consistent with the zone objectives, and
- (b) that the contextually responsive development is consistent with the objectives of the FSR standard, and
- (c) that there are sufficient environmental planning grounds to justify contravening the development standard, and
- (d) that having regard to (a), (b) and (c) above that compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of the case, and
- (e) that given the developments ability to comply with the zone and FSR standard objectives that approval would not be antipathetic to the public interest, and
- (f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- (g) Concurrence of the Secretary can be assumed in this case.

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 highly considered opinion that there is no statutory or environmental planning impediment to the granting of a FSR variation in this instance.

Yours Sincerely



William Fleming



Clause 4.6 FSR

BS, MPLAN
Boston Blyth Fleming Pty Ltd
Director

Attachment D – Section 4.6 Exception to Development Standards

Suite 1, 9 Narabang Way Belrose NSW 2085 | Phone: (02) 9986 2535 | Fax: (02) 9986 3050 | www.bbfplanners.com.au

RE: CLAUSE 4.6 REQUEST TO VARY THE LANDSCAPED AREAS FOR RESIDENTIAL ACCOMMODATION IN ZONE R1**10 MCKELL STREET, BIRCHGROVE****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.

2.0 Inner West Local Environmental Plan 2022 (“IWLEP”)**2.1 Clause 4.3C - Landscaped areas for residential accommodation in Zone R1**

Pursuant to Clause 4.3C(3(a)(ii)) of Inner West Local Environmental Plan 2022 (IWLEP) the landscape area control applicable to the site is 20%. Clause 4.3C(3(b)) includes a 60% maximum site coverage control. The objectives of this control are as follows:

- (a) to provide landscaped areas 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 character of the neighbourhood,
- (d) to encourage ecologically sustainable development,
- (e) to control site density,
- (f) to provide for landscaped areas and private open space.

The subject site sits within a larger strata development that was constructed in the 1980s. The overall site area is measured at approximately 17,140m². No records are available with regard to the existing level of landscaped area or site coverage of the Estate.



Notwithstanding, the site area of 10 McKell Street is measured at 273m² with a proposed site coverage of 121.7m² (44.38%) and landscaped area of 64.65m² (23.68%). When assessed against the individual lot within this strata development the proposal is consistent with the development standard.

It is assumed that when measured across the entire strata development the proposed works would result in a non-compliance with this clause and this clause 4.6 request is provided out of an abundance of caution.

2.2 Clause 4.6 – Exceptions to Development Standards

Clause 4.6(1) of IWLEP provides:

(1) *The objectives of this clause are:*

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 IWLEP 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 4.3C Landscape areas for residential accommodation Development Standard.

Clause 4.6(3) of IWLEP 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 is assumed to not comply with the landscaped area and site coverage with regard to the provision at 4.3C of IWLEP which specifies a maximum site coverage and minimum landscape 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 IWLEP 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 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 2021*, the Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 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 IWLEP 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.*

As these proceedings are the subject of an appeal to the Land & Environment Court, the Court has the power under cl 4.6(2) to grant development consent for development that contravenes a development standard, if it is satisfied of the matters in cl 4.6(4)(a), without obtaining or assuming the concurrence of the Secretary under cl 4.6(4)(b), by

reason of s 39(6) of the Court Act. Nevertheless, the Court should still consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard: *Fast Buck\$ v Byron Shire Council* (1999) 103 LGERA 94 at 100; *Wehbe v Pittwater Council* at [41] (*Initial Action* at [29]).

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 4.4 of IWLEP 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 4.3C of IWLEP 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 4.3C and the objectives for development for 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 4.3C of IWLEP?

4.0 Request for variation

4.1 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 Landscaped areas for residential accommodation in Zone R1

An assessment as to the consistency of the proposal when assessed against the objectives of the standard is as follows:

(a) to provide landscaped areas for substantial tree planting and for the use and enjoyment of residents,

Response: The rear yard will preserve the existing trees along the rear boundary and includes sufficient landscape area to support substantial tree plantings.

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

Response: The proposal seeks to match the rear alignments with the recently approved DA for the adjoining dwelling at 12 McKell Street (DA/2022/0794) and will have a similar landscape rear yard. No 8 also includes a rear yard. These site back onto the public reserve of Mort Bay and benefits from being within a landscaped setting with canopy trees.

The proposal meets this objective.



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

Response: The landscape character will be preserved with compliant levels of site coverage and landscape area achieved when measured with regard to the individual lot. In this regard, compliance demonstrates the development promotes the desired character of the neighbourhood.

(d) to encourage ecologically sustainable development,

Response: The landscape area proposed is suitable for retention and absorption of surface drainage water on site.

(e) to control site density,

Response: When assessed against the individual lot, the proposal is consistent with the FSR, site coverage and landscape area controls which reflects an appropriate density.

(f) to provide for landscaped areas and private open space.

Response: The rear garden will provide for adequate private open space within a landscaped setting. The development meets the private open space requirements within the DCP.

Consistency with zone objectives

The subject site is zoned R1 General Residential pursuant to IWLEP 2022. The stated objectives of the zone are as follows:

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

Response: The development relates to alterations and additions to an existing dwelling.

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

Response: The development will maintain the existing land use of the site

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

Response: N/A

- *To provide residential development that maintains the character of built and natural features in the surrounding area.*

Response: Compliant levels of site coverage and landscape area, when assessed against the individual lot, demonstrates that the development will maintain the character of the built and natural features of the surrounding area.

The proposed works are permissible and consistent with the stated objectives of the zone.

The non-compliant component of the development, as it relates to FSR, demonstrates consistency with objectives of the R1 General Residential zone and the FSR standard objectives. Adopting the first option in *Wehbe* strict compliance with the FSR standard has been demonstrated to be unreasonable and unnecessary.

4.2 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] 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].

Sufficient environmental planning grounds exist to justify the variation. Specifically, the environmental planning grounds consist of the following:

- This clause 4.6 is provided out of an abundance of caution due to the lack of feasibility to measure the existing landscape area and site coverage of the Estate as a whole.
- When assessed against the individual lot the proposal is well under the max site coverage and consistent with the 20% landscape area control. This reflects a reasonable development proposal that has regard for the applicable controls and the desired future character of the area.
- No adverse amenity impacts are anticipated with the proposed site coverage and landscape area.

Sufficient environmental planning grounds exist to justify the variation including the compatibility of the development, as reflected by site coverage and landscape area, with the built form characteristics established by adjoining development and development generally within the site's visual catchment.

The developments compliance with the objectives of the development standard and the general paucity of adverse environmental impact also giving weight to the acceptability of the variation sought.

The proposed development achieves the objects in Section 1.3 of the EPA Act, specifically:

- The proposal promotes the orderly and economic use and development of land (1.3(c)).
- The development represents good design (1.3(g)).
- The building as designed facilitates its proper construction and will ensure the protection of the health and safety of its future occupants (1.3(h)).

It is noted that in *Initial Action*, the Court clarified what items a Clause 4.6 does and does not need to satisfy. Importantly, there does not need to be a "better" planning outcome:

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.

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 4.4 and the objectives of the R2 Low Density 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 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.

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 5 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

Having regard to the clause 4.6 variation provisions we have formed the considered opinion:

- (a) that the contextually responsive development is consistent with the zone objectives, and
- (b) that the contextually responsive development is consistent with the objectives of clause 4.3C, and
- (c) that there are sufficient environmental planning grounds to justify contravening the development standard, and

- (d) that having regard to (a), (b) and (c) above that compliance with clause 4.3C development standard is unreasonable or unnecessary in the circumstances of the case, and
- (e) that given the developments ability to comply with the zone and landscape area standard objectives that approval would not be antipathetic to the public interest, and
- (f) that contravention of the development standard does not raise any matter of significance for State or regional environmental planning; and
- (g) Concurrence of the Secretary can be assumed in this case.

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, there is no statutory or environmental planning impediment to the granting of a landscape area and site coverage variation in this instance.

Yours Sincerely



William Fleming
BS, MPLAN
Boston Blyth Fleming Pty Ltd
Director