




	
DEVELOPMENT ASSESSMENT REPORT	
Application No.	DA/2022/0502
Address	23 Darling Street BALMAIN EAST NSW 2041
Proposal	Alterations and additions to residential development including a glass roof over the existing void and demolition of existing garden bed on basement level.
Date of Lodgement	30 June 2022
Applicant	Peter Perras
Owner	Mr Mouhamed Alameddine
Number of Submissions	Initial: 1
Value of works	\$45,000.00
Reason for determination at Planning Panel	Section 4.6 variation exceeds 10%
Main Issues	FSR variation, outlook loss
Recommendation	Approved with Conditions
Attachment A	Recommended conditions of consent
Attachment B	Plans of proposed development
Attachment C	Section 4.6 Exception to Development Standards
	
LOCALITY MAP	
Subject Site 	Objectors 
Notified Area 	Supporters 

1. Executive Summary

This report is an assessment of the application submitted to Council for alterations and addition to the existing dwelling at 23 Darling Street, Balmain East. The application was notified to surrounding properties and one submission was received in response to the initial notification.

The main issues that have arisen from the application include:

- Variation to the FSR development standard;
- Outlook loss.

The non-compliances are acceptable and therefore the application is recommended for approval.

2. Proposal

The proposal seeks consent for alterations and additions to the existing dwelling, specifically the following works are proposed:

- Construction of a new glass roof over the existing basement void;
- Construction of a new wall at the eastern elevation of the new glass roof;
- Replacement of basement planter box with concrete.

3. Site Description

The subject site is located on the northern side of Darling Street, between James Lane and Thorton Park. The site consists of a single allotment and is generally rectilinear in shape with a total area of 109.3sqm.

The site has a frontage to Darling Street of 4.6m with access from James Lane at the rear. The site is affected by a number of easements including the following:

- Cross Easements affecting the Party Wall shown on the Common Boundary of Lots D and E in D.P. 439960 created by G387871
- Cross Easements affecting the Party Wall shown on the Common Boundary of Lots E and F in D.P. 439960 created by H470360.

The site supports a three-storey brick and rendered terrace house with a tiled and metal roof, a rendered conservatory with a metal roof and a garage with a tiled balcony above. The adjoining properties support three storey terrace dwellings with rear access from James Lane. The subject site is a heritage item (I367, Plym Terrace) and located in the Balmain East Conservation Area.



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
BC/2020/0096	Building Certificate - minor internal changes to approved DA plans	12/06/2020 Approved
D/2017/680	Alterations and additions to existing terrace-house, including alterations and additions to existing roof terrace, elevated deck over on-site parking at the rear, and associated demolition and tree removal.	12/06/2018, approved

Surrounding properties

21 Darling Street, Balmain East

Application	Proposal	Decision & Date
D/2006/312	Alterations to existing dwelling and new roofed pergola to rear.	20/09/2006, approved

25 Darling Street, Balmain East

Application	Proposal	Decision & Date
D/2008/527	Install new gate and stair from street level to lower floor level of existing heritage listed dwelling and increase height of doorway and install security gate at lower floor level.	23/04/2009, refused

4(b) Application history

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

Date	Discussion / Letter / Additional Information
9/11/2022	Request for additional sent to the applicant requesting a Clause 4.6 to vary the FSR development standard and a copy of the submission.
9/12/2022	Clause 4.6 to vary FSR development standard received.

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 (EPA 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*

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 to grant 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) Local Environmental Plans

Inner West Local Environmental Plan 2022

The *Inner West Local Environmental Plan 2022 (IWLEP 2022)* was gazetted on 12 August 2022. As per Section 1.8A – Savings provisions, of this Plan, as the subject 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 *EPA Act 1979* requires consideration of any Environmental Planning Instrument (EPI), and Section 4.15(1)(a)(ii) also requires consideration of any EPI that has been subject to public consultation. The subject application was lodged on 30 June 2022, on this date, the *IWLEP 2022* was a draft EPI, which had been publicly exhibited and was considered imminent and certain.

The draft EPI contained the following amended provisions:

- Changes to the aims of the plan;
- Changes to the objectives of the zone

The development is considered acceptable having regard to the provisions of the Draft EPI as the proposal remains consistent with the aims of the plan and objectives of the zone.

Leichhardt Local Environmental Plan 2013 (LLEP 2013)

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

- Section 1.2 - Aims of the Plan
- Section 2.3 - Zone objectives and Land Use Table
- Section 2.7 - Demolition
- Section 4.3A - Landscaped areas for residential accommodation in Zone R1
- Section 4.4 – Floor Space Ratio
- Section 4.5 - Calculation of floor space ratio and site area
- Section 4.6 - Exceptions to development standards
- Section 5.10 - Heritage Conservation

Section 2.3 Land Use Table and Zone Objectives

The site is zoned LR1 under the *LLEP 2011*. The *LLEP 2013* defines the development as alterations and additions to a dwelling house, a dwelling house is defined as the following:

“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.

Section 4 Principal Development Standards

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

Standard	Proposal	Non compliance	Complies
Floor Space Ratio Maximum permissible: 1:1 or 109.3sqm	1.55:1 or 169.5sqm	54.9% or 60.2sqm	No – acceptable
Landscape Area Minimum permissible: 15% or 16.34sqm	0% or 0sqm	100% or 16.34sqm	No – existing. Acceptable as no change proposed
Site Coverage Maximum permissible: 60% or 65.58sqm	87.5% or 96sqm	45.8% or 30sqm	No – existing. Acceptable as no change proposed

Section 4.6 Exceptions to Development Standards

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

- Section 4.4 – Floor Space Ratio

The applicant seeks a variation to the Floor Space Ratio development standard under Section 4.4 of the *Leichhardt Local Environmental Plan 2013* by 54.9% or 60.2sqm.

Section 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 Section 4.6 of the *Leichhardt Local Environmental Plan 2013* below.

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

- *The proposed density is consistent with the previously approved development on the site, noting that development has historically exceeded the maximum FSR in this locality for some time*
- *No visible impacts on the streetscape or character of the local area*
- *The works are at the side boundary and roof only and relate to an existing void space, there is no impact on the perceived or actual bulk and scale of the development*
- *The proposed alterations, despite being minor in nature, further enhance the dwelling's consistency with the zone objectives*

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 LR1, in accordance with Section 4.6(4)(a)(ii) of the *Leichhardt Local Environmental 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 infill an existing void to a non-habitable area basement/parking area. The additional density will not impede on the built form and perceived density within the immediate context area.
- *To enable other land uses that provide facilities or services to meet the day to day needs of residents.*
Comment: Not applicable, the proposal does not seek to amend the existing facilities on site.
- *To improve opportunities to work from home.*
Comment: Not applicable, the proposed works are located within the basement car parking area and terrace.
- *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.
- *To provide landscaped areas for the use and enjoyment of existing and future residents.*
Comment: Nil permeable landscaping is available on site, the proposal does not seek to amend this.
- *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: Not applicable, subdivision is not proposed.
- *To protect and enhance the amenity of existing and future residents and the neighbourhood.*
Comment: The proposal seeks to infill an existing void to a non-habitable area basement/parking area and as such will generally not have any adverse impacts on the amenity of surrounding properties, having 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 Section 4.6(4)(a)(ii) of the *Leichhardt Local Environmental 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 form and scale from James Lane. The proposed additions will not detract from the adjoining dwellings and 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: Nil permeable landscaping is available on site, the proposal does not seek to amend this. Furthermore, given the location of existing structures on the subject site there is limited scope to introduce new landscaped areas in compliance with the development standard.

- (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.

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 Section 4.6(1)(b) and requirements of Section 4.6(3)(b) of the *Leichhardt Local Environmental Plan 2013*. For the reasons outlined above, there are sufficient planning grounds to justify the departure from the Floor Space Ratio and it is recommended the Section 4.6 exception be granted.

5(b) Development Control Plans

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

DCP2013	Compliance
Part C	
C1.0 General Provisions	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	No – existing thus acceptable
Part C: Place – Section 2 Urban Character	
C2.2.2.1(c) Darling Street East Sub Area	Yes
Part C: Place – Section 3 – Residential Provisions	
C3.1 Residential General Provisions	Yes
C3.2 Site Layout and Building Design	No – see discussion
C3.3 Elevation and Materials	Yes
C3.8 Private Open Space	Yes
C3.9 Solar Access	Yes
C3.10 Views	Yes – see discussion
C3.11 Visual Privacy	No – see discussion

C3.2 Site Layout and Building Design

The proposal seeks to extend the terrace area to the western boundary by infilling the existing void with a glass roof and erecting a 1.24m high solid balustrade at the boundary. The new glass roof is to be structurally supported via posts. Whilst it is noted that the works are not supported by a wall, an assessment against the site provisions of Clause 3.2 of the LDCP 2013 have been considered in this instance.

- *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. Attached dwellings comprise of a range of storeys with varying setbacks to their respective side boundaries. Dwellings to the east and west of the subject site include elevated terraces that include varied setbacks to their respective side boundaries, including nil setbacks. 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, and 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.
- *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: Acceptable. The adjoining dwelling 25 Darling Street has a nil side setback to its respective boundary, and as such the proposed works will not hinder the existing access to this wall.

C3.10 Views

The proposal seeks to erect a 1.24m solid wall balustrade above the FFL of the existing terrace at the western boundary immediately adjacent to the rear living areas and POS area of 25 Darling Street. The proposed wall will have a RL of 13.535 AHD. It is noted that the supporting survey information provided with the application notes that the top of the concrete wall at 25 Darling Street has an RL of 13.08 AHD to the south and 12.55 AHD to the north. With this considered, the wall will sit approximately 273mm above the highest point of the adjoining concrete wall. To mitigate potential view loss impacts and maintain existing view sharing from the rear POS area of 25 Darling Street a condition is included in the recommendation requiring that amended plans be submitted prior to the issue of a Construction Certificate requiring that the height of the wall is reduced to a maximum height of 1m.

An assessment of view impact of the proposal in accordance with the planning principle established in *Tenacity Consulting v Warringah* (2004) NSWLEC 140 is below:

25 Darling Street, Balmain East

*The **first step** is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.*

Comment: The existing views over the subject site from 25 Darling Street whilst currently hindered by neighbouring trees include the Sydney Harbour Bridge, Sydney Harbour and the city skyline from the ground floor kitchen and elevated ground floor rear Private Open Space area. The pictures below identify the existing views from 25 Darling Street.



Photo 1: Views obtained from the ground floor kitchen of the Sydney Harbour Bridge and Sydney Harbour. This view is currently hindered by trees on the adjoining property.



Photo 2: Views obtained from elevated the ground floor rear POS area. The existing views are over the subject site include views of the Sydney Harbour Bridge, Sydney Harbour and city skyline, these views are currently hindered by neighbouring trees.

*The **second step** is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.*

Photo Reference	Comment
1	Views obtained from the ground floor kitchen of the Sydney Harbour Bridge are currently hindered by trees on the adjoining property. This view is obtained over the side boundaries of 23 and 21 Darling Street. This view would be minimally impacted by the proposal.
2	Views obtained from elevated the ground floor rear POS area. The existing views are over the subject site include views of the Sydney Harbour Bridge and city skyline. This view is obtained over the side boundaries of 23 and 21 Darling Street. This view would be minimally impacted by the amended proposal.

*The **third step** is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.*

Comment: As detailed above, whilst the views of the Sydney Harbour Bridge are currently obscured by significant vegetation to the east of the subject site, it is likely that the wall proposed will marginally impact the view currently enjoyed from 25 Darling Street. Properties located on the northern side of Darling Street, currently view share from their rear elevated POS areas and with the proposed works considered this will likely partially obscure these views and will result in view loss creep.

*The **fourth step** is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.*

Comment: The extent of the view loss impacts is attributed to the new wall proposed. It is considered that any increase in height to any ancillary structure within the rear POS area will have an incremental impact to the views benefited by 25 Darling Street. A more skilful design would produce a more superior result, in this instance, the lowering of the wall to an absolute minimum. A design change condition is included in the recommendation of this report to reduce the wall height to a maximum of 1m above the FFL of the rear terrace deck. The recommended design change will reduce the extent of view loss in question.

C3.11 Visual Privacy

There are not considered to be any additional privacy impacts to that of the existing situation resulting from the infill of the void. It is noted that the adjoining property at 25 Darling Street has a similar raised terrace structure and is marginally elevated above the site. Given this the extent of the impacts are considered acceptable.

5(c) 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(d) 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(e) Any submissions

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

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

- Visual privacy;
- View Loss;
- FSR variation

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

Issue: Overshadowing impacts from the wall into the adjoining property at 25 Darling Street
Comment: The proposal is unlikely to result in adverse overshadowing impacts to the adjoining property given that the wall height proposed and reinforced via condition is lower than that of the fence on the adjoining property. As such, and overshadowing impacts will fall within that of the existing fence.

5(f) The Public Interest

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

The proposal is not contrary to the public interest.

6. Section 7.11 Contributions/7.12 Levy

Section 7.12 levies are not payable for the proposal.

7. Conclusion

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

8. Recommendation

- A. The applicant has made a written request pursuant to *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 floor space ratio 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/2022/0502 for Alterations and additions to residential development. Proposal of glass roof over the existing void, demolition of existing garden bed on basement level. at 23 Darling Street, Balmain East subject to the conditions listed in Attachment A below for the following reasons.

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
Drawing Issue C 2,	Main Level & Basement Level Plan	April 22	Perras Design Group
Drawing Issue C 3,	North & West Elevation Plan	April 22	Perras Design Group
Drawing Issue C 4,	Section A	April 22	Perras Design Group
Drawing Issue C 5,	East Elevation Plan	April 22	Perras Design Group

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 solid wall at the western elevation is to have a maximum height of 1m above the FFL of the Level 2 main deck

GENERAL CONDITIONS**3. 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.

4. Works Outside the Property Boundary

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

PRIOR TO ANY DEMOLITION**5. 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 property at 21 Darling Street, Balmain East 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.

6. 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.

PRIOR TO CONSTRUCTION CERTIFICATE

7. 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.

DURING DEMOLITION AND CONSTRUCTION**8. 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.

9. Stormwater Drainage System

Stormwater runoff from all roof and paved areas within the property must be collected in a system of gutters, pits and pipelines discharged by gravity to the kerb and gutter of a public road.

Any existing component of the stormwater system that is to be retained, including any absorption trench or rubble pit drainage system, must be checked and certified by a Licensed Plumber or qualified practising Civil Engineer to be in good condition and operating satisfactorily.

If any component of the existing system is not in good condition and /or not operating satisfactorily and/or impacted by the works and/or legal rights for drainage do not exist, the drainage system must be upgraded to discharge legally by gravity to the kerb and gutter of a public road. Minor roof or paved areas that cannot reasonably be drained by gravity to a public road may be disposed on site subject to ensure no concentration of flows or nuisance to other properties.

10. 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.

ADVISORY NOTES**Prescribed Conditions**

This consent is subject to the prescribed conditions of consent within Sections 69-86 of the *Environmental Planning and Assessment Regulations 2021*.

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.

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.

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.

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.

Dial before you dig

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

Useful Contacts

BASIX Information

1300 650 908 weekdays 2:00pm - 5:00pm

	www.basix.nsw.gov.au
Department of Fair Trading	13 32 20
	www.fairtrading.nsw.gov.au
	Enquiries relating to Owner Builder Permits and Home Warranty Insurance.
Dial Prior to You Dig	1100
	www.dialprior toyoudig.com.au
Landcom	9841 8660
	To purchase copies of Volume One of "Soils and Construction"
Long Service Corporation	Payments 131441
	www.lspc.nsw.gov.au
NSW Food Authority	1300 552 406
	www.foodnotify.nsw.gov.au
NSW Government	www.nsw.gov.au/fibro
	www.diySAFE.nsw.gov.au
	Information on asbestos and safe work practices.
NSW Office of Environment and Heritage	131 555
	www.environment.nsw.gov.au
Sydney Water	13 20 92
	www.sydneypwater.com.au
Waste Service - SITA	Environmental Solutions 1300 651 116
	www.wasteservice.nsw.gov.au

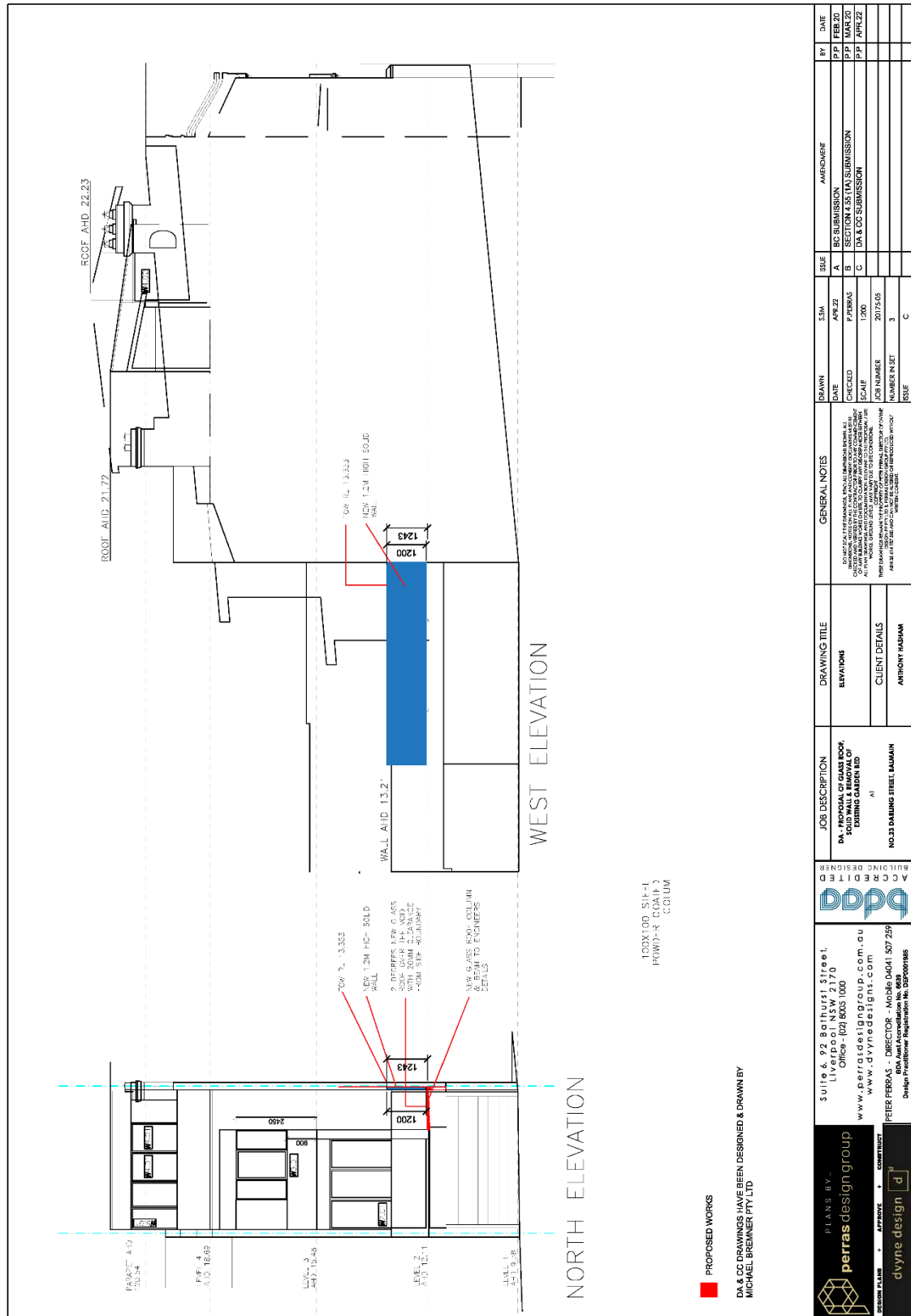
Water Efficiency Labelling and Standards (WELS) www.waterrating.gov.au

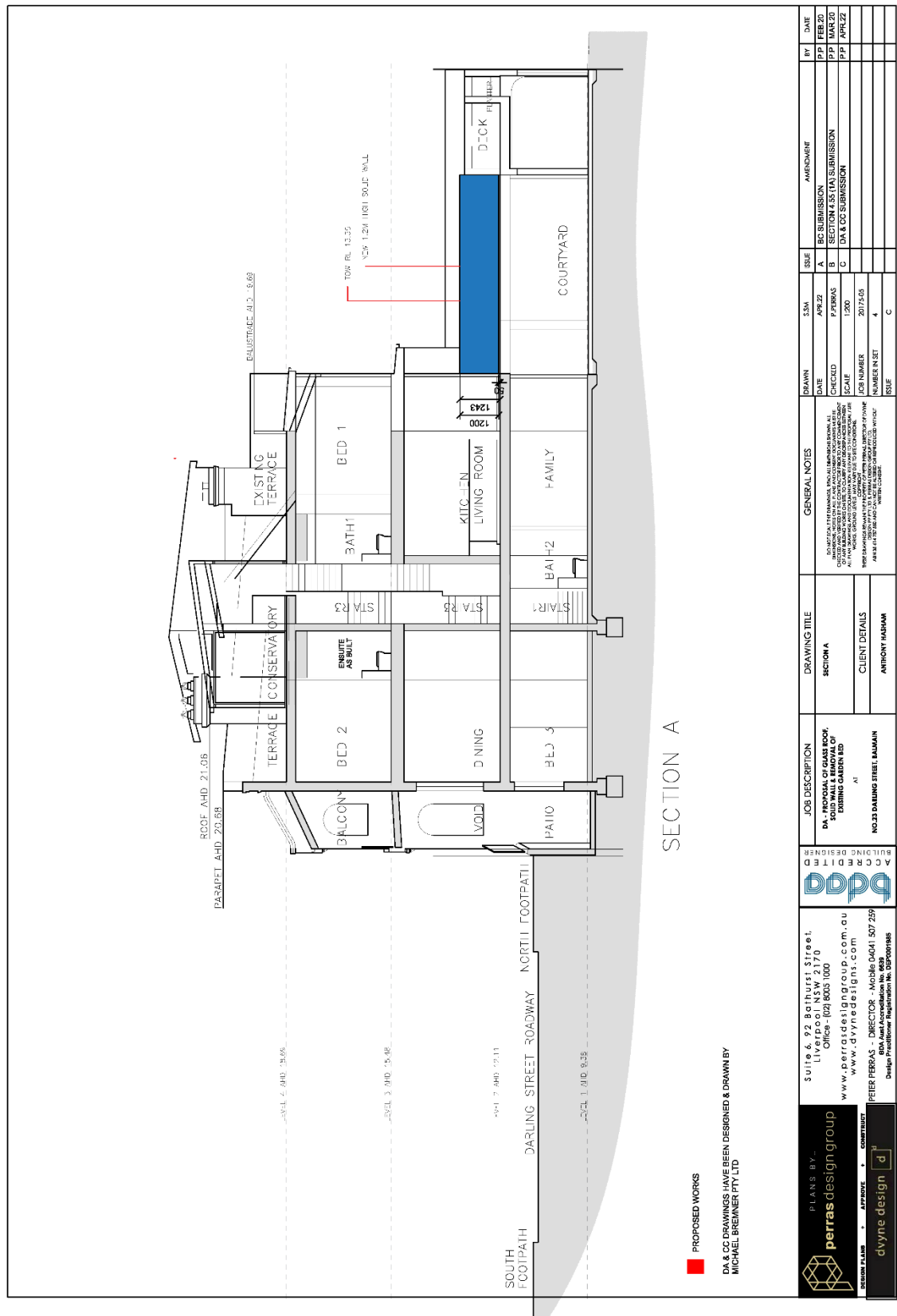
WorkCover Authority of NSW 13 10 50

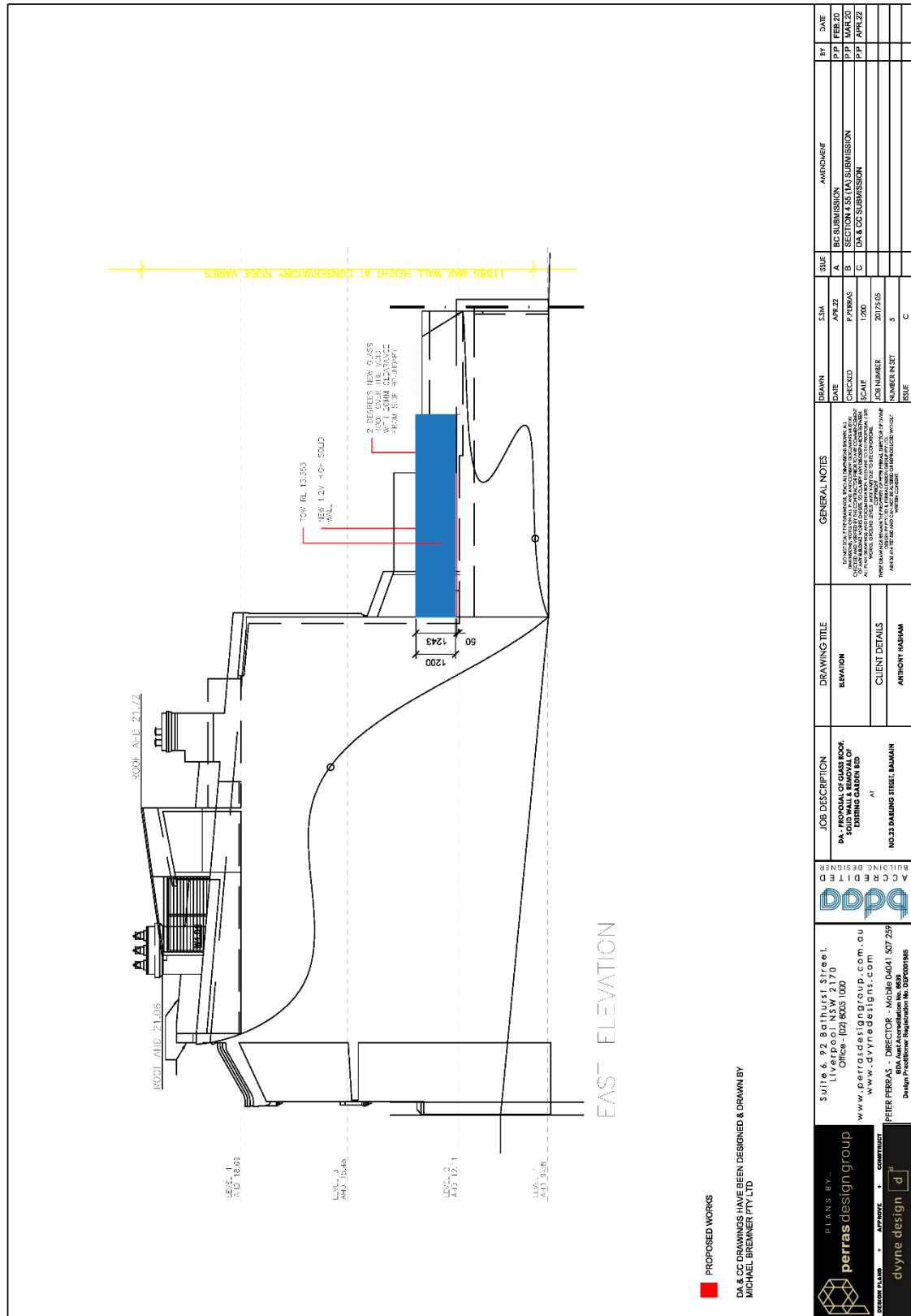
www.workcover.nsw.gov.au

Enquiries relating to work safety and asbestos removal and disposal.

[illegible]







Attachment C- Section 4.6 Exception to Development Standards



9 December 2022

Little Developer Co.
info@littledveloperco.com.au

The CEO
Inner West Council
council@innerwest.nsw.gov.au

Attention: Katerina Lianos, Development Assessment Planner

RE: Application to vary the floor space ratio development standard under Clause 4.6 of the Leichhardt LEP 2000 and response to submission

Dear Katerina,

This letter has been prepared by Little Developer Co. on behalf of our client, Perras Design Group. The letter requests that the Inner West Council and the Local Planning Panel grant consent to the proposed development application for the proposed atrium roof and dividing wall, despite the proposed development contravening the Floor Space Ratio (FSR) development standard within the *Leichhardt Local Environmental Plan 2013* (LEP 2013) in force at the time of lodgement of this application as the superseding LEP came into effect on 12 August 2022.

In summary, it is proposed to provide an additional 8sqm of gross floor area, being the area now enclosed by the dividing wall and atrium roof, which was previously open. The current FSR for the site is 1.47:1, or 161.5sqm. The proposed area of the atrium will add a further 8sqm of gross floor area, resulting in a total gross floor area of 169.5sqm of 1.55:1, which exceeds the previous maximum FSR for Balmain under the LEP 2013 of 0.5:1 by 1.05:1 (reference Clause 4.4 of the LEP 2013).

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The request is considered to be reasonable and justifies that compliance with the standard is unnecessary on the grounds that:

- There are sufficient environmental grounds to justify the contravention of the development standards, namely the fact that no further bulk, or scale or perceived bulk is being added by the proposed work,
- The proposed development is in the public interest, as the objectives of the land use zone and the standards are both achieved notwithstanding the non-compliance,
- The proposed total gross floor area is marginally increasing beyond what has already been approved by Council,
- The FSR contravention is minor with the exterior works not being visible from the street,
- The proposal retains the existing buildings character and contribution to the streetscape;
- The request satisfies the tests set by the Land and Environment Court for the justification and assessment of variations to development standards.

1. INTRODUCTION

The site consists of a single lot at 23 Darling Street, Balmain East in Inner West Local Government Area (LGA). The site has an area of 109.3sqm with an FSR of 1.47:1.

This Clause 4.6 variation request accompanies a development application made pursuant to Section 4.12 of the Environmental Planning and Assessment Act 1979 (EP&A Act) for an extension to the existing dividing wall and closing of an open roofed atrium in the centre of the building.

Clause 4.6 of the Leichhardt LEP 2013 provides the Inner West Council with a degree of flexibility in applying the standards to the proposed development, subject to a written request by the applicant justifying any contraventions and demonstrating that compliance is unreasonable or unnecessary in the circumstance of the case. In addition, the Land and Environment Court, in *Wehbe v Pittwater Council (2007) NSW LEC 827*, *Winten Developments Pty Ltd v North Sydney Council (2001) NSW LEC 46* and *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118* has articulated principles and tests regarding the justification for, and assessment of, exceptions to development standards. The proposed development is assessed against the established principles at **Section 4**.

Floor Space Ratio

The Leichhardt LEP 2013 maximum building FSR for the site is 0.5:1. The proposed total gross floor area (GFA) under a previous DA approval was 161.5sqm (1.47:1). This DA seeks to increase the gross floor area by 8sqm, to a total 169.5sqm (1.55:1). The gross floor area is a void space being enclosed by a roof and party wall expansion.

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2. JUSTIFICATION FOR EXCEPTION TO THE STANDARDS

Clause 4.6 Exceptions to development standards of the Leichhardt LEP 2013 provides Council with a degree of flexibility in applying the Floor Space Ratio development standard to the subject development application (Clause 4.6(1)) provided that: the standards are not excluded from this discretion (Clause 4.6(2)); particular planning outcomes are achieved (Clause 4.6(3)); and that certain procedural requirements are met (Clauses 4.6(4)).

Each of these matters is addressed below.

2.1 Consistency with Objectives of the Clause

Clause 4.6(1) states:

"The objectives of this clause are as follows:

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

The non-compliance with the LEP 2013 Floor space ratio development standard is driven by the goal of achieving better outcomes for and from the development. The proposed development aims to achieve the objects of the EP&A Act, including:

- Object of the EP&A Act to promote the orderly and economic use and development of land by not altering the land use or character of the building,
- Object of the EP&A Act to promote good design and amenity of the built environment with no physical external building elements being altered that are visible from the public domain,
- Maintain consistency with the previously approved development on the site,
- Will not impact on compliance with any broader strategic plan or policy of Council.

Despite the non-compliance with the standard, the proposed development will have a negligible impact on the surrounding development with respect to overshadowing, views, visual impact, and privacy.

2.2 Matters for consideration

In deciding whether or not to grant consent, Council is required to satisfy itself that the request for the variation demonstrates that:

- There are sufficient environmental planning grounds to justify contravening the development standard (Clause 4.6(3)(b)); and
- The proposed development is in the public interest and consistent with the objectives of the standard and the zone in which the development is proposed to be carried out (Clause 4.6(4)(a)(ii)).

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The clauses are addressed below.

Clause 4.6(3)(b) – Environmental planning grounds

It is considered that there are sufficient environmental planning grounds to justify contravening the Floor space ratio development standard under the Leichhardt LEP 2011. The development is considered to be consistent with the objectives of *Clause 4.4 of Floor space ratio*.

Objectives of Clause 4.4 Floor space ratio

Table 1 Compliance with Clause 4.4 of the PLEP 2011

Objectives of Clause 4.4	Compliance	Comment
(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	Yes	The proposed development will not alter the already permissible land use in the R1 General Residential Zone. The proposed density is consistent with the previously approved development on the site, noting that development has historically exceeded the maximum FSR in this locality for some time. Furthermore, as there will be no visible impacts on the streetscape or character of the local area, the proposal is considered to be compatible.
(ii) provides a suitable balance between landscaped areas and the built form, and	Yes	The proposed development does seek to add any more internal or external area, with site coverage already quite high and the proposed garden bed being removed is a small, boundary planter box that does not add to any real or perceived landscape treatment for the site as it sits within a basement garage area.
(iii) minimises the impact of the bulk and scale of buildings,	Yes	As noted under (i), as the works are at the side boundary and roof only and relate to an existing void space, there is no impact on the perceived or actual bulk and scale of the development.

Clause 4.6(4)(a)(ii) – the public interest

The proposed development is considered to be in the public interest as it is generally consistent with a previously approved and altered dwelling on the site, and will not have any real or perceived bulk and scale impacts or amenity impacts to adjacent dwellings.

Objectives of Clause 4.4 Floor space ratio

Refer to the objectives of the development standard which area addressed at **Table 1** above.

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Objectives of the R1 General Residential zone

The site is identified within the R1 General Residential zone under the Leichhardt LEP 2013. The objectives of the zone are addressed below:

- *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.*

The proposed development relates to alterations and additions to an already approved dwelling, that was previously deemed by Council as being consistent with the objectives of the zone. The proposed works will further enhance the liveability of the dwelling by removing an open void, allowing for improved internal amenity, health and cleanliness outcomes for the occupants. Overall, the proposed alterations, despite being minor in nature, further enhance the dwelling's consistency with the zone objectives.

2.3 Procedural Requirements

The procedural requirements of Clause 4.6 of Leichhardt LEP 2013 are addressed below.

Clause 4.6(2)

Clause 4.6(2) states that *"this clause does not apply to a development standard that is expressly excluded from the operation of this clause"*.

Clause 4.4 Floor space ratio of the Leichhardt LEP 2013 is not expressly excluded from the operation of Clause 4.6, and therefore, variation to the FSR standard can be considered under this clause.

Clause 4.6(3)

Clause 4.6 (3) requires a *"written request from the applicant that seeks to justify the contravention of the development standard" that justifies "compliance with the development standard is unreasonable or unnecessary in the circumstances of the case"*.

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This Clause 4.6 variation provides a written request to contravene the Leichhardt LEP 2013 Floor space ratio development standard. In this instance, compliance with the FSR standard is considered unnecessary as the proposal is complementary and will not alter the existing dwelling's contribution to the character of the locality. The proposed impacts of the development on the urban context, streetscape and to adjacent properties are not beyond what would be expected of the already approved development on the site. Therefore, it is considered that the proposed FSR exceedance is not a major departure from the controls or the desired development outcome envisaged by the approval of the recently completed alterations and additions.

Clause 4.6(4)(b)

Clause 4.6(4)(b) stipulates that Council must not grant consent to any variation unless the concurrence of the Secretary has been obtained.

Planning Circular no PS08-003 Variations to development standards (dated 9 May 2008) provides that the concurrence of the Secretary of the Department of Planning and Environment can be assumed where Councils have adopted Clause 4.6 of the Standard Instrument. As such, the final requirement identified above can be assumed to be satisfied.

3. JUSTIFICATION FOR FLOOR SPACE RATIO VARIATION

The site is identified within the *R1 General Residential* zoning under the Leichhardt LEP 2011. The proposed works do not alter the land use or permissibility of the existing dwelling.

As set out by *Clause 4.4 Floor space ratio* of the Leichhardt LEP 2011, the maximum permissible floor space for the site is 0.5:1.

The existing FSR is understood to be 1.47:1. The proposed development does not seek to add any additional bulk to the building, but rather, seeks to enclose an existing void space, which already forms part of the built form and bulk.

The minor FSR exceedance on Lot 1 is a result of the following factors:

- Allowing for closure of an internalised void,
- Increasing the party wall height to minimise noise and privacy impacts to the adjacent dwelling,
- Improving internal functionality and use that is currently compromised by having an open to the sky void, particularly given recent adverse weather conditions.

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4. THE LAND AND ENVIRONMENT COURT PRINCIPLES/TESTS

Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118 is discussed below at **Section 4.1** and addresses the correct approach to consider Clause 4.6 requests.

Two landmark cases articulate the Court's view on reasonable arguments for, and assessment of, requests for exceptions to development standards. These are discussed further below at **Section 4.2** and **Section 4.3**.

4.1 Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118

The procedural requirements of Clause 4.6 of Leichhardt LEP 2013 are addressed below.

In his decision in *Initial Action Pty Ltd v Woollahra Municipal Council (2018) NSWLEC 118*, Chief Justice Preston clarified the correct interpretation of Clause 4.6 requests with regard to Cl 4.6 (4)(a)(i) and (ii). A Cl 4.6 requests must:

- Adequately address the matters required by subclause (3) – that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (Cl 4.6(3)(a)), and that there are sufficient environmental planning grounds to justify contravening the development standard (Cl 4.6(3)(b)); and
- Demonstrate that the proposed development will be in the public interest because it is consistent with the objectives of the development standard (in this case, Cl. 4.4 Floor space ratio) and land use zone objectives (in this case, R1 General Residential) (Cl 4.6 (4)(a)(ii)).

These matters are addressed below.

With respect to the subject site, compliance with the 0.5:1 floor space ratio development standard is considered unnecessary in this case because the proposed development complies with the objectives of the subject development standard (*Clause 4.4 Floor space ratio*). The objectives of the development standards are addressed at **Section 2.2** above. Refer also to the five tests under *Wehbe v Pittwater Council* at **Section 4.2** below. Furthermore, the FSR under the planning controls does not reflect the fact that existing dwellings already significantly exceed this control.

The development is considered to have sufficient environmental planning grounds given the development complies with the objectives of the development standards (addressed at **Section 2.2** above) and has no environmental impacts beyond what would be expected of the previously approved development.

The development will be in the public interest because it raises no inconsistencies with the objectives of the R1 zone and complies with the objectives of the development standard. The proposal does not alter

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permissibility or have any further impacts on adjacent properties with respect to overshadowing, privacy, sunlight impacts and view impacts. Refer to **Section 2.2** above.

The case also identifies that the outcome of the breach to a development standard does not necessarily need to be a neutral or better outcome, if the relevant environmental planning grounds to assess it against don't require such.

With regard to bulk and scale, overshadowing, visual impact, and privacy the objective of the development standard is to maintain the prevailing character and amenity of the locality (Cl4.4(1)(d)). The proposed works will not impact on bulk, scale, character or amenity in this locality.

4.2 *Wehbe v Pittwater Council (2007) NSW LEC 827*

In his decision in *Wehbe v Pittwater Council (2007) NSW LEC 827*, Chief Justice Preston expressed the view that there are five different ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary. The five tests are considered in the table below.

i. <i>The objectives of the standards are achieved notwithstanding non-compliance with the standard</i>	The proposed development complies with the objectives of Clause 4.4 Floor space ratio. The objectives of the standard are addressed at Section 2.2 above.
ii. <i>The underlying objectives or purposes of the standard are not relevant to the development and therefore compliance is unnecessary</i>	The underlying objectives of the standard are relevant to the development. However, as provided in this request, compliance with the standard is considered unnecessary and unreasonable in this case, given the controls do not reflect the density of existing and approved development.
iii. <i>The underlying object or purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable</i>	The underlying object or purpose of the standards would not be defeated or thwarted if compliance was required. The proposal relates to an existing void area, which was left open to the sky. It's enclosure will not add to bulk or scale or set any undesirable precedents.
iv. <i>The development standards have been virtually abandoned or destroyed by the Council's own actions in granting consents departing from the standards and hence compliance with the standard is unnecessary and unreasonable; and</i>	This exception to development standards request does not rely on this reason.
v. <i>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</i>	This exception to development standards request does not rely on this reason.

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<i>unreasonable or unnecessary. That is, the particular parcel of land should not have been included in the particular zone.</i>	
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4.3 Winten Developments Pty Ltd v North Sydney Council (2001) NSWLEC 46

The exception to development standard request is assessed below against the accepted test for the assessment of development standard variation established by Winten Developments Pty Ltd v North Sydney Council (2001) NSWLEC 46.

a) <i>Are the planning controls in question a development standard?</i>	Yes, Clause 4.4 of the Leichhardt LEP 2013 is a development standard.
b) <i>What is the underlying object or purpose of the standards?</i>	The objectives of the standard are addressed at Section 2.2 above.
c) <i>Is compliance with the development standards unnecessary or unreasonable in the circumstances of the case?</i>	Sections 2 and 3 demonstrate that compliance is unnecessary and unreasonable.
d) <i>Is compliance with the development standards consistent with the aims of the Policy (to provide flexibility in the application of development standards); and, in particular, does compliance with the development standards tend to hinder the attainment of the objects specified in Section 5(a)(i) and (ii) of the Environmental Planning and Assessment Act 1979?</i>	As demonstrated at Section 2 , compliance with the standards would be inconsistent with the objectives of Clause 4.6 and would hinder the attainment of the objects of the Act as discussed in Sections 2, 3 and 4 of this request.
e) <i>Is the objection well founded?</i>	The objection is well founded on the grounds that the non-compliance: <ul style="list-style-type: none"> • Has been demonstrated not to raise any issues of State or regional planning significance; • Achieves the objects of the EP&A Act and will not have any negative impacts on the locality; • Enables works that will enhance liveability and amenity of the dwelling.

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5. RESPONSE TO SUBMISSION

A submission was made by the occupant of 25 Darling Street, Balmain. The concerns raised are addressed below:

<p><i>The solid wall 1.24m above the deck of No. 23 is unreasonable. It will block out outlook, make us feel very confined and block our morning sun from the courtyard. Should the neighbour be concerned with overlooking, he can use obscured glass at the deck level.</i></p>	<p>As shown in Figure 1 below, the 1.2 metre high wall will not impact on overshadowing or the feeling of confinement. The adjacent property already has a solid wall to a similar height and has screened the current site as much as practical. The current open balustrade presents poorly and provides a poor privacy outcome for both dwellings.</p> <p>Furthermore, the height of solid wall component is so low, that it will not have any solar access implications beyond that is already provided to screen the courtyards of both properties.</p>
<p><i>Concerns regarding the block wall being on his property.</i></p>	<p>The location of the wall is on the boundary, and has been surveyed. The location of the wall is accurately provided for on the architectural drawings provided under separate cover.</p>

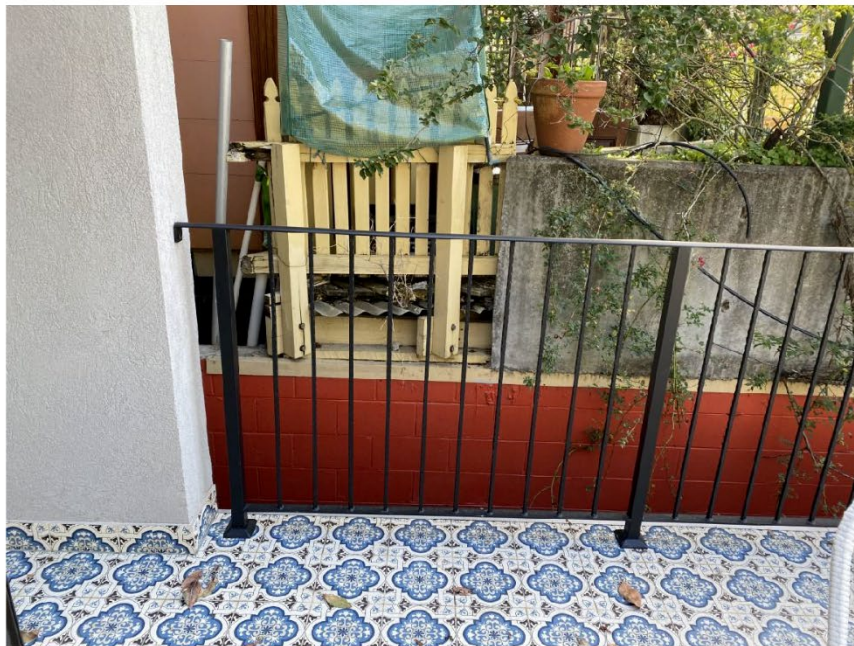


Figure 1 This figure shows the interface between 23 and 25 Darling Street – showing a current lack of privacy and poor interface

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Further to the above, it is noted that there are no objections to the glass atrium.

CONCLUSION

It is therefore considered that the exceedance on the floor space ratio development standard at 23 Darling Street, Balmain is permitted under *Clause 4.6 Exceptions to development standards* and it is requested Council grant development consent.

Please feel free to contact the undersigned on 0415710123 should you wish to discuss this assessment in detail, or email info@littledveloperco.com.au.

Kind regards

A handwritten signature in black ink, appearing to read 'Camille Lattouf', written in a cursive style.

Camille Lattouf
Urban Planner & Director

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