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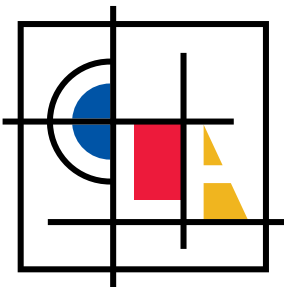
**Clause 4.6 Variation Request – Minimum
Site Area**

Clause 4.6

Variation Request

**36 Selwyn Street, Paddington
Gadigal Country**

**Development Standard:
Variation of 450sqm lot size for
secondary dwellings.**



**CRACKNELL
&
LONERGAN**
ARCHITECTS PTY LTD

FINAL

Site Registration
Prepared on
Prepared for

Lot 1 in D.P. 986080
2nd July 2024
Kieran Mcinerney Architect



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Prepared On:

18 June, 2024 [DRAFT]

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Project Address:

36 Selwyn Street, Paddington

Gadigal Country

Prepared For:

Kieran Mcinerney Architect

Prepared By:

Cracknell & Lonergan

Architects Pty Ltd

Report Set Up By: MH

Draft Report By: MH

Reviewed By: PL

CRACKNELL
&
LONERGAN
ARCHITECTS PTY LTD

ABN 55 100 940 501

Norminated Architect: Peter J Lonergan

NSW Architects Registration No. 5983

156a Church Street

Newtown NSW 2042

(02) 9565 1554

email@cracknellonergan.com.au

www.cracknellonergan.com.au

1.1 Executive Summary

Cracknell & Lonergan Architects were commissioned to provide this Clause 4.6 report in support to a Development Application (DA) seeking to propose the construction of a new secondary dwelling at the subject site No. 36 Selwyn Street, Paddington.

Clause 4.6 of the Local Environmental Plan allows the consent authority to grant consent for development even though the development seeks to depart from the numerical controls regarding the minimum subdivision lot size, of a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in the application of development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and,
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

In this report, it has been explained that flexibility is justified within this case in terms of the matters described in Clause 4.6 which are required to be addressed as part of the written request. This report also addresses, where relevant and helpful, additional matters that the consent authority is required to be satisfied of when exercising either the discretion afforded by Clause 4.6 or the assumed concurrence of the Secretary.



Peter Lonergan

Architect & Director of Design
Cracknell Lonergan Architects Pty Limited
NSW Architects Registration No. 5983

2.0 Setting & Context

2.1 Site Identification

The project site description and location is summarised as follows:

Street Address	36 Selwyn Street, Paddington
Legal Definition	Lot 1 in D.P. 986080
Country	Gadigal Country
Site Area	148.5 sqm
Brief Site Description	The subject site is rectangular in shape forming part of a regular pattern of terrace houses along Selywn Street.
Topography	The subject site has a gentle slope falling from West to East side of the site.
Public Transport	The site is situated within an accessible area that is predominately served by the local bus, several bus stops are within walking distance from the subject site with several bus routes serving the area. Slightly further forms of public transport are accessible mainly light rail being a 15 minute walk from the subject site.
Existing Services	The subject site is currently connected to all standard services - electricity, gas, water, sewerage, telecommunications.



The subject site located behind the tree as viewed from Selywn Street.

2.0 Setting & Context



NSW SIX Maps Imagery - Aerial Map of Site Location



NSW SIX Maps Imagery - Historical 1943 Aerial Image

2.2 Character of Existing Locality

Sourced from the City of Sydney DCP 2012 2.9.2 Selwyn Street Locality Statement - existing character

This locality is bounded by lots fronting Oxford Street to the north, Greens Road to the east, Moore Park Road to the south, Flinders Street to the southwest and South Dowling Street to the west.

Selwyn Street is to retain its existing character of a rich mix of uses, buildings of different types and sizes on its streets and lanes. Selwyn Street has a unique character created by this diversity and combined with consistent groups of terraces and the contrast between modest dwellings and larger institutional and commercial buildings as well as small plazas formed by street closures that 'green' the neighbourhood and provide small open spaces.

The 'special areas' are notable for their intimate scale and amenable pedestrian enclaves, qualities are an important part of the future character. Consolidating commercial and retail uses on Flinders Street is encouraged to provide a greater intensity and variety of land uses and to form a neighbourhood centre.



Existing two storey terrace house from Selwyn Street that is consistent in design along the streetscape. The proposal does not seek to provide any change to the existing terrace house structure on the subject site.

2.0 Setting & Context

Selwyn Street viewing south of the subject site. Selwyn Street provides a wide one way street that has on street parking on both sides. Both sides of the street are occupied by a row of typical two storey terrace houses.



Rear lane of subject site viewed from Iris Street. The current site does not consist of a secondary dwelling and when compared to neighbouring sites does not create a consistent streetscape expression. The proposed works are confined to the rear of the site and adding a new secondary dwelling to provide a consistent streetscape language along Iris Street.



North view along Iris Street provides a consistent secondary dwelling over garage streetscape expression. As such the proposal seeks to provide a similar proposal for the subject site in completing a consistent language along Iris Street.



3.0 The Proposal

3.1 Description of Proposal

The proposed development at No. 36 Selwyn Street, Paddington seeks to construct a new secondary dwelling at the rear of the subject site. The proposed works consists of the following:

- Construction of a new secondary dwelling over ground floor garage which provides a single car garage and an open plan studio living space above.

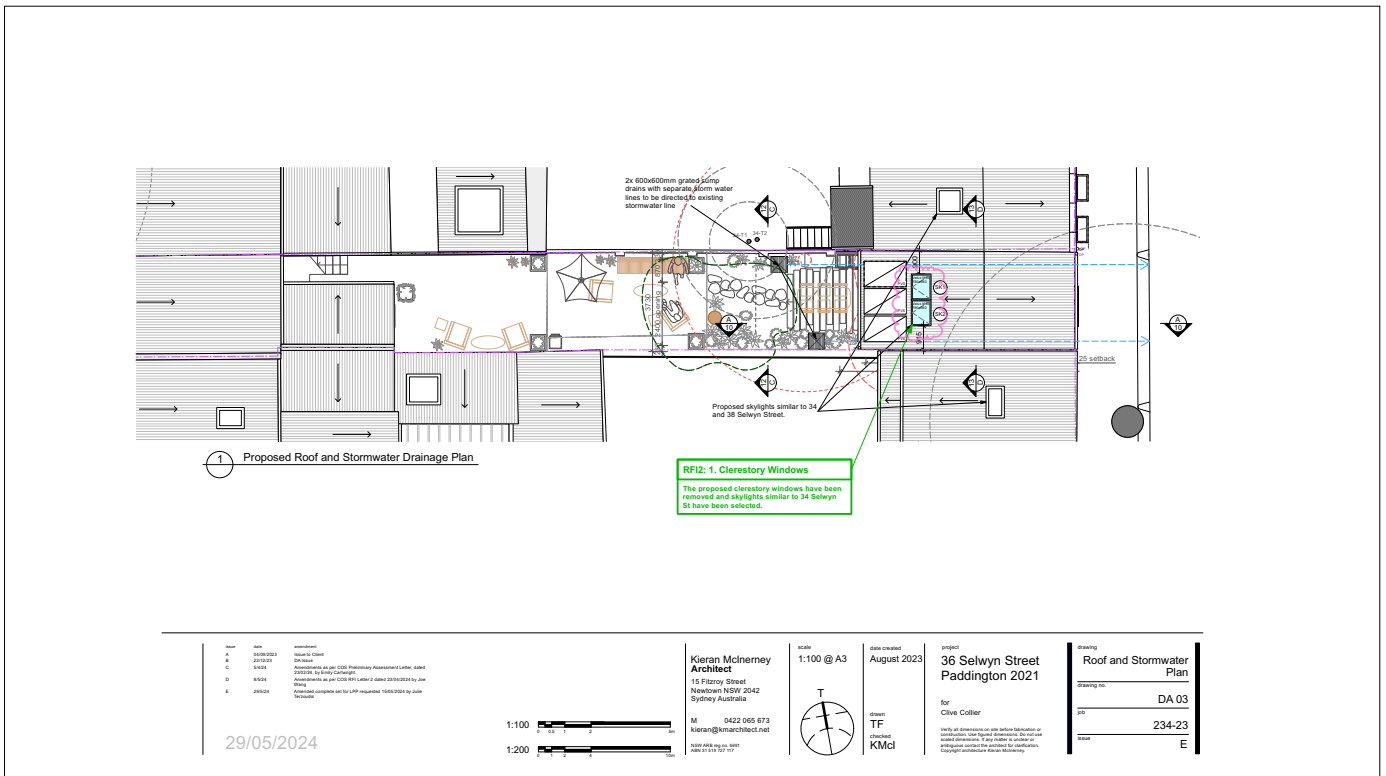
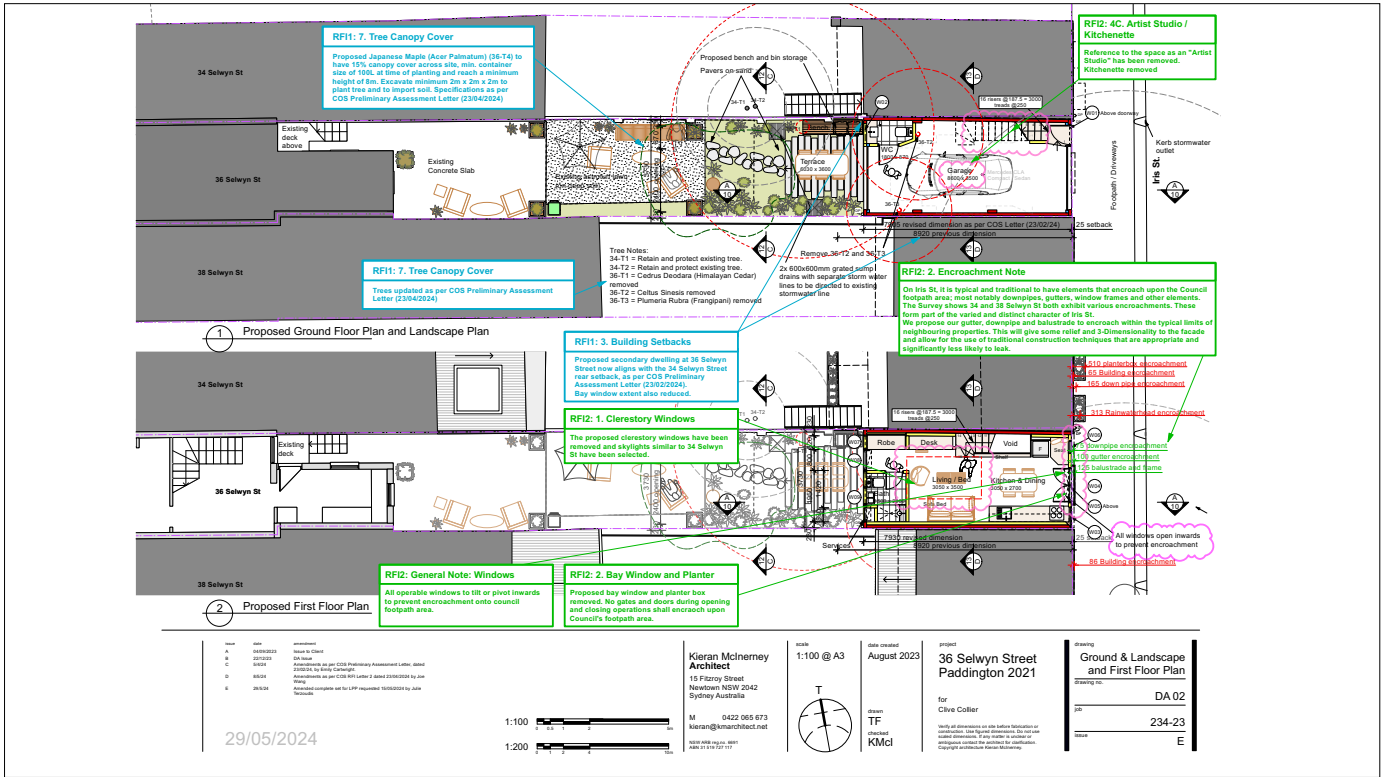
- Proposed new landscaping for the private open space located between the primary and secondary dwelling of the subject site.

3.2 Numerical Summary

The numerical overview of the proposal is as follows:

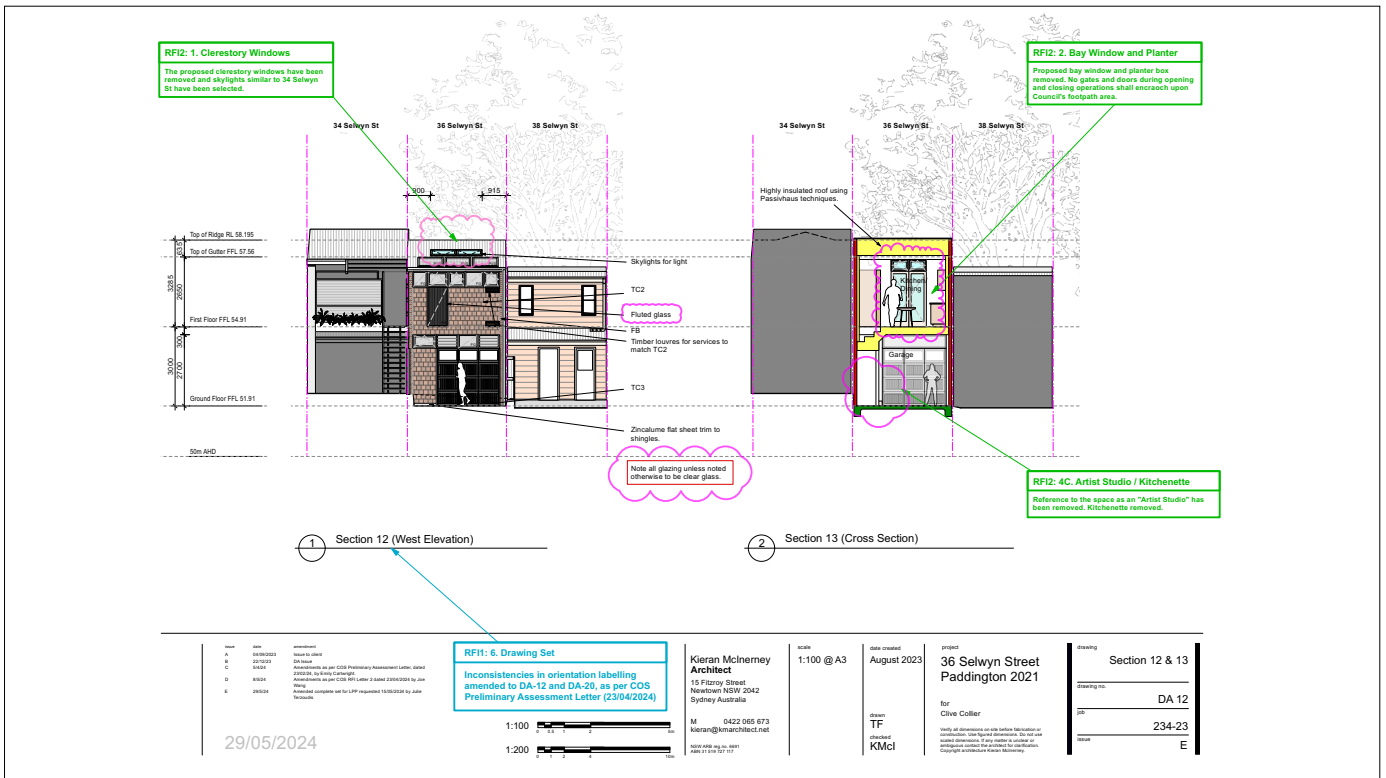
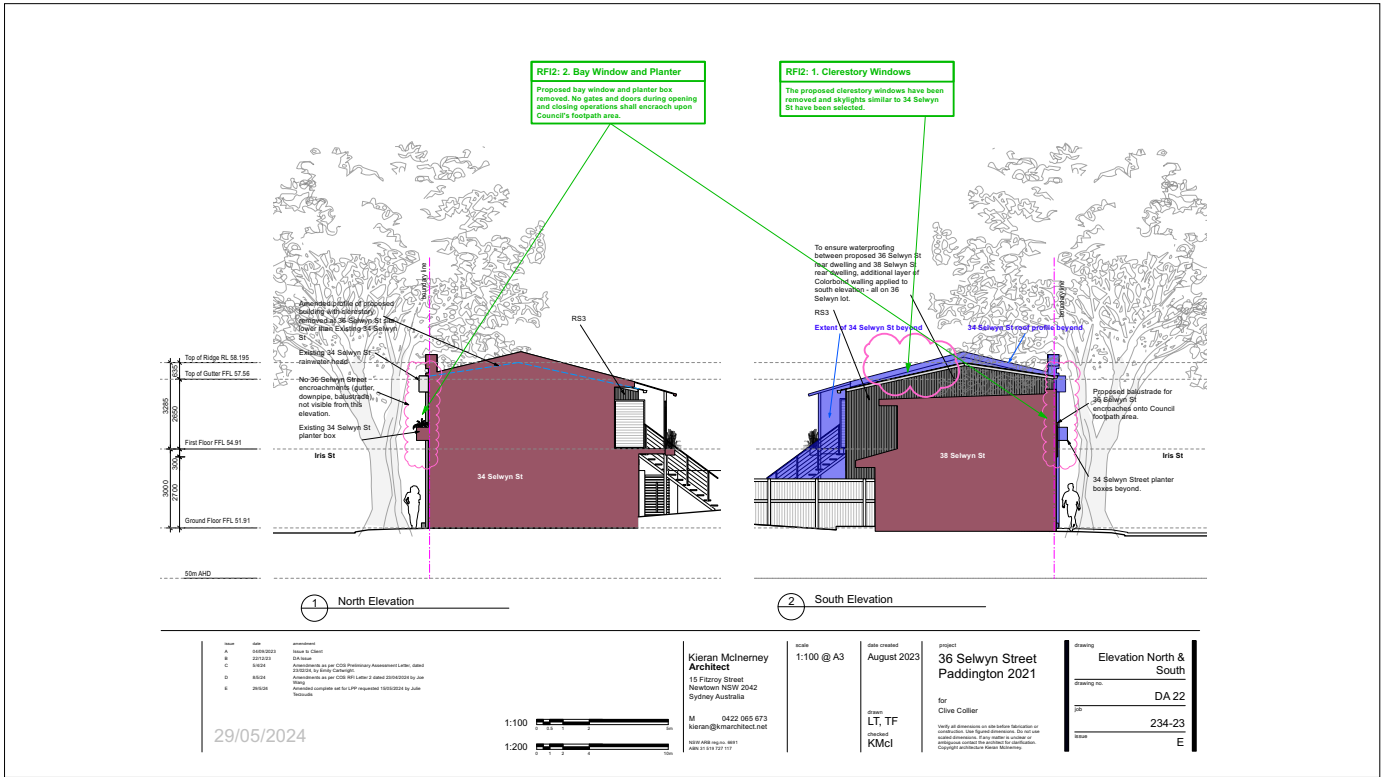
Existing Site Area	148.50 sqm
Proposed Secondary Dwelling:	
Proposed Site Area	148.50 sqm
Existing Gross Floor Area	71.76 sqm
Proposed Gross Floor Area	27.90 sqm
Proposed Floor Space Ratio	0.67:1
Permissible Floor Space Ratio	1.25:1
Maximum Building Height	6.28m
Maximum Permissible Height	12m

3.0 The Proposal



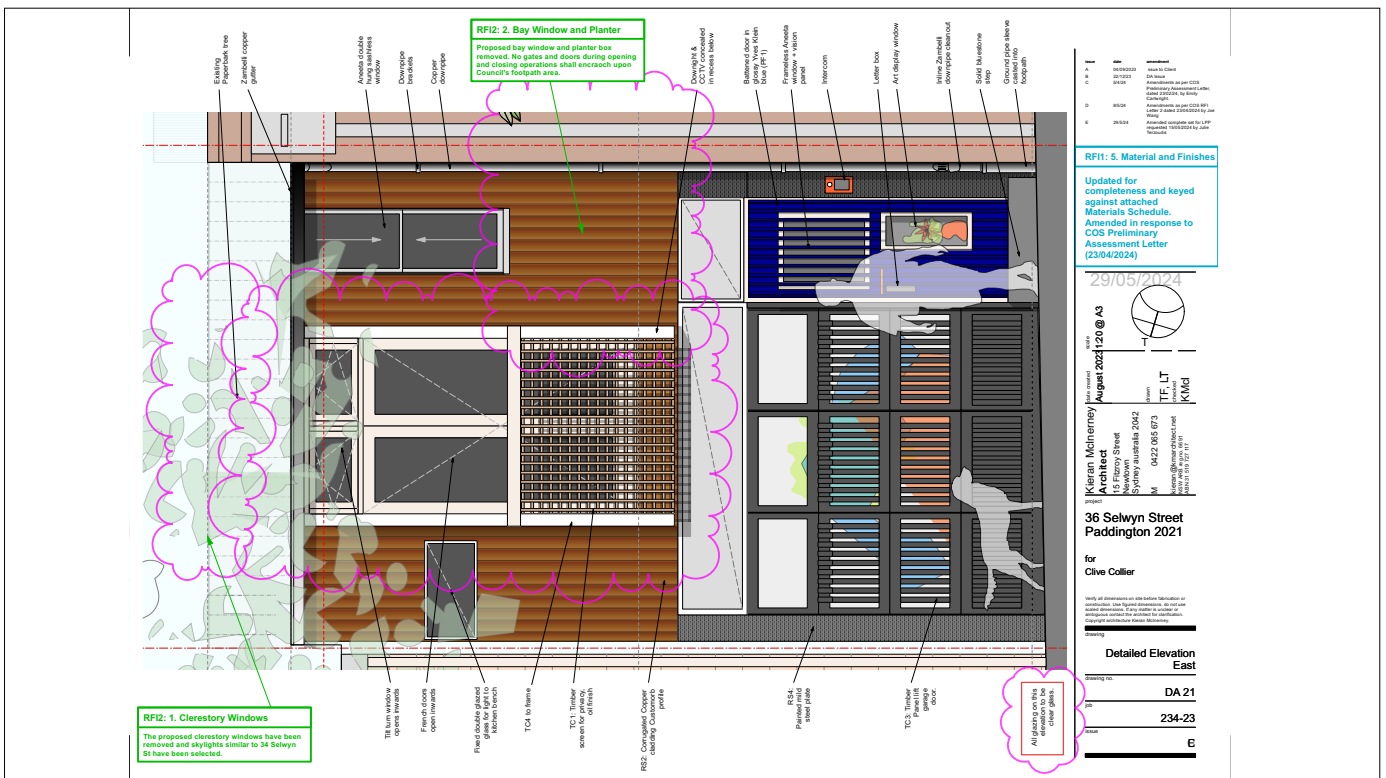
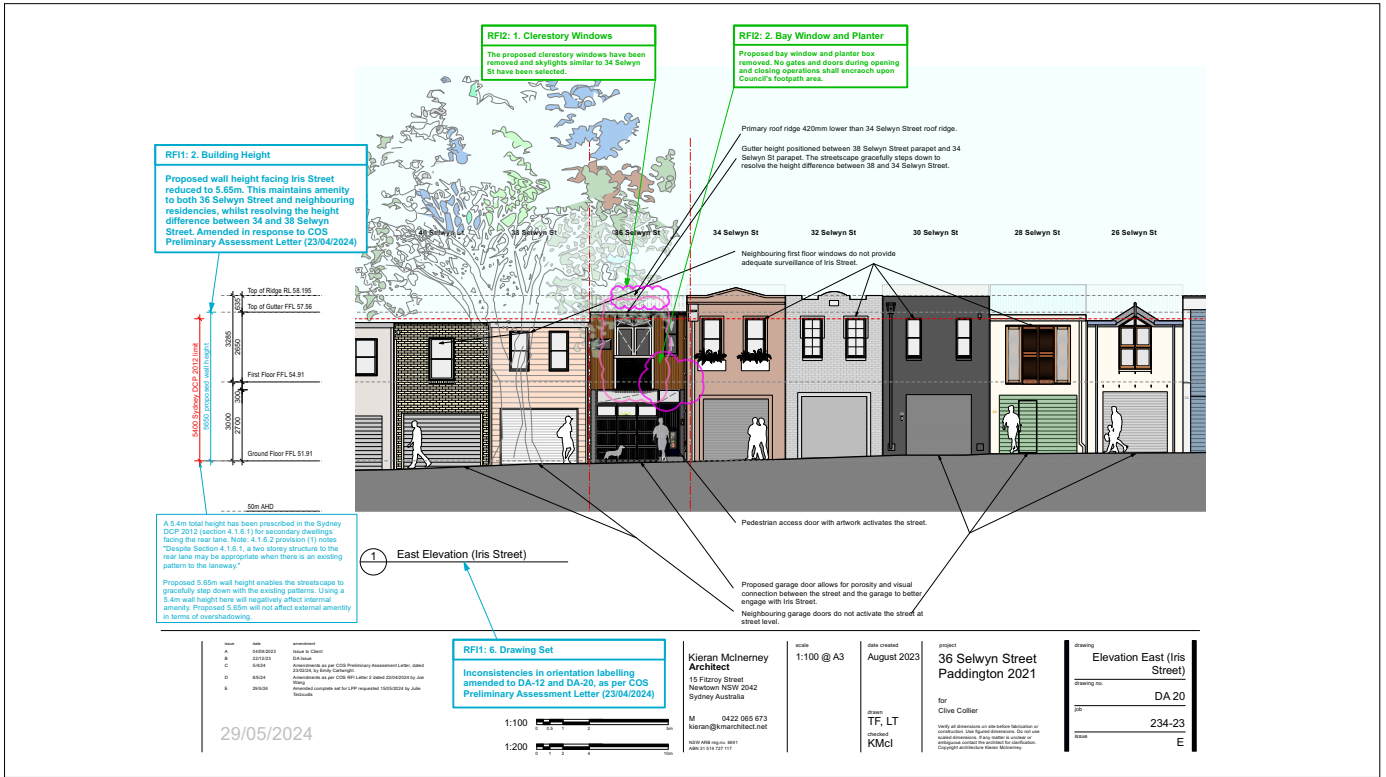
Selected Floor Plans & Stormwater plans- (NOT TO SCALE)

3.0 The Proposal



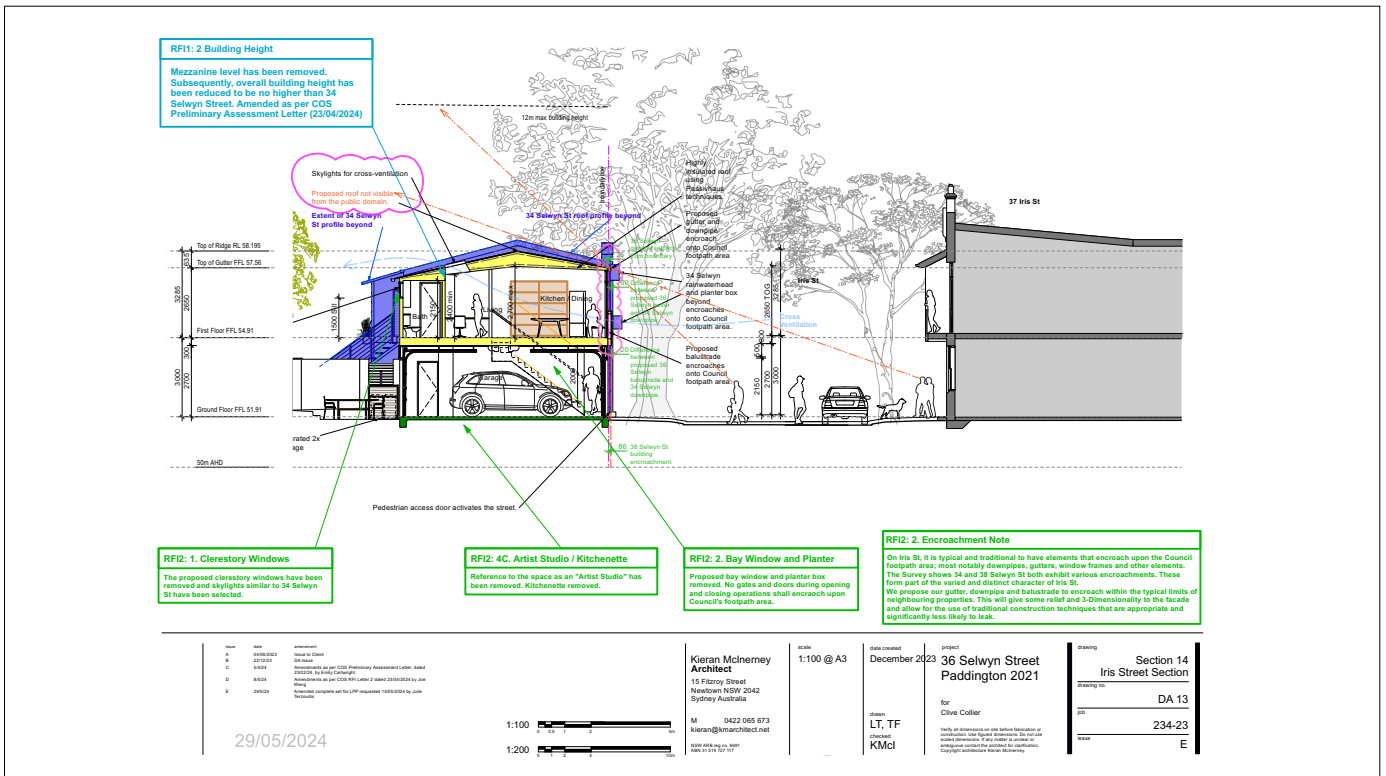
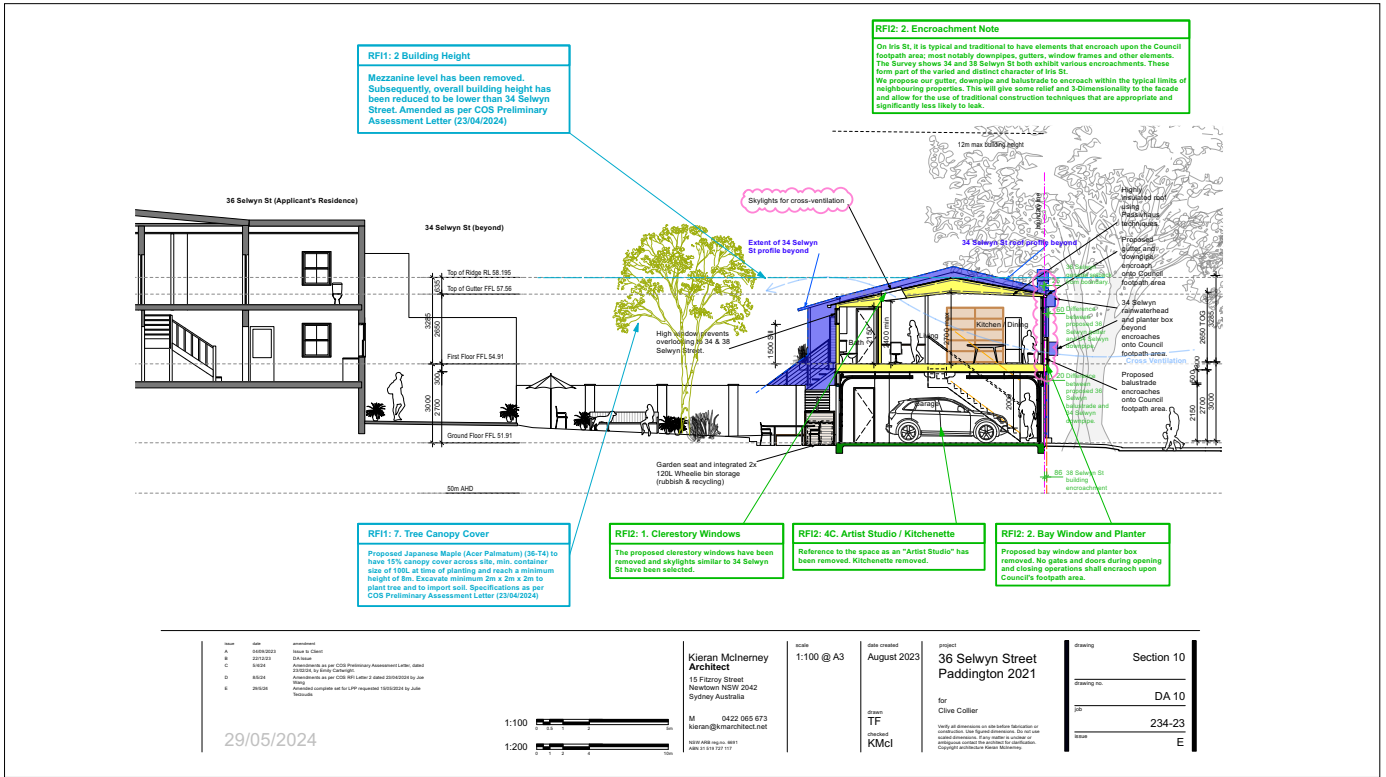
Selected elevations and section- (NOT TO SCALE)

3.0 The Proposal



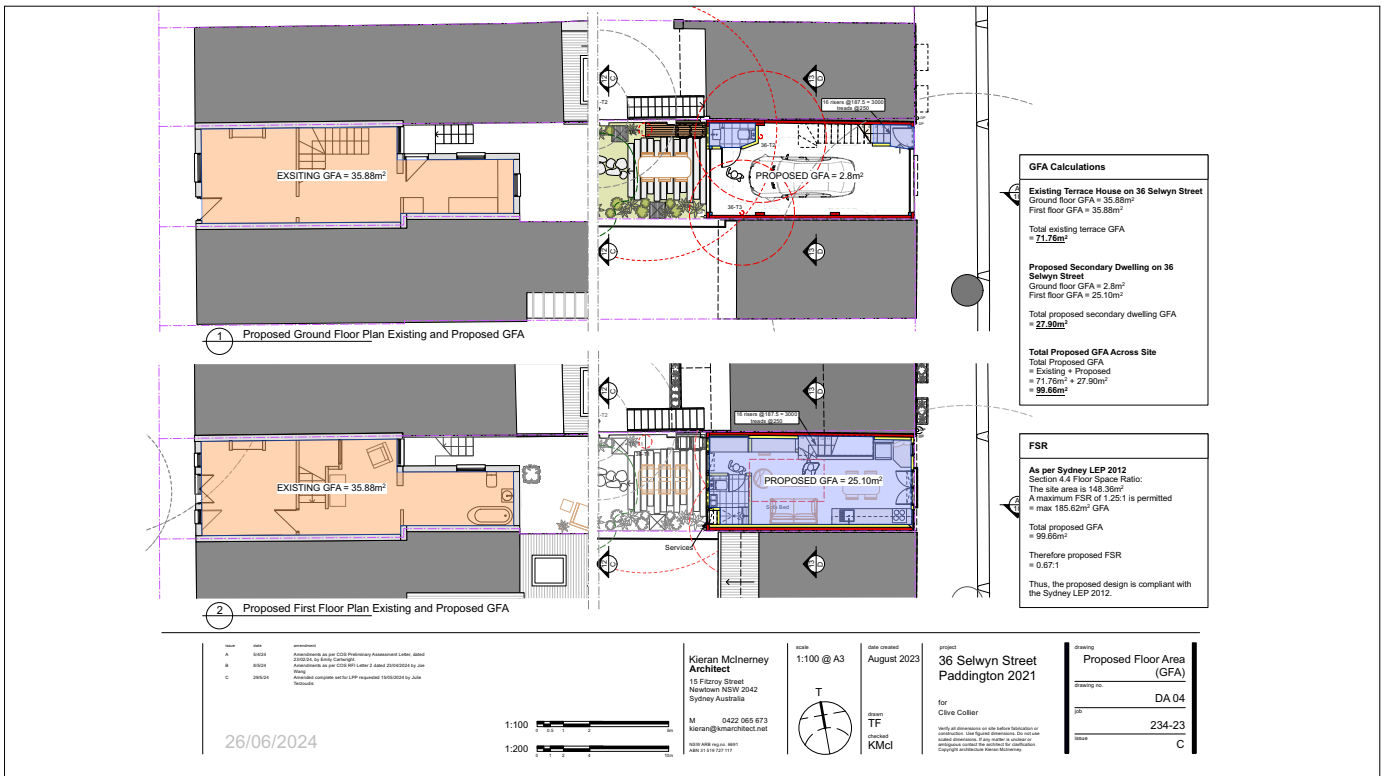
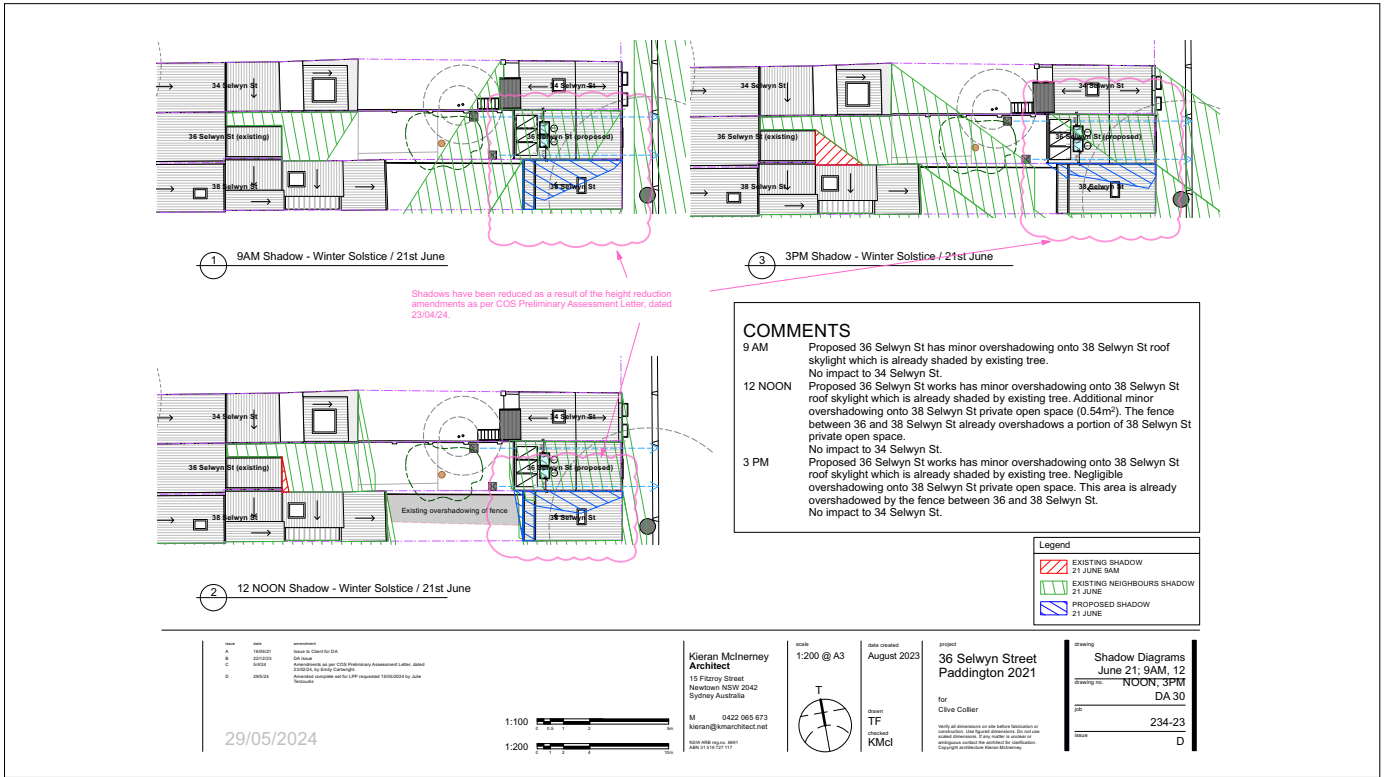
Selected elevations (NOT TO SCALE)

3.0 The Proposal



Selected sections (NOT TO SCALE)

3.0 The Proposal



Selected shadow diagrams and area schedule (NOT TO SCALE)

4.0 Development Standard Variation Sought

4.1 Identification of the Standard to be Varied

Pursuant to Clause 4.6 of the Local Environment Plan (LEP) this objection seeks to vary the State Environmental Planning Policy (Housing) 2021, Chapter 3 Diverse Housing, Part 1 Secondary Dwellings Clause 53 (2)(a) for a detached secondary dwelling - a minimum site area of 450sqm. Stating that the minimum site required to allow for a detached secondary dwelling is 450sqm

Chapter 3 Diverse Housing, Part 1 Secondary Dwellings

Division 2 Secondary dwellings permitted with consent

52 Development may be carried out with consent

(1) Development to which this Part applies may be carried out with consent.

(2) Development consent must not be granted for development to which this Part applies unless—

(a) no dwellings, other than the principle dwelling and the secondary dwelling, will be located on the land, and

(b) the total floor area of the principle dwelling and the secondary dwelling is no more than the maximum floor area permitted for a dwelling house on the land under another environmental planning instrument, and

(c) the total floor area of the secondary dwelling is—

(i) no more than 60m², or

(ii) if a greater floor area is permitted for a secondary dwelling on the land under another environmental planning instrument—the greater floor area.

53 Non-discretionary development standards—the Act, s 4.15

(1) The object of this section is to identify development standards for particular matters relating to development for the purposes of a secondary dwelling that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

Note—

See the Act, section 4.15(3), which does not prevent development consent being granted if a non-discretionary development standard is not complied with.

(2) The following are non-discretionary development standards in relation to the carrying out of development to which this Part applies—

(a) for a detached secondary dwelling—a minimum site area of 450m²,

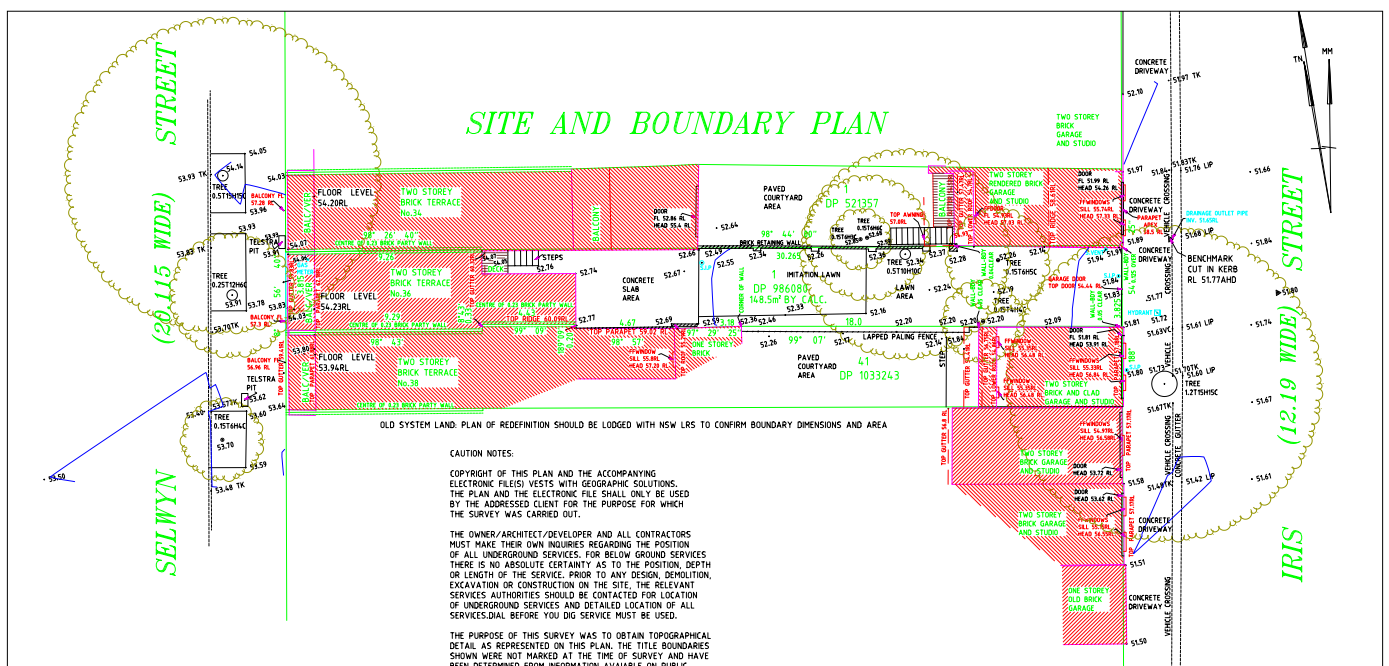
(b) the number of parking spaces provided on the site is the same as the number of parking spaces provided on the site immediately before the development is carried out.

4.0 Development Standard Variation Sought

4.2 Extent of Variation Sought

The following is a numerical summary of the extent of the variation sought for this proposed development.

Maximum Permissible	Proposed Development	Extent of Variation (%)
State Environmental Planning Policy 2021, Chapter 3, Part 1, Division 2, Clause 53(2)(a)		
Minimum of 450sqm lot area required to allow for detached secondary dwelling.	Proposed 148.5 sqm	Variation 301.5 sqm 67%
It should be noted that majority of sites along Selwyn Street consists of detached secondary dwellings that are all located at the rear of the sites, each allotment area along Selwyn Street have similar area to the subject site. As such the proposed development is not differing from the existing pattern of secondary dwellings.		



Selected SURVEY (NOT TO SCALE)

5.1 Overview of Relevant Considerations

5.1.1 Clause 4.6 of the Local Environmental Plan

Clause 4.6 of the LEP includes provisions that allow for exceptions to development standards in certain circumstances. The objective of the clause are:

- (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 function of Clause 4.6 is to enable flexibility in the application of planning provisions by providing the consent authority the ability to approve a development which does not comply with the numerical controls of certain development standards, where it can be shown that flexibility in the particular circumstances of the case would achieve a better outcome for and from the development.

In determining whether to grant consent for development which contravenes a development standard, Cl.4.6(3) requires the consent authority to consider a written request from the proponent of an application that seeks to justify the contravention of the development by demonstrating that:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and*
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.*

Furthermore, the consent authority must also be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for the development within the zone, and whether the concurrence of the Secretary has been obtained.

In Cl.4.6(5) the Secretary is required to consider certain matters before granting concurrence, namely:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and*
- (b) the public benefit of maintaining the development standard, and*
- (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.*

This document forms a written request in compliance with the required consideration under Cl.4.6 to provide a justification for the contravention of the Minimum subdivision lot size contained in the LEP. The assessment of the proposed variation has been undertaken in accordance with this clause.

5.1.2 NSW Land & Environment Court - Case Law

Several decisions by the NSW Land & Environment Court (NSWLEC) have refined the content and structure in which variations to development standards are required to be approached and considered.

The correct approach to preparing and dealing with a request under Cl.4.6 was eloquently summarised by Chief Justice Brian Preston in the case *Initial Action -v- Woollahra Municipal Council [2018] NSWLEC 118* at [13] - [21]. For brevity, this decision is not reproduced in full but it is necessary to note that this decision establishes that “sufficient environmental planning grounds” must be articulated in the written request.

Additionally, in the decision of the commissioner in *Wehbe v Pittwater Council [2007] NSWLEC 827*, Chief Justice Preston expressed the view that there are five different ways in which an objection may be well founded and that approval of the objection may be consistent with the aims of the policy. The five tests for this are tabulated and responded to.

Finally, in the decision of Commissioner Pearson in *Four2Five Pty Ltd* and the subsequent appeal endorsed by Commissioner Pain, further reaffirmed in the recent court cases *Moskovich v Waverley Council [2016] NSWLEC1015* and *Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC7*, recognises the need to identify grounds particular to the circumstances of a proposed development - as opposed merely to grounds that would apply to any similar development on the site or in the vicinity.

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives

(1)(a) To provide an appropriate degree of flexibility in applying certain development standards to particular development,

(1)(b) To achieve better outcomes for and from development by allowing flexibility in particular circumstances,

The latest authority in relation to the operation of Clause 4.6 is the decision of His Honour Chief Justice Preston in *Initial Action Pty Ltd -v- Woollahra Municipal Council* [2018] NSWLEC118. Initial Action involved an appeal pursuant to s56A of the Land & Environment Court Act 1979 against the decision of a Commissioner. At [90] of Initial Action, the Court held that:

In any event, cl 4.6 does not give substantive effect to the objectives of the clause in cl 4.6(1)(a) or (b). There is no provision that requires compliance with the objectives of the clause. In particular, neither cl 4.6(3) nor (4) expressly or impliedly requires that development that contravenes a development standard “achieve better outcomes for and from development”. If objective (b) was the source of the Commissioner’s test that non-compliant development should achieve a better environmental planning outcome for the site relative to a compliant development, the Commissioner was mistaken. Clause 4.6 does not impose that test.

The legal consequence of this decision is that Cl.4.6(1) is not an operational provision and that the remaining clauses of Cl.4.6 constitute the operational provisions for which an assessment must be made in varying a development standard.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

The development standard subject to this cl.4.6 Variation Request is not expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

An established manner for addressing whether or not compliance with a development standard is unreasonable or unnecessary was established in the ‘five-part test’ outlined in *Wehbe -v- Pittwater* [2007] NSWLEC 827.

It is not considered necessary for an application to need to establish all of the tests or ‘ways’ a development standard is unreasonable or unnecessary. It may be sufficient to establish only one way, although if more ways are applicable, an Applicant can demonstrate that compliance is unreasonable or unnecessary in more than one way. The development is justified against the Wehbe Tests in the subsequent section of this report.

5.0 Variation Assessment Framework

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

The sufficient environmental planning grounds to justify the contravention of the development standard are as follows:

- Despite the overall lot area not satisfying the numerical value of 450sqm, the proposed secondary dwelling is able to achieve an interior area of 27.90sqm putting it well within the maximum 60sqm allowed while retaining a consistent pattern of expression along Iris Street. Neighbouring lots along Selwyn Street all have similar lot areas as the subject site while simultaneously consisting of secondary dwellings located at the rear of their lots fronting Iris Street, this contributes to approximately over 50% of allotments along Selwyn Street having secondary dwellings. As such, the proposal's secondary dwelling follows this consistent pattern of secondary dwelling fronting Iris Street and providing the subject site with improved residential amenity.

- The proposal will help provide an improved streetscape language along Iris Street (rear of the subject site), the current subject site lacks any rear structure and as such creates a break in the facade expression along Iris Street. The location of the proposed secondary dwelling infills this break in facade expression and creates a consistent and coherent two storey secondary dwelling streetscape language along Iris Street. Additionally, the proposal retains existing vehicle access preferences along Iris Street and enhances the reflected streetscape expression of rear secondary dwellings, this demonstrates that the overall secondary dwelling expression is adequate in providing high quality residential amenity while retaining existing streetscape expression and function.

- The proposal seeks to provide a new secondary dwelling in an area of high residential demand, this increases the density of the site while retaining a high quality of residential amenity. This reflects the statement in the NSW Productivity Commission's "Building more homes where infrastructure costs less" stating that "DPE projects that by 2041 we will need 550,000 new homes in Sydney - that is around 30,000 new homes per year" (Building more homes where infrastructure costs less, p.9) With the subject site's locality, the secondary dwelling resembles a private retreat in a slowly increasing housing density due to the site's prime location and prospect in achieving the DPE's goal.

- The Department of Planning and Environment's "Explanation of Intended Effect: Changes to create low-and mid-rise housing" identifies the problem with Low Density Residential Zoned areas are lacking housing diversity, this is due to 94% of councils within Greater Sydney prohibiting the construction of higher density houses such as multi-dwelling or manor houses. To provide a positive outcome while withstanding current zoning requirements, the proposal provides the Low Density Residential Zoned area of Paddington increased housing density by introducing a secondary dwelling on an existing site which is consistent with the neighbouring housing expressions, the proposal improves upon residential density without producing a solution that greatly hinders the neighbouring residential amenities or altering the well established streetscape language of the area. This helps relief the housing crisis as identified by the state government while providing comfortable living amenities and retaining privacy of existing dwellings within the area.

5.0 Variation Assessment Framework

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives	
(4) Development consent must not be granted for development that contravenes a development standard unless—	
(a) the consent authority is satisfied that—	
<i>(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and</i>	
This report provides an adequate assessment of relevant considerations under cl.4.6(3) and provides a written response for the purposes of applying for a development standard variation.	
<i>(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and</i>	
Objectives of the SEPP Housing 2021 - Principles of Policy	
Objective	Compliance / Response
a) Enabling the development of diverse housing types, including purpose-built rental housing,	Complies The proposal is situated in an area where a clear development typology is securely concreted into the design expression of the area, as such due to the limited change and site areas the proposal utilizes unused spaces of the subject site to provide a diverse interpretation of a detached secondary dwelling. It is understood that it is common to have secondary dwellings located at the rear of allotments along Selwyn Street, however, the proposal provides a contemporary interpretation by actively blurring the boundaries of the secondary dwelling and the private open spaces in aim to create a diverse living environment. As such the proposal provides a diverse housing experience for its residents while providing a consistent streetscape language.
b) encouraging the development of housing that will meet the needs of more vulnerable members of the community, including very low to moderate income households, seniors and people with a disability,	Complies The proposed detached secondary dwelling was designed to enhance the residential quality of the existing terrace house. As such it was designed to assist growing families of the current generation in an era of rental crisis, the secondary dwelling provides more private spaces for different family members to encourage personal growth.
c) ensuring new housing development provides residents with a reasonable level of amenity,	Complies The proposal ensures the development is provided with high levels of amenity, this includes improved private open spaces that are designated with space for family activities, adequate levels of solar access and solar shading, and a secondary dwelling designed to be flexible in its function.
d) promoting the planning and delivery of housing in locations where it will make good use of existing and planned infrastructure and services,	Complies The proposal promotes the delivery of additional and increased housing density in a location of good existing infrastructure. With the subject site within 10mins walk to multiple bus stops and bus routes serving the area.

5.0 Variation Assessment Framework

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives	
e) minimising adverse climate and environmental impacts of new housing development,	Complies The proposal optimises the usage of natural lighting within the limited space of a secondary dwelling through implementation of high sill windows that provide visual privacy from the primary dwelling while still retaining solar access. Usage of skylight and floor to ceiling windows further contribute to increase solar access and cross ventilation.
f) reinforcing the importance of designing housing in a way that reflects and enhances its locality,	Complies The proposal new detached secondary dwelling reflects and enhances its locality by providing a facade language that is in keeping with the prevailing streetscape expression of secondary dwellings along Iris Street, this is represented with a building height that is consistent with the surrounding, a corrugated metal cladding which is reflective of selected secondary dwellings along Iris Street and a flat roof form create a simplistic and contemporary interpretation of secondary dwellings along Iris Street.
g) supporting short-term rental accommodation as a home-sharing activity and contributor to local economies, while managing the social and environmental impacts from this use,	Not Applicable The proposal is not designed to provide short-term rental, it is a secondary dwelling designed for growing families to utilize long term due to its improved residential amenities. Additionally, the proposal is not at a scale that can accommodate short-term rentals.
h) mitigating the loss of existing affordable rental housing.	Not Applicable The proposal does not seek to reduce the number of existing affordable rental housing as the existing building on site is a private dwelling.
Clause 53 Non-Discretionary development standards - the Act, s 4.15	
1) The object of this section is to identify development standards for particular matters relating to development for the purposes of a secondary dwelling that, if complied with, prevent the consent authority from requiring more onerous standards for the matters	Complies, The proposal has identified the particular development standards relating to the development for the purposes of a secondary dwelling. Despite not meeting the controls, the proposal demonstrates strong consistency with the overall objectives of the SEPP (Housing) 2021 and thus is considered acceptable.
2) The following are non-discretionary development standards in relation to the carrying out of development to which this Part applies—	-
(a) for a detached secondary dwelling—a minimum site area of 450m ² ,	The proposed new secondary dwelling is situated on the subject site with an area of 148.5sqm. Despite not meeting the numerical controls, the proposal demonstrates strong consistency with the overall objectives of the SEPP (Housing) 2021 and thus is considered acceptable.

5.0 Variation Assessment Framework

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives	
(b) the number of parking spaces provided on the site is the same as the number of parking spaces provided on the site immediately before the development is carried out.	The proposal retains the same number of parking spaces immediately before the development is carried out.
Objectives of Clause 2.1 Land Use Zone (R1 General Residential)	
1. Objectives of zone	-
To provide for the housing needs of the community.	Complies The proposal complies with the objectives of the zone by proposing a use which is permissible within the land zone. The proposal rationalises the existing residential layout to provide for a contemporary secondary dwelling which respects its context whilst also meeting the amenity needs of contemporary living.
To provide for a variety of housing types and densities	Complies The proposal is situated in an area where a clear development typology is securely concreted into the design expression of the area, as such due to the limited change and site areas the proposal utilizes unused spaces of the subject site to provide a diverse interpretation of a detached secondary dwelling. It is understood that it is common to have secondary dwellings located at the rear of allotments along Selwyn Street, however, the proposal provides a contemporary interpretation by actively blurring the boundaries of the secondary dwelling and the private open spaces in aim to create a diverse living environment. As such the proposal provides a diverse housing experience for its residents while providing a consistent streetscape language.
To enable other land uses that provide facilities or services to meet the day to day needs of residents.	Not Applicable The proposal is a residential use.
To maintain existing land use pattern of predominantly residential uses.	Complies The proposal seeks to maintain the residential use by constructing a new secondary dwellings within a residential area that is consistent in design language with other dwellings along Selwyn Street.
2 Permitted without consent	-
Home occupations	Complies The proposed development is a construction of a new secondary dwelling with a single car garage designed for residential use.

5.0 Variation Assessment Framework

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives	
3 Permitted with consent	
Attached dwellings; Bed and breakfast accommodation; Boarding houses; Centre-based child care facilities; Community facilities; Dwelling houses; Food and drink premises; Group homes; Home industries; Horticulture; Hostels; Multi dwelling housing; Neighbourhood shops; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Residential flat buildings; Respite day care centres; Roads; Roadside stalls; Semi-detached dwellings; Seniors housing; Sewage reticulation systems; Shop top housing; Shops; Tank-based aquaculture; Any other development not specified in item 2 or 4	<p>COMPLIES</p> <p>The proposed use is permissible with consent and does activate this clause.</p>
4 Prohibited	
Agriculture; Air transport facilities; Airstrips; Amusement centres; Animal boarding or training establishments; Boat building and repair facilities; Boat launching ramps; Camping grounds; Car parks; Caravan parks; Charter and tourism boating facilities; Commercial premises; Crematoria; Depots; Eco-tourist facilities; Entertainment facilities; Environmental protection works; Exhibition villages; Extractive industries; Farm buildings; Forestry; Freight transport facilities; Function centres; Heavy industrial storage establishments; Helipads; Highway service centres; Industrial retail outlets; Industries; Local distribution premises; Mooring pens; Moorings; Mortuaries; Passenger transport facilities; Port facilities; Recreation facilities (major); Recreation facilities (outdoor); Registered clubs; Research stations; Restricted premises; Rural industries; Service stations; Sewerage systems; Sex services premises; Storage premises; Tourist and visitor accommodation; Transport depots; Truck depots; Vehicle body repair workshops; Vehicle repair stations; Veterinary hospitals; Warehouse or distribution centres; Waste or resource management facilities; Water recreation structures; Water supply systems; Wholesale supplies	<p>COMPLIES</p> <p>The proposed use is not of prohibited use.</p>

5.0 Variation Assessment Framework

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives	
Objectives of Clause 4.1 Minimum Subdivision Lot Size	
<i>It should be noted that clause 4.1 “minimum subdivision lot size” does not apply to the subject site of 36 Selwyn Street, Paddington, the objectives of this clause are explored as secondary information to help supplement and give context to the points listed in the subsequent sections.</i>	
1) The objectives of this clause are as follows -	
a) to ensure lot sizes cater for a variety of development,	Complies The existing lot sizes will not be altered and provide acceptable lot area in retaining high levels of residential amenity and existing neighbouring amenities.
b) to ensure lot sizes do not result in adverse amenity impacts,	Complies The proposed do not result in adverse amenity impacts for the proposed or neighbouring dwellings. Adequate setbacks are retained to continue existing visual and acoustic privacy.
c) to ensure lot sizes deliver high quality architectural, urban and landscape design,	Complies The existing lot size delivers adequate space for the proposal in providing high quality architectural and landscape design that improve the residential amenity of the area.
d) to provide a pattern of subdivision that is consistent with the desired future character,	Not Applicable, The proposal does not seek to subdivide the subject site.
e) to ensure lot sizes allow development to be sited to protect and enhance riparian and environmentally sensitive land.	Not Applicable The subject site is not located near existing riparian or in environmentally sensitive land, thus does not activate this clause.
2) This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.	Not Applicable The subject site is not land shown on the lot size map that would require development consent for its proposed subdivision. This section is provided as secondary information to help better understand the context and points that are listed in the below section of this clause 4.6.
3) The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.	Not Applicable The subject site is not land shown on the lot size map that would require development consent for its proposed subdivision. This section is provided as secondary information to help better understand the context and points that are listed in the below section of this clause 4.6.
4) This clause does not apply in relation to the subdivision of any land—	-

5.0 Variation Assessment Framework

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives	
a) by the registration of a strata plan or strata plan of subdivision under the Strata Schemes Development Act 2015, or	Not Applicable The subject site is not a strata plan or a strata plan subdivision. Thus does not activate this clause.
b) by any kind of subdivision under the Community Land Development Act 2021.	Not Applicable The subject site is not any kind of subdivision listed under the Community Land Development Act 2021
Objectives of City of Sydney DCP Section 4.1.6 Secondary and Laneway Dwellings	
a) Ensures secondary dwellings activate lanes and address the public domain	Complies The proposal provides a new secondary dwelling that activates the lanes and address the public domain through introducing a consistent design language along its streetscape.
b) Maintain a reasonable level of amenity to the principal dwelling, the site, surrounding properties, and any adjoining lane.	Complies The proposed secondary dwelling provides a new one car garage allocated to the principal dwelling thus improving its residential amenity. The secondary dwelling provides openings fronting Iris Street that is reflective of other secondary dwellings along the street, this provides passive surveillance along Iris Street creating a safer residential surrounding in the area.
c) Ensure the scale and type of development is compatible with the width of the lane, the significance and the scale of heritage items and heritage conservation areas.	Complies The proposed secondary dwelling is of an appropriate and compatible scale that is reflective of other secondary dwellings along Iris Street which together form a coherent streetscape language for the area.
(b) the concurrence of the Planning Secretary has been obtained.	
The proposed variation has a percentage exceeding greater than 10%, meaning that concurrence is required. The secretary has empowered consideration of such matters to the local council's Local Planning Panel. Consequently, this application is required to be referred to a LPP for determination. Further concurrence of the planning secretary is not known to be required.	
(5) In deciding whether to grant concurrence, the Planning Secretary must consider—	
(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and	
Not Applicable. The proposal does not raise any matter of significance for State or Regional environmental planning.	

5.0 Variation Assessment Framework

5.2 Assessment Against Cl.4.6 Objectives

The following is an assessment of the proposal against the objectives and clauses of Cl.4.6 of the LEP.

Clause 4.6 Objectives
<p>(b) the public benefit of maintaining the development standard, and</p>
<p>Applicable.</p> <p>The development standard of a minimum lot size of 450sqm for secondary dwellings should not prevent the development of the proposal. The proposal brings along its development an increased housing density in the form of a detached secondary dwelling which will provide more private family spaces in an area of limited lot sizes. The proposed secondary dwelling benefits the public through improving the streetscape language of Iris Street by infilling what was a missing piece in a row of secondary dwellings. This increase in density on the site also creates amenities for consumers, including better access to shops and places to eat. These amenities tend to scale with the size and density of the population (Ahlfeldt et al., 2015; Kaufman et al., 2022). Where the proposal provides increased housing density, in the long term provides public benefits by providing a variety of amenities for residents creating a more vibrant local community</p>
<p>(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.</p>
<p>Not Applicable. The proposal is considered appropriate in its context.</p>
<p>(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—</p> <p>(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or</p> <p>(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.</p>
<p>Not Applicable. The subject site is not located within one of the zones listed under this clause.</p>
<p>(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).</p>
<p>Noted. It is the responsibility of the consent authority Council to keep a record of its assessment of this variation.</p>
<p>(8) This clause does not allow development consent to be granted for development that would contravene any of the following—</p> <p>(a) a development standard for complying development,</p>
<p>Compliant. The proposed development is not an application for complying development.</p>
<p>(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,</p>
<p>Compliant. The proposed variation request does not seek to vary a provision under SEPP BASIX.</p>

5.3 Assessment Against Relevant NSWLEC Principles

Webbe -v- Pittwater Council [2007] NSWLEC 827

5.3.1 Test 1: The Objectives of the Development Standard Are Achieved Notwithstanding Non-Compliance with the Standard.

As discussed in Section 5.2 of this report, the objectives of the development standard are adequately achieved notwithstanding non-compliance with the numerical control of the standard:

- The proposal new detached secondary dwelling located at the rear of the site, which introduces a diverse residential housing.
- The proposal provides the existing site with high levels of residential amenity through increasing private residential space through the secondary dwelling. The proposal provides efficient use of lot area while retaining adequate areas of private open space in increasing the level of amenity for its residents.
- The proposal reflects and enhances the locality of the area, this is achieved through a coherent facade expression that is reflective of Iris Street.

This proposed variation therefore satisfies the requirements under Webbe test 1.

5.3.2 Test 2: The Underlying Objective or Purpose of the standard is not relevant to the development and therefore compliance is unnecessary.

This test is not relied upon for the purposes of this development standard variation request.

5.3.3 Test 3: The underlying objective or purpose of the standard would be defeated or thwarted if compliance was required with the consequence being that compliance is unreasonable.

This test is not relied upon for the purposes of this development standard variation request.

5.3.4 Test 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.

As outlined in the SEPP Housing 2021, principle 3(a) “enabling the development of diverse housing types, including purpose-built rental housing” the purpose of enacting certain provisions is to provide more housing diversity, the proposal achieves this by introducing a secondary dwelling located at the rear of the site, this provides a diverse residential housing with a contemporary interpretation on the secondary dwelling, if clause 53(2)(a) “a minimum site area of 450sqm” were to be applied to the proposal, it would suggest that council were to abandon the primary principles of increasing housing diversity within this SEPP. The proposed secondary dwelling continues to provide a diverse residential solution along Selwyn St and Iris St and improved residential amenity. Thus, it is evident that if the secondary dwelling were not to be constructed due to insufficient lot area, it would suggest council's own actions were to diminish the importance of housing diversity.

Subsequently, the subject site is not subjected to Clause 4.1 “Minimum subdivision lot size” suggesting any subdivision can be proposed that is within reasonable consideration within existing cadastral pattern, this alludes to the possibility for the site to be subdivided and resulting to lots all with less than 450sqm area, this solution is still consistent with increasing housing density and diversity and is consistent with Clause 4.1's objectives. With SEPP (Housing) 2021 clause 53(2)(a) “a minimum site area of 450sqm” this would result in direct conflict with the LEP if the development standard were to be enacted as both solutions lead to the result of having two separate residential structures on the subject site, thus reducing the opportunity for increase density and diversity and demonstrating that inconsistent planning controls practically destroys the purpose of one another.

5.3 Assessment Against Relevant NSWLEC Principles

Wehbe -v- Pittwater Council [2007] NSWLEC 827

5.3.5 Test 5: The zoning of the particular land on which the development is proposed not be carried out was unreasonable or inappropriate so that the development standard, which was appropriate for that zoning, was also unreasonable or unnecessary as it applied to that land and that compliance with the standard in the circumstance of the case would also be unreasonable or unnecessary.

This test is not relied upon for the purposes of this development standard variation request.

6.1 Recommendations

There are no further recommendations to be made in this report.

6.2 Conclusion

Clause 4.6 of the Local Environmental Plan allows the consent authority to grant consent for development even though the development seeks to depart from the numerical controls regarding the CI 4.1 Minimum Subdivision Lot Size of a development standard imposed by the LEP. The clause aims to provide an appropriate degree of flexibility in the application of development standards to achieve better outcomes for and from development.

Clause 4.6 requires that a consent authority be satisfied of three matters before granting consent to a development that contravenes a development standard:

- That the applicant has adequately demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case;
- That the applicant has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard; and,
- That the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

For the following reasons, it is concluded that the proposed numerical variation to the development standard is acceptable and presents sufficient environmental planning grounds because:

- The proposal retains an adequate Gross Floor Area that does not exceed the maximum permissible for a secondary dwelling.
- The proposal provides a secondary dwelling in an area that has well established pattern of secondary dwellings fronting Iris Street.
- The proposal provides a consistent and improved streetscape language along Iris Street which enhances the local character.
- The proposal seeks to provide a new detached secondary dwelling which increases the density of the site and is consistent with the NSW Productivity Commission's "Building more homes where infrastructure costs less" stating that "DPE projects that by 2041 we will need 550,000 new homes in Sydney - that is around 30,000 new homes per year" (Building more homes where infrastructure costs

less, p.9) With the subject site's locality and availability to public transport, it is considered a good location for increasing housing density in archiving the DPE's goal while still being withhold to current planning standards.

- The proposal provides a current solution in solving housing density issues within a Low Density Residential Zoned area, as identified within the Department of Planning and Environment's "Explanation of Intended Effect: Changes to create low-and mid-rise housing" Low Density Residential Zoned areas are lacking diversity in their houses, this is due to 94% of councils within Greater Sydney prohibiting the construction of higher density houses such as multi-dwelling or manor houses.

In view of this, it is believed that this Clause 4.6 Variation Request is supportable by the consent authority and that, notwithstanding the numerical non-compliance, the proposal is appropriate for its context, consistent with both the objectives of the standard and the land zone.



Peter J. Lonergan

Director & Nominated Architect

FRAIA | NSWARB 5983 | DEP 0001205 | PDP 0000401

Formal Qualifications

BArchitecture | UNSW

BScArchitecture (Hons) | UNSW

MBEnv (Building Conservation) | UNSW

Certificate Sustainable Design | University of Sydney

Career Profile

Peter Lonergan is Director of Cracknell & Lonergan Architects, a practice he established with Julie Cracknell in 1984. Peter has accumulated over thirty-five years of experience in the field of architecture, interior design, heritage conservation, exhibition design and expert consultancy for the Land & Environment Court. He has also lectured, written, published and taught extensively in the fields of architecture, heritage, planning, history and design. Peter was elected a Fellow of the Royal Australian Institute of Architects in 2019 and continues to serve as a member of the NSWAI Chapter's Heritage Committee.

The practice is actively engaged in the design and construction of many projects of varying scale, often with complex heritage issues. The firm has also been actively engaged in the procurement design and construction of public art projects, also often within very sensitive heritage contexts. Cracknell & Lonergan Architects also works extensively within the fields of heritage conservation and the adaptive reuse of many heritage items and historic structures, as well as providing heritage consultancy services to Sydney architectural practices, advising on the feasibility and opportunities of adaptation.

Experience

NSW Land & Environment Court

Participation in numerous matters in the NSWLEC both as design architect and as expert witness in town planning and heritage matters. Involved in supplying evidence in *Coorey -v- Hunters Hill* which ultimately led to the establishment of the planning principle for determining if a project is new development or alterations and additions.

Architecture

Bradfield, East Crescent St, McMahons Pt | Residential

Aleuca, Miller St, Cammeray | Residential

Kalmar Antiques, QVB | Retail / Heritage

Heritage

Powerhouse Museum | Independent Heritage Review

Mary MacKillop Place | Conservation Management

Mechanics School of Arts (Arthouse Hotel) | Conservation

North Sydney Masonic Temple | Conservation Management

Jarjum College | Restoration & Conservation

Pemulwuy, 'The Block', Redfern | Redevelopment

Redfern Cottage, Minto | Conservation Management

Public Art

Yininmadyemi - Thou Didst Let Fall | Artist: Tony Albert

Murri Totem Poles | Artist: Reko Rennie

Indigenous Art Commission | Musee du Quai Branly, France