

# **Attachment C**

<p><b>Clause 4.6 Variation Request – Floor Space Ratio</b></p>
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**REQUEST TO VARY DEVELOPMENT STANDARD PURSUANT TO  
CLAUSE 4.6 OF SYDNEY LOCAL ENVIRONMENTAL PLAN 2012**

**TO ACCOMPANY A DEVELOPMENT APPLICATION TO  
THE CITY OF SYDNEY COUNCIL FOR ALTERATIONS AND ADDITIONS TO A SINGLE DWELLING**

**Property:** 7 Rennie Street, Redfern NSW 2016.  
**Proposal:** Alterations and additions to a single dwelling.  
**Zoning:** R1 General Residential.

**Development standard to which the request to vary the standard is taken:** Clause 4.4 of the Sydney LEP 2012 (LEP 2012) prescribes a maximum FSR of 1:1 applying to the site.

**1. The Aim of the request**

To allow works that would result in the dwelling having a FSR of 1.43:1, or a GFA of 90.7m<sup>2</sup> on a site area of 63.5m<sup>2</sup>. This represents a variation of 43%. It is noted that the site has an existing FSR of 1.16:1 which equates to a GFA of 73.6m<sup>2</sup>. The proposed additional GFA is 17.1m<sup>2</sup>.

Clause 4.6 of LEP 2012 allows the applicant to request a departure from compliance with a development standard.

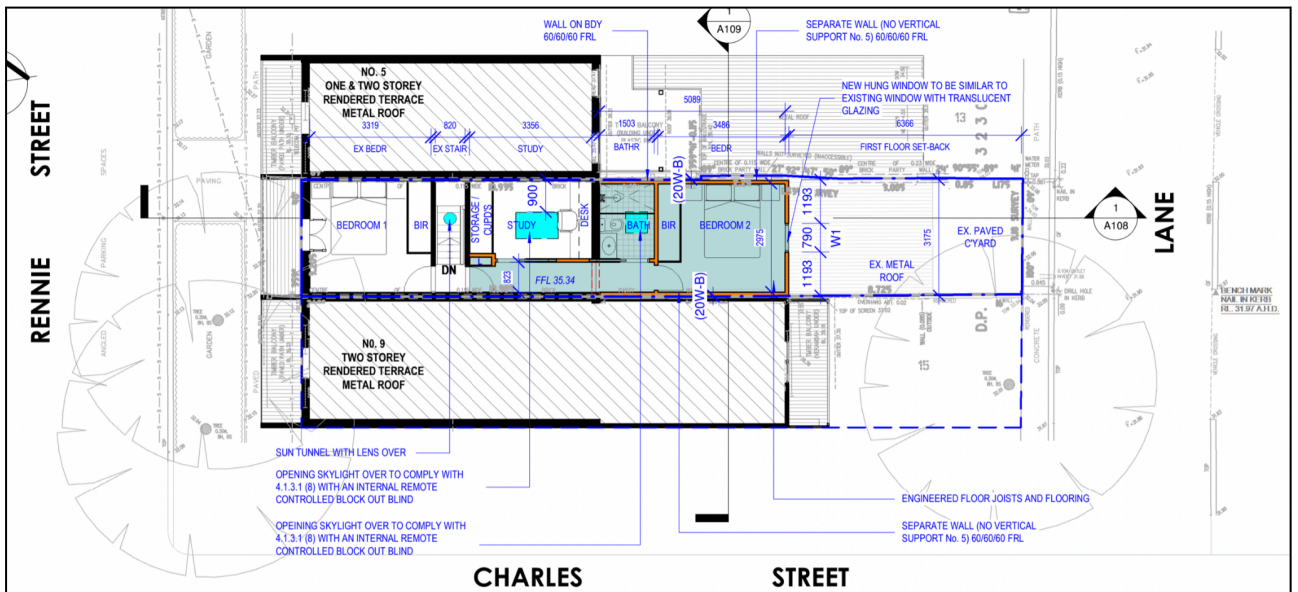


Fig 1 - Demonstrating the amount of additional GFA of 17.1m<sup>2</sup> at first floor level. The proposal aligns with the first floor of the southern neighbour (No.9 Rennie Street).

**2. Objectives of the Standard**

The objectives in relation to Floor Space Ratio in LEP 2012 are given as,

**Clause 4.4 Floor Space Ratio**

1) The objectives of this clause are as follows:

- (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
- (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,
- (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,
- (d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

### **3. Application and Assessment of Clause 4.6 Exceptions to development standards**

Clause 4.6 of LEP 2012 is designed to provide the consent authority some flexibility in the strict compliance with the application of the development standard. There have been various Land and Environment Court judgments that have some relevance to addressing the application of Clause 4.6, among them being,

1. Winten Property Group Limited v North Sydney Council [2001] NSWLEC 46
2. Wehbe v Pittwater Council [2007] NSWLEC 827
3. Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 1009; NSWLEC 90; NSWCA 248
4. Moskovich v Waverley Council [2016] NSWLEC 1015
5. Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118
6. Hansimikali v Bayside Council [2019] NSWLEC 1353
7. Rebel MH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130.

In the assessment of using Clause 4.6 it is particularly relevant to address part (3) of the clause, being,

- (3) Development consent must not be granted to development that contravenes a development standard unless the consent authority is satisfied the applicant has demonstrated that—
- compliance with the development standard is unreasonable or unnecessary in the circumstances, and
  - there are sufficient environmental planning grounds to justify the contravention of the development standard.

Note— The Environmental Planning and Assessment Regulation 2021 requires a development application for development that proposes to contravene a development standard to be accompanied by a document setting out the grounds on which the applicant seeks to demonstrate the matters in paragraphs (a) and (b).

In assessment of the proposal against parts 3 the following is offered.

#### **How is strict compliance with the development standard unreasonable or unnecessary in this particular case?**

The NSW Land and Environment Court in *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90, considered how this question may be answered and referred to the earlier Court decision in *Wehbe v Pittwater Council* [2007] NSW LEC 827. Under *Wehbe*, the most common way of

demonstrating that compliance is unreasonable or unnecessary, was whether the proposal met the objectives of the standard regardless of the non-compliance. Under Four2Five, whilst this can still be considered under this heading, it is also necessary to consider it under Clause 4.6 (3)(a). Furthermore in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, the applicant must demonstrate that Clause 4.6(3) must be adequately justified. The standard method is in using the five part Wehbe test (as noted in the judgment) as an approach in justifying this requirement.

The five part test described in Wehbe are therefore appropriately considered in this context, as follows:

1. The objectives of the standard are achieved notwithstanding non-compliance with the standard;
  - (a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
  - (b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,
  - (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,
  - (d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

The responses to each objective are provided below:

- to provide sufficient floor space to meet anticipated development needs for the foreseeable future,
  - The proposal seeks to provide for the needs of the owners. The works provide a new rear first floor addition and provide an additional study and a bathroom. At present the first floor does not contain a bathroom. The addition of the study will allow for work from home opportunities for the owners, providing for their foreseeable needs, consistent with this objective.
- to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,
  - The intensification of the existing single dwelling is not materially altering with only an additional study and bathroom provided, resulting in no material intensification of the single dwelling use. Vehicle and traffic generation is not materially altering.
- to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,
  - The works are too modest to have any adverse bearing on the capacity of infrastructure.

- to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.
  - The works will result in a built form that is consistent with the form of other terraces in this row. The addition is built to the side boundaries and the rear building line aligns with the rear first floor building line to the southern neighbour at No.9 Rennie Street, and also No.11 Rennie Street further to the south. Moreover No.9 Rennie Street has an additional balcony at first floor level which provides additional bulk at first floor level for that site. Accordingly the proposed built form is less bulky at first floor level when compared with this southern neighbour. The northern neighbours (Nos.1, 3 and 5 Rennie Street) have extended at the ground floor level to be more or less consistent with the existing ground floor rear setback of the subject site (which is not being altered). Accordingly as a result of the development the subject site will more or less align with all neighbours in this row in terms of the rear setbacks, providing what can be assumed to be future desired built form character. Contextually the resultant form is entirely reasonable and will not appear out of place.
  - The building already complies with building height and provides an appropriate first floor rear setback, responding to the context. Accordingly, the proposal does not appear as an overdevelopment of the site and provides good amenity, consistent with this objective.
  - The contributory front elevation and principal building form of the dwelling and row of terraces is unaffected by the works and the works to the rear mimics that of surrounding development. Accordingly, the character and appearance of the Thurlow Street special character area and Rennie and Mount Street Heritage Conservation Area is not adversely affected given that the resultant form mimics that of surrounding development, and contributory aspects of the site are unaffected.
  - The amenity to neighbours is not affected. Solar access is maintained to adjoining sites as shown by the shadow diagrams. No public or private view is unreasonably affected. Accordingly, amenity is maintained.
  - The building bulk is entirely appropriate within the context of the site and good amenity is provided to the subject site and maintained to surrounding sites.

The degree of non-compliance largely results due to the small area of the lot, being only 63.5m<sup>2</sup> in area. The proposal provides a modest dwelling whose setbacks align with adjoining dwellings. It is the very small site area that contributes towards the non-compliance, rather than any unreasonable building bulk. It is important to note that the site has an existing FSR of 1.16:1 which equates to a GFA of 73.6m<sup>2</sup>.

In light of the above, this request provides that the non-compliant FSR satisfies the objective in question.

2. The underlying objective or purpose of the standard is not relevant to the development and therefore compliance is unnecessary;

Not applicable. The underlying objective or purpose of the standard is relevant to the development and is achieved.

3. The underlying object of purpose would be defeated or thwarted if compliance was required and therefore compliance is unreasonable;

The exception request does not rely on this reason.

4. 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;

The exception request does not rely on this reason.

5. The compliance with development standards is unreasonable or inappropriate due to existing use of land and current environmental character of the particular parcel of land. That is, the particular parcel of land should not have been included in the zone.

The zoning of the land is appropriate for the site. The exception request does not rely on this reason.

In addition to demonstrating that the principles of Wehbe are satisfied, strict compliance with the standard is considered to be unreasonable and unnecessary in the circumstances of this case for the following additional reasons.

In the case of *Moskovich v Waverley Council*, the Land and Environment Court accepted that compliance with the standard (FSR in that case) was unreasonable and unnecessary because the design achieved the objectives of the standard and the respective zone, in a way that addressed the particular circumstances of the site, and resulted in a better streetscape and internal and external amenity outcome than a complying development. For the subject application, the proposed development which seeks to vary the FSR standard, achieves a better response to the objectives of the subject R1 General Residential Zone in that it provides a high level of internal amenity for occupants and safeguards the street appearance of the site which is consistent with various LEP and DCP heritage requirements.

On the basis of the above, compliance with the standard is considered to be unnecessary and would be unreasonable.

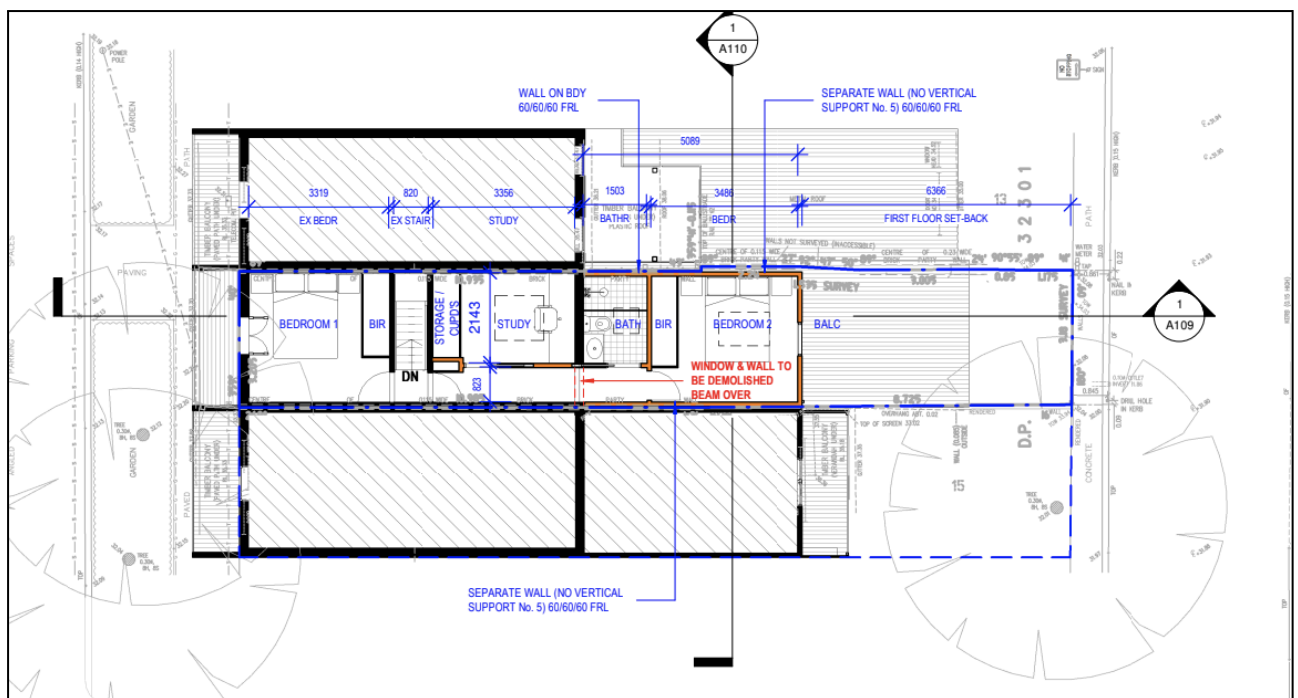
### **Sufficient environmental planning grounds to justify the contravention**

This request provides that there is sufficient environmental planning ground to justify the contravention. Such grounds include:

It has been demonstrated that the proposal and its FSR remains consistent with the objectives of the subject zone as well as Clause 4.4 and 4.6 of the Sydney LEP 2012, despite the numerical non-compliance. It is important to note that the site has an existing FSR of 1.16:1 which equates to a GFA of 73.6m<sup>2</sup>. The additional GFA is 17.1m<sup>2</sup> and the bulk provided results in a consistent form with adjoining terraces.

The proposal would not compromise the character or nature of the area sought by the local environmental planning framework.

The resultant form will result in built form consistency with surrounding development. The rear building line aligns with the rear first floor building line to the southern neighbour at No.9 Rennie Street, and also No.11 Rennie Street further to the south (see figs 2 and 3). The northern neighbours (Nos.1, 3 and 5 Rennie Street) have extended at the ground floor level to be more or less consistent with the existing ground floor rear setback of the subject site (which is not being altered). Accordingly as a result of the development the subject site will more or less align with all neighbours in this row in terms of the rear setbacks, providing what can be assumed to be future desired built form character. Contextually the resultant form is entirely reasonable and will not appear out of place. This results in an acceptable impact in built form terms and the non-compliant FSR does not result in any unreasonable visual impacts.



**Fig 2 - Demonstrating the proposal will result in consistent rear building lines with the immediately adjoining dwellings. Further the image below demonstrates the existing ground floor setback is consistent with the rear setbacks of Nos.1, 3 and 5 Rennie Street, and the first floor rear setback is also consistent with No.11 in addition to No.9.**

The contributory front form of the traditional terrace and the appearance of the adjoining front form of the contributory row of terraces is unaffected by the works. The works are to the rear of the site in an area where the row has already been extensively modified. The character and appearance of the Thurlow Street special character area and Rennie and Mount Street Heritage Conservation Area is not adversely affected given that the contributory aspects of the site are unaffected and the resultant form mimics that of surrounding development.

Adjoining sites are not unreasonably impacted in terms of privacy. An originally proposed rear first floor balcony has been removed from the revised proposal. The proposed rear first floor bedroom window is fitted with obscured/translucent glazing.



Fig 3 - Demonstrating the consistency of the proposed built form with neighboring dwellings. Nos 9 and 11 have a consistent first floor rear setback to that being proposed. Nos.1, 3 and 5 have ground floor rear setbacks consistent with the subject site.

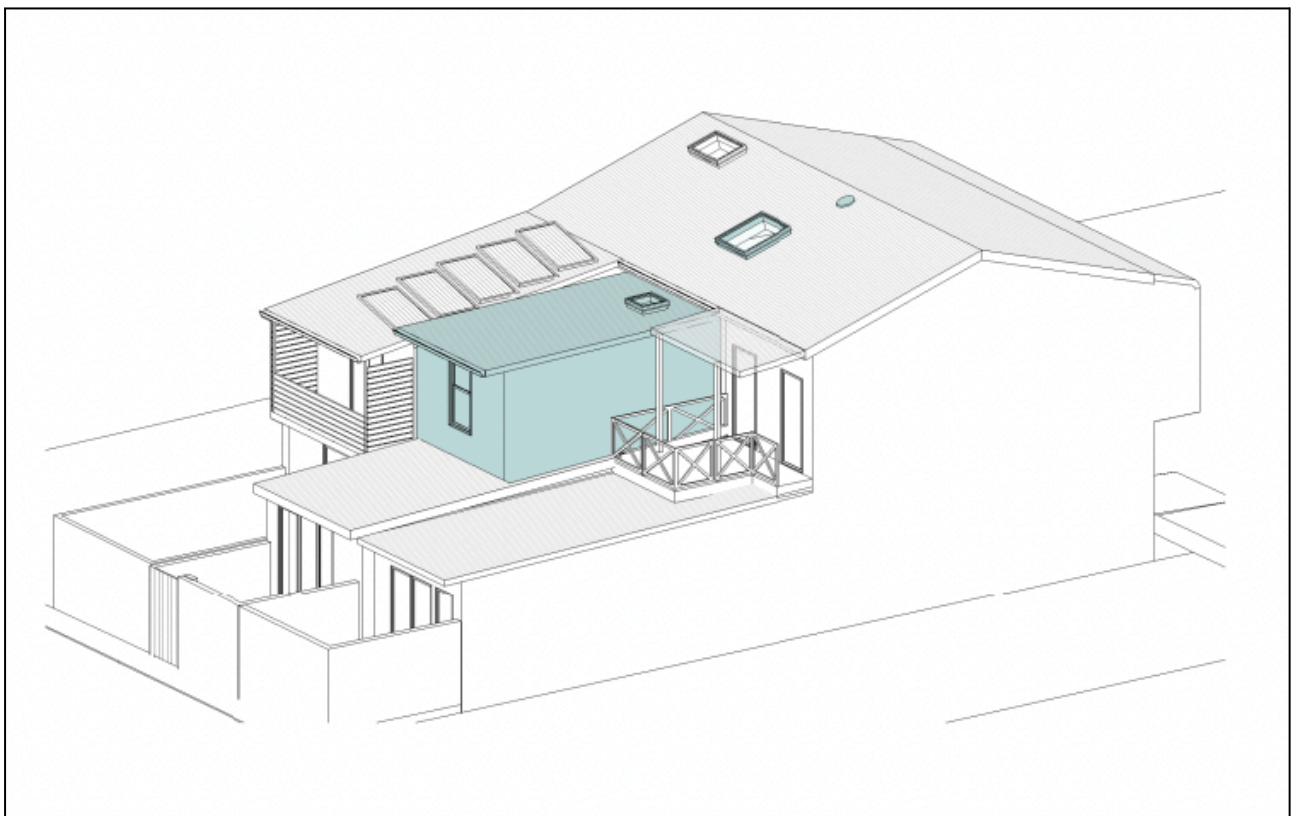


Fig 4 - Demonstrating the consistency of the proposed built form with neighboring dwellings.



The non-compliant FSR does not result in any unreasonable overshadowing impacts as demonstrated in the shadow diagrams shown below. Additionally, no loss of view occurs.

The shadow diagrams show that the proposal will result in no additional overshadowing to the open space or windows of neighbours, including the southern neighbour. At 9am, 12 noon and 3pm additional shadows will fall onto the roof or side wall of the southern neighbour. The amount of additional overshadowing is minor and doesn't impact the functionality of the southern neighbour's photovoltaic panels. At 3pm additional shadows fall onto the rear street.

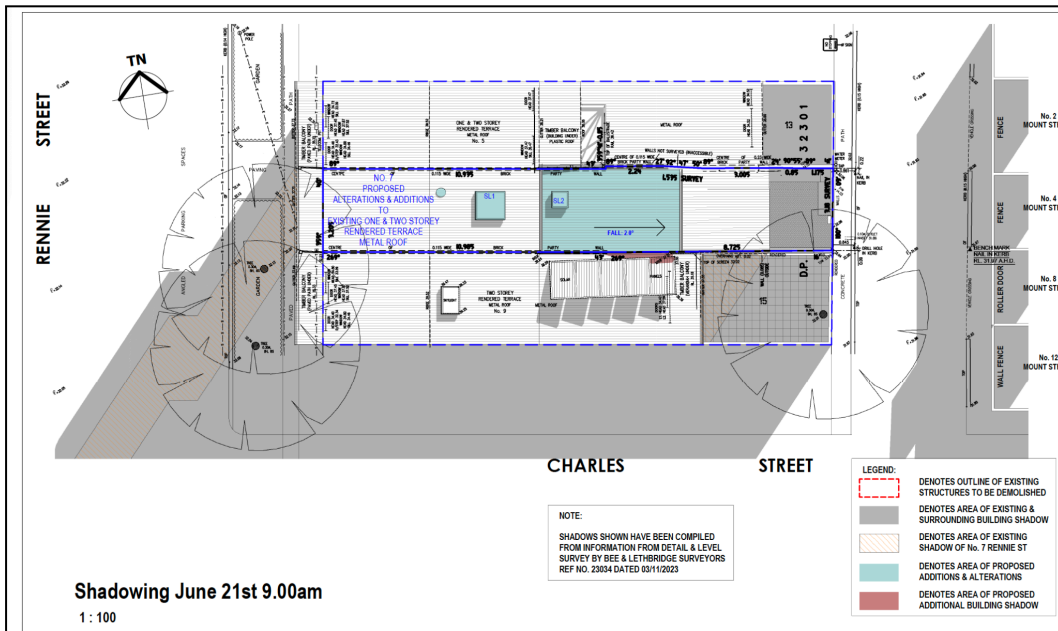


Fig 5 - Shadow diagrams 9am on 21 June.

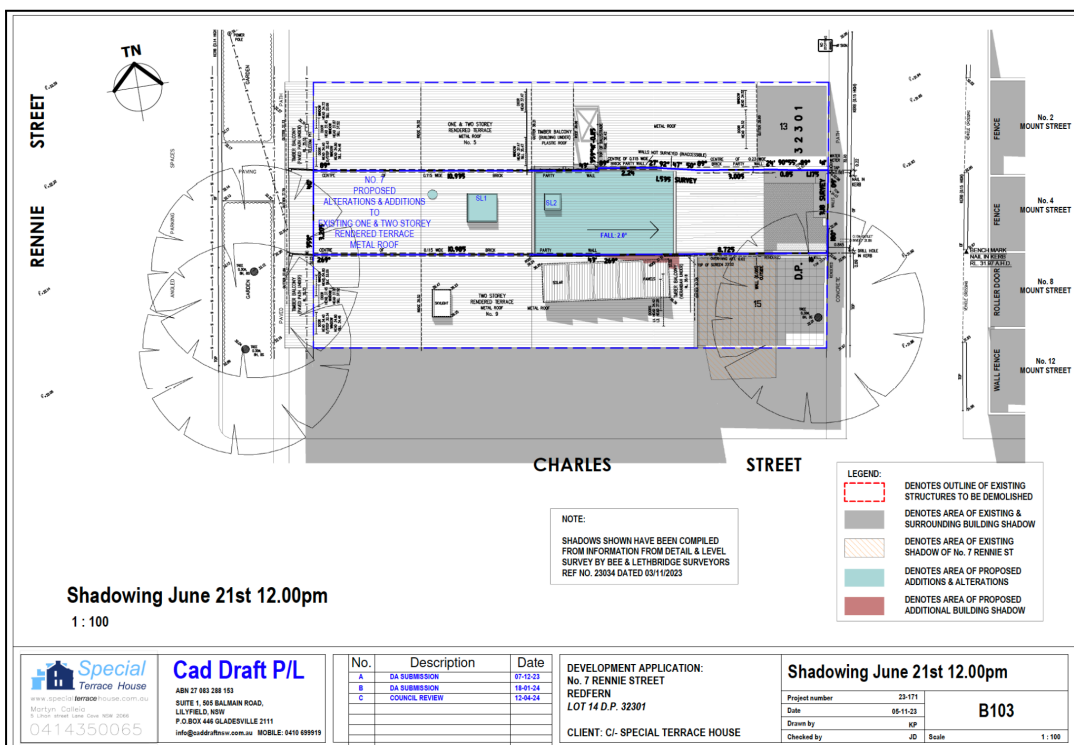


Fig 6 - Shadow diagrams 12 noon on 21 June.

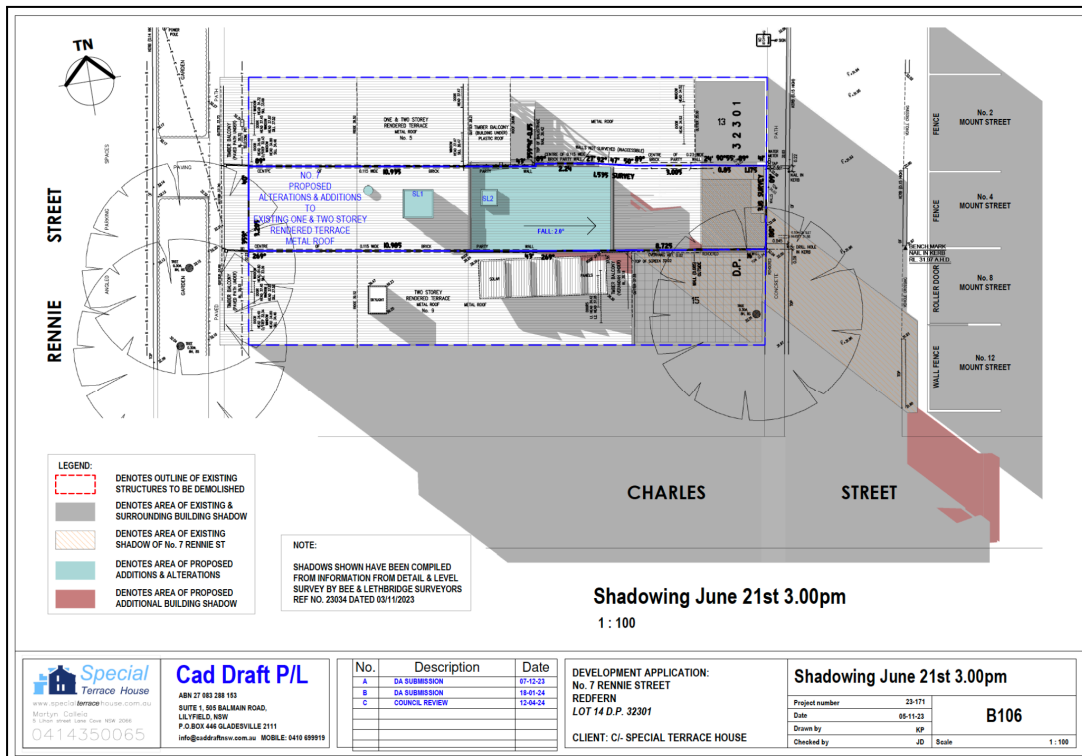


Fig 7 - Shadow diagrams 3pm on 21 June.

The non-compliance assists with providing improved internal amenity for residents, by providing a bathroom at first floor level, a study that allows for working from home and overall improved functionality of the dwelling.

Importantly the existing form has an existing FSR of 1.16:1 which equates to a GFA of 73.6m<sup>2</sup>. The additional bulk in itself complies with the rear setback and building height planning controls.

**Is the variation in the public interest?**

Clause 4.6(4)(a)(ii) states that development consent must not be granted for development that contravenes a development standard unless the proposed development will be in the public interest. The proposal is considered to be in the public interest because it is consistent with the objectives of the particular standard, and the objectives for development within the zone in which the development is proposed to be carried out. The objectives of the standard have been addressed above and are demonstrated to be satisfied. The works are consistent with the requirements for the R1 General Residential Zone because of significant improvements to the amenity of the housing stock on the site.

**Is the variation well founded?**

This Clause 4.6 variation request is well founded as it demonstrates, as required by Clause 4.6 of the Sydney LEP 2012, that:

Compliance with the development standard would be unreasonable and unnecessary in the circumstances of this development;

There are sufficient environmental planning grounds to justify the requested contravention;

The development achieves and is consistent with the objectives of the development standard and the objectives of the R1 General Residential Zone;

There is no public benefit in maintaining the standard; and

The contravention does not raise any matter of State or Regional Significance.

The variation is therefore considered well founded.

Prepared by Damian O'Toole Town Planning Pty Ltd

A handwritten signature in black ink that reads "D O'Toole". The signature is written in a cursive, slightly slanted style.

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**May 2024**