



INNER WEST COUNCIL

DEVELOPMENT ASSESSMENT REPORT

Application No.	M/2016/97
Address	8 Campbell Avenue LILYFIELD NSW 2040
Proposal	Modification to approved development (D/2010/553) to provide first floor balconies & associated doors
Date of Lodgement	15 May 2016
Applicant	MCHP Architects Pty Ltd
Owner	Mr. D & Mrs. A Vasilou
Number of Submissions	Nineteen (19)
Value of works	N/A
Main Issues	Potential privacy impacts upon neighbours
Recommendation	Approval



LOCALITY MAP

Subject Site		Objectors		↑ N
Notified Area		Supporters		

1. Executive Summary

This report is an assessment of the s.96(AA) application submitted to Council for modification to the approved design to provide 3 rear facing 1st floor balconies off Boarding Rooms 6, 7 & 8 at No. 8 Campbell Avenue LILYFIELD NSW 2040.

The application was notified to those persons who were notified of the original DA and also to those persons who made submissions from outside of the notification area and a total of 19 submissions have been received.

The main issue that has arisen from the application involves the protection of the privacy of neighbouring properties.

The application is recommended for approval.

2. Proposal

M/2016/97 seeks to delete Condition 2(a) of Development Consent No. D/2010/553 pursuant to the provisions of Section 96(AA) of the Environmental Planning and Assessment Act, 1979.

Condition 2(a) states:

2. *Amended plans are to be submitted incorporating the following amendments:*
 - a) *All windows at first floor level are to be fixed obscure glazed to a minimum height of 1600mm above the adjoining finished floor level.*

The purpose of this condition is to address the concerns raised by neighbours during the evaluation of the development application regarding the protection of visual privacy.

This application proposes:

- The addition of a 1st floor rear facing balcony off each of the Boarding Rooms 6, 7 & 8 separated by a 1.6m (H) privacy screen between each one and with a privacy screen at each end.
- A solid balustrade 1.0m (H) facing towards the rear boundary.
- The dimensions of each balcony to vary as follows:-
 1. Room 6 & 7 - 1.5m (D) x 3.0m (L)
 2. Room 8 - 1.3m (D) x 2.1m (L)
- Replace the previously approved 1st floor rear facing windows with glass sliding doors to provide access from each 1st floor Boarding Room to the respective balcony.

The original Development Application determined by the NSW Land and Environment Court (Case No: 10818 of 2011) on 22 May 2012 gave approval for alterations and additions to an existing dwelling at 8 Campbell Avenue, Lilyfield for use as an 8 room boarding house. The Sealed Orders of the Court upheld the agreement reached between the parties, which included the inclusion of Condition 2(a).

3. Site Description

The site is approximately 446m² in area and has a frontage of 12.2m to Campbell Avenue. The site is located on the eastern side of the street.

The site presently accommodates a single storey detached bungalow dwelling. The adjoining properties consist of similar bungalows. There is a two storey residential flat

building and two storey multi-unit development opposite the site and a small number of two storey dwellings in the street.

The subject site is not a heritage item however it is located within the *Campbell Estate Heritage Conservation Area* (C17). The Brush Box street trees on both sides of the road reserve in Campbell Avenue are listed as an item of environmental heritage (I623).

The site is located within the Leichhardt Park Distinctive Neighbourhood (*Leichhardt Park Conservation Sub Area*).

The site is not identified as a flood control lot.

4. Background

4(a) Site history

The following table outlines the relevant development history of the subject site.

Date	Application Details
08.03.2011	<p>D/2010/553 – Refused by Council D/2010/553 and D/2010/554 were submitted to Council seeking consent for alterations and additions including a new 1st floor and change of use to a 10 room boarding house at 8 Campbell Avenue and a 9 room boarding house at 10 Campbell Avenue.</p>
Undetermined	<p>DAREV/2011/15 On 26.08.2011 a review of the determination of D/2010/553 was lodged with Council and included amended plans.</p> <p>On 08.09.2011 an appeal against the refusal of D/2010/553 was filed with the Land and Environment Court. The applicant relied on the amended plans.</p>
22.05.2010	<p>Land and Environment Court 10818 & 10819 of 2011 <i>Vasilou v Leichhardt Council [2012] NSWLEC 1127 (22 May 2012)</i> Court Orders issued upholding the agreement between the parties to grant consent for alterations and additions to an existing dwelling at:</p> <ul style="list-style-type: none"> • 8 Campbell Avenue, Lilyfield (D/2010/553) for use as an 8 room boarding house subject to conditions. • 10 Campbell Avenue, Lilyfield (D/2010/554) for use as an 8 room boarding house subject to conditions. <p>Note: There were 2 appeals against the refusal by Leichhardt Council of two development applications; firstly D/2010/553 for 8 Campbell Avenue, Lilyfield (Matter No 10818 of 2011) and secondly, D/2010/554 for 10 Campbell Avenue (Matter No 10819 of 2011).</p> <p>Both applications proposed alterations and additions to 2 existing dwelling houses for the use of each as an 8-room boarding house with a maximum of 12 lodgers.</p> <p>Council would not enter into an agreement under s 34(3) of the LEC Act and accordingly the matter was heard by the Court under s 34(4)(b)(i). The parties resolved the issues between them and sought consent orders from the Court for both applications.</p> <p>Commissioner Morris found that there were no reasons in law preventing</p>

	the orders from being made.
03.10.2014	<p>PREDA/2014/206 & PREDA/2014/206 Alterations to the existing buildings comprising first floor balconies under s.96 to modify the Determinations to D/2010/553 and D/2010/554.</p> <p>The key issue identified in the consideration of the Pre-DA was the potential impacts upon neighbour's visual privacy.</p> <p>The following is a summary of the advice provided to the applicant:</p> <ul style="list-style-type: none"> • As the setback from the rear boundary in excess of 9m, screening measures are not required to the rear of the balconies. • Inclusion of privacy screens (minimum height 1.6m) angled away from surrounding properties to prevent viewing into surrounding properties. • Balconies should comply with the maximum size specified in the LDCP 2013 (1.2m (D) x 2.0m (L)) particularly given the cumulative impacts of multiple balconies may result in privacy impacts upon neighbours. • For acoustic privacy both between the rooms and across boundaries there are consent conditions limiting the maximum noise levels of the use to protect the acoustic privacy of surrounding properties. • No objections were raised on the basis of heritage as the rear 1st floor balconies will not be readily visible from the public domain.

5. Section 96 Assessment

Section 96AA (1) of the Environmental Planning and Assessment Act, 1979 allows Council, as the consent authority, to modify a development consent granted by the Court subject to the following matters:-

- a) *it is satisfied that the development to which the consent as modified relates is substantially the same development*

The meaning of the phrase "*substantially the same development*" is dependent on facts based on a comparative assessment of the approved plans and the proposed amended plans. Principles laid down by the Court in considering s.96 applications are pertinent.

A submission has been made by a neighbouring resident in response to this current application citing the decision of Bignold J. in *Moto Projects (No.2) Pty Ltd v North Sydney Council [1999]* on the question as to whether the proposed modified development remains substantially the same. The answer to this question requires a comparative assessment which "*involves an appreciation, qualitative as well as quantitative, of the developments being compared in their proper context.*"

The "*proper context*" that the submission claims is that Condition 2(a) was accepted by the Court in response to neighbour concerns to address the issue of visual privacy. This is correct.

The submission goes on to state that having regard to the principle extracted from the decision in *Moto*, the proposed modified development is "*manifestly not substantially the same development*" because "*the proposed modifications to nos 8 and 10 Campbell Avenue, by adding sliding doors and balconies in place of fixed and obscure glazed windows (to a height of 1.6 metres), would make an obvious and very material difference to the visual and*

acoustic privacy impacts of the development, not only on the adjoining properties, but especially on the more modest properties on Glover Street (which, as observed above, is already on lower ground)."

The submission fails to acknowledge that it is open to Council to allow the design modifications and impose further reasonable conditions in order to achieve the same purpose as the condition or conditions sought to be modified or deleted.

As detailed later in this report, the proposed balconies; subject to the imposition of a condition requiring limitations on their size and the installation of 1.6m high rear facing privacy screens; are considered acceptable having regard to the visual privacy of neighbouring properties - this being the *raison d'être* for Condition 2(a).

It is also considered that having regard to the extent, type and scale of changes proposed, Council can reasonably be satisfied that the proposed modified development is substantially the same as that approved by the Court. The proposed balconies (as further modified by the recommended conditions of consent) will result in a similar building and will not radically transform the development as approved or change its character.

- (b) *it has notified the application*
- (c) *it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification*
- (d) *it has considered any submissions made concerning the proposed modification*

The application was notified for a period of 14 days from the 27 May 2016 to 10 June 2016 and again for a period of 21 days from 7 December 2016 to 28 December 2016.

Council is in receipt of a total of 19 submissions.

The issues raised in these objections are discussed later in this report.

6. Section 79C(1) Assessment

In accordance with s.96AA (1A) the consent authority in determining an application for modification of a consent under this section, must take into consideration such of the matters referred to in section 79C (1) as are of relevance to the development the subject of the application.

The following is a summary of the assessment of the application in accordance with Section 79C of the Environmental Planning and Assessment Act, 1979.

6(a) Environmental Planning Instruments

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

- State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPPARH)
- 1. Leichhardt Local Environmental Plan 2013

This proposed modified application does not alter the approved development's ability to comply with any development standard and it continues to be satisfactory having regard to the provisions and objectives of the above environmental planning instruments.

6(b) Draft Environmental Planning Instruments

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

- Draft Leichhardt Local Environment Plan 2013 – Housekeeping Amendment.

The application and subject site are not specifically affected by the provisions of the above Draft Leichhardt Local Environment Plan 2013 (Housekeeping Amendment).

6(c) Development Control Plans

The application has been assessed against the relevant Development Control Plans listed below:

- Leichhardt Development Control Plan 2013

More specifically, the application has been assessed against the following clauses of Development Control Plan 2013.

Part A: Introductions

Section 3 – Notification of Applications

Part B: Connections

- B1.1 Connections – Objectives

Part C: Place – Section 1 General Provisions

- C1.0 General Provisions
- C1.1 Site and Context Analysis
- C1.3 Alterations and additions
- C1.4 Heritage Conservation Areas and Heritage Items

Part C: Place – Section 2 Urban Character

Suburb Profile

- C2.2.4 Lilyfield Distinctive Neighbourhoods
 - C2.2.4.3 Leichhardt Park Distinctive Neighbourhood
 - C2.2.4.3(a) Leichhardt Park Conservation Sub Area

Part C: Place – Section 3 – Residential Provisions

- C3.1 Residential General Provisions
- C3.2 Site Layout and Building Design
- C3.3 Elevation and Materials
- C3.8 Private Open Space
- C3.9 Solar Access
- C3.11 Visual Privacy
- C3.12 Acoustic Privacy

Part D: Energy

Section 1 – Energy Management

Section 2 – Resource Recovery and Waste Management

- D2.1 General Requirements
- D2.2 Demolition and Construction of All Development
- D2.3 Residential Development

Part E: Water**Section 1 – Sustainable Water and Risk Management****E1.1 Approvals Process and Reports Required With Development Applications**

- E1.1.3 Stormwater Drainage Concept Plan

E1.2 Water Management

- E1.2.1 Water Conservation
- E1.2.2 Managing Stormwater within the Site
- E1.2.4 Stormwater Treatment
- E1.2.5 Water Disposal

The application satisfies the provisions of the above Development Control Plans with particular matters discussed as follows:

C2.2.4.3(a) Leichhardt Park Conservation Sub Area

Campbell Avenue is recognised as a cohesive street of Californian bungalows in Leichhardt and is protected as a Heritage Conservation Area.

The development of this site (as well as the adjoining site at No.10) involves the retention and alteration of the main dwelling structure, the demolition of the rear single storey additions and construction of new, two storey, rear additions. The Land and Environment Court was satisfied that the design of the 2 developments were compatible with the character of the local area primarily because:

- The development provides for the retention of the main dwelling and the sympathetic addition of new floor space to the rear with a FSR far below that permitted under SEPPARH.
- The area remaining within the rear yard provides for the continuity of the green space between blocks and the setbacks provided; whilst less than in some cases; are consistent with other sites in the local area.
- The setbacks to the upper floors are considerably greater than those evident in the area and are a positive aspect of the application.

It is considered that the proposed rear facing balconies do not significantly alter the compatibility of the development with the local area.

C3.11 – Visual Privacy & C3.12 – Acoustic Privacy

The subject site is surrounded by single storey detached dwelling houses. Given this context and given the number of proposed first floor balconies (i.e. 3), it is considered that Condition 2(a) be modified to ensure that each balcony:

- Be a maximum depth of 1.2m and length of 2.0m to limit the number of persons able to use each balcony at any time. This is a normal requirement under the LDCP 2013 to protect visual privacy in locations where the predominant built form is dwelling houses, attached dwellings and semi-detached dwellings.
- Include a rear facing privacy screen to each balcony to ensure satisfactory protection of neighbours' visual and aural privacy. This privacy screen should match the side facing privacy screens. It is considered that the inclusion of both side and rear facing privacy screens will minimise the transmission of noise within each Boarding Room and minimise the transmission of noise to adjoining properties.

The proposed balconies will be setback from the rear boundary approximately 12.0m, which when combined with the limited size and rear facing privacy screens; will provide adequate privacy protection for neighbouring properties; including those adjoining in Campbell Avenue and those fronting Glover Street.

(a)(iv) Environmental Planning and Assessment Regulation 2000

The application has been assessed against the relevant clauses of the Environmental Planning and Assessment Regulation 2000. The application complies with the Environmental Planning and Assessment Regulation 2000.

6(d) The likely impacts

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

6(e) The suitability of the site for the development

The site is zoned R1 - *General Residential* under LLEP 2013. The modified development remains permissible with consent under the current zoning.

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.

6(f) Any submissions

The application was initially notified for a period of 14 days from the 27 May 2016 to 10 June 2016. The application was then renotified due to incorrect notification plans from 3 June 2016 to 17 June 2016.

The notification of the application included:

- Letters sent to surrounding properties.
- A yellow site notice placed on the site.
- Listing under the notification section on Council's website.

19 objections were received during the combined advertising periods.

In carrying out the notification process, letters were not sent to all persons who made a submission in respect of the original development application as required under s.96AA (1) (c). As a consequence, the application was re-notified to surrounding properties and to those persons who made a submission to the original application for a period of 21 days from 7 December 2016 to 28 December 2016.

The following is a summary of the issues raised that relate to the proposed design modifications and a response to those issues:

The proposed balconies represent a significant change from the development as approved to the extent that the development is not substantially the same development as the development for which the consent was originally granted.

Response: As explained previously in this report, it is considered that the modifications do not result in the proposed development being substantially different from the approved development.

The proposed multiple balconies will have significant amenity impacts in terms of loss of privacy (both visual and aural) on properties in Glover Street, which are downhill from the subject site; also adjoining properties in Campbell Street and properties as far away as Perry Street

Response: A condition is recommended requiring the proposed balconies to include a rear facing privacy screen 1.6m high. When combined with the already proposed 1.6m side facing privacy screens, these balconies will be enclosed on 3 sides but open to the sky. The result will be that the privacy (visual and aural) of all surrounding properties will be adequately protected while providing improved daylight to the interior space and ventilation (due to the installation of sliding glass doors instead of normal windows) to each of the Boarding Rooms when compared to the approved design.

The applicants' argument that neighbours' privacy will be protected by the construction of a 2.2m high rear fence and landscaping is nonsense.

Response: A balcony which is enclosed on 3 sides provides acceptable visual privacy and sound attenuation for surrounding neighbours and reduces the reliance on side/rear landscaping and fencing to achieve the same effect.

1st floor rear facing balconies were proposed in the development scheme refused by Council. Before the Court and in order to secure development consent, the applicants agreed to a condition for all 1st floor windows to be fixed obscure glass to a minimum height of 1.6m above FFL without balconies. The proposed balconies materially subvert the consent orders entered into by both parties and agreed to by the Court.

Response: The original staff recommendation for the initial DA was to permit the balconies, subject to adequate screening. The reasons given for refusal of the DA do not specifically identify loss of privacy as a standalone reason, although they do reference "the planning issues raised in the objections by residents". The recognition that an alternative solution may achieve the same purpose of the original condition does not, in itself, amount to the subversion of the matters previously agreed between the parties.

Balconies are not required in boarding houses

Response: While this is a correct statement, Council DCP 2013 supports housing that will enhance private amenity and the occupants of this development should not be denied access to private spaces that provide access to daylight and clean air.

How high are the balconies (measured from a verifiable point)?

Response: The floor level of the balconies would be approximately 1200mm below the gutter line of the existing house.

Extra artificial lights infiltrating to neighbouring properties from the balcony areas and this will increase especially when sliding doors are left open and also if the glass is "clear glazed".

Response: Rear facing privacy screens will minimise any light spill over neighbouring properties.

The addition of balconies will facilitate areas where residents can smoke (as smoking will not be permitted inside rooms). This is of concern to all adjoining neighbours who may be subjected smoke from these areas.

Response: Any person in the outdoor or open area of any neighbouring property may smoke. This is not an activity that is particular only to occupants of Boarding Rooms.

The balconies may be used for inappropriate purposes such as housing pets, hanging clothes, and also may lead to noise impacts and security concerns especially if all balconies are used at the same time.

Response: The operation of the boarding house is subject to a Plan of Management – pets require the prior approval of the Property Manager. It is unlikely that the hanging of clothes or keeping of pets ipso facto would create an amenity impact for neighbours, as residential properties often accommodate pets and clothes drying without loss of amenity to neighbours. The small size of the balconies will restrict the intensity of use, and it is noted that the PoM restricts total occupancy of these 3 rooms to a maximum of four (4) persons – i.e two x single occupancy and one x dual occupancy (room 8).

6(g) 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.

7 Referrals

7(a) Internal

The application was not required to be referred to any Council department for comment.

7(b) External

The application was not required to be referred to any external body for comment.

8. Conclusion

This application has been assessed under Section 96 of the Environmental Planning and Assessment Act, 1979 and subject to recommended conditions, is considered to be satisfactory. Therefore the application is recommended to be partly approved subject to the amendments listed below.

9. Recommendation

That Council as the consent authority pursuant to Section 96 of the Environmental Planning and Assessment Act, 1979 modify Development Consent No. D/2010/553 by way of M/2016/97 at 8 Campbell Avenue, LILYFIELD as per Attachment A.

Attachment A – Recommended conditions of consent

A. THE FOLLOWING CONDITIONS ARE TO BE AMENDED:

Amend Condition 1 to read as follows:

1. Development must be carried out in accordance with Development Application No. D/2010/553 and the following plans and supplementary documentation, except where amended by the conditions of this consent.

Plan Reference	Drawn by	Dated
Drawing No: 09-031-DA010A	MCHP Architects	XX.06.10
Drawing No: 09-031-DA011E	MCHP Architects	14.03.12
Drawing No: 09-031-DA012F	MCHP Architects	30.03.12
Drawing No: 09-031-DA013F	MCHP Architects	30.03.12
Drawing No: 09-031-DA014F	MCHP Architects	30.03.12
Drawing No: 09-031-DA015F	MCHP Architects	30.03.12
Drawing No: 09-031-DA016F	MCHP Architects	30.03.12
Document Title	Prepared/Issued By	Dated
BASIX Certificate Certificate No: A135432	MCHP Architects	27.03.2012
Plan of Management		15 May 2012
Landscape Plan	Therese McGroder	March 2012

Unless amended by the documentation approved by M/2016/97 listed as follows:

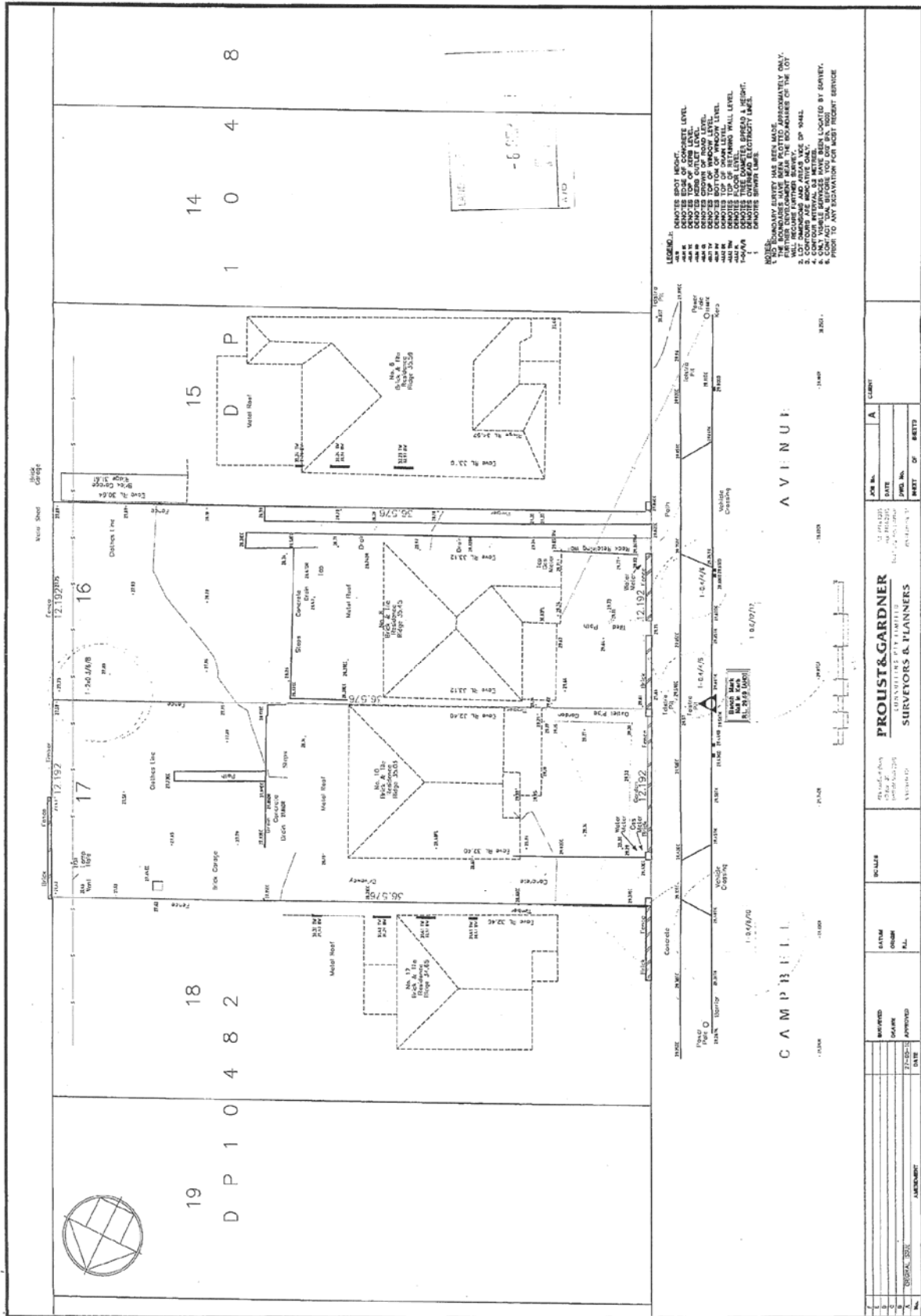
Plan Reference	Drawn by	Dated
Drawing No: 12-046 S96 01 Revision C Overall Site/Roof Plan – No 8 & No.10	MCHP Architects	28.10.2014
Drawing No: 12-046 S96 02 Revision B First Floor Plan	MCHP Architects	28.10.2014
Drawing No: 12-046 S96 03 Revision A Elevations Sheet 1	MCHP Architects	09.08.2013
Drawing No: 12-046 S96 04 Revision B Elevations Sheet 2	MCHP Architects	28.10.2014

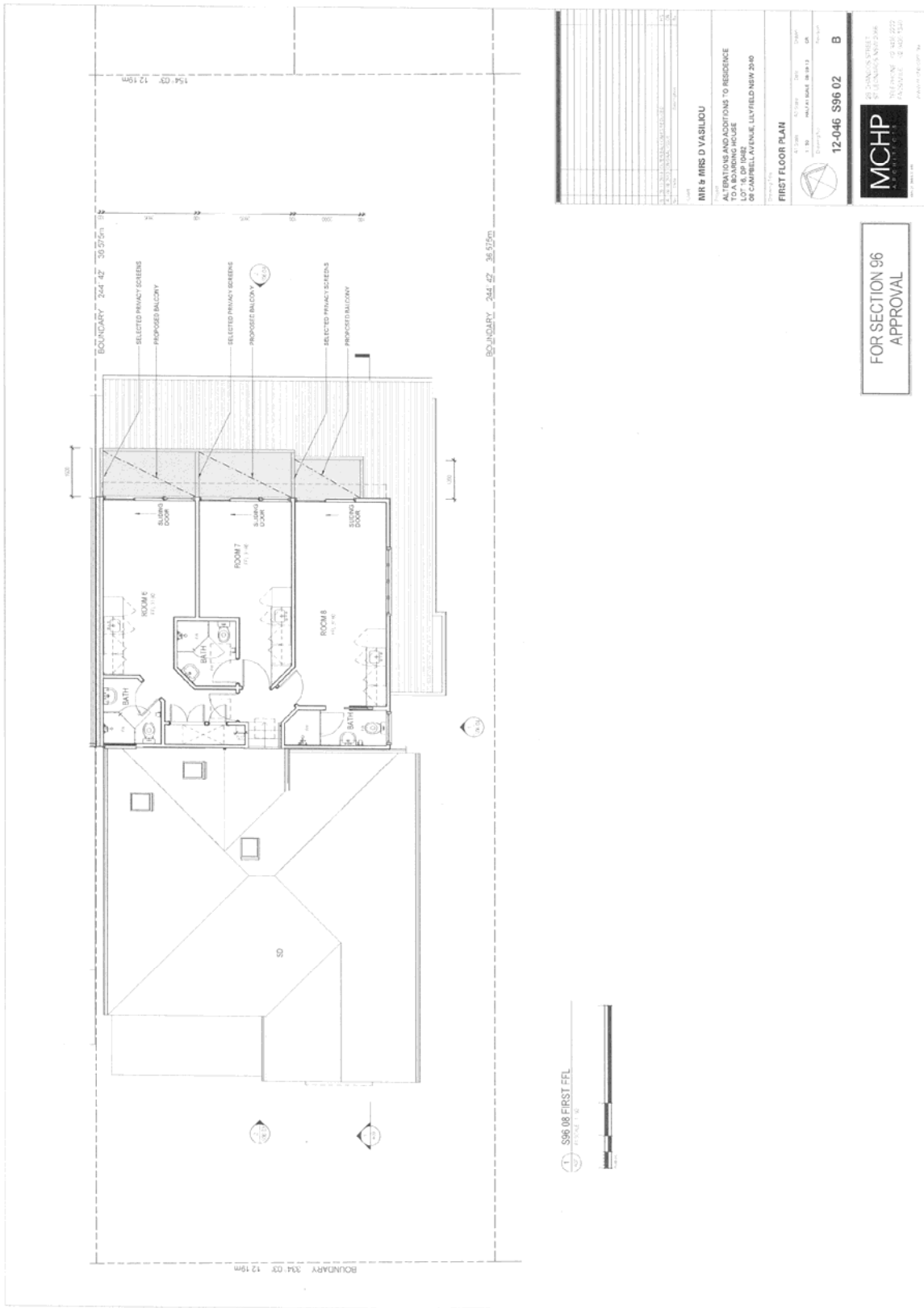
In the event of any inconsistency between the approved plans and supplementary documentation, the plans will prevail.

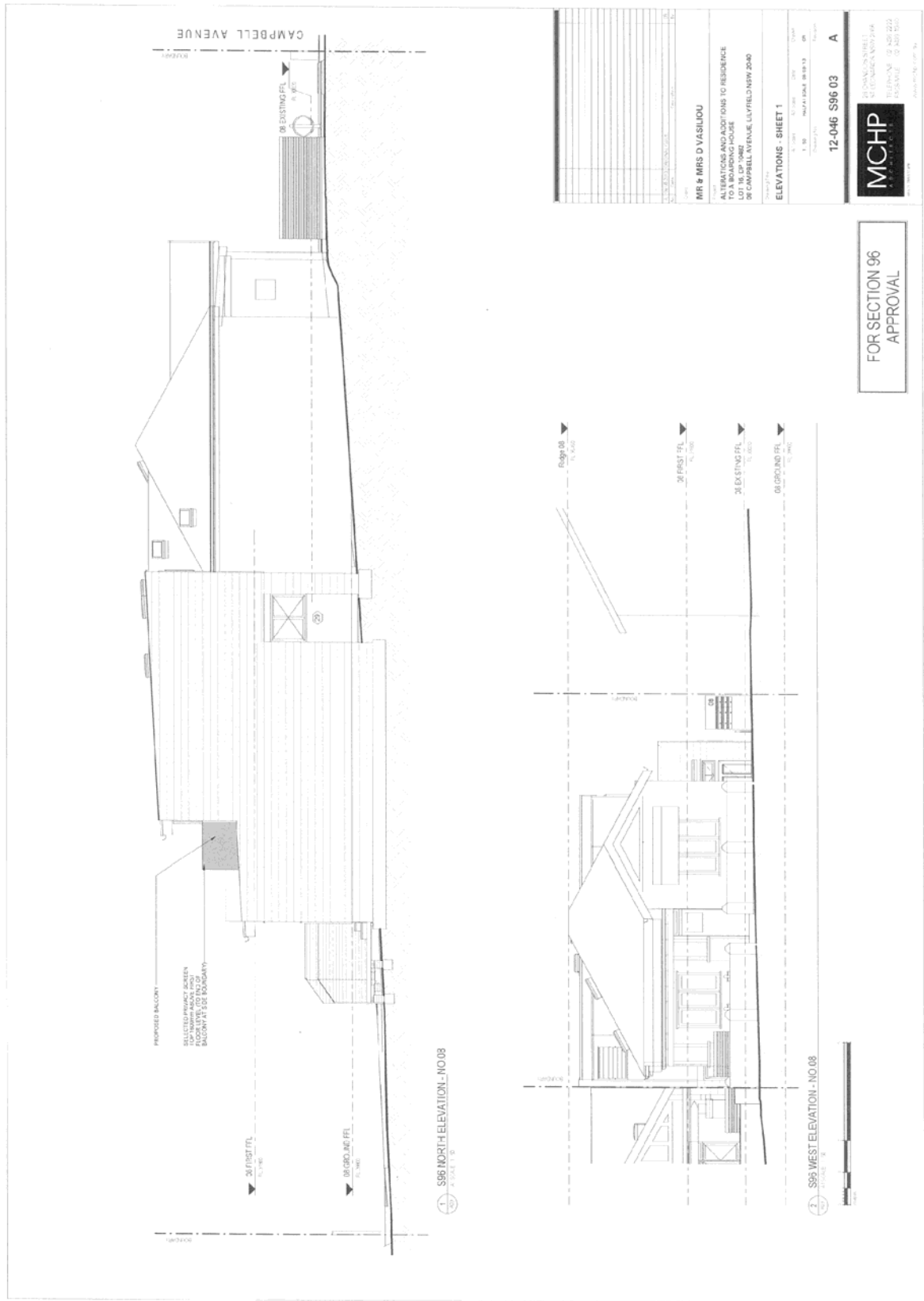
Amend Condition 2(a) to read as follows:

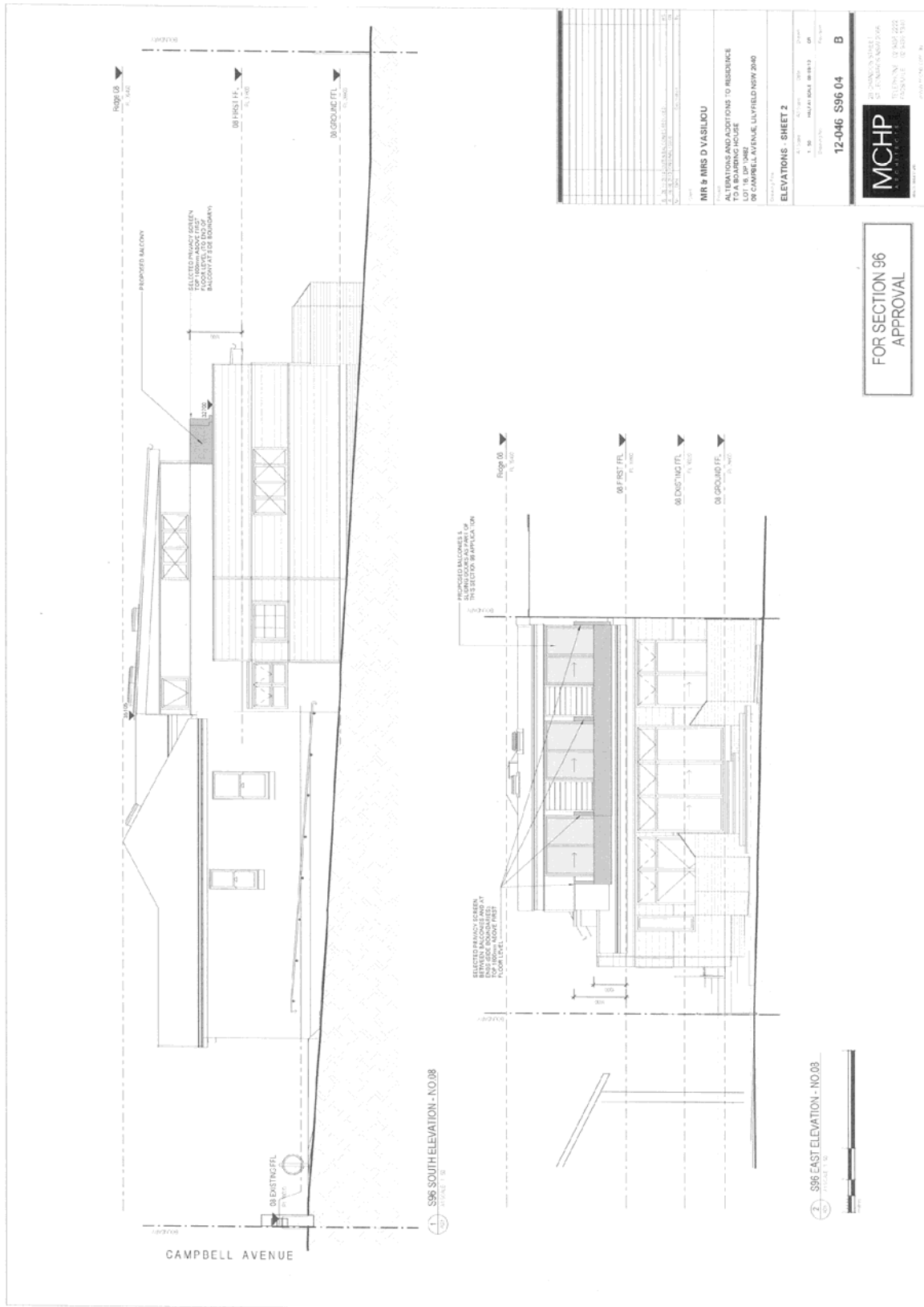
2. Amended plans are to be submitted incorporating the following amendments:
 - a) The rear facing balconies off Boarding Rooms 6, 7 and 8 are to have a maximum depth of 1.2m and length of 2.0m; and are to have a rear facing, fixed privacy screen 1.6m high. The rear facing privacy screen is to match the side facing privacy screens.

Attachment B – Plans of proposed development









S96 SOUTH ELEVATION - NO.03

S96 EAST ELEVATION - NO.03

<p>MR & MRS D VASILIKU</p> <p>ALUMINUM WINDOW AND DOOR SUBSTITUTIONS TO RESIDENCE 101/103 CAMPBELL AVENUE LOT 18, DP 13482 88 CAMPBELL AVENUE, UNYFIELD NSW 2040</p>	
<p>ELEVATIONS - SHEET 2</p>	
<p>DATE: 12/08/2014</p> <p>SCALE: 1:50</p> <p>PROJECT NO: 12-046-S96-04</p> <p>SHEET NO: B</p>	<p>DATE: 12/08/2014</p> <p>SCALE: 1:50</p> <p>PROJECT NO: 12-046-S96-04</p> <p>SHEET NO: B</p>

FOR SECTION 96
APPROVAL



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