




 DEVELOPMENT ASSESSMENT REPORT	
<b>Application No.</b>	DA/2022/0106
<b>Address</b>	79 Rowntree Street BIRCHGROVE NSW 2041
<b>Proposal</b>	Demolition of existing dwelling and construction of a new dwelling
<b>Date of Lodgement</b>	18 February 2022
<b>Applicant</b>	Mr Ara Margossian
<b>Owner</b>	Aramazd Pty Ltd
<b>Number of Submissions</b>	Initial: 4
<b>Value of works</b>	\$816,079.00
<b>Reason for determination at Planning Panel</b>	Clause 4.6 variation exceeds 10%
<b>Main Issues</b>	FSR variation, building location zone, side setback, visual privacy
<b>Recommendation</b>	Approved with Conditions
<b>Attachment A</b>	Recommended conditions of consent
<b>Attachment B</b>	Plans of proposed development
<b>Attachment C</b>	Clause 4.6 Exception to Development Standards
<b>Attachment D</b>	Statement of significance for the Town of Waterview Heritage Conservation Area
	
LOCALITY MAP	
Subject Site 	Objectors 
Notified Area 	Supporters 

## 1. Executive Summary

This report is an assessment of the application submitted to Council for demolition of existing dwelling and construction of a new dwelling at 79 Rowntree Street, Birchgrove. The application was notified to surrounding properties and four submissions were received in response to the initial notification.

The main issues that have arisen from the application include:

- Variation to the floor space ratio (FSR) Development Standard under the Leichhardt Local Environmental Plan 2013 (LLEP 2013);
- Insufficient setback to the rear boundary at the first floor;
- Insufficient side setbacks to the north-eastern boundary; and
- Visual privacy impacts to the adjoining and adjacent properties.

The departure from the Floor Space Ratio (FSR) Development Standard has been assessed to be acceptable where the proposal meets all heads of consideration under the provisions of Clause 4.6 of the Leichhardt Local Environmental Plan 2013 including the relevant zone and development standard objectives.

The side setback proposed to the north-eastern boundary results in adverse amenity impacts to the adjoining dwelling at 89 Rowntree Street, whilst the rear setback proposed at the first floor is contrary to the pattern of development. Furthermore, both the ground floor kitchen window and rear deck result in direct overlooking into the window of 69 Rowntree Street and adjacent POS areas of neighbouring properties respectively. With the imposition of appropriate conditions requiring an increased side and rear setback respectively as well as privacy mitigation measures to the rear deck and kitchen window the application is considered suitable for approval.

## 2. Proposal

The proposal seeks to demolish all existing structures, carry out excavation works and the construction of a new dwelling. The new dwelling will comprise of the following:

- Lower Ground Floor
  - Bedrooms x 3;
  - Bathroom/laundry;
  - Storage area;
  - Family room with attached rear deck;
  - External stairway connecting rear yard to ground floor;
- Ground Floor
  - Bedroom x 1;
  - Bathroom;
  - Living/kitchen with rear balcony;
  - New driveway and internal garage.
- First Floor
  - Bedroom x 1
  - Ensuite;
  - Walk in wardrobe with balcony to the street.

### 3. Site Description

The subject site is located on the southern side of Rowntree Street, between Spring Street and Curtis Road. The site consists of a single allotment and is generally rectilinear shaped with a total area of 230.4sqm.

The subject site has a frontage to Rowntree Street of 10.3m and supports a two storey dwelling with a storage under croft area. The subject site is located within a conservation area and has a fall of approximately 1.9m from the front to the rear boundary. The adjoining properties along Rowntree Street encompass a similar topography to the subject site and as such the adjoining dwellings present as a single and/or two storey form to the Rowntree Street streetscape and a two and/or three storey built form when viewed from the rear respectively.



### 4. Background

#### 4(a) Site history

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

#### Subject Site

Application	Proposal	Decision & Date
PDA/2020/0510	Demolition of existing dwelling and construction of new dwelling	Advice issued 20/01/2021
PDA/2020/0280	Demolition of existing dwelling and construction of new dwelling	Advice issued 7/09/2020

**Surrounding properties****81 Rowntree Street, Birchgrove**

<b>Application</b>	<b>Proposal</b>	<b>Decision &amp; Date</b>
D/2012/126	Alterations and additions to the ground-floor of the existing dwelling including a new deck. SEPP 1 objections for Floor Space Ratio and Landscaped Area.	Approved, 3/05/2012
M/2012/104	Section 96 modification of D/2012/126 which approved alterations and additions. Modification consists of changes to the conditions of consent.	Approved, 25/07/2012

**81 Rowntree Street, Birchgrove**

<b>Application</b>	<b>Proposal</b>	<b>Decision &amp; Date</b>
D/2012/334	Alterations and additions to the existing dwelling including internal layout changes at ground and lower ground-floor levels, facade changes and associated site works. SEPP 1 objection for Floor Space Ratio.	Approved, 26/09/2012

**4(b) Application history**

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

<b>Date</b>	<b>Discussion / Letter / Additional Information</b>
26/07/2022	Request for additional information sent to the applicant requesting design changes to address the outstanding heritage matters, building location zone of the first floor, northern side setback, solar access impacts as well a clause 4.6 variation request for FSR.
17/08/2022	Response to request to information letter provided by the applicant including revised plans to address the heritage matters, revised shadow diagrams, Clause 4.6 to vary FSR. Further justification was provided regarding the building location zone of the first floor and northern side setback.

**5. Assessment**

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

**5(a) Environmental Planning Instruments**

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

- *State Environmental Planning Policy (Resilience and Hazards) 2021*
- *State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004*

The following provides further discussion of the relevant issues:

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

Chapter 4 Remediation of land

Section 4.16 (1) of the SEPP requires the consent authority not consent to the carrying out of any development on land unless:

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

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

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

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

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

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

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

- Clause 1.2 - Aims of the Plan
- Clause 2.3 - Zone objectives and Land Use Table
- Clause 2.5 - Additional permitted uses for land
- Clause 2.7 - Demolition
- Clause 4.3A - Landscaped areas for residential accommodation in Zone R1
- Clause 4.4 – Floor Space Ratio
- Clause 4.5 - Calculation of floor space ratio and site area
- Clause 4.6 - Exceptions to development standards
- Clause 5.10 - Heritage Conservation
- Clause 6.1 - Acid Sulfate Soils
- Clause 6.2 - Earthworks
- Clause 6.4 - Stormwater management

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

The site is zoned LR1 under the *LLEP 2011*. The *LLEP 2013* defines the development as:

*“Dwelling house means a building containing only one dwelling.”*

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

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

Standard	Proposal	non compliance	Complies
<b>Floor Space Ratio</b> Maximum permissible: 0.9:1 or 207.4sqm	1:1 or 231.15sqm	23.75sqm or 11.5%	No
<b>Landscape Area</b> Minimum permissible: 15% or 34.6sqm	62sqm or 26.9%	-	Yes
<b>Site Coverage</b> Maximum permissible: 60% or 138.2sqm	56% or 129sqm	-	Yes

Clause 4.6 Exceptions to Development Standards

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

- Clause 4.4 – Floor Space Ratio

The applicant seeks a variation to the Floor Space Ratio development standard under Clause 4.4 of the *Leichhardt Local Environment Plan 2013* by 11.5% (23.75 sqm).

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

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

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

- *The new dwelling house helps to provide housing types and densities to meet the housing needs of the community in a development that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.*
- *The development has been designed in a manner which protects and enhances the amenity of existing and future residents and the neighbourhood.*
- *The proposal is generally consistent with existing height, bulk and scale of the existing dwelling and is in keeping with the density pattern in the locality*

- *The development facilitates design excellence by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design.*
- *The variation to the floor space ratio control (11.5%) is relatively modest as it is of negligible impact to the streetscape and the amenity of neighbouring properties largely owing to natural topography which enables that a significant portion of the lower ground floor is below natural ground level*

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

It is considered the development is in the public interest because it is consistent with the objectives of the R1 – General Residential Zone, in accordance with Clause 4.6(4)(a)(ii) of the *Leichhardt Local Environment Plan 2013* for the following reasons:

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

Comment: The proposal caters for the housing needs of the community by improving upon existing development for ongoing residential use.

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

Comment: The proposal seeks to provide a new dwelling that is generally consistent with the density of the HCA.

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

Comment: NA

- *To improve opportunities to work from home.*

Comment: The proposal includes rooms to allow opportunities for the residents to work from home.

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

Comment: The proposal is predominately compatible with the character, style and pattern of surrounding dwellings with the exception of the first floor rear setback which can be addressed by way of condition.

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

Comment: The proposal is consistent with the landscaped area requirements.

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

Comment: NA, No subdivision is proposed.

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

Comment: The proposed development will generally not have any adverse impacts on the amenity of surrounding properties, with particular regard for solar access, visual privacy and bulk and scale.

It is considered the development is in the public interest because it is consistent with the objectives of the Floor Space Ratio development standard, in accordance with Clause 4.6(4)(a)(ii) of the *Leichhardt Local Environment Plan 2013* for the following reasons:

- *(a to ensure that residential accommodation—*

*(i) is compatible with the desired future character of the area in relation to building bulk, form and scale, and*

Comment: The subject site is located within the Birchgrove Distinctive Neighbourhood. The design of the development complements the character of the area and maintains the predominant two storey scale from the street. The proposed additions will not detract from the adjoining dwellings, and is considered not to compromise the desired future character of the distinctive neighbourhood.

- *(ii) provides a suitable balance between landscaped areas and the built form, and*

Comment: The proposal is consistent with the landscaped area requirements.

- *(iii) minimises the impact of the bulk and scale of buildings,*

Comment: The proposal generally provides an acceptable scale of development in the context of surrounding development and would not pose adverse amenity impacts to neighbouring properties subject to recommended conditions pertaining to the side and rear setbacks.

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

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

However, it is noted in order to address other outstanding design matters discussed elsewhere within this report, namely in relation to the side and rear setback provisions, recommended design change conditions if adopted will subsequently reduce the FSR on the subject site closer to compliance.

#### Clause 5.10 Heritage Conservation

The subject property at 79 Rowntree Street, Birchgrove, is a contributory dwelling located within the Town of Waterview Heritage Conservation Area (C4 in Schedule 5 of the *Leichhardt LEP 2013*). The proposal seeks to demolish the existing dwelling and ancillary structures and construct a new dwelling, the demolition of a contributory dwelling within a HCA requires an assessment against the planning principle from *Helou v Strathfield Municipal Council*. An assessment of this has been undertaken below:

1. *What is the heritage significance of the conservation area?*

Comment: Please refer to Attachment D for a copy of the statement of significance for the Town of Waterview Heritage Conservation Area.

2. *What contribution does the individual building make to the significance of the conservation area?*

Comment: The HIS details significant alterations and additions made to the dwelling and states that in comparison to Californian Bungalows elsewhere in Birchgrove, the subject dwelling is an ordinary dwelling with no interesting detailing that makes little or no contribution to the streetscape.

3. *Is the building structurally unsafe?*



Comment: The Structural Report concludes the dwelling is not structurally adequate to accommodate any future works.

4. *If the building is or can be rendered structurally safe, is there any scope for extending or altering it to achieve the development aspirations of the applicant in a way that would have a lesser effect on the integrity of the conservation area than demolition? If the answer is yes, the cost of the necessary remediation/rectification works should be considered.*

Comment: The structural report provided with the application states that remediation of the existing dwelling is impractical. Namely that it is not feasible, practicable or economical to salvage the dwelling and that there aren't any remediation works that can be recommended to conserve the dwelling. Furthermore, attempts to make the structure adequate will require significant work, most of which requires removal of existing elements of the dwelling. The underpinning works to the existing footings in particular are labour intensive and risk damage to the structure in the process due to the fragility of the brick footings.

5. *Are these costs so high that they impose an unacceptable burden on the owner of the building? Is the cost of altering or extending or incorporating the contributory building into a development of the site (that is within the reasonable expectations for the use of the site under the applicable statutes and controls) so unreasonable that demolition should be permitted? If these costs are reasonable, then remediation/rectification (whether accompanied by alteration and/or extension or not) should be preferred to demolition and rebuilding.*

Comment: The structural report provided with the application does not believe it is feasible, practicable or economical to attempt to salvage the structure.

6. *Is the replacement of such quality that it will fit into the conservation area? If the replacement does not fit, the building should be retained until a proposal of suitable quality is approved.*

Comment: The amended proposal has largely incorporated the design change requests as detailed within the request for additional information letter. As such the proposed infill dwelling will fit in with the immediate streetscape and the Town of Waterview HCA.

Based on the assessment above, the demolition of the existing dwelling is supported. The proposed infill dwelling has been designed so it is consistent with the character of the HCA in terms of built form, scale and materials.

Having regard to the above, the proposal is considered to satisfy the provisions of Clause 5.10 of LLEP 2013.

### 5(b) Inner West Local Environmental Plan 2022

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

Section 4.15(1)(a)(i) of the *Environmental Planning and Assessment Act 1979* requires consideration of any Environmental Planning Instrument (EPI), and (1)(a)(ii) also requires consideration of any EPI that has been subject to public consultation. The subject application was lodged on 18 February 2022, on this date, the IWLEP was a draft EPI, which had been publicly exhibited and was considered imminent and certain.

Notwithstanding this, the amended provisions of the draft EPI do not alter the outcome of the assessment of the subject application.

## 5(d) Development Control Plans

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

<b>LDCP2013</b>	<b>Compliance</b>
<b>Part C</b>	
C1.0 General Provisions	Yes
C1.1 Site and Context Analysis	Yes
C1.2 Demolition	Yes
C1.3 Alterations and additions	Yes
C1.4 Heritage Conservation Areas and Heritage Items	Yes
C1.11 Parking	Yes
C1.12 Landscaping	Yes
<b>Part C: Place – Section 2 Urban Character</b>	
C2.2.2.6 Birchgrove Distinctive Neighbourhood	Yes
<b>Part C: Place – Section 3 – Residential Provisions</b>	
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	Yes – see discussion
C3.11 Visual Privacy	Yes – see discussion
<b>Part D: Energy</b>	
Section 1 – Energy Management	Yes
Section 2 – Resource Recovery and Waste Management	
D2.1 General Requirements	Yes
D2.2 Demolition and Construction of All Development	Yes
D2.3 Residential Development	Yes
<b>Part E: Water</b>	
Section 1 – Sustainable Water and Risk Management	
E1.1.3 Stormwater Drainage Concept Plan	Yes
E1.2 Water Management	Yes
E1.2.1 Water Conservation	Yes
E1.2.2 Managing Stormwater within the Site	Yes
E1.2.3 On-Site Detention of Stormwater	Yes

The following provides discussion of the relevant issues:

C3.2 Site Layout and Building Design*Building Location Zone (BLZ)*

The BLZ is to be determined on a floor-by-floor basis where works are to be reasonably expected to be built. The proposed first floor of the dwelling is setback 6.3m from the rear boundary and serves a generously sized 32sqm master bedroom with ensuite, WIR as well

as an 8.7sqm void to the kitchen entry area on the ground floor below. The properties immediately adjoining the site at 81 and 69 Rowntree Street do not have an established first floor addition, and as such in accordance with the provisions under this part the BLZ is to be established on merit. Pursuant to Control C6 under this Part of LDCP2013, where a proposal seeks to establish a new BLZ, various tests need to be met. These tests are assessed below:

- *a. Amenity to adjacent properties (i.e. sunlight, privacy, views) is protected and compliance with the solar access controls of this Development Control Plan is achieved;*

Comment: Acceptable. The proposal complies with applicable solar access and privacy controls and will result in no loss of views.

- *b. the proposed development will be compatible with the existing streetscape, desired future character and scale of surrounding development;*

Comment: Not acceptable. Due to the fall of the site, the first-floor works will not adversely impact the existing Rowntree Street streetscape but will contravene with the desired future character, scale and rhythm of surrounding developments when viewed from the rear. Whilst the properties immediately adjoining the subject site do not have a first-floor addition, dwellings further to the north-east of the site, with 83 and 85 Rowntree Street being the closest, can be utilised to guide where bulk should be reasonably expected on the site. The first floor of 83 Rowntree Street has a rear setback of 8.6m, in comparison to the proposal which has a rear setback of 6.3m, this is a difference of 2.3m. This significant difference in the location of the rear setback does not ensure that the pattern of development/built form can be maintained for dwellings located on the south-eastern side of Rowntree Street. Furthermore, the rear setback proposed will result in incremental visual bulk impacts to the properties at the rear and will hinder the ability of the immediately adjoining properties to benefit from view to Sydney Harbour in the future.

- *c. the proposal is compatible in terms of size, dimensions privacy and solar access of private open space, outdoor recreation and landscaping;*

Comment: Acceptable. The proposed development is compliant with the minimum POS, site coverage and solar access requirements under the provisions of the LDCP 2013.

- *d. retention of existing significant vegetation and opportunities for new significant vegetation is maximised; and*

Comment: Acceptable. The proposal is consistent with the landscaped area requirements

- *e. the height of the development has been kept to a minimum to minimise visual bulk and scale, as viewed from adjoining properties, in particular when viewed from the private open space of adjoining properties.*

Comment: Acceptable. The overall height of the proposal has been designed to follow the fall of the site, this being from the front to the rear of the site.

The proposal in its current form has not demonstrated that it satisfies the merits of the BLZ test. Furthermore, given that the proposal seeks to construct a new dwelling on the site there is no reasonable justification derogate from the BLZ requirements. As such a condition is included in the recommendation requiring that the first-floor is setback 2.3m resulting in a setback of 8.3m from the rear boundary.

#### *Side setbacks*

The subject site falls approximately 1.9m from the front to the rear of the site and as such the side setback requirements are varied. The new dwelling seeks a 231mm to nil setback to the north-eastern boundary on all floors, whilst the dwelling will be setback from the southwestern boundary by 900mm at the lower ground and ground floor, and 2.6m to 3.9m at the first floor. In this regard, the following table outlines the location / extent of proposed side setback breaches:

Elevation	Wall height	Required setback	Proposed setback	Complies	Elevation
North east (81 Rowntree Street)	4.5m (front of dwelling) – 7.2m (rear of dwelling)	980mm (front of dwelling) – 2.5m (rear of dwelling)	231mm - nil	No, not acceptable in part.	North east (81 Rowntree Street)
South west (69 Rowntree Street)	2.6m (front of dwelling) – 7.2m (rear of dwelling)	115mm (front of dwelling) – 2.5m (rear of dwelling)	900mm (lower and ground floor) 2.6m – 3.9m (first floor)	No - Acceptable	South west (69 Rowntree Street)

Pursuant to Clause C3.2 of the LDCP2013, where a proposal seeks a variation of the side setback control 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 LDCP2013 and complies with streetscape and desired future character controls.*

Comment: Acceptable. Detached dwellings comprise of a range of storeys with varying setbacks to their respective side boundaries. Dwellings on the south-eastern side of Rowntree Street generally have a side setback to one boundary to allow pedestrian access down to the rear yard or a secondary side entrance to the dwelling. The form and scale of the proposal and its architectural style, materials and finishes will be complementary with, and will remain consistent with the existing surrounding development and will maintain the character of the area.
- The pattern of development is not adversely compromised.*

Comment: Acceptable. The pattern of development consists of varying setbacks to their respective side boundaries, the pattern of development within the streetscape is not compromised by the proposal.
- The bulk and scale of the development has been minimised and is acceptable.*

Comment: Acceptable. The proposed development has been designed with consideration to the objectives of the desired future character in addition to compliance with the development standards of the LLEP 2013.
- The proposal is acceptable with respect to applicable amenity controls e.g. solar access, privacy and access to views.*

Comment: Acceptable. The proposal complies with applicable solar access and privacy controls and will result in no loss of views as a result of the side setbacks of the form.
- The proposal does not unduly obstruct adjoining properties for maintenance purposes.*

Comment: Not acceptable. The proposed side setback at the northern boundary, this being 231mm to nil will hinder the existing access and the continued maintenance of the external weatherboard wall of the dwelling at 81 Rowntree Street. It is recommended on any consent issued that the northern eastern wall of the garage is to be setback so that there is a minimum 600mm separation distance between the proposal and the southern wall of 81 Rowntree Street.

### C3.9 Solar Access

Given the constraints of the site, namely the site fall and orientation, it is difficult for the new dwelling to satisfy the requirements under Provision C9 which requires new dwellings to obtain a minimum 3 hours of direct sunlight to the main living room area between 9am and 3pm. The new dwelling has been configured to concentrate the primary living areas to the rear of the site to allow access to the POS area in compliance with the LDCP 2013 controls and objectives. With this considered in addition to the pattern of development for dwellings located

along the south-eastern side of Rowntree Street the absence of direct solar access to the main living room area is acceptable.

The shadow diagrams provided with the application illustrate the proposal will result in additional overshadowing impacts to the rear POS area to the adjoining dwellings to the south of the subject site, this being 69 Rowntree Street, 56 to 60 Short Street. The diagrams provided with the proposal illustrates the impacted properties received less than the minimum 50% direct solar access to their respective POS area during the winter solstice. Pursuant to Control C19 under this Part of the of the LDCP2013, where a proposal seeks to further reduce the amount of solar amenity retained to the adjoining property, various tests need to be met. These tests are assessed 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: As the subject site is located within a HCA, to ensure compliance with the objectives of the heritage provisions any new infill development is required to be of an appropriate scale and form that is consistent with the streetscape, desired future and HCA character. With this considered the new dwelling satisfies the heritage requirements whilst minimising visual bulk and subsequent overshadowing where possible. The proposal seeks to vary the FSR development standard without compromising the requirements under Clause 4.6 of the LLEP 2013. A condition is included in the recommendation requiring that the first floor has an increased setback from the rear to respond to the BLZ requirements, this recommended design change will likely marginally improve the extent of solar access retained at the adjoining properties.

- *Site orientation;*

Comment: The subject site has a north-west to south-west orientation, with north-west being the front of the site. The proposal will result in additional overshadowing impacts to 69 Rowntree Street between 9am -11am; to 56 Short Street between 9am – 11am; to 58 Short Street between 12pm and 2pm; to 60 Short Street between 1pm – 3pm. The shadow diagrams provided illustrate that the proposal will not result in any additional overshadowing impacts to the impacted POS area during the March/September Equinox – ensuring that the adjoining sites will retain solar amenity throughout the remainder of the year.

- *The relative levels at which the dwellings are constructed;*

Comment: The proposed development employs minimum ceiling heights where possible.

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

Comment: The proposed development has been articulated and designed to mitigate overshadowing impacts to the adjoining property where possible. A condition is included in the recommendation requiring that the first floor has an increased setback from the rear to respond to the BLZ requirements, this recommended design change will likely marginally improve the extent of solar access retained at the adjoining properties.

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

Comment: Given the existing site constraints, this being the site fall, orientation, HCA and pattern of development orientation, an alternative solution would produce a marginally improved result during 21 June. It is recommended on any consent issued that the first floor has an increased setback from the rear to respond to the BLZ requirements, this recommended design change will likely marginally improve the extent of solar access retained at the adjoining properties.

### C3.11 Visual Privacy

Provision C9 under this part permits balconies at the first floor with a maximum depth of 1.2m and length of 2m however a larger balcony may be considered if it can be demonstrated that there will be no adverse impact to surrounding properties. The proposal seeks to include a

balcony to the rear of the ground floor accessible via the kitchen and living room and is to measure 1.5m in depth and 8m in length (this being the full width of the dwelling as viewed from the rear). Due to the steep fall of the site the ground floor rear balcony will be perceived as a first-floor balcony when viewed from the rear POS areas of the adjoining dwellings at Rowntree and Short Street and as such the requirements of C9 are to be considered in this instance.

As the proposed balcony is to the main living areas within the dwelling and is a highly used area within the dwelling additional design measures are recommended to be incorporated to minimise the extent of the visual privacy impacts where possible. To mitigate direct overlooking into the rear POS areas of the adjoining properties at 81 and 69 Rowntree Street as well as the POS areas to the properties at the rear a condition is included in the recommendation requiring that the depth of the balcony is reduced to 1.2m and privacy screens are erected at the north-east and south-west side elevations to a minimum block out density of 75% to a height of 1.8m.

Furthermore, the objectives under this part require sightlines within 9m and 45 degrees between living rooms to be mitigated. The ground floor window at the south-west elevation will look into the ground floor window of 69 Rowntree Street. To mitigate direct overlooking into the adjoining property a condition is included in the recommendation requiring that the sill height of W05 to the kitchen has an increased sill height of 1.7m above the FFL.

#### 5(e) The Likely Impacts

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

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

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

#### 5(g) Any submissions

The application was notified in accordance with the Community Engagement Framework for a period of 14 days to surrounding properties. Four submissions were received in response to the initial notification.

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

- Loss of solar access to 60 Short Street – see Section 5(d)
- Obstruction of continued maintenance of external wall of 81 Rowntree Street – see Section 5(d)
- Visual privacy impacts from ground floor rear balcony and ground floor kitchen window– see Section 5(d)

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

Issue: Acoustic impacts from the sliding doors at the western elevation adjacent to 69 Rowntree Street.

Comment: The proposed sliding doors are to service bedrooms within the dwelling and are setback 900mm from the side boundary, it is unlikely that this glazing at the lower ground floor will attribute to adverse acoustic impacts to the adjoining property.

Issue: Acoustic and visual privacy impacts from the ground floor bathroom to 69 Rowntree Street.

Comment: The south-west bathroom window is a highlight window and services a non primary area within the dwelling as such it is not likely there will be adverse impacts to the adjoining property.

#### 5(h) The Public Interest

The public interest is best served by the consistent application of the requirements of the relevant Environmental Planning Instruments, and by Council ensuring that any adverse effects on the surrounding area and the environment are appropriately managed. The proposal is not contrary to the public interest.

## 6 Referrals

### 6(a) Internal

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

- Heritage
- Development Engineering
- Trees

## 7. Section 7.11 Contributions/7.12 Levy

Section 7.12 levies are payable for the proposal.

The carrying out of the development would result in an increased demand for public amenities and public services within the area. A contribution of \$8,160.79 would be required for the development under Former Leichhardt Local Government Area Section 7.12 Development Contributions Plan 2020

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

## 8. Conclusion

The proposal generally complies with the aims, objectives and design parameters contained in *Leichhardt Local Environmental Plan 2013* 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. The applicant has made a written request pursuant to Clause 4.4 Floor Space Ratio of the *Leichhardt Local Environmental Plan 2013*. After considering the request, and assuming the concurrence of the Secretary has been given, the Panel is satisfied that compliance with the standard is unnecessary in the circumstance of the case and that there are sufficient environmental grounds to support the variation. The proposed development will be in the public interest because the exceedance is not inconsistent with the objectives of the standard and of the zone in which the development is to be carried out.
- B. That the Inner West Local Planning Panel exercising the functions of the Council as the consent authority, pursuant to s4.16 of the *Environmental Planning and Assessment Act 1979*, grant consent to Development Application No. DA/2022/0106 for demolition of existing dwelling and construction of a new dwelling at 79 Rowntree Street, Birchgrove subject to the conditions listed in Attachment A below.



## Attachment A – Recommended conditions of consent

### CONDITIONS OF CONSENT

#### DOCUMENTS RELATED TO THE CONSENT

##### 1. Documents related to the consent

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

Plan, Revision and Issue No.	Plan Name	Date Issued	Prepared by
A-DA-006, Rev 2	Proposed site & roof plan	2/08/2022	ORK Design
A-DA-008, Rev 2	Proposed lower ground floor plan	2/08/2022	ORK Design
A-DA-009, Rev 2	Proposed Ground Floor Plan	2/08/2022	ORK Design
A-DA-010, Rev 2	Proposed First Floor Plan	2/08/2022	ORK Design
A-DA-011, Rev 2	Proposed north & south elevation plan	2/08/2022	ORK Design
A-DA-012, Rev 2	Proposed west & east elevation	2/08/2022	ORK Design
A-DA-013, Rev 2	Proposed sections	2/08/2022	ORK Design
A-DA-014, Rev 2	Finishes Schedule	2/08/2022	ORK Design
A-DA-056, Rev 2	Front fence elevation & driveway section	2/08/2022	ORK Design
1262232S	Basix Certificate	29/11/2021	AENEC
C-3685-01, Rev 2	Stormwater Drainage Plan	14/0/2022	Kozarvoski & Partners

L-001, Rev A	Landscape Plan	4/02/2022	Jason Pakenham
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As amended by the conditions of consent.

### **DESIGN CHANGE**

#### **2. Design Change**

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

- a. The first floor level is to be setback 2.3m so as to result in a 8.3m setback from the rear boundary.
- b. The north-eastern wall of the garage is to be setback so that there is a minimum 600mm separation distance between the proposed north eastern boundary wall of the garage and the southern external weatherboard wall of 81 Rowntree Street, Birchgrove. The internal width of car space shall be maintained at 3 metres with the rest of the dwelling altered internally to accommodate this change.
- c. The depth of the ground floor rear balcony is to be reduced from 1.5m to 1.2m

### **FEES**

#### **3. Security Deposit - Custom**

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

<b>Security Deposit:</b>	1% of cost of works or \$8000.00 - whichever is greater
<b>Inspection Fee:</b>	\$350.00

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

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

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

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

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

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

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

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

Payment amount\*:

\$8,160.79

\*Indexing of the Section 7.12 contribution payment:

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

*payment method* to confirm the correct current payment amount (at the expected time of payment).

Payment methods:

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

**5. Long Service Levy**

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

**GENERAL CONDITIONS**

**6. Tree Protection**

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

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

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

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

**7. Boundary Alignment Levels**

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

**8. Balcony**

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with amended plans indicating the erection of a privacy screen on the north-eastern and south-western sides of the ground floor rear balcony having a minimum block out density of 75% and a height of 1.6 metres above the finished floor level of the balcony.

**9. Privacy**

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with amended plans indicating Window 05 (kitchen window) being amended in the following manner:

- a. Minimum sill height of 1.7 metres above floor level.

**10. Waste Management Plan**

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

**11. Erosion and Sediment Control**

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

**12. Standard Street Tree Protection**

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.

**13. Works Outside the Property Boundary**

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

**PRIOR TO ANY DEMOLITION****14. Dilapidation Report**

Prior to any works commencing (including demolition), the Certifying Authority and owners of identified properties, must be provided with a colour copy of a dilapidation report prepared by a suitably qualified person. The report is required to include colour photographs of all the adjoining properties at 81 and 69 Rowntree 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.

**15. Advising Neighbours Prior to Excavation**

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

**16. Construction Fencing**

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

**PRIOR TO CONSTRUCTION CERTIFICATE****17. Dilapidation Report – Pre-Development – Minor**

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

**18. Parking Facilities - Domestic**

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with plans certified by a suitably qualified Civil Engineer demonstrating that the design of the vehicular access and off-street parking facilities must comply with Australian Standard AS/NZS2890.1-2004 Parking Facilities – Off-Street Car Parking and the following specific requirements:

- a. The garage slab or driveway must rise within the property to be 170mm above the adjacent road gutter level and higher than the street kerb and footpath across the full width of the vehicle crossing. The longitudinal profile across the width of the vehicle crossing must comply with the Ground Clearance requirements of AS/NZS 2890.1-2004;
- b. A minimum of 2200mm headroom must be provided throughout the access and parking facilities. Note that the headroom must be measured at the lowest projection from the ceiling, such as lighting fixtures, and to open garage doors;
- c. Longitudinal sections along each outer edge of the access and parking facilities, extending to the centreline of the road carriageway must be provided, demonstrating compliance with the above requirements;
- d. The garage/carport/parking space must have minimum clear internal dimensions of 3000mm x 5400mm (length x width) . The dimensions must be exclusive of obstructions such as walls, doors and columns, except where they do not encroach inside the design envelope specified in Section 5.2 of AS/NZS 2890.1-2004;
- e. Where the drop adjacent to the end of the parking module(s) exceeds 600mm, structural barriers must be provided. Where the drop is between 150-600mm, wheel stops must be provided. These physical controls must be installed in accordance with the requirements of Section 2.4.5 of AS/NZS2890.1-2004. The design of structural barriers must be certified by a suitably qualified Civil Engineer with Chartered Engineer of Institution of Engineers Australia (CPEng) or Registered Professional Engineer of Professionals Australia (RPEng) qualifications;
- f. A plan of the proposed access and adjacent laneway, drawn at a 1:100 scale, demonstrating that vehicle manoeuvrability for entry and exit to the parking space complies with swept paths from AS/NZS 2890.1:2004. The plan must include any existing on-street parking spaces;
- g. The maximum gradients within the parking module must not exceed 1 in 20 (5%), measured parallel to the angle of parking and 1 in 16 (6.25%), measured in any other direction in accordance with the requirements of Section 2.4.6 of AS/NZS 2890.1-2004;
- h. The parking space must be set back from the property boundary by a minimum of 1000mm to [improve sight distance to pedestrians and/or accommodate a transition between the parking space and the boundary]; and
- i. The external form and height of the approved structures must not be altered from the approved plans.

#### **19. Stormwater Drainage System – Minor Developments (OSD is required)**

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

- a. The design must be generally in accordance with the stormwater drainage concept plan on Drawing No. C-3685-01 prepared by Kozarovski & Partners and dated 14/02/2022, as amended to comply with the following;
- b. Stormwater runoff from all roof areas within the property being collected in a system of gutters, pits and pipeline and be discharged, together with overflow pipelines from any rainwater tank(s), by gravity to the kerb and gutter of a public road/directly to Council's piped drainage system via the OSD/OSR tanks as necessary;
- c. Comply with Council's Stormwater Drainage Code, Australian Rainfall and Runoff (A.R.R.), Australian Standard AS3500.3-2018 'Stormwater Drainage' and Council's DCP;
- d. Charged or pump-out stormwater drainage systems are not permitted including for roof drainage;
- e. The design plans must detail the existing and proposed site drainage layout, size, class and grade of pipelines, pit types, roof gutter and downpipe sizes;
- f. OSD may be reduced or replaced by on site retention (OSR) for rainwater reuse in accordance with the relevant DCP that applies to the land. Where this is pursued, the proposed on-site retention (OSR) tanks must be connected to a pump system for internal reuse for laundry purposes, the flushing of all toilets and for outdoor usage such as irrigation. Surface water must not be drained to rainwater tanks where the collected water is to be used to supply water inside the dwelling, such as for toilet flushing or laundry use;
- g. Pipe and channel drainage systems including gutters must be designed to convey the one hundred (100) year Average Recurrence Interval (ARI) flows from the contributing catchment to the OSD/OSR tanks;
- h. Details of the 100-year ARI overflow route in case of failure/blockage of the drainage system must be provided;
- i. As there is no overland flow/flood path available from the rear and central courtyards to the Rowntree Street frontage, the design of the sag pit and piped drainage system is to meet the following criteria:
  - a. Capture and convey the 100 year Average Recurrence Interval flow from the contributing catchment assuming 80% blockage of the inlet and 50% blockage of the pipe;
  - b. The maximum water level over the sag pit shall not be less than 150mm below the floor level or damp course of the building; and
  - c. The design shall make provision for the natural flow of stormwater runoff from uphill/upstream properties/lands.
- j. A minimum 150mm step up shall be provided between all external finished surfaces and adjacent internal floor areas
- k. The design must make provision for the natural flow of stormwater runoff from uphill/upstream properties/lands;
- l. Details of external catchments currently draining to the site must be included on the plans. Existing natural overland flows from external catchments may not be blocked or diverted, but must be captured and catered for within the proposed site drainage



system. Where necessary an inter-allotment drainage system must be incorporated into the design;

- m. No nuisance or concentration of flows to other properties;
- n. The stormwater system must not be influenced by backwater effects or hydraulically controlled by the receiving system;
- o. 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;
- p. An inspection opening or stormwater pit must be installed inside the property, adjacent to the boundary, for all stormwater outlets;
- q. Only a single point of discharge is permitted to the kerb and gutter, per frontage of the site;
- r. New pipelines within the footpath area that are to discharge to the kerb and gutter must be hot dipped galvanised steel hollow section with a minimum wall thickness of 4.0mm and a maximum section height and width of 100mm or sewer grade uPVC pipe with a maximum diameter of 100mm;
- s. All stormwater outlets through sandstone kerbs must be carefully core drilled in accordance with Council standard drawings;
- t. All redundant pipelines within footpath area must be removed and footpath/kerb reinstated

## 20. Structural and Geotechnical Report

Prior to the issue of a Construction Certificate, the Certifying Authority must be provided with an integrated structural and geotechnical report and structural plans that address the design of the proposed basement, prepared certified as compliant with the terms of this condition by a qualified practicing Structural and Geotechnical Engineer(s) who holds current Chartered Engineer qualifications with the Institution of Engineers Australia (CPEng) or current Registered Professional Engineer qualifications with Professionals Australia (RPEng). The report and plans must be prepared/ amended to make provision for the following:

- a. The basement must be fully tanked to prevent the ingress of subsurface flows;
- b. Retaining walls must be entirely self-supporting in the event that excavation is undertaken within the road reserve adjacent to the property boundary to the depth of the proposed structure;
- c. Any existing or proposed retaining walls that provide support to the road reserve must be adequate to withstand the loadings that could be reasonably expected from within the constructed road and footpath area, including normal traffic and heavy construction and earth moving equipment, based on a design life of not less than 50 years;
- d. All components of the basement, including footings, must be located entirely within the property boundary;
- e. No adverse impact on surrounding properties including Council's footpath and road;

- f. The existing subsurface flow regime in the vicinity of the development must not be significantly altered as a result of the development;
- g. Recommendations regarding the method of excavation and construction, vibration emissions and identifying risks to existing structures or those on adjoining or nearby property; and
- h. Provide relevant geotechnical/ subsurface conditions of the site, as determined by a full geotechnical investigation.

#### 21. Structural Certificate for retained elements of the building

Prior to the issue of a Construction Certificate, the Certifying Authority is required to be provided with a Structural Certificate prepared by a practising structural engineer, certifying the structural adequacy of the property and its ability to withstand the proposed additional, or altered structural loads during all stages of construction. The certificate must also include all details of the methodology to be employed in construction phases to achieve the above requirements without result in demolition of elements marked on the approved plans for retention.

#### 22. Sydney Water – Tap In

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

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

### **DURING DEMOLITION AND CONSTRUCTION**

#### 23. Tree Protection

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

Botanical/Common Name/Location
<i>Lagerstroemia indica</i> (Crepe Myrtle) - Public footpath
<i>Elaeocarpus reticulatus</i> (Blueberry Ash) - Public footpath

**24. Construction Hours – Class 1 and 10**

Unless otherwise approved by Council, excavation, demolition, construction or subdivision work are only permitted between the hours of 7:00am to 5:00pm, Mondays to Saturdays (inclusive) with no works permitted on, Sundays or Public Holidays.

**25. Survey Prior to Footings**

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

**PRIOR TO OCCUPATION CERTIFICATE****26. Certification of Tree Planting**

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

A minimum of one (1) x 75L litre size additional tree, which will attain a minimum mature height of ten (10) metres, must be planted in a more suitable location within the property at a minimum of 2.5m from any dwelling house or garage, and may not be planted less than at a minimum of 1.5 metres from any boundary or structure and allowing for future tree growth. The tree is to conform to AS2303—*Tree stock for landscape use*. Trees listed as exempt species from Council's Tree Management Controls, Palms, fruit trees and species recognised to have a short life span will not be accepted as suitable replacements.

If the replacement trees are found to be faulty, damaged, dying or dead within twelve (12) months of planting then they must be replaced with the same species (up to 3 occurrences). If the trees are found dead before they reach a height where they are protected by Council's Tree Management Controls, they must be replaced with the same species.

**27. Project Arborist Certification**

Prior to the issue of any Occupation Certificate, the Principal Certifier is to be provided with certification from the project arborist the requirements of the conditions of consent related to the landscape plan and the role of the project arborist have been complied with.

**28. No Encroachments**

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

**29. Protect Sandstone Kerb**

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

**ADVISORY NOTES****Insurances**

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

**Public Domain and Vehicular Crossings**

The vehicular crossing and/or footpath works are required to be constructed by your contractor. You or your contractor must complete an application for *Design of Vehicle Crossing and Public Domain Works – Step 1* form and *Construction of Vehicle Crossing and Public Domain Works – Step 2* form, lodge a bond for the works, pay the appropriate fees and provide evidence of adequate public liability insurance, before commencement of works.

You are advised that Council has not undertaken a search of existing or proposed utility services adjacent to the site in determining this application. Any adjustment or augmentation of any public utility services including Gas, Water, Sewer, Electricity, Street lighting and Telecommunications required as a result of the development must be at no cost to Council

Any damage caused during construction to Council assets on the road reserve or on Council or Crown land must be repaired at no cost to Council.

Any driveway crossovers or other works within the road reserve must be provided at no cost to Council.

No consent is given or implied for any Encroachments onto Council's road or footpath of any service pipes, sewer vents, boundary traps, downpipes, gutters, eaves, awnings, stairs, doors, gates, garage tilt up panel doors or any structure whatsoever, including when open.

#### **Prescribed Conditions**

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

#### **Notification of commencement of works**

At least 7 days before any demolition work commences:

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

#### **Storage of Materials on public property**

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

#### **Toilet Facilities**

The following facilities must be provided on the site:

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

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

#### **Infrastructure**

The developer must liaise with the Sydney Water Corporation, Ausgrid, AGL and Telstra concerning the provision of water and sewerage, electricity, natural gas and telephones respectively to the property. Any adjustment or augmentation of any public utility services

including Gas, Water, Sewer, Electricity, Street lighting and Telecommunications required as a result of the development must be undertaken before occupation of the site.

**Other Approvals may be needed**

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

**Failure to comply with conditions**

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

**Other works**

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

**Obtaining Relevant Certification**

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

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

**National Construction Code (Building Code of Australia)**

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

**Notification of commencement of works**

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

- a. In the case of work for which a principal contractor is required to be appointed:
  - i. The name and licence number of the principal contractor; and
  - ii. The name of the insurer by which the work is insured under Part 6 of that Act.
- b. In the case of work to be done by an owner-builder:
  - i. The name of the owner-builder; and
  - ii. If the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

**Dividing Fences Act**

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

**Permits from Council under Other Acts**

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

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

- i. Installation or replacement of private stormwater drain, utility service or water supply.

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

#### Noise

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

#### Amenity Impacts General

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

#### Construction of Vehicular Crossing

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

#### Dial before you dig

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

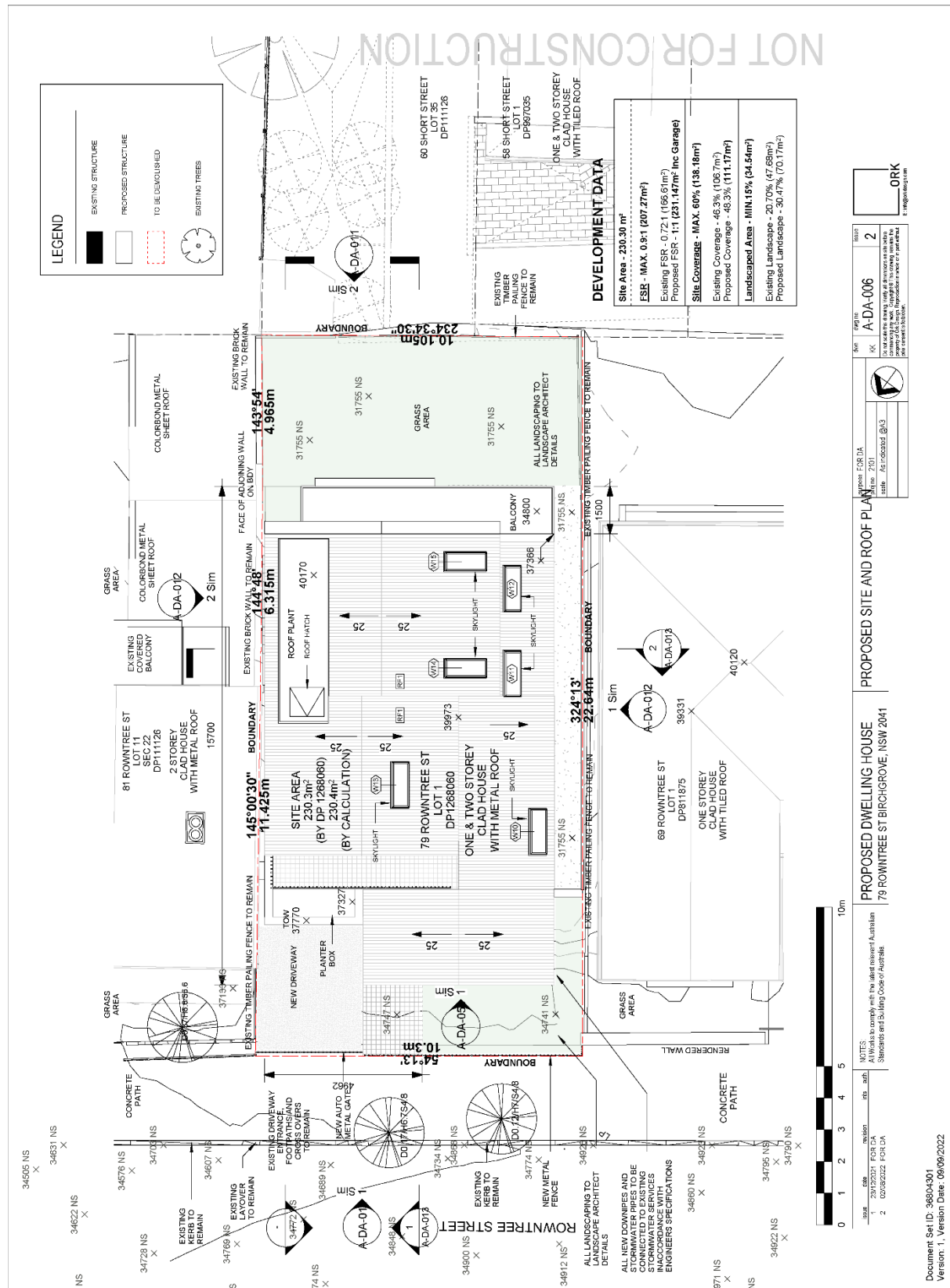
#### Useful Contacts

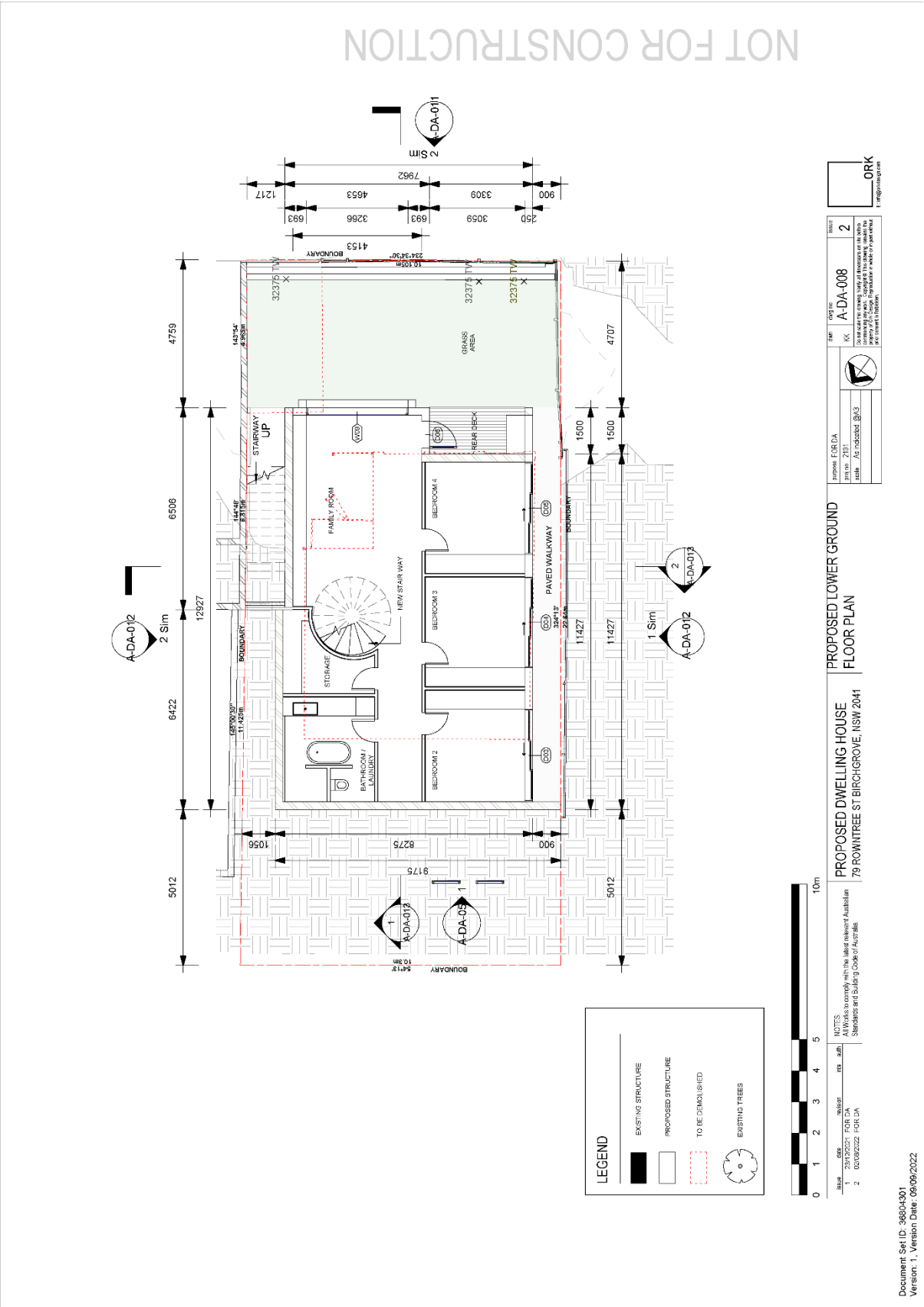
BASIX Information	1300 650 908 weekdays 2:00pm - 5:00pm <a href="http://www.basix.nsw.gov.au">www.basix.nsw.gov.au</a>
Department of Fair Trading	13 32 20 <a href="http://www.fairtrading.nsw.gov.au">www.fairtrading.nsw.gov.au</a> Enquiries relating to Owner Builder Permits and Home Warranty Insurance.
Dial Prior to You Dig	1100



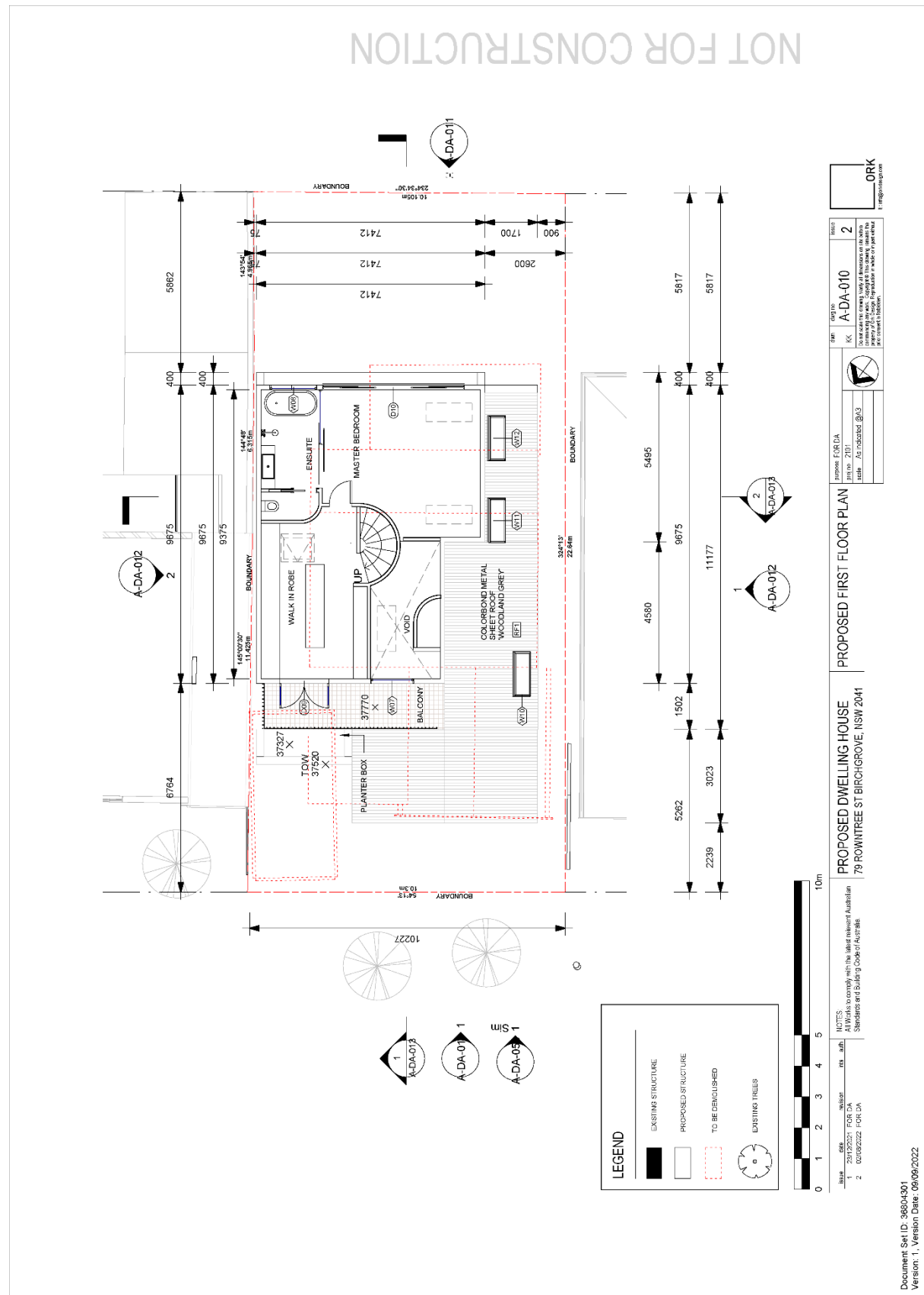
			<a href="http://www.dialprior.toyouDIG.com.au">www.dialprior toyouDIG.com.au</a>
Landcom			9841 8660
			To purchase copies of Volume One of "Soils and Construction"
Long Service Corporation	Payments	131441	
			<a href="http://www.lspc.nsw.gov.au">www.lspc.nsw.gov.au</a>
NSW Food Authority		1300 552 406	
			<a href="http://www.foodnotify.nsw.gov.au">www.foodnotify.nsw.gov.au</a>
NSW Government			<a href="http://www.nsw.gov.au/fibro">www.nsw.gov.au/fibro</a>
			<a href="http://www.diySAFE.nsw.gov.au">www.diySAFE.nsw.gov.au</a>
			Information on asbestos and safe work practices.
NSW Office of Environment and Heritage		131 555	
			<a href="http://www.environment.nsw.gov.au">www.environment.nsw.gov.au</a>
Sydney Water		13 20 92	
			<a href="http://www.sydneywater.com.au">www.sydneywater.com.au</a>
Waste Service - Environmental Solutions	SITA	1300 651 116	
			<a href="http://www.wasteservice.nsw.gov.au">www.wasteservice.nsw.gov.au</a>
Water Efficiency Labelling and Standards (WELS)			<a href="http://www.waterrating.gov.au">www.waterrating.gov.au</a>
WorkCover Authority of NSW		13 10 50	
			<a href="http://www.workcover.nsw.gov.au">www.workcover.nsw.gov.au</a>
			Enquiries relating to work safety and asbestos removal and disposal.

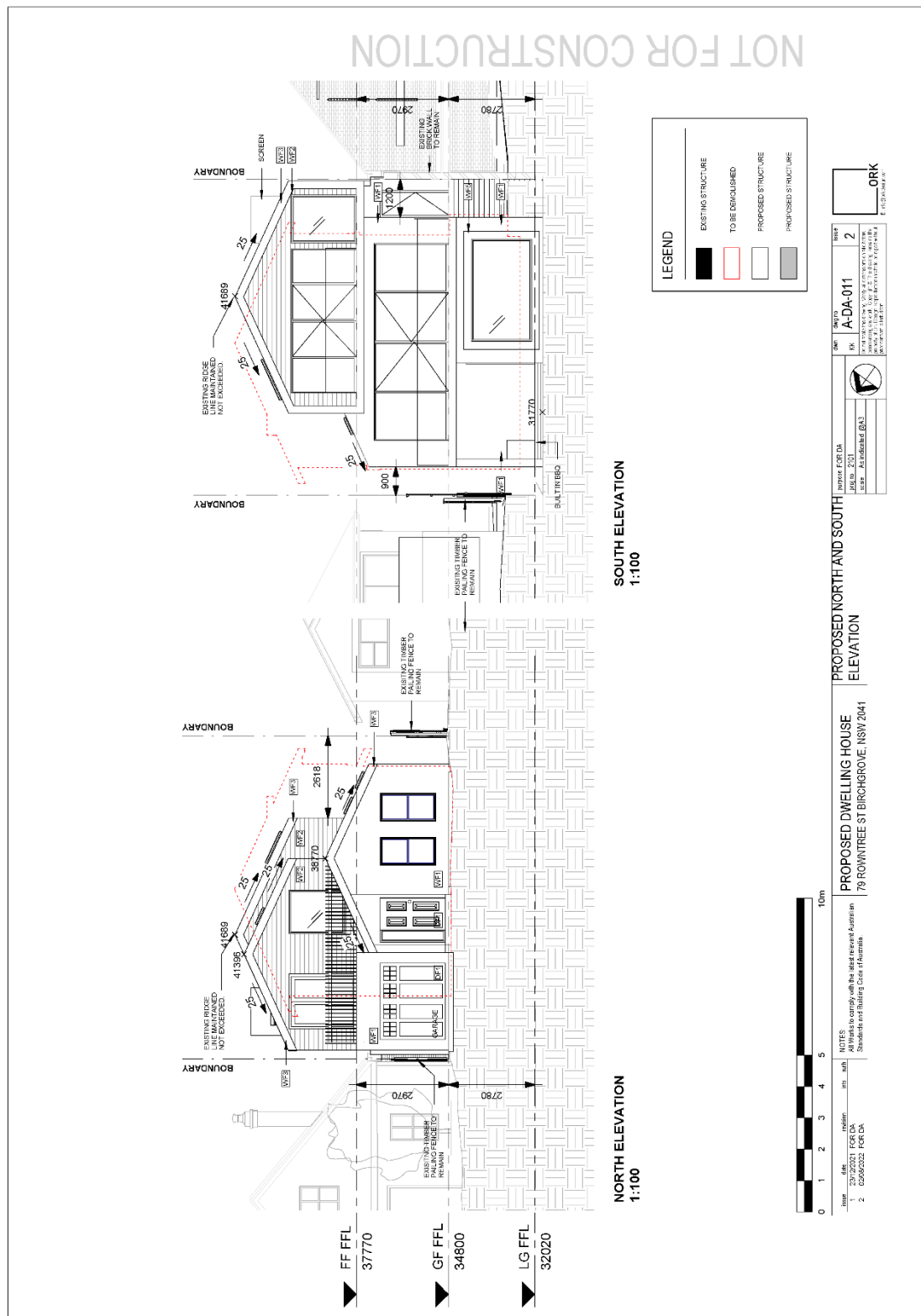
## Attachment B – Plans of proposed development

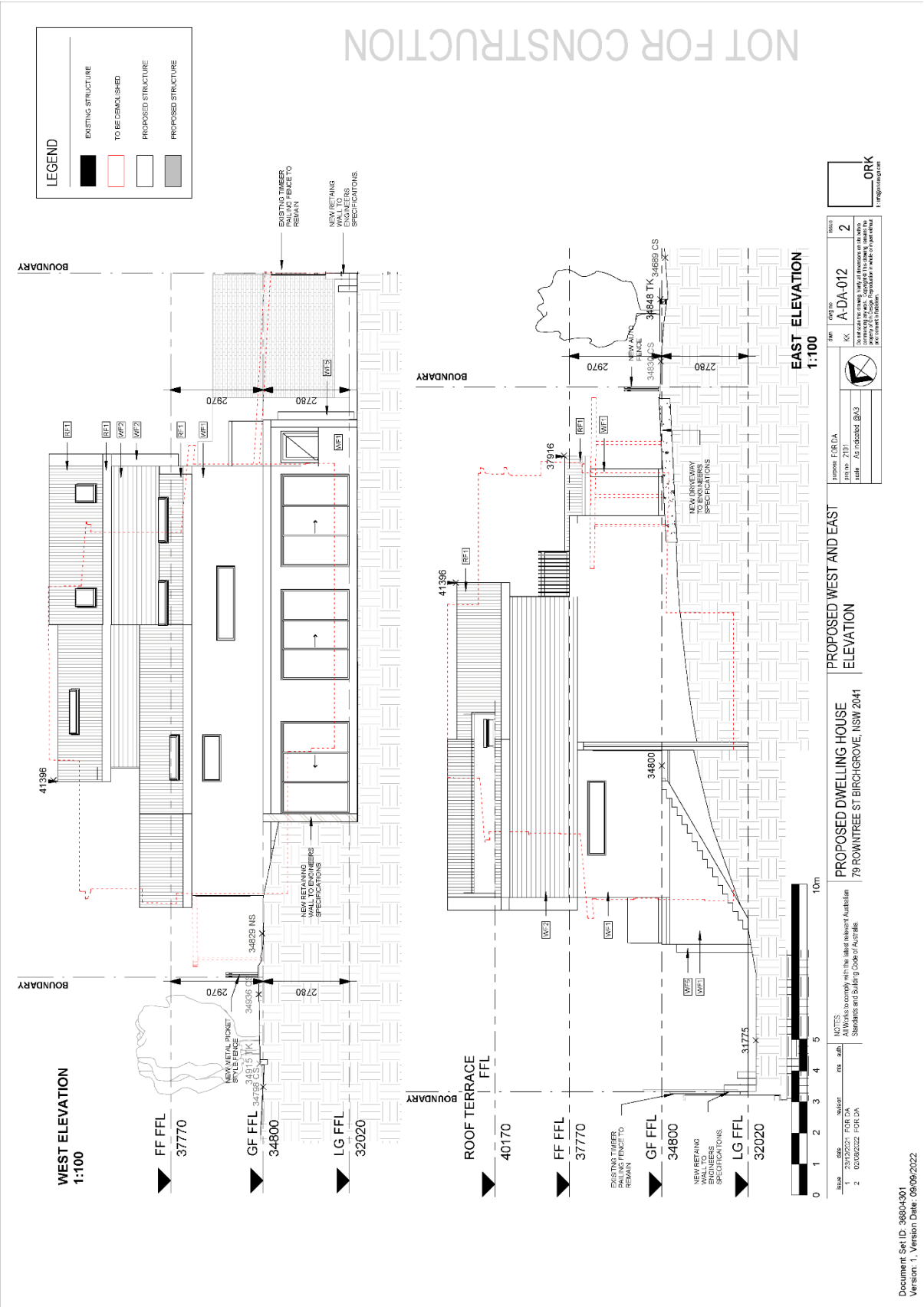


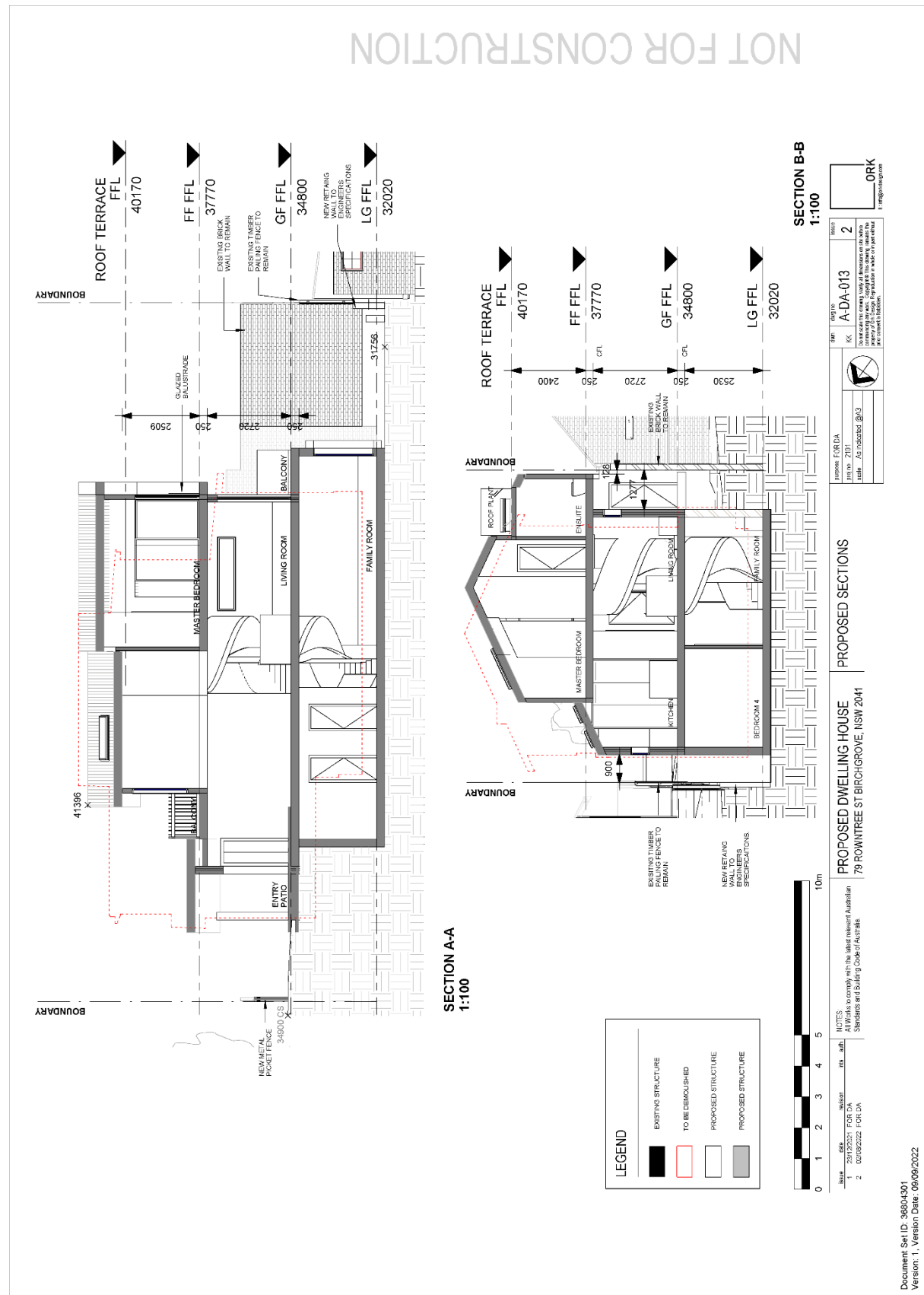





























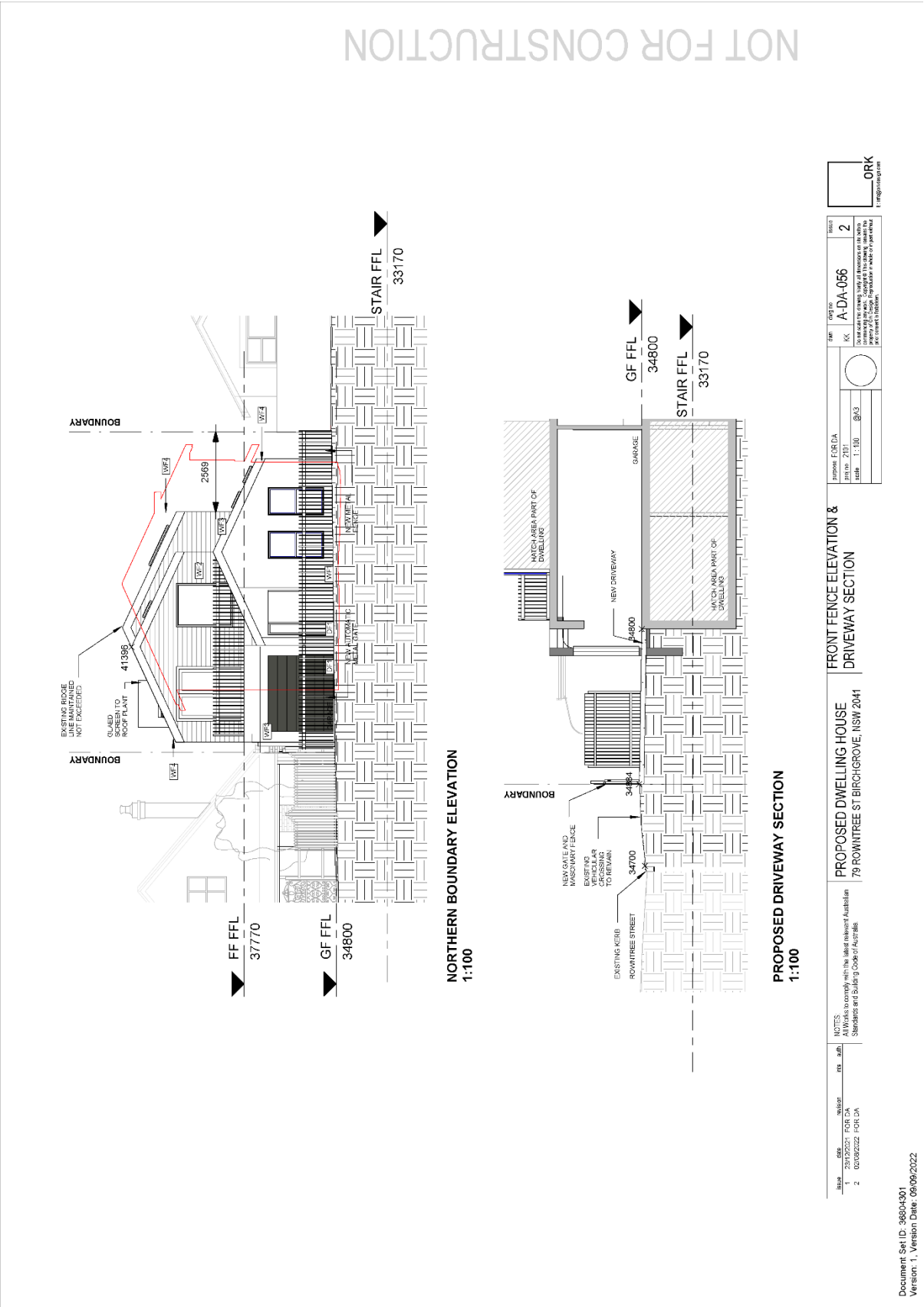
## BUILDING SPECIFICATIONS

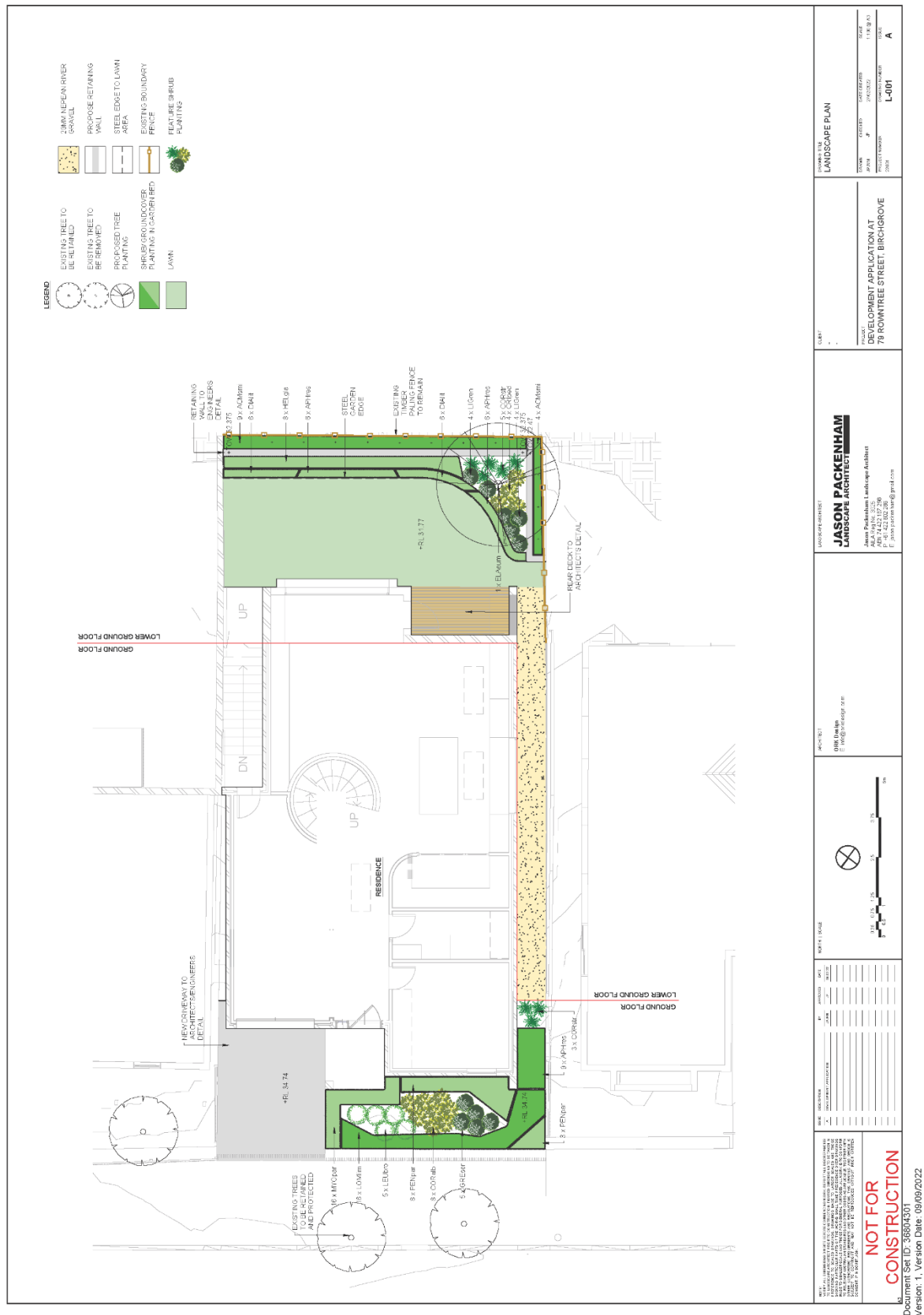
## FINISHES AND MATERIALS

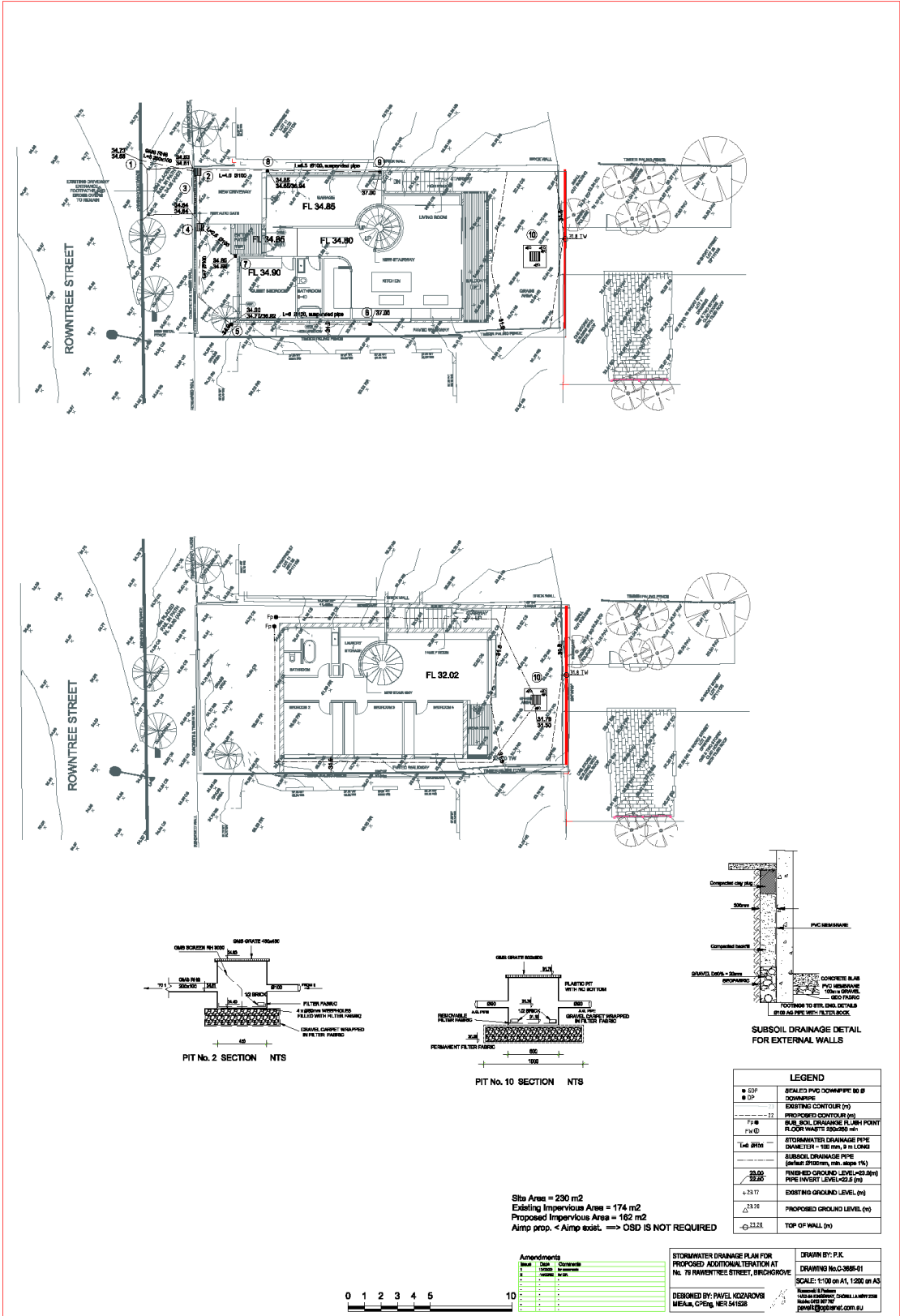
 <p>BALCONY BALUSTRADE, ENTRY METAL FENCE, PEDESTRIAN GATE &amp; AUTOMATIC SLIDING GATE PICKET STYLE DULUX 'WOODLAND GREY' FINISH</p>	 <p>TIMBER SOLID CORE PIVOT ENTRY DOOR AND GARAGE ROLLER DOOR, WINDOW FRAMES FOR W01, W02, W06 AND DOOR D09 COLOUR DULUX 'WHITSUNDAY' FINISH [DF1]</p>	 <p>COLOUR DULUX 'WOODLAND GREY' FINISH [WF5]</p>	 <p>PAVED ENTRY WALKWAY AND PATIO FINISH [PVF1]</p>	 <p>COBBLESTONE FINISH DRIVEWAY [CSF1]</p>
 <p>CAVITY BRICK WALLS EXTERNAL RENDER FINISH COLOUR DULUX 'BEIGE ARTEFACTS' [WF1]</p>	 <p>TIMBER FRAMED WALL EXTERNAL CLADDING FINISH GSR 'CINNETAL' - STREET STYLE - HEADLAND WEATHERBOARD OR SIMILAR COLOUR DULUX 'WHITSUNDAY' FINISH [WF2]</p>	 <p>FASCIA FINISH COLOUR DULUX 'WOODLAND GREY' FINISH [WF3]</p>	 <p>METAL ROOF AND GUTTERS COLORBOND 'WOODLAND GREY' FINISH [RF1]</p>	 <p>ALUMINIUM FRAME WINDOWS / DOORS DULUX 'WOODLAND GREY' POWDERCOATED FINISH [WNF1]</p>
 <p>DOWNPIPES COLORBOND 'WOODLAND GREY' FINISH</p>	 <p>DOWNPIPES COLORBOND 'WOODLAND GREY' FINISH</p>	 <p>DOWNPIPES COLORBOND 'WOODLAND GREY' FINISH</p>	 <p>DOWNPIPES COLORBOND 'WOODLAND GREY' FINISH</p>	 <p>DOWNPIPES COLORBOND 'WOODLAND GREY' FINISH</p>

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Document Set ID: 36804301  
Version: 1, Version Date: 09/09/2022







DocRef: H10-110-3866-01  
Version: 1.0 (Rev. 02) 20/09/2022

## Attachment C- Clause 4.6 Exception to Development Standards



### VARIATION TO CLAUSE 4.6 OF LEICHHARDT LOCAL ENVIRONMENTAL PLAN 2013

#### VARIATION OF A DEVELOPMENT STANDARD REGARDING THE WORKS WITHIN COUNCIL'S MAXIMUM FLOOR SPACE RATIO AS DETAILED IN CLAUSE 4.4(2B)(b) OF THE LEICHHARDT LOCAL ENVIRONMENTAL PLAN 2013

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Proposal: Demolition and construction of new dwelling house  
Address: 79 Rowntree Street, Birchgrove  
Applicant: Mr Ara Margossian

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#### 1.0 Introduction

This variation request is made pursuant to the provisions of Clause 4.6 of Leichhardt Local Environmental Plan 2013 (LLEP2013). It is requested that Council supports a variation to the maximum floor space ratio as described in Clause 4.4(2B)(b) of the LLEP 2013.

#### 2.0 Background

Clause 4.4(2) establishes the maximum floor space ratio for development within this area and refers to the maximum floor space ratio noted within the "Floor Space Ratio Map".

However, subclause 2B(b) states that:

*"(b) on land shown edged red or green on the Floor Space Ratio Map is not to exceed—*

*...*

*(ii) in the case of development on a lot with an area of 150 square metres or more but less than 300 square metres—0.9:1, or..."*

As the subject site is on land shown edged green, the relevant floor space ratio for this locality is 0.9:1 and is considered to be a 'development standard' as defined by Section 4 of the *Environmental Planning and Assessment Act 1979*.

Accordingly, the maximum gross floor area allowed for this site is 207.27m<sup>2</sup>. The development proposes a gross floor area of 231.147m<sup>2</sup> at a floor space ratio of 1:1 which results in an 11.5% increase over the maximum allowable floor space ratio.

The proposal is considered acceptable and there are sufficient environmental planning grounds to justify contravening the development standard.

### 3.0 Purpose of Clause 4.6

The LLEP 2013 contains its own variations clause (Clause 4.6) to allow a departure from a development standard. Clause 4.6 of the LLEP 2013 is similar in tenor to the former State Environmental Planning Policy No. 1, however the variations clause contains considerations which are different to those in SEPP 1. The language of Clause 4.6(3)(a)(b) suggests a similar approach to SEPP 1 may be taken in part.

There is recent judicial guidance on how variations under Clause 4.6 of the LEP should be assessed.

In particular, the principles identified by Preston CJ in *Initial Action Pty Ltd vs Woollahra Municipal Council [2018] NSWLEC 118* have been considered in this request for a variation to the development.

### 4.0 Objectives of Clause 4.6

The objectives of Clause 4.6 are as follows:

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

The development will achieve a better outcome in this instance as the site will provide for the allow for the demolition of the existing dwelling house and construction of a new dwelling house, which is consistent with the stated Objectives of the R1 General Residential Zone, which are noted as:

- *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 improve opportunities to work from home.*
- *To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.*
- *To provide landscaped areas for the use and enjoyment of existing and future residents.*
- *To ensure that subdivision creates lots of regular shapes that are complementary to, and compatible with, the character, style, orientation and pattern of the surrounding area.*
- *To protect and enhance the amenity of existing and future residents and the neighbourhood.*

As sought by the zone objectives, the new dwelling house helps to provide housing types and densities to meet the housing needs of the community in a development that is compatible with

the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas. The development has been designed in a manner which protects and enhances the amenity of existing and future residents and the neighbourhood.

The proposed development is for demolition of an existing 2-storey (plus lower ground level) dwelling house and construction of a new dwelling house.

The subject site is located within the Town of Waterview Heritage Conservation Area. However, the demolition of the dwelling is supported by a Heritage Impact Statement prepared by Andrew Starr Heritage dated January 2022 which states:

*"The demolition and rebuild is necessary due to the deficiencies in the structure of the existing dwelling. Principal among these faults is that the existing house does not have adequate footings. It is built directly on the ground which has caused damp in the walls. Lack of maintenance of the existing house has caused general dilapidation of the structure. Many areas of the existing house and shed contain hazardous asbestos."*

And concludes as follows:

*"The existing building at No. 79 Rowntree Street Birchgrove has been altered to such an extent that the original character is no longer demonstrated in the existing fabric. Because of this compromise to its significance its demolition is achieved without significant impact to the integrity of the Heritage Conservation Area."*

Council in its correspondence dated 26 July 2022 notes the following:

*"The subject site is identified as a contributory item to the Town of Waterview Heritage Conservation Area. The proposal is supported in principle..."*

There is no maximum building height development standard contained in the LLEP 2013 however the built form of the proposed dwelling house includes a 2-storey building over a lower ground level mostly contained below natural ground level which reads as a 2-storey dwelling from the streetscape owing to the natural topography of the site. The height of the proposed dwelling house is the same as the existing dwelling house (RL 41.689).

The Leichhardt Development Control Plan 2013 prescribes additional requirements such as landscaping, building setbacks, car parking, building design, sunlight and overshadowing, ventilation, private open space, dwelling typology and accessibility landscaping and services and storage to which the development performs favourably.

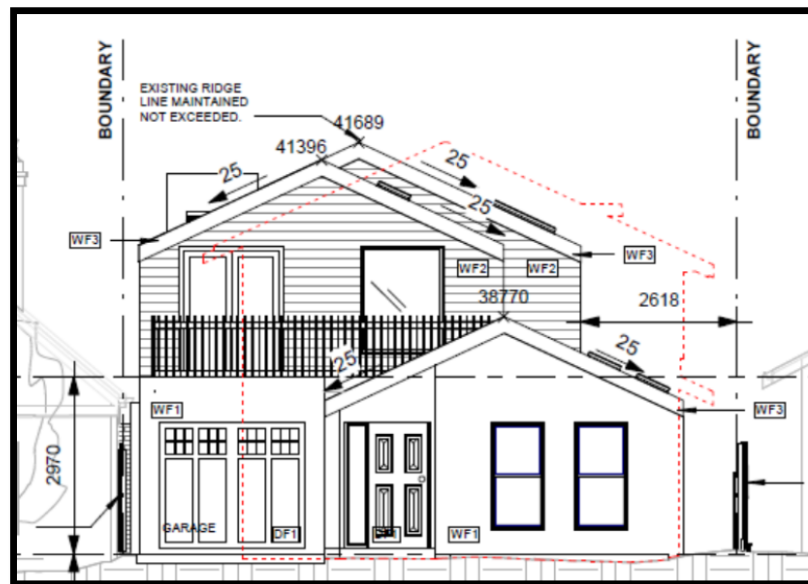
The proposal is setback 2.6m from Rowntree Street, which is consistent with the setback of adjoining buildings and not closer to the front boundary than the existing dwelling house.

The side setbacks are between 900mm to the western boundary and 130mm to 231mm along the eastern side boundary again consistent with the existing dwelling house and similar to established setback patterns in the HCA.

The rear setback to the lower ground level building walls is 4.7m which is improved on the current dwelling house which has part of the structure with a nil setback to the rear boundary.

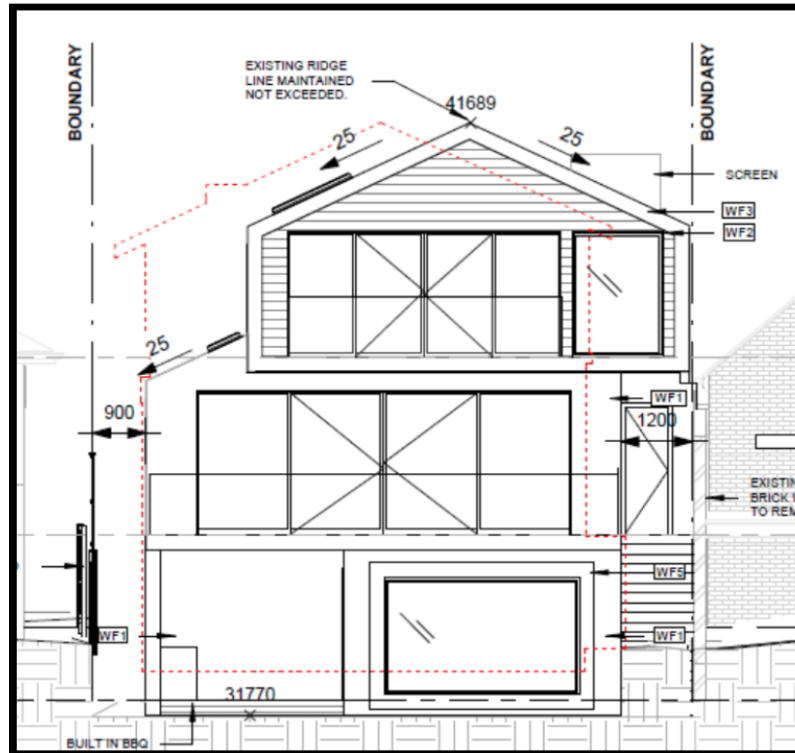
The bulk and scale of the proposed dwelling house is generally consistent with that of the existing dwelling house as evidenced by the elevation diagrams which show the proposed and existing building outline.

**North Elevation**

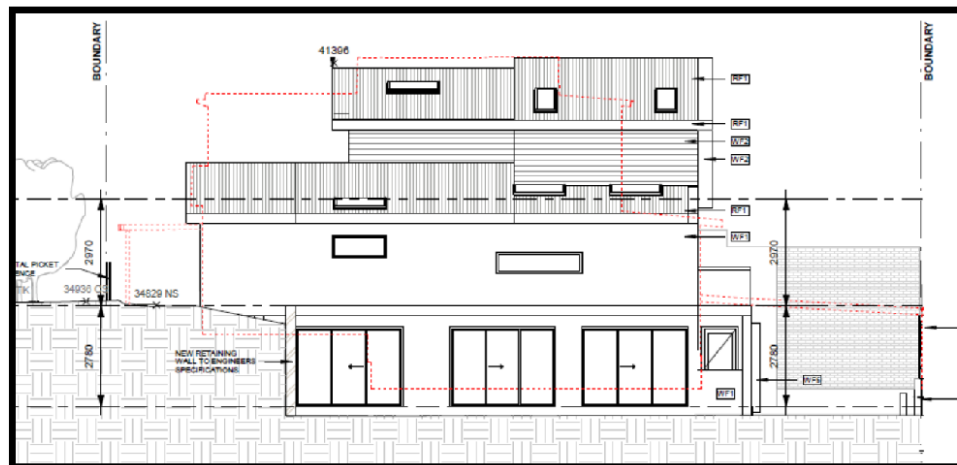


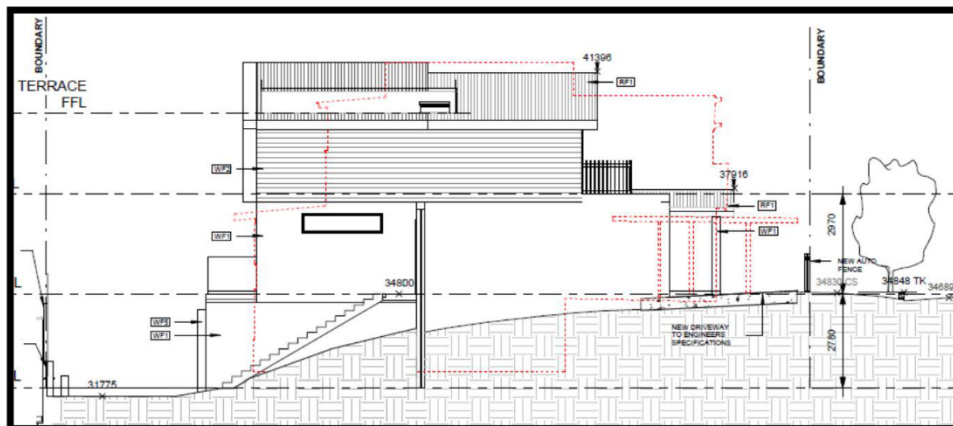


South Elevation



West Elevation



**East Elevation**

## 5.0 Onus on Applicant

Clause 4.6(3) provides that:

*"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."*

This submission has been prepared to support our contention that the development adequately responds to the provisions of 4.6(3)(a) & (b) above.

## 6.0 Justification of Proposed Variation

There is jurisdictional guidance available on how variations under Clause 4.6 of the Standard Instrument and LLEP 2013 should be assessed contained in *Initial Action Pty Ltd vs Woollahra Municipal Council* [2018] NSWLEC 11 & *Samadi v Council of the City of Sydney* [2014] NSWLEC 1199.

Paragraph 27 of the judgement states:

*"Clause 4.6 of (the LEP) imposes four preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed*

*development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). The fourth precondition requires the Court to consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i))."*

#### **Precondition 1 - Consistency with zone objectives**

The proposed development of and use of the land within the R1 General Residential Zone is consistent with the zone objectives, which are noted over as:

- *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 improve opportunities to work from home.*
- *To provide housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.*
- *To provide landscaped areas for the use and enjoyment of existing and future residents.*
- *To ensure that subdivision creates lots of regular shapes that are complementary to, and compatible with, the character, style, orientation and pattern of the surrounding area.*
- *To protect and enhance the amenity of existing and future residents and the neighbourhood.*

#### **Comments**

It is considered that the proposed development is consistent with zone objectives for the following reasons:

- The new dwelling house helps to provide housing types and densities to meet the housing needs of the community in a development that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas.
- The development has been designed in a manner which protects and enhances the amenity of existing and future residents and the neighbourhood.

Accordingly, it is considered that the site may be developed with a variation to the prescribed

maximum floor space ratio control, whilst maintaining consistency with the zone objectives.

**Precondition 2 - Consistency with the objectives of the standard**

The objectives of Clause 4.4 are articulated at Clause 4.4(1):

*“(a) to ensure that residential accommodation—*

- (i) is compatible with the desired future character of the area in relation to building bulk, form and scale, and*
- (ii) provides a suitable balance between landscaped areas and the built form, and*
- (iii) minimises the impact of the bulk and scale of buildings,*

**Comments:**

It is considered that the proposed development is consistent with objectives of the development standard for the following reasons:

- As evidenced with the above elevation diagrams showing the existing and proposed building envelope, the proposal is generally consistent with existing height, bulk and scale of the existing dwelling and is in keeping with the density pattern in the locality. Further bulk or scale as demonstrated in NSW Land and Environment Court in *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*, considered scale and density in the context of the surrounding area which formed a planning principle discussed further in this report.
- The proposal minimises adverse environmental effects on the use and/or enjoyment of adjoining properties and the public domain by providing a development that is generally consistent in built form to adjoining properties except for a relatively minor breach of the floor space ratio (11.5%). The proposal includes suitable windows and patio areas at upper levels which do not detract from the visual or acoustic privacy of neighbouring properties.
- The proposal replaces an ageing dwelling house which substandard construction methods that caused loss of structural integrity through rising damp and limited economical life with a contemporary development consistent in bulk and scale of adjoining developments.
- The proposal provides an appropriate correlation between the size of a site and the extent of the development on that site being within the required setbacks and landscaping for the site noting that the proposal, with the removal of the rear portion of the structure adjoining the rear boundary, will increase the landscaped area from 20.7% to 30.47%.

- The proposal reflects Council's desired building envelope in height, bulk, area, density, setback, use, and other similar characteristics of development which have been discussed previously in this report,

Accordingly, it is considered that the site may be developed with a variation to the prescribed maximum floor space ratio of 11.5%, whilst maintaining consistency with the development standard objectives.

**Precondition 3 - To consider a written request that demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case**

It is unreasonable and unnecessary to require strict compliance with the development standard as the proposal provides for a high quality design outcome which broadly complies with Council's controls.

Council's controls in Clause 4.4(2B)(b) provides a maximum floor space ratio of 0.9:1.

It is considered that the proposal achieves the objectives of Clause 4.4(2B)(b) and that the development is justified in this instance for the following reasons:

- 1) The development is modest in scale and does not add excessive bulk or scale as demonstrated in NSW Land and Environment Court in *Project Venture Developments v Pittwater Council [2005] NSWLEC 191*, which considered scale and density in the context of the surrounding area which formed the following planning principle: Compatibility in the urban environment.

The planning principles provides: The most apposite meaning in an urban design context is capable of existing together in harmony. Compatibility is thus different from sameness. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

In order to test whether a proposal is compatible with its context, two questions should be asked.

- i. Are the proposal's physical impacts on surrounding development acceptable? The physical impacts include constraints on the development potential of surrounding sites*

In relation to the physical impacts, consideration is given to noise, overlooking, overshadowing and constraining development potential which can be assessed with relative objectivity (as was applied in this principle).

In relation to noise and overlooking, the proposal includes suitable windows at upper levels and construction materials and methods and finishes typical of contemporary development.

In relation to overshadowing, solar access details are provided as part of the architectural plans (Dwgs. A-DA-015 to A-DA-053), which shows that adjoining properties receive the required amount of sunlight in mid-winter to living areas.

*ii. Is the proposal's appearance in harmony with the buildings around it and the character of the street?*

The most important contributor to urban character is the relationship of built form to surrounding space, a relationship that is created by **building height, setbacks and landscaping**. In special areas, such as conservation areas, **architectural style and materials** are also contributors to character.

The principle provides that buildings do not have to be the same height to be compatible. Notwithstanding, the proposed dwelling house is no higher than the existing dwelling house and not dissimilar to properties within the locality.

The principle notes front and rear setbacks are an important element of urban character and determine the rhythm of building and void. While it may not be possible to reproduce the rhythm exactly, new development should strive to reflect it in some way. The proposal is setback 2.8m from Rowntree Street (which is consistent with adjoining properties), and narrow side setbacks similar to the existing dwelling house.

The proposal is setback 2.6m from Rowntree Street, which is consistent with the setback of adjoining buildings and not closer to the front boundary than the existing dwelling house.

The side setbacks are between 900mm to the western boundary and 130mm to 231mm along the eastern side boundary again consistent with the existing dwelling house and similar to established setback patterns in the HCA.

The rear setback to the lower ground level building walls is 4.7m which is improved on the current dwelling house which has part of the structure with a nil setback to the rear boundary.

The bulk and scale of the proposed dwelling house is generally consistent with that of the existing dwelling house as evidenced by the elevation diagrams shown previously which show the proposed and existing building outline.

The development proposes an improvement to the landscaped area increasing it from 20.7% to 30.47%.

The site and existing development to be demolished for the proposed development is not a heritage item or adjoining or adjacent heritage items. The subject site is however located within the Town of Waterview Heritage Conservation Area and is a contributory item.

Notwithstanding, in the most common sense, the Commissioner provides that most people "experience the urban environment without applying the kind of analysis described

above" and simply moving around a city is enough for a person to respond to their surroundings and like in the planning principle that if simply taking a walk in this neighbourhood there is little chance that with the alterations and additions that this development would be seen "out of context" and therefore within a compatible scale and density in the context of the surrounding area.

For the above reasons it would therefore be unreasonable and unnecessary to cause strict compliance with the development standard.

**Precondition 4 - To consider a written request that demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court [or consent authority] finding that the matters required to be demonstrated have been adequately addressed**

Council's controls in Clause 4.4(2B)(b) provides a maximum floor space ratio of 0.9:1 for the subject development. The development proposes a floor space ratio of 1:1 being 231.147m<sup>2</sup> of GFA or a variation of 11.5%.

The variation is justified in this instance for the following reasons:

- The development does not result in adverse environmental effects on the use or enjoyment of adjoining properties and the public domain.
- The development maintains an appropriate visual relationship between new development and the existing character of the locality.
- The development provides an appropriate correlation between the size of a site and the extent of the development on that site.
- The development facilitates design excellence by ensuring the extent of floor space in building envelopes leaves generous space for the articulation and modulation of design.
- The development ensures that the floor space ratio on land in Zone R1 General Residential generally reflects Council's desired building envelopes
- The development provides for the housing needs of the community.
- The development provides housing that is compatible with the character, style, orientation and pattern of surrounding buildings, streetscapes, works and landscaped areas
- The proposed works will provide for improved amenity for the occupants, which promotes good design which is consistent with the Objective 1.3 (g) & (h) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard.

Having regard to the above, it is considered there are sufficient environmental planning grounds to justify a variation of the development standard for floor space ratio.

In the recent 'Four2Five' judgement (*Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90*), Pearson C outlined that a Clause 4.6 variation requires identification of grounds that are particular to the circumstances to the proposed development. That is to say that simply meeting

the objectives of the development standard is insufficient justification of a Clause 4.6 variation.

It should be noted that a Judge of the Court, and later the Court of Appeal, upheld the Four2Five decision but expressly noted that the Commissioner's decision on that point (that she was not "satisfied" because something more specific to the site was required) was simply a discretionary (subjective) opinion which was a matter for her alone to decide. It does not mean that Clause 4.6 variations can only ever be allowed where there is some special or particular feature of the site that justifies the non-compliance. Whether there are 'sufficient environmental planning grounds to justify contravening the development standard', it is something that can be assessed on a case by case basis and is for the consent authority to determine for itself.

The decision on appeal of *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7* is to be considered. In this case the Council appealed against the original decision, raising very technical legal arguments about whether each and every item of clause 4.6 of the LEP had been meticulously considered and complied with (both in terms of the applicant's written document itself, and in the Commissioner's assessment of it). In February 2016 the Chief Judge of the Court dismissed the appeal, finding no fault in the Commissioner's approval of the large variations to the height and FSR controls.

While the judgment did not directly overturn the Four2Five decision an important issue emerged. The Chief Judge noted that one of the consent authority's obligations is to be satisfied that *"the applicant's written request has adequately addressed...that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case ...and that there are sufficient environmental planning grounds to justify contravening the development standard."* He held that this means:

*"the Commissioner did not have to be satisfied directly that compliance with each development standard is unreasonable or unnecessary in the circumstances of the case, but only indirectly by being satisfied that the applicant's written request has adequately addressed the matter in subclause (3)(a) that compliance with each development standard is unreasonable or unnecessary".*

Accordingly, in regard to the proposed development at 79 Rowntree Street, Birchgrove the following environmental planning grounds are considered to be sufficient to allow Council to be satisfied that a variation to the development standard can be supported:

- The proposed development promotes good sustainable design and enhance the residential amenity of the buildings' occupants, which is consistent with the Objective 1.3 (g) & (h) of the EPA Act which is a suitable environmental planning ground which justifies the flexible application of the development standard
- The variation to the floor space ratio control (11.5%) is relatively modest as it is of negligible impact to the streetscape and the amenity of neighbouring properties largely owing to natural topography which enables that a significant portion of the lower ground floor is below natural ground level.

In the *Wehbe* judgment (*Wehbe v Warringah Council [2007] NSWLEC 827*), Preston CJ



expressed the view that there are 5 different ways in which a SEPP 1 Objection may be well founded and that approval of the Objection may be consistent with the aims of the policy. These 5 questions may be usefully applied to the consideration of Clause 4.6 variations: -

- i. *the objectives of the standard are achieved notwithstanding non-compliance with the standard;*

**Comment:** Yes. Refer to comments under 'Justification of Proposed Variation' above which discusses the achievement of the objectives of the standard.

- ii. *the underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;*

**Comment:** It is considered that the purpose of the standard is relevant and the purpose is satisfied.

- iii. *the underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;*

**Comment:** Compliance does not defeat the underlying object of the standard development. Furthermore, it is noted that development standards are not intended to be applied in an absolute manner; which is evidenced by clause 4.6 (1)(a) and (b).

- iv. *The development standard has been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standard and hence compliance with the standard is unnecessary and unreasonable;*

**Comment:** Not applicable.

- v. *the zoning of the particular land is unreasonable or inappropriate so that a development standard appropriate for that zoning is also unreasonable and unnecessary as it applies to the land and compliance with the standard would be unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.*

**Comment:** The development standard is applicable to and appropriate to the zone.

## 7.0 Conclusion

This proposed development necessitates a departure from the maximum floor space ratio development standard, with the proposed development achieving a maximum floor space ratio of 1:1 or a variation of 11.5%.

This objection to the maximum floor space ratio specified in Clause 4.4(2B)(b) of the LLEP 2013 adequately demonstrates that that the objectives of the standard will be met.

The bulk and scale of the proposed development is appropriate for the site and locality. Strict

compliance with the maximum floor space ratio would be unreasonable and unnecessary in the circumstances of this case and should be supported.

Kind regards



Wesley Folitarik  
B. Environmental Planning (UWS); M. Property Development (UTS)  
Managing Director | Urbanism

## Attachment D – Statement of significance for the Town of Waterview Heritage Conservation Area

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### Area 15 Town of Waterview Conservation Area

#### Landform

The land in this conservation area is located around a small creek (known as Curtis Waterhole) that enters Waterview Bay (now Morts Bay) at its most western point. The area is generally sheltered and includes flat low-lying land near the bay (where Morts Dock was built) rising south to higher land along Darling Street and west to the prominent knoll of Dock Road and Bates Street.

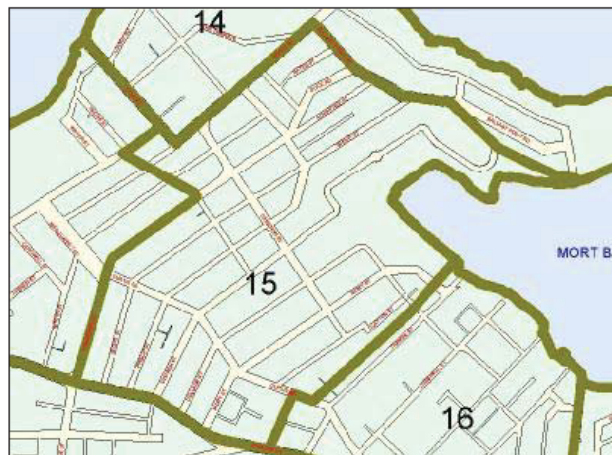


Figure 15.1 Town of Waterview Conservation Area Map.

#### History

The area that was later developed by Thomas Mort as the Town of Waterview included land originally purchased from Gilchrist's Balmain Estate in 1836 by Curtis and Lamb. In 1854 these two lots at the eastern end of the bay were purchased by Captain Rowntree and Thomas Holt for a slipway and dry dock. Thomas Mort was impressed with the sheltered bay and joined them in the enterprise.

Mort also accepted the transfer of most of the land around the dock area and commissioned Surveyor FH Reuss to lay out a township of 700 modest residential allotments. Initially Mort sought to provide rental accommodation near the dock to attract skilled labour and he indicated that a building society might be formed to assist purchasers, probably so that there would always be a pool of skilled workers living nearby. Allotments were 1/2 chain (33ft) wide with depths ranging from 84-109 feet, but subsequent resubdivision to allow two houses (terrace or semi) on one allotment occurred at the time of building and produced many smaller parcels. There were no back lanes for night soil disposal.

Small groups of similar houses suggest the area was constructed by small-scale building contractors, or by individual owner/builders.

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Mort purchased more land adjoining the original township and after his death in 1877 his trustees continued the dense subdivision and development of this area in response to the growth of Morts Dock Industries and the building boom of the 1880s.

It took forty years from 1857 for the town to be fully occupied. Just over half the allotments had been sold by 1878, but by 1896 the streets created within Mort's Town – Mort, Church, Phillip, Short, College, Rowntree, Curtis, Spring and Cameron Streets – were filled with an assortment of houses, 796 in all, 396 of brick, 348 of weatherboard, 51 of stone and one of iron. Small groups of corner shops and pubs served the community.

By 1861 the dock was leasing facilities to other maritime activities, and it developed its own associated engineering industries. Morts Dock and Engineering Co grew rapidly to become the largest private employer in Australia in a variety of maritime and engineering industries. During the 1940s it built corvettes, frigates and a floating dock. Economic fluctuations affecting the dock also affected its workers. The dock, the Town of Waterview and its pubs were the site of the beginnings of the urban labour movement. The dock closed in 1958; the site was levelled and used as a container terminal. More recently, the land was developed for residential purposes by the Department of Housing.

#### Sources

Solling, M and Reynolds, P 1997, 'Leichhardt: on the margins of the city', *Leichhardt Historical Journal*, Vol. 22, Allen and Unwin.

Reynolds, P 1985, 'The first 22 lots – an overview: Suburbanisation in Balmain', *Leichhardt Historical Journal*, Vol. 14.

Further research by Max Solling.

#### Significant Characteristics

- Regular street pattern made up of wider streets (about 50ft wide) marking the boundaries of the township (Rowntree, Mort, Curtis and Cameron Streets) or giving access to the dock (Church Street) with narrower streets filling the remainder.
- Lack of back lanes.
- A very regular streetscape resulting from:
  - regular width allotments of 33ft (or half 33ft) giving rise to uniform densely developed streets of single or double -fronted houses/terraces;
  - use of limited range of building materials – either rendered brick or painted weatherboard;
  - face brick houses of post c1890 and the fifty-odd stone buildings are noticeable for their different building materials; and
  - remarkably intact collection of single and two-storey attached and detached dwellings, many of them weatherboard.

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- Density of pubs.
- Corner stores and small groups of stores and pubs at some cross roads.

#### Statement of Significance or Why the Area is Important

- One of a number of conservation areas which collectively illustrate the nature of Sydney's early suburbs and Leichhardt's suburban growth particularly between 1871 and 1891, with pockets of infill up to the end of the 1930s (ie prior to World War II). This area, through the form and fabric of its houses, corner shops and pubs, its street layout and allotment shapes, demonstrates a remarkably intact area of early workers' housing from 1850s to 1890s with later infill development prior to World War II (ie pre-1939). It is significant for its surviving development prior to World War II.
- Demonstrates through the density of pubs (and former pubs) within the township area its close association with the growth of the urban labour movement. A number of these pubs are of national heritage significance for their historical and enduring social values as part of the history of unionism and of the Ships Painters and Dockers Union in particular.
- Demonstrates, through the nature of its housing, the important role played by Morts Dock as a magnet for workers and the location of their housing.
- Demonstrates, through its rendered and painted brickwork, the nature of construction in Sydney before the ready availability of hard pressed, face bricks.
- Demonstrates the work of Surveyor Reuss.
- Associated with prominent local entrepreneurs and land developers, some of whom were aldermen of Council.
- Demonstrates, with Bodalla Village on the New South Wales south coast, the role of Thomas Mort in providing 'appropriate' housing for his employees.

#### Management of Heritage Values

##### Generally

This is a conservation area. Little change can be expected other than modest additions and discrete alterations. Buildings which do not contribute to the heritage significance of the area may be replaced with sympathetically designed infill.

##### Retain

- All pubs, preferably as public houses, or in related activities (boarding houses etc) or as small-scale commercial uses.
- All pre-1939 buildings, especially timber buildings, and all their architectural details. Replacement of lost detail, based only on evidence, should be encouraged.
- Original finishes, particularly rendered brick houses.

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- All remaining sandstone kerbs and gutter.

Avoid

- Diagonally placed chicanes, and other works that diminish the straight line of the original road layout.
- Alterations that change the shape (form) of the pubs – particularly the removal of verandahs or the creation of new verandahs for which there is no historical evidence.
- Alterations that change the shape of the building or original roof forms on the main part of the buildings.
- Removal of original detail. (Encourage restoration from evidence.)
- Additions of details not part of the original fabric of the building.
- Interruption to the almost continuous kerb and gutters.