

Addendum Assessment Report – DA2021/1330 – 15 Bligh Crescent Seaforth - Item 3.3 DDP Meeting 10 August 2022

Development Assessment

To: DDP Chair and Panel Members

Cc: Rodney Piggott – Manager Development Assessment

From: Jordan Davies – Principal Planner

Date: 13 October 2022

Subject: DA2021/1330 – Deferred Item 3.3 – DDP Agenda 10 August 2022 – 15 Bligh Crescent Seaforth

Record Number: 2022/646389

This document is an addendum assessment report which follows the deferral of Item 3.3 at the meeting of the Development Determination Panel (DDP) on 10 August 2022 in relation to DA2021/1330 for Alterations and additions to a dwelling house at Lot 12 & Lot 13A DP 5297, 15 Bligh Crescent SEAFORTH.

This addendum report should be read in conjunction with the original assessment report for DA2021/1330 prepared for the DDP agenda. This addendum report addresses the amended plans submitted by the applicant and the deferral recommendation of the DDP panel, specifically the change in the quantum of floor space within the development and the assessment of the amount of floor space under Clause 4.6 of the Manly LEP 2013.

On 10 August 2022, the DDP deferred the item and made the following recommendation:

*THAT Council as the consent authority **defers determination** of DA2021/1330 for alterations and additions to a dwelling house on land at Lot 12 & Lot 13A DP 5297, 15 Bligh Crescent SEAFORTH, for the following reasons:*

1. *The applicant be invited to:*
 - a. *re-calculate the GFA in accordance with the definition provided within the Manly LEP and modify the development so that the total amount of GFA on site does not exceed the maximum permitted by the Manly DCP for an undersized Lot of 0.4:1; and*
 - b. *submit amended plans and documentation reflective of (a) (including but not limited to updated written Clause 4.6 objections for height and FSR) within 14 days of the minutes being published.*
2. *On receipt, the amended plans will be notified for a period of 14 days and a supplementary assessment report is to be provided to the Panel for consideration which accurately considers the suitability of the amended plans against the matters for consideration prescribed by Section 4.15 of the Environmental Planning and Assessment Act, 1979 and any further*

submissions made.

As a result of the deferral, the applicant has submitted the following information in response and these documents are attached to this addendum report:

1. Amended plans prepared by Weir Phillips Architects dated 25/08/22 (Drawing DA07 Revision B and DA19 Revision B);
2. An updated Clause 4.6 Variation Request relating to Clause 4.4 MLEP 2013 Floor Space Ratio, prepared by Longitude Planning dated 24 August 2022.
3. Cover letter – Response to Request for Further Information, prepared by Weir Phillips Architects dated 25 August 2022.

Of particular importance, the storage area on Level 4 of the dwelling was not included in the Floor Space Ratio calculation and therefore, the submitted Clause 4.6 request could not be relied upon for the determination of the application.

This matter has now been rectified by the applicant's additional information by way of the amended material referenced above.

Response to Deferral Recommendation

The following comments are made in relation to the deferral recommendation and the updated documentation submitted by the applicant.

1. *The applicant be invited to:*
 - a. *re-calculate the GFA in accordance with the definition provided within the Manly LEP and modify the development so that the total amount of GFA on site does not exceed the maximum permitted by the Manly DCP for an undersized Lot of 0.4:1; and*

Comment: The applicant has submitted an amended Level 4 plan which reduces the quantum of floor space on L4 by 6sqm and provided an updated plan DA19 (Issue B) which calculates FSR inclusive of the storage area as per the Manly LEP definition of 'gross floor area'.

This results in a FSR of 307sqm, or, 0.409:1 in accordance with the maximum permitted floor space for an undersized allotment under Clause 4.1.3.1 Manly DCP (which is based on a 750sqm lot). Although the amended plans have an FSR of 7sqm (or 0.009:1) above the maximum permitted floor space under Clause 4.1.3.1 MDCP, it is not considered to warrant refusal of the application and the assessment of the FSR breach is addressed under the Clause 4.6 Assessment later in this addendum report.

- b. *submit amended plans and documentation reflective of (a) (including but not limited to updated written Clause 4.6 objections for height and FSR) within 14 days of the minutes being published.*

Comment: Amended plans and an amended Clause 4.6 variation request was submitted to address the revised floor space ratio. As the height of the building and design of the roof is unchanged on the amended plans submitted, it was not necessary for the applicant to submit an amended Clause 4.6 Variation for Building Height and the building height variation is appropriately addressed in the original assessment report.

2. *On receipt, the amended plans will be notified for a period of 14 days and a supplementary assessment report is to be provided to the Panel for consideration which accurately considers the suitability of the amended plans against the matters for consideration prescribed by Section 4.15 of the Environmental Planning and Assessment Act, 1979 and any further submissions made.*

Comment:

The amended plans and documents were re-notified for a period of 14 Days from 8 September 2022 to 22 September 2022. No further submissions were received during this period regarding the amended plans.

This supplementary assessment report should be read in conjunction with the original assessment report with the exception of the below updated assessment of Floor Space Ratio under Clause 4.4 MLEP 2013 and Exception to Development Standards under Clause 4.6 MLEP 2013. The remainder of the matters for consideration under S4.15 EP&A 1979 are addressed in the original assessment report and the assessment of these matters remains unchanged.

Mainly LEP 2013 – Development standards Clause 4.3 and 4.4

Clause	Requirement	Existing	Previous Proposal	Amended Plans	Compliance
4.4 Floor Space Ratio	0.4:1 FSR 113.8m ² * Site area is 284.5m ²	1.03:1 FSR 293.8m ² (including L4 storage area)	1.1:1 FSR 313m ² (including L4 storage calculated as per the MLEP definition of Gross Floor Area) <i>*Note: Original plans showed 298m² which was excluding L4 storage area, not in accordance with the GFA definition</i>	1.08:1 FSR 307m ²	No – 58% variation However, proposed floor space reduced 6sqm as a result of Rev B amended plans.

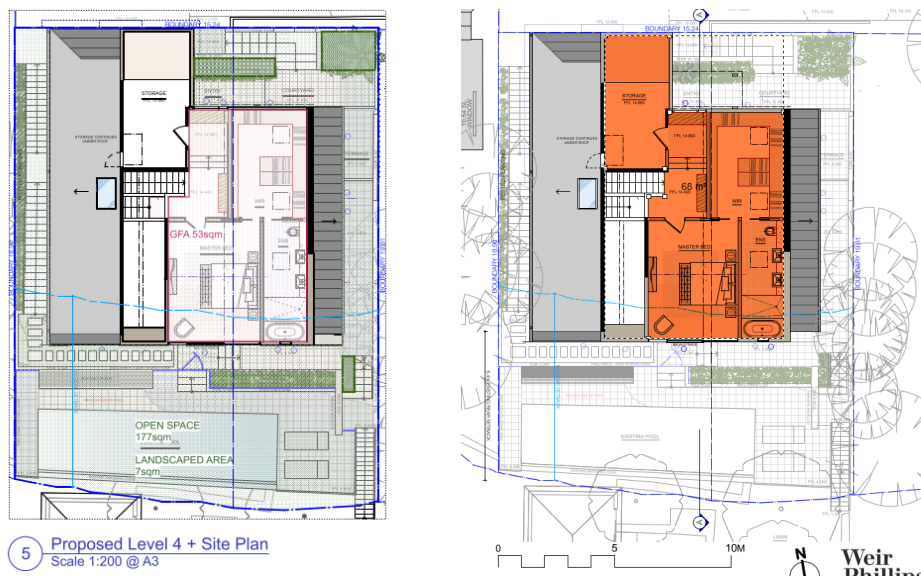


Figure 1 – Left image showing how L4 Floor space was calculated (excluding storage) upon the issue A Plan (53sqm). Right image showing L4 Floor Space calculated including storage area upon the Issue A Plan (68sqm).

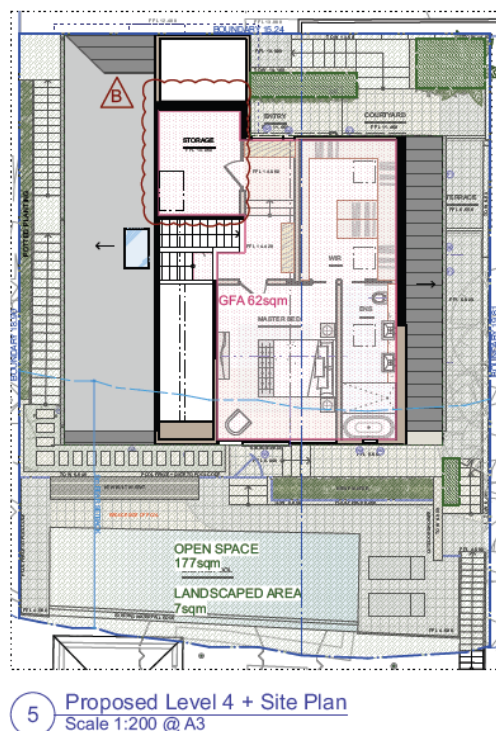


Figure 2 – Image showing how L4 Floor Space is calculated (including storage) for the Issue B plan (amended plan) at 62sqm, which includes a reduced storage area.

Manly LEP 2013 Clause 4.6 Assessment – Floor Space Ratio Clause 4.4

Detailed Assessment

4.6 Exceptions to development standards

Description of non-compliance:

Development Standard:	Floor Space Ratio (Clause 4.4)
Requirement:	FSR 0.4:1
Proposed	FSR 1.08:1
Percentage variation to requirement	58%

Assessment of request to vary a development standard:

The following assessment of the variation to Clause 4.4 – Floor space ratio development standard has taken into consideration the recent judgement contained within *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118, *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61, and *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130.

Clause 4.6 Exceptions to development standards:

(1) The objectives of this clause are as follows:

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

(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.

Comment:

Clause 4.4 - Floor space ratio development standard 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
(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(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
(b) the concurrence of the Secretary has been obtained.

Clause 4.6 (4)(a)(i) (Justification) assessment:

Clause 4.6 (4)(a)(i) requires the consent authority to be satisfied that the applicant's written request, seeking to justify the contravention of the development standard, has adequately addressed the matters required to be demonstrated by cl 4.6(3). There are two separate matters for consideration contained within cl 4.6(3) and these are addressed as follows:

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

Comment:

The Applicant has provided an updated written request for the variation to Clause 4.4 - Floor space ratio which has accurately described the quantum of floor space within the proposal. The Applicant's written requests have demonstrated that the objectives of the development standards are achieved, notwithstanding the non-compliance with the development standards.

In doing so, the Applicant's written request has adequately demonstrated that compliance with the development standards is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a).

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

Comment:

In the matter of Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118, Preston CJ provides the following guidance (para 23) to inform the consent authority's finding that the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard:

'As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [26]. The adjectival phrase "environmental planning" is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.'

s 1.3 of the EPA Act reads as follows:

1.3 Objects of Act (cf previous s 5)

The objects of this Act are as follows:

(a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,

- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,*
- (c) to promote the orderly and economic use and development of land,*
- (d) to promote the delivery and maintenance of affordable housing,*
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,*
- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),*
- (g) to promote good design and amenity of the built environment,*
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,*
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,*
- (j) to provide increased opportunity for community participation in environmental planning and assessment.*

The applicants written requests argue, in part:

The environmental planning grounds particular to this site and to this proposal relates to the improved accessibility and function and amenity of the house with minimal adjustments to the existing building envelope, and redistribution of floor area thereby maintaining the essence of the existing bulk and scale and height of the building.

Enclosing of some balcony areas and opening up the south east corner of Level 1 and extending into the attic roof space on Level 4, and the subtle changes to external materials and finishes and reduction in glazing, achieves an improved outcome in terms the visible bulk and scale of the house from both the street and from Middle Harbour.



Figure 1: Extract from Drawing DA21 Photomontage drawing showing the existing house on the left and proposed, to demonstrate the existing height and envelope is maintained and the improved changes to colours and finishes, including reduced areas of glazing.

The Manly DCP includes provisions relating to undersized lots and the subject site qualifies in this regard because it has an area of only 284.5m² in an area of Manly that has a minimum lot size of 750m².

The site is located in area 'U' on the LEP Lot Size Map, which has a minimum lot size of 750m². The site is an existing undersized lot and in accordance with Part 4.1.3.1 Exceptions to FSR for undersized lots of the DCP and Figure 30 – Extent of variation for undersized lots, the extent of variation to be considered would be 0.4:1 of 750m² or a maximum of 300m² for undersized lots in area 'U' on the LEP Lot Size Map.

The proposal has a gross floor area of 307m² which is slightly more than 300m² and in considering this exception request to the FSR standard, Council can be satisfied that the objectives of the FSR standard and the objectives of the E3 zone will be met. Notwithstanding the minor departure from the 300m² maximum of Part 4.1.3.1 of the objectives of the DCP are also satisfied.

- 1) To ensure the scale of development does not obscure important landscape features.*
- 2) To minimise disruption to views to adjacent and nearby development.*
- 3) To allow adequate sunlight to penetrate both the private open spaces within the development site and private open spaces and windows to the living spaces of adjacent residential development.*

The absence or lack of environmental harm in this case is also a relevant environmental planning ground, with specific reference to the adjoining properties and more generally the locality, and particularly having regard to the redistribution of floor area, which is largely within the envelope of the building and there being no adverse physical impacts on the existing levels of privacy, solar access and views of adjoining and adjacent properties.

The contention that an environmental planning ground could include establishing a lack of environmental harm was supported in a recent case in the Land and Environment Court of NSW in Initial Action v Woollahra Council (2018) NSWLEC 118.

This was also an appeal against a Commissioner's decision on questions of law. This case related to the Commissioner's refusal to grant development consent for a residential flat building that contravened the height of buildings development standard of the Woollahra LEP 2014, and the Commissioner was not satisfied that contravention of the development standard was justified in the Clause 4.6 exception to a development standard.

In his Principal judgment Preston CJ made a similar finding as he did in Randwick City Council v Micaul Holdings Pty Ltd at [34], in relation to consistency of a development with the objectives of a development standard and consideration that a lack of adverse amenity impacts on adjoining properties is a sufficient ground justifying a development contravening the development standard.

Of particular relevance is objective (d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain, of the FSR standard.

There will be no adverse effects on the amenity of the adjoining and adjacent properties or the locality arising from the proposed alterations and additions to the existing dwelling house.

For the reasons outlined, there are sufficient environmental planning grounds particular to the circumstances of the site and the design of the proposed alterations and additions to the existing dwelling house, to justify the departure from the floor space ratio standard.

In terms of the Objects of the EP&AA Act, the proposal will be consistent with the objectives of the Act, particularly in relation to ecologically sustainable development, the orderly and economic use and development of the land, sustainable management of built and cultural heritage and good design and amenity of the built environment.

Comment from Council on planning grounds:

It is noted that whilst the percentage of the variation is particularly high when considered against the requirements of the MLEP 2013 (58% and 1.08:1). However, the Manly DCP contains a specific provision that considers circumstances like this on 'undersized allotments' and allows the FSR to be based on a 750sqm lot which would permit up to 300sqm of floor space. The control acknowledges that the nature and size of an undersized allotment, including the constraints due to the size of the lot, can be used as an 'environmental planning ground' to warrant departure from the development standard. The applicant has referenced this DCP control in their justification which is considered to fall within the scope of objective (c) and (g) of the EPA Act, with the proposal making use of the existing building envelope within the site to provide for increased amenity of the building, whilst not having unreasonable impacts on the built or natural environment. Notwithstanding the proposal containing 7sqm more than the 300sqm maximum prescribed under Clause 4.1.3.1 MDCP, the minor breach of the DCP control is supported as there are no unreasonable impacts arising from the development regarding views, overshadowing, bulk/scale and privacy (as discussed in detail within the original assessment report).

In this regard, the applicant's written request has demonstrated that the proposed development is an orderly and economic use and development of the land, and that the structure is of a good design that will reasonably protect and improve the amenity of the surrounding built environment, therefore satisfying cls 1.3 (c) and (g) of the EPA Act.

Therefore, the applicant's written request has adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standards as required by cl 4.6 (3)(b).

Therefore, Council is satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

Clause 4.6 (4)(a)(ii) (Public Interest) assessment:

cl 4.6 (4)(a)(ii) requires the consent authority to be satisfied that:

(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

Comment:

In considering whether or not the proposed development will be in the public interest, consideration must be given to the underlying objectives of the Floor Space Ratio development standard and the objectives of the C3 Environmental Management zone.

An assessment against these objectives is provided below.

Objectives of development standard

The underlying objectives of the standard, pursuant to Clause 4.4 – ‘Floor space ratio’ of the MLEP 2013 are:

a) to ensure the bulk and scale of development is consistent with the existing and desired streetscape character,

Comment: The overall bulk and scale of the development will be generally retained, with additions being relatively minor. It will not significantly alter the existing streetscape.

b) to control building density and bulk in relation to a site area to ensure that development does not obscure important landscape and townscape features,

Comment: The proposal will not obscure any important townscape features. The proposal will impact on a small amount of water view from the public road; however, this impact is considered negligible, and not unreasonable as assessed within the original assessment report. The proposal is consistent with the variations envisaged by the Clause 4.1.3.1 MDCP in relation to undersized lots with regard to floor space.

c) to maintain an appropriate visual relationship between new development and the existing character and landscape of the area,

Comment: The proposal will generally maintain the overall shape and building envelope of the existing building on site, with relatively minor additions. The visual relationship with the surrounding area will not be significantly altered.

d) to minimise adverse environmental impacts on the use or enjoyment of adjoining land and the public domain,

Comment: The proposal will not have any significant adverse impacts on the use or enjoyment of adjoining land and the public domain.

e) to provide for the viability of business zones and encourage the development, expansion and diversity of business activities that will contribute to economic growth, the retention of local services and employment opportunities in local centres.

Comment: N/A

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the Clause 4.4 Floor Space Ratio.

Zone objectives

The underlying objectives of the C3 Environmental Management zone are:

- *To protect, manage and restore areas with special ecological, scientific, cultural or aesthetic values.*

Comment: The existing building footprint is generally unaltered given the site is currently entirely built upon. The proposal will generally maintain the existing building envelope, with relatively minor additions. It will not have any significant adverse impacts on the surrounding area.

- *To provide for a limited range of development that does not have an adverse effect on those values.*

Comment: The proposal is for alterations and additions to an existing dwelling house, which is a permissible use in the zone.

- *To protect tree canopies and provide for low impact residential uses that does not dominate the natural scenic qualities of the foreshore.*

Comment: The proposal does not result in removal of any canopy trees, and results in a small increase in landscaped area, where none currently exists on site. The proposal does not significantly alter the existing building envelope and will not change the existing building to an extent that it comes to dominate the natural scenic qualities of the foreshore.

- *To ensure that development does not negatively impact on nearby foreshores, significant geological features and bushland, including loss of natural vegetation.*

Comment: The proposal is within the existing building footprint and will introduce a small amount of landscaping where none currently exists. The development will have no significant adverse impacts on nearby foreshores, significant geological features or bushland, including loss of natural vegetation.

- *To encourage revegetation and rehabilitation of the immediate foreshore, where appropriate, and minimise the impact of hard surfaces and associated pollutants in stormwater runoff on the ecological characteristics of the locality, including water quality.*

Comment: The site is wholly constructed upon. The proposal will improve the existing situation slightly in this regard by including 7sqm of landscaped area. However, the proposed alterations and additions do not create any new adverse impacts in this regard.

- *To ensure that the height and bulk of any proposed buildings or structures have regard to existing vegetation, topography and surrounding land uses.*

Comment: The overall height and bulk of the existing building is not significantly changed by the proposed alterations and additions. There is no existing vegetation on site, and the proposal will not make any significant changes to the topography or impact on any surrounding land uses.

Conclusion:

For the reasons detailed above, the proposal is considered to be consistent with the objectives of the C3 Environmental Management zone.

Clause 4.6 (4)(b) (Concurrence of the Secretary) assessment:

cl. 4.6(4)(b) requires the concurrence of the Secretary to be obtained in order for development consent to be granted.

Planning Circular PS20-002 dated 5 May 2020, as issued by the NSW Department of Planning, advises that the concurrence of the Secretary may be assumed for exceptions to development standards under environmental planning instruments that adopt Clause 4.6 of the Standard Instrument. In this regard, given the consistency of the variation to the objectives of the zone, and in accordance with correspondence from the Deputy Secretary on 2 November 2021, Council staff under the delegation of the Development Determination Panel, may assume the concurrence of the Secretary for variations to the Height of building and Floor space ratio Development Standards associated with a single dwelling house (Class 1 building).

Recommendation

That Northern Beaches Council as the consent authority vary clause 4.4 Floor Space Ratio development standards pursuant to clause 4.6 of the MLEP 2013 as the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3) and the proposed development will be in the public interest and is consistent with the objectives of the standard and the objectives for development within the zone in which the development is proposed to be carried out.

Council's has undertaken assessment of the amended plans and information following the deferral of Item 3.3. As a result of the assessment contained within this addendum report (and as per the original assessment report), it is recommended that the application is approved, subject to the below amendments to Condition 1 and the conditions contained within the original assessment report.

Recommended Amendments to Condition 1 in BOLD:

1. Approved Plans and Supporting Documentation

The development must be carried out in compliance (except as amended by any other condition of consent) with the following:

a) Approved Plans

Architectural Plans - Endorsed with Council's stamp
--

Drawing No.	Dated	Prepared By
DA01 Issue A	14/7/21	Weir Phillips Architects
DA02 Issue A	14/7/21	Weir Phillips Architects
DA03 Issue A	14/7/21	Weir Phillips Architects
DA04 Issue A	14/7/21	Weir Phillips Architects
DA05 Issue A	14/7/21	Weir Phillips Architects
DA06 Issue A	14/7/21	Weir Phillips Architects
DA07 Issue B	25/8/22	Weir Phillips Architects
DA08 Issue A	14/7/21	Weir Phillips Architects
DA09 Issue A	14/7/21	Weir Phillips Architects
DA10 Issue A	14/7/21	Weir Phillips Architects
DA11 Issue A	14/7/21	Weir Phillips Architects
DA12 Issue A	14/7/21	Weir Phillips Architects
DA13 Issue A	14/7/21	Weir Phillips Architects
DA14 Issue A	14/7/21	Weir Phillips Architects
DA18 Issue A	14/7/21	Weir Phillips Architects
DA23 Issue A	14/7/21	Weir Phillips Architects

Reports / Documentation – All recommendations and requirements contained within:		
Report No. / Page No. / Section No.	Dated	Prepared By
BASIX Certificate A419891	30 July 2021	Damian O'Toole Town Planning
Geotechnical Investigation Report Ref: 34158Rrpt	7 July 2021	JK Geotechnics

- b) Any plans and / or documentation submitted to satisfy the Deferred Commencement Conditions of this consent as approved in writing by Council.
- c) Any plans and / or documentation submitted to satisfy the Conditions of this consent.
- d) The development is to be undertaken generally in accordance with the following:

Landscape Plans		
Drawing No.	Dated	Prepared By
DA22 Issue A	14/7/21	Weir Phillips Architects

Waste Management Plan		
Drawing No/Title.	Dated	Prepared By
Waste Management Plan	Not dated	Tulip 7

In the event of any inconsistency between conditions of this consent and the drawings/documents referred to above, the conditions of this consent will prevail.

Reason: To ensure the work is carried out in accordance with the determination of Council and approved plans.

End of Memo